State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION

OAL DKT. NO. EDS 12912-14

AGENCY DKT. NO. 2015-21695

J.G. and R.G. o/b/o/ R.G.,

Petitioner,

v.

VOORHEES TOWNSHIP

BOARD OF EDUCATION,

Respondent.

Jamie Epstein, Esq., for petitioner

Howard Mendelson, Esq., (Davis & Mendelson, LLC, attorneys) for respondent

Record Closed: February 3, 2015 Decided: February 6, 2015

BEFORE **W. TODD MILLER**, ALJ:

STATEMENT OF THE CASE

On September 4, 2014, petitioner requested relief from the Office of Special Education (OSEP) Programs. The petition averred inter alia, that Voorhees Township Board of Education (respondent or district) violated petitioner's Individualized Education Plan (IEP) by failing to place a nurse in the building where the disabled student would receive his extended school year educational programs and services. For the reasons discussed below, the relief sought by petitioner is **DENIED**.

PROCEDURAL HISTORY

The petitioner requested a fair hearing and the matter was filed with the Office of Administrative Law (OAL) on October 6, 2014, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. A prehearing conference was held by the undersigned on November 5, 2014, and the matter was set for trial on November 24, 2014. The hearing continued on December 3, 2014, and December 22, 2014, and January 21, 2015. Closing briefs were submitted on February 3, 2015, and the record closed.

FACTUAL BACKGROUND

Most of the material facts were undisputed. Petitioners' son (R.G.) is a twelve-year old student that is classified as multiplied disabled along with a seizure disorder (Periventricular Leukomalacia), cognitive, sensory and auditory deficits, along with other learning related disabilities (R-1:4). He is eligible for special education services and was assigned to a self-contained fifth-grade class for the 2013-2014 school year.

R.G. was adopted when he was about ten months old. Petitioners were advised during the adoption that R.G. was at risk of being impaired or disabled based upon the presence of certain medical conditions.

R.G. received early intervention services at home. He then attended the Burlington County Special School Services District after reaching age three. R.G. then moved on to the Riverside School until 2009. R.G.'s IEP plans did not contain any special (seizure) alerts while he was attending the Burlington County or Riverside programs. R.G.'s mother contends that it was not necessary because the Burlington and Riverside districts kept her informed of her son's seizure activity.

In 2009 petitioners moved to Voorhees and R.G. attended the Osage Elementary School until 2013. R.G. graduated from the Osage Elementary School at the end of 2014. He was assigned to the Voorhees Middle School for the 2014-2015 school year which included extended school year services (ESY or summer school) that

was set to commence on July 7, 2014 (R-1:24). The dispute herein is whether R.G.'s IEP requires that a nurse be physically present in the Voorhees Middle School (VMS) building during ESY.

R.G.'s May 28, 2014, IEP contains a special alert in the heading of the first page of the document that states "if the [R.G.] **falls**, take him to the nurse immediately and notify parent" (R-1:1)(emphasis added). The IEP explains under "parent concerns" that when "[R.G.] **falls**, we need to be informed within minutes of his fall and an incident report should be filed" (R-1:9) (emphasis added). Petitioner's mother indicated that she is very scared for R.G since his transitioning to middle school. There are more classroom movements and R.G. could get bumped or hurt (R-18, track 1 at 1:10 -1.20). R.G.'s mother explained that the primary purpose of the special alert and incident reporting provision in the IEP is for medical tracking purposes. Petitioners inform R.G.'s treating doctors of the number seizures and will change his medications, if needed[1]. Petitioners maintain a log at home for all of R.G.'s seizures.

R.G. does not receive any treatment at home from a nurse. Petitioners indicated that R.G. has seizures (described[2] as stares, laughs, giggles, hiccups, pauses, or falls) a few times per week. R.G. might fall unrelated to his seizures or have seizure and not fall at all. He is able to walk and talk after the seizures. He has never been treated or seen by a nurse when this occurs at home[3]. Again his parents reiterated that they record the apparent seizure and inform his treating doctors.

Neither the IEP nor the ESY portion of the IEP contains any related services for the school nurse. No medical interventions are required or authorized in the IEP and none have been provided since petitioner has been with the district. There is a seizure treatment plan on file, but this too does not require any related nursing services, actual nursing services or medical interventions in any form or kind. There were no authorized medications administrations, injections, or medical treatments for R.G. in the event of a

[1] Digital recording, December 22, 2014 at 5.01 p.m.
[2] See R-9 Seizure Plan - This describes how the seizures will appear.
[3] Digital recording, January 21, 2015 at 11:57.49 a.m.

seizure. Nor does R.G. require any nursing services after school. He does not have a nurse at home during the week or on weekends.

R.G.'s 2014-2015 ESY or summer program started on July 7, 2014, and ended on August 14, 2014. The ESY was set for Monday through Thursday from 9:00 a.m. to 1:00 p.m. ESY included occupational therapy, physical therapy, speech-language therapy and adult support along with in-class special education (hereinafter academic and therapeutic provisions). R.G.'s ESY instructor was a former athletic coach and was trained in first aid, CPR and AED use. R.G. also had a "two-on-one aide" meaning that one aide would follow and support two special needs students. During the summer of 2014, the district offered petitioners a "one-on-one aide" as a means to assuage their concerns about R.G. falling or possibly getting hurt (R-6).

The May 28, 2014, IEP does not contain any substantive, medical or related nursing services for either ESY or the full school year. Indeed, the district has two nurses on staff for its three district buildings that are open during the summer. R.G.'s IEP states that his ESY will be offered at the VMS which is different from the building R.G. attended during the 2013-2014 school year (Osage School). There is no nurse on location at the VMS during the summer. But two nurses are on staff within the district (R-4). They are located at buildings that are within are five to ten minutes of the VMS. Petitioners refused to send their son to the VMS for the 2014 ESY because there was no nurse physically present in the VMS building.

During the IEP meeting neither party addressed with specificity whether a nurse must be in physically situated the school building when R.G. is in school, particularly summer school. Petitioners assumed that a nurse would be physically present in the building while the district assumed that having a nurse on staff in the district was sufficient for R.G.'s needs. Each side recorded the May 28, 2014, IEP meeting wherein portions were played during the hearing. The gravamen of the nursing discussion during the IEP meeting is about reporting any seizure activity to petitioners so they can log it and report it to R.G.'s treating doctors (P-9; R-18).

The district claimed the IEP's ESY program met the requirements of Individuals with Disabilities Education Act (IDEA) and provided a Free Appropriate Public Education (FAPE). The IEP was developed with the assistance and input from petitioner's consultant Dr. Howard Margolis (R-1: Meeting Participants). Dr. Margolis provide a detailed list of twelve parental concerns or requests prior to the development of the IEP. There is no mention that a nurse that must be in the VMS building. The outline of concerns states under item 12, "Incident reports, e.g. when [R] falls, we need to be informed within minutes of his fall and an incident report should be filed" (R-2). This language was adopted verbatim in the IEP. Petitioners did not contest the substance of the educational components of the ESY program. And petitioner did not offer any rebuttal evidence that the ESY program failed to provide a FAPE – except for the provision involving a "if R.G. **falls** take him to the nurse immediately".

The Osage Elementary School Nurse, Susan Guerin (Guerin) testified. Guerin is familiar with myoclonic epilepsy seizures which she described as momentary or brief stares or muscle twitching (see, R-9). They generally do not involve the more horrific depictions of violent muscle twitching and flailing on the ground. Guerin explained that R.G. has been in the elementary school for at least two years. Guerin has never witnessed or observed R.G. having a seizure. Nor has Guerin made any her seizure determinations or reports based upon first hand observations of R.G. On one occasion a teaching staff member was on field trip with R.G. The teacher thought she observed what looked like a seizure when R.G. paused and stared for about two seconds (R-11). Later the teacher reported her observations to the nurse and a parental notice or report was generated.

R.G. never required any form of emergency treatment by the school staff or nurse. Nor has there been a need to call 911 (emergency), treat R.G. with any form of medical intervention or nursing services for his seizure disorder. If a myoclonic seizure were to occur at school the basic treatment is to keep the child comfortable and generate an incident report. Two years of records demonstrated R.G. has only been treated for cuts and scrapes and no seizures, during his time in the Osage Elementary

School (R-10 to R-12). The treatment for cuts and bruises generally lasted one minute or less.

The due process petition filed with the OAL on October 6, 2014, raises the following issues for adjudication. Did the respondent district fail to comply with petitioner's 2013-2014 IEPs specifically by: 1) failing to provide an onsite school nurse for extended school year services (ESY); 2) changing the onsite school nurse provision in the IEP without petitioner's consent; and 3) cause petitioner to miss a significant portion of his 2014 ESY; 4) is petitioner entitled to compensatory services?

The district avers that it had two nurses on staff for the ESY albeit; at a different building locations within the district. This met the requirements contained in the student's IEP. The student only has to be seen by a nurse if he falls and a nurse would be called from one of the two other buildings to see petitioner, if he fell. Moreover, his ESY instructor was trained in first aid, CPR, AED use, and would call 911, if circumstances warranted. These are the same services the nurse would provide. The district offered, as an accommodation or as an assurance to the child's parents, a one-on-one aide to follow petitioner around to prevent any falls; to provide ESY services in the same building as the school nurse; or home instruction – all which were refused by petitioners.

FINDINGS OF FACT AND CREDIBILITY

1. R.G is eligible for special education based upon his diagnosis with a seizure disorder (Periventricular Leukomalacia), cognitive, sensory and auditory deficits, along with other learning related disabilities.

2. R.G.'s seizure disorder is described as myoclonic seizures which involve short stares, muscle twitches, laughing, hiccupping, according to the school nurse and his parents.
3. Voorhees BOE does not have a nurse in every school building during its ESY (summer) program. The BOE has two nurses that cover three buildings. They

are within five to ten minutes of the school where R.G. would be attending during ESY.

4. R.G.'s May 28, 2014, IEP contains no specific "related services" for a skilled or certified nurse. In the heading of the IEP it states "if the [R.G.] falls, take him to the nurse immediately and notify parent".

5. The primary intention or goal of this language was for recording and reporting purposes, not emergency assistance. These reports assisted R.G.'s parents and treating doctors in monitoring his medications and making adjustments, if necessary. This was discussed in the IEP meetings and reflected in the IEP itself under parent concerns. It was reiterated during R.G.'s mother's testimony and was emphasized in the complaints filed by the petitioners with the district. Emphasis was always placed on the need for an incident report so R.G.'s doctors could be immediately notified about the frequency of his seizures.

6. The district offered sufficient and convincing evidence that it was providing this level of service and would continue to do so during the 2014 ESY program. Nurse Guerin maintained a detailed log of all of R.G.'s incidents (R10-12). She never offered any medical treatment for R.G.'s seizures for the two years he was in her building. Guerin never saw R.G. have a seizure over the two-year period that she was his nurse. She simply would come on scene afterwards and would write down what the teacher(s) observed and passed the information along to R.G.'s parents.

7. The district also offered convincing proofs that it took extraordinary precautions with regard to R.G.'s safety. He was provided a one-on-two aide in his IEP and offered a one-on-one aide for ESY. His classroom instructor was informed of his medical condition and was trained in first aid, CPR and AED use.

The proofs and testimony offered by the district were reliable, believable and corroborated by the IEP itself, logs, emails, reports and at times by the testimony of

petitioners. On the contrary petitioners did not rebut the proofs and testimony offered by the district. Petitioner's offered no rebuttal medical testimony that the precautions taken by the district was inadequate.

CONCLUSIONS

Congress enacted the IDEA, 20 U.S.C. §§ 1400-1487 to ensure that children with disabilities are provided with educational opportunities. State and federal laws require local public school districts to identify, classify and provide a free appropriate public education to children with disabilities. 20 U.S.C.A. § 1412; N.J.S.A.18A:46-8, -9. In short, New Jersey school districts have an affirmative obligation to ensure that children with special needs are offered an appropriate education in accordance with federal and state law.

A "free appropriate public education" is special education and **related services** that are provided at public expense, under public supervision and direction, and without charge; that meet the standards of the State educational agency; that include an appropriate preschool, elementary, or secondary school education; and that are provided in conformity with an IEP as required under 20 U.S.C. § 1414(d). 20 U.S.C. § 1401(8). "Special education" is specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings, and instruction in physical education. 20 U.S.C. § 1401(25); c.f., N.J.A.C. 6A:14-1.3.

Federal law is complied when a local school board provides a handicapped child with a personalized educational program and sufficient support services to confer some educational benefit on the child. Hendrick Hudson Dist. Bd. of Ed. v. Rowley, 458 U.S. 176 (1982). The Third Circuit Court of Appeals indicated that the appropriate standard is whether the IEP offers the opportunity for "significant learning" and "meaningful educational benefit." Ridgewood Bd. Of Educ. v. N.E., 172 F.3d 238 (3d. Cir., 1999).

The United States Supreme Court held that the burden of proof in a special education matter rests with the party filing the claim or initiating the action. Schaffer v. Weast, 546 U.S. 49 (2005). This was a departure from the holding in Lascari v. Board of Educ., 116 N.J. 30 (1989) wherein the New Jersey Supreme Court held that the district carried the burden of proof regardless if it was the petitioner or respondent. The New Jersey legislature opted to promulgated N.J.S.A. 18A:46-1.1[4] placing the burden of back upon the school districts regardless of filing status. Thus, the district bears the burden of production and proof that it provided petitioners' child a FAPE.

The substantive academic and therapeutic program contained in R.G.'s May 28, 2014, IEP were not challenged in this proceeding. Therefore, I **CONCLUDE** that the district meet its burden of proof that the IEP in question was properly designed to provide R.G. with a FAPE. Ridgewood Bd. Of Educ., supra.

The only remaining issue is did the district otherwise fail to comply nursing provision found in the heading of the IEP. The IEP states if the [R.G.] falls, "take him to the nurse immediately and notify parent" (R-1:1). Petitioners aver that this language required the district to have a nurse **on the school premises** whenever and wherever their son was being educated. And since a school nurse was not on the VMS premises during the 2014 ESY, the district violated the student's IEP.

Every board of education is required to hire at least **one** certified school nurse. N.J.S.A. 18A:40-1. The statute does not require the position to be full-time. Ramsey Teachers Assoc. v. Bd. of Educ. Boro. of Ramsey, 382 N.J. Super. 241, 246 (App. Div. 2006). Consistent with the nursing statutes, Voorhees was not required to have a certified school nurse physically present at every school campus during the school year or during its summer program. Voorhees Board of Education employed two nurses for the three building locations during the summer 2014 (R-4). The VMS was the one

[4] This statue states "[w]henever a due process hearing is held pursuant to the provisions of the "Individuals with Disabilities Education Act," 20 U.S.C. §1400 et seq., chapter 46 of Title 18A of the New Jersey Statutes, or regulations promulgated thereto, regarding the identification, evaluation, reevaluation, classification, educational placement, the provision of a free, appropriate public education, or disciplinary action, of a child with a disability, the school district shall have the burden of proof and the burden of production."

location that did not have nurse "on location" during the summer. The nurses at the two other campuses covered the VMS. Indeed, if R.G. fell at the VMS, a school nurse would come to the building, immediately evaluate R.G. and contact his parents as required in IEP. The district concluded that having a nurse on staff within the district was sufficient for ESY, in the absence of any compelling medical requirement or report stating otherwise.

The district understood and interpreted the nursing provision to mean a nurse had to be on staff[5] within the district at all times and that anytime R.G. fell, a nurse must determine whether the fall was caused by a seizure, or caused by an accident unrelated to a seizure. This was similar to the understanding expressed by R.G.'s mother. She explained[6] that the primary reason for the nurse to see R.G. after a fall was to document the reason for his fall so as to inform his treating physicians. If his seizures were occurring too often his medications could be adjusted, if needed.

This conclusion is supported by prior statements of petitioners to the district staff. On June 4, 2014, the school nurse recorded that Mrs. G. was upset about nobody notifying her that - "R.G. falling a few times on May 27th." "I'm not blaming you, but somebody is at fault for not notifying me" She, (R.G.'s mother) would like an accident report each time he falls (R-10; R-12:14). The IEP also states in the "parental concerns" section that when "[R.G.] falls, we need to be informed within minutes of his fall and an incident report should be filed" (R-1:9).

R.G.'s IEP history also supports the district's interpretation of the IEP nursing provision. Indeed, R.G.'s prior IEP's, while he was with other school districts, did not have any nursing provisions or special nursing alerts. There was also no evidence that R.G. required nursing level treatment for his seizures. The 2010 seizure action plan prepared by R.G.'s treating doctor simply states contact the school nurse (R-9).

[5] N.J.A.C. 6A:16-2.1(f); N.J.A.C. 6A:16-2.3
[6] Digital recording, December 22, 2014, at 5:00 p.m.

Likewise there were no specific nursing "related services[7]" identified or included in R.G.'s IEP.

The nurse never treated R.G. for a seizure and never observed any seizures, in the two preceding years while R.G as attending the Osage school. They only way the nurse was able to document a seizure was by discussing the underlying circumstances and observations with those who were present, if or when, R.G fell. For example, on October 24, 2014, the school nurse noted that "Mrs. Dinicolas states at the field trip to the Acme [R.G.] had pause for two seconds around 10:00 a.m., teacher not sure if it was a seizure. Notified dad" (R-11). Myoclonic seizures involve short stares, muscle twitches, laughing, hiccupping according to the school nurse and petitioners (R-9). That is why the nurse did not observe or treat R.G. for any seizures over the past two years. Her role was to simply report what the teachers observed and/or treated R.G. for minor cuts or bruises, if needed (R-10-12).

Finally, there was no evidence that R.G. required a private nurse, for safety or medical purposes, in his private life, either after school or on weekends. His parents do not employ a nurse or take him to a nurse or doctor after every apparent seizure that he experiences while at home. N.J.S.A. 18A:40-3.2(b) provides "[m]edically fragile students who **require clinical nursing services** while attending school should expect and **receive the same level of care they receive at home**. Maintaining a **continuity of care for medically** fragile students creates a safer environment at school fosters learning, and gives parents confidence that their children's medical needs are being met by qualified health care providers" [emphasis added]. It follows that if R.G. did **not** require clinical nursing services after school or on weekends; and did **not** require any related (skilled) nursing services from the school nurse while at school, then he did **not**

[7] In general the term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children. 20 U.S.C. § 1401. [Emphasis added]

need a school nurse to be on standby in the same building while he attended summer school, in the event he “fell or falls.” I so **CONCLUDE**. There is an absence of medical and factual basis demanding such high level of service. Two years of nursing reports clearly demonstrate that majority of time when R.G. fell at school was entirely unrelated to seizure activity (R10-12). The nurse would simply treat a scrape, bump or bruise, if any, just like she would for all other children, and notify petitioners. The two nurses within the district during ESY could provide this level of service.

Based upon the factual, historical, and medical background set forth above, along with weighing the credibility of all witnesses, I **CONCLUDE** that the district’s interpretation of the nursing provision in the IEP was more logical and reasonable.

Circumstances requiring the presence of a school nurse are illustrated in two cases below. In Irving Independent School Dist. v. Tatro, 468 U.S. 883 (1984) the court discussed the role of a school nurse under "related services" and “medical services" for severely a disabled child. The child was diagnosed with spina bifida causing a neurogenic bladder which prevented the child from emptying her bladder voluntarily. Consequently, the student had to be catheterized every three or four hours to avoid injury to her kidneys. A procedure known as clean intermittent catheterization (CIC) was required. This is a simple procedure that can be performed in a few minutes by a layperson with less than an hour's training. It is not a medical service that must be performed by a physician. Thus school personal could provide the related service to the student. The court went on to explained:

> First, to be entitled to related services, a child must be handicapped so as to require special education. See 20 U. S. C. § 1401(1); 34 C.F.R. § 300.5 (1983). In the absence of a handicap that requires special education, the need for what otherwise might qualify as a related service does not create an obligation under the Act. See 34 C.F.R. § 300.14, Comment (1) (1983).
>
> Second, only those services necessary to aid a handicapped child to benefit from special education must be provided, regardless how easily a school nurse or layperson could

> furnish them. For example, if a particular medication or treatment may appropriately be administered to a handicapped child other than during the school day, a school is not required to provide nursing services to administer it.
>
> Third, the regulations state that school nursing services must be provided only if they can be performed by a nurse or other qualified person, not if they must be performed by a physician. See 34 C.F.R. §§ 300.13(a), (b)(4), (b)(10) (1983). See also, e. g., Department of Education of Hawaii v. Katherine D., 727 F.2d 809 (CA9 1983).

In Cedar Rapids Community Sch. Dist. v. Garret F. by Charlene F., 526 U.S. 66 (1999) a student was wheelchair-bound and ventilator dependent. He required a responsible individual nearby to attend to certain physical needs during the school day. The district declined to accept financial responsibility for the services, believing that it was not legally obligated to provide continuous one-on-one nursing care. The court held that IDEA requires the district to provide the student with the nursing services he requires during school hours as a related service. The statute may not require public schools to maximize the potential of disabled students commensurate with the opportunities provided to other children, see Rowley, 458 U.S. at 200; and the potential financial burdens imposed on participating States may be relevant to arriving at a sensible construction of the IDEA, see, Tatro, 468 U.S. at 892, supra**.**

In the matter at bar, R.G. was not designated for any skilled or related services from a nurse. The nurse alert was included in the heading of the student's IEP as a precautionary warning. Petitioner claims that the nurse provision in the IEP required a nurse to be on constant standby, in the same building as R.G. I **DISAGREE**. In the absence of more detailed role requiring skilled nursing in the related services section of the IEP, as illustrated in the above-mentioned cases, I must conclude that the presence of a nurse in the district; albeit not in the student's building, was sufficient to meet the requirements found in R.G.'s IEP. N.J.S.A. 18A:40-3.2(b).

Finally, notwithstanding the disagreement over the nursing language, the district remained ready, willing and able to provide R.G. his entire panoply of ESY (academic

and therapeutic) services at the VMS during the summer of 2014 (R-5). When petitioners expressed concern that a nurse would not be in their child's building, a one-on-one aid was offered to assuage petitioners' concerns and ensure that R.G. was protected from falls or injury (R-5). Indeed, the ESY special education teaching staff was apprised of all unique needs for their summer students, including R.G. R.G.'s special education teacher was trained in first aid, CPR and use of an AED device (P-6). Therefore, substantial precautions were instituted for R.G. and others.

The district also tried to accommodate petitioners in other ways including moving R.G. to a build with a (summer time) school nurse (R-15). The building location was different but the academic and therapeutic services were substantially similar (R-14). Major differences were the grade level of the children. The modified location included third, fourth and fifth graders whereas the children at VMS would be students in sixth, seventh and eighth grade. Special education students can be mixed with different aged students for up to four grades. N.J.A.C. 6A:14-4.7(a)(2). Indeed, R.G. would also lose the opportunity to become familiar with (transition) into the VMS building and become familiar with the building layout and students over the six weeks of summer. This was an important consideration for petitioners, so they rejected the district's accommodation offer.

Finally the district offered petitioners home schooling if they were not going to agree to send R.G. to the VMS for the six-week summer program. This too was rejected by petitioners.

I am mindful that the alternatives offered by the district were not ideal from petitioners' prospective and the alternatives had some legitimate academic flaws as discussed by Dr. Margolis. But these alternatives illustrated that the district was attentive to the circumstances and looked for options to resolve the impasse.

Petitioners also asserted that the district could have simply contracted with an outside nursing service for the six weeks at a cost of about $5000. The district's failure to do so infers bad faith or a lack of cooperation. The district's operations, finances and

budgeting are well within management's discretion. G.M. v. Roselle Park Borough Board of Education, 95 N.J.A.R. 2d. (EDU) 107, 109. It will not be "usurped or assumed by the Commissioner of Education absent a definitive showing of bad faith or arbitrary actions taken in bad faith without a rational basis." Ibid. There is no per se IDEA rule, authority, or law that requires management to spend the more public dollars than it deems lawfully necessary. If two nurses were on duty in the district, and that was sufficient under IDEA and New Jersey law, the district does not have to purchase a third nurse merely because it would be inexpensive to do so.

Finally, even if the IEP was interpreted favorably for petitioner mandating that a nurse be physically present in the building at all times that R.G. was present; under the facts of this case, the lack of building nurse was **not** be a substantial violation of the IEP. The absence of any specific "related services" for the nurse in the IEP; the short durations of the seizures; lack of any prior treatment for seizures by the nurse; the lack of a nurse at home where R.G. spends the majority of his time; the lack of a nurse on field trips, vacations, and all events outside school; the extensive safety precautions taken by the district; and the historical evidence indicating that the role of the school nurse was that of a report generator, leads me to **CONCLUDE** that if two nurses were in nearby buildings but not in R.G's building, it would be a de minimis IEP deviation. In Melissa S. by Karen S. v. School District of Pittsburgh, No. 05-1759, 183 Fed. Appx. 184, 186-187, 2006 U.S. App. LEXIS 14118 at (3d Cir. June 8, 2006) the court observed:

> [t]o prevail on a claim that a school district failed to implement an IEP, a plaintiff[8] must show that the school failed to implement substantial or significant provisions of the IEP, as opposed to a mere de minimis failure, such that the disabled child was denied a meaningful educational benefit. Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000). Flexibility to implement an IEP is maintained, yet the school district is accountable for "confer[ring] some educational benefit upon the handicapped child," as required by the IDEA. T.R. ex rel.

[8] I remain mindful that the district bears the burden of proof in New Jersey. As indicated, the district met its burden of proof and petitioners did not rebut, impeach or undermine the district proofs.

N.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000) (citing Rowley, 458 U.S. at 188-89).

The district never denied R.G. any of his academic or therapeutic services embodied in his 2014 IEP. And it was these services that made up the "substantial or significant provisions of the IEP." And there was no objective evidence that R.G. was placed at risk if he attended the 2014 ESY program at VMS, without a nurse in the building.

In summary, I **CONCLUDE** the district was not required by law or in the student's IEP to provide an "onsite school nurse" for extended school year services (ESY); 2) the district did not change or amend the school nurse provision in the IEP without petitioner's consent; 3) petitioner missed a significant portion of his 2014 ESY by his own choice and not by the district's doing (P-8; R-16); and 4) petitioner is entitled to compensatory services, notwithstanding the dispute herein.

To be clear as to number four above, the district offered to provide R.G. all of his ESY academic and therapeutic programs and services before and during the course of this contested case (i.e. compensatory education) (R-4, 5, 6 and 16). Therefore, compensatory education was never denied or contested by the district. The district concluded that petitioners turned down ESY at their choosing. Nevertheless, the liability or causation triggering the need for compensatory education remained contested by petitioners. For the reasons explained above, the district must continue to offer R.G. compensatory services for the educational and therapeutic programs he missed during the summer 2014. I **CONCLUDE** that the liability or causation requiring compensatory education is not attributable to the district. Therefore my directive to provided compensatory education is not tantamount to deeming petitioners a prevailing party but rather is just a reminder that R.G. is entitled to receive what was lost during the summer of 2014.

Petitioners appeared to be very caring and concerned parents. They have a disabled child that needs an extraordinary amount of care. Their dispute over whether a nurse had to be present in the building when their son was also present was made

out of abundance of concern for his safety. But it was not based upon an actual documented medical need or a related IEP service. I suspect, not all, but some children with seizure disorders might require a nurse to be on standby, in the same school building. This would depend on the type or severity of seizures, seizure treatment plan, required medical interventions delineated by competent physicians, and other factors. Here, R.G.'s IEP, history within the district and seizure plan did not include or require any nursing interventions other than of basic first aid (R-9).

ORDER

I **ORDER** that the relief sought by petitioners be **DENIED**. The action filed by petitioners is **DISMISSED**.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2009) 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.A. § 1415(i)(2); 34 C.F.R. § 300.516 (2009).

February 6, 2015 _____

DATE **W. TODD MILLER**, ALJ

/jb

WITNESSES AND DOCUMENTS IN EVIDENCE

WITNESSES

For Petitioner:

Dr. Howard Margolis, Petitioners' Special Education Expert
J.G., Student's Mother
R.G., Student's Father

For Respondent:

Dawn Danley, Case Manager
Susan Guerin, School Nurse
Dr. Diane Young, Assistant Superintendent
Dr. Elaine Hill, Director of Special Services
Dr. Frank DeBerardinis, Assistant Superintendent

EXHIBITS

For petitioner:

P-1 IEP May 24, 2013, Face Sheet Only
P-2 Dr. Howard Margolis, Resume
P-3 Dr. Howard Margolis, Report
P-4 OPRA Response, Bayada Nurse Costs
P-5 Nemours Letter from Nurse Practitioner, July 7, 2014
P-6 E-Mail dated July 8, 2014, from J.G.
P-7 E-Mail dated July 17, 2014, from J.G and R.G.
P-8 E-Mail dated August 7, 2014, from J.G and R.G.
P-9 CD of IEP Meeting

For respondent:

R-1 IEP dated May 28, 2014
R-2 List of Parental Concerns from Dr. Howard Margolis, May 28, 2014
R-3 Intentionally Omitted
R-4 E-Mail dated July 9, 2014, from Dr. Elaine Hill
R-5 E-Mail dated August 4, 2014, from Dawn Danley
R-6 E-Mail dated September 23, 2014, from Dawn Danley
R-7 E-Mail dated August 7, 2014, from J.G.
R-8 E-Mail dated August 12, 2014, from Dr. Elaine Hill
R-9 Seizure Plan, March 4, 2010
R-10 R.G. Nurse Visit Log
R-11 R.G. Nurse Visit Log
R-12 R.G. Nurse Visit Log
R-13 Intentionally Omitted
R-14 E-Mail dated July 15, 2014, from Dr. Elaine Hill
R-15 E-Mail dated July 15, 2014m from Catherine Thomas, NJDOE
R-16 E-Mail dated August 12, 2014, from Dr. Elaine Hill
R-17 CD/Flash Drive of IEP Meeting