



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

**FINAL DECISION**

OAL DKT. NO. EDS 01039-22

AGENCY DKT. NO. 2022-33843

**M.P. and R.P. on behalf of C.P.,**

Petitioners,

v.

**BERNARDS TOWNSHIP**

**BOARD OF EDUCATION,**

Respondent.

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**M.P. and R.P. on behalf of C.P.,** petitioners, pro se

**Cherie L. Adams, Esq.,** for respondent (Adams, Gutierrez & Lattiboudere, LLC,  
attorneys)

Record Closed: April 7, 2022

Decided: May 23, 2022

BEFORE **JUDITH LIEBERMAN, ALJ:**

**STATEMENT OF CASE AND PROCEDURAL HISTORY**

On January 13, 2022, petitioners filed a due process complaint, pursuant to the Individuals with Disabilities Act (IDEA), 20 U.S.C. §§ 1400 to 1482, N.J.A.C. 6A:14-2.7, with the Department of Education (DOE), Office of Special Education (OSE). They seek

home instruction for their son, C.P.<sup>1</sup> They also seek compensatory services due to respondent's failure to meet with them to discuss their request. OSE transmitted the petition to the Office of Administrative Law, where it was filed on February 10, 2022, as a contested case. N.J.S.A. 52:14B-1 to B-15; N.J.S.A. 52:14F-1 to F-13.

A telephone prehearing conference was held on March 3, 2022, during which petitioners advised that they do not contest C.P.'s individualized education plan (IEP). Rather, they want the IEP to be implemented at home due to C.P.'s health and difficulty wearing a mask.<sup>2</sup> Respondent Bernards Township Board of Education (respondent or Board) advised during the conference that it intended to file a motion to dismiss the due process petition. A brief filing schedule was established and the hearing was scheduled for July 18, 2022.

On March 14, 2022, respondent filed a motion to dismiss, with a certification and documents, in which it argued that petitioners have not stated a cognizable claim under the IDEA or related State of New Jersey laws. 20 U.S.C. § 1415(c)(2)(A); 34 C.F.R. § 300.508(d); N.J.A.C. 6A:14-2.7(a). Petitioners filed a response on April 7, 2022, and the record for the motion closed that day.

### **FACTUAL DISCUSSION AND FINDINGS**

The following, taken from the parties' pleadings and briefs, is undisputed and I thus **FIND** the following as **FACT**:

M. P. and R. P. are the parents of C.P., who is seven years old and in the second grade in the Bernards Township School District. (March 10, 2022, Certification of Director of Special Services Jean O'Connell ("O'Connell cert.") at ¶ 4-5.) C.P. is eligible for special education and related services under the classification of autism. Id. at ¶6.

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<sup>1</sup> Petitioners filed separate petitions on behalf of their two other children. These petitions are not addressed here.

<sup>2</sup> To help prevent contracting the COVID-19 virus.

Petitioners' due process petition was filed pursuant the IDEA, 20 U.S.C. §§ 1400 to 1482<sup>3</sup> They asserted in their due process petition that C.P. is diagnosed with autism and expressive speech delay. He "is not able to be educated in school at this time, as he is not able to wear a mask due to his severe allergies. He is not able to breathe wearing a mask. [His] severe allergies put him at a compromised risk if he should contract Covid. [He] also has surgery coming up in March." Petition at 4. For these reasons, C.P. "has been working at home on the District curriculum from the [school district] website, as well as his IEP goals since September 2021." Ibid. Petitioners seek a meeting with the school district to discuss updating C.P.'s IEP to permit "home instruction with his educational program, supports, and the related services as per his IEP." Ibid. Petitioners also seek "compensatory services, since the District has declined to meet with [them] since November 1, 2021, to work together to resolve the situation." Ibid.

Respondent asserts that C.P. has been absent from school since September 2021, when petitioners asked if he could attend school virtually. O'Connell cert. at ¶31, 11. The District advised that students could not attend school virtually during the 2021-2022 school year without a documented medical authorization for home instruction. Id. at ¶11. In response, petitioners requested medical home instruction or virtual instruction for C.P. due to their concerns about the Covid-19 virus and the vulnerability of C.P.'s father, R. P. Ibid.

The District requested documentation of R.P.'s medical condition and C.P.'s medical needs. Id. at ¶12. Petitioners provided notes dated October 1, 2021, and October 5, 2021, in which doctors recommended remote instruction due to R. P.'s medical condition. Id. at ¶13. The District's school physician, Dr. Matthew J. Speesler, spoke with petitioners' pediatrician and concluded there was no basis to permit home or virtual instruction for C.P. He explained his decision in an October 13, 2021, letter. He noted that he unsuccessfully attempted to speak with R. P.'s pulmonologist on multiple occasions. Id. at ¶15, Exh. 1.

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<sup>3</sup> As noted, the petition was filed with OSE, with a DOE form that explained the filing requirements found in the IDEA. Petition at 1.

Petitioners were advised that their son was required to return to school, unless he were disenrolled. Id. at ¶14. On October 17, 2021, O'Connell advised petitioners by email that C. P. must return to school or face truancy charges. In an October 28, 2021, O'Connell advised petitioners:

As we have discussed, the State of New Jersey mandated that schools reopen for all students this 2021-2022 school year. As such all students are required to physically attend school. The only exception is where a student has an underlying individual health condition that puts him/her at an undue risk of exposure to Covid-19, or of exacerbated symptoms of exposed Covid, and which prevents him/her from attending school in person. The decision on whether there is a valid medical justification for the student to remain out of school is made by the school physician after reviewing the medical justification supplied by the family. As you are also aware, our school physician has reviewed the documentation you supplied and has found no medical justification to approve home instruction for your children as they do not have medical conditions meeting the above criteria.

We have previously advised you of this decision and have repeatedly requested that the children return to school immediately to prevent the need for further action. The District has specific obligations under the compulsory education laws that require it to initiate truancy charges[.] . . . Consequently, if your children do not return to school immediately and by no later than Monday, November 1, 2021, we will have no alternative but to initiate truancy charges and follow the required reporting procedures.

Id. at ¶17, Exh. 2.]

Despite this, C.P. did not return to school. Id. at ¶16. The District subsequently initiated truancy proceedings. Id. at ¶19.

Petitioners requested an IEP meeting, which was conducted on January 27, 2022. They requested that C.P. receive virtual instruction or home instruction that would implement the existing program and services in his IEP. Id. at ¶ 27. The District

determined that the IEP would not be amended and the case manager would “not make a determination relative to home instruction.” Id. at ¶28.

On January 28, 2022, C.P.’s pediatrician wrote, that C.P. has “been unable to effectively wear his mask due to sensory and developmental issues, and has repeatedly complained that he can’t breathe with the mask. Because he has not been consistently wearing his mask he is at increased risk for Covid-19 infection. Due to this and the communication barriers presented by the masking requirements in school, we would recommend that he receive home instruction.” Id., Exh. 3. The school physician spoke again with the pediatrician and received new medical notes. Id. at ¶ 23. The district denied the request for medical home instruction.

On February 24, 2022, Dr. Speesler wrote that, during his conversation with the pediatrician, he was advised that there had been no change in C.P. or R.P.’s medical condition since the date of his first letter, January 28, 2022. Dr. Speesler wrote that he was “denying home instruction since the criteria for home instruction has not been met, as outlined by the State of New Jersey Department of Education statutes.” Id., Exh. 4. Petitioners have not appealed this determination. Id. at ¶29.

## **LEGAL ARGUMENT AND CONCLUSION**

### **Parties Arguments**

Respondent moved to dismiss the petition because it does not state a cognizable claim under the IDEA or related state laws. N.J.A.C. 6A:14-2.7(a) provides, “a due process hearing may be requested when there is a disagreement regarding identification, evaluation, reevaluation, classification, educational placement, the provision of a free, appropriate public education, or disciplinary action.” Because the due process petition here does not challenge C.P.’s program, services, or placement, or even assert that the District violated the IDEA, it does not meet the standard for a due process petition in this context. Rather, petitioners request a different method for the implementation of his existing IEP, which they do not argue is insufficient or lacking in any way.

Respondent also asserts that, pursuant Executive Order 175, issued by Governor Murphy on August 13, 2020, New Jersey school districts are not permitted to offer virtual instruction as an option for the 2021-2022 school year, absent medical justification.

In response, petitioners assert that they seek an amendment to C.P.'s IEP that would allow for home instruction "since the District physician will not approve home instruction." Pet. Brf. at ¶1. Petitioners believe it is unsafe for him to be in school without a mask. Ibid. They contend that the District has not provided, in response to their requests, the specific basis for Dr. Speesler's determination, and moreover, that the doctor did not speak with them or C.P. before denying their request. Id. at ¶ 3, 9. They explain that C.P. was required to remain home, in quarantine with his family, in advance of his surgery which was scheduled for March 31, 2022, and for which a post-operative appointment was scheduled for April 20, 2022. Id. at ¶¶ 6-7. Finally, they assert that they were unaware until recently that they could appeal a medical determination. Id. at ¶4.

#### Standard of Review

Respondent sought, and was granted, leave to file a motion to dismiss, which requires an analysis of "whether a cause of action is suggested by the facts." Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)(citations omitted).

Because the matter arises on [respondent's] motion to dismiss, [the court must] accept as true the facts alleged in the complaint. . . . [Petitioners] are entitled to every reasonable inference in their favor. A reviewing court must "search the complaint in depth and with liberality to ascertain whether the fundamental cause of action may be gleaned even from an obscure statement of claim. . . ."

[Craig v. Suburban Cablevision, Inc., 140 N.J. 623, 625-26 (1995)(citations omitted).]

A motion to dismiss should only be granted in the rarest of instances. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 772 (1989). “If a complaint must be dismissed after it has been accorded . . . meticulous and indulgent examination . . . then, barring any other impediment such as a statute of limitations, the dismissal should be without prejudice to a [petitioner]’s filing of an amended complaint.” Ibid.

Pursuant to N.J. Court Rule 4:6-2<sup>4</sup>, if “matters outside the pleading are presented to and not excluded by the court, the motion [to dismiss] shall be treated as one for summary [decision] and disposed of as provided by R. 4:46, and all parties shall be given reasonable opportunity to present all material pertinent to such a motion.” See also Jersey City Educ. Ass’n v. City of Jersey City, 316 N.J. Super. 245, 253-54 (App. Div. 1998).

Summary decision may be granted “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.” N.J.A.C. 1:1-12.5(b). The New Jersey Supreme Court addressed the analysis, which requires:

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 himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.”

[Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 540 (1995)(quoting Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)).]

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<sup>4</sup> N.J.A.C. 1:1-1.3 permits the OAL to look to the Court Rules for guidance.

See also R. 4:46-2(c) (“An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact”).

Here, respondent presented a certification and exhibits in support of its motion. Consequently, the motion must be treated as a motion for summary decision.

### IDEA

The IDEA is intended to ensure that all children with disabilities have available to them a “free appropriate public education [FAPE] 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). The Act defines FAPE as special education and related services provided in conformity with the IEP. See 20 U.S.C. § 1401(9). A FAPE and related services must be provided to all students with disabilities from age three through twenty-one. N.J.A.C. 6A:14-1.1(d). A FAPE means special education and related services that: a) have been provided at public expense, under public supervision and direction, and without charge; b) meet the standards of the State educational agency; c) include an appropriate preschool, elementary, or secondary school education in the State involved; and d) are provided in conformity with the IEP. 20 U.S.C. § 1401(9); N.J.A.C. 6A:14-1.1 et seq. The local public school district is responsible for delivering the services. N.J.A.C. 6A:14-1.1(d).

A parent may file a due process petition to challenge a failure to provide FAPE. However, the scope of subjects of such a complaint is limited by regulation. N.J.A.C. 6A:14-2.7(a) provides, “a due process may be requested when there is a disagreement regarding identification, evaluation, re-evaluation, classification, educational placement, and the provision of a free appropriate public education or disciplinary action.” This is distinct from other school law matters, such as truancy. See e.g., N.J.S.A. 18A:38-27.

Therefore, while a child may be classified as eligible for special education, and thus have an IEP that governs the provision of his education and related services, there



can remain educational questions and issues that fall outside the scope of the IDEA. In C.R. and N.R. on behalf of E.R. v. South Brunswick Township Board of Education, 2019 N.J. AGEN LEXIS 202 (April 19, 2019), petitioners, parents of a minor child classified as eligible for special education services and who had an IEP, alleged that the child was not provided a FAPE because she was subjected to an illegal search and seizure, was bullied, and the school did not properly respond to the incidents. The ALJ found, “[D]espite claiming a denial of a FAPE, petitioners' original claim for relief did not set out how respondent failed to meet its burden to provide a FAPE pursuant to the IEP in place, and did not refer to identification, evaluation, reevaluation, classification or educational placement.” Id. at \*5. The ALJ found that, instead, the parents' claims related to areas of the law outside of the IDEA.

Here, it is undisputed that petitioners do not contest the propriety of C.P.'s IEP, which incorporated his evaluations, classification, and placement. Their statements during the prehearing conference and in their petition make it plain that they do not challenge the IEP. Their opposition to this motion reinforces that they seek implementation of the IEP at their home rather than at school, due to their concerns about C.P.'s health. The school laws, and not the laws governing special education, control. See N.J.S.A. 18A:6-9; N.J.A.C. 6A:3-1.3. I, therefore, **CONCLUDE** that this is not an issue that falls within the scope of permitted due process petitions.

I therefore **ORDER** that respondent's motion for summary decision is **GRANTED** and petitioners' due process petition is **DISMISSED**. Petitioners should pursue their claims in accord with the controlling school laws.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2021) 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 (2021). 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.

May 23, 2022  
DATE

  
JUDITH LIEBERMAN, ALJ

Date Received at Agency \_\_\_\_\_

Date Mailed to Parties: \_\_\_\_\_

JL/lam/mpb

**EXHIBITS:**

**OAL Exhibit 1:**

Letter dated June 9, 2022, to petitioners and respondent's counsel from Judith Lieberman, ALJ