



*State of New Jersey*  
OFFICE OF ADMINISTRATIVE LAW

**FINAL DECISION**

**GRANTING MOTION TO DISMISS**

**D.A. ON BEHALF OF D.A.,**

Petitioner,

v.

**JERSEY CITY BOARD OF EDUCATION,**

Respondent.

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OAL DKT. NO. EDS 10837-22

AGENCY DKT. NO. 2023-35116

**D.A.**, petitioner, pro se

**Jessika Kleen**, Esq., for respondent (Machado Law Group. attorneys)

Record Closed: June 30, 2023

Decided: July 28, 2023

BEFORE **WILLIAM J. COURTNEY, ALJ**:

**STATEMENT OF THE CASE**

D.A., ("Petitioner"), filed a petition for due process on behalf of her minor daughter D.A., alleging that respondent, Jersey City Board of Education ("Board") took no action to provide educational and/or support services to her disabled daughter while she was awaiting admission to a medical facility for stabilization of her severe behavioral issues. D.A.'s severe behavioral issues included violence toward peers and staff at the State-approved private school she attended for students with Autism and other learning disabilities. The Board responded to petitioner's allegations by indicating that it has fully complied with all of its obligations under the Individuals with Disabilities Education Act

("IDEA") and New Jersey statutes and regulations concerning its obligation to provide a system of free and appropriate special education and related services. The Board further maintained that any failure by D.A. to receive a Free and Appropriate Public Education was the result of petitioner refusing the education, services and assistance offered to her.

### **PROCEDURAL HISTORY**

Petitioner filed her Request for Due Process on November 2, 2022. The Board filed its Answer on November 9, 2022 and the matter was transferred to the Office of Administrative Law ("OAL") on December 5, 2022 for a hearing. In a separate filing on December 2, 2022, the Board filed its own Petition for Due Process to Deny a request made on petitioner's behalf for an Independent Educational Evaluation ("IEE"). The two matters were consolidated on February 21, 2023. On March 3, 2023, the Board filed a Motion for Summary Decision (the "First Motion") which sought dismissal of petitioner's Request for Due Process. Petitioner filed opposition to the First Motion on March 29, 2023. Prior to the First Motion being decided, on May 25, 2023, the Board filed a revised Motion for Summary Decision (the "Second Motion") which essentially updated the First Motion and restricted its request for summary disposition to petitioner's due process claim. Although petitioner filed no opposition to the Second Motion, this tribunal did consider petitioner's opposition to the First Motion<sup>1</sup> which was factually and substantially similar to the Second Motion which is being decided herein.

### **FACTUAL FINDINGS**

All factual findings set forth below were contained within in the March 3, 2023 Certification of Karen Gullace submitted in support of the First Motion and referred to and relied on extensively in the Second Motion. The only factual findings not contained in Ms. Gullace's Certification were findings 25, 26 and 27 which were facts set forth in the

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<sup>1</sup> The First Motion sought Summary Decision on the Board's due process complaint which sought to an Order Denying petitioner's request for an IEE. The Second Motion only sought Summary Decision on petitioner's Due Process Request. The Second Motion also updated the Board's statement of facts to include what had occurred up until May 25, 2023.

Statement of Facts contained in respondent's brief and submitted in support of the Second Motion<sup>2</sup>. None of the following factual findings have been disputed by the petitioner.

1. D.A. is a 10-year-old student residing within the jurisdiction of the Jersey City Board of Education ("Board").
2. D.A. is eligible to receive Special Education and Related Services under the classification of multiply disabled.
3. D.A. suffers from Autism and severe behavioral issues resulting in violent behavior toward peers and staff members. D.A.'s IEP includes a Behavioral Intervention Plan culminating in the use of physical holds when her behavior endangers others and cannot be deescalated through alternative measures.
4. The Board completed its triennial reevaluation of D.A. in May of 2022. At that time, a Social Assessment and a Psychological Evaluation were conducted.
5. At the conclusion of the 2021- 2022 school year, D.A. enrolled at YCS Sawtelle Learning Center ("Sawtelle"), a State-Approved private school for students with autism and other developmental disabilities.
6. From July 5, 2022 through July 29, 2022, D.A. attended the extended school year program ("ESY") at Sawtelle and was supposed to continue attending Sawtelle on a full-time basis through the 2002- 2003 school year.
7. While attending the ESY program at Sawtelle, staff members were required to use physical holds in response to D.A. 's violent outbursts on eighteen occasions.
8. On August 19, 2022, D.A.'s treating psychiatrist determined it was medically necessary for her to attend a program identified as "RU Cares" to stabilize her severe behavioral issues. RU Cares is a partial hospitalization program

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<sup>2</sup> Although factual findings 25, 26 and 27 are not contained in a Certification, I **FIND** these statements of facts set forth in the brief to be highly credible. Each of these facts were supported by the exhibits provided by respondent's counsel and they were not disputed by the petitioner.

which provides specialized services to children and adolescents with who engage in dangerous behaviors.

9. Petitioner did not share D.A.'s treating psychiatrist's recommendation with the Board until September 7, 2022, when, without prior notice, she advised that D.A. would not be returning to Sawtelle for the 2022-23 school year. Instead, petitioner indicated that she intended to enroll D.A. at RU Cares and requested that D.A. be placed on home instruction pending her discharge from the RU Cares program. The Board agreed.
10. On September 14, 2022, the Board proposed an IEP that provided for home instruction which would continue until D.A. enrolled in an appropriate out-of-District placement.
11. On September 20, 2022, the Special Education teacher who had been assigned to provide home instruction to D.A. contacted petitioner to arrange a home instruction schedule. Petitioner refused to discuss home instruction asserting that D.A.'s I.E.P. had not yet gone into effect and that she had not agreed to anything. Petitioner then directed the teacher to have the Board's attorney contact her attorney.
12. On September 28, 2022, petitioner's former counsel sent correspondence to the Board refusing home instruction because of renovations being made to petitioner's apartment and D.A.'s "increased behavioral challenges". Petitioner's former counsel also requested confirmation that Bedside Instruction would be provided while D.A. attended RU Cares.
13. Attached to former counsel's September 28, 2022 correspondence were copies of two letters. The first was a copy of the August 19, 2022 letter from D.A.'s psychiatrist indicating that it was medically necessary for D.A. to attend the RU Cares Day Hospital Program for stabilization of her severe behavioral issues. The second letter dated September 19, 2022, from the same psychiatrist, indicated that D.A. was not able to attend school at this time and requested that Bedside Instruction be provided to D.A. for the remainder of 2022.

14. In response to the September 28, 2022 correspondence from petitioner's former counsel, on October 4, 2022, the Board confirmed that it would fund home/bedside Instruction while D.A. attended the RU Cares program.
15. On October 25, 2022, D.A.'s case manager followed up with petitioner regarding D.A.'s enrolment status in the RU Cares program. The case manager also inquired as to whether petitioner would consent to Virtual Home Instruction until D.A. was enrolled in RU Cares.
16. In response to the case manager's October 25, 2022 inquiry, petitioner indicated that D.A. had not yet enrolled at RU Cares due to issues with her medical benefits. Petitioner also refused Virtual Home Instruction and told the case manager not to call back.
17. On November 30, 2022, petitioner filed the instant complaint seeing due process alleging that the Board failed to provide educational programming since the beginning of the 2022-2023 school year.
18. By letter dated November 30, 202, petitioner's former counsel requested that the Board provide an Independent Educational Evaluation at public expense. Specifically, petitioner requested independent evaluations in the following areas: neuropsychiatric, psychological, educational, speech and language, social, occupational therapy, and physical therapy. Petitioner also requested a Functional Behavioral Assessment.
19. On December 2, 2022, the Board filed a request for due process to deny petitioner's request for an IEE at public expense, as D.A.'s triennial reevaluation was completed in March of 2022 and provided information necessary to develop an appropriate educational program.
20. On February 9, 2023, the Board sent an Offer of Settlement to petitioner proposing the following consideration in exchange for D.A.'s enrollment at RU Cares and withdrawal of the complaint in this matter.
  - a. Placement in an appropriate out-of-District program, as soon as possible, for the remainder of the 2022-2023 school year.
  - b. Home Instruction until D.A. enrolls into an appropriate placement.

- c. Home/Bedside Instruction while D.A. attends RU Cares.
  - d. Transition planning in collaboration with RU Cares to prepare D.A. for re-entry into an educational environment.
  - e. Areevaluation planning meeting upon D.A.'s discharge from RU Cares to determine whether additional evaluations are needed to develop an appropriate educational program.
21. On February 10, 2023, the day after the offer of settlement was made, petitioner rejected the Board's offer.
22. On or about May 3, 2023, D.A. enrolled at RU Cares.
23. On May 5, 2023, the Board requested authorization from petitioner to communicate with RU Cares to facilitate Bedside Instruction at the facility.
24. On May 8, 2023, petitioner denied the Board's request for authorization to communicate with RU Cares, effectively refusing the offer of Bedside Instruction.
25. On or about May 3, 2023 D.A. was enrolled at RU Cares.
26. On May 5, 2023, the Board requested a signed authorization from petitioner needed to effectuate communications between the Board and RU Cares to facilitate Bedside Instruction at the facility.
27. On May 8, 2023, petitioner denied the Board's request for a signed authorization, effectively refusing the offer of bedside instruction.

### **LEGAL ANALYSIS**

The OAL rules governing motions for summary decision are found at N.J.A.C. 1:1-12.5. These provisions mirror the language of R. 4:46-2 and the Supreme Court's decision in Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954). Under N.J.A.C. 1:1-12.5(b), the determination to grant summary decision should be based on the papers presented as well as any affidavits, which may have been filed with the application. In order for the adverse, i.e., the non-moving party to prevail in such an

application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding. See Brill v. Guardian Life Insurance co. of America, 142 N.J. 520 (1995). A complaint may be dismissed for failure to state a claim if it fails to articulate a legal basis that will result in a plaintiff receiving some form of relief. Hoffman v. Hampshire Labs Inc., 405 N.J. Super 105 (App. Div. 2009). Dismissal is the appropriate remedy when a complaint fails to provide a basis of relief and discovery would not provide one. Banco Popular N. Am. v. Gandi, 184 N.J. 181 (2005).

Petitioner's request for due process in this matter was set forth in in a November 2, 2022 email to the New Jersey Department of Education in which she alleged that the Board failed to provide educational services to D.A. Petitioner also alleges in her request for due process that the Board would only provide educational services to D.A. after she was enrolled into the RU Cares program for children with severe behavioral problems. However, the uncontested facts in this case clearly show, and I **FIND** that the Board has made numerous attempts to provide educational services to D.A. and on each occasion the educational services offered were refused by petitioner. I further **FIND** that it was the petitioner, not the Board, that placed the condition of enrollment into the RU Care program on the receipt of educational instruction.

The education of children with disabilities "is regulated by a complex scheme of federal and state statutes and administrative regulations." Lascari v. Bd. of Educ. 116 N.J. 30, 33 (1989). The Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq., was enacted at the federal level to ensure that children with disabilities have access to a Free Appropriate Public Education ("FAPE"). 20 U.S.C. § 1412(a)(1). The IDEA provides the framework for special education in New Jersey that is reflected in New Jersey statutes (N.J.S.A. 18A:46-1 to 46-55) and regulations (N.J.A.C. 6A:14-1.1 to -10.2). Pursuant to the IDEA, each board of education is responsible for providing a system of free, appropriate special education and related services. N.J.A.C. 6A:14-1.1(d). A school Board satisfies its obligation to provide FAPE by offering its classified students personalized instruction and sufficient support services which "are necessary to permit the child 'to benefit' from the instruction." G.B. v. Bridgewater-Raritan Regional

Bd of Educ., 2009 U.S. Dist. LEXIS 15671 (D.N.J. Feb. 27, 2009), (citing Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 189 (1982)).

In the case at bar, there is no question that D.A. qualifies for protection under the IDEA and is entitled to FAPE. Since 2015, the Board has been providing services for D.A. under an Individualized Education Program (“IEP”) which contains a Behavioral Intervention Plan (“BIP”)<sup>3</sup>. To provide D.A. with an appropriate education environment, the Board placed her at the Sawtelle Learning Center (“Sawtelle”) which specializes in the education of children with autism who engage in dangerous behaviors. The petitioner acknowledges that D.A.’s behaviors became so violent while she was attending the ESY program at Sawtelle she needed to be physically restrained more than eighteen times. As a result of this violent behavior, petitioner sought the assistance of a psychiatrist who, in a letter dated August 19, 2022, concluded it was “medically necessary that D.A. attend RU Cares Day Hospital Program for stabilization of severe behavioral issues.” Petitioner did not explain why this letter was not provided to the Board until September 7, 2022 when she first advised the Board that D.A. would not be returning to Sawtelle for the 2022/2023 school year and instead would be enrolling in the RU Cares program.

At the same time that petitioner advised the Board of D.A.’s removal from Sawtelle, petitioner requested that D.A. be placed on home instruction pending her discharge from the RU Cares Program. The uncontested facts in this case reveal that the Board agreed to petitioner’s request and seven days later proposed an IEP providing home instruction until D.A. enrolled in an appropriate out-of-district placement. This response by the Board is important because they were not limiting their offer of home instruction to a period of time between D.A.’s start in the RU Cares program through an ultimate placement in an out-of-district program, they were offering home instruction that would start immediately and last through D.A.’s placement in an appropriate out-of-district program. Given that petitioner had failed to advise the Board of her intended actions until after the start of the 2022/2023 school year, I **FIND** that the actions of the Board were both timely and appropriate. I further

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<sup>3</sup> According to her BIP the behaviors at issue included aggression in the form of grabbing, hitting, kicking, biting, scratching, and hairpulling and property destruction in the form of swiping objects off surfaces, flipping classroom furniture, pulling things off of the wall and kicking items off shelves.



**FIND** that petitioner's response to the Board's actions and proposed IEP was entirely inappropriate, and that this refusal was only the first in a series of actions taken by petitioner that has made it virtually impossible for the Board to provide educational services to D.A.

On September 19, 2022 D.A.'s psychiatrist authored a letter indicating that D.A. "was not able to attend school at this time." and to [please] provide bedside instruction<sup>4</sup> for the remainder of 2022". The very next day, the Special Education teacher assigned by the Board to provide home instruction for D.A. contacted petitioner to arrange a Home Instruction schedule. Petitioner, who was the person that requested home instruction, refused to discuss a schedule, and directed the teacher to have the Board's attorney contact her attorney. Although the Board continues its offer of home instruction to date, petitioner continues to refuse that offer.

As a direct result of petitioner's unilateral removal of her daughter from Sawtelle and refusal of home instruction, D.A. did not receive any education services for the 2022/2023 school year. Other than a bald claim contained in her request for due process that the Board was at fault, no credible evidence has been provided that would indicate that the Board has not provided D.A. with an opportunity to obtain a Free and Appropriate Special Education or that the Home Instruction offered was not appropriate. It was D.A.'s private psychiatrist that indicated that D.A. could no longer attend school due to her violent behavior. It was also that same doctor who requested bedside instruction while D.A. was attending RU cares. In a September 28, 2022 letter from Petitioner's lawyer, it became clear that petitioner was refusing any type of home instruction (whether at D.A.'s home or a location within the community) until such time that D.A. was admitted to the RU Cares program. The letter stated:

[Petitioner] has been provided a proposed IEP, dated September 14, 2022 which provides for home instruction pending appropriate academic school placement. [Petitioner] anticipates that her child will start shortly at RU Cares full-day hospitalization program, which has been determined

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<sup>4</sup> On October 4, 2022, the attorney for the Board confirmed that "the Board [would] fund Bedside Instruction while the student attends the full-day program at Rutgers."

medically necessary by her psychiatrist pursuant to the enclosed letter. Please confirm the school's willingness to provide bedside instruction upon entry into this program and advise what information is needed in order to facilitate this and to amend the IEP accordingly." Home" instruction is not feasible, given the child's needs and the fact that petitioner's landlord is performing necessary repairs to the apartment during the daytime currently. It is my further understanding that petitioner does not presently have the ability to access [D.A.'s] school issued computer as the password has changed. [Petitioner] also feels that home instruction in a setting outside the home (like a library) is not feasible for D.A. at present given her increased behavioral changes.

I **FIND** that the Board has continued to offer exactly what was asked of them and that either home instruction or instruction in a setting outside of the home was the appropriate way to provide educational service for D.A. given the circumstances. D.A.'s own Psychiatrist indicated that she was unable to attend school until she was enrolled in medical facility to treat her increasingly aggressive behaviors and he recommended bedside instruction. I also **FIND** that the Board is in no way responsible for the delay in D.A.'s receipt of educational services which continues to date. The prolonged delay in D.A.'s receipt of services was due to petitioner's inability for nine months to have D.A. enrolled in the RU Cares program along with her refusal of educational services offered by the Board during that entire period. When D.A. was finally admitted to the RU Cares program in May of 2023, the Board was still prepared to provide bedside instruction during her hospital admission, as recommended by her psychiatrist, but petitioner refused to sign the necessary authorization that would have enable the Board to coordinate the bedside instruction with her medical care providers at RU Cares<sup>5</sup>. The petitioner's refusal to sign the authorization effectively constituted a refusal of the very bedside instruction that she had asked for and the Board agreed to provide.

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<sup>5</sup> In an attempt to provide educational services to D.A. after her admission to RU Cares, counsel for the Board reached out to RU Cares to ensure that bedside instruction would be permitted during a patient's course of medical treatment. After learning generally that bedside instruction was permitted while attending the RU Cares program, counsel was required to obtain written authorization from petitioner in order to specifically discuss D.A. and her educational needs with representatives of RU Cares.

Because petitioner's actions are the reason D.A. has not received any educational instruction or related services in September of 2022, it is difficult to imagine how she would be entitled to any form of relief from the Board. Compensatory education is the type of relief that is typically sought and awarded to remedy a public agency's failure to provide a disabled child with appropriate educational services during a time that the child was entitled to FAPE. G.L. v. Ligonier Valley Sch. Board, 802 F. 3<sup>rd</sup> 601 (3d Cir. 2015). The purpose of compensatory education is to "replace educational services the child should have received in the first place," and such remedy "should aim to place disabled children in the same position [he or she] would have occupied *but for the school Board's violation of the IDEA*" Ferren C. v. Sch. Dist. of Philadelphia, 612 F.3d 712, 717-18 (3d Cir. 2010) (quoting Reid v. Board of Columbia, 401 F.3d 516, 518 (D.C. Cir. 2005) (emphasis added). Also, where the award of compensatory education is appropriate, the court must look to the school Board's actions during the period of the alleged deprivation. Mary Courtney T. v. Sch. Dist. of Philadelphia, 575 F.3d 235, 251 (3d Cir. 2009).

The lack of educational services received by D.A., from September 2022 to present, was the result of petitioner's refusal to accept any of the services offered by the Board and not the result of the Board's violation of the IDEA. Accordingly, an award of compensatory education at the expense of the Board would not be an appropriate equitable remedy for any claims made by petitioner relating to that period.

Regarding any claim or potential claim for prospective relief, petitioner's rejection of the Board's February 9, 2023 Offer of Settlement renders any such claim moot. The offer provided: (a) D.A.'s placement, as soon as possible, in an appropriate out-of-Board program for the remainder of the school year; (b) Home Instruction until D.A. enrolled in said placement; (c) Home/Bedside Instruction while D.A. attends R U Cares; (d) collaborative transition planning with R U Cares to prepare D.A. for reentry into an educational environment; (e) and an evaluation planning meeting upon D.A.'s discharge from R U Cares to determine her need for additional services.

An action is moot when the decision sought can have no practical effect on the existing controversy." Redd v. Bowman, 223 N.J. 87, 104 (2015). 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); Fox v. Twp. of E. Brunswick Bd. of Educ., EDU 10067-98, Initial Decision (March 19, 1999), *aff'd.*, Comm'r (May 3, 1999); J.L. and K.D. ex rel. J.L. v. Harrison Twp. Bd. of Educ., EDS 13858-13, Final Decision (January 28, 2014).

Through its Offer of Settlement, the Board agreed to provide all relief that would be available to petitioner under the IDEA. Her rejection demonstrates that she has failed to state a claim upon which relief can be granted, as this Court cannot provide a remedy beyond which has already been offered. To the extent that petitioner seeks monetary damages, “compensatory and punitive damages are not an available remedy under the IDEA.” Chambers v. Sch. Dist. of Phila. Bd. of Educ., 587 F.3d 176, 186 (3d Cir. 2009). Any claim for prospective relief is consequently moot.

Considering the pleadings, certifications, documents produced, and arguments presented by, or on behalf of, the parties, I **FIND** that there are no material facts in dispute and that no reasonable tier of fact could not conclude that the Board refused to provide educational services to D.A. or that a violation of the IDEA has occurred. Petitioner, as the non-moving party has failed to submit an affidavit (or any other credible offer of proof) that indicates there is indeed a genuine issue of material fact which can only be determined by and evidentiary proceeding. This matter is therefore ripe for summary decision, and I **CONCLUDE** that for the reasons set forth above, the Board’s Motion for Summary Decision dismissing the petition for due process filed under OAL Docket No. EDS10837-22, should be **GRANTED**.

### **ORDER**

It is therefore **ORDERED** that,

1. Respondent’s Motion for Summary Decision is **GRANTED**; and
2. The due process petition entitled D.A. o/b/o D.A. v. Jersey City Board of Education, OAL Dkt. No. EDS 10837-2022 is **DISMISSED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2022) 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 (2022). 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.

July 28, 2023



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DATE

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**WILLIAM COURTNEY, ALJ**

Date Received at Agency

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July 28, 2023

Date Mailed to Parties:

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July 28, 2023

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