

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

**DECISION**

OAL DKT. NO. EDS 00034-15

AGENCY DKT. NO. 2015 22122

**JACKSON TOWNSHIP  
BOARD OF EDUCATION,**

Petitioner,

v.

**S.G. AND K.G. ON BEHALF OF A.G.,**

Respondents.

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**Joanne L. Butler**, Esq., for petitioners (Schenck, Price, Smith & King, LLP)

**Michael I. Inzelbuch**, Esq., for respondents

Record Closed: April 27, 2016

Decided: May 13, 2016

BEFORE **JOHN S. KENNEDY**, ALJ:

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

Petitioner, Jackson Township Board of Education (Board) brought this action against S.G. and K.G., the parents of A.G., seeking an order to compel consent to evaluate A.G. The matter was transmitted to the Office of Administrative Law (OAL), where it was filed as a contested case on January 2, 2015. ALJ John Shuster permitted the parents to file an Amended Petition and Cross-Claim. By the time Judge Schuster

permitted the parents to file the Amended Petition and Cross-Claim, the action filed by the Board had been resolved, thus leaving only respondents' Amended Petition and Cross-Claim to be considered. The Board objected to Judge Schuster's decision and filed an appeal in the United States District Court. On January 15, 2016, the District notified Judge Schuster of the appeal and requested that the within matter be adjourned for the hearing scheduled for January 25, 2016. Judge Schuster denied this request on January 20, 2016, at which time the District submitted its disclosures required by N.J.A.C. 1:6A-10.1. The matter was reassigned to me and heard on January 25, 2016, and February 24, 2016. At issue is (1) whether the District denied A.G. a Free Appropriate Public Education ("FAPE") by failing to evaluate and/or classify him within a timely manner; (2) whether the district denied A.G. FAPE by failing to offer him a program that could provide meaningful educational benefit; and (3) whether the district is responsible for the tuition and costs for related services in accordance with his current placement. On January 25, 2016, I ruled that the Board's disclosures were not timely filed pursuant to N.J.A.C. 1:6A-10.1 and all witness testimony and documents intended to be presented on behalf of the Board were barred. Post-hearing briefs were submitted and the record closed on April 27, 2016<sup>1</sup>.

### **FINDINGS OF FACT**

Based on the testimony of the witnesses and examination of the documentary evidence, I **FIND** the following **FACTS** are undisputed:

The parents registered A.G., date of birth December XX, 19XX, with the District on June 18, 2014, for ninth grade. A.G.'s mother executed the registration form (P-37). Prior to enrolling with the District, A.G. had attended private school specifically tailored for the Orthodox Jewish community and did not have an Individualized Education

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<sup>1</sup>Post hearing briefs were filed on behalf of both parties by March 29, 2016. Respondents filed additional testimony, argument and documents on April 19, 2016. The Board objected to the April 19, 2016 submission on April 27, 2016. This tribunal considered the testimony, arguments and documents submitted on April 19, 2016 and agree with the Board that there is no basis to accept those documents or arguments. However, since the testimony and arguments were reviewed and considered, the record closed on April 27, 2016.

Program (IEP) or a 504 Plan. On July 3, 2014, the parents requested that the District's Child Study Team (CST) evaluate A.G. The District obtained a 2010 Psychoeducational Report of Jordana Skurka (P-62) and a 2014 Learning Evaluation Report of Francine Matthews (P-46). The Learning Evaluation Report diagnosed A.G. with Attention Deficit, Hyperactive Disorder (ADHD). After receiving these reports, the District conducted a meeting with the parents to discuss the request for evaluations on July 23, 2014. The district chose not to evaluate A.G. as a result of the July 23, 2014, meeting, but noted that A.G. should be referred for Section 504 due to his diagnosis of ADHD (P-21).

The parents provided notice of their unilateral placement of A.G. to the "Tree of Knowledge" School in Miami, Florida on August 11, 2014 (P-14). On August 18, 2014, the District sent correspondence to the parents that they remain ready, willing and able to provide A.G. with FAPE (P-22) and scheduled a CST meeting on September 3, 2014. Although the District had received no additional information between July 23, 2014, and September 3, 2014, the CST agreed to conduct evaluations of A.G. after the September meeting was conducted. By this time, A.G. had been enrolled and began attending school at the Tree of Knowledge in Miami, Florida and therefore, the parents refused the evaluations until A.G. returned to New Jersey. The District filed due process seeking to compel the parents to consent to evaluate A.G. on December 16, 2014 (P-1). A.G. was evaluated for the first time by the district on March 31, 2015. The District has not prepared an Individualized Education Program (IEP) for A.G.

### **TESTIMONY**

Susan K. Caplan, M.Ed., LDT-C

Ms. Caplan had previously worked for Marlboro Township BOE as a teacher and Learning Disabilities Teacher Consultant (LDT-C). After retiring from Marlboro, she worked as a Supervisor of Child Study Teams for the Catapult Company which provides service plans and evaluations for non-public students. She had been licensed by the State of New Jersey Department of Education as a Teacher of the Handicapped,

Supervisor, and LDT-C. Ms. Caplan was accepted as an expert in Special Education, Diagnostic Evaluations, Case Management and 504 plans.

Ms. Caplan did not meet A.G. until December 2015, and attempted to speak to the District's case manager about him. She did not receive a return call. Ms. Caplan reviewed the Learning Evaluation prepared by Dr. Matthews (P-46) which contained the prior diagnosis of ADHD, and found a weakness in Math. Based on the District's Educational evaluation, dated April 1, 2015, A.G. had a Broad Math score of 67 and Math Calculation score of 66. These scores place A.G. at one percentile and demonstrate that he does not have basic arithmetic skills. A.G.'s Full Scale IQ is 87 based on Dr. Skurka's Neuro-Psychological Evaluation (P-62). The math score being significantly below average would require resource room or small group instruction and would lead Ms. Caplan to believe that A.G. has a learning disability. Based on the information available to the District at the time of the July 23, 2014, Initial Identification Meeting, Ms. Caplan's opinion is that the District should have evaluated A.G. at that time.

Ms. Caplan feels that A.G. would have been eligible for Special Education and Related Services under the eligibility category of "Multiply Disabled" (MD) because he has a learning disability demonstrated by his math scores and has been medically diagnosed with ADHD. Ms. Caplan also feels that A.G. was emotionally disturbed and exhibited social problems that would require counseling and a social skills program in addition to an educational program. Ms. Caplan sees A.G. as having the potential to be high functioning but he had shut down and refused to go to school or get out of bed. She would consider him a "kid in crisis" that needs a residential program designed to address all of his needs.

Ms. Caplan has observed the Tree of Knowledge program in Miami, Florida. This program addresses the math issues, executive functioning and behavioral challenges with which A.G. has been diagnosed.

K.G., Mother of A.G.

K.G. provided A.G.'s educational history and explained that he was expelled from one school when he was in fourth grade. By the middle of seventh grade, his attendance at school worsened and they could not get him out of bed. He would only eat at night when everyone else in the home was asleep to avoid interaction with even his family. Prior to making the decision to enroll A.G. with the District, the parents considered numerous options for A.G. including the Fusion School in Princeton, the Collier School and the New Grange School. At least one of these schools would not accept him because he did not have an IEP. The parents signed a release permitting the District to get in touch with all of his doctors in the summer of 2014. K.G. had originally learned of the Tree of Knowledge School in Miami from a friend, when A.G. was in the sixth grade. She did not consider sending him at that time because she did not want him to be so far away. By the time he was in the ninth grade, K.G. felt that there was no other choice. She visited the school in the spring of 2014 when she was considering all of her options for A.G. Since A.G. started at the Tree of Knowledge he has demonstrated significant progress and has started to become "a person".

At the time A.G. was registered with the District, the parents had not yet decided to send him to the Tree of Knowledge. This decision was only made after the District refused to evaluate him. When A.G. was registered with the District, K.G. had no idea what an IEP, ISP or 504 Plan was.

Nicki Salfer, M.A., M.S.

Ms. Salfer has a Bachelor of Arts degree. in Business Marketing and a Master's degree in Education. She is a Florida Licensed Special Education Teacher and a Wilson Certified Instructor. She operates the Tree of Knowledge School in Florida, New Jersey and Ohio with each location offering specialized services for kids with special needs. Ms. Salfer is the Curriculum Director and Interventionist at the Miami school. The Miami school utilizes an accredited and approved curriculum called "Fuel Ed" which uses virtual technology to match state requirements. Ms. Salfer developed A.G.'s curriculum,

has weekly meetings with his teachers, provides calming procedures for A.G. when he gets “very wound up” and works with him to develop executive functioning skills. He receives counseling by a licensed clinical psychologist and well as services from a mental health counselor, a speech therapist and an occupational therapy assistant. He participates in a social skills program, a life skills program and is involved with the student government program. He receives math instruction in a small classroom with instruction from a special education teacher and nightly tutoring. He has no attendance issues at the Tree of Knowledge because he is brought to school every day and has no option but to attend school.

While the Miami school is not approved as a New Jersey school for the disabled, it is approved in Florida. It is a residential program that has twenty-eight students. A.G. receives instruction in all academics through certified teachers and all of his related services are provided by Florida certified teachers.

S.G., Father of A.G.

S.G. and K.G. registered A.G. together in June 2014, with the District. He alone attended the July 2014 CST meeting, as his wife was spending the summer in the Catskills. He requested the District to evaluate A.G. and executed a consent form for the District to complete evaluations. The parents provided no new information to the District between July and September 2014, other than notice that they were sending A.G. to the Tree of Knowledge School, where the District originally refused to evaluate A.G. and later agreed to do so but only after he had started at the Tree of Knowledge.

Robert Cerco, Director of Special Services for the District

Dr. Cerco explained that the August 18, 2014, correspondence to A.G.’s parents offered FAPE to A.G. (P-22). FAPE is offered to all students whether they are classified or not. Cerco did not attend the September CST meeting but believes they met to discuss the parent’s concerns and determine if there was a need for evaluations. This

was after they had received the parents' notice of unilateral placement at the Tree of Knowledge and the District offered to evaluate A.G. after that meeting. Cerco never saw the parental consent to the evaluations and the District filed for Due Process to facilitate these evaluations.

### **LEGAL ANALYSIS AND CONCLUSIONS OF LAW**

The Individuals with Disabilities Act (IDEA) was enacted to assist states in educating disabled children. It requires states receiving federal funding under the Act, such as New Jersey, to have a policy in place that ensures that local school districts provide disabled students with FAPE designed to meet their unique needs. See 20 U.S.C.A. § 1412; N.J. Const. art. VIII, IV, 1; N.J.S.A. 18A:46-8; N.J.A.C. 6A:14-1.1 et seq., Hendrick Hudson Cent. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). State regulations track this requirement that a local school district must provide FAPE as that standard is set under the IDEA. N.J.A.C. 6A:14-1.1. A FAPE and related services must be provided to all students with disabilities from age three through twenty-one. N.J.A.C. 6A:14-1.1(d). A 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, or secondary school education in the State involved; and d) are provided in conformity with the individualized education program (IEP) required under sec. 614(d). 20 U.S.C.A. § 1401(9).

In order to provide a FAPE, a school district must develop and implement an IEP. N.J.A.C. 6A:14-3.7. An IEP is “a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs.” Sch. Comm. of Burlington v. Dep’t of Educ. of Mass., 471 U.S. 359, 368, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385, 394 (1985).

In addition, when scrutinizing a FAPE claim, there is a two-part inquiry. A court must first ask whether the state or school district has complied with the procedures of

the Act when developing the IEP, and second, whether the IEP developed through the Act's procedures is "reasonably calculated to enable the child to receive educational benefits." Rowley, supra, 458 U.S. at 207, 102 S. Ct. at 3051, 73 L. Ed. 2d at 712. While the IDEA does not require a school district to provide an IEP that maximizes "the potential of a disabled student, it must provide 'meaningful' access to education and confer 'some educational benefit' upon the child for whom it is designed." Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999) (citations omitted). In "[e]xamining the quantum of benefit necessary for an IEP to satisfy IDEA," the Third Circuit held "that IDEA 'calls for more than a trivial educational benefit' and requires a satisfactory IEP to provide 'significant learning,' and confer 'meaningful benefit.'" Ibid. (citations omitted).

Following amendments to the State regulations, in 1989, the New Jersey Supreme Court enunciated the standard to be applied in determining the adequacy or the appropriateness of an IEP. The Court in Lascari v. Ramapo Indian Hills Regional School District, 116 N.J. 30, 47-48 (1989), held that the education offered to a disabled child must be sufficient to confer some educational benefit upon the pupil. The Court went on to state that the current standard in New Jersey parallels the federal standard enunciated in Rowley. Lascari, supra, 116 N.J. at 48. This standard provides the foundation upon which the pupil's IEP is built. Moreover, the IEP establishes "the rationale for the pupil's educational placement." N.J.A.C. 6A:14-1.3.

Other Third Circuit decisions have further refined that standard to clarify that such educational benefit must be "meaningful," "achieve significant learning," and confer "more than merely trivial benefit." T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572 (3d Cir. 2000); Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238 (3d Cir. 1999); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 183-184 (3d Cir. 1988), cert. den. sub. nom., Central Columbia Sch. Dist. v. Polk, 488 U.S. 1030, 109 S. Ct. 838, 102 L. Ed. 2d 970 (1989). The Third Circuit has re-emphasized the importance of the inquiry into whether the placement proposed by the district will provide the student with

“meaningful educational benefit.” I.H. v. State-Operated Sch. Dist. of Newark, 336 F.3d 260 (3d Cir. 2003).

Consequently, a FAPE is defined in broad terms—a limited definition would not encompass the many needs of such a dynamic population—that are consistent with the IDEA’s corresponding mandate that the states provide each disabled child with specifically designed instruction that is tailored to the child’s unique needs and is a “basic floor of opportunity.” Rowley, supra, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690. Notwithstanding the demand that a FAPE is one that is sufficient to confer some educational benefit that is more than trivial or “de minimis,” it does not need to maximize the potential of the child. Polk, supra, 853 F.2d 171. For this reason, the parents of a disabled child cannot compel a school district to provide an educational benefit that is better than the one under the IEP, providing the IEP is sufficient to confer a meaningful educational benefit that is more than trivial or “de minimis.” Generally speaking, children with special needs must be provided an education tailored to their individual needs and that confers meaningful benefit. Ibid.

N.J.A.C. 6A:14-2.7(k) provides that procedural violations may lead to a finding that FAPE was denied if the violations impeded the child’s right to FAPE; impeded the parents’ opportunity to participate in the decision-making process; or caused a deprivation of educational benefits. It is “no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard.” Bd. of Educ. v. Rowley, 458 U.S. 176, 205-6, 102 S. Ct. 3034, 3050, 73 L. Ed. 2d 690, 712 (1982). Our courts have observed that “[t]he procedural requirements of the IDEA are essential to the fulfillment of its purposes.” D.B. and L.B. o/b/o H.B. v. Gloucester Twp. Sch. Dist., 751 F.Supp. 2d 764 (D.C.N.J. 2010). Where, as in this case, the District responded to a referral for special education with no attention to the procedural processes that guide the delivery of services, I am left with the conclusion that M.S. was denied FAPE.

When the parent contacted the District in 2014, A.G. had not been a student in the District prior to his registration in same and he was now a teenager. Thus, the District did not “know” A.G., nor could it, without further observation and evaluation of his needs. The parent’s July 3, 2014, contact with the District should have been treated as an initial referral and under N.J.A.C. 6A:14-3.3(e)

a meeting of the child study team, the parent and the regular education teacher of the student who is knowledgeable about the student’s educational performance or, if there is no teacher of the student, a teacher who knowledgeable about the district’s programs [should have been] convened within 20 calendar days . . . .

The July 23, 2014, meeting should have resulted in agreement as to the evaluations, assessments, and observation needed to “get to know” A.G. and assess his educational needs. The regulations moreover require that “[a]fter parental consent for initial evaluation has been received, determination of eligibility for services under that chapter, and if eligible, development and implementation of the IEP for the student shall be completed within 90 calendar days.” N.J.A.C. 6A:14-3.4(e). None of these procedural requirements were attempted and met by the District until after they received the parents’ notice of their unilateral placement of A.G. to the Tree of Knowledge School in Miami, Florida on August 11, 2014 (P-14).

The IEP is an agreement between the parties that specified how special education and related services will be delivered. 20 U.S.C. § 1414(d)(1)(A). It is the vehicle through which a child receives FAPE. D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 557 (2010); Lascari v. Bd. of Educ. of the Ramapo-Indian Hills Reg’l Sch. Dist., 116 N.J. 30 (1989). A meeting to develop the IEP must be held within thirty calendar days of a determination that a student is eligible for special education and related services. N.J.A.C. 6A:14-3.7(a). The regulation goes on to provide that

An IEP shall be in effect before special education and related services are provided to a student with a disability

and such IEP shall be implemented as soon as possible following the IEP meeting . . . at the beginning of each school year, the district board of education shall have in effect an IEP for every student who is receiving special education and related services from the district . . . .

[N.J.A.C. 6A:14-3.7(a)(10).]

None of these procedural requirements were met by the District in this case.

Indeed once presented with a child with special needs, like A.G., as so advised by his parents, the IDEA mandated that the District engage A.G. in the IEP process. Had the District done so, and had the parents remained adamant that they wanted funding for the Tree of Knowledge and only the Tree of Knowledge after having been offered a properly developed IEP, my decision might have been different. However, the District failed to engage in any of the steps that might have convinced A.G.'s parents that it had something educationally valuable and suited to their son.

I **CONCLUDE** that the District failed to evaluate A.G., failed to conduct observations until March 2015, and failed to offer an IEP for A.G. to commence in the District in September 2014, despite A.G. being registered as of June 18, 2014. N.J.A.C. 6A:14-2.7(k); see also Rowley, supra, 458 U.S. at 205-6, 102 S. Ct. at 3050, 73 L. Ed. 2d at 712; H.B., supra, 751 F. Supp. 2d 764.

When a court examines whether a district has provided FAPE, the appropriateness of an IEP is not determined by a comparison between the private school unilaterally chosen by parents and the program proposed by the district. S.H. v. State-Operated Sch. Dist. of Newark, 336 F.3d 260, 271 (3d Cir. 2003). Rather, the pertinent inquiry is whether the IEP proposed by the district offered FAPE with the opportunity for significant learning and meaningful education benefit within the LRE. G.B. and D.B. ex rel J.B. v. Bridgewater-Raritan Reg'l Bd. of Educ., EDS 4075-06, Final Decision (June 13, 2007), <http://njlaw.rutgers.edu/collections/oal/>. Upon a finding that the district provided FAPE, the appropriateness of the private school program is

irrelevant. H.W. and J.W. ex rel A.W. v. Highland Park Bd. of Educ., 108 Fed. Appx. 731, 734 (3d Cir. 2004). The District bears the burden of proof by the preponderance of the competent and credible evidence that it has provided a FAPE to A.G. in the least restrictive environment. N.J.S.A. 18A:46 -1.1. As I have previously found that an IEP was not drafted or offered for A.G., it follows, and I so **CONCLUDE** that FAPE was not provided.

### **The Burden of Proof Rests With the School District**

As a recipient of federal funds under the IDEA, 20 U.S.C.A. § 1400 et seq., the State of New Jersey has a policy that assures all children with disabilities the right to a FAPE. 20 U.S.C.A. § 1412. The responsibility to provide FAPE, including special education and related services, rests with the local public school district. 20 U.S.C.A. § 1401(9); N.J.A.C. 6A:14-1.1 et seq.; N.J.A.C. 6A:14-1.1(d). In accordance with N.J.S.A. 18A:46-1.1, the burden of proving that FAPE has been offered likewise rests with the school personnel. The District will have satisfied the requirements of law by providing A.G. with personalized instruction and sufficient support services “as are necessary to permit [him] ‘to benefit from the instruction.’” G.B. and D.B. obo J.B. v. Bridgewater-Raritan Reg’l Bd. of Educ., 2009 U.S. Dist. LEXIS 15671, \*5 (D.N.J. Feb. 27, 2009) (citing Rowley, supra, 458 U.S. at 189, 102 S. Ct. at 3042, 73 L. Ed. 2d at 701; D.S., supra, 602 F. 3d 553).

On January 14, 2008, New Jersey adopted legislation that placed the burden of proof and the burden of production in special education matters with the respective school district, regardless of which party seeks relief. N.J.S.A. 18A:46-1.1. This statute has not been revoked, modified, or found to be preempted by federal law. Accordingly, I **CONCLUDE** that the District has the burden of proof regarding the petition at issue.

When a school district fails to ensure that a FAPE is being provided, as was determined in this case, parents have the right to unilaterally place their child in a private school and receive reimbursement from the school district for tuition. Burlington,

supra, 471 U.S. at 370-71, 105 S. Ct. at 2002-03, 85 L. Ed. 2d at 395-96; N.J.A.C. 6A:14-2.10(b). Reimbursement, however, is never required if a school district offered the disabled student a FAPE. N.J.A.C. 6A:14-2.10(a).

Once a forum 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). Under this provision, “equitable considerations are relevant in fashioning relief.” Sch. Comm. of Burlington, supra, 471 U.S. 359, 374, 105 S. Ct. 1996, 2005, 85 L. Ed. 2d 385, 398, and the court enjoys “broad discretion” in so doing. Id. at 369. Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Ibid.

The United States Supreme Court held in a unanimous 1993 decision that, when a public school provides an inappropriate education to a classified child, courts may order reimbursement to those parents who unilaterally place their child in a private school, even if the private school does not meet certain criteria. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993). In other words, parents are not held to the same standard as local education agencies in making out-of-district placements. Ibid.

It is clear that A.G.’s parents are caring and thoughtful parents who have A.G.’s best interests at heart. Neither the text of the IDEA nor its legislative history imposes a “requirement that the private school be approved by the state in parent placement reimbursement cases.” Florence, supra, 510 U.S. at 11, 114 S. Ct. 364, 126 L. Ed. 2d 291. To the contrary, the Court of Appeals concluded that the IDEA’s state-approval requirement applies only when a child is placed in a private school by public school officials. N.J.A.C. 6A:14-2.10(b)

In addition, the IDEA includes a mainstreaming requirement requiring education in the “least restrictive environment.” See 20 U.S.C.A. § 1412(a)(5)(A). Courts in this

Circuit have interpreted this mainstreaming requirement as mandating education in the least restrictive environment that will provide meaningful educational benefit. “The least restrictive environment is the one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled.” Carlisle Area Sch. v. Scott P., 62 F.3d 520, 535 (3d Cir. 1995), cert. den. sub. nom., Scott P. v. Carlisle Area Sch. Dist., 517 U.S. 1135, 116 S. Ct. 1419, 134 L. Ed. 2d 544 (1996). Federal courts have adopted a two-part test for determining whether a school district complies with the statutory preference for the least restrictive environment. The first step is to determine whether the local school can educate the child in a regular classroom with the use of supplementary aids and services. Only if it is determined that the child cannot be educated in the regular classroom with supplementary aids and services does it then become necessary to consider out-of-district placements. Oberti v. Bd. of Educ. of Clementon Sch. Dist., 995 F.2d 1204, 1215 (3d Cir. 1993).

The Third Circuit provided further instruction on the definition of meaningful benefit when it found that the benefit must be meaningful in light of the student’s potential; to fulfill this mandate, the student’s capabilities as to both “type and amount of learning” must be analyzed. Ridgewood, supra, 172 F.3d at 248. “When students display considerable intellectual potential, IDEA requires a great deal more than a negligible [benefit].” Id. at 247 (quoting Polk, supra, 853 F.2d at 182). When analyzing whether an IEP confers a meaningful benefit, “adequate consideration [must be given] to . . . [the] intellectual potential” of the individual student to determine if that child is receiving a FAPE. Ridgewood, supra, 172 F.3d at 248. Moreover, there is no bright-line rule to determine the amount of benefit required of an appropriate IEP, and a “student-by-student analysis that carefully considers the student’s individual abilities” is required. Ibid. There must be a degree, intensity, and quality of special education and related services adequate to provide an educational benefit to the individual child. Egg Harbor Twp. Bd. of Educ. v. S.O., 19 I.D.E.L.R. 15, 17 (D.N.J. 1992).

Finally, the New Jersey Administrative Code requires certain prerequisites be fulfilled before an Administrative Law Judge can require the school district to reimburse parents for the unilateral placement of their child in a school. N.J.A.C. 6A:14-2.10(b) requires that:

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, . . . or approved private school for the disabled without the consent of or referral by the district board of education, an ALJ may require the district to reimburse the parents for the cost of that enrollment if the ALJ finds that (1) the district had not made a free, appropriate public education available to that student in a timely manner prior to that enrollment and (2) that the private placement is appropriate.

A parental placement may be found to be appropriate even if it does not meet the state standards that apply to education provided by the SEA or LEAs. 3 C.F.R. § 300.148.

Accordingly, the courts recognize that parents who are compelled to unilaterally place their child [as in this case] by necessity to 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. Accordingly, 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.

[K.B. and D.B. o/b/o L.B. v. The Morris Sch. Dist., EDS 15435-12, Final Decision (Nov. 2013), <http://njlaw.rutgers.edu/collections/oal> (citing Florence Cty. Sch. Dist., *supra*, 510 U.S. at 15, 114 S. Ct. at 366, 126 L. Ed. 2d at 293).]

See L.M. v. Evesham Twp. Bd. of Educ., 25 F. Supp. 2d 290 (D.N.J. 2003); T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 581 (3d Cir. 2000).]

There was quite a bit of testimony that A.G. was making significant progress at the Tree of Knowledge. Issues regarding A.G.'s attendance were addressed based on the hands-on nature of the residential placement offered at the Tree of Knowledge and his math challenges have been addressed as a result of the small classroom instruction he receives from a special education teacher and nightly tutoring.

The placement will be acceptable if the education provided by the private school is reasonably calculated to enable the child to receive education benefits. Florence County Sch. Dist., *supra*, 510 U.S. at 11, 114 S. Ct. at 364, 126 L. Ed. 2d at 291. Based on the evidence presented at the hearing, it is clear that the Tree of Knowledge School provided such educational benefits to A.G. Furthermore, it is clear that the sectarian nature of an otherwise appropriate private school does not bar reimbursement to the parents who so place their children. L.M. by his parents H.M. and E.M. v. Evesham Twp. Bd. of Educ., 256 F. Supp. 2d 290 (D.N.J. 2003).

The District has argued, since the Tree of Knowledge is not a New Jersey approved school, the teachers were not appropriately qualified to teach A.G. It is clear, however, that "private schools' failure to comply with state's licensure requirements or state's educational standards was not a bar to tuition reimbursement." Warren G. v. Cumberland Cty. Sch. Dist., 190 F.3d 80, 83 (1999). There was much evidence presented that despite some New Jersey licensure shortcomings, the Tree of Knowledge and its curriculum provided through the Fuel Ed program are licensed and approved in the State of Florida. It is clear that the teachers at the Tree of Knowledge are providing a reasonable educational environment for A.G. As such, I **CONCLUDE** that the Tree of Knowledge was reasonably calculated to enable A.G. to receive educational benefits.

The District argues in its post-hearing brief that this tribunal's ruling that the District was precluded from presenting evidence was made in error. The Board, however, failed to comply with N.J.A.C. 1:6A-10.1(c) which requires:

- (a) All discovery shall be completed no later than five business days before the date of the hearing;
- (b) Each party shall disclose to the other party any documentary evidence and summaries of testimony intended to be introduced at the hearing;
- (c) Upon application of a party, the judge shall exclude any evidence at hearing that has not been disclosed to that party at least five business days before the hearing, unless the judge determines that the evidence could not reasonably have been disclosed within that time.

It is clear that the District failed to disclose to the other party any documentary evidence and summaries of testimony intended to be introduced at the hearing at least five business days before the hearing. The District should have been aware that the hearing was scheduled for January 25, 2016, when Judge Schuster so advised the parties on a December 8, 2015, telephone conference. The fact that the District decided to appeal Judge Schuster's previous ruling permitting the parents to file the Amended Petition and Cross-Claim and requested the District Court stay the January 25, 2016, proceedings does not relieve them of their obligations as outlined in N.J.A.C. 1:6A-10.1(c).

### **CONCLUSION**

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Board did not offer to provide a free and appropriate education to A.G., and, therefore, the parents' request for reimbursement for their unilateral out-of-district placement of A.G. at the School of Knowledge in Miami Florida, including board and transportation expenses, should be granted.

### **ORDER**

It is **ORDERED** that the relief requested by petitioner as set forth above, is **GRANTED**.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2015) 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.A. § 1415(i)(2); 34 C.F.R. § 300.516 (2015). 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.

\_\_\_\_\_  
May 13, 2016  
DATE

\_\_\_\_\_  
**JOHN S. KENNEDY, ALJ**

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

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

JSK/vj

**APPENDIX**

**WITNESSES**

**For petitioner:**

Susan K. Caplan, M.Ed., LDT-C

K.G., Mother of A.G.

Nicki Salfer, M.A., M.S.

S.G., Father of A.G.

Robert Cerco, Director of Special Services for the District

**For respondent:**

None

**EXHIBITS**

- P-1 Districts Due Process Petition – December 16, 2014
- P-2 Answer to District’s Due Process Petition – December 23, 2014
- P-3 NJDOE Acknowledgment – December 18, 2014
- P-4 Correspondence of M. Inzelbuch, Esq. to ALJ Schuster – November 11, 2015
- P-5 Correspondence of J. Butler, Esq. to ALJ Schuster – November 12, 2015
- P-6 Correspondence of M. Inzelbuch, Esq. to ALJ Schuster – November 18, 2015
- P-7 LETTER ORDER of ALJ Schuster allowing Amended Answer and Cross-Petition to be filed – November 24, 2015
- P-8 Amended Answer to District’s Petition with Cross-Petition – November 25, 2015
- P-9 Correspondence of J. Butler, Esq. – December 3, 2015
- P-10 PRE-HEARING ORDER of ALJ Schuster in accordance with December 8, 2015 Telephone Conference – December 11, 2015
- P-11 Parental request for Evaluations – July 3, 2014
- P-12 Initial Identification and Evaluation Planning – Proposed Action – July 23, 2014
- P-13 Meeting Attendance Sign-In Sheet – July 23, 2014

- P-14 Correspondence of Parent to Susan Goodwin – August 11, 2014
- P-15 Correspondence of Parent to Susan Goodwin – August 14, 2015 (unilateral placement notice)
- P-16 Psychological Evaluation of Cynthia Maher, Psy.D. – March 31, 2015
- P-17 Social History Report of Elleen Keegan, LCSW – June 18, 2015
- P-18 Educational Evaluation of Susan Goodwin, MS, LDT-C – April 1, 2015
- P-19 Psychiatric Evaluation of Dr. Joseph C. Hewitt, D.O. – June 29, 2015
- P-20 Correspondence of Dr. Martin Karp, Miami-Dade County School Board Member – July 7, 2015
- P-21 District’s handwritten “Meeting Notes” – July 23, 2014 Meeting
- P-22 Correspondence of Robert J. Cerco to Parents – August 18, 2014
- P-23 Invitation for Initial Identification and Evaluation Planning – August 18, 2014
- P-24 Initial Identification and Evaluation Planning – Proposed Action (incorrectly dated as “9/3/14”)
- P-25 Meeting Attendance Sign-In Sheet – September 3, 2014
- P-26 Correspondence of Kurt Holtz, Director of Guidance to parents – August 25, 2014
- P-27 Invitation for Initial Identification and Evaluation Planning – July 7, 2014
- P-28 Initial Identification and Evaluation Planning – Evaluation Not Warranted – July 23, 2014
- P-29 Record Request to District – August 15, 2014
- P-30 Record Request to District – December 23, 2014

- P-31 Record Request to District – May 7, 2015
- P-32 Record Request to District – December 10, 2015
- P-33 E-Mail of Denise Brueckner, CST Office to Parents – July 2, 2014
- P-34 District's Answer to Cross-Petition – December 14, 2015
- P-35 Correspondence of J. Butler, Esq. to M. Inzelbuch, Esq. forwarding records – January 7, 2015
- P-36 Invitation for Initial Identification and Evaluation Planning – August 21, 2014
- P-37 Jackson Township School District Student Registration Forms and Registration Documents – June 18, 2014
- P-38 Jackson High School District – Course Request Worksheet (2014-2015)
- P-39 Correspondence of J. Butler, Esq. to M. Inzelbuch, Esq. forwarding records – June 3, 2015
- P-40 Correspondence of Sue Goodwin to Parents – May 22, 2015
- P-41 E-Mail of Parent to Susan Goodwin – April 1, 2015
- P-42 Correspondence of Denise Brueckner, CST Secretary to Tree of Knowledge Learning Academy – April 2, 2015
- P-43 E-Mail of Susan Goodwin to Tree of Knowledge – May 13, 2015
- P-44 E-Mail of Nicki Salfer to Susan Goodwin – May 13, 2015
- P-45 E-Mail of J. Butler, Esq. to M. Inzelbuch, Esq. forwarding records and attached records – January 12, 2016
- P-46 Learning Evaluation of Dr. Francie M. Matthews, Ph.D. – February 20 & March 4, 2014
- P-47 File contents of Dr. Francie M. Matthews, Ph.D.
- P-48 Curriculum Vitae of Dr. Francie M. Matthews, Ph.D.
- P-49 E-Mail Confirmation of P-46 to P-48 to J. Butler, Esq. – January 14, 2016

- P-50 Educational Evaluation of Susan K. Caplan, M.Ed., LDT-C  
– December 29, 2015
- P-51 Invoice of Susan K. Caplan, M.Ed., LDT-C
- P-52 Curriculum Vitae of Susan K. Caplan, M.Ed., LDT-C
- P-53 E-Mail Confirmation of P-50 to P-52 to J. Butler, Esq. –  
January 14, 2016
- P-54 Medical Records of Dr. Robert Shanik
- P-55 E-Mail Confirmation of P-54 to J. Butler, Esq. – January  
14, 2016
- P-56 Psychiatric Evaluation of Dr. Charles F. Martinson –  
October 20, 2014
- P-57 Curriculum Vitae of Dr. Charles F. Martinson
- P-58 E-Mail Confirmation of P-56 to P-57 to J. Butler, Esq. –  
January 14, 2016
- P-59 Subpoena For Records to Dr. Joseph C. Hewitt, D.O. –  
January 15, 2016
- P-60 Neuro-Psychological Evaluation of Dr. Michael Steinhardt,  
Psy.D, July 14/18, 2014 with E-Mail confirmation to J.  
Butler, Esq.
- P-61 Medical Records of Dr. Ronen Hizami, M.D., P.C. with E-  
Mail Confirmation to J. Butler, Esq.
- P-62 Psychoeducational Evaluation of Jordana Skurka, Psy.D.,  
dated October 28, 2010 with E-Mail confirmation to J.  
Butler, Esq.
- P-63 Invoice of Dr. Charles Martinson
- P-64 Speech and Language Evaluation Report of Constance N.  
Wieler, MS, CCC-SLP dated May 27, 2015
- P-65 Invoice of Constance N. Wieler
- P-66 Curriculum Vitae of Constance N. Wieler
- P-67 E-Mail Confirmation of P-64 to P-66 to J. Butler, Esq.
- P-68 TOK – High School Report Card for 2014-2015 School

- Year
- P-69 TOK - Note of Patricia Ouellette, English Studies & Math Teacher – April 18, 2015
  - P-70 TOK - Woodcock Johnson IV – October 26, 2015
  - P-71 TOK – Report of Mr. B. Wolland, Social Studies Teacher – May 12, 2015
  - P-72 TOK – Report of Mr. D. Trueba, Construction Technology Teacher – May 12, 2015
  - P-73 TOK – Report of Mr. W. Berliant, Science Teacher – May 12, 2015
  - P-74 TOK – Report of Ms. P. Ouellette, Math for Daily Living/Algebra I Teacher – May 12, 2015
  - P-75 TOK – Class Schedule (Grade 10) 2015-2016 School Year
  - P-76 E-Mail Confirmation of P-68 to P-75 to J. Butler, Esq.
  - P-77 Parents Initial Witness List – January 14, 2016 with E-Mail Confirmation to J. Butler, Esq.
  - P-78 Notice to Produce / Document Demand to Jackson School District – January 15, 2016 with E-Mail Confirmation to J. Butler, Esq.
  - P-79 TOK – School Attendance 2015-2016 School Year
  - P-80 TOK – Report Card 2015-2016 School Year – Term 1
  - P-81 TOK – “Skills Without Pills”
  - P-82 TOK – Minnesota Multiphasic Personality Inventory – July 8, 2015
  - P-83 TOK – Resume and Certifications of Nicki Salfer, M.A., M.S., Chief Executive Operator
  - P-84 TOK – Resume and Certifications of Dr. Mordechai Salfer, Ph.D, Founder and Executive Director
  - P-85 TOK – Resume and Certification of Mimi Elias, Speech Language Pathologist
  - P-86 TOK – Bio and Certification of Helene Ann Lieberman,

Occupational Therapist

- P-87 TOK – Resume of Jesus David Quiceno, Occupational Therapist Intern
- P-88 TOK – Certification of Patricia Ann Ouellette
- P-89 E-Mail Confirmation of P-79 to P-88 to J. Butler, Esq.
- P-90 TOK – Resume and Certification of Patricia Ann Ouellette with E-Mail Confirmation to J. Butler, Esq.
- P-91 Subpoena to Testify to Susan K. Caplan, M.Ed., LDT-C dated January 21, 2016 with E-Mail Confirmation to J. Butler, Esq.
- P-92 Response to Subpoena of Dr. Joseph C. Hewitt with E-Mail Confirmation to J. Butler, Esq.
- P-93 District’s Witness List dated January 20, 2016 with REJECTION of M. Inzelbuch, Esq. – January 20, 2016
- P-94 Correspondence of J. Butler, Esq. to ALJ Schuster – January 15, 2016
- P-95 LETTER ORDER of The Honorable John Schuster III, ALJ to J. Butler, Esq. – January 20, 2016
- P-96 Correspondence of J. Butler, Esq. to ALJ Schuster – January 21, 2016
- P-97 E-Mail Confirmation of Petitioners Updated Exhibit Charting List to J. Butler, Esq. – January 21, 2016
- P-98 Correspondence of J. Butler, Esq. to ALJ Schuster – December 3, 2015
- P-99 Correspondence of J. Butler, Esq. to ALJ Schuster – December 14, 2015
- P-100 Correspondence of ALJ Schuster to J. Butler, Esq. – December 18, 2015
- P-101 Correspondence of J. Butler, Esq. to ALJ Schuster – January 15, 2016
- P-102 Correspondence of ALJ Schuster to J. Butler, Esq. –

- January 20, 2016
- P-103 Correspondence of J. Butler, Esq. to ALJ Schuster –  
January 20, 2016
- P-104 Correspondence of J. Butler, Esq. to ALJ Schuster –  
January 21, 2016
- P-105 Correspondence of K. Gilfillan, Esq. to M. Inzelbuch, Esq.  
forwarding Order to Show Cause – January 21, 2016
- P-106 Correspondence of J. Butler, Esq. to ALJ Laura Sanders –  
January 22, 2016
- P-107 Correspondence of J. Butler, Esq. to ALJ John Kennedy –  
January 24, 2016
- P-108 ORDER Denying Order to Show Cause of Peter G.  
Sheridan, U.S.D.J. – January 25, 2016
- P-109 Subpoena to Testify to Nicki Salfer – February 17, 2016
- P-110 Subpoena to Testify to Susan Goodwin, LDT-C, Case  
Manager – February 17, 2016
- P-111 E-Mail of M. Inzelbuch, Esq. to J. Butler, Esq. forwarding  
updated TOK Records – February 17, 2016
- 1) AG High School Report Card
  - 2) TOKLA write-up and description of program
  - 3) Accreditation
  - 4) Class DOJO Explanation and Review
- P-112 Correspondence of M. Inzelbuch, Esq. to J. Butler, Esq. –  
February 4, 2016
- P-113 Transcript of Recorded Proceedings – January 25, 2016
- P-114 Parental request (again) for Independent Evaluations  
Psychiatric and Psychological – February 16, 2016 at  
meeting
- P-115 Witness List Amendment #1 – February 19, 2016
- P-116 Medical Note/Report of Dr. Eliot B. Garson, Ph.D. –  
February 7, 2016

- P-117 Updated Records of TOK – February 22, 2016:  
Educational Evaluation of Patricia Quellette – August 28, 2014  
Work Sample – August 28, 2014  
High School Report Card 2015-2016 (Term 1)  
2015-2016 Class Schedule
- P-118 Medical Records of Dr. Joyce W. Rydzinski
- P-119 Medical Records of Dr. Robert Shanik
- P-120 Eligibility/Classification Conference Report – DRAFT –  
undated and unsigned (Provided at February 16, 2016  
Meeting)
- P-121 Correspondence of J. Butler, Esq. to ALJ Kennedy –  
February 22, 2016
- P-122 Correspondence of M. Inzelbuch, Esq. to ALJ Kennedy –  
February 23, 2016
- P-123 Yeshiva Tiferes Torah Report Cards for 2012-2013 School  
Year (Grade 7) and 2013-2014 School Year (Grade 8)  
Provided by Parents at time of Registration (with other  
documents provided by parents)
- P-124 Certification of Service upon Susan Goodwin, LDT-C,  
Case manager – February 18, 2016
- P-125 E-Mail of M. Inzelbuch, Esq. to J. Butler, Esq. requesting  
that Susan Goodwin bring her entire CST and School  
File(s) to Court – February 23, 2016
- P-126 Transcript of Recorded Proceedings – February 24, 2016
- P-127 Correspondence of M. Inzelbuch, Esq. to Judge Kennedy  
– February 25, 2016
- P-128 Correspondence of M. Inzelbuch, Esq. to Judge Kennedy  
Re: Exhibits – February 26, 2016
- P-129 Correspondence of J. Butler, Esq. to Judge Kennedy Re:  
Exhibits – March 4, 2016

- P-130 Correspondence of Robert J. Cerco, Director to Parents –  
March 14, 2016
- P-131 District's Post-Hearing Brief of J. Butler, Esq. – March 14,  
2016