



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

**FINAL DECISION**

OAL DKT.NO. EDS 13897-23

AGENCY DKT. NO. 2024-36788

**A.Z. AND C.Z. on behalf of A.Z.,**

Petitioner,

v.

**LIVINGSTON TOWNSHIP BOARD**

**OF EDUCATION,**

Respondent.

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**Barry E. Janay**, Esq. for petitioners (Law Offices of Barry E. Janey, attorneys)

**Isabel Machado**, Esq., for Respondent, (Machado Law Group, attorneys)

BEFORE **KIMBERLY A. MOSS**, ALJ:

Record closed: January 12, 2024

Decided January 25, 2024

This matter having come before the Office of Administrative Law by Isabel Machado, Esq., attorney for Livingston Township Board of Education (Respondent or District) on a Motion to Dismiss. The petition was filed with the Office of Administrative Law on December 12, 2023. On or about December 8, 2023, respondent filed its motion to dismiss for failure to state a claim. Petitioner filed opposition to the motion on January 8, 2024. Respondent replied to the opposition on January 12, 2024.

Petitioner filed a due process petition alleging that L.A. was not provided with a free and appropriate public education (FAPE), reimbursement of school costs for the unilateral placement of A.Z. at Morristown Beard School (MBS) and that A.Z. remain at MBS with the District paying the costs.

### **FACTUAL DISCUSSION**

Having reviewed the submissions in favor or and in opposition to the motion to dismiss, I **FIND** the following **FACTS**:

A.Z. is a Livingston resident. A.Z. previously attended Livingston public school from kindergarten through fifth grade (2015-2016 school year through 2020-2021 school year.)

In 2018 petitioners informed the district that A.Z. had an auditory processing disorder and requested accommodation with her nondisabled peers. On December 10, 2018, A.Z. was referred to the District's child study team (CST). The District sent petitioners an invitation to initial identification and planning meeting on December 13, 2018. A copy of the New Jersey Department of Education's Parental Rights in Special Education (PRISE) was enclosed with the December 13, 2018, initial identification, and planning meeting notice.

Petitioner C.Z. attended the January 2, 2019, meeting. The District determined that A.Z. did not qualify for an Individualized Education Plan. A.Z. was not suspected of having a disability which adversely affected her educational performance. A.Z. was meeting grade level benchmarks for reading and writing and was on grade level in math.

A.Z. was given a 504 plan. As part of the 504 plan, A.Z. was to be provided with written notes in advance of class, given additional time on exams and quizzes, and the ability to take times exercises in a separate quite room. She was also permitted to leave school on specific days to attend out-of-school supplemental programing paid for

by petitioners. Petitioners asked the District to either offset the cost of the supplemental programing or provide A.Z. with the supplemental program. The District declined.

In the Spring of 2020, the District moved all students to remote learning. The 2020-2021 school year would be on a rotating basis hybrid model. On several occasions A.Z. was not provided with the accommodation provided by the 504 plan. Petitioners complained to A.Z.'s teachers and were told they would accommodate her where possible. Petitioners spoke to the principal who reiterated what they were told by the teachers. A.Z.'s grades suffered, and she became increasingly upset and depressed. A.Z. was moved to remote learning, but this did not help.

On July 1, 2021, petitioners withdrew A.Z. from the Livingston Public School District. A.Z was enrolled in MBS. Since beginning at MBS, A.Z.'s grades and mental health have improved.

On August 10, 2023, petitioner wrote to each member of the Livingston Board of Education requesting reimbursement for the expenses paid for MBS.

### **LEGAL ANALYSIS AND CONCLUSION**

N.J.A.C. 6A:3-1.5(g) provides:

Nothing in this section precludes the filing of a motion to dismiss in lieu of an answer to a petition, provided that such motion is filed within the time allotted for the filing of an answer. Briefing on such motions shall be in the manner and within the time fixed by the Commissioner, or by the ALJ if the motion is to be briefed following transmittal to the OAL.

N.J.A.C. 6a:3-1.10 provides:

At any time prior to transmittal of the pleadings to the OAL, in the Commissioner's discretion or upon motion to dismiss filed in lieu of answer, the Commissioner may dismiss the petition on the grounds that the petitioner has advanced no cause of action even if the petitioner's factual allegations are accepted as true or for lack of jurisdiction, failure to prosecute or other good reason.

On a motion made pursuant to R. 4:6-2(e) "the inquiry is confined to a consideration of the legal sufficiency of the alleged facts apparent on the

face of the challenged claim." *P. & J. Auto Body v. Miller*, 72 N.J. Super. 207, 211 (App.Div.1962). The court may not consider anything other than whether the complaint states a cognizable cause of action. *Ibid.* For this purpose, "all facts alleged in the complaint and legitimate inferences drawn therefrom are deemed admitted." *Smith v. City of Newark*, 136 N.J. Super. 107, 112 (App.Div.1975). See also *Heavner v. Uniroyal, Inc.*, 63 N.J. 130, 133 (1973); *Polk v. Schwartz*, 166 N.J. Super. 292, 299 (App.Div.1979). A complaint should not be dismissed under this rule where a cause of action is suggested by the facts and a theory of actionability may be articulated by way of amendment. *Muniz v. United Hsps. Med. Ctr. Pres. Hsp.*, 153 N.J. Super. 79, 82-83 (App.Div.1977). However, a dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted. *Reider v. State Department of Transportation* 221 N.J. Super. 547,522 (App.Div. 1987)

N.J.A.C. 6A:14-2.7(a)(1) provides:

A due process hearing is an administrative hearing conducted by an administrative law judge. For students age three through 21, 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. For students above the age of 21, a due process hearing may be requested while the student is receiving compensatory educational or related services.

1. A request for a due process hearing shall be filed within **two years** of the date the party knew, or should have known, about the alleged action that forms the basis for the due process petition. The two-year period for filing for a due process hearing may be extended by an administrative law judge if:

i. A district board of education specifically misrepresented to the parent that the subject matter of the dispute was resolved to the parent's satisfaction; or

ii. The district board of education withheld information that was required by law to be provided to the parent.

In this matter, there was nothing in the petition that stated that District provided petitioners with information that delayed the filing of the due process petition. Petitioner took A.Z. out of the District because they believed that the District would not comply with the 504 plan. Petitioners were given the PRISE information in December 2018. There is no indication that the District withheld any information which caused petitioners to delay in filing the due process petition.

I **CONCLUDE** that petitioners filed the due process petition after the two-year statute of limitations and do not fall within the exceptions to the statute of limitations.

N.J.A.C. 6A:14-2.10 provides:

(a) Except as provided at N.J.A.C. 6A:14-6.1(a), the district board of education shall not be required to pay for the cost of education, including special education and related services, of a student with a disability if the district board of education made available a free, appropriate public education and the parents elected to enroll the student in a nonpublic school, an early childhood program, or an approved private school for students with disabilities.

(b) If the parents of a student with a disability who previously received special education and related services from the district of residence enroll the student in a nonpublic school, an early childhood program, or approved private school for students with disabilities without the consent of, or referral by, the district board of education, an administrative law judge may require the district board of education to reimburse the parents for the cost of enrollment if the administrative law judge finds that the district board of education had not made a free, appropriate public education available to the student in a timely manner prior to enrollment and that the private placement is appropriate.

1. A parental placement may be found to be appropriate by a court of competent jurisdiction or an administrative law judge pursuant to N.J.A.C. 6A:14-6.5 for placements in unapproved schools, even if the parental placement does not meet the standards that apply to the education provided by the district board of education.

(c) The parents must provide notice to the district board of education of their concerns and intent to enroll their child in a nonpublic school at public expense. The cost of reimbursement described at (b) above may be reduced or denied:

1. If, at the most recent IEP meeting that the parents attended prior to the removal of the student from the public school, the parents did not inform the IEP team that they were rejecting the IEP proposed by the district board of education;

2. If, at least 10 business days (including any holidays that occur on a business day) prior to the removal of the student from the public school, the parents did not give written notice to the district board of education of their concerns or intent to enroll their child in a nonpublic school;

3. If, prior to the parents' removal of the student from the public school, the district board of education proposed a reevaluation of the student and provided notice pursuant to N.J.A.C. 6A:14-2.3(g) and (h), but the parents did not make the student available for the reevaluation; or

4. Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(d) The cost of the reimbursement for enrollment in a nonpublic school shall not be reduced or denied if the parents failed to provide the required notice described in (c)1 and 2 above if the conditions in (d)3 and 4 below are met, and, at the discretion of a court or an administrative law judge, may not be reduced if the conditions in (d)1 and 2 below are found to exist:

1. The parent cannot read and/or write in English;
2. Compliance with the notice requirement in (c)1 and 2 above would likely result in physical or serious emotional harm to the student;
3. The district board of education prevented the parent from providing the notice specified in (c)1 and 2 above; or
4. The parent had not received written notice according to N.J.A.C. 6A:14-2.3(e) and (f) of the notice requirement that is specified in (c)1 and 2 above.

Here, A.Z. was not receiving special education services in the District. She did not have an IEP. Even if she was receiving special education services, petitioners did not provide notice to the district board of education of their intent to enroll their child in a nonpublic school at public expense. Petitioners sent letters to the District requesting that the District pay for A.Z.'s nonpublic school education expenses two years after they withdrew her from the District.

Accordingly, I **CONCLUDE** that A.Z. was not receiving special education services and even if she was petitioner did not provide ten days' notice prior to her removal from the District.

It is therefore **ORDERED** that the respondents' motion to dismiss the petition be and hereby is **GRANTED**.

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.

January 25, 2024



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DATE

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**KIMBERLY A. MOSS, ALJ**

Date Received at Agency:

January 25, 2024

Date Mailed to Parties:  
ljb

January 25, 2024