



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 08946-17

AGENCY REF NO. 2017/26288

K.E. AND B.E. ON BEHALF OF T.E.,

Petitioners,

v.

**NORTHERN HIGHLANDS REGIONAL BOARD
OF EDUCATION AND UPPER SADDLE RIVER
BOARD OF EDUCATION,**

Respondent.

Thomas J. O’Leary, Esq., for Petitioners (Connell Foley, attorneys)

James L. Plosia, Esq., for Respondent Northern Highlands Regional Board of Education (NHR) (Plosia Cohen, attorneys)

Stacey Therese Cherry, Esq., for Respondent Upper Saddle River Board of Education (USR) (Fogarty & Hara, attorneys)

Record Closed: June 5, 2018

Decided: June 27, 2018

BEFORE THOMAS R. BETANCOURT, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners filed a request for a due process petition with the Office of Special Education Programs, New Jersey Department of Education (NJDOE).

The Department of Education transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, to the Office of Administrative Law (OAL), where it was filed on June 23, 2017.

A prehearing conference was held on June 30, 2017, and a prehearing order was entered by the undersigned on the same date.

Respondent, Northern Highlands Regional Board of Education (NHRHS), filed a notice of motion to dismiss petitioners' due process petition on September 21, 2017. Respondent, Upper Saddle River Board of Education (USR), filed a brief neither in support nor in opposition to the motion, but to clarify certain facts, on October 2, 2017. Petitioners filed their response thereto on October 12, 2017. Respondent filed its sur response brief on October 23, 2017.

Oral argument on the motion was held on November 28, 2017. An order denying the motion to dismiss was entered on November 29, 2017.

Respondent, NHRHS, filed motions to bifurcate and to dismiss Petitioners' compensatory education claims against NHRHS on December 11, 2017. Respondent, USR, filed a brief in support of said motion on January 2, 2018. Petitioner filed a brief in opposition on January 4, 2018. Respondent, NHRHS, filed a sur reply brief on January 8, 2018. An order granting the motion to bifurcate, and denying the motion to dismiss the compensatory education claim against NHRHS, was entered on January 12, 2018.

On January 2, 2018, Hillary D. Freeman, Esq., counsel for Petitioners filed a motion to be relieved as counsel. Oral argument on the motion to be relieved was

heard on January 8, 2018. An Order granting the motion was entered on January 9, 2018.

Thomas J. O'Leary, Connell Foley, entered his appearance on behalf of Petitioners on January 29, 2017.

A hearing on the matter concerning the claims against NHRHS was held on February 9, 2018, and February 14, 2018.

By letter dated May 17, 2018, counsel for USR advised that the matter between USR and Petitioners was resolved by way of settlement. An executed settlement agreement and resolution of the USR Board of Education were also submitted.

SUMMARY OF RELEVANT TESTIMONY

Respondent's Case

Tracy LaRocca testified as follows:

She is employed by NHRHS as a learning disability teacher consultant. She is also a part-time teacher. She is a member of the Child Study Team (CST) for NHRHS.

She became aware of T.E. approximately the end of June 2016. Thomas Buono, Director of Special Education, informed her he had received a letter from petitioners requesting an evaluation of T.E. by the CST. At the time T.E. was in eighth grade at the Cavallini Middle School in the USR district. T.E. had a 504 plan at the Cavallini Middle School.

NHRHS had created a 504 Accommodation Plan for T.E. Ms. LaRocca is not a member of the 504 Committee. The 504 Accommodation Plan was signed by B.E. on June 12, 2016, with handwritten comments added.

T.E. was to attend NHRHS in September 2016. She was not aware at the time that T.E. would be going to Dwight Englewood School. She learned of this later in the summer of 2016, or possibly the start of the school year. On July 15, 2016, petitioners had signed a contract with Dwight Englewood School for T.E. to attend starting in September 2016.

An invitation to a planning meeting, dated July 7, 2016, was sent to petitioners for a CST meeting on July 20, 2016.

Ms. LaRocca reviewed the records of T.E. from the Cavallini Middle School. The CST met with petitioner B.E. on July 20, 2017. Petitioners were concerned about the safety of T.E. due to incidents that had occurred at Cavellini. B.E. made no mention of any incidents that occurred at the Cavallini School at this meeting. There was no discussion about inadequacies with the 504 Plan at the CST meeting.

B.E. requested Dr. Healy perform evaluations of T.E. as she was concerned with cognitive issues for T.E. NHRHS agreed to have Dr. Healy perform the neurological/educational evaluation. NHRHS agreed to pay what was permissible per State mandates.

B.E. had no suggestions regarding the safety of T.E. while at NHRHS. She did express concerns regarding crowded hallways. NHRHS could accommodate T.E. with crowded hallways by permitting him to leave class five minutes early. This is done often for many students, even ones not classified for special education services or with a 504 plan.

Ms. LaRocca was under the impression T.E. would be attending NHRHS in September. She also thought he would be classified for special education services and that an appropriate Individual Education Plan (IEP) would be developed.

B.E. did not advise the CST that a contract for Dwight Englewood School had already been signed. B.E. did mention that Dwight Englewood was under consideration for T.E.

After the meeting emails were exchanged between Ms. LaRocca and B.E. to schedule the appointment with Dr. Healy and about how much of the fee would be paid by NHRHS. Dr. Healy's report was not received until October 11, 2016.

There was no other meeting with petitioners after the July 20, 2016, meeting.

An invitation to an eligibility meeting was sent to petitioners. The meeting was scheduled for October 13, 2016. The meeting took place. At the meeting petitioners said that T.E. was attending Dwight Englewood and did not anticipate moving him to NHRHS. There was no comment on the IEP proposed. Petitioners agreed that T.E. should be classified. Petitioners did not sign the IEP.

A letter from petitioners' then attorney, dated November 9, 2016, to the attorney for NHRHS, stated petitioners' disagreement with the proposed IEP. The petitioners did not express this at the eligibility meeting held on October 13, 2016. Petitioners provided no input at this meeting.

Ms. LaRocca had a conversation with Kelly Peterfriend the 504 Coordinator at NHRHS. She prepared the 504 Accommodation Plan. She was not involved in the eligibility meeting or the preparation of the IEP.

She noted that one box on the NHRHS 504 Accommodation Plan was not checked by B.E. It was signed by B.E.

Ms. LaRocca was aware of an incident at the Cavellini Middle School where another student caused T.E. to sit on a pencil and puncture his anus. B.E. was very concerned with T.E.'s safety at NHRHS. Ms. LaRocca did speak with Thomas Buono regarding B.E.'s concerns as to safety. She does not believe she specifically discussed

the pencil incident with Mr. Buono or that Cavallini had assigned a one-on-one aide for T.E.'s safety.

She advised B.E. that aides are available and offered an aide for the hallway. She also offered that T.E. could leave class early. She told B.E. that NHRHS was safe and that there were very few incidents. The proposed IEP did not provide for a one-on-one aide. The parents stated at the IEP meeting on October 13, 2016, that they wanted T.E. to remain at Dwight Englewood as they felt that NHRHS could not keep T.E. safe.

The petitioners did not express a concern that T.E. should have a one on one aide at either the July 20, 2016, or the October 13, 2016, meetings.

Petitioner's Case

K.E., Petitioner, testified as follows:

He is the father of T.E. T.E. attended the Cavallini Middle School in the Upper Saddle River district. High School would be NHRHS.

He had concerns with T.E.'s development, which led to the discovery of a brain tumor. T.E. had surgery to remove the tumor on October 15, 2015, while in eighth grade. He missed school. He returned to school in mid-November 2015. He had major concerns due to the surgery and wanted to keep him safe. Kids were abusive to T.E. His iPad was taken his first week back at school. His back pack was also taken. The students who did this did not receive discipline.

T.E. had a grand mal seizure on May 16, 2016. Another student had picked him up and threw him on his head. He was transported from the school in an ambulance.

There was another incident at Cavallini where a student held a pencil under T.E. while he was sitting. This caused significant bleeding.

He was very concerned for the safety of T.E. James McCusker, the principal at Cavallini, told him a full-time person was to stay with T.E. to ensure his safety.

He spoke with Mr. McCusker about T.E. transferring to NHRHS and expressed safety concerns.

There was a June 12 or 13, 2016, meeting with Mr. McCusker. Mr. McCusker said he would reach out to the principal at NHRHS. K.E. also spoke with Mr. McCusker about T.E. attending private school.

K.E. wanted a specific action plan to keep T.E. safe. K.E. also stated he wanted T.E. to attend NHRHS. K.E. stated that even though he signed a contract to send T.E. to Dwight Englewood he still wanted T.E. to attend NHRHS. He stated Dwight Englewood was a safe option.

K.E. attended a meeting on October 13, 2016, regarding an IEP for T.E. At the meeting he discussed concerns for the safety of T.E. and how to proceed with reimbursement for tuition at Dwight Englewood. T.E. stated that NHRHS offered nothing for safety other than the 504 Plan accommodation of permitting T.E. to leave class five minutes early.

At the meeting an IEP was proposed. It was not signed at the meeting by Petitioners. Thereafter Petitioners' attorney sent a letter rejecting the IEP.

Petitioners have a younger son who also attends Dwight Englewood. This son is not classified and has no safety concerns. The number one reason was for him to keep an eye on T.E.

He does not know if T.E. has an IEP or a 504 Plan at Dwight Englewood. T.E. does not have a one-on-one aide at Dwight Englewood. He did not ask for a one-on-one aide from Dwight Englewood. T.E. would always be within range of a staff member

who could help him. T.E. was monitored in case he had a seizure and for safety concerns.

His wife signed the 504 Plan from NHRHS. This occurred after the pencil incident. T.E. received a one-on-one aide at USR after the pencil incident. The 504 Plan does not provide for a one-on-one aide. He does not recall his wife showing him the 504 Plan after she signed.

At a meeting with Kelly Peterfriend, the 504 coordinator at NHRHS, he said T.E. needed a one-to-one aide due to the pencil incident. It was a "complete necessity." There was no one-to-one aide at Dwight Englewood. It was not needed there.

He did not know who the 504 coordinator was at USR. He did not meet with her. He assumed his wife did.

He was not involved in selecting Dr. Healy to do an assessment of T.E. He does not recall if Dr. Healy recommended a one-to-one aide in his report. He stated all of Dr. Healy's recommendations were initiated by Dwight Englewood.

He did not know if the contract with Dwight Englewood required payment of 100% of the tuition. The tuition was paid by making a deposit and making monthly payment. The contract was signed July 15, 2016, but he stated he was not sure at the time if T.E. would be attending Dwight Englewood. He stated he needed to secure a safe option. He was willing to lose the deposit.

Dwight Englewood is not a special education school. He does not understand the term special education. He only contacted schools Mr. McCusker recommended. K.E. described the services T.E. receives at Dwight Englewood.

He did not recall that NHRHS advised him of services they would provide T.E. before he signed the contract with Dwight Englewood. He did not ask NHRHS to

provide the specialists provided by Dwight Englewood. Then he stated he did ask for these services at “every meeting” with NHRHS.

K.E. stated he did not want to send T.E. to Dwight Englewood. He said they were begging NHRHS. He stated they did not respond to his concerns.

B.E., Petitioner, testified as follows:

She is the mother of T.E.

T.E. was an eighth-grade student at the Cavallini School in the USR District. He was out of school due to brain surgery. His full return to school was on January 3, 2016. After the brain surgery T.E. was a totally different child. His whole personality and emotional state was significantly different. He couldn't remember things.

T.E.'s iPad and note book were taken while in eighth grade. Two or three days later the items were returned after B.E. emailed T.E.'s teacher.

A Section 504 Accommodation Plan, dated May 12, 2016, was signed by her with NHRHS. She stated that while she signed the plan she did not check the box on the form that she agreed with the plan. She stated she did not agree as other accommodations discussed were not included in the plan. This plan was provided by NHRHS a few days after the pencil incident at USR. She stated she did not agree as she wanted to be sure T.E. was safe. She said the 504 Plan was a “fluid document.” It was a work in progress. T.E. had constantly changing needs.

She related the incident at USR when T.E. had a grand mal seizure. She also related the incident at USR when T.E. was caused to sit on a pencil.

USR thereafter assigned a one-on-one aide. She reviewed a series of emails with Mr. McCusker at USR regarding her concerns for T.E.

She stated “we” (meaning Mr. McCusker, her, her husband, and hopefully a guidance counselor) were setting up a meeting with NHRHS to discuss safety concerns.

She asked the CST at Cavallini School to recommend private schools.

She stated she wanted NHRHS to have a “top down” approach regarding T.E. She repeated this “top down” several times. She and Mr. McCusker exchanged emails in June 2016 discussing private schools, which included Dwight Englewood and Montclair Kimberly School.

A meeting at NHRHS was held on June 28, 2016. The purpose was to plan T.E.’s transfer to NHRHS and ensure his safety. She expected NHRHS to come up with a plan to keep T.E. safe. She thought the principal at NHRHS should attend meetings. She did not dictate anything as she did not know how to keep T.E. safe.

At the meeting on June 28, 2016, she submitted a letter requesting T.E. be evaluated for special education services. She met the guidance counsellor at this meeting, but felt it was not a “seasoned” guidance counsellor as the person was new to NHRHS.

She never intended to send T.E. to private school. She wanted to send him to NHRHS. She was hoping to send him to NHRHS but the events that happened at USR had her concerned. She had no options at this point.

The 504 Plan provided by NHRHS provided that T.E. could leave class five minutes early. She thought this would stigmatize T.E.

She met with the school nurse at NHRHS to review T.E.’s seizure medication.

There was a meeting scheduled for July 20, 2016, with the CST. The contract with Dwight Englewood was signed on July 15, 2016. She and her husband signed the contract because it was their only option. Dwight Englewood had given them

assurances to keep T.E. safe. She did not ask Dwight Englewood for a one-on-one aide. She had not received sufficient assurances from NHRHS.

At the July 20, 2016, meeting she did not inform NHRHS that she and her husband had signed a contract to send T.E. to Dwight Englewood.

She sent an email on August 26, 2016, to Mr. Buono to schedule a meeting after testing of T.E. was completed.

NHRHS would be the proper placement for T.E. if she had assurances they could keep T.E. safe.

Prior to the hearing she spoke with her husband about his testimony the previous hearing date.

She stated she never received PRISE (Parental Rights in Special Education). T.E. had an IEP at USR. The IEP states that PRISE was provided. She maintained she did not receive it. She did not recall being given PRISE by Ms. LaRocca at the July 20, 2016, meeting. She stated she did receive PRISE at the October 13, 2016, IEP meeting at NHRHS.

She never discussed with Mr. McCusker that NHRHS would pay the tuition for Dwight Englewood. Dwight Englewood never discussed with her getting reimbursed from NHRHS. She never spoke with anyone about getting reimbursed for tuition at Dwight Englewood. The tuition at Dwight Englewood is \$42,000. She was willing to lose this sum if NHRHS did what she wanted. Dwight Englewood was the only private school applied to. Mr. McCusker never said NHRHS would not be an appropriate placement for T.E.

Dr. Healy was chosen by a recommendation from another person. NHRHS agreed to use Dr. Healy.

She understood that asking for T.E. to be evaluated would initiate the IEP process.

She did not agree with the NHRHS 504 Plan when she signed it. She inserted written comments because she was trying to get to an agreement. She reiterated it was a “fluid document.” All the incidents that occurred at USR happened before the 504 Plan was signed on June 12, 2016. She stated the comments were added over time. She doesn’t recall when she gave the 504 Plan with her comments to NHRHS. She thinks it was on June 28, 2016.

She advised Ms. Peterfriend on June 28, 2016, of certain students that should not be with T.E. This was implemented by NHRHS. She requested meetings with teachers and T.E. at NHRHS. This did not occur.

T.E. has no 504 Plan or IEP at Dwight Englewood.

She does not know the difference between Dwight Englewood and NHRHS in instructional minutes.

Her younger son also attends Dwight Englewood. One of the reasons the other son attends Dwight Englewood is for him to look after T.E. This gives her and her husband peace of mind. She is very happy with Dwight Englewood. Her sons are not in the same class. They do lunch together.

She stated, “not really” when asked a factor in placing T.E. at Dwight Englewood is that none of the students who assaulted T.E. would be at Dwight Englewood. She does not know if any such incidents occurred at NHRHS. She did not ask this question of NHRHS.

She does not know number of students per teacher at NHRHS.

At Dwight Englewood T.E. would never be alone without an adult present.

CREDIBILITY

When witnesses present conflicting testimonies, it is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. In other words, credibility is the value a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness's story in light of its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); In re Polk, 90 N.J. 550 (1982). Credibility findings "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463 (1999). A fact finder is expected to base decisions of credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837 (1973).

The finder of fact is not bound to believe the testimony of any witness, and credibility does not automatically rest astride the party with more witnesses. In re Perrone, 5 N.J. 514 (1950). Testimony may be disbelieved, but may not be disregarded at an administrative proceeding. Middletown Twp. v. Murdoch, 73 N.J. Super. 511 (App. Div. 1962). Credible testimony must not only proceed from the mouth of credible witnesses but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546 (1954).

When facts are contested, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings. Credibility is the value that a finder of fact gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, its internal consistency, and the manner in which it "hangs together" with the other evidence. Carbo, 314 F.2d at 749.

I had a great deal of difficulty with K.E.'s testimony. He was argumentative. He was evasive. He was condescending. He would often argue with District counsel over the type of questions asked. I would advise K.E. he was to answer the question posed if there was no objection from his attorney. He would not answer yes or no questions

directly. He spun his answers to conform to his theme, which was NHRHS did not offer sufficient assurances that T.E. would be safe. He signed a contract with Dwight Englewood on July 15, 2016, but repeatedly said he was willing to lose the entire tuition if only NHRHS could assure him of T.E.'s safety. He was evasive in responses to simple questions. He stated in response to a question as to why his younger son also attended Dwight Englewood, a son who has no special education or 504 accommodation needs, that the number one reason was for him to keep an eye on T.E. This response defies credulity as his younger son is not in the same classes and sees T.E. at lunch. He also stated that NHRHS refused to pay Dr. Healy. This is false. NHRHS agreed to pay Dr. Healy up to the amount that was permitted. While I do believe the incidents related to T.E. occurred at USR, I cannot deem K.E. a credible witness. I thought him disingenuous in much of his testimony.

The testimony of B.E. was also problematic. She was also argumentative and evasive while being cross-examined. She repeated her assertion that all she and her husband wanted was for T.E. to be safe and that NHRHS had not provided assurances for this. She also stated several times she wanted a "top down" approach. She seemed concerned that the NHRHS principal did not attend the 504 meeting or the IEP meeting. While I do not believe B.E. was being purposely untruthful, I do believe she was only willing to provide answers that adhered to her version of what transpired. She was unwilling, or unable, to answer a simple yes or no question directly. Her answers always required additional responses to such yes or no questions. I cannot deem her credible.

Tracy LaRocca testified in a direct and professional manner. She answered questions directly and without hesitation. She did not try to avoid or evade answering questions. I deem her credible.

FINDINGS OF FACT

1. Respondent, NHRHS, operates the Northern Highlands Regional High School.
2. Respondent, USR, operates the K-8 schools in Upper Saddle River.
3. T.E. attended school in the USR district at the Cavellini School until completion of eighth grade in June 2016.
4. T.E. was eligible to be enrolled in the NHRHS district as a high school freshman. T.E. became the responsibility of NHRHS on July 1, 2016.
5. While in eighth grade T.E. was diagnosed with a brain tumor. He had surgery for the same on October 19, 2015. He did not return to school full time at Cavellini until January 3, 2016.
6. T.E. was a changed person after the surgery.
7. Upon his return to Cavellini, T.E. had a Section 504 Plan. This was during his eighth-grade year.
8. While at Cavellini, after his return from surgery, T.E. had his iPad and note book taken. They were not returned until B.E. contacted the teacher about it.
9. In June 2016 two events took place at Cavellini. One event was another student placed a pencil pointing up under T.E. while he was about to be seated in his chair. This caused injury to T.E. The second event was T.E. was tackled to the ground by another student and suffered a grand mal seizure.
10. Both the above events caused T.E.'s parents to be concerned about his safety while at school.
11. A proposed 504 Accommodation Plan was sent to Petitioners in June 2016. J-2.
12. B.E. signed the 504 Plan on June 12, 2016, and inserted written comments. J-15.
13. When signed by B.E., notwithstanding the handwritten comments and the failure to check the "I agree" box, this 504 Plan was accepted by Petitioners and was the operative 504 Plan at that time.
14. A meeting was held at NHRHS on June 28, 2016, to discuss the 504 Plan. B.E. attended this meeting. K.E. did not attend this meeting.

15. At the June 28, 2016, meeting B.E. delivered a handwritten letter requesting that T.E. be evaluated for special education and related services. J-1.
16. On July 7, 2016, an invitation to a meeting – notice was sent from NHRHS to petitioners. J-4.
17. The meeting was held on July 20, 2016. Both K.E. and B.E. attended. J-5.
18. At this meeting evaluations to be done for T.E. were discussed. B.E. requested Dr. Jane Healy perform the Neuro-Psychology evaluation. NHRHS agreed to this request and to pay for the same up to the amount permitted.
19. On July 15, 2016, petitioners unilaterally enrolled T.E. at Dwight Englewood School. They did not notify NHRHS of this fact at the July 20, 2016, meeting. J-9.
20. Petitioners did not notify NHRHS of this action until K.E. sent an email to Thomas Buono, Special Education Supervisor, on August 11, 2016. J-11.
21. Petitioners did not notify NHRHS of their intention to seek reimbursement for the costs of tuition until K.E. sent another email to Mr. Buono on September 7, 2016. J-11.
22. Dr. Healy did not complete her report until October 2016. Her report was received by NHRHS on October 11, 2016. J-13.
23. An IEP meeting was scheduled for October 13, 2016. J-6.
24. Both K.E. and B.E. attended the October 13, 2016, IEP meeting. At this meeting T.E. was found eligible to receive special education and related services and an IEP was proposed. T.E. was classified under the category of Traumatic Brain Injury. Neither petitioner signed the IEP at the meeting. J-7.
25. After the meeting the Board attorney forwarded the IEP to Petitioners' attorney. J-7.
26. Thereafter Petitioners rejected the IEP via a letter from their attorney. J-8.
27. At the October 13, 2016, meeting the petitioners indicated they did not intend to enroll T.E. at NHRHS. Petitioners did not provide input at the meeting. Petitioners did agree that T.E. should be classified.
28. The 504 Accommodation Plan signed by B.E. on June 12, 2016, offered FAPE to T.E. as it addressed his needs and provided adequate accommodations. J-15.

29. The IEP proposed at the October 13, 2016, offered FAPE to T.E. It properly identified classification category as Traumatic Brain Injury and offered special education and related services to address his needs. J-7.

LEGAL ANALYSIS AND CONCLUSION

By order of the undersigned, dated January 12, 2018, the matter against NHRHS was limited as follows: a) what, if any, effect shall Petitioners' failure to provide adequate notice pursuant to N.J.A.C. 6A:14-2.10(c) and 20 U.S.C. §1412(a)(10)(C)(ii) have on their request for reimbursement of tuition and other costs for the unilateral placement of T.E.; b) whether Petitioners' Section 504 claims are subsumed by their IDEA claims against NHRHS; and, c) whether Petitioners are entitled to compensatory education.

The answer to those questions need not be addressed as I have determined factually that both the Section 504 Accommodation Plan signed by B.E. on June 12, 2016, and the IEP offered by NHRHS at the October 13, 2016, meeting offered FAPE. As FAPE was offered and rejected by Petitioners, their requests for relief set forth in the due process petition must be denied.

Section 504

The purpose of Section 504 and its implementing regulations is to prohibit discrimination against disabled individuals. A review of the Act and its implementing regulations reveals that it provides a broader range of coverage than does the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1487. Like IDEA, Section 504 and its implementing regulations guarantee school-age pupils who meet the eligibility criteria the right to a free, appropriate public education (FAPE) that is comparable to that required under the IDEA. 34 C.F.R. § 104.22.

T.E. became eligible to attend NHRHS on July 1, 2016. At that time a 504 Accommodation Plan for T.E. was in place. The threshold question herein is whether at that time NHRHS provide FAPE to T.E.

In Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176, 203 (1982), the Supreme Court stated that a school district satisfies the requirement to provide a FAPE to a disabled child “by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” Neither the IDEA nor 504 require a school district to maximize a student’s potential or provide the best possible education at public expense.

In evaluating whether an FAPE was furnished one must make an inquiry into the individual student’s potential and educational needs. Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238 (3d Cir. 1999).

Also, 34 C.F.R. § 103.34 in relevant part states that qualified handicapped students are entitled to receive the same educational opportunities as other students within the district’s jurisdiction, and every school district is obligated to provide a FAPE to qualified handicapped students in the regular education environment. A school district shall place a student with a disability in the regular education environment unless it is demonstrated that the education of that student cannot be achieved satisfactorily, even with the use of support aids and services.

Under Section 504, “[n]o otherwise qualified individual with a disability in the United States, as defined in . . . [29 U.S.C. § 705(20)] shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794(a). For purposes of Section 504, “[t]he term ‘disability’ means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” 42 U.S.C. § 12102(1). The term “major life activities” includes “caring for oneself, performing

manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working,” and “also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” 42 U.S.C. § 12102(2).

Importantly, the definition of disability must be construed broadly, such that “[a]n impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability”; “[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active”; and, “[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures.” 42 U.S.C. § 12102(4)(C), (D), (E)(i).

Section 504 applies to “all of the operations of” a local school district. 29 U.S.C. § 794(b). Under the law’s school-specific regulations, 34 C.F.R. §§ 104.31 to -104.39, “[a] recipient that operates a public elementary or secondary education program or activity shall provide a [FAPE] to each qualified handicapped person who is in the recipient’s jurisdiction, regardless of the nature or severity of the person’s handicap.” 34 C.F.R. § 104.33(a). The law further requires a local educational agency to “conduct an evaluation . . . of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.” 34 C.F.R. § 104.35(a).

Under Section 504, local educational agencies “shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an

impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure." 34 C.F.R. § 104.36.

To prevail on a Section 504 claim alleging the denial of a FAPE, a parent must show that her child "(1) has a disability; (2) was otherwise qualified to participate in a school program; and (3) was denied the benefits of the program or was otherwise subject to discrimination because of her disability." Chambers v. Sch. Dist. of Philadelphia Bd. of Educ., 587 F.3d 176, 189 (3d Cir. 2009) (citations omitted).

T.E. certainly has a disability. That is not contested herein. Nor is it contested that T.E. is otherwise qualified to participate in a school program. What is disputed is whether or not T.E. was denied the benefits of the program due to his disability. That simply did not happen in the instant matter. T.E. was afforded a Section 504 Accommodation Plan at the meeting of June 12, 2016. That plan was accepted by petitioner B.E., albeit with some handwritten comments. NHRHS offered FAPE to T.E. That was rejected by Petitioners due to their overwhelming concern for T.E.'s safety. Petitioners lay their claim on their assertion that NHRHS never offered adequate assurances to them to allay their fears for T.E.'s safety. It is important to note those concerns arose over incidents that happened in another district. While it is clear that NHRHS offered accommodations to T.E. to assure his safety, these were simply not enough for Petitioners. However, Petitioners were unable to offer what would constitute adequate assurances. Further, Petitioners offered no expert testimony as to what would constitute a safe environment for T.E. Petitioners did not question whether T.E. would receive FAPE under the 504 Plan.

Individual With Disabilities Act

Federal funding of state special education programs is contingent upon the states providing a "free and appropriate education" (FAPE) to all disabled children. 20 U.S.C. § 1412. The Individuals with Disabilities Act (IDEA) is the vehicle Congress has chosen to ensure that states follow this mandate. 20 U.S.C. §§ 1400 et seq. "[T]he IDEA specifies that the education the states provide to these children 'specially [be]

designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction.” D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 556 (3d Cir. 2010) (citations omitted). The responsibility to provide a FAPE rests with the local public school district. 20 U.S.C. § 1401(9); N.J.A.C. 6A:14-1.1(d). Subject to certain limitations, FAPE is available to all children with disabilities residing in the State between the ages of three and twenty-one, inclusive. 20 U.S.C. § 1412(a)(1)(A), (B). The district bears the burden of proving that a FAPE has been offered. N.J.S.A. 18A:46-1.1.

New Jersey follows the federal standard that the education offered “must be ‘sufficient to confer some educational benefit’ upon the child.” Lascari v. Bd. of Educ. of Ramapo Indian Hills Reg’l High Sch. Dist., 116 N.J. 30, 47 (1989) (citations omitted). The IDEA does not require that a school district “maximize the potential” of the student but requires a school district to provide a “basic floor of opportunity”. Rowley, 458 U.S. at 200. In addressing the quantum of educational benefit required, the Third Circuit has made clear that more than a “trivial” or “de minimis” educational benefit is required, and the appropriate standard is whether the child’s education plan provides for “significant learning” and confers “meaningful benefit” to the child. T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000) (internal citations omitted).

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

meeting the student's needs. N.J.A.C. 6A:14-3.7(e)(3). The school district must then review the IEP on an annual basis to make necessary adjustments and revisions. 20 U.S.C. § 1414(d)(4)(A)(i).

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

Petitioners requested that T.E. be evaluated for special education and related services by delivering a handwritten letter to NHRHS at the June 28, 2016 meeting. The District duly convened a meeting on July 20, 2016, wherein it was agreed that T.E. should be evaluated. The District also agreed to use Dr. Jane Healy, at the request of Petitioners, to do psychoeducational and neuropsychological evaluations for T.E. Petitioners were informed that the eligibility meeting could not occur until after receipt of the evaluations. Notably, Dr. Healy's report was not received by the District until mid-October 2016. The District immediately convened an eligibility meeting on October 13, 2016, and proposed an IEP for T.E. It is also noteworthy that Petitioners had already unilaterally placed T.E. at Dwight Englewood on July 15, 2016. Petitioners offered no opportunity for NHRHS to develop an IEP for T.E. as he was placed at the private school three months prior to the IEP meeting. Petitioners claim that they wanted T.E. to attend NHRHS but could not do so as there were not adequate assurances for his safety appear disingenuous as they placed T.E. well before either the 504 Accommodation Plan or the proposed IEP could be implemented. The IEP certainly addresses T.E.'s needs and offers FAPE. Further, Petitioners offered no testimony of any kind to rebut the District's proposed IEP.

Based upon the foregoing, I **CONCLUDE** that Petitioners' due process petition should be **DISMISSED**.

ORDER

It is hereby **ORDERED** that Petitioners' due process petition is **DISMISSED**, with prejudice

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2017) 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 (2017). 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 Programs.



June 27, 2018 _____

DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

Settlement Between Petitioners and Upper Saddle River

The Department of Education transmitted the contested case on pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, to the Office of Administrative Law (OAL), where it was filed June 23, 2017.

This case arises under the Individuals with Disabilities Education Act, 20 U.S.C. §§1400 to 1482. The parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached document.

I have reviewed the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached document.
2. The settlement fully disposes of all issues in controversy between them and is consistent with the law.

Therefore, I **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

It is further **ORDERED** that petitioners' appeal is **DISMISSED** with prejudice.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2016). 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 Programs.



June 27, 2018

DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency:

Date Mailed to Parties:

APPENDIX

Witnesses

For Petitioners:

K.E., Petitioner

B.E., Petitioner

For Respondent:

Tracy LaRocca

Exhibits

Joint Exhibits:

- J-1 June 30, 2016, handwritten request for evaluation
- J-2 June 2016 504 Accommodation Plan issued by NHRHS
- J-3 Not in evidence
- J-4 July 7, 2016, Invitation to a Meeting – Notice
- J-5 July 20, 2016, signature page of meeting participants
- J-6 October 11, 2016, Invitation to a Meeting – Notice
- J-7 November 1, 2016, email from James Plosia, Esq. to Staci Greenwald, Esq. forwarding IEP
- J-8 November 9, 2016, letter from Staci Greenwald, Esq. to James Plosia, Esq.
- J-9 July 15, 2016, Dwight Englewood School Enrollment Contract
- J-10 Email exchange from June 30, 2016, to July 12, 2016, between B.E. and Kelly Peterfriend
- J-11 Email exchange from August 8, 2016, to September 7, 2016, between James McCusker, K.E. and Thomas Buono
- J-12 May 2017 Due Process Petition
- J-13 October 2017 report of Dr. Jane Healy
- J-14 Undated Certification of K.E.
- J-15 June 12, 2016, executed Section 504 Accommodation Plan

- J-16 not in evidence
- J-17 July 28, 2016, email from Tracy LaRocca to B.E.
- J-18 Email exchange from October 10, 2016, to October 18, 2016, between K.E. and Thomas Buono
- J-19 July 28, 2016, email from B.E. to Tracy LaRocca
- J-20 July 29, 2016, email from B.E. to Tracy LaRocca
- J-21 Undated two-page document from Dr. Jane Healy regarding billing

For Petitioners:

- P-1 Email exchange from December 9, 2015, to December 10, 2015, between Bridgette Uzar and B.E.
- P-2 Not in evidence
- P-3 Email exchange from April 26, 2016, to April 27, 2016, between Catherine Teehan, B.E. and Bridgette Uzar
- P-4 Email exchange from June 8, 2016, to June 9, 2016, between James McCusker and B.E.
- P-5 Email exchange from June 9, 2016, to June 16, 2016, between James McCusker and B.E.
- P-6 Email exchange from June 16, 2016, to June 22, 2016, between James McCusker and B.E.
- P-7 Photograph
- P-8 IEP for T.E. from Upper Saddle River Schools

For Respondent:

None

Settlement between Petitioners and Respondent, Upper Saddle River BOE:

Minutes of the Board of Education of the Borough of Upper Saddle River for May 14, 2018

Settlement Agreement and Release