



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 14944-18

AGENCY DKT NO. 2017 25129

I.K. ON BEHALF OF Z.S.

Petitioners,

v.

MONTCLAIR BOARD OF EDUCATION,

Respondent.

Donald Soutar, Esq. for petitioners (John Rue & Associates attorneys)

Katherine Gilfillan, Esq., for respondent, (Schench, Price, Smith & King, attorneys)

Record Closed: July 20, 2020

Decided: July 27, 2020

BEFORE **KIMBERLY A. MOSS**, ALJ:

This matter concerns a request for a due process hearing by petitioner I.K. on behalf of minor child, Z.S., who was classified as eligible for special education and related services. Petitioner asserts that the Montclair Board of Education (respondent or District) failed to provide Z.S. with a free appropriate public education (FAPE) and requests

compensatory education for Z.S. The District contends that the IEP provides FAPE to Z.S. and petitioner is not entitled to compensatory education.

PROCEDURAL HISTORY

This matter was remanded by Judge Madeline Cox Arleo from the Federal District Court on May 31, 2018 and transferred to the Office of Administrative Law (OAL) on October 15, 2018 as a contested case. A motion for Summary Decision was filed by Petitioner on November 6, 2019. Respondent filed opposition to the motion on November 21, 2019. I denied the motion on November 26, 2019. I heard the case on the December 11, 2019, January 14, 2020 and July 20, 2020, on which date the record closed.

FACTUAL DISCUSSION AND FINDINGS

TESTIMONY

Ruby Campbell

Ruby Campbell (Campbell) is a School Social Worker/Case Manager for Montclair. In the 2016-2017 school year, the Montclair preschool program (Montclair pre-k) teachers had general education and special education certificates. The Montclair pre-k program has three general education classes and two special education classes. Campbell was the case manager for Z.S who became part of the Montclair school district when she was three. Z.S. received early intervention services. Z.S.'s initial evaluation for early intervention services was on February 4, 2016, when Z.S. was in Head Start. Z.S. is blind.

Z.S. had a psychological evaluation, educational evaluation, occupational therapy (OT) evaluation, speech therapy evaluation and physical therapy evaluation. There was a consultation with the Commission for the Blind to determine what needs were to be addressed for Z.S. and adapting the classroom for Z.S. A teacher for the visually impaired

(TVI) was discussed. Heather Garey was the representative from the Commission for the Blind for Z.S.

Campbell observed Z.S. at Head Start. The Head Start program that Z.S. was in only identified the students play station in Braille. Z.S. sat at a table with other students. The toys were not labeled in Braille. Campbell had concerns about Montclair being able to service Z.S. because she was blind. Campbell knew that St Joseph's School for the blind (St Joseph's) could service Z.S.

Z.S. was found eligible for services. An IEP was developed. Initially the IEP was for half day of classes. It was amended to full day classes. The proposed services were that Z.S. would be in the Montclair preschool program with Speech, OT, Physical Therapy, a personal aide and a consult with the Commission for the Blind. The District would work with the Commission for the Blind to adapt the classroom and translate information into Braille.

The Commission for the Blind have different levels of service. It felt that Z.S. needed level three service. In level three service the Commission for the Blind come into the class two to three times a week to work with Z.S., the teacher, and the aide. This would help Z.S. to become part of the class and keep Z.S. safe.

Play is the principal way of learning in preschool. Montclair pre-k had to find ways to integrate Z.S. in the play schemes. The preschool curriculum would be translated into Braille by the Commission for the Blind. They would teach her teachers Braille. The teachers would send the lesson plan to the Commission for the Blind who would translate it into Braille and return it in two weeks.

There was an IEP meeting on May 2, 2016. At that meeting, petitioner wanted Z.S. in a general education setting with a full-time teacher from the Commission for the blind. The Commission for the Blind stated that Z.S. does not need a full-time TVI. Petitioner wanted Z.S. to have a full time TVI and the mobility teacher. A mobility

assessment was done of Z.S. when she was in Head Start. Petitioner did not agree with the IEP. The disagreement was about where the services would be. Petitioner wanted Z.S. at Montclair Community (Community) which is a private school. Petitioner believes that Z.S.'s only challenge is her blindness. Community could not guarantee that it could comply with Z.S.'s IEP. At the mediation Susan Gaither, (Gaither) the family service coordinator for Community did not feel comfortable with having teachers at Community do all that was needed for Z.S. The IEP provided that Z.S. would be placed at Montclair Preschool (Pre-k) in a class with general education students fifty percent of the time.

In the amended IEP of June 13, 2016, the speech services were concerned with pragmatic language and how Z.S. uses language in social settings. The speech would be in a group setting. Learning Braille was one of the goals and objectives. The OT and physical therapy would expand play skills, improve self-care skills and pragmatic language skills. Z.S. would be in a general education class with typical peers as well as students with disabilities fifty percent of the time.

The IEP's states that no other options were considered. That is an oversight and not an accurate statement.

Z.S. would receive instruction in Braille and instructions on how to navigate the school and classroom. An extended school year ESY was offered to Z.S. at St Joseph's. The District could not provide instruction in Braille in the summer. Gaither, Heather Garey (Garey), Z.S., TVI from the Commission and Janell Washington (Washington) from Head Start were at the amended IEP meeting. Garey and Washington agreed with the IEP.

Modifications to the IEP included accommodations for material in Braille and set classroom with appropriate landmarks and space for Z.S. to negotiate, everything was to be labeled in Braille and extraneous auditory input was to be manageable.

Z.S. stayed in Head Start until June 2016 to finish out the school year. She went to the ESY program at St Joseph's during the summer of 2016. Z.S. did not attend

Montclair public school in the fall of 2016. Z.S. would have received orientation/mobility services from the District once she was placed in a class.

Community was considered as a placement for Z.S. but it was deemed inappropriate. The IEP proposed Z.S. go to the self-contained class fifty percent of the time and general education at Montclair Pre-K fifty percent of the time

Marissa Sheji

Marissa Sheji (Sheji) is a school psychologist at Montclair Public Schools. She is assigned to the pre-school program and is a member of the child study team (CST). She did the psychological evaluation of Z.S. in the spring of 2016. Sheji did a functional assessment of Z.S. which included one-hour observation in Head Start where other children were in the room. Z.S. was directed to interact with the other children. A teacher's aide and TVI instructor were present. Sheji observed Z.S. working with the TVI. Z.S. was working on play acting and letter activities. There was no Braille lettering. TVI used hand over hand assistance with Z.S. Z.S. needed a lot of redirection. She commented on everything that she heard. Z.S. needed verbal redirection to get back on task. Z.S. was more comfortable with adults.

Z.S. needed support to expand her play skills and learning to play in preschool. She needed guided instruction for play with adult prompting and facilitation. She needed to process information verbally and Braille instruction. Sheji believes that Z.S.'s program should be the Montclair pre-k general education program with specialized instruction for play, OT, physical therapy and speech therapy. Petitioner disagreed with the placement. Placement options were discussed with petitioner. These options included Community, Head Start, Montclair general education placement and St Joseph's. Z.S. needed specialized instruction in OT, Physical Therapy, Speech and Braille instruction. Sheji consulted with a speech therapist to increase Z.S.'s language use appropriately. She also wanted to make sure Z.S. interacted appropriately with her peers. She wanted Z.S. to be more independent and initiate play with peers.

Sheji has placed students at Community. Those students needed minimal support such as speech therapy for articulation or fine motor issues. Community does not have a state approved curriculum and not all of the teachers have teaching certificates. Montclair Pre-K has a state approved curriculum.

Sheji has placed students in Head Start which has an income requirement. Head Start is for students with minimal needs. Sheji has concerns about placing a child at Head Start with higher needs. When Z.S. was at Head Start, she could not use Braille independently or independently navigate the class.

Community was not appropriate for Z.S. because it could not deliver the services she needed, and it would not be accountable for failure to deliver those services.

Sheji uses the Patel Developmental Inventory which is a social and emotional evaluation. She would not give the Patel Developmental Inventory to a child who is visually impaired. Z.S. had previously been given the Patel Developmental Inventory. Patel Developmental Inventory scores are not acceptable to monitor progress, they are not standardized on students with visual impairment. Concordia Learning Center did a vision report of Z.S. it did not use the Patel Developmental Inventory. It uses the Oregon Project for visually impaired. Montclair pre-k has no staff instructor who provides instruction to the visually impaired.

Miya Thompson-Smith

Miya Thompson-Smith (Smith) is a learning disabilities teacher consultant (LDTC) for Montclair. LDTC assess learning styles of children, their strengths, weaknesses and needs. She has been trained to administer the Woodcock Johnson and Patel tests.

Thompson-Smith was part of the CST that assessed Z.S. She did a collaborative evaluation of Z.S. She observed Z.S. at Head Start. She was told that Z.S. was learning to use a cane, which is important for safety and moving around the class. Pat Deiter was

the TVI at Head Start. She had a good rapport with Z.S. but they did not use Braille. At Thompson-Smith's second observation Z.S. was sitting at a table with other students who were kicking her under the table and taking food from her plate.

Thompson-Smith assessed Z.S. academically and helped develop learning readiness goals. Z.S. has well developed expressive and receptive language skills but she needs to facilitate communication with peers and be part of the class. Z.S. needs modifications and accommodations' to be successful in class. Z.S. needs a Braille writer, a class fully labeled in Braille and hands on activities with real objects being presented to her.

Thompson-Smith was present at the May 16, 2016, resolution meeting between petitioner and the District. Z.S.'s placement was discussed. Petitioner wanted Z.S. placed at the Community Pre-K program. Gaither was at the resolution meeting. Gaither was not confident that Community teachers could implement the IEP. The children changed classes and the instructors were not trained for children with significant needs. Placement at Community is not appropriate for students with significant needs.

Thompson-Smith did not participate in creating the goals and objectives in speech for Z.S. The visual goals came from the Commission for the Blind. She created the learning readiness goals including Z.S. remember and repeat familiar phrases or nursery rhymes.

The IEP provided Z.S. with specialized instruction methods, strategies and activities for her to access the general education curriculum. Z.S. would need a special education teacher to teach her colors.

Head Start was beginning to teach Z.S. Braille. There is no TVI on staff at Montclair Pre-K. In 2016 Montclair had no Braille teachers and did not have a Braille writer. Thompson-Smith had no communication with the Commission for the Blind.

Jennifer Finnerty

Jennifer Finnerty (Finnerty) is the Supervisor of Pupil Services in Montclair. She has a School Psychologist and Supervisor certificates. She does psychological assessments. She has used the Wexler scale. She has developed preschool disability programs. She can interpret psychological assessment.

When Finnerty began in Montclair all of the pre-school classes were self-contained. That changed to three general education class and one self-contained class. Pre-school child with a disability is the only pre-school classification. The three general education pre-school teachers in Montclair have general education and special education certificates.

Finnerty has been a case manager in Midland Park. In Montclair her role is not decision maker in the IEP but more of a support role. She has sat in on over one hundred IEP meetings in Montclair. She has evaluated more than one hundred students.

The IEP considers observations, data, parental input and evaluations. Then the present levels are considered and goals and objectives to measure progress are formed. The program is developed first. Then the placement is determined based on the goals and objectives and the least restrictive environment. The least restrictive environment is general education with no support. The next would be general education with supports then self-contained classes then home instruction.

Montclair adopted a state approved pre-school curriculum. The pre-school curriculum has exposure to numbers, letters and sounds. There was a lawsuit filed against Montclair because of lack of compliance with the least restrictive environment. Montclair was monitored and took steps to resolve the issue, which included workshops and training on the least restrictive environment. Montclair had to provide documentation of the steps taken at the pre-school level to ensure students were placed in the least restrictive environment. This was done prior to 2017.

Finnerty knows Z.S. She spoke to the CST for Z.S. to make sure the IEP was implemented. Petitioners did not sign the IEP of May 2, 2016. Montclair could not implement the IEP without the parents signing the IEP. Finnerty was at the resolution meeting on May 16, 2016, where the parents disagreed with the IEP. Petitioners wanted full day placement at Community. Prior to the resolution meeting, the IEP had Z.S. in the Montclair Pre-school program for half of a day. Petitioners wanted Z.S. in a general education environment. At the time of the resolution meeting Z.S. was in the Head Start full day program. Gaither of Community was present at the resolution meeting. CST believed that Community was not appropriate for Z.S.

After the mediation was held, Z.S. was placed in a full day program at Montclair pre-k with extended school year (ESY) at St Joseph's . St Joseph's is a state approved school for the blind. Montclair does not have universal pre-school. The morning session is 9:30 -11:30 a.m. The afternoon session is 12:30-3:00 p.m. Petitioners signed the amended IEP of June 13, 2016.

Finnerty observed Z. S. at St. Joseph's with Z.S.'s prospective teacher at Montclair pre-k. The purpose was to get a feel for Z.S.'s skill level. She wanted to consult with the teacher to transition Z.S., ensure the modifications were appropriate and see what Z.S. was learning. Finnerty asked the teacher how the classroom should be set up including the placement of the table and bookcase. She asked about prompting blind students with audio cues. Finnerty was told to label everything in Braille. Montclair ordered a Braille writer. Finnerty wanted to see Z.S. with teachers who had experience with blind students before she started school in Montclair.

Community is in the same building as Montclair pre-k. It is not run by the District but there are slots for students with IEP's at Community. CST considered placing Z.S. in Community but there were concerns because the students they placed at Community had maladaptive behaviors. Community require students that can attend, sit, socialize and navigate the classroom with minimal prompting. Z.S. does not have these skills based

on Finnerty's observation of her at St Joseph's. In addition, the teachers at Community are not certified by the State.

Prior to the 2016-2017 school year, pre-school students with IEP's were placed at Head Start. When a student has an IEP progress is accessed on each goal and objective. The teachers does assessments throughout the year and there are tri-annual progress reports. The special education teacher is responsible for social, emotional and academic goals. The District cannot force Community or Head Start to enforce the goals of the IEP.

Z.S.'s educational goals were Braille reading and writing, learning readiness skills, social skills, emotional skills speech therapy and occupational therapy (OT). Z.S. needed to learn the social skills of using toys purposefully in pretend play, initiate speech play activities with peers, join others in play and use language in play.

Z.S. did not attend school in the District for the 2016-2017 school year. She attended Head Start. Finnerty received notification in August or September 2017 that Z.S. moved to Bloomfield.

Z.S. needs a special education teacher for specific instruction in Braille. The teacher would be given supports from the Commission for the Blind, a Braille writer and information on how to provide instruction to Z.S. The lesson plan would be provided to the Commission for the Blind one to two weeks in advance so it can be translated into Braille.

Finnerty's concern was with the staff at Community. She is concerned that Z.S. have a special education teacher for Braille instruction consistent throughout the day. Montclair did not have a Braille teacher. They were planning to consult a TVI who would be provided by the Commission for the Blind. The TVI from the Commission for the Blind would be responsible for hands on teaching of Z.S. for the time that the TVI was present.

Finnerty was never instructed that the Commission for the Blind would not provide services for Z.S. at Community or Head Start. The CST considered Community. The District has provided Speech Therapy, OT and Physical Therapy to students at Community. Community had prevented students from attending group, if the student is in another class at the same time.

Community has three, three-year old classes, a four-year-old class and a transition class, for students transitioning to kindergarten. The classes at Community have eighteen to nineteen students.

Montclair Pre-k capped enrollment at 14 per class. Finnerty was concerned that the class size at Community eighteen-nineteen would be difficult for Z.S. The IEP states that Z.S. would have an aid for two and one-half hours, but she would have an aide all day.

I.K.

I.K. is the mother of Z.S. who has a visual impairment. She has no vision. She is currently six years old in the first grade. I.K. was twenty-four week pregnant with Z.S. when she was told that Z.S. would be blind. Z.S. was started in early intervention at two months old. She had OT and Physical Therapy.

Z.S. went to Head Start in the infant room. There were eight children and two adults. The students worked on potty training, numbers and sounds. Z.S. started pre-Braille and associating different textures.

Prior to turning three, Z.S. was in the toddler classroom at Head Start. There were eight to ten students. She had TVI through the Commission for the Blind. Most of the time, Z.S. was in general education activities. Z.S. had services from the Commission for the Blind at Head Start. She did not have a one to one aid at Head Start.

When Z.S. was ageing out of early intervention, petitioner contacted the district to register Z.S. for school. She spoke to Ruby Campbell in March 2016. Campbell mentioned the Montclair DLC class. Montclair DLC is the entire Montclair pre-k program. Petitioner expected Z.S. to be in a community setting. At that time Z.S., had been in Head Start for two years. Petitioner wanted Z.S. to have social skills and interact with students. Petitioner was not satisfied with the DLC. She was not happy with the time for the one to one aide. I.K. did not like the proposed placement because the majority of Z.S.'s time would be receiving services and she would not be getting an education.

The DLC program had a smaller number of students, eight to nine with paraprofessional. Petitioners expected less one to one and more children to children contact which she did not see in the DLC class. Petitioner only saw one DLC class. Petitioner also saw the Pre-K class at Community which had more students than teachers and it had a lively environment. Petitioner wanted Z.S. at Community, not DLC.

Petitioner was not told that the CST had considered Community for Z.S. At the May 2, 2016, IEP meeting placement options for Z.S. were discussed. A Head Start representative were present at the IEP meeting. Petitioner wanted Z.S. in a general education class. Petitioner was told that Community was a private school and the District could not ensure services at Community and it did not have a one-to-one aid. Z.S. needed a one-to-one aid for orientation and mobility. She also needed an aide to learn Braille with hand over hand instruction and verbal cues.

The District proposed a half day program for Z.S. in the DCL class. Petitioner did not know that the District had more than one pre-K class. Petitioner did not sign the IEP because it did not seem to offer academics for Z.S.

There was a mediation to discuss petitioners' concerns on May 16, 2016. A representative from Community was present. The District stated that it would not place Z.S. at Community. At that time petitioner agreed to have Z.S. placed in the Montclair pre-k all day. Z.S. would receive an aide all day. The District would provide for the

Commission for the Blind to provide assistance to Z.S. and her teacher. Petitioner signed the amended IEP after the mediation, but before Z.S. went to St Joseph's for ESY.

In the fall of 2016, Z.S. remained at Head Start. Head Start representatives were in contact with petitioner since the IEP meeting. She decided to keep Z.S. at Head Start after the mediation with Montclair. Z.S. did not have an aide at Head Start. Petitioner and her family members decided to volunteer at Head Start to act as an aide for Z.S. Z.S. was not receiving Speech Therapy, OT or Physical Therapy at Head Start. There were eighteen students in the head start class.

Petitioner enrolled Z.S. in a program called My Gym to work on coordination., She enrolled Z.S. in a music program for coordination and music therapy, a swimming program for strength and in summer camp to interact with peers.

Z.S. made progress in Head Start. She could read and was working on numbers. Her interaction with peers improved. Z.S. was improving educationally. Lesson plans were sent to the Commission for the Blind to translate into Braille.

Petitioner moved to Bloomfield for Z.S.'s education. She provided Bloomfield Board of Education (Bloomfield) with Z.S.'s IEP from Montclair. Her concern was with Z.S. having a one-to-one aid. Z.S. completed the first grade.

Heather Garey

Heather Garey (Garey) has a certification in Teacher for the Visually Impaired and disabilities (TVI). She works for the Commission for the Blind as TVI. She provides Braille to students as well as Braille materials and consults. She has as caseload of twenty-eight students.

Garey has been the TVI for Z.S. since she was three. She teaches Z.S. Braille reading and writing. Z.S. knows all her letters and all the necessary punctuation. She provides support on the Braille note taker and consults with the teacher and aide on adaptive materials and classroom accommodations. She also orders the Braille materials.

She began working with Z.S. in the fall of 2016 at Head Start. They worked on pre-braille and tactile skills. Z.S. preferred to interact with adults. Her verbal skills were above the other students at Head Start. Z.S. would speak to the other students. She worked with mobility instruction. The class was set up one way and was not changed. At the end of that school year, she would pull out Z.S. for Braille instruction.

In the 2017-2018, school year she continued teaching Z.S. letter recognition using letter contractions and an electronic Braille device. Z.S. improved in reading and writing. She would pull Z.S. out and work one on one. Z.S. went to school in Bloomfield for Kindergarten. Garey checks with the teacher to see how Z.S. is doing in relation to the other students. She does this to determine if Z.S. has a problem, Garey wants to know is it a content problem or a Braille problem.

Garey attended the IEP meeting for Z.S. in Montclair as well as the second meeting. It is important for Garey to see the classroom and activities to tailor them for Z.S. The recommendations from the Commission for the Blind in the May 2, 2016 IEP were general recommendations for a three-year-old. They included labeling the room for Z.S. with tactile labels. Another recommendation was access to a Braille writer, which is the first machine that a student uses to learn Braille. The Commission for the Blind would provide the Braille writer to whatever placement Z.S. is in.

When Z.S. was in Head Start, Garey would see her three time a week for forty-five minutes to one hour. She does progress reports at the end of the year. She did not provide any progress reports on Z.S. to the CST.

I **FIND** the following **FACTS**:

Z.S. lived in Montclair during the time in question. She was eligible to receive special education services under the classification of pre-school child with disabilities. Z.S. was born on May 20, 2013. Prior to her birth, her parents were informed that would be blind. Z.S. began early intervention when she was two months old. She had Occupational and Physical Therapy.

Z.S. started in the infant room in Head Start . She was started in pre-Braille and associating textures. Prior to turning three, She was moved to the toddler room at Head Start which had eight to ten students. Z.S. had a TVI, Garey, who was provided by the Commission for the Blind. The Commission for the Blind provided services for Z.S while she was at Head Start. She did not have a one to one aid at Head Start.

In March 2016, Z.S. was registered with the District. Montclair pre-k is also called DCL. Montclair has three pre-k general education classes and one self-contained pre-k class. The self-contained class curriculum is presented differently than the general education curriculum. The other classes have fifty percent of the students with IEP and fifty percent of the students without IEP's. Z.S. had a Psychological, Educational OT, Speech Therapy and Physical Therapy evaluation. The District also consulted the Commission for the Blind to determine Z.S. needs and adapting the classroom for Z.S.

The Commission for the Blind have different levels of service. It determined that Z.S. needed level three services which includes the Commission for the Blind coming into the class two to three times a week to work with Z.S., her teacher and her aide. The Commission for the Blind would also teach braille to Z.S.'s teacher.

Sheji, a school psychologist for the District observed Z.S. at Head Start. Z.S. was working with her TVI. There was no braille lettering at the Head Start that Z.S. attended. Z.S. needed redirection as the TVI worked hand over hand with her. Z.S. needed verbal

redirection to get on track. Sheji believes that Z.S. should be placed in the general education pre-k program with specialized instruction in play, OT, Physical Therapy and Speech Therapy. Z.S. with regard to speech, would benefit from intervention to address social-pragmatic language skills, increased development of language and develop play skills. Z.S. was more comfortable with adults.

I.K. visited the one of the Montclair pre-K class. When I.K. visited the Montclair pre-K class it had eight to nine students with a paraprofessional. The class had more one to one assistance than I.K. expected. I.K. also visited a Community pre-k class which had more students and had a lively environment. The Montclair pre-K and Community are in the same building.

The IEP meeting was held on May 2, 2016. Garey, the TVI from the Commission for the blind and Washington from Head Start were present for the meeting. The initial IEP proposed that Z.S. would be in a half day program. She would be in a general education class at least fifty percent of the week. The related services were Speech-Language therapy group six times a month for thirty minutes, OT twice a week for thirty minutes, Physical Therapy individual once a week for thirty minutes and Physical Therapy in a group once a week. She would have a personal aide daily for 150 minutes and daily small bus or vehicle transportation. Z.S. would have extended school year at St Joseph's. The IEP had Braille reading and writing goals and benchmarks as well as Speech/Language, Social, Emotional, Behavioral, motor skills and other goals and benchmarks. The Speech services were concerned with pragmatic language and how Z.S. uses language in social settings. The Speech would be in a group setting. Learning Braille was one of the goals and objectives. The OT and Physical Therapy would expand play skills, improve self-care skills and pragmatic language skills. Z.S. would be in a general education class with typical peers as well as students with disabilities fifty percent of the time.

The IEP had the following modifications for Z.S.: accommodations for Braille materials, allow additional time to process information and respond, utilize verbal and

auditory clues to prepare for transitions, set up classroom with appropriate landmarks and space to negotiate, have clear pathways, provide manipulatives, provide experiences with real materials, use songs to support learning and facilitate peer interaction. The accommodations recommended by the Commission for the Blind include: paraprofessional, preferential seating for optimal auditory access, labeling of room, access to braille writer, space to store materials provided in advance to the Commission for the Blind for the TVI/aide to adapt, keep paths clear in room and place materials in consistent locations, allow Z.S. to explore objects tactually, feel Braille labels, verbalize well, provide detailed directions, refer to students by name, leave all doors open or closed and limit extraneous auditory output.

Z.S. would have an orientation and mobility assessment once she began the program. The IEP states that no other options were considered but the testimony showed that Community, Head Start and St Joseph's was also considered.

Petitioner did not consent to the IEP. She wanted among other things for Z.S. to be at Community to be with a larger number of students. Petitioner was also concerned that the IEP did not seem to offer academics to Z.S.

An IEP resolution meeting was held on May 16, 2016. Susan Gaither from Community was present at this meeting with the CST. Although petitioner wanted Z.S. at Community, Gaither was not comfortable having the teachers at Community do all that was required for Z.S. Special education students at Community had to be able to sit, attend, socialize and navigate the class with minimal prompting. The teachers at Community are not state certified and the District cannot force Community or Head Start to enforce the goals of the IEP. The students at Community change classes. Their instructors are not trained to assist students with significant needs. The District amended the IEP to include a full day placement of Z.S. at Montclair pre-K, Z.S. would receive an aid all day, the Commission for the Blind would provide assistance to Z.S. and her teacher. I.K. signed the amended IEP.

Z.S. went to St Joseph's for the extended school year. Finnerty observed Z.S. at St Joseph's to consult with the teachers, ask how the classroom should be set up for Z.S. and prompting blind students with audio clues. She was told to label everything. She wanted to see Z.S. with teachers who had experience teaching blind students.

The District ordered a Braille writer. Z.S. would have a special education teacher for specific Braille instruction. That teacher would be given support from the Commission for the Blind, a Braille writer and information on how to provide instruction to Z.S. The TVI would be present three days a week to provide hands on instruction to Z.S. and provide instruction to the teacher. Z.S. lesson plans would be sent to the Commission for the Blind one to two weeks in advance so that it could be translated into Braille. Finnerty was concerned that Z.S. would have a special education teacher for Braille instruction consistent throughout the day and Montclair did not have a teacher for the visually impaired.

Montclair Pre-K capped enrollment at fourteen per class. The District does not provide universal pre-school. There is a morning session which is from 9:30 to 11:30 a.m. and an afternoon session which is from 12:30 to 3:00 p.m.

In the fall of 2016, I.K. decided that Z.S. should remain at Head Start. Z.S. did not have a one-to-one aid at Head Start so I.K. and various family members volunteered at Head Start to act as Z.S.'s aid. While she was at Head Start, Z.S. was not receiving Physical Therapy, OT or Speech. There were eighteen students in Z.S.'s class in the Fall of 2016. Head Start sent Z.S.'s lessons to the Commission for the Blind to translate into Braille. Petitioner moved to Bloomfield. One of the reasons was for Z.S.'s education.

Campbell is an expert in Pre-school Special Education programming, School Psychology, and Special Education programs at a preschool level. Sheji is an expert in School Psychology, and Special Education programming at a preschool level. Thompson-Smith is an expert in Learning Disability and Special Education programming a Pre-school

level. Finnerty is an expert in Psychological testing, Special Education and Special Education Programing.

LEGAL ANALYSIS AND CONCLUSION

The IDEA provides federal funds to assist participating states in educating disabled children. *Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 179, 102 S. Ct. 3034, 3037, 73 L. Ed. 2d 690, 695 (1982). One of purposes of the IDEA is “to ensure that all children with disabilities have available to them a [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C. §1400(d)(1)(A). In order to qualify for this financial assistance, New Jersey must effectuate procedures that ensure that all children with disabilities residing in the state have available to them a FAPE consisting of special education and related services provided in conformity with an IEP. 20 U.S.C. §§ 1401(9), 1412(a)(1). The responsibility to provide a FAPE rests with the local public school district. 20 U.S.C.A. § 1401(9); N.J.A.C. 6A:14-1.1(d). The district bears the burden of proving that a FAPE has been offered. N.J.S.A. 18A:46-1.1.

The United States Supreme Court has construed the FAPE mandate to require the provision of “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Rowley*, supra, 458 U.S. at 203, 102 S. Ct. at 3049, 73 L. Ed. 2d at 710. 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) (citing *Rowley*, supra, 458 U.S. at 200, 102 S. Ct. at 3048, 73 L. Ed. 2d at 708). The IDEA does not require that a school district “maximize the potential” of the student, *Rowley*, supra, 458 U.S. at 200, 102 S. Ct. at 3048, 73 L. Ed. 2d at 708, but requires a school district to provide a basic floor of opportunity. *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 533–34 (3d Cir. 1995). 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 IEP 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); *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999); *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 180, 182 84 (3d Cir. 1988), cert. den. sub. nom. *Cent. Columbia Sch. Dist. v. Polk*, 488 U.S. 1030, 109 S. Ct. 838, 102 L. Ed. 2d 970 (1989). In other words, the school district must show that the IEP will provide the student with “a meaningful educational benefit.” *S.H. v. State-Operated Sch. Dist. of Newark*, 336 F.3d 260, 271 (3d Cir. 2003). This determination must be assessed in light of the individual potential and educational needs of the student. *T.R.*, supra, 205 F.3d at 578; *Ridgewood*, supra, 172 F.3d at 247 48. The appropriateness of an IEP is not determined by a comparison of the private school and the program proposed by the district. *S.H.*, supra, 336 F.3d at 271. Rather, the pertinent inquiry is whether the IEP offered a FAPE and the opportunity for significant learning and meaningful educational benefit within the least restrictive environment.

Toward this end, an IEP must be in effect at the beginning of each school year and be reviewed at least annually. 20 U.S.C. § 1414 (d)(2) and (4); N.J.A.C. 6A:14-3.7. A complete IEP must contain a detailed statement of annual goals and objectives. N.J.A.C. 6A:14-3.7(e)(2). 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.” *Ibid.* 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 New Jersey Supreme Court has recognized that “[w]ithout 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.” *Lascari*, supra, 116 N.J. at 48.

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).

The IDEA mandates that, to the maximum extent possible, children with disabilities must be educated in the least restrictive environment. 20 U.S.C.A 1412(a)(5) N.J.A.C. 6A:14-1.1(b)(5). This environment is one that, to the greatest extent possible, educates disabled children together with children who are not disabled in the same school the disabled child would attend if the child was not disabled.

In this matter, the IEP offered Z.S. full day placement at Montclair pre-k, level three services from the Commission for the Blind, which included two to three days instruction with the TVI from the Commission for the Blind, a Braille reader, lessons translated into Braille, braille reading and writing, the classroom labeled in Braille. The evaluations determined that Z.S. needed speech therapy, OT and physical therapy. The speech services were concerned with pragmatic language and how Z.S. uses language in social settings. The OT and physical therapy would expand play skills, improve self-care skills and pragmatic language skills. Z.S. would be in a general education class with typical peers as well as students with disabilities fifty percent of the time which was provided in the IEP. Petitioner wanted Z.S. at Community. Gaither, the representative of Community was not comfortable that Community could provide the services that Z.S. needed. Head Start did not provide Speech, OT, Physical therapy or a one-to-one aid to Z.S. which was provided in the IEP. The District could not require Community or Head Start to comply with the IEP. I **CONCLUDE** that the IEP provided Z.S. with FAPE in the least restrictive environment.

The next issue is whether Z.S. is entitled to compensatory education. Compensatory education is a remedy not specifically provided for in the IDEA. However,

the courts have recognized that "Congress expressly contemplated that the courts would fashion remedies not specifically enumerated in IDEA." *W.B. v. Matula*, 67 F.3d 484, 494-95 (3d Cir. 1995). Thus, a student deprived of a FAPE may be entitled to an award of compensatory education, which is an available remedy even after the student has reached age twenty-one. *Ridgewood*, supra, 172 F.3d. at 249; *M.C. v. Central Reg. Sch. Dist.*, 81 F.3d 389, 395 (3d Cir. 1996); *Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520, 536 (3d Cir. 1995); *Lester H. v. Gilhool*, 916 F.2d 865, 873 (3d Cir. 1990), cert. denied, 499 U.S. 923, 111 S. Ct. 1317, 113 L. Ed.2d 250 (1991).

The legal standard for the granting of such relief is summarized by the Third Circuit as follows:

[A] school district that knows or should know that a child has an inappropriate IEP or is not receiving more than a de minimis educational benefit must correct the situation. If it fails to do so, a disabled child is entitled to compensatory education for a period equal to the period of deprivation but excluding the time reasonable required for the school district to rectify the problem.

[*M.C.*, supra, 81 F. 3d at 397.]

Awards of compensatory education have included an additional two and one-half years of special education where the school district had been lax in its efforts to provide a proper placement, *Lester H.*, supra, 916 F. 2d at 873, and payment of college tuition where the disabled student would apply credits obtained toward acquisition of a high school diploma. *Sabatini v. Corning-Painted Post Area Sch. Dist.*, 78 F.Supp.2d 138, 145-146 (W.D.N.Y. 1999).

In this matter the IEP would have provided Z.S. with FAPE in the least restrictive environment, therefore she is not entitled to compensatory education.

Based on the foregoing, I **CONCLUDE** that the IEP provided Z.S. with FAPE and Z.S. is not entitled to compensatory education.

ORDER

Accordingly, IT IS **ORDERED** that the due process petition is and is hereby **DISMISSED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2019) 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 (2019). 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 Policy and Dispute Resolution.

July 27, 2020



DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency

July 27, 2020

Date Mailed to Parties:
ljb

July 27, 2020

WITNESSES

For Petitioner

Heather Garey

For Respondent

Ruby Campbell

Melissa Sheji

Miya Thompson-Smith

Jennifer Finnerty

EXHIBITS

Joint Exhibits

J-1 Request for Mediation Dated May 6, 2016

J-2 Mediation Agreement Dated June 13, 2016

J-3 Petition for Due Process Dated August 18, 2019

J-4 Answer to Due Process Petition Dated November 18, 2019

J-5 January 11, 2016 part B Notification/Referral to Local Public School

J-6 February 4, 2016 Consent for Initial Evaluation and Attendance Sign-in Sheet

J-7 March 15, 2016 Collaboration /Observation Occupational Therapy and Physical
Therapy Evaluations

J-8 March 2, 2016 Speech/Language Evaluation

J-9 March 22, 2016 Collaborative Evaluation Psychological/Educational Evaluations

J-10 March 24, 2016 Confidential Social History

J-11 May 2, 2016 Initial Eligibility Determination

J-12 May 2, 2016 IEP

J-13 May 16, 2016 Resolution Meeting Sign-in Sheet

J-14 June 3, 2016 Mobility Assessment Report

J-15 June 20, 2016 Related services Meeting Sign-in Sheet

J-16 June 26, 2016 Email Scheduling O&M Assessment

J-17 Wagner Prescription Dated March 20, 2016

J-18 June 13, 2016 IEP

For Petitioner

None

For Respondent

R-1 Not in Evidence

R-2 Not in Evidence

R-3 Not in Evidence

R-4 Z.S. Records from Early Intervention

R-5 Email Chain March 24, 2016 to April 18, 2016 (Parents and Case Manager)

R-6 Email Dated May 13, 016 (Parent/District)

R-7 Email dated May 13, 2016 (Parent/ District)

R-8 Resume of Jennifer Finnerty

R-9 Resume of Ruby Campbell

R-10 Resume of Miya Thompson-Smith

R-11 Resume of Marissa Sheji

R-12 Not in Evidence

R-13 Not in Evidence

R-14 Not in Evidence