State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
OAL DKT. NO. EDS 02615-23
AGENCY DKT. NO. 2023-35490

A.L. ON BEHALF OF J.L.,
Petitioner,
v.
TRENTON PUBLIC SCHOOL DISTRICT BOARD OF EDUCATION,
Respondent.

Record Closed: April 10, 2024 Decided: May 9, 2024

BEFORE **JUDITH LIEBERMAN**, ALJ:

STATEMENT OF THE CASE

Petitioner A.L., on behalf of her adult son J.L., seeks compensatory relief pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 to 1482.[1] J.L., who is now twenty-two years old, was deemed eligible for special education by respondent Trenton Public School District Board of Education (respondent, Trenton, or District). J.L. was absent from school for significant periods of time, in some cases missing entire marking periods. Petitioner seeks placement at Mercer High School within

[1] Petitioner also sought psychological, educational, speech/language, and occupational evaluations. Before the hearing commenced, respondent conducted the evaluations that petitioner sought, and petitioner and J.L. moved out of the District. Thus, the only remaining claim is for one year of compensatory education.

the Mercer County Special Services School District (SSSD) or home schooling and an additional year of education to compensate for the time J.L. was home and not present in school during the 2021–2022 and 2022–2023 school years. Respondent asserts that although J.L. has serious medical issues, he was not medically excused from attending for more than a few days and the parent did not communicate with the school about the absences. The District endeavored to get the student to attend, including but not limited to initiating truancy proceedings. The District eventually approved home schooling; however, J.L.'s attendance continued to be poor, and he has not obtained sufficient credits to graduate. The District contends that J.L. is ineligible for compensatory education because it offered him a free and appropriate public education (FAPE), which J.L. did not accept, and there is no basis for finding that Mercer High School is the only appropriate educational setting.

PROCEDURAL HISTORY

Petitioner filed a due-process petition on behalf of her adult son J.L.[2] on February 21, 2023. The matter was transmitted by the Department of Education, Office of Special Education (OSE), to the Office of Administrative Law (OAL), where it was filed on March 23, 2023, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. During the first proceeding, on April 5, 2023, the parties expressed their mutual interest in resolving the matter and discussed how that could be accomplished. A hearing was scheduled for May 10, 2023. At that time, the parties continued to discuss how the matter could be resolved. They requested that the matter be continued to May 19, 2023. Having not fully resolved the issues in the due-process petition, the hearing was scheduled to be conducted on June 21, 2023, and June 29, 2023. During a June 8, 2023, prehearing conference, respondent advised that it approved home instruction for J.L. and that it would conduct the evaluations petitioner sought. Respondent requested an adjournment of the June hearing dates to permit the completion of the evaluations. Petitioner consented. The hearing was rescheduled to August 10, 2023, and September 19, 2023. I convened another prehearing conference on June 9, 2023, to discuss how the matter

[2] On December 28, 2022, J.L. signed a notarized letter in which he advised that he appointed petitioner as his guardian for educational and medical issues.

could proceed more expeditiously. After a lengthy discussion, the parties agreed that they would continue to pursue resolution and would advise of their progress within one week. Although the matter was not fully resolved, on July 13, 2023, petitioner advised that she was moving out of the Trenton School District and would withdraw her due-process petition on or about July 15, 2023. Petitioner did not withdraw her petition, and on August 1, 2023, she advised that she intended to pursue only compensatory relief due to the impact of the COVID-19 pandemic. Her other claims had been resolved by the respondent.

Because the hearing was to be conducted by Zoom video technology, the parties were directed to submit all exhibits to the OAL by August 7, 2023. Respondent submitted its exhibits on August 7, 2023. Petitioner advised that day that she was unable to submit her exhibits because she was ill and had a doctor appointment the following day. She also requested an adjournment of the August 10, 2023, hearing for the same reason. On August 8, 2023, she again requested an adjournment of the August 10, 2023, hearing because she was still unwell. Respondent consented to the adjournment.

The hearing was rescheduled to September 19, 2023, and October 18, 2023. Petitioner was directed to submit her exhibits by September 7, 2023. That day, she advised that she would submit her exhibits after she received an outstanding psychological report, which she expected within one or two days. On September 8, 2023, petitioner advised that she did not deliver the exhibits due to the weather and represented that she would mail the documents on September 11, 2023. She would forward the psychological report when she received it, likely September 14, 2023.

On September 3, 2023, respondent filed a motion to exclude petitioner's undisclosed witnesses and evidence and a motion to dismiss for failure to comply with a court order. A prehearing conference was held on September 15, 2023, during which respondent's motions were discussed. Because petitioner advised respondent that she and her son J.L. were her only intended witnesses and petitioner provided her exhibits to respondent on September 14, 2023, respondent withdrew the motions to bar witnesses and evidence and to dismiss the due-process petition. Respondent requested an adjournment of the September 19, 2023, hearing so the parties could prepare a joint

statement of stipulated facts. Petitioner consented to the adjournment. At that time, she requested the assistance of a French interpreter during the hearing.

The hearing commenced on October 18, 2023. It ended prematurely because petitioner stated that she was sick and could not spend several more hours tending to the hearing.[3] Another hearing date was scheduled for November 15, 2023. Petitioner requested an adjournment because she had a doctor appointment. Respondent consented to the adjournment. The hearing was then scheduled for December 11, 2023. That day, during petitioner's testimony, she stated that she did not feel well. Shortly thereafter, her remote connection repeatedly disconnected and reconnected. She stated that she did not know how to fully activate the connection, notwithstanding having done so previously. After several unsuccessful attempts to continue petitioner's testimony, her remote connection ended, and she did not return or access the hearing telephonically. Respondent requested that the hearing be adjourned and rescheduled to a day when the hearing could be conducted in person. Given that petitioner had not returned to the virtual hearing room, the adjournment request was granted, and an in-person hearing was scheduled for February 9, 2024.

Petitioner did not appear for the February 9, 2024, hearing, which was to begin at 9:30 a.m. At 9:19 a.m. that day, petitioner advised the OAL that she was unable to appear for the hearing due to ill health. Respondent's representative and respondent's counsel were in the hearing room, prepared to start the hearing. I reported to the hearing room. Although petitioner did not seek an adjournment of the hearing, I treated her communication as a request for an adjournment. In response, respondent moved for a directed verdict notwithstanding that it had not completed its cross-examination of petitioner. I denied both requests.[4] I declined to continue the hearing to another day because almost one year had elapsed since the matter was transmitted to the OAL and the hearing was to have concluded that day. The proceeding was delayed due to

[3] Petitioner stated that she could not proceed after approximately three hours. She was offered an opportunity to take a break and resume after she rested. She asserted that she required more than a recess. The parties were advised that the next scheduled hearing date would be peremptory and that they should plan to be available for the full hearing day.

[4] The reasons for the denials were placed on the record that day and were memorialized in a February 9, 2024, letter.

petitioner's interruptions, prior adjournment request, and failure to appear. Rather than entertain respondent's motion to dismiss, I admitted all petitioner's exhibits into evidence, with the exception of a limited number of documents that are not relevant[5] and expert reports that were unsupported by expert testimony.[6] The parties were directed to file briefs setting forth their arguments. As respondent requested an opportunity to review the hearing transcript, the parties were permitted to submit their briefs within thirty days of their receipt of the transcript. They were advised that the due date for submission of the briefs would not be extended. A final hearing was scheduled for April 10, 2024, during which the parties would be able to discuss their submissions. A French interpreter translated for petitioner during the April 10, 2024, proceeding, and the record closed that day.

FACTUAL DISCUSSION AND FINDINGS

The following facts, taken from the parties' stipulations, testimony, and exhibits offered during the hearing, are undisputed.[7]

J.L. is twenty-two years old. His birthday is February 16, 2002. R-1. He turned twenty-one, which is the maximum age of eligibility for special education, during the 2022–2023 school year. R-1; R-27. J.L. and his mother A.L, who is the petitioner, resided in the Trenton School District at all times relevant to this matter.

J.L. was eligible for special education as a student with a disability under the classification category of "other health impaired." R-7; R 8; R-12; R-14. He has Beckwith-

[5] Petitioner's personal medical records, drawings and notes prepared by J.L., and a February 24, 2023, prescription for a psychiatric and educational evaluation, which was not given to the District until September 2023. Petitioner submitted multiple exhibits as P-1 through P-6.

[6] February 13, 2021, and January 6, 2023, reports by Dr. Huang and a September 5, 2023, neuropsychiatric evaluation.

[7] This is a not a verbatim recitation of the testimony and documentary evidence in the record. It a summary of the testimony and documentary evidence that I found to be relevant to this matter.

The transcripts of the October 18, 2023, December 11, 2023, and February 9, 2024, hearing dates are referred to herein as "T1," "T2," and "T3," followed by the referenced page and line numbers. A transcript for the April 10, 2024, proceeding was not produced.

Wiedemann Syndrome, which is a "rare overgrowth syndrome that can cause cancer." R-7 at 0055; P-1. He had kidney cancer and one of his kidneys was removed. P-7 at 0055. He has "sensory processing deficits and cognitive and developmental delays which impacts [sic] his ability to meet with success in grade level courses." R-7 at 0075. He was also diagnosed with mild intellectual disability, speech and language disorder, developmental coordination disorder, attention-deficit/hyperactivity disorder, and obesity. R-20 at 0250.

In or about February 2019, respondent placed him at Mercer High School within the SSSD. R-32; R-33 at 0341. Mercer High School was dedicated to special education students. R-7 at 0076. Respondent placed students at Mercer High School when it determined that it could not provide a program that satisfactorily met the student's needs. Ibid. J.L. previously had not attended school in over three years. Because he had not earned high school credits, he was placed in a ninth-grade class. R-7 at 0054.

J.L.'s June 11, 2019, individualized education program (IEP), for the 2019–2020 school year, continued the placement at Mercer High School. R-7. He was in a multiply disabled (MD) special class with extended school year services and was assigned a personal school and bus aide. R-7 at 0052, 0073. He was to continue ninth-grade instruction in English, math, financial literacy, physical education, science, and world history. He was also able to participate in most of the school's electives. Id. at 0054. The IEP contained goals in various areas including social interaction, application of math skills, improvement of literal comprehension, development of reading-comprehension skills, development of writing skills, and expanding vocabulary. R-7 at 0067–70. His elective classes "exposed him to a variety of pre-vocational skills" including daily-living skills, food service, video production, and art. Id. at 0063. Modifications including extra time, flexible schedule, repetition of directions, short breaks, encouragement of independent activity, multimodal instruction, and visual aids were applied to all his subject areas. Id. at 0070. The IEP further provided that J.L. would no longer require the use of a one-to-one aide during the 2019–2020 school year because Mercer High School staff reported that he demonstrated the ability to be independent throughout the school day and was able to navigate the school with regular support from classroom and school staff. Id. at 0072. Petitioner agreed to the discontinuation of the one-to-one aide starting

September 2019. Id. at 0077. The IEP recorded that petitioner and J.L. would contact the New Jersey Division of Vocational Rehabilitation Services and that they would communicate with the New Jersey Division of Disability Services when J.L. was in twelfth grade. Id. at 0063–64.

The IEP recorded that J.L.'s "attendance has been a factor in his academic and social progress. According to his mother, [he] has doctor's appointments, she has appointments and busing issues have been the reasons for him missing [forty-one]+ days to date. In addition, [J.L.'s] transportation issues seem to cause some anxiety, especially at the end of the school day (he is currently taking Access Link to and from school)." Id. at 0054. The IEP also noted that J.L.'s "poor attendance precluded him from completing an assessment such as the New Jersey Career Assistance Navigator (NJCAN) or the Photographic Interest Inventory to assess his vocational interests and aptitudes. It is suggested that he meets with school-based transition specialist/representative for determination of possible job interests." Id. at 0062. The IEP also provided that he was exempt from meeting the District's graduation attendance policy as a prerequisite for graduation. The IEP noted, "Attendance policy is adjusted for this student given the nature of [his] medical condition and respective frequent visits with medical specialists." Id. at 0074. It provides "alternate requirements to be achieved by [J.L.] to qualify for a State endorsed diploma[.]" Ibid. "Standby home instruction will be provided for times when the student['s] health makes it impossible for him to attend school for an extended period." Ibid.

Due to the COVID-19 pandemic, on March 13, 2020, the SSSD advised that starting March 16, 2020, it would operate on a virtual/remote instruction learning platform, and learning packets were provided to students. R-34 at 0348. Mercer High School provided Google Classroom opportunities and instructional packets to J.L. During the 2019–2020 school year, J.L. was reported as having missed 97 out of 111 school days between September and February 2020. For the entire school year, he was absent 106 out of 185 school days. R-33 at 0342.

A June 3, 2020, IEP for the 2020–2021 school year continued J.L.'s placement in an MD class at Mercer High School with transportation and a personal bus aide, academic

classes, and vocation and life skills classes and activities. R-8 at 0085–86, 0093–04. The IEP addressed his poor attendance noting, "Regular transportation and consistent attendance continue to be concerns. [Petitioner] provided . . . a doctor's note on 2/28/20 in support of a request for a delayed start time of 9:00 due to [J.L.'s] medical needs in the morning. She is hopeful that [sic] son's attendance will improve when school opens, with the approval of a modified school schedule." Id. at 0091. As in the prior IEP, the 2020–2021 IEP provided that, due to his medical condition and doctor appointments, J.L. was not required to meet the District's attendance requirements and "standby home instruction will be provided" when J.L.'s health "makes it impossible for him to attend school for an extended period." Id. at 0106.

During the 2020–2021 school year, the students had the option to attend virtually, and J.L. elected to do so. R-13. J.L. thus continued to receive remote instruction. Pursuant to Mercer High School's policy, if a student completed his work he was deemed to have attended. Based on this criterion, J.L. was reported as being absent for only 4 out of 183 possible school days during the 2020–2021 school year and he earned all thirty credits attempted. R-33 at 0345, P-4.

Remote instruction was no longer available during the 2021–2022 school year. IEPs were prepared for the 2021–2022 school year on April 26, 2021, and May 25, 2021. Both continued J.L.'s placement in the MD program at Mercer High School, with transportation and a bus aide. R-12; R-14.[8] The IEPs provided that he was exempt from the District's graduation attendance policy, "given the nature of [his] medical condition and respective frequent visits [with] medical specialists." R-14 at 0216.

J.L. did not attend school in September and October 2021. On October 15, 2021, District staff met with petitioner to discuss his attendance. Another meeting with petitioner was conducted on January 20, 2022. J.L. did not attend school during the intervening months. On November 16, 2021, the District issued an Office of Special Education Written Notice of Action Proposed or Denied "to discuss [J.L.'s] chronic absenteeism since

[8] The April 2021 IEP was revisited and finalized in May 2021 upon completion of a social history reevaluation. Although speech, learning, and psychological assessments were proposed, petitioner did not consent to them due to concerns about J.L.'s health and the COVID-19 pandemic. R-14 at 0192.

September 2021." R-16. The notice advised that it rejected petitioner's proposal that J.L. attend Mercer High School part-time in the afternoon because it would not permit him to attend core academic classes. It further advised, "If chronic absenteeism continues the [D]istrict will contact Parent, Truancy and Division of Child Protection and Permanency." R-16 at 0229.

J.L.'s January 28, 2022, report card shows that he was absent eighty-nine out of eighty-nine days during the first two marking periods. R-33.

On February 15, 2022, the District sent a second Office of Special Education Written Notice of Action Proposed or Denied. It advised that the District conducted an "IEP review," and attempted to communicate with petitioner via multiple letters, phone calls, and conversations. R-17 at 0232. The Written Notice advised, "To date we have not received any contact from you [petitioner] regarding the school's plan to provide support in addressing attendance issues." R-17 at 0232. "Your child has continued with the chronic absenteeism pattern and has been absent every day for the past 10 days[. We] considered keeping [him] on roll but there is a pattern of chronic absenteeism." Ibid. "In spite of multiple attempts via phone and mail, your child continues to remain chronically absent and is in danger of being dropped from the rolls. Your family has been referred to truancy court and may be referred to the Division of Child Protection and Permanency (DCP&P) due to educational neglect. **Please respond to this notice by [March 4, 2022] or your child will be dropped from school**." Ibid. Petitioner did not respond, and J.L. did not return to school by March 4, 2022.[9] Thus, the District determined it was obligated to drop J.L. from the school rolls and pursue truancy.

Between April 1, 2019, and February 10, 2022, Mercer High School's principal issued several memoranda about J.L.'s absences to the District's Director of Special Services. Copies of the memoranda were sent to the SSSD case manager. Issued when a student is absent five or more consecutive days, each memorandum listed the number

[9] Although school districts may drop a student from the rolls after ten consecutive unexcused absences, the District provides for an additional fifteen days' notice for students with disabilities.

of days J.L. was absent during a specific time period and the reason for the absence, "if known." R-6 at 0035–49. The memoranda are summarized as follows:

Date of memorandum	Number of absences/Time period	"Reason, if known"
April 1, 2029	Thirteen days/March 2019	"bussing issues; medical [appointments]"
May 1, 2019	Eight days/April 2019	Doctor appointments
June 4, 2019	Twelve days/May 2019	"Medical issues"
June 27, 2019	Thirteen days/June 2019	"Medical waiver"
October 4, 2019	Seventeen days/September 2019	"Medical waiver"
November 1, 2019	Nineteen days/October 2019	"Medical waiver"
December 3, 2019	Fifteen days/November 2019	"Medical [appointments] (medical waiver)"
December 20, 2019	Ten days/December 2019	"Medical [appointments]/mother sick"
February 3, 2020	Eighteen days/January 2020	"Medical waiver"
March 2, 2020	Eighteen days/February 2020	"Medical waiver"
August 16, 2021	Twenty-five days/July/August 2021	"Attendance waiver due to medical issues"
October 4, 2021	Fourteen days/September 2021	"Attendance waiver due to medical issues"
December 6, 2021	Eighteen days/November 2021	"Attendance waiver due to medical issues"
January 11, 2022	Seventeen days/December 2021	"Medical waiver"

February 10, 2022	Twenty days/January 2022	"Medical waiver"

[Ibid.]

On or about November 3, 2022, petitioner submitted a form to re-enroll J.L. R-18. A triennial re-evaluation planning meeting was conducted on November 30, 2022, to determine whether J.L. continued to remain eligible for special education and related services. Petitioner attended the meeting. The District proposed that J.L. would undergo re-evaluations in the following areas: educational assessment; speech/language assessment; social history assessment; and psychological assessment. R-19. Petitioner and J.L. agreed to the evaluations. Ibid.

An IEP meeting was also conducted on November 30, 2022; Dr. Mowatt, petitioner, J.L. and the other members of the IEP team attended the meeting. The meeting was intended, in part, to help J.L. "transition back into an educational program." T1 58:14–15. J.L. was asked to attend so the IEP team, including District teachers, could observe and assess him in the school setting and the school nurse could meet with him and "ensure that [they are] planning appropriately for [him.]" T1 58:12–13. Although petitioner requested that J.L. return to Mercer High School, the IEP team proposed that J.L. attend Trenton Central High School for the 2022–2023 school year[10] R-20 at 0249. It was reported that the change of placement was proposed for two reasons: J.L.'s poor attendance at Mercer High School[11] and because Trenton High School developed a program that was appropriate for his needs. The IEP noted that Trenton High School was a less restrictive environment and was closer to J.L.'s home than Mercer High School. The IEP team proposed that J.L. would be in self-contained classes for language arts literacy, mathematics, science, and social studies, and he would have a one-to-one aid

[10] The IEP was effective November 30, 2022, through June 21, 2023, and September 7, 2023, through November 29, 2023. Id. at 0245.

[11] The IEP provided, "While attending Mercer High School [J.L.] had excessive absences. Several attempts were made to address [his] poor attendance. . . . Due to [J.L.'s] excessive absences while attending Mercer High School [he] will be placed in a self-contained classroom at Trenton Central High School. An out-of-district placement will be revisited later when [he] consistently attends his assigned placement at Trenton Central High School daily." Id. at 0277.

who would help him transition back to school. He would receive the related nursing service of bowel/bladder management and specialized transportation with a bus aide. R-20 at 0247–49. The District would continue to evaluate J.L. during the school year. Unlike the prior IEPs, J.L. was not exempt from the District's attendance policy for graduation. Id. at 0276. When the IEP was prepared, J.L. had 89.5 credits toward graduation. Staff would monitor his attendance on weekly basis to "document excessive absences." Id. at 0279.

Petitioner signed the IEP that day, thus indicating that she consented to the immediate implementation of the IEP. Despite A.L.'s consent and signature, J.L. did not attend school during the 2022–2023 school year. R-36. He earned 89.5 out of 130.5 credits attempted. P-4. Petitioner filed her due-process petition on February 21, 2023.

Near the close of the 2022–2023 school year, after the due-process petition was filed, petitioner executed an authorization to release medical information to apply for home instruction for J.L. R-21. The school doctor approved home instruction. However, when instruction was being delivered to J.L. in his home, he was not regularly available for home instruction. The instructor reported that, on multiple occasions, J.L. was not present at the home or petitioner and he did not respond to her attempts to reach them on multiple occasions. This occurred even after she confirmed the dates and times of the home instruction sessions with petitioner. R-37.

On July 12, 2023, the child study team (CST) met with petitioner to conduct a reevaluation meeting. The CST wrote,

> [T]he extent of need for special education services and the impact of the disabilities on [J.L.'s] educational performance cannot be adequately determined because he has not attended school consistently for the last four years and has not engaged with the home instruction services provided to him. At this point in time, it is recommended that [J.L.] transition to adult services that may be more amenable to his comprehensive needs and availability, as reported by the parent. Transitioning to long-term community-based services would encourage the continuity and support that the family needs to facilitate community-based planning, connection and

> eligibility considerations for [J.L.'s] vocational, residential, and medical support needs.
>
> . . . .
>
> Due to existing cognitive deficits, the team considered determining that [J.L.] remained eligible for special education services and be found eligible for the bridge year of IEP services due to COVID. However, this option has been rejected for the following reasons: he has reached the maximum age of eligibility, does not have enough course credits to qualify for a high school diploma, has not met the state attendance requirements to be eligible for a certificate of attendance and was not made available for prescribed educational services during the last four school years nor for home instruction for the last four weeks.
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> [R-27 at 0321.]

Testimony

For respondent

Dr. Hortense Samantha Mowatt, Supervisor of Special Education,[12] testified that, she was not "aware of [the District] having any authorization" from medical practitioners advising that J.L. would need to miss school for ten consecutive or twenty cumulative days. T1 64:1–2. The District received only "isolated letters of, [sic] the student was seen in a clinic or was seen for a treatment for a particular day." T1 64:1–4.

When the District attempted to address J.L.'s absenteeism, petitioner was not responsive. The District had "[n]o success with connecting with the parent of [sic] seeing the student" and thus "a meeting was scheduled with the parent to discuss a plan to bring

[12] Dr. Mowatt oversaw the child study team, monitored program implementation and the delivery of programs and services, and coordinated those services and instruction for students with special needs. T1 28:17–29:6.

the student back to school and to find out what interventions we could employ." T1 42:24–43:3. The October 12, 2021, meeting was intended to

> problem solve any challenges, support the parent in how we could re-connect services, the transportation. There had been calls to transportation to not come to the home. So, we were really looking at how we could support the family in getting back to school. There were concerns about the parent's health, about the student's health and knowing that the school could support the student. Any health concerns that the student presented.
>
> So, we wanted Mom to feel supported. Met with her. Re-connected transportation and gave them notice as well to, again, support the parent because she had a lot of things going on and that was the focus of the virtual meetings to have that discussion and to problem solve and challenges that were coming up.
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> [T1 45:11–46:1.]

The District requested petitioner's consent to discuss with J.L.'s doctors their concerns about him so it could develop a plan to address the concerns. However, petitioner did not consent to these communications.

A virtual meeting with petitioner was held on January 20, 2022. The District asked J.L. to attend but he did not. The goal of the meeting was to "find out what interventions were needed" and provide "any accommodations, any services, to address any of the medical concerns[.]" T1 47:21–25. By way of example, an asthma plan was already in place for J.L. If, for instance, a toileting plan were necessary, the District would have implemented one. Petitioner stated during the meeting that J.L. had a rash that required her to apply medicine three times a day. She also stated that she would try to get a medical note from his doctor. R-17 at 0231. However, despite the District's efforts to coordinate services and communicate with J.L.'s medical providers, J.L. still did not attend school.[13]

[13] Dr. Mowatt felt compelled to telephone Adult Protective Services (APS), because J.L. was over eighteen years old. APS directed Dr. Mowatt to request the Trenton Police Department conduct a wellness check. The police visited J.L.'s home and advised Dr. Mowatt that there was no sign of injury or abuse of J.L. P-4; T1 50:14–53:22.

On December 14, 2022, the New Jersey Department of Education (DOE) issued a memorandum that addressed implementation of a then-newly-enacted law, P.L. 2021, c. 109.[14] The law provides for additional instruction, services, or compensatory services if "there was some component of [the student's] program that wasn't adequately delivered or they weren't able to receive due to the condition around COVID and access that was available at that time." T1 67:19–22. To assess this, the CST considers the services that were required; the duration and quantity of services that were not provided; whether there was a problem with the delivery of the services; the student's progress; whether the student was adversely impacted; and whether additional or compensatory services would be beneficial.

The IEP team determined that J.L. was not eligible for the additional or compensatory education that was permitted by the new law. It considered J.L.'s academic experience, particularly his "limited attendance at school during his high school career despite multiple interventions." T1 70:2–3. Importantly, J.L. did not avail himself of the services offered by his IEPs. The IEP team also considered whether an additional year of school or compensatory services would have "really . . . have helped basically bridge [J.L.] to where they needed to be in planning for adulthood." T1 70:12–14. J.L. had not acquired the necessary credits or met the attendance requirements for graduation, and the expectation was that he would again not participate in school. Dr. Mowatt explained, "As we provide services, the goal of those services is to look at that plan for adulthood, but if we haven't been able to deliver those services, then our hand[s] are kind of tied in terms of where do we go next?" T1 71:15–18. Considering J.L.'s practical needs, and the goal of providing "interventions and supports that were going to be continuous, consistent and more appropriate[,]" the IEP team concluded that J.L. would be best served by support from the New Jersey Division of Developmental Disabilities (DDD). T1 71:21–22. DDD provides services for people with disabilities who are transitioning into adulthood, such as vocation and independent living support and community experiences.

[14] N.J.S.A. 18A:46-6.3.

For petitioner

Petitioner A.L. testified that J.L.'s doctor reported that he was medically able to attend school. However, he could not attend school when he was sick. J.L.'s doctors wrote notes in which they documented that they saw J.L. on specific days. Some doctors requested that J.L.'s absences be excused or advised that he could return to school. Petitioner produced the following documents that were authored by J.L.'s medical practitioners:[15]

- Undated letter from Taly Galubach, M.D., North Shore-Long Island Jewish Children's Hospital, advising that because J.L. has one kidney, he cannot "sustain a long (i.e. 2 hr.) bus ride." P-1.
- March 1, 2018, note from Ronald Feinstein, M.D. advising that J.L. was anticipated to be away from school from March 1, 2018, through May 1, 2018. P-6.
- October 23, 2018, letter from Nadia Saldanha, M.D., advising that J.L. requires an attendant to help him in the bathroom and directing how vehicle seatbelts should be utilized. P-3.
- November 5, 2018, letter from Fanny Murken, M.D., Children's Hospital of Philadelphia, advising that J.L. is medically able to attend school and that, although petitioner stated he requires adapted physical education because he has an enlarged spleen, there is not a record of an enlarged spleen. Dr. Murken further advised that J.L. required a special education class. P-1.
- December 4, 2018, letter from Nadia Saldanha, M.D., advising that J.L. was taking Ex-Lax and MiraLAX daily for constipation. P-1.
- February 5, 2019, note from Northwell Health, Cohen Children's Medical Center advising that J.L. was seen for a medical evaluation. P-1.
- Undated letter advising that J.L. had a medical appointment scheduled for February 15, 2019. P-1.
- "After Visit Summary" issued after a February 28, 2019, appointment with Dr. Murken.

[15] These documents were admitted into evidence. Petitioner labeled multiple documents as P-1 through P-6. They were not identified individually.

- September 13, 2019, letter from Melvin T. Featherstone, M.D., JHMC Ambulatory Care Center Pediatrics Outpatient Clinic, advising that J.L. requires "[o]ne on one assistance at school in classroom and to accompany him for bathroom privileges and on bus due to his cognitive, orthopedic and medical conditions. Please provide mom with disability 504 document." P-1.
- October 29, 2019, note advising that he was seen by the Department of Pediatric Orthopedics and that he may return to school. The note also requested that his absence or late arrival to class be excused. P-1.
- November 25, 2019, note from Leonard Kristal, M.D., Pediatric Dermatology of Long Island, addressed "To whom it may concern" asking that J.L. be excused because he had a doctor's appointment. P-1.
- On December 11, 2019, J.L.'s gastroenterologist advised that J.L. "requires a strict bowel regimen to remain regular and without symptoms." P-1. He required MiraLAX diluted in juice each day at noon. "Failure to give [J.L.] his medication as prescribed will result in disruption of his bowel regimen and he may not be able to perform at his best. Please excuse his absences related to his GI problems with having timely bowel movements." Ibid.
- January 9, 2020, note from Stacey J. Kruger, M.D., Northwell Health, in which Dr. Kruger wrote she saw J.L. that day and his absence or lateness that day should be excused. P-1.
- January 28, 2020, note from a doctor[16] at Northwell Health, advising that J.L. was seen that day and could return to school on January 30, 2020. P-1.
- November 3, 2020, letter from gastroenterologist Samuel Bitton, M.D., advising that he treats J.L. P-1.
- December 18, 2020, note from Dr. Featherstone, advising that he saw J.L. that day and that J.L.'s absence from "Google Class" should be excused. P-1.
- March 18, 2021, form advising of an April 14, 2021, appointment for J.L. with Annamaria Iakovou, M.D., Northwell Health Physician Partners. P-1.
- May 11, 2021, letter from Samuel Bitton, M.D., advising that J.L. was seen by Dr. Bitton that day. P-1.
- June 3, 2021, letter advising that J.L. underwent an MRI procedure that day. P-1.

[16] The doctor's name is illegible.

- July 13, 2021, letter from Jon-Paul DiMauro, M.D., advising that he saw J.L. that day and requesting that petitioner be excused from court because she accompanied him. P-1.
- October 11, 2021, radiology rest results for J.L. P-1.
- October 19, 2021, application for home instruction. P-6.
- October 21, 2021, letter from Linda Carmine, M.D., Division of Adolescent Medicine, Cohen Children's Medical Center, advising that J.L. was seen that day "with complex medical history for annual physical and evaluation following respiratory illness with negative COVID test and active asthma. He may attend school part time and is approved for medical leave until January 3rd, 2022." P-1.
- January 17, 2022, application for home instruction.
- February 16, 2022, visit summary by Dr. Samuel Bitton. P-1.
- April 5, 2022, letter from Ruee Huang, M.D., advising that J.L. was seen by the doctor and he should be excused from school that day. P-1.
- July 8, 2022, visit summary by Dr. Bitton. P-1.
- May 10, 2023, letter from Mary Huang, Pediatric Nurse Practitioner, listing J.L.'s diagnoses. P-1.
- May 23, 2023, "Visit Summary, Cohen Childrens Adolescent and Pediatric Medicine. P-4.
- May 23, 2023, statement by Mary Huang, DNP, CPNP, on an application for home instruction, advising that J.L. was anticipated to be away from school from May 23, 2023, to July 1, 2023. P-6.

Additional Factual Findings

It is the obligation of the fact finder to weigh the credibility of the witnesses before making a decision. Credibility is the value that a fact finder gives to a witness' testimony. Credibility is best described as that quality of testimony or evidence that makes it worthy of belief. "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Estate of Perrone, 5 N.J. 514, 522 (1950). To assess credibility, the fact finder should consider the

witness' interest in the outcome, motive, or bias. A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

In determining credibility, I am aware that the District employees would want to support the program they developed for J.L. and its decisions concerning the necessity of compensatory education. I am also aware that petitioner believes that what she seeks is in the best interest of J.L. In addition to considering each witness' interest in the outcome of the matter, I observed their demeanor, tone, and physical actions. I also considered the accuracy of their recollection; their ability to know and recall relevant facts and information; the reasonableness of their testimony; their demeanor, willingness, or reluctance to testify; their candor or evasiveness; any inconsistent or contradictory statements; and the inherent believability of their testimony.

As the fact finder, I had the ability to observe the demeanor, tone, and physical actions of the witnesses during the hearing. Dr. Mowatt testified in a professional and clear manner. She answered questions and explained respondent's actions and decisions thoroughly and without hesitation. However, it appears that she did not possess firsthand knowledge of certain key facts. In particular, she testified that she was not aware that the District received correspondence from J.L.'s medical practitioners authorizing extended absences. However, in his memoranda to the District Director of Special Services, the Mercer High School principal attributed all J.L.'s absences to medical issues and on several occasions specifically cited "medical waivers" or "attendance waiver due to medical issues." In each instance, J.L. had been absent from eight to twenty-five days in one month. Dr. Mowatt also testified that she was aware of only two discrete requests for excused absences.[17] Petitioner produced other correspondence, including an October 21, 2021, letter from Dr. Linda Carmine, Division of Adolescent Medicine, in which she wrote that J.L. may attend school part-time and is approved for medical leave until

[17] An October 18, 2021, "School Note" signed by a Northwell Health Department of Pediatrics, Urgent Care Center, medical provider, advising that J.L. was seen on October 11, 2021, and that he may return to school October 19, 2021; a December 24, 2020, letter from Melvin T. Featherstone, M.D., advising that J.L. was seen on December 18, 2020, and that his absence from Google Class that day should be excused.

January 3, 2022. There is no evidence in the record documenting that this or the other letters were, in fact, given to school personnel. However, before the District amended J.L.'s IEP to place him at Trenton High School, the IEPs expressly addressed the likelihood that he would miss school due to his health and exempted him from the State's pre-graduation attendance requirement.[18] For these reasons, I find, that while Dr. Mowatt credibly testified to her understanding of the facts about which she has firsthand knowledge, I cannot fully credit her account of the District's knowledge of the reasons for J.L.'s absences.

With respect to petitioner's testimony, although she was afforded multiple opportunities to testify, her testimony was limited for two reasons. First, as detailed above, she did not appear for the final hearing day. Second, when she was present and had an opportunity to testify, she demonstrated a degree of reluctance or unwillingness to do so. When cross-examined by respondent's counsel, petitioner reported that she was "here today only to answer the Judge's questions." T2 12:16–25. When reminded that she was expected to answer questions posed by respondent's counsel, she reiterated that she intended to answer only the Judge's questions and not questions presented to her by respondent's counsel. T2 13:6–25. It must be noted that petitioner declared her inability or reluctance to participate in the hearing when she was asked questions. She also demonstrated a lack of credibility. On multiple occasions during the December 11, 2023, hearing, petitioner was asked if she could hear the judge. She replied, "No" several times. T2 49:3–25.[19] For these reasons, I find that petitioner did not present her case in a forthright manner. However, given that she proceeded pro se, and mindful of the importance of the issue presented, all but a select few of her exhibits were entered into evidence and were given full consideration, as was her written submission.

[18] See e.g. R-7 at 0074 and R-8 at 0106 (IEP provided that, due to his medical condition and doctor appointments, J.L. was not required to meet the District's attendance requirements; "alternate requirements [would be established] to be achieved by [J.L.] to qualify for a State endorsed diploma" and "standby home instruction will be provided" when J.L.'s health "makes it impossible for him to attend school for an extended period"); see also R-12 and R-14 (exempting J.L. from the District's attendance requirement).

[19] An interpreter was present throughout the hearing for petitioner's benefit.

Accordingly, based upon the testimonial and documentary evidence, and having had the opportunity to observe the appearance and demeanor of the witnesses, I **FIND** the following additional **FACTS**:

J.L.'s school attendance was satisfactory only while he attended school remotely, during the 2020–2021 school year, due to the COVID-19 pandemic. He was deemed to have attended when he completed the day's assignments. During the other times at issue, the District was aware that J.L. had medical issues that caused him to miss many school days. Its IEPs acknowledged the impact of his medical conditions and doctor appointments and provided that he was not required to meet the District's attendance requirements; alternate requirements to achieve a State endorsed diploma would be applied, and standby home instruction would be provided when his health made it "impossible for him to attend school for an extended period."[20]

The District was notified on a monthly basis when J.L. was absent more than five days. Mercer High School reported the total number of absences for the prior month and further reported that they were due to medical issues and/or that there was an "attendance waiver" due to medical issues. The District did not address this communication; did not explain what "attendance waiver" meant; and did not indicate that it responded to these memoranda in a contemporaneous fashion. That is, there is no evidence in the record of the District's efforts to address these reports by contacting petitioner or providing accommodations to J.L., including home instruction.

Starting October 2021, the District endeavored to address J.L.'s poor attendance. While there is no basis to doubt Dr. Mowatt's testimony that it sought to support petitioner and achieve a cooperative solution, the District attributed its failure to address and rectify J.L.'s poor attendance to petitioner's failure to respond or provide certain information. Indeed, the record does not include evidence of petitioner's cooperation with the District. However, the District's documentation cites only one option that was proposed and rejected: petitioner suggested a part-time program that the District determined would

[20] It appears that the 2021–2022 IEP did not address home instruction because it continues to reference J.L.'s remote instruction.

have been inappropriate because it would have omitted core academic subjects. The District did not explain what else was discussed with petitioner, any other supports that it proposed, how they were to be implemented, or whether any supports could have been implemented without petitioner's cooperation. Nonetheless, it advised it would pursue a truancy action.

The record is undeveloped with respect to J.L.'s status as an enrolled student from March 4, 2022, the date the District indicated he would be disenrolled, through November 2022, when petitioner re-registered J.L. in school. However, it is clear that petitioner approved the November 30, 2022, IEP, which placed J.L. at Trenton High School, and that J.L. did not attend school during the 2022–2023 school year. There is no evidence in the record that petitioner or J.L. were coerced into agreeing to the November 2022 IEP that placed him at Trenton High School.

After petitioner filed her due-process petition, she submitted a request for home schooling, which was approved by the District. The home instructor was unable to access J.L. at his home on several occasions. They were either not home or did not allow the home instructor to enter the home.

The District determined that J.L. was not entitled to an additional year of schooling pursuant to N.J.S.A. 18A:46-1.3. It reached this conclusion based upon his absences and his failure to avail himself of the home instruction during four weeks in 2023. Also, he did not have enough credits to qualify for a diploma and did not meet the state attendance requirements. It concluded that he would be best served by transitioning to long-term community-based services.

Parties' Arguments

Respondent asserts that it provided a FAPE to J.L. but J.L. did not avail himself of the education offered to him. It contends that he "was rarely medically excused from school[.]" Resp. Br. at 30. Moreover, he failed to attend Mercer High School, which is the placement that petitioner now seeks. Given the provision of a FAPE, and J.L.'s failure to take advantage of his educational plan, compensatory education is unwarranted.

Petitioner contends that the "appropriate placement for J.L. is an all-special education school[,] not Trenton High School" and that she was coerced into agreeing to placement at Trenton High School in November 2022. Pet. Br. at 6–7. She also asserts that respondent "ignore[d]" letters from J.L.'s doctors asking the school district to provide home instruction when J.L.'s health prevented him from reporting to school. Id. at 2.[21] She further asserts that respondent "stop[ped] him from going to school" and "did not provide any form of education or home instruction" since 2021, despite receiving "multiple letters written by doctors that were concerned about J.L.'s education." Id. at 4–5. Although she sought, in the due-process petition, an additional year of school, in her brief, she requests compensatory education in the form of twenty-four interactive specialized reading sessions, speech therapy, occupational therapy, and life-skills training, to be provided by Mercer High School. Id. at 11.

CONCLUSIONS OF LAW

This case arises under the Individuals with Disabilities Education Act (Act), 20 U.S.C. §§ 1400 to 1482. One purpose of the Act is to ensure that all children with disabilities have available to them a "free appropriate public education [(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 New Jersey, the District bears the burden of proof at a due process hearing to show, by a preponderance of the credible evidence, that it has met its legal obligation to provide a FAPE. Lascari v. Bd. of Educ. of the Ramapo Indian Hills Reg'l High Sch. Dist., 116 N.J. 30, 46 (1989); N.J.S.A. 18A:46-1.1.

The Act defines FAPE as special education and related services provided in conformity with the IEP. 20 U.S.C. § 1401(9). The Act, however, leaves the interpretation of FAPE to the courts. See Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238,

[21] In her brief, petitioner also addressed the application of Section 504 of the Rehabilitation Act and the Americans With Disabilities Act to the facts of this case. These claims are not considered here as they were not plead in petitioner's due-process petition. To the extent petitioner argues that respondent relies upon outdated evaluations, this is also not considered here because it was not plead in the due-process petition.

247 (3d Cir. 1999). In Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 203 (1982), the United States Supreme Court held that a state provides a handicapped child with FAPE if it provides personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. The Court reasoned that the Act was intended to bring previously excluded handicapped children into the public education systems of the states and to require the states to adopt procedures that would result in individualized consideration of and instruction for each child. Rowley, 458 U.S. at 189.

The Act did not impose upon the states any greater substantive educational standard than would be necessary to make such access to public education meaningful. Rowley, 458 U.S. at 192. In support of this limitation, the Court quoted Pennsylvania Assn. for Retarded Children v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), and 343 F. Supp. 279 (1972), and Mills v. Bd. of Educ. of the District of Columbia, 348 F. Supp. 866, 876 (D.D.C. 1972). Rowley, 458 U.S. at 192. The Court reasoned that these two cases were the impetus of the Act; that these two cases held that handicapped children must be given access to an adequate education; and that neither of these two cases purported any substantive standard. Rowley, 458 U.S. at 192–93. The Court also wrote that available funds need only be expended "equitably" so that no child is entirely excluded. Rowley, 458 U.S. at 193, n.15. Indeed, the Court commented that "the furnishing of every special service necessary to maximize each handicapped child's potential is . . . further than Congress intended to go." Rowley, 458 U.S. at 199. Thus, the inquiry is whether the IEP is "reasonably calculated" to enable the child to receive educational benefits. Rowley, 458 U.S. at 207.

The Third Circuit later held that this educational benefit must be more than "trivial." See Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 180 (3d Cir. 1988). Stated otherwise; it must be "meaningful." Id. at 184. Relying on the phrase "full educational opportunity" contained in the Act, and the emphasis on "self-sufficiency" contained in its legislative history, the Third Circuit inferred that Congress must have envisioned that "significant learning" would occur. Id. at 181–82. The Third Circuit also relied on the use of the term "meaningful" contained in Rowley, as well as its own interpretation of the benefit the handicapped child was receiving in that case, to reason

that the Court in Rowley expected the benefit to be more than "de minimis," noting that the benefit the child was receiving from her educational program was "substantial" and meant a great deal more than a "negligible amount." Id. at 182. Nevertheless, the Third Circuit recognized the difficulty of measuring this benefit and concluded that the question of whether the benefit is de minimis must be answered in relation to the child's potential. Id. at 185. As such, the Third Circuit has written that the standard set forth in Polk requires "significant learning" and "meaningful benefit"; that the provision of "more than a trivial educational benefit" does not meet that standard; and that an analysis of "the type and amount of learning" of which a student is capable is required. Ridgewood, 172 F.3d at 247–48. Thus, the IEP must confer a meaningful educational benefit in light of a student's individual needs and potential. See T.R. ex rel. N.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 578 (3d Cir. 2000).

In Endrew F. v. Douglas Cnty. Sch. Dist., 580 U.S. 386 (2017), the United States Supreme Court clarified that while it had declined to establish any one test in Rowley for determining the adequacy of the educational benefits conferred upon all children covered by the Act, the statute and the decision point to a general approach: "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." 580 U.S. at 399. Toward this end, the IEP must be "appropriately ambitious" in light of those circumstances. 580 U.S. at 402.

The Court continued that a student offered an educational program providing merely more than de minimis progress from year to year could hardly be said to have been offered an education at all, and that it would be tantamount to sitting idly until they were old enough to drop out. 580 U.S. at 402–03. The Act demands more, the Court asserted. "It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Ibid.

Thus, in writing that the IEP must be "appropriately ambitious in light of the child's circumstances," the Court sanctioned what has already been the standard in New Jersey: The IEP must be reasonably calculated to provide significant learning and meaningful benefit in light of a student's individual needs and potential.

An IEP must not only be reasonably calculated to provide significant learning and meaningful benefit in light of a student's needs and potential, but also be provided in the least-restrictive environment. See 20 U.S.C. § 1412(a)(5)(A). To the maximum extent appropriate, children with disabilities are to be educated with children without disabilities. Ibid. Thus, removal of children with disabilities from the regular-education environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Ibid. Indeed, this provision evidences a "strong congressional preference" for integrating children with disabilities in regular classrooms. Oberti v. Bd. of Educ. of Clementon Sch. Dist., 995 F.2d 1204, 1214 (3d Cir. 1993).

The "measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date. . . . Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement." Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 (3d Cir. 1995). However, a procedural violation with respect to the implementation of the IEP may rise to a substantive violation justifying compensatory education or tuition reimbursement, but only where the procedural defects caused such substantial harm that a FAPE was denied. C.H. v. Cape Henlopen Sch. Dist., 606 F.3d 59, 66–67 (3d Cir. 2010). Substantive harm is demonstrated when "procedural inadequacies (i) [i]mpeded the child's right to a FAPE, (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of the educational benefit." Coleman v. Pottstown Sch. Dist., 983 F. Supp. 2d 543, 564 (E.D. Pa. 2013), aff'd 581 F. Appx. 141 (3d Cir. 2014);[22] see also Rodrigues v. Fort Lee Bd. of Educ., 458 Fed. Appx. 124, 127 (3d Cir. 2011) (finding that a lack of measurable goals in an IEP was a procedural error but did not affect a student's substantive rights or deny a FAPE where student was mainstreamed and progress was measured by grades and state proficiency assessments); N.M. ex rel. M.M. v. Sch. Dist. of Philadelphia, 394 Fed. Appx. 920, 923 (3d Cir. 2010) (finding that IEP lacking annual

[22] Unpublished federal court decisions and administrative decisions are not precedential. They are referenced here because they provide relevant guidance.

goals relating to some of a student's needs stemming from his disability was not a procedural flaw rising to a substantive harm because the IEP still provided a FAPE); Schoenbach v. District of Columbia, 309 F.Supp.2d 71, 83 n.10 (D.D.C. 2004) ("failure to implement all services outlined in an IEP does not constitute a per se violation"); Melissa S. v. Sch. Dist. of Pittsburgh, 183 Fed. Appx. 184, 187–88 (3d Cir. 2006) (assuming the student was impermissibly left alone several times, "this is not the kind of substantial or significant failure to implement an IEP that constitutes a violation of the IDEA").

The only remedy sought here is compensatory education. The purpose of compensatory education is to remedy past deprivations of a FAPE. Lester H. v. Gilhool, 916 F.2d 865, 872 (3d Cir. 1990). It "serves to 'replace [] educational services the child should have received in the first place' and . . . such awards 'should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.'" Ferren C. v. Sch. Dist. of Phila., 612 F.3d 712, 717–18 (3d Cir. 2010) (quoting Reid ex rel. Reid v. D.C., 401 F.3d 516, 518 (D.C. Cir. 2005)). The authority of a court to remedy a deprivation of FAPE is "a profound responsibility, with the power to change the trajectory of a child's life." Thus, the "courts, in the exercise of their broad discretion, may award [compensatory education] to whatever extent necessary to make up for the child's lost progress and to restore the child to the educational path he or she would have traveled but for the deprivation." Upper Darby Sch. Dist. v. K.W., 2023 U.S. Dist. LEXIS 129803, *35–36 (E.D. Pa. 2023) (quoting G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 625 (3d Cir. 2015)).

"A disabled student's right to compensatory education accrues when the school knows or should know that the student is receiving an inappropriate education." D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 (3d. Cir. 2012) (quoting P.P. v. West Chester Area Sch. Dist., 585 F.3d 727 (3d. Cir. 2009)). A child who has been deprived of a FAPE is "entitled to compensatory education for a period equal to the period of deprivation, excluding only the time reasonably required for the school district to rectify the problem." Ibid.

Compensatory education is available even after the right to a FAPE has terminated. Thus, while a school district's obligation to provide a FAPE extends only to

disabled students under the age of twenty-one, students over that age, and those who have already graduated high school, remain eligible to receive compensatory education. Lester H. v. Gilhool, 916 F.2d 865 (3rd Cir. 1990); see also Brooks v. District of Columbia, 841 F.Supp. 2d 253, 258 (D.D.C. 2012) (emphasizing that "every Circuit court that has addressed the question has held that a former student retains the right to compensatory education despite the fact that the IDEA no longer guarantees the student FAPE because he or she has graduated high school or has turned 22); Ferren C. v. Sch. Dist. of Phila., 612 F.3d 712, 718 (3rd Cir. 2010) (holding that the court had equitable power to grant compensatory education to a twenty-four year old autistic woman who had been denied a FAPE). Similarly, a student who has left the school district may still be eligible for compensatory education. D.F. v. Collingswood Borough Bd. of Ed., 694 F.3d 488, 497–98 (3d Cir. 2012).

Petitioner referenced N.J.S.A. 18A:46-6.3(b) as part of her claim for compensatory relief. It provides:

> Notwithstanding the provisions of N.J.S.18A:46-6, N.J.S.18A:46-8, or of any other law, rule, or regulation concerning the age of eligibility for special education and related services to the contrary, a board of education shall, in the 2023-2024 school year, provide special education and related services contained in an individualized education program to a student with disabilities who attains the age of 21 during the 2022-2023 school year, provided that the parent of the student and the individualized education program team determine that the student requires additional or compensatory special education and related services, including transition services, during the 2023-2024 school year. A student receiving special education and related services pursuant to this subsection shall not be eligible to receive such education and services beyond June 30, 2024, unless otherwise provided in a student's individualized education program or as ordered by a hearing officer, complaint investigation, or court of competent jurisdiction.

The Department of Education issued a December 14, 2022, memorandum in which it wrote that the law "was created to address the impact of remote and/or hybrid instruction due to COVID on students with disabilities who would exceed the age of eligibility for special education and related services (21 years old)[.]" R-2. Here, the evidence in the

record does not support a finding that J.L. was adversely impacted by remote instruction. Rather, his attendance was reported to be satisfactory during pandemic-required remote instruction. Nonetheless, he may still be eligible for compensatory relief under the controlling law.

Respondent has not referenced cases that address the impact of a student's absences on the school district's ability to provide a FAPE. A search has not revealed relevant New Jersey decisions that address this. However, other jurisdictions have addressed the issue. They have held that, if a student is consistently absent and this affects his ability to receive the services in his IEP, the school district should take steps to address the absences. Failure to do so may constitute a failure to properly implement the IEP. However, there is not a strict rule governing this analysis; the facts of each case must be carefully and individually considered.

In Garcia v. Bd. of Educ. of Alburquerque Pub. Schs., 520 F.3d 1116 (10th Cir. 2008), the court found the school committed a procedural violation when it failed to prepare a student's IEP in a timely manner.[23] However, the student did not attend school for a significant number of days and eventually dropped out of school. The court noted that contributory fault can be relevant when assessing whether and what relief may be appropriate: an award of compensatory education can be "unnecessary and wasteful" if the student has no interest in attending. Id. at 1130. The court considered the student's demonstrated reluctance to attend school,[24] and that the school district "for the most part made diligent and extensive efforts to provide [her] with whatever special services that could help her in progressing toward graduation." Id. at 1130. The district court declined to award compensatory education, highlighting that the student demonstrated "superb performance" when she attended and noted, importantly, that she could return any time and avail herself of FAPE. Ibid. The Tenth Circuit affirmed the district court. However, it stressed that its agreement with the district court should "not be taken as excusing the

[23] The court did not conclude that this constituted a substantive violation. Nonetheless, it examined the lower court's decision to not award compensatory relief.

[24] There was "strong evidence indicating that, regardless of what actions the school district did or did not take . . . [the student's] poor attitude and bad habits would have prevented her from receiving any educational benefit." Id. at 1127.

school district's actions, or as condemning [the student] for being a poor student. Rather, our affirmance of the district court's disposition is simply a product of the discretion that Congress reposed in that court. We cannot say that the court traversed the bounds of that discretion in determining that the relief [the student] seeks is neither necessary nor merited in light of [her] educational history and the educational services already available to her should she choose to return to school." Id. at 1131; see also Los Lunas Pub. Sch. Bd. of Educ. v. Schneider, 2023 U.S. Dist. LEXIS 167719, *57 (D.N.M. September 20, 2023) ("This Court does not understand the Circuit's decision in Garcia to mean that this Court is required to reverse a [hearing officer's] decision against a school district that denied a child FAPE because the child was occasionally absent or because, in the school district's view, the parents refused to work with the school").

In Cundiff-Enoch v. District of Columbia, 2024 U.S. Dist. LEXIS 20166 *29 (D.D.C. February 2, 2024), a special education student attended school only twenty-five days during the 2021–2022 school year. Over approximately six months, her special education team took multiple steps to address her absenteeism, including but not limited to daily and weekly communication with the student and her parent by the special education teacher and coordinator, weekend check-ins, and development of "an academic plan to address her emotional instability, truancy, and missing assignments." Id. at *6. The plan "included meetings with each of her teachers, assignment deadlines, an emotional behavior check-in with [the] social worker, and a daily attendance tracker." Ibid. The team also conducted a comprehensive psychological evaluation, with academic testing. When the student continued to not attend school, the team met again to address her absenteeism. It "discussed possible root causes and planned to create an attendance and education plan." Id. at *8. It "believed that [her] poor attendance was preventing her from succeeding academically and from accessing her IEP services." Ibid. It held a "re-engagement and graduation plan meeting" with the student and parent "to discuss [her] IEP, graduation plan, attendance issues, and transportation services." Ibid. The team "stressed that [her] attendance was key to her ability to graduate." Ibid. The team also amended the IEP to respond to concerns that the IEP lacked attendance goals, assistance was required for the student to access transportation, and specialized instruction hours were insufficient.

Addressing the claim that the school district denied the student a FAPE by failing to conduct a functional behavior assessment (FBA) to develop an appropriate behavioral intervention plan (BIP) to address the student's absenteeism, the District Court noted that there is not a specific directive concerning how school districts shall respond attendance issues.[25] It found that the school district "took great care to encourage [the student] to attend school," noting that

> staff were often in daily contact with [the student] and her parent regarding attendance. The extent to which [school] staff tr[ied] to encourage [the student's] attendance was exhibited through the connection between [school] staff and [the student] in times of crisis, when staff would connect with [her] and were sometimes even more responsive than [her] parent. For example, . . . staff, rather than [the student's] parent, responded to a suicide threat made by [the student]. on a weekend. These extensive efforts more than suffice to meet the IDEA's requirement to consider the use of positive behavioral interventions and supports. 20 U.S.C. § 1414(d)(3)(B)(i). Not only did [the school] consider such use, but staff actually implemented numerous positive behavioral interventions and supports.
>
> [Id. at *30–31 (internal citations to the record omitted).]

Because the school district "took sufficient steps to support [the student's] attendance[,]" it did not "violate the IDEA by failing to provide services due to [her] non-attendance." Id. at *33.

In Garris v. District of Columbia, 210 F.Supp. 3d 187 (D.D.C. 2016), parents claimed the school failed to properly address their child's truancy problems. The school prepared an FBA and a BIP that "recommended a host of interventions designed to improve [the student's] attendance." Id. at 192. Although the BIP did not specifically

[25] "'[I]n the case of a child whose behavior impedes the child's learning,' the IDEA requires that the IEP team 'consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.' 20 U.S.C. § 1414(d)(3)(B)(i). The IDEA does not require the IEP team to include positive behavioral interventions or supports in the IEP, much less an FBA specifically." Cundiff-Enoch, 2024 U.S. Dist. LEXIS 20166 at *29 (emphasis added); see also 34 C.F.R. 300.324(a)(2)(i) (2023) ("In the case of a child whose behavior impedes the child's learning or that of others, [the IEP team must] consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior") (emphasis added).

address an incident that the parents asserted precipitated the student's absences, the parents' expert opined that the BIP satisfactorily addressed attendance. The District Court found no error in the hearing officer's conclusion that, "[g]iven this testimony by Petitioner's expert witness, given the Student's questionable interest in school generally, and given the quality of the [FBA], . . . Petitioner failed to meet her burden[.]" Ibid.

In Downingtown Area School District, 113 LRP 34703 (SEA PA August 11, 2013), parents of a student with an IEP who missed ninety-seven days in one school year claimed that the student was denied a FAPE because the school district pursued a truancy charge against the student rather than conducting a functional behavior analysis and developing an attendance plan. The hearing officer found that the school district took a variety of necessary steps prior to initiating truancy, including but not limited to an in-school intensive outpatient program, which provided two to three small group therapy sessions for children with difficulty adjusting to middle school, recommendations for in-home wraparound services, individual and small group instruction in areas of academic need, offering rewards, not penalizing the student for assignments turned in late, exposing the student to gradually longer periods of time in school, and having the parents call the assistant principal when the student was refusing to leave the home. The hearing officer further noted that the parents initially cooperated with these plans but eventually stopped. Because the school tried to work with the student and the family "within the areas of its influence" and it pursued truancy only after the efforts failed, the hearing officer found that this did not constitute a denial of FAPE. See also Urban Pathways Charter Sch., 112 LRP 27526 (SEA PA May 1, 2012) (student missed nearly 25 percent of the school year because, according to his parent, he did not want to go to school; the school denied him FAPE by failing to determine what was causing the truancy and addressing it with behavioral interventions).

Here, there is no evidence in the record that challenges respondent's assertions that its IEPs were reasonably calculated to provide significant learning and meaningful benefit in light of J.L.'s individual needs and potential, if J.L. attended school. However, his IEPs expressly addressed the likelihood that he would miss school and acknowledged the need for an accommodation to respond to this problem. While respondent charges that J.L.'s significant absences were undocumented and unexcused, the memoranda to

the District from the Mercer High School Principal demonstrate knowledge that J.L.'s medical problems prevented him from attending school on a very regular basis.

Despite the District's apparent knowledge, it did not endeavor to address J.L.'s absences or provide the accommodations referenced in his IEPs in a robust manner. The record does not demonstrate in adequate detail what the District attempted to do in response to the problem, other than advise petitioner of the absences; reject petitioner's proposal that J.L. attend school on a part time basis; and warn that a truancy action was possible. It is accepted that petitioner was not responsive to the District's attempts to communicate with her about this, and petitioner has not produced evidence indicating that she responded in a meaningful manner. Nonetheless, there is no evidence in the record showing that the District was unable to explore options for J.L. under these circumstances. The IDEA and the cases interpreting it require school districts to take more action than that which is demonstrated here.

I recognize that the District was confronted by a difficult situation that was made more difficult by petitioner's failure to cooperate. However, this matter involves a student's inability to attend school, and thus, his inability to access his education. His failure to "avail" himself of his education does not obviate the District's obligation to adequately attempt to address his absenteeism. As the above-referenced cases provide, the District's less than comprehensive effort to address J.L.'s absenteeism led to a substantive, not merely procedural, violation of the IDEA. This failure is compounded by the fact that he cannot simply re-enroll in school, as he is now twenty-two years old. Accordingly, I **CONCLUDE** that J.L. is entitled to relief in the form of compensatory education.

The amount and form of compensatory education must next be determined. In Lauren P. v. Wissahickon Sch. Dist., 310 Fed. Appx. 552 (3d Cir. 2009), the Third Circuit affirmed the district court's finding that the school district "(1) knew or should have known that [the student's] behavioral problems were impeding her education, (2) recognized that the IEP was inadequate, and (3) addressed [the student's] behavior in a piecemeal

fashion rather than through a consistent behavior management plan." 310 Fed. Appx. at **5–6. The district court affirmed the following findings about the student's disability:

> [I]t is clear that part of Student's disability is distractibility that manifests itself as not completing assignments, becoming distract[ed] coming from and going to class, losing assignments, not completing assignments, and so forth. Not only are these behaviors part of her disability, they interfere with her learning and require intervention. She needed a behavior management plan that shaped the desired behaviors and used positive reinforcement rather than the negative consequences provided. Moreover, this behavior management plan should have been used consistently across all school settings by all teachers.
>
> Second, Student's problems worsened and the District should have known that the program it was providing was not effective. Instead, the District blamed Student for behaving like a student with a disability.
>
> [P. v. Wissahickon Sch. Dist., 2007 U.S. Dist. LEXIS 44945, *18–19.]

The district court agreed that the school district "knew or should have known [the student] is a child whose behavior impedes her learning when it developed [her] IEP . . . and [the school district] failed to provide an appropriate IEP by not including a management plan to address that behavior." Id. at *20.

The district court acknowledged that the school district "expended a great deal of effort and good faith" on the student's case. Id. at *23. However, "an award of compensatory education does not require a finding of bad faith or egregious circumstances." Ibid. It and the Third Circuit agreed that compensatory education was required for the number of school days during the years at issue in that case.

Lauren P. serves as a guide here. As in that case, there is no finding the Trenton School District acted in bad faith. Nonetheless, J.L. should be provided compensatory education sufficient to permit him to achieve the education he missed due to his chronic absences, keeping in mind when the District knew or should have known that it needed

to take additional steps to address J.L.'s needs. J.L. attended school during the 2020–2021 school year, albeit remotely. By November 18, 2021, the District knew that J.L. was chronically absent; this is when it advised that it was considering initiating a truancy action. Starting no later than that date, the District should have endeavored to address the situation by means other than truancy. For these reasons, I **CONCLUDE** that the District shall enroll J.L. in school, with an appropriate program to be developed by his IEP team, for the number of days remaining in the 2021–2022 school year, after November 18, 2021. During the 2022–2023 school year, the District again attempted to work with petitioner and J.L. by developing a new IEP. Given J.L.'s history, the District should have realized by December 30, 2022, one month after the new IEP was signed, that J.L. continued to be chronically absent. For these reasons, I **CONCLUDE** that the District shall enroll J.L. in school, with an appropriate program to be developed by his IEP team, for the number of days remaining in the 2022–2023 school year after December 30, 2022, less the number of days J.L. was approved for medical home instruction. Contrary to petitioner's suggestion, there is no basis to order that J.L. be placed at Mercer High School, as J.L. did not report to school there when remote instruction ended. There is no evidence in the record suggesting that placement there is required. Accordingly, I **CONCLUDE** that J.L. shall be enrolled at Trenton High School.

ORDER

For the foregoing reasons, it is **ORDERED** that petitioners' request for relief pursuant to the IDEA is **GRANTED** as follows. Respondent shall enroll J.L. at Trenton High School, and his IEP team shall develop an appropriate program for the number of days remaining in the 2021–2022 school year, after November 18, 2021, and for the number of days remaining in the 2023–2023 school year after December 30, 2022, less the number of days J.L. was approved for medical home instruction.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2024) 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 (2024). 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 9, 2024
DATE

JUDITH LIEBERMAN, ALJ

Date Received at Agency

Date Mailed to Parties:

JL/sg/mg

APPENDIX

WITNESSES

For petitioner

A.L.

For respondent

Dr. Hortense Samantha Mowatt

EXHIBITS

For petitioners

P-1

- National Cancer Institute “Questions and Answers About Living with Beckwith-Wiedemann Syndrome.
- Undated letter from Taly Galubach, M.D., North Shore-Long Island Jewish Children’s Hospital
- November 5, 2018, letter from Fanny Murken, M.D., Children’s Hospital of Philadelphia
- December 4, 2018, letter from Nadia Saldanha, M.D.
- February 5, 2019, note from Northwell Health, Cohen Children’s Medical Center
- Undated letter advising that J.L. had a medical appointment scheduled for February 15, 2019.
- February 28, 2019, form signed by petitioner, authorizing Children’s Hospital of Philadelphia to release and obtain information about J.L.
- “After Visit Summary” issued after a February 28, 2019, appointment with Dr. Murken.

- September 13, 2019, letter from Melvin T. Featherstone, M.D., JHMC Ambulatory Care Center Pediatrics Outpatient Clinic
- October 29, 2019, note advising that J.L. was seen by the Department of Pediatric Othopaedics and he may return to school.
- November 25, 2019, note from Leonard Kristal, M.D., Pediatric Dermatology of Long Island
- December 11, 2019, note from J.L.'s gastroenterologist
- January 9, 2020, note from Stacey J. Kruger, M.D., Northwell Health
- January 28, 2020, note from a doctor at Northwell Health
- November 3, 2020, letter from gastroenterologist Samuel Bitton, M.D.
- December 18, 2020, note from Dr. Featherstone
- March 18, 2021, form advising of an April 14, 2021, appointment for J.L. with Annamaria Iakovou, M.D., Northwell Health Physician Partners
- May 11, 2021, letter from Samuel Bitton, M.D.
- June 3, 2021, letter advising that J.L. underwent an MRI procedure that day.
- July 13, 2021, letter from Jon-Paul DiMauro, M.D.
- October 11, 2021, radiology rest results for J.L.
- October 21, 2021, letter from Linda Carmine, M.D., Division of Adolescent Medicine, Cohen Children's Medical Center
- January 17, 2022, application for home instruction
- February 16, 2022, visit summary by Dr. Samuel Bitton
- April 5, 2022, letter from Ruee Huang, M.D.
- July 8, 2022, visit summary by Dr. Bitton.
- May 10, 2023, letter from Mary Huang, Pediatric Nurse Practitioner
- "Patient Appointment List Notice" with handwritten notes

P-3

- June 27, 2018, letter from Trenton Public Schools to petitioner
- June 29, 2018, letter from petitioner to Mrs. S. Ash, Trenton Public Schools
- October 23, 2018, letter from Nadia Saldanha, M.D.
- Undated "Comprehensive Medical Examination" by the East Orange School District

- May 7, 2014, teacher report concerning J.L.
- September 15, 2014, East Orange School District special education form

P-4

- April 5, 2019, report card, Mercer County Special Services School District
- October 17, 2019, Mercer High School “Positive Report”
- June 22, 2020, Mercer County Special Service School District report card
- August 14, 2020, Mercer County Special Service School District report card
- June 24, 2021, Mercer County Special Service School District report card
- Undated memorandum regarding Mercer High School “Olympics” for the 2021 extended school year
- Undated “Asthma Treatment Plan –Student”
- Undated prescription for physical therapy
- May 19, 2023, letter from petitioner to Judge Lieberman
- May 23, 2023, Visit Summary, Cohen Childrens Adolescent and Pediatric Medicine

P-5

- June 16, 2023, letter from petitioner to Mrs. Johnson

P-6

- March 1, 2018, note from Ronald Feinstein
- May 23, 2023, statement by Mary Huang, DNP, CPNP
- June 13, 2023, memorandum from Tekeshia Avent, Program Manager for Specialized Services, Trenton Public Schools, to Shakida Faniel
- June 30, 2023, “Weekly Work Record for Home Instruction” signed by Shakida Faniel and petitioner
- October 19, 2021, application for home instruction.

For respondent

R-1 Pleadings
R-2 New Jersey Department of Education Memo re: P.L. 2021, c. 109
R-3 District Policy & Regulation 5200 - Attendance
R-4 J.L.'s Transcript from Mercer High School
R-5 Mercer County Special Services School District Calendars
R-6 Notices of Chronic Absences from Mercer County Special Services School District April 2019–February 2022
R-7 June 11, 2019, IEP
R-8 June 3, 2020, IEP
R-9 Notice Following a Reevaluation Planning Meeting
R-10 Reevaluation Planning Meeting
R-11 Social History Evaluation of J.L.
R-12 J.L.'s April 26, 2021, IEP
R-13 Eligibility Conference Report
R-14 J.L.'s May 25, 2021, IEP
R-15 Invitation to a Meeting re: Attendance Concerns
R-16 Written Notice of Action Proposed or Denied – Re: Chronic Absenteeism
R-17 Meeting Attendance Form January 20, 2022 & Written Notice of Action Proposed or Denied – Re: Chronic Absenteeism
R-18 Registration Papers to Trenton Public Schools
R-19 Re-Evaluation Determination Plan for J.L.
R-20 November 30, 2022, IEP
R-21 Consent to Release Medical Information
R-22 Psychological Evaluation
R-23 Educational Evaluation
R-24 Speech & Language Evaluation
R-25 Occupational Therapy Evaluation
R-26 Invitation to July 12, 2023, meeting
R-27 Eligibility Conference Report
R-28 Abdel Gutierrez CV
R-29 Allison Chavanon CV

R-30 Dr. H. Samantha Mowatt CV

R-31 Home Language Survey

R-32 Notification of Placement at Mercer High School

R-33 Report cards

R-34 COVID-19 Plan

R-35 Notices re: remote instruction

R-36 Trenton Central High School attendance report 2022–2023

R-37 Summary of home instruction