

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 00874-19

AGENCY DKT. NO. 2019-29161

T.Y. AND A.Y. ON BEHALF OF A.Y.,

Petitioners,

v.

**GREENWICH TOWNSHIP BOARD OF
EDUCATION AND WARREN COUNTY
SPECIAL SERVICES,**

Respondent.

George M. Holland, Esq., for and A.Y. on behalf of A.Y.

Jared S. Shure, Esq., for Greenwich Board of Education (Methfessel & Werbel,
attorneys)

Rita F. Barone, Esq., for Warren County Special Services (Purcell, Mulcahy,
Hawkins, Flanagan & Lawless, attorneys)

Record Closed: November 20, 2019

Decided: January 6, 2020

BEFORE **ANDREW M. BARON**, ALJ:

STATEMENT OF THE CASE

Petitioners, T.Y. and A.Y. (the parents) on behalf of A.Y., filed a Petition for Due Process against the Warren County School Services Commission and the Greenwich School District alleging Denial of FAPE under IDEA and Section 504 during the 2016-17 school year. In very general language, the pleadings seek Compensatory Education and Monetary Damages for failure to provide FAPE during the 2016-17 school year; and Monetary Damages for alleged abuse and neglect that occurred against A.Y. in violation of the New Jersey Law Against Discrimination. (NJLAD). The pleadings give background information on A.Y. and the circumstances leading to his classification as a special needs student. The pleadings also include allegations that sometime in the first three months of the 2016-17 school year, A.Y. evidenced significant behavioral problems which led school officials to put him in restraints. The pleadings do not identify how either respondent failed to meet their obligations under A.Y.'s IEP, and/or how A.Y. was denied FAPE. No attempt was ever made to amend the pleadings to provide more specific details as to the alleged denial of A.Y.s educational rights under his IEP. In mid-December 2016, respondents on their own and with consent of A.Y.'s parents, transferred A.Y. to another school better suited to address A.Y.s educational and emotional needs.

PROCEDURAL HISTORY

On or about January 11, 2019, the parents filed a Petition for Due Process against the District, seeking the relief identified above in the Statement of the Case. The parties agreed to mediate, which was unsuccessful on February 7, 2019. The matter was transmitted to the Office of Administrative Law, and a settlement conference was conducted on March 20, 2019. Again, the matter did not resolve. Thereafter, on June 27, 2019, the Warren Special Services Commission filed a Motion to Dismiss the due Process Complaint for Failure to State a Claim which was joined by the Greenwich School District.

Following an extension, petitioner filed a response in opposition to the Motion on August 6, 2019. With the opposition, petitioners attached exhibits, specifically a certification from A.Y.'s mother and an expert report which it argues constitutes facts in dispute. Among other things, petitioners' counsel argues the motion must fail on procedural grounds because respondents did not include any certification under the motion under R. 1:5-2. The motion itself, was filed on legal grounds that an Administrative

Law Judge does not have jurisdiction to grant the relief contained in the due process complaint pleadings filed on behalf of A.Y. More specifically, the argument set forth is that an Administrative Law Judge does not have the power to order monetary relief, (which was requested in all three counts of the complaint), and an Order for compensatory education has to have a sufficient basis in order to receive such an award.

In its reply, in lieu of a Certification, respondent's counsel attached certain exhibits in a similar fashion to the opposition filed by petitioner; specifically, a copy of the IEP for the 2016-17 calendar year, and the 2015-16 IEP, together with occupational assessment. In both cases, it appears A.Y.'s mother consented and signed off on the services and placement for A.Y. as recommended by the child study team.

Since both sides elected to attach documents to its respective positions, and respondent's motion is based on a legal theory, the undersigned has exercised its discretion to treat this motion as more of a Summary Disposition matter.

Oral argument on the first submissions was conducted on September 20, 2019. At the conclusion of argument, permission was granted to petitioner to file a Supplemental Letter Brief on some of the issues raised until October 4, 2019, and Respondents filed a Reply to same on October 18, 2019. Oral argument was held on these submissions on November 13, 2019, and the record was left open until November 20, 2019 at which time counsel for petitioner forwarded an additional supplemental argument with attachments.

For the reasons set forth below, I agree that there is no basis to allow this matter to proceed to a full plenary hearing, and the Motion should be granted as to all three Counts of the petition.

For the purposes for the Motion, I **FIND** the following **FACTS** in this case:

1. By way of background, A.Y. is a thirteen year old boy, classified as developmentally disabled, having been diagnosed with Autism Spectrum Disorder at a young age.

2. Among other conditions related to his diagnosis, A.Y. suffers from cognitive delays, difficulty communicating, challenges with socialization and behavioral issues.
3. As a result of these conditions, A.Y. was deemed eligible by the Greenwich School district to receive special education services under IDEA and related statutes and regulations for such children, including but not limited to Section 504 of the Rehabilitation Act of 1973.
4. His 2015 IEP signed by petitioners, indicates under the Description of Behaviors Section that "A.Y. exhibits behaviors that are managed in this special education setting, that he has improved in dealing with frustration and aggressive behavior.
5. From September through December 2016, A.Y. was placed in an out of district day program located in Pohatcong, New Jersey, operated by the WCSS.
6. None of these facts are disputed by respondents.
7. While enrolled in this program, for purposes of this motion only, it is alleged that A.Y. was subjected to physical abuse by district personnel, who were unable to control his behavior, which gave rise to placing A.Y. in restraints, as well as secluding him from other students. Ultimately, in December 2016, A.Y. missed two weeks of school until respondents could find a more suitable school placement for him to which petitioners gave their consent.
8. In December 2016, following reports that school officials were unable to cope with A.Y.'s behavior issues which led to the imposition of restraints, and with a continuing obligation to provide FAPE to A.Y., Greenwich and Warren School Services District officials determined that a change in day school placement was appropriate. Within two weeks, in order to meet the district's continuing FAPE and Section 504 obligations, A.Y. was placed with the consent of

petitioners at another school, deemed more suitable to handling his learning and behavioral challenges.

I therefore **FIND** that giving every favorable inference to petitioners under IDEA, FAPE and Section 504 of the Rehabilitation Act, petitioners pleadings are deficient, and the undersigned has no power or authority to award monetary damages or compensatory damages in this case. I further **FIND** and **ORDER** that A.Y. is entitled to remain at his current placement for the next school year under the provision of her IEP unless by mutual consent, the parties agree another placement is more appropriate.

DISCUSSION

Respondents, Warren County School Services Commission, and Greenwich School District respectively, bring this Motion for Summary Decision seeking dismissal of petitioner's Due process petition for Failure to State a Claim upon which Relief Can be Granted.

Petitioner filed a three-count due process petition against both entities. In Count I, petitioner contends that A.Y. was denied FAPE under IDEA and Section 504. The relief petitioner seeks connected to this allegation is counsel fees, other costs and expert witness fees for bringing the within litigation.

Count II of the petition seeks compensatory education essentially in the form of monetary damages in connection with an incident involving a physical confrontation by a school staff member against A.Y.

Count III, essentially mirrors Count II, in that it also seeks monetary relief for alleged violations of IDEA, Section 504, and the New Jersey Law Against discrimination, (NJLAD).

Petitioners' counsel zealously argues that the imposition of restraints to control A.Y.'s behavior constitutes a denial of FAPE and denial of A.Y.'s rights under Section 504 of the Rehabilitation Act that warrant a full plenary hearing.

Respondents contend that all three Counts, by virtue of their general non-specific language, together with the apparent focus on monetary relief under the guise of violations of FAPE and Section 504 are not properly before the Office of Administrative law, and if such alleged violations occurred, belong in another forum.

Counsel for petitioner argues he must exhaust his administrative remedies first, and that discovery will be developed during the course of a plenary hearing, which would give rise to the undersigned “fashioning a remedy as it sees fit.”

Together with its brief and supplemental brief, in opposition to the Motion, petitioner’s counsel attached a Certification from A.Y.s mother, as well as a report from a licensed psychologist, Doreen M. DiDomenico.

In her Certification, A.Y.s mother states he was diagnosed as being on the autism spectrum at a very young age but did not exhibit behavior problems until he entered the Pohatcong Middle School program which is under the jurisdiction of the respondent Warren County Special Services Commission until late September early October 2016. In late October, A.Y.s mother learned from another parent that he had been physically abused by staff members who were unable to control him forcing them to put him in restraints. Citing to the IEP for that school year which identifies no behavioral problems, his mother indicates in her Certification that she was called to school seven to ten times in a short period to pick up A.Y. due to his behavior. Both mother and her counsel blame the school for the onset of these problems and argue that as a result, A.Y. did not receive FAPE.

While the negative implications of the imposition of restraints on a minor is self-evident, and cannot be discounted, no specifics are provided by petitioner as to the educational impact of these actions taken by school officials which otherwise demonstrate that A.Y. was denied FAPE. The pleadings are also deficient in that they fail to allege

A.Y. was denied access to school for an extended period, and/or that the IEP was not implemented. Instead, petitioners suggest a negative inference should be drawn from the fact that the 2016-17 IEP does not discuss behavioral issues, so it can be concluded that the behavioral issues were caused by the school, thereby denying A.Y. FAPE.

In a nine-page report attached to the opposition to the motion, Dr. DiDomenico essentially recounts what was reported to her by A.Y.'s mother concerning A.Y.'s behavioral issues while he was enrolled for a little more than three months at the Pohatcong School. Only the last paragraph of the report addresses the possible impact of the restraints, and even though no educational impact is identified. The diagnosis is Post Traumatic Stress Syndrome, associated with the imposition of restraints. That alone, while certainly not condoned, is not a basis to justify a finding of the need to award compensatory education.

Giving all due consideration to the findings in the report, Dr. DiDomenico concludes that A.Y. displayed symptoms of significant anxiety suggestive of Post-Traumatic Stress Disorder during the period and after the restraints were used as a means of behavior management. Nonetheless, and giving every favorable inference to the petitioners and their son, the report does not address how petitioner was denied FAPE and/or how A.Y.'s rights were violation under Section 504 of the Rehabilitation Act.

Recognizing their continuing obligations to provide FAPE and an education in accordance with Section 504 of the Rehabilitation Act, respondents acted in a timely fashion, within two weeks of the time it was determined the school placement was not appropriate, and with parental consent, transferred A.Y. to another school within their jurisdiction that was better suited to address his needs.

Also undisputed is there is no Notice of Tort Claim and/or lawsuit pending against the district in Superior Court or Federal Court for the alleged physical abuse A.Y. experienced. Petitioners reference the New Jersey Law Against Discrimination as a possible means of jurisdiction for the undersigned to award monetary relief. Simply put, I do not agree. Each of these alternate venues may be more appropriate forums for a litigant to seek monetary damages, for the imposition of restraints, and the physical and emotional harm that counsel zealously argues A.Y. experienced. While petitioner's counsel has suggested the undersigned has broad discretionary powers to craft a remedy for what happened to A.Y., the fact of the matter is no such remedy exists within the powers of an Administrative Law Judge, to award monetary damages when a classified

student is physically abused by a school staff member. The same limitation to the powers of an ALJ apply, where compensatory education is requested, but there is no evidence of personal monies expended for tutoring or other services when there is an allegation that a district failed to provide services or implement an IEP. Again, no such allegation is pled, just a very general accusation that A.Y. did not get FAPE.

LEGAL ANALYSIS AND CONCLUSIONS

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400–1482, ensures that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and ensures that the rights of children with disabilities and parents of such children are protected. 20 U.S.C. § 1400(d)(1)(A), (B); N.J.A.C. 6A:14-1.1. A “child with a disability” means a child with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities, and who, by reason thereof, needs special education and related services. 20 U.S.C. § 1401(3)(A). A.Y. has been diagnosed with autism and classified as a preschool child with a disability.

States qualifying for federal funds under the IDEA must assure all children with disabilities the right to a free “appropriate public education.” 20 U.S.C. § 1412(a)(1); Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176 (1982). Each district 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 “free appropriate public education” (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 school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under 20 U.S.C. § 1414(d). 20 U.S.C. § 1401(9); Rowley, 458 U.S. 176. Subject to certain

limitations, FAPE is available to all children with disabilities residing in the State between the ages of three and twenty-one, inclusive. 20 U.S.C. § 1412(a)(1)(A), (B).

An individualized education program (IEP) is a written statement for each child with a disability that is developed, reviewed and revised in accordance with 20 U.S.C. § 1414(d); 20 U.S.C. § 1401(14); 20 U.S.C. § 1412(a)(4). When a student is determined to be eligible for special education, an IEP must be developed to establish the rationale for the student's educational placement and to serve as a basis for program implementation. N.J.A.C. 6A:14-1.3, -3.7. At the beginning of each school year, the District must have an IEP in effect for every student who is receiving special education and related services from the District. N.J.A.C. 6A:14-3.7(a)(1). Annually, or more often, if necessary, the IEP team shall meet to review and revise the IEP and determine placement. N.J.A.C. 6A:14-3.7(i). FAPE requires that the education offered to the child must be sufficient to "confer some educational benefit upon the handicapped child," but it does not require that the school district maximize the potential of disabled students commensurate with the opportunity provided to non-disabled students. Rowley, 458 U.S. at 200. Hence, a satisfactory IEP must provide "significant learning" and confer "meaningful benefit." T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577-78 (3d Cir. 2000).

The Supreme Court discussed Rowley in Endrew F. v. Douglas County School District RE-1, 137 S. Ct. 988 (2017), noting that Rowley did not "establish any one test for determining the adequacy of educational benefits" and concluding that the "adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." Id. at 996, 1001. Endrew F. warns against courts substituting their own notions of sound education policy for those of school authorities and notes that deference is based upon application of expertise and the exercise of judgment by those authorities. Id. at 1001. However, the school authorities are expected to offer "a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." Id. at 1002.

In Lascari v. Ramapo Indian Hills Reg'l Sch. Dist., 116 N.J. 30, 46 (1989), the New Jersey Supreme Court concluded that "in determining whether an IEP was appropriate, the focus should be on the IEP actually offered and not on one that the school board could have provided if it had been so inclined." Further, the New Jersey Supreme Court stated:

As previously indicated, the purpose of the IEP is to guide teachers and to ensure that the child receives the necessary education. Without an adequately drafted IEP, it would be difficult, if not impossible, to measure a child's progress, a measurement that is necessary to determine changes to be made in the next IEP. Furthermore, an IEP that is incapable of review denies parents the opportunity to help shape their child's education and hinders their ability to assure that their child will receive the education to which he or she is entitled.

[Id. at 48-9. (citations omitted).]

In accordance with the IDEA, children with disabilities are to be educated in the least restrictive environment (LRE). 20 U.S.C. § 1412(a)(5); N.J.A.C. 6A:14-1.1(b)(5). To that end, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are to be educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment should occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1412(a)(5)(A); N.J.A.C. 6A:14-4.2. The Third Circuit has interpreted this to require that a disabled child be placed in the LRE that will provide the child with a “meaningful educational benefit.” T.R., 205 F.3d at 578. Consideration is given to whether the student can be educated in a regular classroom with supplementary aids and services, a comparison of benefits provided in a regular education class versus a special education class, and the potentially beneficial or harmful effects which placement may have on the student with disabilities or other students in the class. N.J.A.C. 6A:14-4.2(a)(8).

The District contends that it provided FAPE to A.Y. in the least restrictive environment. Conversely, petitioners contend that the less than four-month placement in Pohatcong was not appropriate to meet A.Y.’s individualized needs and the imposition of restraints together with the inability to control behavior did not provide A.Y. with a FAPE. The District bears the burden of proof and the burden of production whenever a due process hearing is held pursuant to the provisions of the IDEA. N.J.S.A. 18A:46-1.1.

The creation of an adequate IEP under the IDEA requires that a school district consider positive behavioral interventions where a student's behavior impedes his learning. See *M.H. v. New York City Dept. of Education*, 712 F. Supp. 2nd 125 (S.D.N.Y.) and *A.C. ex rel. M.C. v. Bd. of Ed. Of Chappaqua School District*, 553 F 3rd. 165, (2nd Cir. 2009) wherein an IEP was still deemed adequate even if no behavior management strategies were included. The sufficiency of chosen strategies for dealing with behavioral issues requires deference to the expertise of school officials. *Grim v. Rhinebeck Cent. School Dist.* 346 F3rd 377 (2nd Cir. 2003).

Respondents seek summary decision. The rules governing summary decision in OAL matters are embodied in N.J.A.C. 1:1-12.5. these provisions mirror the language of rule 4;46-2 and the Supreme Court decisions in *Judson v. People's Bank and Trust Co. of Westfield* 17 N.J. 67 (1954) Under N.J.A.C. 1:1-12.5, the determination to grant summary decision should be based on papers presented as well as any affidavits which may have been filed with the application. In order for the responding party to prevail, affidavits are usually submitted showing there is indeed a genuine issue of material fact. See: *Brill v. Guardian Life Insurance co. of America*, 142 N.J. 520 (1995).

The analysis for determining if such a motion should be granted involves reviewing the pleadings to determine if a cause of action can be found with its four corners. *Van Natta Mechanical Corp. v. Di Staulo*, 277 N.J. Super 175 (App. Div. 1984). Plaintiff or petitioner is entitled to a liberal interpretation of the complaint, and a cause of action may be gleaned from an obscure statement of claim, giving an opportunity to amend if necessary. *Printing Mart -Morristown v. Sharp Electronics Corp* 116 N.J. 739 (1989).

But a complaint may be dismissed for failure to state a claim if it fails to articulate a legal basis that will result in 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. *Popular N. Amv. Gandi* 184 N.J. 161 (2005).

Petitioners' counsel argues that it is compelled to bring this action in the Office of Administrative Law in order to exhaust its administrative remedies. *Batchelor v. Rose*

Tree Media Sch. Dist. 759 F 3rd 266 (3rd Cir. 2014). See also Wellman v. Butler Area Sch. Dist. 877 F 3rd. 125 (3rd Cir. 2017).

It is suggested that the Office of Administrative law has “broad discretion” to provide or award compensatory education to remedy a public agency’s failure to provide a disabled child with appropriate services during the time the child was entitled to a free appropriate education and was denied appropriate services G.L. v. Ligonier Valley Sch. District 802 F. 3rd 601 (3rd Cir. 2015). It is further suggested that regardless of the pleadings, an ALJ should still exercise its fact-finding powers and allow a party to utilize the hearing as a tool of discovery so that the parents of a disabled child can understand and find out what is going on with their child. See Andrew F. ex rel. Joseph F. v. Douglas City. Sch. Dist. RE-1 S. Ct. 988 (2017).

Finally, in pleading and seeking a compensatory award, petitioner’s counsel attaches and relies on an April 19, 2018 letter from the U.S. Department of Education to a Michigan parent that states “there is nothing to limit the powers of a hearing officer to issue a compensatory award based on a specific set of facts and circumstances.”

Although the actions restraining A.Y. should not be condoned, compensatory education aims to place disabled children in the same position they would have occupied but for the school districts violating IDEA. G.L. v Ligonier Valley Sch Dist. Auth 802 F3rd 601 (3rd Circ. 2015). In this petitioner’s case the expert report does not suggest a rational for compensatory education to be awarded and the district took appropriate steps to transfer A.Y. to another school in a timely fashion.

CONCLUSION

Based on a review of the pleadings, the submissions, the replies and the documents attached by both sides, and giving every favorable inference to petitioners, for the reasons set forth herein, I **CONCLUDE** that the Motion for Summary Decision, filed by the Warren County Special Services District, and joined by the Greenwich School

District should be granted; and while I **CONCLUDE** that the imposition of restraints against A.Y. was not an appropriate means of controlling his behavior, I **CONCLUDE** that upon learning of these actions by school officials, the Respondents acted in an appropriate and expeditious manner by finding and placing A.Y. in another school with the consent of his parents, better suited to address his educational and behavioral needs; and I further **CONCLUDE** that since it appears that the time A.Y. missed from school was limited to approximately two weeks, and no monies were expended by his family for tutoring or other services while a new placement was found, as well as the fact it is now two years later, there is no basis to award compensatory education, and by virtue of this office's limited jurisdiction, there is also no basis for the undersigned to award compensatory damages to A.Y.'s family.

ORDER

Based on the foregoing, it is hereby **ORDERED** that certain relief sought by respondents dismissing the petition and entering summary decision in favor of respondents is **GRANTED**.

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).

January 6, 2020

DATE

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ANDREW M. BARON, ALJ

APPENDIX

Witnesses

For Petitioners:

For Respondent:

Exhibits

Petitioner:

- P-1 Certification of A.Y.'s mother (Attached to July 31, 2019 opposition)
- P-2 C.V. of Expert (attached to July 31, 2019 opposition)
- P-3 Expert Report (attached to July 31, 2019 opposition)
- P-4 Answer to Amended Due Process Petition, dated August 22, 2018 p
- P-5 U.S. Department of Education Policy Letter dated April 19, 2018 (attached November 20, 2019 submission)

Respondent:

- R-1 IEP, dated April 19, 2016 (attached to October 2018 submission)
- R-2 Occupational Therapy Stated, dated April 20, 2015
- R-3 IEP, dated June 10, 2015