



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 06485-20

AGENCY DKT. NO. 2020-31731

L.B. ON BEHALF OF J.B.,

Petitioners,

v.

EDISON TOWNSHIP BOARD OF EDUCATION,

Respondent.

Esther Canty Barnes, Esq., for petitioner, (Rutgers University Special Education Clinic, School of Law, Newark, attorneys)

Rita F. Barone, Esq., for respondent (Flanagan, Barone & O'Brien, L.L.C., attorneys)

Record Closed: August 5, 2021

Decided: August 25, 2021

BEFORE **JOSEPH A. ASCIONE**, ALJ:

STATEMENT OF THE CASE

In this matter L.B. on behalf of J.B. (petitioners) bring an action for compensatory education against the Edison Township Board of Education (respondent), for the period from March 17, 2020 to June 18, 2020, as a result of the alleged loss of services due to the Covid-19 closure. J.B. the student, turned

twenty-one years of age in October 2019. This date was before the Covid-19 pandemic occurred. J.B. pursuant to an April 13, 2018, decision of the Office of Administrative Law, received an award of compensatory education from the Roselle School District, for eighteen-months. That compensatory education appears to have provided placement at the New Road of Somerset (New Road). J.B. moved to Edison in January 2019, Edison accepted the out-of-district placement at New Road, and provided transportation until in-person classes ceased due to the pandemic. New Road prepared an Individual Education Plan (IEP) which anticipated his graduation from Edison in June 2020, J.B. continues to receive compensatory education at New Road from the Roselle School District pursuant to the prior decision of this tribunal. The matter was filed in the state Office of Special Education Programs on June 15, 2020; and transmitted to the Office of Administrative Law (OAL) on July 15, 2020, as a contested matter. Various conferences were held with the tribunal in an attempt to resolve the matter. Respondent moved from summary disposition on June 9, 2021, the petitioner filed opposition papers on June 18, 2021. The parties dispensed with oral argument on August 5, 2021. The main issue is what standard is applied to determine if a school district provided a child with a free appropriate public education (FAPE) during the COVID-19 national health crisis?

BACKGROUND

J.B. reached the age of twenty-one in October 2020. At that time Edison had J.B.'s educational responsibility, the parents move into its district in January of 2020. J.B. is classified as autistic, and also suffers from attention deficit hyperactivity disorder. The parties anticipated his graduation in June of 2020. Services were provided by Edison at New Road up until its closure due to Covid-19. On-line services were provided from March 2020 through June 2020 at New Road. It appears J.B. did not take full advantage of these services, though it appears some counseling continued through June 2020. In June 2020, Edison conducted a virtual child study team meeting for J.B. The child study team review his performance reports provided by New Road. Edison offered extended school year at New Road for the summer of 2020. J.B. did not

take advantage of the offer. J.B. has obtained his driver's license and registered for Selective Service. J.B. had completed vocational training in copper network wiring. Edison graduated J.B. in June 2020. J.B. is eligible for services from the New Jersey Division of Vocational Rehabilitation Services (NJDVRS), and the New Jersey Division of Developmental Disabilities (NJDDD).

Edison maintains it has provided FAPE during the closure by on-line and other activities through New Road, and offered appropriate compensatory education in the form of the extended school year during the summer of 2020, and it has no further obligation under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §§ 1400-1.

FACTUAL FINDINGS

Based upon consideration of the documentary evidence presented, and the absence of objection to the certifications from either counsel, I **FIND** the following **FACTS**:

1. During the Covid-19 closures services were offered by Edison to J.B. at New Road, during the period from March 2020 through June 2020.
2. Some of those services were not used by J.B.
3. Services at New Road are continuing pursuant to a previous decision of this tribunal against Roselle Park in the form of compensatory education.
4. Edison virtually convened a child study team evaluation of J.B. in June 2020, offered an extended school years during the summer of 2020.
5. Petitioners' did not take advantage of this offer.
6. The State of New Jersey has additional opportunities for vocational and support services under programs from the NJDVRS and NJDDD.

7. Edison has “to the greatest extent possible” provided FAPE during the March 2020 to June 2020 period to J.B.

LEGAL ANALYSIS

The Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §§ 1400-1487, requires States to ensure that all children with disabilities have access to a free appropriate public education (“FAPE”) which is designed to meet their unique needs, and establishes procedural due process rights for the children. Each school district’s board of education must have policies, procedures, and programs to ensure that all students with disabilities between the ages of three and twenty-one have access to a FAPE and are educated to the maximum extent appropriate in the least restrictive environment (“LRE”). N.J.A.C. 6A:14-1.2(b). Education in the LRE requires, whenever possible, the child is educated in the regular educational environment with children who are not disabled, i.e., the child is included in the mainstream education system. N.J.A.C. 6A:14-4.2; 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. 300.114. See also Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist., 995 F.2d 1204, 1214 (3d Cir. 1993). An education is “appropriate” if it includes “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 203 (1982). In New Jersey, a FAPE must include both special education and any necessary related services, such as counseling, occupational or physical therapy, and speech-language services. N.J.A.C. 6A:14-1.1(b)(3), (d); N.J.A.C. 6A:14-3.9(a). See also 20 U.S.C. § 1401(9), (26)(A); 34 C.F.R. 300.34(a).

Once a student is determined to be eligible for special education and related services the local educational agency (“LEA”) must develop an individualized education program (“IEP”) which establishes the rationale for a student’s educational placement and serves as the basis for program implementation. N.J.A.C. 6A:14-1.3; -3.7. When determining if an IEP is appropriate, the court should look at the IEP actually offered, and not at the IEP which could have been offered. Lascari v. Ramapo Indian Hills Reg’l Sch. Dist., 116 N.J. 30, 46-47 (1989). An IEP is appropriate if it offers “more than a trivial or de minimis educational benefit,” and must provide “significant learning” and

confer a “meaningful benefit” to the disabled child when gauged in relation to the child’s potential. Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 182, 184-85 (3d Cir. 1988). See also Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 248 (3d Cir. 1999).

I. Implementing an IEP

In a typical due process hearing the school district has the burden to prove by the preponderance of the credible evidence that the proposed IEP was proper, and that the child was provided a FAPE. N.J.S.A. 18A:46-1.1; N.J.A.C. 1:6A-14.1(d). Lascari, 116 N.J. at 44; L.E. v. Ramsey Bd. of Educ., 435 F.3d 384, 391 (3d Cir. 2006). There are two possible violations of the IDEA, procedural and substantive. The reviewing court must determine (1) whether the school district complied with the IDEA’s procedural requirements and (2) whether the IEP was reasonably calculated to enable the child to receive a meaningful educational benefit. Rowley, 458 U.S. at 207; D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 564 (3d Cir. 2010). The petitioner claims that JB was denied a FAPE because he was not provided in-person services and was not provided some services required under his IEP. This would likely fall under a claim that a child’s IEP was not properly implemented, which is a substantive violation of the IDEA. See e.g., H.M. v. Haddon Heights Bd. of Educ., 822 F. Supp. 2d 439, 455 (D.N.J. 2011). As the petitioners claim there are no alleged procedural violations of the IDEA, the only issue is whether J.B. received a FAPE in the LRE. N.J.A.C. 6A:14-2.7(k).

In a claim that a school district failed to implement an IEP, the school district must show that any deviations from the IEP were not substantial or significant failures (i.e., a meaningful failure), such that the child was not denied a meaningful educational benefit. Melissa S. v. Sch. Dist., 183 F. App’x 184, 187 (3d Cir. 2006) (citing Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000. See also Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007). A meaningful failure means that the services provided to the child fell “significantly short of the services required by the child’s IEP.” Van Duyn, at 822. The child need not suffer a demonstrable educational harm to prevail, but the child’s lack of educational progress may be indicative of whether there has been a material failure to implement their IEP. Ibid. While this standard

allows LEAs some flexibility in implementing a child's IEP, it still holds the agencies accountable for material failures to provide the child a meaningful educational benefit. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000). Therefore, for a school district to defeat a claim that it failed to properly implement a child's IEP it must generally prove that:

“(1) the failure to implement [a substantial or significant provision of the IEP] was not a “complete” failure; (2) the variance from the special education and related services specified in the IEP did not deprive the student of a FAPE; and (3) the provision of special education and related services made meaningful progress toward the achievement of the specific goals stated in the IEP.”

[Leighty v. Laurel Sch. Dist., 457 F. Supp. 2d 546, 554 (W.D. Pa. 2006).]

II. Temporary IDEA Rules During COVID-19 Crisis

A. U.S. Department of Education Rules

In March 2020, the U.S. Department of Education issued an advisory document advising how LEAs should comply with IDEA regulations during the COVID-19 public health crisis. The document was not intended to impose additional requirements on LEAs, nor act as legally binding rules, but rather to provide informal guidance of the Department of Education's interpretation of the IDEA and its implementing regulations in the specific context of the COVID-19 health crisis. US Dept. of Educ., Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak, (Mar. 2020), <https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf>. The Department of Education provided that if an LEA continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE.” Id., at 2. The Department of Education stated that during this time schools were only required to ensure that “to the greatest extent possible, each student with a disability can be provided the special education and

related services identified in the student's IEP." Ibid.¹ IEP teams were encouraged (but not required) to develop contingency plans in the event their school closed due to the pandemic. Id. at 5. This could include providing special education and related services at an alternate location or online, with virtual instructions or instructional telephone calls, and identifying what services, if any, could be provided at the child's home. Ibid.

B. New Jersey Department of Education Rules

In 2019, New Jersey issued guidance rescinding prior guidance that allowed for certain therapy and speech-language services to be provided through tele-practice, instead requiring that school districts provide them only in-person.² It was not until April 2020 that the State Board of Education adopted a temporary rule allowing school districts and agencies to deliver special education and related services to students through tele-health, tele-medicine, electronic communications, remote, virtual, or other online platforms.³ (modifying N.J.A.C. 6A:14-1.1(d); 14-3.9(a); and 14-5.2). In June 2020, the N.J. Department of Education ("NJDOE") released an advisory document that "strongly encouraged" schools to provide additional special education and related services to students who were denied these services due to the pandemic.⁴ And for the students' IEP teams to meet with each student's parents or guardians to discuss the need for additional IDEA services based on the student's transition goals after the

¹ This standard has been previously advised by the Department of Education in 2018 for federal programs impacted by federally declared disasters. See, U.S. Dep't of Educ., Non-regulatory Guidance on Flexibility and Waivers for Grantees and Program Participants Impacted by Federally Declared Disasters, (Sept. 2018), at 13-15 ¶¶ C-1, C-2, C-3, C-5, <https://www2.ed.gov/policy/gen/guid/disasters/disaster-guidance.pdf>.

² NJ Dept. of Educ., Delivery of Related Services to Students with Disabilities Through Telepractice, (June 4, 2019), <https://www.nj.gov/education/broadcasts/2019/JUN/04/20166/Delivery%20of%20Related%20Services%20to%20Students%20with%20Disabilities%20Through%20Telepractice.pdf>.

³ NJ Dept. of Educ., Providing Special Education and Related Services to Students with Disabilities During Extended School Closures as a Result of COVID-19, (April 3, 2020), <https://www.nj.gov/education/broadcasts/2020/apr/3/Providing%20Special%20Education%20and%20Related%20Services%20to%20Students%20with%20Disabilities%20During%20School%20Closures%20as%20a%20Result%20of%20COVID-19.pdf>.

⁴ NJ Dept. of Educ., Providing Additional Services for Students with Disabilities Who Will Graduate or Exceed Eligibility for Special Education Services, (June 12, 2020), at 1, <https://www.nj.gov/education/broadcasts/2020/jun/12/Providing%20Additional%20Services%20for%20Students%20with%20Disabilities%20Who%20Will%20Graduate%20or%20Exceed%20Eligibility%20for%20Special%20Education%20Services.pdf>.

student graduated or aged out. Ibid. The NJDOE clarified that it did not have the ability to extend IDEA eligibility, but still encouraged school districts to consider students' need for continued or additional services after losing access to services with the closure of the schools. Id. at 2. In June 2021, the New Jersey Legislature passed S. 3434 (L. 2021, c. 109) now codified as N.J.S.A. 18A:46-6.3 which provided for additional public education and related services to students with disabilities who exceeded, or will exceed, the age of eligibility during the 2020-21 or 2021-22 school years. However, this bill does not provide for an additional year of special education and related services for those that aged out during the 2019-20 school year, and those students must instead depend on the NJDOE's advisory document from June 2020 unless the child was denied a FAPE and is entitled to compensatory education.

III. Applying the “Greatest Extent Possible” Standard

According to the U.S. Department of Education in interpreting the IDEA in light of the national public health crisis children with disabilities are required to be provided the same educational opportunities as children without disabilities to the greatest extent possible. Since there is no case law or agency decisions clarifying what falls under this standard it should be given its plain meaning. State v. Joas, 34 N.J.179, 187 (1961); Universal Underwriters Group v. Heibel, 386 N.J. Super. 307, 314 (App. Div. 2006); Lopez v. Santiago, 125 N.J. Super. 268, 270 (App. Div. 1973) (words in a statute are to be given their ordinary and well-understood meaning in the absence of explicit indication of special meaning); Downey v. Bd. of Educ. of Jersey City, 74 N.J. Super. 548, 553 (App. Div. 1962). See also Czar, Inc. v. Heath, 398 N.J. Super. 133, 138 (App. Div. 2008); State Dep't of Health v. Tegnazian, 205 N.J. Supr. 160, 175 (App. Div. 1985) (administrative regulations are subject to the same rules of construction as statutes).

Since New Jersey may have a higher standard for what qualifies as a FAPE (See Lascari, 116 N.J. at 47-48) the standard that a child must receive a meaningful educational benefit likely also applies to whether an LEA implemented a child's IEP to the greatest extent possible. And so, a “material failure” to implement may be found if the child did not make meaningful educational progress according to their IEP's stated

goals and benchmarks, and may be evidenced through grades, service logs, and other related reports. See Van Duyn, 502 F.3d at 822; Lascari, 116 N.J. at 47.; Polk, 853 F.2d at 184; Ridgewood Bd. of Educ., 172 F.3d at 248. See also, N.J.A.C. 6A:14-3.7(e)(6).

Here services were offered by Edison. One must look to the circumstances of the LEA's charged with implementing the IEP. Therefore, while a great deal of services may have, looking retrospectively, been possible for an LEA to provide, when weighing whether the LEA complied with the IDEA and provided a child with a FAPE, the fact finder should factor what the LEA believed was feasible at the point in time the alleged FAPE was denied rather than looking solely at what the LEA could have done. See Lascari, 116 N.J. at 46-47; Susan N. v. Wilson Sch. Dist., 70 F.3d 751, 762 (3d Cir. 1995). See also Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 (3d Cir. 1995) ("so long as the IEP responds to the [child's] needs, its ultimate success or failure cannot retroactively render it inappropriate."). Therefore, if the LEA can prove that any deviations from the child's IEP or any loss in meaningful educational progress were not a material failure then the LEA has met its burden of proof. See Van Duyn, 502 F.3d at 823 (a school promptly taking corrective action to remedy deviations from the listed IEP services may be sufficient to find there was no material failure); Bobby R., 200 F.3d at 349 (no IDEA violation found where IEP had not been perfectly implemented where academic performance had improved in some areas although it declined in others); Catalan ex rel. E.C. v. District of Columbia, 478 F. Supp. 2d 73, 76 (D.D.C. 2007) (although IEP was violated where therapist missed a handful of speech and language sessions and cut others short because of child's fatigue rendering the therapy unproductive, such deviations were not sufficiently substantial to constitute a FAPE deprivation).

It appears that J.B. received what services Edison, through New Road, initially could provide its students once in-person classes stopped through informational packets and remote learning and therapy (once permitted by temporary amendments to the State's rules), especially since J.B.'s schedule primarily consisted of out-of-school specialized internships. There is evidence in the record that J.B. was provided special education and related services and made some educational progress from March till

June 2020, although it is difficult to determine if these three months of schooling were as meaningful to J.B.'s education as they would have been before the school's closure. See Respondent's Ex. D.

Petitioner cites to D.S. v. Bayonne Bd. of Educ., to support their argument that the grades J.B. received in his fourth quarter of his 2019-20 school year should not be considered sufficient to prove he was provided a FAPE. 602 F.3d 553 (3d Cir. 2010). In D.S., the court finds that conclusive significance should not be given to a child's scores or advancement in grade if the child was not mainstreamed into the regular classroom and is instead taught separately in a classroom or "cluster" with only children with disabilities. Id. at 568. However, even when applying this rule, it appears that Edison did provide J.B. with a FAPE as evidenced in the progress notes, logs, and reports generated by New Road and seen in JB.'s Summary of Performance report. Respondent's Ex. D. While it is certain that J.B. did not receive the full benefits that his IEP was designed to provide after New Road went remote in March 2020, it also appears that any loss in IEP services and educational opportunities were de minimis and that Edison provided J.B. a FAPE to the greatest extent possible at the time.

IV. Compensatory Education

In the present matter Edison has claimed that they have no obligation to provide J.B. with a compensatory education even if was denied a FAPE during the months that New Road closed to in-person classes because J.B. aged out of the IDEA in the 2019-20 school year, and because J.B. has remained at New Road School with funding from Roselle. Respondent's Brief at 8.

The purpose of compensatory education is to "replace educational services the child should have received in the first place," and the remedy "should aim to place disabled children in the same position they would have occupied but for the school district's violation of the IDEA." Ferren C. v. Sch. Dist. of Philadelphia, 612 F.3d 712, 717-18 (3d Cir. 2010) (internal citations omitted). See also Ridgewood Bd. of Educ., 172 F.3d at 249. Compensatory education is due from the time the school district knew, or should have known, the student was not receiving a FAPE, but excluding the

reasonable time required for the district to remedy the problem. M.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389, 397 (3d Cir. 1996). Considering the purposes of compensatory education and the goals of the IDEA, a student that was deprived of a FAPE should still be entitled to compensatory education even if they have reached the age of twenty-one and aged out of the IDEA's coverage. Ridgewood Bd. of Educ., 172 F.3d. at 249; M.C. v. Central Reg. Sch. Dist., 81 F.3d 389, 395 (3d Cir. 1996); Carlisle Area Sch. Dist., 62 F.3d at 536.

If Edison had denied J.B. a FAPE, then it would be required to provide him with a compensatory education, regardless of whether he had already "gained back" any lost progress due to Roselle providing him a previously court ordered compensatory education.⁵

CONCLUSION

I **CONCLUDE** that Edison did provide FAPE to J.B. during the period from March to June 2020, and the New Road IEP had the capacity to address J.B.'s educational needs.

ORDER

It is hereby **ORDERED** that respondent's motion for summary disposition dismissing the petition is **GRANTED**, and


It is hereby further **ORDERED** that petitioner's claim for compensatory education for J.B. during the period from March 2020 through June 2020 is **DENIED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2019) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.516 (2019). If the parent or adult student feels that this decision is not being fully implemented with respect to

⁵ For a possible comparative case see N.P. v. East Orange Bd. of Educ., No. 06-5130 (DRD), 2011 U.S. Dist. LEXIS 11171, at *13-15 (D.N.J. Feb. 3, 2011) (discussing Neshaminy Sch. Dist. v. Karla B., No. 96-3865, 1997 U.S. Dist. LEXIS 3849 (E.D.Pa. Mar. 20, 1997)).

program or services, this concern should be communicated in writing to the Director, Office of Special Education Policy and Dispute Resolution.

August 25, 2021 _____
DATE



JOSEPH A. ASCIONE, ALJ

Date Received at Agency: August 25, 2021

Date Sent to Parties: August 25, 2021

JA/mmm