

**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**FINAL DECISION**

OAL DKT. NO. EDS 05547-16

AGENCY DKT. NO. 2016/24118

**D.B. AND A.I. ON BEHALF OF S.B.,**

Petitioners,

v.

**PASCACK VALLEY REGIONAL HIGH SCHOOL**

**BOARD OF EDUCATION, BERGEN COUNTY,**

Respondent.

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**D.B.**, petitioner, pro se

**Rodney Hara**, Esq., for respondent (Fogarty & Hara, attorneys)

Record Closed: August 31, 2016

Decided: September 9, 2016

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

Petitioner converted her mediation case to a Due Process Petition on March 8, 2016. The matter was transmitted to the Office of Administrative Law (OAL) as a contested case on April 12, 2016.

A prehearing conference was held on June 9, 2016, and a Prehearing Order was entered by the undersigned on June 10, 2016.

A hearing was held on August 31, 2016, at which time the record was closed.

Petitioner's due process petition seeks to have her son, S.B., remain at Pascack Valley Regional High School (PV).

**SUMMARY OF RELEVANT TESTIMONY**

Eva Merck testified as follows:

She is the district supervisor of special services for Respondent. She knows S.B. and is familiar with his student progress. She has attended several Individual Education Program (IEP) meetings with Petitioner and S.B.

An IEP was prepared for S.B. for the 2012-2013 school year. S.B. was placed in special education for mathematics, language arts, and social studies. S.B. also received speech and language therapy. This IEP was prepared two months into S.B.'s freshman year on November 14, 2012. Both S.B. and Petitioner were present for the IEP meeting. (R-3.)

An IEP was prepared for each subsequent school year, through the 2014-2015 school year. (R-4, R-5 and R-6.) R-6 goes to February 2016, S.B.'s junior year.

S.B.'s attendance was a problem. His absenteeism progressed through time. He missed a significant amount of school. In his sophomore year his work declined significantly. The Board of Education decided to re-evaluate S.B. A psycho-educational evaluation was performed. (R-12.) A psychiatric evaluation was performed. (R-13.)

Based upon the evaluations the Board of Education re-classified S.B. as "other health impaired."

A new IEP was prepared dated June 12, 2015, which reflected the changes in classification. S.B. was offered counseling and given an attendance waiver due to his substantial absenteeism. His schedule was hand-picked. (R-7.)

Due to low mathematics skills S.B. was placed in a mathematics course better suited to his skills. This course had one-on-one instruction. S.B. refused to participate in one-on-one instruction. He wanted to be placed in Algebra II with Trigonometry. He thought one-on-one instruction gave the wrong impression. Respondent offered one-on-one instruction outside of school as it did not want to set S.B. up for failure.

S.B.'s progress was assessed and a revised IEP was put in place, as the previous IEP was not being fully realized. The IEP team felt the need to re-assess. (R-8.) Respondent wanted to test S.B. and offered S.B. three days to prepare, which Respondent would provide. S.B. refused to participate in the preparatory work.

Respondent did place S.B. in the Algebra II with Trigonometry class in accordance with his wishes. The teacher thought if S.B. attended each class he could achieve a passing grade. After being placed in the class he requested, S.B. failed to attend.

S.B. also had deficiencies in English. At the end of his sophomore year he was at risk of failing everything due to his absenteeism, which was significantly beyond Respondent's policy. Respondent wanted S.B. to complete eight weeks, at four hours per week, of intensive reading and writing. It was offered to him over the summer after sophomore year. S.B. did not take the class over the summer. He did take the course when the school year began, after the end of regular classes, and completed it.

S.B.'s absenteeism was a major concern to Respondent. In the 2013/2014 school year he had 15 unexcused absences, 2 excused absences, and 40 unexcused tardies. In the 2014/2015 school year S.B. had a total of 40 unexcused absences, 1 excused absence, and 56 unexcused tardies. In English class alone he missed 33 classes and was late 16 times. (R-16.)

S.B. had expressed a desire to become an automobile mechanic post graduation. Respondent arranged for an internship for S.B. in this field. S.B. did not want to work without compensation. Respondent explored internship opportunities where S.B. could receive wages after completing the internship hours. Three interviews

were arranged, but S.B. failed to attend them. This was the start of an alternate placement for S.B.

An IEP meeting was held on December 1, 2015, to assess S.B.'s progress. S.B. refused to attend. Petitioner did attend. It was obvious that S.B. could not function in the morning. Respondent proposed sending S.B. to the Knight School in the New Milford school district. Classes began at 3:00 p.m. and ended at 6:30 p.m. The Knight School allowed for creative scheduling. Petitioner expressed a desire to get S.B. more help and counseling. Petitioner asked for more time to do so. Respondent agreed to see if counseling would help. Respondent offered to assist with counseling. Petitioner declined this offer of help. S.B. never received counseling as Petitioner did not follow through.

Also at this time S.B. was requesting a full class schedule. Respondent did not think it a good idea. It was in the middle of the academic year and classes were already in progress. This was related to the IEP team at the meeting via a telephone conversation between Petitioner and S.B. An IEP was developed. (R-9.)

S.B. was not completing sufficient work to graduate. At the time of this IEP meeting S.B. had 49 absences. S.B. was not following any recommendations. Petitioner failed to get counseling for S.B. Respondent was concerned that S.B. would not graduate on time.

Ms. Merk thought Respondent did all it could for S.B.

Frank Andrisani testified as follows:

He is employed by Respondent as a guidance counselor. He is the guidance counselor for S.B. He is aware of the various revisions to the IEP to address the needs of S.B. Each IEP took into account S.B.'s concerns over certain courses. Changes did not improve attendance. S.B. last attended school on January 28, 2016. In the last school year S.B. has 146 unexcused absences and 15 tardies.

Another IEP meeting was held on January 11, 2016. At the time of the meeting S.B. was in violation of the school attendance policy. Based on the lack of attendance S.B. earned zero credits for the 2015/2016 school year as of November 30, 2015. (R-14.)

The IEP developed at this meeting resulted in a recommendation that S.B. attend the Knight School. This is the IEP that is the subject of the due process petition. It should be noted that by filing the due process petition Respondent was prevented from implementing the latest IEP. S.B. could have continued to attend PV in accordance with his wishes and that of Petitioner.

S.B. wanted a full-time schedule. S.B. became involved with a verbal confrontation with a teacher and was suspended for three days effective January 29, 2016, through February 4, 2016. S.B. has never returned to school. (R-16 and R-17.)

D.B., Petitioner, testified as follows:

She feels her son has been mistreated. She never said the latest IEP was inappropriate. S.B. has been attending school with the same children since kindergarten. She wants him to stay with his friends. She feels he was picked on. She feels Respondent did not do enough for S.B. She thinks it is the child study team's job to get S.B. to attend school. She feels disappointed.

#### **FINDINGS OF FACT**

1. S.B. is a student at PV and has been since his freshman year.
2. S.B. was classified as Specific Learning Disabled and an appropriate IEP was prepared outlining his course of study and services to be provided. Petitioner signed off on the IEP. (R-4.)
3. During his freshman year S.B. had 15 unexcused absences, 2 excused absences, and was tardy 40 times. R-16.)

4. An IEP was prepared for his sophomore year. S.B. continued to be classified as Specific Learning Disabled. Petitioner signed off on the IEP. (R-5.)
5. During his freshman year S.B. had 40 unexcused absences, 1 excused absence, and was tardy 56 times. (R-16.)
6. An IEP was prepared for his junior year. S.B. continued to be classified as Specific Learning Disabled. Both S.B. and Petitioner signed off on the IEP. (R-6.)
7. Another IEP meeting was convened on June 12, 2015, for the purpose of re-evaluating S.B. S.B. was re-classified as Other Learning Disabled. Petitioner signed off on the new IEP. (R-7.)
8. Another IEP meeting was held on September 10, 2015, to assess S.B.'s progress and to review or revise the IEP. S.B.'s classification remained Other Learning Disabled. (R-8.)
9. Another IEP meeting was held on December 1, 2015, to assess S.B.'s progress and review or revise the IEP. S.B.'s classification remained Other Learning Disabled. (R-9.)
10. Another IEP meeting was held on January 11, 2016. At this meeting Respondent proposed an out-of-district placement at the Knight School in New Milford, New Jersey. (R-10.)
11. Petitioner rejected this IEP and expressed a desire that S.B. remain at PV.
12. S.B. had the ability to remain at PV for his junior year as Petitioner filed a due process petition preventing the implementation of the last IEP. S.B. failed to avail himself of this opportunity and stopped attending school completely.
13. During his junior year S.B. had 147 unexcused absences and was tardy 15 times. (R-16.)
14. Due to the excessive absenteeism, S.B. was in danger of not graduating with his class.
15. Respondent repeatedly addressed S.B.'s needs and attempted to provide a course of study that would enable S.B. to meet his potential and graduate with his class.

16. He was provided with an attendance exemption. His classes were hand-picked for him.
17. At one point S.B. expressed an interest in becoming an automobile mechanic upon graduation. Respondent arranged for an internship for the same. When S.B. objected as he did not want to work without pay, Respondent looked for a way to meet this requirement. S.B. would be paid after completing his internship hours. Three separate interviews were arranged for S.B. regarding the internship. He failed to attend any of them.
18. Respondent provided FAPE. S.B., through his excessive absenteeism and tardiness, failed to avail himself of the same.
19. S.B.'s current placement at PV is no longer appropriate to address his academic and emotional needs since he refuses to attend any program.

### **LEGAL ANALYSIS AND CONCLUSION**

Under the Individuals with Disabilities Education Act (2004) (IDEA), 20 U.S.C.A. § 1400 et seq., as amended by P.L. 10B-44L, children are entitled to a free and appropriate public education (FAPE) and to receive a meaningful education therein. In order to assure delivery of a FAPE, the IDEA requires school districts to provide an appropriate Individualized Educational Program (IEP) for each child with a disability.

Federal funding of state special education programs require the states to provide a FAPE to all disabled children. 20 U.S.C.A. § 1412. “[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 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 this 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 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.

It is abundantly clear that Respondent did all it could do to provide FAPE to S.B. Respondent continually amended the IEP to meet both the educational needs, and personal wishes, of S.B. Both S.B. and Petitioner participated in IEP meetings and approved the IEP, save the final IEP, where S.B. did not attend. That is the IEP that is the subject of the due process petition. At every turn, Respondent was thwarted in providing FAPE by the chronic absenteeism of S.B.

It should be noted that the due process petition asks that S.B. be permitted to remain at PV for his senior year, and that placement in the Knight School not take place. When the due process petition was filed it prevented Respondent from placing S.B. at the Knight School and S.B. was to remain at PV, pending the outcome of the due process petition. S.B. has not attended school since January 28, 2016.

### **ORDER**

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

This decision is final pursuant to 20 U.S.C.A. § 1415(l)(1)(A) and 35 CFR § 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); 35 CFR § 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.

September 9, 2016

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DATE

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**THOMAS R. BETANCOURT, ALJ**

**APPENDIX**

Witnesses:

For Petitioner:

D.B., petitioner

For Respondent:

Eva Merk, District Supervisor of Special Services

Frank Andrisani, Guidance Counselor

Exhibits:

For Petitioner:

None

For Respondent:

- R-1 Request for Mediation (Not in Evidence)
- R-2 Letter dated March 23, 2016, to Petitioner in response to due process petition
- R-3 IEP dated November 14, 2012
- R-4 IEP dated November 14, 2013
- R-5 IEP dated March 10, 2014
- R-6 IEP dated February 9, 2015
- R-7 IEP dated June 12, 2015
- R-8 IEP dated September 10, 2015
- R-9 IEP dated December 1, 2015
- R-10 IEP dated January 11, 2016
- R-11 2015-2016 Progress Reports (Not in Evidence)
- R-12 Psycho-Educational Evaluation
- R-13 Psychiatric Evaluation
- R-14 S.B.'s grades
- R-15 Standardized Test Scores (Not in Evidence)
- R-16 S.B.'s attendance records

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R-17 S.B.'s Student Conduct List

R-18 S.B.'s Student Schedule year 2015-2016