State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDS 09244-19

AGENCY DKT. NO. 2019 30077

M.R. ON BEHALF OF M.M.,

Petitioners,

v.

UNION TOWNSHIP BOARD OF EDUCATION,

Respondent.

Julie Warshaw, Esq., for petitioner (Warshaw Law Firm, LLC, attorneys)

Christine Soto, Esq., for respondent (Florio, Perrucci, Steinhardt and Cappelli, LLC, attorneys)

Record Closed: December 13, 2019 Decided: January 3, 2020

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In accordance with the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1415, M.R. has requested a due process hearing on behalf of her son, M.M., who is classified as eligible for special education and related services. The request for due process was received by the Office of Special Education Programs (OSEP) on

June 10, 2019. The contested case was transmitted to the Office of Administrative Law (OAL), where it was filed on July 10, 2019. M.R. disagrees with an Individualized Education Plan (IEP) dated May 14, 2019. The IEP continued homebound instruction for M.M. but omitted behavioral intervention services contained in the prior IEP. And at the time of filing, M.M. was not receiving the promised instruction, and the parties could not reach agreement on how to facilitate its resumption.

The petition also raised claims that were not justiciable in this forum; to include tort claims and a claimed violation of the Anti-Bullying Act. N.J.S.A. 18A:37-14. These extraneous claims somewhat obfuscated petitioner's viable IDEA concerns, but after conferencing with counsel, I was able to frame the issue before me in a Prehearing Order dated October 7, 2019, as follows:

> In light of the fact that M.M. is not in school, I advised counsel that the hearing will focus on determining what educational services should be provided to M.M. at this time, and what relief is required to ensure that such services can be properly delivered to him. It appears that both parties agree that homebound instruction is appropriate but cannot agree on how to facilitate the exchange of information needed to support development of a homebound IEP.

I received no objection from counsel to the form of the Prehearing Order. During a subsequent telephone conference with counsel, I was informed that homebound had resumed and that the Board had offered extra hours of instruction as compensatory education.

The Union Township Board of Education ("the Board") asserts that the issues raised by the petition thus have been resolved, rendering the matter moot. The Board moreover asserts that the OAL is without jurisdiction to adjudicate any remaining claims in the petition. The Board filed a Motion for Summary Decision on November 25, 2019, and petitioner opposed the motion via letter brief and certifications on December 2, 2019. The Board replied to the opposition on December 13, 2019, and the record closed.

FINDINGS OF FACT

The salient facts are not in dispute, and I **FIND**:

M.M. is a twelve-year-old student who has been diagnosed with Autism, generalized anxiety disorder and agoraphobia. He has been classified as eligible for special education and related services since 2011, under the eligibility category "autistic." M.M. previously received services in an in-district self-contained classroom; he progressed successfully enough that, in the Fall of 2017, all agreed to a transition to a general education classroom for the fifth grade with two resource pull-outs per day. But the transition went poorly and by April 2018, M.M. was placed on home instruction. School personnel and M.M.'s mother began to explore an out-of-district placement. M.M. was accepted at the Gateway School, and the parties agreed to placement there. But M.M.'s anxiety prevented him from leaving the house, and his psychiatrist supplied a note indicating that he should remain at home. A November 2018 IEP thus provided for a program of homebound instruction five times weekly for 120 minutes a session (or ten hours weekly), together with behavioral intervention services once per week for 120 minutes.[1] That IEP confirmed that ultimately M.M. would attend Gateway. It was noted that the role of the behaviorist was to assist with the transition to the agreed upon day program.

The program of home instruction was not entirely successful. M.M. was unavailable for instruction, both physically and emotionally, a good bit of the time. Nor were the offered behavioral interventions successful. The petition contains a glaring incongruity in its assessment of the behavioral services being delivered to M.M. via homebound. It asserts that these services resulted in "little progress," and then avers in the very next paragraph that the program supervisor had reported "significant progress."

[1] Somewhat inexplicably, the IEP states that the placement category is a "Private Residential School" ; M.R. urges that she agreed to all aspects of the IEP but for residential placement. And the record nowhere reveals that this was or is the recommendation of the school district. Petitioner urges that the November IEP also provided speech and language, and occupational therapies. This is not the case. The IEP only provided for speech therapy, and only as part of an extended school year program that was to include an autism class placement.

But overall the submissions of the parties make it clear, and I **FIND**, that these interventions resulted in minimal, if any, progress. The goal of behavioral support was to encourage M.M. to leave the house and attend school. The fact that M.M. remains unable to do so is evidence enough that he continues to be significantly behaviorally involved.

Notwithstanding, homebound instruction continued until May 31, 2019, when an IEP meeting took place. The Child Study Team (CST) proposed an IEP that continued home instruction for ten hours per week but discontinued the behavioral support services provided in the earlier IEP. The most recent note from M.M.'s psychiatrist was to expire on May 28, 2019, and school personnel advised that in order to continue homebound instruction an updated doctor's note would be required. It is at this juncture that the relationship between the parties unraveled. The district was unable to obtain a doctor's note, as petitioner contended that M.M.'s anxiety was so severe he could not leave the house to see a psychiatrist. And his mother rejected the IEP because it discontinued behavioral services in the home.

When the case was assigned to me on October 3, 2019, M.M. was receiving no educational program whatsoever. The due process petition appeared to be asking for psychiatric care at home, but counsel clarified that an in-home psychiatric evaluation was the relief sought. Thereafter, on October 17, 2019, M.M. was examined by a school appointed psychiatrist, Dr. Ellen Platt, at the doctor's office. On or about October 22, 2019, Dr. Platt advised the school district verbally that M.M. was cleared for home instruction. The parties disagree when homebound resumed, but all agree that it is now taking place, albeit fraught with the same difficulties that plagued the parties previously. By letter dated November 6, 2019, counsel for the Board advised that M.M. would receive an additional 146 hours of home instruction to compensate him for the sessions missed from June 2019 through October 30, 2019.[2]

[2] The parties disagree about why there was a break in services, with the Board urging that petitioner is at fault for failing to supply a doctor's note. But the Board also urges, and I agree, that it matters not since it has agreed to compensate M.M. for the time lost regardless of who or what is to blame.

Petitioner's opposition to the motion recounts the ongoing difficulties being encountered in delivering homebound instruction but does not assert that M.R. desires any other form of instruction for her son at this time. Per M.M.'s mother, the instructor is only present about five hours per week. And although M.R. urges that the prior homebound instructor "indicated that M.M. has made little progress because either M.M. locks himself in his room or the bathroom or he is asleep and not available for home instruction," she now is aggrieved that the prior instructor has been replaced because "M.M. [is] at least familiar with [the prior instructor] and would be less scared of her."

As for the offered compensatory education, M.R. does not indicate how many hours she believes M.M. is owed. Rather, she urges that the petition should not be dismissed only because she distrusts the district's calculation of hours, and "[since] there is no way to know if they will follow through with their assertion [that compensatory education would be provided], petitioner is entitled to an enforceable Order through either a settlement agreement or a determination by an ALJ." Having received no information or documentation from the petitioner to the contrary, I **FIND** that 146 hours of instruction will compensate M.M. for lost homebound services.

A review of the petition for due process, and the opposition to the motion, readily reveals that petitioner has a much broader litigation agenda than ensuring that her son receives homebound instruction pending out-of-district placement. The petition asserts at length that upon being placed in the mainstream, M.M. was the victim of bullying that went unaddressed by school personnel. As a result, M.R. alleges that school personnel "directly and proximately caused and continue to cause trauma, mental stress, anxiety, Post-Traumatic Stress Disorder, and damages to petitioner and M.M." The petition seeks psychiatric and psychological care at home for M.M.; a new Harassment Intimidation and Bullying (HIB) investigation; compensatory and punitive damages; and attorney's fees and costs. Lest the reader of the petition be left with any doubt that monetary damages were a paramount objective in filing for due process, this demand is repeated no fewer than three times. And counsel explains further in her opposition to the motion that

> [d]ue to the state of the law on exhaustion of remedies, it is imperative that Petitioner state all of her claims against the Respondent and if some of the claims are not heard due to a lack of jurisdiction, then at least Petitioner can say that she tried to exhaust her remedies…[citations omitted]…Further, since there is not [sic] settlement agreement in this matter addressing all of Petitioner's claims, then Petitioner has a right to request all forms of relief. If Petitioner prevails on the merits in her due process action and there is a determination by this Court that M.M. was denied FAPE, then said finding can be used later in a civil action against said Respondent. Petitioner also filed a Notice of Tort Claim due to the extreme distress, Agoraphobia, and Post Traumatic Stress Disorder that was directly and proximately caused by the district's failures to address the bullying against M.M. … to assert said claims for compensatory damages and attorney's fees, and other relief is appropriate in this matter.

I do not doubt for a moment that M.R. cares about her child's educational well-being. And I **FIND** that the petition for due process was filed, in part, because the district insisted on medical authorization to support further homebound instruction and had terminated behavioral services in the home; all legitimate IDEA concerns. But, I also **FIND** that the petition was filed largely as a scaffold for a personal injury claim. Petitioner believes that her son's current dire emotional state was caused by the inaction of school district personnel when M.M. experienced difficulties in his mainstream program, and she seeks monetary compensation.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

N.J.A.C. 1:1-12.5(b) provides that summary decision should 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." Our regulation mirrors R. 4:46-2(c), which provides that "[t]he judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, 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 a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the 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. Our courts have long held that "if the opposing party . . . offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'Fanciful, frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (citing Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954)). 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, 142 N.J. at 540 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, 477 U.S. at 252. I **CONCLUDE** that this matter is ripe for summary decision. My reasoning is three-fold: most of the claims of the petition are either outside my jurisdiction or moot; as to any remaining claims there are no disputed material facts; and the goals of the IDEA are best served by dismissal of this action.

Homebound has resumed and compensatory education has been offered. The Board thus urges that the claims of the petition have been rendered moot, and I largely agree. An action is moot when it no longer presents a justiciable controversy because the issues raised have become academic. For reasons of judicial economy and restraint it is appropriate to refrain from decision-making when an issue presented is hypothetical, judgment cannot grant effective relief, or the parties do not have a concrete adversity of interest. Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976); J.L. and K.D. o/b/o J.L. v. Harrison Twp. Bd. of Educ., EDS 13858-13, Final Decision (January 28, 2014) <http://lawlibrary.rutgers.edu/oal/search.html>. The IDEA claims raised in the petition have been mostly resolved.

I **CONCLUDE** that there is no further relief that can be afforded this petitioner relative to placement. Indeed, both homebound, and ultimate placement at Gateway, have been agreed to by both the parent and school personnel. Moreover, the Board will provide compensatory hours of instruction to make-up for the time missed from May to October 2019. The Board thus has agreed to give M.M. precisely what I could have and would have ordered to compensate him for any denial of a free and appropriate public education (FAPE). I **CONCLUDE** that M.M. should receive compensatory education in the amount of 146 hours of instruction. I **CONCLUDE** that there is no further relief that can be afforded this petitioner relative to compensatory education.

Petitioner urges that homebound has not been delivered satisfactorily. She asserts that M.M. is not receiving the ten hours per week to which he is entitled by law. The regulation that guarantees this level of homebound instruction addresses an IEP Team determination that a student must have his or her IEP implemented via one-to-one instruction at home, because "all other less restrictive program options have been considered and have been determined inappropriate." N.J.A.C. 6A:14-4.8(a). Here, M.M. was not placed on homebound via an IEP Team determination; rather, his medical needs prevent him from attending school. M.M.'s homebound services are governed by N.J.A.C. 6A: 16-10.1, which provides that

> [t]he district board of education shall provide instructional services to an enrolled student, whether a general education student in kindergarten through grade 12 or special education student age three to 21, when the student is confined to the home or another out-of-school setting due to a temporary or chronic health condition or a need for treatment that precludes participation in their usual education setting, whether general education or special education.

The regulation makes it clear that home instruction under these circumstances requires that, "the parent shall submit to the school district a request that includes a written determination from the student's physician documenting the projected need for confinement…" N.J.A.C. 6A:16-10.1(a)(1). I thus **CONCLUDE** that the district's insistence on an up-to-date medical note was appropriate, and consistent with the

regulatory language. For a student with disabilities no number of hours of instruction is specified, with the regulation providing that "home instruction shall be consistent with the student's individualized education plan (IEP) to the extent appropriate..." N.J.A.C. 6A:16-10.1(c)(4). I **CONCLUDE** that the district is obliged, to the extent possible, to offer ten hours per week of homebound instruction, as promised in the IEP. I so **CONCLUDE** remaining fully cognizant that this amount of homebound is likely impossible unless M.M.'s medical crisis is resolved; and to reiterate, the regulation requires compliance with the IEP only to "the extent appropriate."

Relative to the behavioral interventions offered in the home under the prior IEP, there are no factual disputes that warrant proceeding to hearing. Nowhere do the pleadings or other submissions reveal that anyone found these interventions unnecessary. Likewise, all agree that because M.M. is so behaviorally involved, these in-home services were less than successful. I nonetheless **CONCLUDE** that the district should attempt to resume this support. The parties certainly will not achieve their mutual goal of returning M.M. to a school setting if nothing is done to assist him. Again, I am fully aware that M.M. may not make himself available to the therapist, and again appreciate that these services can be offered only to the extent possible.

The ineffectiveness of the current homebound program leads me to the real crux of this matter, and to the most important reason why this petition should be dismissed. The submissions of the parties make it plain that M.M. is experiencing grave psychiatric difficulties; as a result, it is doubtful that continued homebound instruction is going to benefit him academically or emotionally in any real way. Yet there is no real disagreement as to what services the parties presently wish to see in place; M.M. thus remains in an educational limbo. And because neither party asks that another educational placement be considered, this petition will do nothing to propel his education forward. I **CONCLUDE** that M.M. is best served by dismissing this petition with the direction that the IEP Team promptly reconvene and talk in earnest about how to best educate M.M. That conversation can and must consider both educational

interventions and medical ones; or put another way, both the parent and school personnel have a role to play in helping M.M. succeed. [3]

The statutory scheme makes clear that school districts are not responsible for medical treatment. 20 U.S.C. §1401(26)(A) provides that while "related services" can mean transportation and other supportive services such as medical services, "such medical services shall be for diagnostic and evaluation purposes only…" See also: Irvington Independent Sch. Dist. v. Tatro, 468 U.S. 883 (1984), where the Supreme Court analyzed the type of medical care that falls within the ambit of the IDEA. The Court recognized that the services of a medical doctor were not the responsibility of the public schools, and that Congress intended "to spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence." Irving Independent Sch. Dist. v. Tatro, 468 U.S. at 892. The petition asks that a psychiatrist come to the home. I **CONCLUDE** that the district is not responsible for psychiatric care at home. To the extent that the petition sought only a psychiatric evaluation, I **CONCLUDE** that this claim is moot, as M.M. was examined by Dr. Platt at district expense. And to the extent that M.M.'s health is such that he requires more intensive medical interventions, I **CONCLUDE** that obtaining the help he needs is his mother's obligation, and not that of the school district.

Relative to the tort claims which are at the heart of this petition, M.R. urges that under the Supreme Court decision in Fry v. Napolean Cmty. School, 137 S. Ct. 743 (2017), she must exhaust her administrative remedies before bringing these claims elsewhere. Petitioner misapprehends the import of the Fry decision. Under Fry, a petitioner must exhaust the IDEA's procedures before filing a claim under Section 504 of the Rehabilitation Act, or similar laws, only when a suit "seeks relief that is also available under the IDEA." Fry 137 S. Ct. at 752. Subsequent case law clarifies that a

[3] My description of the homebound program as "ineffective" should not be construed as a determination that the school district denied FAPE to M.M. Homebound instruction's lack of success is due to the seriousness of M.M.'s difficulties. This nonetheless was the program requested by the child's physician. It now continues based on the recommendation of a school appointed psychiatrist, and at the family's request. Homebound instruction thus is being provided as an accommodation to the family; and should not be viewed as a failure by the district to meet its obligations under special education law. But I also feel strongly that something more can and should be done for M.M. What that "more" is must be determined by the parties through the collaborative process envisioned by the IDEA.

court is required to consider the gravamen of a complaint to determine if a plaintiff seeks relief for denial of the IDEA's core guarantee of FAPE. Then, and only then, is exhaustion required. See: Wellman v Butler Area Sch. Distr., 877 F. 3d 125, 131 (3rd Cir., 2017).

Tort claims are the essence of the petition before me. The IDEA affords no remedy for tortious conduct; exhaustion is thus not required under Fry's holding. Our courts have recognized that the "IDEA's primary purpose is to ensure [a] FAPE, not to serve as a tort-like mechanism for compensating personal injury." Nieves-Marquez v Puerto-Rico, 353 F. 3d 108, 124-6 (1st Cir. 2003). Nor are compensatory and punitive damages available under the IDEA. See: Chambers v Sch. Dist. of Phila. Bd. of Educ., 587 F. 3d 176 (3rd Cir., 2009). It is inconceivable that the Fry Court's ruling was intended to turn this well-established law on its head. The filing of tort claims here is frivolous; adds stress to an already overburdened system; and is a disservice to M.M., the Union Township School District, and to all the stakeholders in New Jersey who utilize our special education due process system.

Special education due process is not intended as a platform for claims for unrelated damages. Due process under the IDEA was designed to ensure that children receive FAPE in real time. It is thus ironic, and more than a bit sad, that a petition that describes a child who is struggling mightily seeks nothing that will truly change his circumstances, focusing instead on money.[4] A dismissal of this petition will refocus these parties, I hope, on what is most important for M.M.; his health and his educational future.

[4] Attorney's fees, also sought by the petition, are likewise unavailable in this forum. Instead, the prevailing party in an administrative proceeding is required to bring a separate judicial action to recover these fees. 20 U.S.C.A. § 1415(i)(3)(B), See Chang on behalf of Chang v. Bd. of Educ., 685 F. Supp. 96, 99 (D.N.J. 1988) (holding that a complainant in an administrative proceeding must bring a separate action in order to recover attorney fees). And claims arising under the New Jersey Anti-Bullying Act, N.J.S.A. 18A:37-14, likewise are not cognizable here.

ORDER

It is **ORDERED** as follows:

1. The Board will provide 146 make-up hours of instruction to M.M., and any remaining claims for compensatory education are **DISMISSED** as moot.
2. The claims for resumption of homebound instruction are **DISMISSED** as moot.
3. The Board, through its Child Study Team, is directed to attempt to offer ten hours per week of instruction to M.M. together with the behavioral services provided via the November 2018 IEP. It is understood that these services can only be delivered to the extent that M.M. is able to make himself physically and emotionally available for instruction.
4. To the extent that additional doctor's notes are needed to continue homebound services, petitioner will cooperate with district requests for such documentation.
5. The parties will meet as an IEP Team on or before January 31, 2020, and discuss next steps for M.M., including but not limited to proposed educational placements by the district, and a discussion of the efforts being made by M.R. to address M.M's medical needs.
6. The remaining claims of the petition for medical care; relief under the Anti-Bullying Act; the claims that the Board, through its personnel, proximately caused damages to M.M.; and the claims for compensatory damages, punitive damages and attorney's fees, are **DISMISSED** for lack of jurisdiction.
7. If the parties are unable to reach accord at the January 2020 IEP meeting, the IDEA due process procedures remain available to them.
8. The January 14, 2020, hearing date will not be necessary, and is adjourned.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2018) 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 (2018). 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.

January 3, 2020	
DATE	**ELLEN S. BASS**, ALJ
Date Received at Agency	January 3, 2020
Date Mailed to Parties:	

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