



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

**FINAL DECISION**

OAL DKT. NO. EDS 07220-21

AGENCY NO. 2022-33244

**N.T. o/b/o K.D.,**

Petitioner,

v.

**MIDDLETOWN TOWNSHIP  
BOARD OF EDUCATION,**

Respondent.

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**Keri Avellini Donohue, Esq.**, for petitioner (Brain Injury Rights Group)

**Jared S. Schure, Esq.**, for respondent and cross-petitioner (Methfessel & Werbel, attorneys)

Record Closed: January 26, 2022

Decided: January 27, 2022

BEFORE **KIM C. BELIN**, ALJ:

**STATEMENT OF THE CASE**

This matter arises out of the Individuals with Disabilities Education Act, (IDEA) 20 U.S.C.A. §§1401 to 1484. N.T., the parent of petitioner K.D., (K.D.) contends that Middletown Township Board of Education (Middletown) failed to provide K.D. with a free and appropriate public education (FAPE), and unilaterally changed K.D.'s placement to

virtual/remote learning without proper notice to or consent from N.T. in violation of the “stay put” provisions of the IDEA and Section 504 of the Rehabilitation Act of 1973 (Section 504) (citation omitted). In addition, N.T. seeks unspecified independent educational evaluations, compensatory education, and reimbursement of all costs. Middletown contends in its cross-petition that additional independent educational evaluations are unwarranted.

### **PROCEDURAL HISTORY**

N.T., o/b/o K.D. filed a Petition of Appeal, dated July 26, 2021, with the Commissioner of Education. The Department of Education (DOE) transmitted this matter as a contested case to the Office of Administrative Law (OAL) where it was filed on August 26, 2021. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

Middletown filed its answer and cross-petition dated August 3, 2021. The DOE transmitted this matter as a contested case to the OAL where it was filed on August 26, 2021. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Middletown’s cross-petition remains pending and will be adjudicated separately if not withdrawn.

A telephone prehearing conference was held with the parties on November 1, 2021, where counsel for K.D. did not deny failing to respond to Middletown’s discovery requests and agreed to provide responses to the discovery requests by November 5, 2021. A subsequent telephone status conference was scheduled for November 15, 2021.

At the November 15, 2021, telephone status conference counsel for Middletown acknowledged that he received documents, but they were unresponsive to his requests. Counsel for K.D. requested additional time to respond and indicated that she may request to withdraw the petition without prejudice. The parties agreed to reconvene on November 29, 2021. However, counsel for K.D. failed to appear at that status conference call.

On November 30, 2021, counsel for K.D. sent an email to the undersigned apologizing for missing the conference call and agreeing to make herself available for another conference call. Middletown, on this same date, requested leave to file a motion

for sanctions to dismiss petitioner's petition due to counsel's failure to provide discovery. On December 1, 2021, the undersigned directed counsel for K.D. to provide the overdue discovery by December 6, 2021, and scheduled a status telephone conference with counsel for December 7, 2021. However, counsel for K.D. failed to provide the requested discovery on December 6, 2021, and failed to appear at the status telephone conference on December 7, 2021.

On December 8, 2021, Middletown filed the present motion for sanctions for failure to produce discovery. On January 21, 2022, the undersigned sent notice to petitioner's counsel advising her that Middletown's motion for sanctions would be granted if she failed to submit a response before January 27, 2022. To date, counsel for K.D. has failed to submit a response.

### **FACTUAL DISCUSSION AND FINDINGS**

The following FACTS are undisputed and I, therefore **FIND**:

1. K.D. is a student who resides within the Middletown School District and was deemed eligible as of March 2020, for special education services and related services under the classification of Specific Learning Disability. (Middletown Cross-petition, ¶2.)
2. K.D. has not attended public school in Middletown since the 2019-2020 school year but was voluntarily removed by his parent, N.T. and enrolled in a Catholic school as of July 2020. Id. at ¶4.
3. In a letter dated July 26, 2021, counsel for K.D., filed a request for a due process hearing. Middletown, through its counsel, filed its answer and cross-petition on or about August 3, 2021.

4. In a letter dated October 1, 2021, Middletown submitted a request for documents to counsel for K.D. (Exhibit A, Letter Brief for Motion for Sanctions.<sup>1</sup>)
5. Having received no response, Middletown, through its counsel sent a letter dated October 25, 2021, to counsel for K.D. indicating that her responses were overdue and seeking a date certain when the responses would be submitted. (Motion, Exhibit B.)
6. On November 1, 2021, the parties had a telephone prehearing conference with the undersigned. During this conference call counsel for K.D. acknowledged her failure to provide the documents, apologized for not being responsive and agreed to provide the requested discovery by November 5, 2021. Another status conference call was scheduled for November 15, 2021.
7. On November 15, 2021, counsel for K.D. sent an email to counsel for Middletown containing responses to Middletown's notice to produce. (Motion, Exhibit C.)
8. At the November 15, 2021, status telephone conference counsel for Middletown acknowledged that he received the documents but found them unresponsive. Counsel for K.D. requested additional time to submit responsive documents. This request for additional time was granted and the parties agreed to reconvene on November 29, 2021.
9. In a letter dated November 18, 2021, counsel for Middletown stated that the documents provided by K.D., through his counsel were "willfully and manifestly non-responsive and fail[ed] to address virtually every enumerated request made by the Board." The letter also advised that if responsive documents were not received by November 29, 2021, counsel for Middletown would file a motion to compel discovery and/or a motion for sanctions. (Motion, Exhibit D.)
10. On November 29, 2021, counsel for K.D. failed to appear at the status telephone conference.

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<sup>1</sup> Hereinafter "Motion."

11. On November 30, 2021, counsel for K.D. emailed the undersigned's assistant and copied opposing counsel explaining and apologizing for missing the conference call and agreed to make herself available for another conference call. (T-1.)<sup>2</sup>
12. Middletown submitted a letter dated November 30, 2021, to the undersigned requesting a briefing schedule and leave to file a motion for sanctions to dismiss petitioner's petition due to counsel's willful failure to provide discovery. (Motion, Exhibit E.)
13. On December 1, 2021, the undersigned responded via email to the parties stating that in light of counsel's explanation for missing the conference call, she was directed to provide the overdue discovery by December 6, 2021, and a status conference call was scheduled for December 7, 2021. (Motion, Exhibit F.)
14. However, counsel for K.D. failed to submit discovery on or by December 6, 2021, and failed to appear at the status telephone conference on December 7, 2021.
15. On January 21, 2022, the undersigned sent an email to counsel for K.D. indicating that Middletown's motion would be granted on January 27, 2022, if she failed to submit a written response to the present motion before that date. (T-2.)

### **LEGAL ANALYSIS AND CONCLUSIONS**

Parties in a contested case are to "commence immediately" to exchange information and discovery requests must be responded to within fifteen days of notice and service. N.J.A.C. 1:1-10.4(a). In addition, discovery must be completed no later than ten days before the first scheduled evidentiary hearing or by such date ordered by the judge. N.J.A.C. 1:1-10.4(e). Here, Middletown served discovery requests on the petitioner on October 1, 2021. (Motion, Exhibit A.) It is factually undisputed that these requests were not responded to in a timely manner, which is the basis for the present

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<sup>2</sup> "T" refers to Tribunal exhibit.

motion. It is equally undisputed that counsel for the petitioner did not object to the Middletown's discovery requests as permitted in N.J.A.C. 1:1-10.4(d).

An ALJ may dismiss a petition for a party's failure to comply with procedural requirements under N.J.A.C. 1:1-14.14(a)(1). J.G. v. Paramus Bd. of Educ., 2008 U.S. Dist. LEXIS 30030, \*9 (D.N.J. April 11, 2008). While dismissal should be imposed sparingly in the case of discovery rule violations, it is nonetheless appropriate where a party's "ability to defend his case is seriously impaired." Zaccardi v. Becker, 88 N.J. 245, 253 (1982). In his petition, K.D. asserts that Middletown failed to provide him with a FAPE and violated Section 504 by unilaterally changing his placement from in class learning to virtual/remote learning due to the COVID-19 pandemic. (P-1.) In addition, the petition contends that this change violates K.D.'s Individual Education Plan (IEP) which does not provide for remote special education services resulting in a loss in educational benefits to K.D.'s detriment. Id.

Among the discovery sought by Middletown are copies of all records and documents petitioner intends to rely upon to substantiate his claims and allegations including all individualized services plans, Section 504 plans and IEPs developed during the school years K.D. was not enrolled in Middletown. (Motion, Exhibit A, ¶10, 11, 26, 27.) Middletown requested all documents that would substantiate the allegation that Middletown failed to provide K.D. with a FAPE, and documents substantiating the claim that remote learning was detrimental to K.D. (Id. at ¶25.) Middletown asserts that the absence of the petitioner's discovery responses is "highly prejudicial." (Motion, at 5.)

The discovery being sought in this matter is directly relevant to the petitioner's claims and Middletown's ability to form a defense to those claims. It is uncontested that the petitioner failed to provide responsive documents to Middletown discovery requests. There is no showing that the petitioner's failure to respond to Middletown's discovery requests was a mere oversight or neglect. Savoia v. F.W. Woolworth Co., 88 N.J. Super. 153, 160 (App. Div. 1965). Indeed, a review of the documents provided by petitioner's counsel reveal that not a single document relates to whether K.D. received a FAPE in the least restrictive environment as mandated by law. N.J.A.C. 6A:14-1.1 et seq. Rather, every document is related to guidelines for school districts on continuing educational

services to general education students and children with disabilities during the Covid-19 pandemic. Specifically, included were:

- Supplemental Fact Sheet dated March 21, 2020, from the U.S. Department of Education;
- Q&A on Providing Services to Children with Disabilities during the Coronavirus Disease 2019 Outbreak; Executive Order 104;
- Supplemental Guidance regarding requirement for Public Health-Related School Closure dated March 13, 2020;
- Notice of Rule Waiver from NJ DOE dated April 1, 2020;
- Providing Special Education and Related Services with Disabilities During Extended School Closures as a result of COVID-19 dated April 13, 2020;
- Parental Waivers for the Delivery of Remote or Virtual Special Education and Related Services dated April 30, 2020;
- Guidance for Summer Learning Programs dated June 12, 2020;
- The Road Back Restart and Recovery Plan dated July 24, 2020;
- Executive Order No. 214; COVID-19 Public Health Recommendations for Local Health Department for K-12 Schools;
- Letter dated July 1, 2020, from the U.S. Department of Education to former Commissioner Repollet without enclosures;
- 2020 IDEA Basic and Preschool Grant Awards by District, Charter School and State Agency;
- Letter dated July 1, 2020, from the U.S. Department of Education to former Commissioner Repollet with enclosures;
- Annual State Application under Part B of the IDEA;
- List of State-Imposed Special Education Rules, Regulations or Policies dated March 16, 2021
- February 2021 Document Informing LEAs of State-Imposed Rules, Regulations not required by IDEA or Federal Regulations
- Year of Age Cohort (ages 3 – 21) for which FAPE is ensured;
- Section V.B. Significant Disproportionality Reporting Form; and

- Fiscal Years 2020-2022 State Tables for the US. Department of Education.  
(Motion, Exhibit C.)

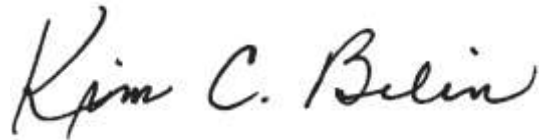
Middletown did not request any of the documents in this exhaustive list which suggests that petitioner's counsel was intentionally evasive and willfully non-responsive.

Accordingly, I **CONCLUDE**, that the petitioner has effectively abandoned his claim in this matter. Such dilatory conduct from the party who initiated the claim constitutes behavior that "thwarts persistent efforts to obtain the necessary facts" and justifies a claim's dismissal with prejudice. Abtrax Pharmaceuticals, Inc. v. Elkins-Sinn, Inc., 139 N.J. 499, 515-16 (1995). I **FURTHER CONCLUDE** that the petitioner's refusal to provide discovery in this matter impairs Middletown's ability to properly prepare and present a defense to the petitioner's claims, and such conduct justifies dismissal of the petition due to these procedural deficiencies. J.G., 2008 U.S. Dist. LEXIS 30030 at \*11. See also H.F. obo Minor Child D.F. v. Bd. of Educ. of Teaneck, Bergen County, EDU 20234-15, Initial Decision, (September 28, 2016) <http://lawlibrary.rutgers.edu/oal/search.html>.



**ORDER**

Based on the foregoing, Middletown Township Board of Education's motion for sanctions is hereby **GRANTED** and petitioner's petition is **DISMISSED WITH PREJUDICE**.



January 27, 2022 \_\_\_\_\_

DATE

\_\_\_\_\_ **KIM C. BELIN, ALJ**

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

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

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**APPENDIX**  
**EXHIBITS**

**For petitioner:**

P-1 Petition, dated July 26, 2021

**For respondent:**

R-1 Answer and cross-petition, dated August 3, 2021

R-2 Letter brief for Motion for Sanctions, dated December 8, 2021, with exhibits

**For Tribunal:**

T-1 Email, dated November 30, 2021, from Keri Donohue, Esq.

T-2 Email, dated January 21, 2022, from ALJ's chambers to counsel