

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NOS. EDS 02906-15 and
EDS 04333-15
AGENCY DKT. NO. 2015-22376

E.I. AND R.H. O/B/O L.H.,

Petitioners,

v.

FAIR LAWN BOARD OF EDUCATION,

Respondent.

Denise Dimson Rekem, Esq., for petitioners (Parles Rekem, attorneys)

Robin Ballard, Esq., for respondent (Schenck, Price, Smith & King attorneys)

Record Closed: October 16, 2015

Decided: October 20, 2015

BEFORE **JESSE H. STRAUSS, ALJ:**

STATEMENT OF THE CASE

E.I. and R.H. on behalf of their daughter, L.H. (L.H. or parents), filed a due process petition against respondent, Fair Lawn Board of Education (Fair Lawn or District) contending that they are entitled to reimbursement of expenses related to the transportation of L.H. before the District placed a nurse on L.H.'s bus qualified to administer the drug Diastat. They also contend that the District failed to provide L.H. with

a Free Appropriate Public Education (FAPE) by not amending L.H.'s Individual Education Program (IEP) to include the provision for a nurse as part of L.H.'s bus transportation to and from her out-of-district school.

The Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq., requires a public school district to provide its students with a FAPE. In issue is whether the parents are entitled reimbursement for a period when they personally transported their daughter to and from school and whether the IEP should have been amended to reflect a requirement that a nurse be on the bus as part of the related service provided to L.H. by the District.

PROCEDURAL HISTORY

The parents filed their due process petition on February 26, 2015, along with a Request for Emergent Relief. As the District began providing a nurse on L.H.'s bus on March 9, 2015, the Honorable Sandra Ann Robinson issued an Emergent Relief Order on March 27, 2015, ordering "that the medically trained individual continue on the transport with L.H. throughout the period of a due process hearing on this matter." I heard the matter on April 8, July 22, and October 16, 2015, at which time the record closed.

FACTUAL DISCUSSION

Having heard the testimony of various witnesses and having reviewed all documents entered into evidence, I make the following **FINDINGS of FACT**:

L.H. is an eighteen-year-old girl classified under the category "Autistic". She currently attends New Beginnings, an out-of-district placement in Fairfield, New Jersey, to and from which the District provides bus transportation as a related service. The transportation service is set forth in L.H.'s IEP.

On February 5, 2015, L.H. was taken to Hackensack University Medical Center because of trouble breathing and postictal state (seizure). (P-2.) Although Hospital

staff recommended that the parents follow up the emergency room visit with an appointment to a general pediatrician, the parents took L.H. to her pediatric neurologist, Dr. Michael Katz, the next day. He diagnosed Epilepsy and prescribed Diastat a medication that must be administered rectally for seizures lasting greater than two minutes. (P-3.)

On Monday, February 9, 2015, the parents contacted Michael Russomanno, L.H.'s case manager to inform him of the seizure event and to request that a nurse or health professional trained in the administration of Diastat be provided on L.H.'s bus. Mr. Russomanno did not appear as a witness in this proceeding to present any conflicting testimony to that of the parents. There is nothing to suggest that the parents' testimony as to their interactions with Mr. Russomanno on or after February 9 was inaccurate. In the February 9 conversation, Mr. Russomanno told the parents that, in order for the District to provide the service for L.H., it required consent from the parents for the District's physician, Dr. Gary Muccino, to speak to and share information with Dr. Katz. That day, the parents signed and faxed to Mr. Russomanno a Fair Lawn Public Schools "Release of Student Information" authorizing Dr. Katz and "the Fair Lawn School District Physician-Dr. Muccino to reciprocally share and release medical, educational or other records and/or confidential information regarding my son/daughter [L.H.]" (P-4.) Thereafter, the parents spoke every day with Mr. Russomanno and repeatedly asked if the District needed any other information in order to provide a nurse. On February 13, E.I.H. called and emailed Mr. Russomanno requesting an explanation as to why Dr. Muccino had not yet contacted Dr. Katz because the parents were having difficulty driving L.H. to and from school each day. She also suggested that he send Dr. Katz a medication administration form similar to the one Dr. Katz filled out for New Beginnings. Mr. Russomanno apparently complied, since Dr. Katz filled out this form on February 13. (R-1.)

On February 17, E.I.H. sent Mr. Russomanno an email summarizing their interaction since February 9 to secure a trained medical professional on the bus expressing concern that Dr. Muccino had not yet contacted Dr. Katz. (P-5.) That day, the parents' counsel wrote to the District's counsel summarizing the history of this situation, including copies of the above documents and demanding that a nurse or

medically-trained professional be immediately placed on L.H.'s bus. (P-8.) Also, on February 17, Dr. Katz faxed a letter to Mr. Russomanno informing him that he had prescribed Diastat which has to be administered within two minutes of a seizure during her transportation to and from school or during the school day. (R-2.) Although the District's schools were closed from February 16 through February 20 for winter break, Mr. Russomanno came in on February 18 and emailed the letter to Dr. Joyce Beam, Director of Special Education and to Michele Perino. When the District reopened on February 23, Dr. Katz's letter was sent to Dr. Muccino for review. Dr. Muccino left a message for Dr. Katz on February 24, and they spoke thereafter. On February 26, Dr. Muccino advised the District's superintendent that, after speaking with L.H.'s neurologist, the District should provide medically-trained personnel on the bus until the results of further neurological testing of L.H. clarified her condition and medical needs. Dr. Beam so notified the parents on February 27. Dr. Beam also informed the parents that the District would reimburse them for their transportation of L.H. to school until a medically-trained person could be secured for the bus. (R-3.)

Earlier, on February 20, the parents' counsel again emailed the District's counsel requesting when it would provide a nurse and asking if the filing of an emergent relief application was necessary. The District's counsel responded that the parents' doctor's letter was only sent on Wednesday (February 18) and that it was unfair to complain about a lack of response in less than forty-eight hours. (P-9.)

On February 25, Mr. Russomanno emailed E.I.H. summarizing his involvement in the nurse request as follows:

“ . . . the consent that was signed by your husband on Feb 9, 2015 was faxed to the Board office on Feb 10, 2015. On Feb 12, 2015, after speaking with Dr. Beam, I informed your husband that “Permission to administer medication” form was needed to be completed by Dr. Katz and that once completed that form will be sent to the Board office. The “Permission to Administer Medication Form” was faxed to Dr. Katz on Feb 13, 2015, was completed by Dr. Katz and faxed to me, which was then faxed to the Board at the end of the same day. On Feb 17, 2015, a letter from Dr. Katz as faxed to me explaining [L.H.'s] condition, which I forwarded to the Board Office on Feb 18, 2015. When I returned to the office on Monday Feb 23, 2015, I emailed

you with an update as per Dr. Beam, that Dr. Katz's letter has been sent to Mr. Watson to share with the district medical inspector."
(P15.)

On February 26, not having yet been notified that the District would provide the nurse, the parents filed a Due Process Petition and Request for Emergent Relief. Notification that the District would supply the nurse came a day later.

The District embarked on an effort to secure the necessary person for the bus. It has provided medically-trained personnel since March 9, 2015.

District personnel pondered whether the IEP needed to be amended to add the nurse-transportation component and decided instead to add it to L.H.'s Individualized Health Plan (IHP) rather than to her IEP on the basis that the service was being provided in response to a medical issue rather than that she needed that type of accommodation to benefit her education. This service was added to the New Beginnings IHP on March 27, 2015, at the request of the District. The amended IHP provides, "While awaiting diagnostic information the district is providing on the school bus a licensed medical professional to carry out medical orders regarding seizure medication." (R-7.)

The parents drove L.H. to and from New Beginnings (two round trips a day) on sixteen different days - February 9, 10, 11, 12, 18, 19, 20, 23, 24, 25, 26, 27, and March 2, 3, 4, and 6, 2015. Each round trip was 32.6 miles for a total of 65.2 miles per day. The District paid the parents \$48.10 for the five days after February 26 in accordance with its notification to the parents representing a single round trip reimbursement a rate of \$.31 per mile, the New Jersey public employee reimbursement rate. The parents contend that they should be reimbursed at the federal reimbursement rate of \$.575 per mile. The parents contend that they are entitled to reimbursement at 65.2 miles per day times \$.575 per mile or \$37.49 per day times sixteen days for a total of \$599.84. The \$48.10 paid by the District for a single round trip for five days would reduce the parents claimed amount to \$551.74. The State of New Jersey mileage reimbursement rate was \$.31 per mile during the relevant time period.

LEGAL ANALYSIS AND CONCLUSIONS

The Individuals with Disabilities Education Act (IDEA or the Act), 20 U.S.C. §§ 1400 et seq., requires New Jersey to effectuate procedures that ensure that all children with disabilities residing in the state have available to them a FAPE consisting of special education and related services provided in conformity with an IEP. 20 U.S.C. §§ 1401(9), 1412(a)(1). A purpose of the IDEA is

to ensure that all children with disabilities have available to them a free appropriate public education 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).]

Under 20 U.S.C. § 1412(a)(1), any state qualifying for federal assistance under the IDEA must adopt a policy that assures all children with disabilities the right to a free appropriate public education. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 180-81, 102 S. Ct. 3034, 3037, 73 L. Ed. 2d 690, 696 (1982). State regulations track this requirement that a local school district must provide FAPE as that standard is set under the IDEA. N.J.A.C. 6A:14-1.1. New Jersey follows the federal standard requiring such entitlement to be “sufficient to confer some educational benefit,” although the State is not required to maximize the potential of handicapped children. Lascari v. Ramapo Indian Hills Reg. High Sch. Dist., 116 N.J. 30, 47 (1989) (citing Rowley, supra, 458 U.S. at 200, 102 S. Ct. at 3048, 73 L. Ed. 2d at 708). Third Circuit decisions have further refined that standard to clarify that such educational benefit must be “meaningful,” “achieve significant learning,” and confer “more than merely trivial benefit.” T.R. v. Kingwood Tp. Bd. of Educ., 205 F.3d 572 (3d Cir. 2000); Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238 (3d Cir. 1999); Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 183-84 (3d Cir. 1988), cert. den. sub. nom. Cent. Columbia Sch. Dist. v. Polk, 488 U.S. 1030, 109 S. Ct. 838, 102 L. Ed. 2d 970 (1989). The Third Circuit has reemphasized the importance of the inquiry into whether the placement proposed by a district will provide the student with a “meaningful educational

benefit.” S.H. v. State-Operated Sch. Dist. of Newark, 336 F.3d 260 (3d Cir. 2003). The quantum of educational benefit necessary to satisfy the IDEA varies with the potential of each pupil. N.E., supra, 172 F.3d at 247.

An IEP must list the related services a student is entitled to receive, when that service is required to assist the student in benefiting from special education. 20 U.S.C. § 1401(26)(A) and N.J.A.C. 6A:14-3.9. Transportation services are provided to special needs students as a related service. N.J.A.C. 6A:14-3.9 (a) (7). Additionally, special needs students shall be provided with transportation in accordance with their IEP. Such transportation services may include transportation aides and special arrangements for other assistance to and from school. N.J.A.C. 6A:27-5.1. Importantly, nursing services shall be provided as a related service only to the extent such services are designed to enable a child with a disability to receive a FAPE and described in the IEP. N.J.A.C. 6A:14-3.9 (a) (9).

Once Dr. Muccini agreed that L.H. required a nurse on the bus as part of her transportation-related service notwithstanding his position that L.H. required additional and more definitive testing, the above interlocking regulations make it abundantly clear that the District was required to amend L.H.’s IEP to reflect the nursing service as part of the transportation related service, and I so **CONCLUDE**. These regulations repeatedly refer to the IEP, not an IHP. The IEP is the contract between a district and a petitioner. An IHP does not have that status. The presence of a nurse on the bus as a safety net to administer a medication within two minutes of a seizure is no less a supportive service to allow a child such as L.H. to access her education than is the transportation requirement itself. It is required to assist a child with a disability to benefit from special education. L.H. is deterred from accessing her education unless she can be transported to and from New Beginnings safely. For accord, see Cedar Rapids Cmty Sch. Dist. v. Garret F., 526 U.S. 66, 119 S. Ct. 992, 143 L. Ed. 2d 154 (1999) (nursing services required for ventilator, catheterization, and suctioning of tracheotomy tube). The District erred in not amending the related services portion of L.H.’s IEP. If it were subsequently determined by more comprehensive testing that this service for L.H. was not necessary, the IEP can again be amended.

The remaining issue is whether the parents are entitled to reimbursement for their transportation of L.H. to and from New Beginnings until the District's provision of a nurse on the bus began on March 9, 2015. The District is correct that reimbursement for unilateral action by parents is a judicially-created equitable remedy that first require parents to meaningfully engage in the process. I **CONCLUDE** that the parents here did, indeed, meaningfully engage in the process but that the District inappropriately dragged its feet before agreeing to engage a nurse for L.H.'s bus. The District argues that not until Dr. Katz faxed his letter to Mr. Russomanno on February 17 did the District learn that L.H. required the presence of a medically-trained professional on the bus. However, this letter request, although an important part of making a medical request for services, hardly excuses the District from its delay in action. There is no evidence that Mr. Russomanno was demanding of the parents such a specific doctor's letter. Rather the parents complied with the process that Russomanno established. Moreover, Mr. Russomanno knew from the outset that the only issue was assistance on the bus, since nurse availability during the school day was an issue for New Beginnings not Fair Lawn. Mr. Russomanno's email summary supports the fact that the parents followed all of his instructions, none of which included that a letter be sent by Dr. Katz on February 17. There is no indication that the District was waiting for or required a more formal letter from Dr. Katz or had so notified the parents despite their daily outreach to Mr. Russomanno seeking assistance on the bus. Mr. Russomanno received the required consent on February 9 to permit Dr. Muccino to communicate with Dr. Katz. According to Mr. Russomanno's summary, he faxed it to the Board office. Yet, there is no evidence that the Board did anything at that time. In terms of the equities and the requirement for reasonable collaboration, quite simply, the District dropped the ball. Therefore, I **CONCLUDE** that the parents are entitled to reasonable compensation for part of the period during which they transported L.H. before March 9 because of a failure of the District to provide a FAPE

I disagree that the parents are entitled to sixteen days of transportation reimbursement. Even if the District had acted or had reacted more promptly and had Dr. Muccino made contact with Dr. Katz immediately after February 10, it reasonably would have taken at least five working days to secure the services of a nurse. The District could not reasonably be expected produce a nurse as soon as the demand was

made. The release from the parents was not faxed to the District until approximately 4:00 p.m. on March 9. (See, P-4.) As an equitable remedy, I **CONCLUDE** that the parents are entitled to additional reimbursement for the five second round trips on February 27 and March 2, 3, 4, and 5 and for two round trips on February 19, 20, 23, 24, 25, 26, and 27. The cost of the education must be free in order to fulfill the FAPE requirement. Therefore, the parents are entitled to reimbursement for two rather than one round trip per day because they had endured the cost of two round trips each day. There is no law on what the mileage reimbursement rate should be in this situation—that is the IRS rate or the rate used to reimburse state employees. New Jersey, unlike some other states, has no regulation setting forth a specific mileage reimbursement rate for parents who transport a special needs child. The parents contend that they should be reimbursed at the IRS mileage rate of \$.575, while the District contends that the reimbursement rate should be the \$.31 that the State of New Jersey uses to reimburse its employees who use personal automobiles on official business. After the hearing concluded, counsel for the District provided me with a document from the Council of State Governments setting forth the rates of mileage reimbursement for private vehicle use for each state. New Jersey's \$.31 reimbursement rate is the lowest in the country. I, however, take administrative notice that this is attributable to the fact that New Jersey has one of the lowest gasoline tax rates in the country and that rate is, therefore, reasonable. Both the reimbursement of a parent for transportation of a special needs child and the reimbursement of a public employee for the use of a private vehicle involve the expenditure of public funds, actions that require the prudent protection of the public fisc. Accordingly, I **CONCLUDE** that the parents should be reimbursed at the lower \$.31 per mile for 19 round trips of 32.6 miles each for a total of \$192.

ORDER

It is **ORDERED** that the IEP for the 2014-2015 school year be amended to include a medically-trained professional on L.H.'s bus and that a stay put on this issue remain in place in the event that the parties have not agreed on an IEP for the 2015-2016 school year.

It is further **ORDERED** that the District pay the parents \$192 as compensation for transporting their daughter to and from New Beginnings consistent with the above.

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.

October 20, 2015

DATE

JESSE H. STRAUSS, ALJ

Date Received at Agency

10/20/15

Date Mailed to Parties:

id

APPENDIX

LIST OF WITNESSES

For Petitioners:

E.I.H.

R.H.

For Respondent:

Michele Perino

LIST OF EXHIBITS IN EVIDENCE

For Petitioners:

- P-1 Fair Lawn Volunteer Ambulance Intake Form, February 5, 2005
- P-2 HUMC Emergency Dept Visit Summary Information and Bill
- P-3 CVS Pharmacy Diazepam Medication Label for L.H.
- P-4 Fair Lawn Schools Release of Student Info Form, February 9, 2015
- P-5 Email, EIH to Russomanno, February 13, 2015
- P-6 Email, Russomanno to EIH, February 13, 2015
- P-7 Physician's Order for Treatment of Diastat from Katz, February 9, 2015
- P-8 Letter, Rekem to Ballard, February 17, 2015
- P-9 Emails, Rekem and Ballard, February 17-21, 2015
- P-10 Emergency Care Plan, Seizure Disorders, February 18, 2015
- P-11 Email, Russomanno to Beam and Perino, February 18, 2015
- P-12 Email, Ballard to Rekem, February 24, 2015
- P-13 Emails, E.I.H. and Rekem, February 24-25, 2015
- P-14 Not Admitted
- P-15 Emails, Russomanno and Beam and Perino, February 25, 2015
- P-16 Emails, Russomanno and Beam and Perino, February 27-March 2, 2015
- P-17 Email, Perino to Morgenstein, March 17, 2015

- P-18 Fair Lawn Public Schools, Release of Student Information, March 2, 2015 P-19 Emails, Russomanno and Beam and Perino, February 27-March 2, 2015 P-20 Email, Rekem to Ballard, March 1-2, 2015
- P-21 Not Admitted
- P-22 Not Admitted
- P-23 Email, Rekem to Ballard, March 3, 2015
- P-24 Email Morgenstein to E.I.H., March 6, 2015
- P-25 Email Ballard to Rekem, March 6, 2015
- P-26 Email, E.I.H. to Wilson, March 23, 2015
- P-27 Fax, Perino to O'Connor, March 23, 2015
Post-Hearing Submission, July 23, 2015

For Respondent:

- R-1 Administration of Medication Form, February 13, 2015 R-2 Letter, Katz, February 17, 2015
- R-3 Email, Beam to E.I.H., February 27, 2015
- R-4 Email, Morgenstein, to E.I.H., March 6, 2015
- R-5 Fair Lawn Board of Education Purchase Order, May 28, 2015 R-6 Not Admitted
- R-7 New Beginnings IHP, March 27, 2015
Post-Hearing Submission, August 28, 2015