



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

GRANTING SUMMARY DECISION

OAL DKT. NO. EDS 09332-20

AGENCY DKT. NO. 2021-32175

J.S. o/b/o D.S.,

Petitioner,

v.

**BOARD OF EDUCATION OF THE
LENAPE REGIONAL HIGH SCHOOL
DISTRICT,**

Respondent.

Sean Benoit, Esquire, for petitioner (Community Health Law Project)

R. Taylor Ruilova, Esquire, on behalf of respondent (Comegno Law Group, LLP)

Record Closed: May 6, 2021

Decided: May 27, 2021

BEFORE **DEAN J. BUONO**, ALJ:

STATEMENT OF THE CASE

Petitioner J.S., on behalf of D.S., filed an Emergent Relief Application to compel the Lenape Regional High School District Board of Education (the District), to provide an

at-home nurse for D.S. during remote learning. This was based on the nursing service provision included in D.S.'s individualized education program (IEP).

This Court denied petitioner's application in the October 14, 2020, Order Denying Emergent Relief. The order concluded that petitioner did not meet the high threshold to obtain emergent relief. This was due to petitioner's failure to satisfy all four requirements for emergent relief as discussed in Crowe v. DeGoia, 90 N.J. 126 (1982) and codified at N.J.A.C. 6A:3-1.6.¹

Since this Court's denial of petitioner's emergent relief application, the District filed a motion for summary decision, stating that petitioner failed to state a claim for which relief can be granted, and that petitioner's application should be dismissed because the District continues to provide D.S. with a free and appropriate public education (FAPE) in accord with his May 2020 IEP.

PROCEDURAL HISTORY

Petitioner filed a request for emergent relief and a due process hearing at the State Office of Special Education Programs (OSEP). On October 6, 2020, OSEP transmitted the matter to the Office of Administrative Law (OAL) as a contested case seeking emergent relief for the petitioner. The parties presented oral argument on the emergent relief application on October 13, 2020, via Zoom teleconferencing system due to COVID-19 restrictions.

On October 14, 2020, petitioner's request for emergent relief was denied. A prehearing conference was conducted via telephone on October 15, 2020. On March 19, 2021, the Lenape Regional High School District Board of Education (the District) filed a motion for summary decision. On March 26, 2021, petitioner submitted an opposition brief addressing the District's motion, as well as a cross-motion for summary decision.

¹The October 2020 order concluded that 1) petitioner would not suffer irreparable harm by denying the requested relief, 2) petitioner did not demonstrate the existence of a settled legal right underlying her claim, 3) petitioner did not show likelihood of prevailing on the merits, and 4) the balance of equities and interests did not weigh in favor of granting the requested relief. The order was to remain in effect until a decision was issued.

The cross-motion argues that the District failed to provide proper written notice to D.S. when they unilaterally stopped providing a related service in his IEP, depriving him of FAPE.

On March 31, 2021, the District submitted an opposition brief to petitioner's cross-motion as well as a reply brief to petitioner's opposition to the District's motion for summary decision. On April 5, 2021, petitioner filed a reply brief to the District's opposition to petitioner's cross-motion.

The record closed on May 6, 2021, after a telephone conference.

FACTUAL DISCUSSION AND FINDINGS

D.S. is a nineteen-year-old, twelfth-grade special education student in the Lenape Regional High School District. (Certification of Joann Stratton (hereafter "J.S. Cert.") ¶4). Petitioner obtained guardianship of D.S. on July 17, 2020, in the Burlington County Surrogate's Court. (*Id.* at ¶3.).

D.S. is eligible for special education and related services under the classification of "multiply disabled." He has been diagnosed with Cerebral Palsy, Global Developmental Disorder, Epilepsy, and Type I Diabetes. (J.S. Cert. ¶5; Exhibit A, at p. 1).

Pursuant to his May 7, 2020, IEP, D.S. attends Kingsway Learning Center ("Kingsway") in Voorhees, which is an out-of-district placement. (Certification of Patricia Piserchia (hereafter Piserchia Cert.) ¶4; Cert. of J.S. ¶4; Exhibit A, at p. 1).

D.S. was diagnosed with Type I diabetes in 2014. Because of that diagnosis, coupled with D.S.'s other medical issues, D.S.'s medical providers deemed it "medically necessary" for D.S. to have "ongoing skilled nursing 16 hours a day (to include one-on-one nursing in school indefinitely)" due to his high risk of hypoglycemia and diabetic seizures. (Letter from Dr. Jeffrey Blackman, MD., Exhibit C, at p. 2; Letter from Kimberly Moyer-Shoe, MSN, CPNP, CDE, Exhibit B, at p. 1).

Since 2014, D.S. has needed the individual nurse at school. (Cert. of J.S. ¶6.) D.S.'s May 7, 2020, IEP for the 2020-21 school year lists, as a related service, the "Nursing Service: Individual" and that he receives such service "1 x Daily 360 min." (Exhibit A, at p. 1; J.S. Cert. ¶7; Piserchia Cert. ¶5). The "Special Alerts" section of D.S.'s IEP states that he requires the one-to-one nurse to monitor his seizure activity and glucose levels. (Exhibit A, at p. 1). D.S.'s in-school nurse has always been provided by Bayada Nursing Services. (J.S. Cert. ¶8).

In an April 15, 2020, letter from D.S.'s doctor in the Endocrine Department at DuPont Hospital for Children, D.S. is described as "unable to provide any self care for his type 1 diabetes" and that D.S. has an extreme high risk of hypoglycemia and has been using "multiple daily injections and Dexcom continuous glucose monitoring system to avoid risk of hypoglycemia and diabetes seizures." (Exhibit B, at p. 1). The letter states that D.S. will need nursing care no less than sixteen hours a day both at home and at a school setting. (Id.).

For the 2020-21 school year, petitioner decided that it would be in D.S.'s best interest for him to receive remote learning instruction during the COVID-19 pandemic, primarily due to his medical conditions which place him in a high-risk category. (J.S. Cert. ¶9).

Petitioner claims that at the end of August 2020, the Bayada case managers informed her that they were told that the District would not be paying for the individual nurse to come to D.S.'s home during school hours while D.S. receives remote instruction during the 2020-21 school year. (J.S. Cert. ¶10). Petitioner has continued to bring D.S. to Kingsway twice a week to receive the related services of occupational therapy, physical therapy, and assistive technology therapy. (J.S. Cert. ¶12). She claims that the District informed Bayada that the District will only pay for the nurse for the time that D.S. is physically in school for those services. (Id.).

The District claims that on or around September 9, 2020, the Director of Special Services for the District spoke to petitioner regarding the nursing service while D.S. participates in remote instruction at home. (Piserchia Cert. ¶11). During that conversation,

the Director claims that she “explained to Petitioner that D.S.’s IEP was written for in-person instruction in a school setting, and . . . only requires the nurse to ensure his safety when physically attending his out-of-district placement.” (Id. ¶12).

The Director claims that petitioner related that she serves as D.S.’s nurse during the night and had requested that the District provide a nurse so she could get some sleep while D.S. is participating in remote instruction at home. (Piserchia Cert. ¶13). The Director further alleges that she informed petitioner that it was not the District’s responsibility to provide a nurse “so [petitioner] can sleep during the day while D.S. is participating in remote instruction in his home.” (Id. ¶14).

Petitioner claims that the Director’s assertions that she “asked for the nurse so she can sleep during the day” is “not true.” (J.S. Cert. ¶13). Petitioner claims that when D.S. is not in school, he receives sixteen hours a day of Private Duty Nursing through Medicaid, and that petitioner is responsible for the other eight hours, which is typically at night. (Id.). Petitioner claims that she tried to explain this to the Director at the start of the 2020-21 school year. (Id.).

Petitioner further argues that the District did not hold any IEP meeting to change D.S.’s IEP or discuss the need for the nursing service at home. (J.S. Cert. ¶11). Nor did the District send petitioner anything in writing detailing this change, and by failing to provide notice and an opportunity for a Child Study Team meeting, petitioner was denied an opportunity to fully participate in D.S.’s education. (Id.). Petitioner claims that by failing to provide her with written notification of the change, she was not able “to file for due process within a timely manner to stop it from going into effect.” (Id.). Petitioner states that had she be given proper written notification she would have filed for stay-put. (Id.).

Petitioner states that the individual nurse is necessary for remote instruction because if D.S.’s glucose levels are too low or high, his cognitive functioning may become impaired and make it impossible for him to focus or function and participate in school. (J.S. Cert. ¶7). The District argues that D.S. does not require any regular or active medical interventions beyond such monitoring when he is outside of his home, and that the

provision of the nurse is not necessary for D.S. to otherwise access his educational programming and/or related services. (Pischerchia Cert. ¶7).

The District argues that because D.S.'s documented need for a nurse in the school setting is "purely medical, rather than educational," they recommended that petitioner seek to secure a nurse for his medical needs in the home through private insurance. (Pischerchia Cert. ¶15). Petitioner then filed an emergent relief application on October 6, 2020, seeking "a nurse in the home during virtual instruction as result of COVID 19." (Pischerchia Cert. ¶16).

Petitioner claims that without the nursing services, D.S. would not be able to participate in the virtual/remote school program, and because it is "clearly laid out as a related service in his IEP," the District must pay for the service to be provided at home. (J.S. Cert. ¶15-16).

This Court issued an Order Denying Emergent Relief on October 14, 2020, concluding that petitioner did not meet the high burden warranting the granting of emergent relief requiring the District to provide the nurse for home instruction. See Order Denying Emergent Relief, October 14, 2020.

The District argues that since petitioner's emergent relief application was denied, D.S. continues to receive all of his academic instruction in a remote setting, and that despite the fact that the nursing service has not been provided at D.S.'s home, D.S. is still "successfully participating in and accessing his remote virtual instruction." (Pischerchia Cert. ¶18-19). Teachers report that D.S. is attentive to daily sessions, such as morning meeting, and that he uses his voice and TouchChat HD app to answer questions. (Pischerchia Cert. ¶20-21). When lessons present D.S. with new information, he is provided with structured choices to assist his response, and such assistance is "required for full participation in all activities." (Id. ¶21-22). During live sessions, D.S. is reported to have a positive demeanor and can greet and engage with peers, especially with routine activities and high interest topics. (Id. ¶23). D.S. participates in all live sessions unless they conflict with his in-person therapies. (Id.).

Petitioner also claims that D.S. has been able to participate in the remote school throughout 2020-21 school year because “Bayada has continued to send the 1:1 nurse out to the home even though Lenape is not paying for it.” (J.S. Cert. ¶15). Petitioner states that “it is her understanding that Medicaid has been paying for it.” (*Id.*). She asserts, however, that it has been “made clear” that Medicaid is not necessarily responsible to pay, but that it is most likely occurring because she is fighting with the school district, and that as a “payer of last resort,” Medicaid must “see that [petitioner] is following through on the proper administrative remedies to get the responsible party to pay.” (*Id.*). Currently, D.S.’s Medicaid plan has authorized eight hours a day of private duty nursing while he is in school and then sixteen hours when he is not. (*Id.*).

LEGAL ANALYSIS AND CONCLUSION

I. The District’s Motion for Summary Decision

Pursuant to N.J.A.C. 1:1-12.5(b), a summary decision “may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” This rule is substantially similar to the summary judgment rule embodied in the New Jersey Court Rules, R. 4:46-2. See Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). In connection therewith, all inferences of doubt are drawn against the movant and in favor of the party against whom the motion is directed. *Id.* at 75. In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the New Jersey Supreme Court addressed the appropriate test to be employed in determining the motion:

[A] determination whether there exists a “genuine issue” of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The “judge’s function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” [Brill, 142 N.J. at 540 (citations omitted).]

The District argues that petitioner's application should be dismissed because the District continues to provide D.S. with FAPE in accordance with his May 7, 2020, IEP, and that it has been clearly demonstrated that D.S. has been successfully able to access and participate in remote instruction. Petitioner asserts that the District's failure to provide the individual nursing as a related service is a denial of FAPE.

I concur with the District for the reasons stated herein.

a. The Individuals with Disabilities Act (IDEA) and FAPE

Pursuant to the Individuals with Disabilities Education Act (IDEA), U.S.C. §§ 1400 to 1484, federal funding for New Jersey's special education programs is contingent on the State's providing a "free and appropriate education" (FAPE) to all age-eligible disabled students. 20 U.S.C. 1412(a); Hendrick Hudson Central Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 179 (1982). Since New Jersey receives federal funding, the federal requirements are codified at N.J.S.A. 18A:46-1 to -55 and N.J.A.C. 6A:14-1.1 to-10.2.

FAPE is defined in 20 U.S.C. 1401(9) as special education and related services provided at public expense, under public supervision and direction, and without charge, which meet the standards of the State educational agency and include an appropriate education in the State involved in conformity with the IEP required under 20 U.S.C.. 1414(d). The student's IEP is the centerpiece of the IDEA's system for delivering education to disabled children. D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 557 (3d Cir. 2010); see 20 U.S.C. 1412(a)(4).

An IEP contains a specific statement of a student's present abilities, goals for improvement, services designed to meet those goals, and a timetable for reaching the goals by way of the services. Holmes ex rel. Holmes v. Millcreek Twp. Sch. Dist., 205 F.3d 583, 589 (3d Cir. 2000) ((citing 20 U.S.C. § 1401(a)(20)). A FAPE provides a disabled student access to a "meaningful" education. See Rowley, 458 U.S. at 192.

New Jersey has adopted regulations implementing the IDEA, which provide that each district board of education is responsible for a system of free, appropriate special education and related services for students with disabilities age three through twenty-one. N.J.A.C. 6A:14-1.1(d). New Jersey follows the federal standard that the education offered must be enough 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).

b. D.S. Was Not Denied FAPE When He Transitioned to Remote Instruction Without the District's Provision of the Nursing Service

Petitioner requests an order requiring the District to pay for a nurse to attend D.S.'s remote instruction at home, which petitioner asserts is a related service for D.S. to access FAPE as stated in his IEP. Petitioner alleges that D.S. cannot participate in remote schooling at home without this nursing service. The District argues that by not paying for the nursing service for D.S.'s remote instruction, D.S. is not being denied a FAPE, primarily because such service constitutes medical care and is included in the IEP only to monitor his health conditions and ensure that D.S. is safe while physically attending school.

Nursing services are typically required as "related services" in an IEP to the extent such services are designed to enable a child with a disability to receive FAPE. N.J.A.C. 6A:14-3.9(a)(8).² The nursing service is already in D.S.'s IEP, which negates the claim

² This provision incorporates 20 U.S.C. 1401, which states that "related services" are supportive services that may be required to assist a child with a disability to benefit from special education. 20 U.S.C. 1401(26)(a). Such services may include speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, social work services, and **medical services**. *Id.* In Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883 (1984), the U.S. Supreme Court addressed the question of whether providing clean intermittent catheterization (CIC) to a student constituted a related service that a school district was required to provide under IDEA, or whether it was excluded as a related service because it was a "medical service" serving purposes other than diagnosis or evaluation. The Court found that the CIC procedure **was necessary for the child to remain in school, so it was a related service the State was required to provide**. In Cedar Rapids Cmty Sch. Dist. v. Garret F., 526 U.S. 66 (1999), cited by petitioner, the Court affirmed that absent an elaboration of the statutory terms more convincing than in Tatro, there is no good reason to depart from that settled law. Also, Third Circuit authority is consistent with Tatro and Garret F. For example, the Third Circuit concluded that a child's psychiatric stabilization was a necessary part of his educational program, which is a continuing, interrelated process in which his psychological difficulties and his education continue in tandem. The Court noted that without

that it is purely medical unconnected to D.S.'s access to FAPE. If that was the case, the District would have added the nursing service to an individualized health plan (IHP) for D.S. An IHP is used when a student has medical problems that require monitoring but nevertheless do not affect the student's ability to learn. See N.J.A.C. 6A:16-2.1(a)(10). Such plans are used when the requested service responds to purely medical issues as opposed to educational ones. E.I.H. v. Fair Lawn Bd. of Educ., 747 Fed. Appx. 68, 69-70 (3rd Cir. 2018). Here, the nursing service is clearly included in D.S.'s IEP as a "related service," thus it is necessary for D.S. to access FAPE **while in school**.

Therefore, the actual dispute between petitioner and the District hinges on how D.S.'s IEP should be implemented while he is "**in school**" **at home**, and whether D.S. has adequate access to a FAPE. The District, who bears the burden of proving that a FAPE has been offered, has shown that D.S. has been offered and has been able to achieve a FAPE during remote instruction. Petitioner has not provided any support to the contrary.

First, there is no sound legal basis to conclude that temporary remote instruction in this context should be treated identically to instruction in a school setting for IEP and FAPE purposes. In other words, there is no precedent that requires the District to implement a student's IEP fully for remote instruction necessitated by a national health emergency.

Instead, the New Jersey State Board of Education adopted temporary modifications to the New Jersey Administrative Code. These temporary modifications enhance the ability of school districts to satisfy their legal obligations to provide a FAPE to students with disabilities during a period of extended school closures resulting from COVID-19. See Temporary Modifications to Special Education Regulations, N.J.A.C. 6A:14 (adopted by the State Board of Education, April 1, 2020).

Regarding related services, the modified rules state that "[d]uring an extended public-health related school closure, related services **may** be provided through

the counseling and monitoring, the educational process could not take place. Twp. of Bloomfield Bd. of Educ. vs. S.C. ex rel T.M., 2005 U.S. Dist. LEXIS 21424 at *31.

telemedicine and telehealth, **or** through electronic communications, which include virtual, remote, or other online platforms, **as appropriate and as required by the student's IEP to the greatest extent possible.**" N.J.A.C. 6A:14-3.9(a) (emphasis added). This provision and others are intended to provide IEP teams with the flexibility necessary to implement services during unprecedented school closures. See [Providing Special Education and Related Services to Students with Disabilities During Extended School Closures as a Result of COVID-19](#), State of New Jersey Dep't of Education (April 3, 2020).

Further, both the Federal and New Jersey Departments of Education released nonbinding guidance on how to implement IEPs during this time. The U.S. Department of Education's Supplemental Fact Sheet emphasizes that federal disability law allows for flexibility in determining how to meet the individual needs of students with disabilities, and that **this determination may need to be different in this time of unprecedented national emergency.** See [Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities](#), U.S. Dep't of Education (March 21, 2020). The New Jersey Department of Education guidance similarly states that remote instruction and services must be consistent with the student's IEP **to the most appropriate extent possible.** See [New Jersey Specific Guidance for Schools & Districts](#), New Jersey Dep't of Education (April 13, 2020).

Here, despite keeping D.S. at home for remote instruction, petitioner has continued to send D.S. to school on a weekly basis to receive other related services in person, including physical therapy, occupational therapy, and augmentative communication services. Significantly, during these weekly in-person visits, the District continues to provide D.S. with the nursing service, per his IEP. These facts, which petitioner does not dispute, strongly support the claim that the District is in fact implementing D.S.'s IEP to the most appropriate extent possible while D.S. pursues remote instruction.

The District has also demonstrated that since petitioner initiated this action, D.S. has been able to participate effectively in remote instruction. Teachers report that D.S. is attentive to daily sessions and that he uses his voice and TouchChat HD app to answer questions. When lessons present new information, structured choices are provided to

D.S., which are necessary for him to fully participate. During live sessions, D.S. has a positive demeanor, greets peers and engages with them, and participates in all live sessions unless he is attending in-person therapy. In sum, D.S. has had full access to the remote curriculum and is reported to be progressing by his teachers. He actively participates in his remote instruction and has recorded a perfect attendance from August 2020 through February 2021. These facts strongly support that D.S. is accessing a FAPE while receiving remote instruction.

Significantly, petitioner has acknowledged that since shifting to remote instruction, Medicaid has, in fact, proffered the same nursing services to D.S. at home and that D.S. has been able to continue to participate in remote school throughout the 2020-21 school year. This admission **directly contradicts** petitioner's claim that D.S. is being denied a FAPE. Nothing in the record suggests that any harm to D.S. is occurring. Instead, petitioner makes an unsupported assertion that Medicaid **may** discontinue paying for the nurse, and that this hypothetical risk is enough to create a genuine dispute of fact regarding D.S.'s access to FAPE. However, no documentation has been provided to support this claim. Petitioner has not produced any evidence that D.S. is being or will be denied a meaningful educational benefit as required by FAPE because of this arrangement.

In sum, the District has plainly met their burden of showing D.S. is being provided a FAPE during this time, and that his IEP is being implemented **to the most appropriate extent possible** while D.S. is receiving remote instruction. Petitioner has not provided any evidence indicating otherwise. Thus, no genuine dispute of fact exists warranting an evidentiary hearing on the issue of whether D.S. is being denied FAPE, and the District's motion for summary decision is granted.

II. Petitioner's Cross-Motion for Summary Decision

Petitioner also filed a cross-motion for summary decision on the grounds that the District failed to provide proper written notice to D.S. when the District stopped providing the nursing service from D.S.'s IEP, thus depriving him of FAPE under IDEA.

Petitioner claims that the District's failure to follow proper procedures under the law requiring written notification of modifications to the IEP deprived petitioner of the ability to meaningfully participate in D.S.'s education and to properly challenge the action. The District argues that they did not modify D.S.'s IEP and that it is being implemented as written on May 7, 2020.

If a party alleges a procedural violation of IDEA, the 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. N.J.A.C. 6A:14-2.7(k). The determination of whether a procedural defect has deprived a student of a FAPE requires a court to consider the **impact** of the procedural defect, and not merely the defect per se.

Assuming this case involves a procedural violation of IDEA,³ nothing in the record as described above indicates that D.S.'s right to FAPE was impeded, that petitioner's opportunity to participate in the decision-making process was significantly impeded, or that D.S. was deprived of educational benefits warranting summary decision in favor of petitioner.

CONCLUSION

There are no genuine issues of material fact to be determined. As such, having reviewed the parties' submissions and argument in support of, and opposition to, the within motions for summary decision, **I CONCLUDE** that no issues of material fact exists and the District's motion for summary decision should be **GRANTED**.

³ Meaning, that the District improperly "modified" or "changed" D.S.'s IEP in violation of IDEA. However, this issue is not dispositive.

ORDER

It is **ORDERED** that the District's motion for summary decision be and hereby is **GRANTED**. It is **FURTHER ORDERED** that the instant petition be **DISMISSED WITH PREJUDICE**.

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

May 27, 2021
DATE



DEAN J. BUONO, ALJ

Date Received at Agency

Date Mailed to Parties:

mph