

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 02498-16

AGENCY DKT. NO. 2016-23911

J.H.,

Petitioner,

v.

PLAINFIELD BOARD OF EDUCATION,

Respondent.

June Dennis, Esq., for petitioner

Lisa M. Fittipaldi, Esq., for respondent (DiFrancesco, Bateman, Kunzman, Davis,
Lehrer & Flaum, attorneys)

Record Closed: March 22, 2017

Decided: April 13, 2017

BEFORE **MICHAEL ANTONIEWICZ, ALJ:**

STATEMENT OF THE CASE

Petitioner filed a due process petition seeking a finding that there was a denial of a Free and Appropriate Public Education (FAPE), including the failure to provide a specialized reading program entitled "Linda Mood Bell" and to provide any and all other relief which is deemed to be equitable and proper.

PROCEDURAL HISTORY

The Department of Education, Office of Special Education Programs, transmitted this matter to the Office of Administrative Law (OAL), where it was filed on February 19, 2016, for determination as a contested case. Hearings were held on September 9, 2016, September 28, 2016, and November 14, 2016.

A post-hearing brief was only filed by the respondent on February 14, 2017, with a deadline for filing same on February 20, 2017. No post-hearing filing was submitted by the petitioner. The undersigned received a letter on March 16, 2017, by respondent requesting that a decision be issued without the benefit of any submission by the petitioners. A copy of this letter was mailed to the petitioner. No response by petitioner regarding respondent's letter was received by the undersigned and no such submission by the petitioner was made to date. As such, the record was closed March 22, 2017.

FINDINGS OF FACT

Based upon the evidence produced and my observations of the demeanor and credibility of the testimony, I **FIND** the following **FACTS**:

J.H. was born on February 1, 1996, and is classified as eligible for special education and related services. J.H. has been diagnosed with attention deficit hyperactivity disorder (ADHD). J.H. attended school at the New Roads School in Parlin, New Jersey in the 2014-2015 school year and has attended that school since approximately the second grade.

J.H. had special education services and had all academic required courses in his educational program, including afterschool tutoring, transportation to afterschool tutoring, social skills group, speech in a group, and individual speech. J.H. was tutored five days a week after school, received counseling once a week in a group, and had a one-to-one assistance for three hours a day. J.H. also had supplementary aids and services and had a phonic ear that assisted him to focus.

The IEP (J-3) program extended the school year (ESY) for J.H. past the closing of school in June. The services listed in the IEP for J.H. for the summer of 2014 were

given five days a week and included academic subjects in speech, counseling, and tutoring. The IEP also provided present levels and an overview of how the student was doing and the goals and objectives which were reviewed at the IEP meeting. These goals and objectives were summarized in report cards and progress reports.

The IEP, dated April 15, 2015, had listed related services, all of which J.H. received. Respondent mailed progress reports and report cards to J.H.'s mother, J.D. There were some behavioral concerns, which were addressed by providing services with the school psychologist and the social skills group. At no time was J.H. ever suspended or disciplined for his behavior.

The District does not schedule afterschool tutoring. The District pays the bill for afterschool tutoring with the contracted agency and the parent is responsible to set up the times and place where the services will be provided. J.D. signed the attendance sheet for the IEP meeting on April 1, 2015, and, in fact, attended this meeting. (J-3.) Also in attendance was the Department of Children Protection and Permanency (DCPP) worker, school psychologist (who ran the social skills groups at the New Roads School), speech therapist, and J.H.'s teacher. J.H. himself also attended this IEP meeting but did not sign in. The IEP contained a statement of special education services and a statement of related services. J.H. received core-content curriculum for high school students as were his academic skills classes. J.H. also received supplementary aids and services by a personal aide and the phonic ear.

At this IEP meeting held on April 1, 2015, measurable post-secondary goals were reviewed. These goals were required for secondary-school-age students in order to plan for the student's transition, including vocational training, full-time supported employment, and other skills for independent living. J.D. made no objection to the goals at the time of the IEP meeting. In addition, there were goals and objectives for related services and special classes from the New Roads School for the 2013-2014 school year. (J-6.) The related progress reports were sent to J.D. The goals that are set in the IEP are finalized in the IEP meeting based on input from the school and parent.

There was also created an IEP from November 2015 to October 2016, dated October 20, 2015. (J-4.) This IEP was created based on the fact that the mother requested that J.H. be transferred to another school, Deron II. J.D. and the student also attended this IEP meeting. In addition, the Deputy Attorney General from DCPD, the Deron School psychologist, speech therapist, law guardian, and the educational surrogate (by phone) all participated in the meeting. This IEP did not cover academic services for many periods because the focus is on transition and job sampling because J.H. had fulfilled graduation requirements for high school. The record included J.H.'s transcript for the grades 8 through 12 from the New Roads School, which confirms that J.H. completed the requirements for high school and is ready for transition services. (J-11.) The placement at Deron represents a change in the stage of J.H.'s education as it focuses more on transition and job sampling. Deron provides working on-site (resembling a real store) so that students are trained to work a cash register and deal with inventory. Once again, the mother made no objection about the educational or vocational training. In fact, J.H. stated at the meeting that he was happy with his placement at Deron. Deron provided information about measurable goals and J.H. received extended-school-year services. There was contained in that IEP appropriate measurable secondary goals and a statement of transition planning for J.H. There was no one-on-one aide and the goal was to encourage the student to become more independent. In addition, J.D. had no objection to J.H.'s course work. J.H.'s progress was charted at Deron by progress reports and report cards. (See J-15, which was J.H.'s marking period report card, including transition activities that teaches him such things as shopping for groceries and how to use public transportation.)

The IEP for November 2015 to October 2016 had an Annual Goals page which were discussed at the IEP meeting held on October 29, 2015. Neither J.D. or J.H. made any objection to those goals at this meeting.

J.D. made a request for independent evaluations and the District agreed to provide same. There was an agreement to provide same dated October 9, 2014. (J-9.) The District would then provide J.D. with a list of approved individuals to provide an evaluation. As of the date of the hearing, J.D. did not produce an invoice for an independent evaluation. (J-9 is a copy of the independent evaluations obtained by J.D.)

without submitting same for payment by the District.) Transportation services such as bringing J.H. to school and his tutoring sessions at the North Edison Public Library were provided on a daily basis by the District. The transportation was provided by the Union County Educational Services Commission and was set up to bring J.H. wherever his parent requested he receive afterschool tutoring services and then picked him up after school from service tutoring and bring him home. J.H. received two hours of tutoring, five days a week. In addition, payment for J.H.'s aide and his extended-school-year program at Deron were introduced. (J-10.)

J.H. spoke at the IEP meeting held on October 29, 2015. (J-4.) J.H. explained what courses he was taking. It was the request of all parties that J.H. change schools and go to Deron, as discussed at the IEP meeting. The District was not in receipt of any requests from J.D. with reference to reading therapies.

A school psychologist who worked for the District was a member of the Child Study Team (CST) and reviewed the IEP's of April 2014, April 2015, and October 2015. (J-2, J-3, J-4.) The witness was also familiar with the evaluations done by Leonard Educational Evaluation done on April 7, 8, and 25, 2015. (J-9.) The purpose of these evaluations was to determine at what grade levels J.H. was operating. The evaluations found that J.H.'s reading comprehension level was in the low area. The evaluation did not provide a recommendation on how to improve his reading comprehension. J.H.'s assessment in mathematics was at a higher area compared with the rest of his scores. J.H. was able to visually identify things, but for oral discourse comprehension, he scored in a very low percentile. There were also no recommendations to improve those skills. J.H. also scored in the low range on assessment of written language, with no recommendation on how to improve.

The school psychologist determined that J.H.'s IQ was 58, which was in the mild retardation range. IQ is a generally stable determination without much change. With this IQ, J.H. would not be able to read at a high school grade level. The school psychologist relied on speech and language evaluations when dealing with a student like J.H., who is classified as autistic, but could benefit from assistance in the communication area. J.H.'s poor memory skills were documented in the IEP's and

reports from his teachers. J.H.'s IEP also has modifications that address all of the issues that were contained in the Leonard Evaluation Reports. There are no therapies or services J.H. would receive because autistic students usually have communication problems. It would be a disservice to give J.H. classification without any new services as it would impair him from applying into a vocational school in the future. The recommendation by the Leonard Evaluation to obtain services from the Division of Vocational Rehabilitation and the Department of Developmental Disabilities was misplaced as such services are available to those who have graduated from high school or aged out of that process. The Division of Vocational Rehabilitation Services receives a list of students from the high school who would benefit from their services. Then the parent must attend an evaluation by that department and interview and administer testing. If the parent wants the student trained in a job skill, the agency will pay for that training. J.H. would not benefit from other therapies or more tutoring than those he was receiving.

IQ was a limiting factor for J.H.; however, he did benefit from all the remediation he was receiving. The areas of weakness set forth in the Leonard Evaluation were addressed in the IEP. J.H. received speech therapy and tutoring. J.H. received the maximum benefit of the supports given to him. There was nothing in the Leonard Evaluation which showed that J.H.'s IQ slipped.

This venue obtained little helpful information from the petitioner's witness, Dr. Palmer, as her last examination of J.H. was when he was fourteen years old, when he was in the eighth grade. J.H. is now nineteen years old. Dr. Palmer felt that J.H. needed attention socially and interpersonally, as well as long-term planning for independent living, vocational and career planning. Dr. Palmer's last report was made in 2011. Dr. Palmer found that J.H.'s IQ was around 58, which was in the extremely low range. Dr. Palmer also found that even with a Linda Mood Bell program, J.H. would never read at grade level. Dr. Palmer believed that the use of the phonic ear was an appropriate intervention to help J.H. with his auditory processing disorder.

Kid Care Concierge (KCC) was not contracted to provide services for J.H. at the close of the summer program (August until October 2015). The only time that they did

not provide services for J.H. was September 2014 and resumed services in October 2014. KCC provides tutoring in math and language arts based upon the IEP.

Carol Padgitt (Padgitt), the principal of the New Roads School stated that J.H. attended New Roads School for about six years and left after finishing twelfth grade in 2015. The District performed assessments on J.H. and that J.H. worked to the best of his ability. New Roads School provided whatever his IEP required. And whatever the goals and objectives for the year were developed by the teacher were worked on throughout the year. J.H. was able to use a literature program that was started several years ago and used different books from different companies to help develop comprehension. J.H. made good progress and worked to the best of his ability. J.H. had a one-to-one aide while at New Roads, but tried to wean him off such an aide in order to learn to work independently. Padgitt stated that J.H. made measurable progress and was independent. The aide did not accompany J.H. to speech. J.H. was taught to common-core standards while at New Roads, but it was modified and adapted to meet his level and skills. J.H. completed the academic requirements in order to meet his high school diploma. Padgitt stated that if J.H. did not meet the 80% criteria in his IEP, then modifications would be made to the program and they would look for additional material to assist him. The teacher would then put that goal back into the IEP if he had not met it. With the appropriate remedial support, J.H. made progress but did not move from his first grade to a ninth-grade level. If services were listed in the April IEP, they were provided by New Roads School. J.H. was given speech individually one time a week and four times a week in a group. J.H. also received ELA, reading lab, and mathematics. J.H.'s reading program was intensive and given every day. New Roads' teachers would use materials and books that accompany the goals and objectives.

An additional witness called by J.D. was Donna Shelichach (Shelichach) who was the principal at Deron II. Shelichach confirmed that J.H. made meaningful progress and that Deron provided intervention when needed. J.H. was in a community based instruction program and that he was learning reading in the context of preparing to work so his instructions in math and oral language is geared toward life after school. Deron assisted J.H. to function outside of a school setting. In the end, it was stated that the

IEP sets the goals and objectives with a modified curriculum so that J.H. was able to fulfill State standards.

LEGAL DISCUSSION

Federal funding of state special education programs is contingent upon the states providing a “free and appropriate education” (FAPE) to all disabled children. 20 U.S.C.A. § 1412. The Individuals with Disabilities Act (IDEA) is the vehicle Congress has chosen to ensure that states follow this mandate. 20 U.S.C.A. §§ 1400 et seq. “[T]he IDEA specifies that the education the states provide to these children ‘specially [be] designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction.’” D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 556 (3d Cir. 2010) (citations omitted). The responsibility to provide a FAPE rests with the local public school district. 20 U.S.C.A. § 1401(9); N.J.A.C. 6A:14-1.1(d). Subject to certain limitations, FAPE is available to all children with disabilities residing in the State between the ages of three and twenty-one, inclusive. 20 U.S.C.A. § 1412(a)(1)(A), (B). The district bears the burden of proving that a FAPE has been offered. N.J.S.A. 18A:46-1.1.

New Jersey follows the federal standard that the education offered “must be ‘sufficient to confer some educational benefit’ upon the child.” Lascari v. Bd. of Educ. of Ramapo Indian Hills Reg’l High Sch. Dist., 116 N.J. 30, 47 (1989) (citations omitted). The IDEA does not require that a school district “maximize the potential” of the student but requires a school district to provide a “basic floor of opportunity.” Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 200, 102 S. Ct. 3034, 3047, 73 L. Ed. 2d 690, 708 (1982). In addressing the quantum of educational benefit required, the Third Circuit has made clear that more than a “trivial” or “de minimis” educational benefit is required, and the appropriate standard is whether the child’s education plan provides for “significant learning” and confers “meaningful benefit” to the child. T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000) (internal citations omitted).

As noted in D.S., an individual education plan (IEP) is the primary vehicle for providing students with the required FAPE. D.S., supra, 602 F.3d at 557. An IEP is a

written statement developed for each child that explains how FAPE will be provided to the child. 20 U.S.C.A. § 1414(d)(1)(A)(i). The IEP must contain such information as a specific statement of the student's current performance levels, the student's short-term and long-term goals, the proposed educational services, and criteria for evaluating the student's progress. See 20 U.S.C.A. § 1414(d)(1)(A)(i)(I)-(VII). It must contain both academic and functional goals that are, as appropriate, related to the Core Curriculum Content Standards of the general education curriculum and "be measurable" so both parents and educational personnel can be apprised of "the expected level of achievement attendant to each goal." N.J.A.C. 6A:14-3.7(e)(2). Further, such "measurable annual goals shall include benchmarks or short-term objectives" related to meeting the student's needs. N.J.A.C. 6A:14-3.7(e)(3). The school district must then review the IEP on an annual basis to make necessary adjustments and revisions. 20 U.S.C.A. § 1414(d)(4)(A)(i).

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

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

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

The IDEA also requires that disabled children be provided education in the least restrictive environment (LRE), which is, educated alongside non-disabled children except when “the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C.A. § 1412(a)(5)(A). In order to determine whether a state is complying with the LRE requirement, the court must ask “whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily.” Oberti v. Bd. of Educ. of the Borough of Clementon Sch. Dist., 995 F.2d 1204 (3rd Cir. 1993). To enable the court to answer that question, the following must be considered: “(1) the steps the school district has taken to accommodate the child in a regular classroom; (2) the child’s ability to receive an educational benefit from regular education; and (3) the effect the disabled child’s presence has on the regular classroom.” T.R., supra, 205 F.3d at 577, 579.

When considering the first factor, a court must determine whether the school district provides “a continuum of alternate placements . . . to meet the needs of handicapped children” 34 C.F.R. § 300.551(a). This continuum must include “the whole range of supplemental aids and services.” Oberti, supra, 995 F.2d at 1216. The second factor entails a comparison between the benefits of a mainstream placement and a special education classroom. Ibid. If a court finds that a child cannot be satisfactorily educated in a regular classroom, it must then determine “whether the school has mainstreamed the child to the maximum extent appropriate, i.e. whether the school has made efforts to include the child in school programs with nondisabled children whenever possible.” Id. at 1215.

In N.S. and M.S. ex rel. A.S. v. West Milford Township Board of Education, EDS 12783-14, EDS 01792-15, Initial Decision (September 1, 2015), <http://njlaw.rutgers.edu/collections/oal/>, petitioner wanted more than the IEP proposed by the District for A.S., which included, among other things, a multisensory approach to

reading for twenty-five minutes each day, plus speech and language therapy for thirty minutes twice a week. In noting that the standard is not what is optimal but what is appropriate, the Court found that West Milford provided A.S. with an appropriate IEP that was reasonably calculated to provide A.S. with significant learning and meaningful educational benefit in the least restrictive environment, therefore, the Court did not need to determine whether the program and out-of-district placement for A.S. was appropriate. Ibid.

Petitioner, in this hearing, failed to present any credible evidence that her son was, in fact, denied FAPE in the LRE. The evidence presented by the District shows that J.H. received FAPE in the LRE and thus complied with the IDEA. J.H. received meaningful educational benefits considering his intellectual potential. The IEP provided short- and long-term objectives and was reviewed and adjusted on an annual basis. J.H. received special education and related services, supplementary aids and services, classroom modifications, an extended school year, district and Statewide testing accommodations, and specialized transportation. The IEP in this case provided the student with afterschool tutoring five days per week, even during the extended school year, specialized transportation, counseling sessions, speech and language sessions, and extended school years. The goals and objectives contained in J.H.'s IEP even met the requirements for J.H. to qualify for a New Jersey State-endorsed diploma. No evidence was presented by the petitioner to challenge such a finding.

J.H.'s 2014 and 2015 IEPs demonstrate that the District considered the LRE for J.H. The District identified the supplementary aides and services that were considered to implement J.H.'s annual goals and compared the benefits provided in the general education class and in the special education class in order to determine that the LRE for J.H. was in a private school for the disabled.

This analysis applies not only to the petitioner's IDEA claims, but also her arguments premised on § 504 of the Rehabilitation Act. Section 504 mandates that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program that receives federal funds." Ridley Sch.

Dist. V. M.R., 680 F.3d 260, 280 (3d Cir. 2012) (quoting 29 U.S.C.A. § 794(a): “As we have explained, § 504’s ‘negative prohibition’ is similar to the IDEA’s ‘affirmative duty’ and . . . requires schools that receive federal financial assistance to ‘provide a free appropriate public education to each qualified handicapped person who is in the recipient’s jurisdiction.”). Ibid. (quoting W.B. v. Matula, 67 F.3d 492-93 (3d Cir. 1995)). As under the IDEA, providing a FAPE in accordance with § 504 requires a school district to “reasonably accommodate the needs of the handicapped child so as to ensure meaningful participation in educational activities and meaningful access to educational benefits.” Ibid. Consequently, finding that the Plainfield Board of Education did not deny J.H. a FAPE is dispositive of the petitioner’s § 504 claims.

As a result of the IEP meeting held in July 2015, all the parties agreed to transfer J.H. to Deron II at that time. This action was, in fact, confirmed in the recommendations of Leonard Education in 2011, that J.H.’s vocational/transitional education be addressed. Thus, there is no basis for the petitioner’s position that the District failed to provide J.H. with a FAPE in the LRE.

Petitioner also contends that the District failed to comply with J.H.’s IEP by failing to provide one-on-one para-educator support in J.H.’s classroom, appropriate reading support, tutoring service, related transportation services, and extended-school-year services as set forth in the IEP. Once again, the petitioner has failed to present competent admissible evidence to support this position. The District provided sufficient evidence to show that it was providing ample reading support to J.H. given his IQ and learning issues. J.H.’s 2014 and 2015 IEPs show that J.H. was provided with all of the services set forth in those IEPs. J.H.’s prior IEPs provided him with a personal aide once a day for three hours. As J.H. aged, it was clearly important that he begin to function independently. A personal assistant is very restrictive and was not proposed by J.H.’s teachers or the principal at Deron II.

J.H.’s prior IEPs provided him with reading with modifications, including individualized instruction, use of a comprehensive reading program, employing verbal and physical prompts, providing visual cues to assist with oral comprehension, amongst other modifications and he was also provided with a phonic ear and AlphaSmart. J.H.’s

IEPs provided him with afterschool tutoring five days per week for two hours each day with transportation to the afterschool tutoring. J.H.'s prior IEPs and current IEP provided him with an extended school year. As such, there is no basis for the petitioner's position that the District failed to provide J.H. with an IEP or failed to implement the IEP. Contrary to such an assertion, the District has shown that it provided and implemented an appropriate IEP.

Petitioner has also failed to demonstrate that the District failed to comply with the Federal requirements for J.H.'s evaluations. When the petitioner requested independent evaluations, the District agreed to same, but requested that the petitioner specify which evaluations she wanted to have completed. The petitioner then obtained her own evaluations for J.H. and then never provided the bills for those independent evaluations, even though the District requested same. The District submitted evidence that J.H. was doing well in an appropriate placed educational setting. The IEP CST confirmed this fact in their individual testimony in this hearing. J.H. was classified as autistic and his re-evaluation is current from May 2013 to October 2016. I **CONCLUDE** that J.H. has an appropriate classification and an appropriate education program. I also **CONCLUDE** that there is no need now for additional evaluations of J.H.

Petitioner has also asserted that the District failed to provide J.H. with an education in accordance with the State's Core General Curriculum. Petitioner has again failed to present adequate evidence in support of this position. On the contrary, the District presented evidence (see testimony of Padgitt) that J.H. received an education in accordance with the Core General Curriculum. The petitioner also contends that the District unilaterally removed J.H.'s one-on-one para-educator in his classroom, removed tutoring and transportation services, replaced speech and language classes with counseling from J.H.'s IEP, and also failed to provide notice to J.H. or his mother. Petitioner also states that the District failed to hold a manifestation determination meeting. I fail to find any unilateral amendments made by the District to J.H.'s IEP. J.H.'s mother attended the May 20, 2014, April 1, 2015, and October 29, 2015, IEP meetings and was invited to all other IEP meetings. There can be no finding that changes were made to the IEP without notice to the petitioner.

There was no requirement for a manifestation determination meeting. It is only when a special education student is suspended for disciplinary reasons for more than ten days that the CST/IEP team should meet in order to determine whether the special education student's conduct was a manifestation of his disability. 20 U.S.C.A. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e). At that time the team must answer two questions: 1) was the student's conduct caused by, or did it have a direct and substantial relationship to his disability; and 2) was the student's conduct a direct result of the District's failure to implement his IEP? 20 U.S.C.A. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1) (2006). If either question is answered in the affirmative, a manifestation determination must be made. In this case, the District never asked for J.H.'s suspension or removal from the school and therefore, there is no need for a manifestation determination meeting.

Two-Year Limitation Prior To Filing Due Process Petition

As ruled upon at the beginning of the hearing, the IDEA statute of limitations requires a parent to request a due process hearing within two years of "the date the parent . . . knew or should have known about the alleged action that forms the basis of the complaint." 20 U.S.C. § 1415(f)(3)(C). The IDEA statute of limitations also permits a parent to request a hearing "in such time as the State law allows," "if the State has an explicit time limitation for requesting such a hearing." Ibid. In New Jersey, the law permits a two-year statute of limitations in order to file a due process petition. N.J.A.C. 6A:14-2.7(a)(1).

This legislation states:

A request for a due process hearing shall be filed within two years of the date the party knew or should have known about the alleged action that forms the basis for the due process petition. The two-year period for filing for a due process hearing may be extended by an administrative law judge if: (i) A district board of education specifically misrepresented to the parent that the subject matter of the dispute was resolved to the satisfaction of the parent; or (iii) The district board of education withheld information that was required by law to be provided to the parent.

[ibid.]

Petitioner made several allegations which are clearly beyond the two-year statute of limitation. The IDEA statute of limitations applies to § 504 claims premised on IDEA obligations, such as those invoking FAPE duties. P.P. ex rel. Michael P. v. W. Chester Area Sch. Dist., 585 F.3d 727, 735-37 (3d Cir. 2009). In addition, there is no factual or legal basis to support any extension of the statute of limitations. Therefore, the IDEA statute of limitations is applicable to all of the petitioner's claims in this case.

It is the burden of the petitioner to provide an explanation for the delay in filing this petition from when she "knew or should have known" of the alleged violations contained in the due process petition. Petitioner's attempt to extend the claims well beyond the two-year statute of limitations must be rejected. As such, the petitioner's claims in this matter are limited to alleged violations after January 11, 2014, which is within the two-year statute of limitation from the petitioner's filing of the due process petition that was filed on January 11, 2016.

Compensatory Education

Compensatory education is a remedy not specifically provided for in the IDEA. It "is a judicially designed cure for school district failures to provide [a FAPE]." Metzger, Compensatory Education Under the Individuals with Disabilities Education Act, 23 Cardozo L. Rev. 1839, 1840 (2002). "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 Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 249 (3d Cir. 1999)¹; M.C. v. Central Reg'l 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,

¹ The holding in Ridgewood that there was no federal statute of limitations for compensatory education claims has been superseded by statute, 20 U.S.C.A. § 1415, as recognized in P.P. v. West Chester Area School District, 585 F.3d 727 (3d Cir. 2009) (A parent or agency shall request an impartial due process hearing within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint).

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 the 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). The remedy of compensatory education is available only where a student's substantive rights are affected by a district's non-compliance with the IDEA. "Accordingly, [a] procedural violation is actionable under the IDEA only if it results in a loss of educational opportunity for the student, seriously deprives parents of their participation rights, or causes a deprivation of educational benefits." Ridley Sch. Dist. V. M.R., 680 F.3d 260, 274 (3rd Cir. 2012) (quoting D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 565 (3d Cir. 2010)).

It is clear that a student deprived of a FAPE may be entitled to an award of compensatory education. Ridgewood Bd. of Educ., supra, 172 F.3d 238. The testimony and evidence presented in this case do not demonstrate that respondent knew or should have known "that a child has an inappropriate IEP or is not receiving more than a de minimis educational benefit" and failed to correct the situation. The record is further clear herein that J.H. was provided a FAPE. There is no evidence that

respondent intentionally sought to impede J.H.'s educational benefit. I **CONCLUDE** that petitioner is not entitled to any compensatory education.

I, therefore, **CONCLUDE** that petitioner is not entitled to the compensatory education because the proofs submitted fail to establish the necessary elements such relief under the law. Specifically, I further **CONCLUDE** that respondent has met its burden of proof that it provided FAPE to J.H. for all years at question in this matter.

ORDER

For the foregoing reasons, petitioners' request for relief is **DENIED**.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2014) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C.A. § 1415(i)(2); 34 C.F.R. § 300.516 (2014). 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.

April 13, 2017

DATE

MICHAEL ANTONIEEWICZ, ALJ

Date Received at Agency

April 13, 2017

Date Mailed to Parties:

jb

APPENDIX

Witnesses

For Petitioner:

J.D.
Laura Palmer
William Schaarschmidt
Natasha Eldridge (via telephone)
Carol Padgitt
Donna Shelichach

For Respondent:

Melissa Remo
Margaret Smiley

Exhibits

Joint:

- J-1 IEP dated May 1, 2013
- J-2 IEP dated April 22, 2014
- J-3 IEP from the New Roads School dated April 1, 2015
- J-4 IEP from the Deron II School dated November 20, 2015
- J-5 Report Cards/Progress Report 2012-2013, April 17, 2013 to June 19, 2013
- J-6 Report Cards/Progress Report 2013-2014, April 4, 2014 to June 20, 2014
- J-7 Report Cards/progress Report 2014-2015, September 4, 2014 to November 10, 2014
- J-8 Report Cards/Progress Report 2014-2015, November 20, 2014 to January 28, 2015
- J-9 Response to Written Parental Request for Evaluation dated October 15, 2014, and Leonard Educational Evaluation dated April 8, 2015
- J-10 Invoices (bus transportation, aid, and tutoring)

- J-11 Student Transcript from New Road School 2008-2013
- J-12 CBI Curriculum Outline New Road School Group Counseling
- J-13 Progress Report dated January 23, 2015
- J-14 The Davis Center Diagnostic Evaluation dated May 13, 2013
- J-15 Deron School Report Card/Progress Report November 2015 to January 2016

For Petitioner:

- P-1 Neuropsychological Evaluation by Laura Palmer, Ph.D., LLC on April 14 and 15, 2011

For Respondent:

None