



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

**FINAL DECISION**

OAL DKT. NO. EDS 03510-22

AGENCY DKT. NO. 2022-34019

**G.K. ON BEHALF OF A.M.,**

Petitioner,

v.

**WASHINGTON TOWNSHIP**

**BOARD OF EDUCATION,**

Respondent.

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**Kat McKay**, Esq., for petitioner (Brain Injury Rights Group, attorneys)

**Sanmathi Dev**, Esq., for respondent (Capehart & Scatchard, P.A., attorneys)

Record Closed: September 29, 2022

Decided: October 11, 2022

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

**STATEMENT OF THE CASE**

The petitioner, G.K., on behalf of her child, A.M., filed a Due Process Petition with the Office of Special Education, Department of Education maintaining that respondent, Washington Township Board of Education (Board), failed to provide A.M. with a Free Appropriate Public Education (FAPE) by failing to implement his

Individualized Education Program (IEP), dated March 3, 2020, because of the switch to virtual instruction on or about March 16, 2020, under Executive Order 104. Additionally, petitioner asserted that the school closure was a unilateral modification of A.M.'s IEP in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 et seq. (Section 504.) The Board, in its Answer, stated that A.M. received remote instruction during the pandemic-related school closure and was provided with a FAPE as mandated by the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. §1415.

### **PROCEDURAL HISTORY**

The petitioner filed a Due Process Petition with the Office of Special Education, Department of Education, on March 11, 2022. The respondent filed its Answer on April 18, 2022. The matter was transmitted to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 to 13, where it was filed on April 29, 2022.

On July 25, 2022, the respondent filed a Motion for Partial Summary Decision to dismiss petitioner's claim that closing the school to in-person instruction due to the COVID-19 pandemic automatically resulted in a denial of FAPE to A.M. The petitioner's brief in opposition to the motion was received on September 9, 2022, and the respondent's reply brief was received on September 23, 2022. I held a telephone conference on September 29, 2022, to discuss issues raised in the briefs and to determine the need for additional oral argument. The parties agreed that additional oral argument was not needed, so I closed the record on September 29, 2022.

### **FACTUAL DISCUSSION**

I **FIND** the undisputed material facts are as follows:

A.M. was born on February 13, 2011. On April 5, 2013, he was determined eligible for special education services, as a preschool child with a disability.

For the 2019-2020 school year, A.M. was a third-grade student with a disability classification of Multiply Disabled. He attended school in the District and received special education services and instruction. As stated in the Due Process Petition, the last agreed upon IEP was dated March 3, 2020. There is no claim that this IEP violated the IDEA.<sup>1</sup> On March 16, 2020, the Governor of New Jersey signed Executive Order 104, which indefinitely closed all public and private pre-schools, elementary, and secondary schools for in-person instruction in New Jersey because of the COVID-19 pandemic, effective March 18, 2020. When the District was closed for in-person instruction, all students, including A.M., received virtual instruction.

As alleged in respondent's Answer, A.M. received instruction, including special education services, via remote instruction during the pandemic-related school closure. The Answer also alleged that in the fall of the 2021-2022 school year, "the District proposed to conduct comprehensive evaluations, which consisted of the following: educational, occupational therapy, physical therapy, psychological, social, and speech and language." In petitioner's opposition brief, under Statement of Facts, petitioner noted that in December 2021, the District conducted triennial evaluations. It was also noted that during the 2021-2022 school year, A.M. was a fifth-grade student with a disability classification of Multiply Disabled, placed in a self-contained classroom, with a one-to-one aide, and receiving related services. The Answer filed by respondent alleged that the parties "met multiple times, including on March 24, 2022, to develop an IEP." There is nothing in the record stating whether the parties agreed to a new IEP.

The petitioner, in her Due Process Complaint, described the District's denial of a FAPE only as it related to A.M.'s pendency rights beginning in March 2020, and continuing through the 2020-2021 school year, due to remote instruction. Petitioner's denial of a FAPE claim is based on the following allegations:

1. The District altered the location where A.M. received his academic and related services from a school classroom to remote instruction in the student's home.

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<sup>1</sup> Petitioner's opposition brief contains the following statement: "Nor is the Parent claiming that the

2. The District altered the delivery of services from in-person to virtual through remote instruction.
3. As per A.M.'s IEP, none of his academic and related services were to be provided remotely; therefore, the change to virtual instruction was in contravention to A.M.'s IEP.
4. The District altered the IEP's mandated services for A.M. without notice to petitioner and without her consent.

While respondent disputed petitioner's characterization of the events, it does not dispute that it was required to close for in-person instruction starting in March 2020 due to the COVID-19 pandemic. Executive Order 104 closed all the schools in New Jersey for in-person instruction, effective March 18, 2020. Thereafter, on August 13, 2020, Executive Order 175 permitted schools to provide in-person instruction on an individual basis but did not require all schools in New Jersey to resume in-person instruction for the 2020-2021 school year.

### **SUMMARY DECISION**

Summary Decision may be rendered in an administrative proceeding if the pleadings, discovery, and affidavits "show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). The standard to be applied in deciding a motion pursuant to N.J.A.C. 1:1-12.5(b) is essentially the same as that governing a motion under R. 4:46-2 for summary judgment in civil litigation. Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 121, (App. Div. 1995), certif. denied, 145 N.J. 372 (1996).

A court should grant summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue of material fact, and that the moving party is entitled to a judgment as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-

529 (1995). The Supreme Court of New Jersey has adopted a standard that requires judges to “engage in an analytical process to decide whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” Id. at 533.

A court should deny a motion for summary decision when the party opposing the motion has produced evidence that creates a genuine issue as to any material fact challenged. Brill, 142 N.J. at 528-29. When making a summary decision, the “judge’s function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” Id. at 540.

Herein, respondent also maintained that petitioner, in her due process complaint, failed to state a claim upon which relief can be granted. Pursuant to N.J.A.C. 1:1-1.3(a) and R. 4:6-2, a party may move for dismissal of a complaint for failure to state a claim. In evaluating the complaint, all well-pled factual allegations must be accepted as true. However, this standard does not apply to “unwarranted inferences, unsupported conclusions, or legal conclusions disguised as factual allegations.” Baraka v. McGreevey, 481 F.3d. 187, 211 (3d Cir. 2007).

I **FIND** that this matter is ripe for summary decision. My reasoning is two-fold: there are no disputed material facts; and the claims made by the petitioner, even when deemed as true and given all reasonable inferences, do not support a denial of a FAPE as a per se or automatic violation of the procedural requirements of the IDEA during a state of emergency due to the COVID-19 pandemic.

### **LEGAL DISCUSSION**

The crux of petitioner’s claim is that the Board violated the stay put provision of the IDEA. The stay put provision provides that during the pendency of an IDEA proceeding, the student shall remain in the then-current educational placement. D.M. v. N.J. Dep’t of Educ., 801 F.3d 205, 211 (3d Cir. 2015).

The global COVID-19 pandemic resulted in the declaration of a public health emergency in the United States and in the State of New Jersey, which impacted the nationwide operation of schools. The Honorable Sarah G. Crowley, ALJ, recently addressed the issue in her final decision in the matter of F.V. and M.V. on behalf of B.V. v Cherry Hill Township Board of Education, OAL Docket No. EDS 01556-2021 (April 6, 2022), in which she stated:

The effect of the pandemic on the requirements of FAPE and LRE is worthy of some discussion. On or about March 15, 2020, the State of New Jersey, by Executive Order of the Governor, declared a State of Emergency due to a serious pandemic which came about due to the Covid-19 virus. Among other things, the Order included a shutdown of all schools throughout the State, in an effort to contain the virus, and protect students, teachers, staff and parents from being exposed to others who might be carrying the virus. Little was known at the time about the potential threat, and it was hoped that after a two-week period, that schools and the rest of the State could open up again, with minimal disruption. Re-opening did not happen at that time, and school districts were left to develop alternate methods of teaching through virtual instruction for the balance of the 2019-2020 school year. This was especially challenging for teachers and students who are involved with delivering and receiving special education and related services, impacting thousands of students and families of students like B.V., who are eligible to receive these services.

Recognizing the need to address the situation, the Commissioner of Education, and the Department of Education itself, issued some modified guidelines to districts regarding the alternate method of teaching and delivering services to students, including but not limited to the ongoing obligation to offer and provide FAPE. The directives and guidelines that came out, however, did not require districts to revise the IEPs for students receiving Special Education services. The U.S. Department of Education (USDOE) issued a document advising local education agencies (LEAs) on how to comply with IDEA regulations during the COVID-19 public health emergency. The document was not intended to impose additional requirements on LEAs, nor act as legally binding rules, but rather to provide informal guidance of the USDOE's interpretation of the IDEA and its implementing regulations in the specific context of the COVID-19 health crisis. US Dept of Educ., Questions and Answers to Providing Services to Children with Disabilities

During the Coronavirus Disease 2019 Outbreak, (Mar. 2020), <https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf>. The USDOE provided that if LEAs choose to continue providing educational opportunities to the general student population during a school closure, “the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE.” Id. at 2. The USDOE stated that during this time schools were required to ensure that “to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student’s IEP.” Ibid.

Based upon the above directives from the State of New Jersey and the US Department of Education, it is clear that services needed to be provided to special education students during these unprecedented times. However, there was no obligation to amend every IEP based on the student’s desire to return to school or continue with remote learning. In addition, the directive from the State as well as the USDOE clearly states that the services to be provided to special education students in remote learning was to be “to the greatest extent possible.” The foregoing directive recognizes that we are in unprecedented times and that the services were to be provided to the greatest extent possible and that they were to mirror what was provided to other students without disabilities.

F.V. and M.V. obo B.V. v. Cherry Hill Twp Board of Educ., OAL Docket No. EDS 01556-2021 (Final Decision, April 6, 2022, pages 9-11).

Here, based upon the foregoing, the District was not obligated to amend A.M.’s IEP to address the change from in-person services to remote learning. The directives from the State and USDOE indicated that services for special education students during remote learning were to be provided to the greatest extent possible.

The United States District Court for the District of New Jersey, in an unpublished decision, Carmona v. N.J. Dep’t of Educ., Civil Action No. 21-18746, 2022 U.S. Dist. LEXIS 92868 (D.N.J. May 14, 2022), addressed this issue when it denied plaintiffs’ motion in a putative class action for an automatic injunction under the stay put provision of the IDEA. Similarly, plaintiffs maintained that the school district’s move to virtual instruction in March 2020 was a unilateral change in educational placement in violation of the stay put provision. In holding that the stay put provision did not apply, the District

Court was persuaded by the reasoning expressed by the United States District Court for the Southern District of New York in J.T. v. DeBlasio, 500 F. Supp. 3d 137 (S.D.N.Y. 2020). In J.T., the court explained that because the switch to remote learning impacted every student in the district, “the City did not change any student’s classification, district, or teacher.” Id. at 189-190. Consequently, the court concluded that a system-wide decision of general applicability did not constitute a change in pendency. Id. at 188-189.

Applying those principles herein, the District’s actions in closing its schools to in-person instruction, and switching to virtual instruction due to the COVID-19 pandemic and pursuant to Executive Orders, did not constitute an automatic or per se violation of a FAPE to A.M. Accordingly, I **CONCLUDE** that petitioner’s claim that the District failed to implement A.M.’s IEP dated March 3, 2020, solely because it switched to remote instruction in mid-March 2020, must fail. The guidance issued by the USDOE and the reasoning in Carmona and J.T. indicated that virtual instruction could be instituted during the pandemic without the obligation to amend A.M.’s IEP. As such, A.M.’s pendency rights under his IEP were not violated when the District was forced to switch all its students to virtual instruction in mid-March 2020.

This is not to say that the student did not experience regression in his educational skills, abilities, and performance while on remote instruction. Due process under the IDEA was designed to ensure that children receive FAPE in real time. The District conducted evaluations of A.M. in December 2021, and it was alleged that the parties were meeting to formulate an IEP for A.M. This Due Process Petition appears to have derailed that process. As petitioner stated in her opposition brief, the “gravamen of the DPC herein is that the District denied A.M. a FAPE in multiple school years, by denying academic and related services as well as modifying the Student’s last agreed-upon Individualized Education Program (“IEP”) without notice to, or consent by, the Parent.” The sole focus and only claim in this Due Process Petition is that the District’s switch to virtual instruction resulted in a failure to implement the March 3, 2020, IEP. As I have found that there is no basis for that claim, as a per se violation of FAPE, I **CONCLUDE** that there are no other claims for relief contained within the Due Process Petition.



Petitioner's request for independent educational evaluations in her Due Process Petition stem from her claim that FAPE was denied by a failure to implement the March 2020 IEP due to remote instruction. The petitioner alleged, in her petition, that she disagreed with the student's prior evaluations because "they do not accurately reflect the needs of the student." However, respondent, in its Answer, claimed that petitioner did not comply with N.J.A.C. 6A:14-2.5(c) because she never advised the District that she disagreed with the evaluations conducted, or requested an independent evaluation prior to the filing of her Petition. While petitioner can request independent evaluations in a Due Process Petition, there must be a basis for the claim and, in this case, petitioner tied her request to the failure to implement the March 2020 IEP. Such basis does not support petitioner's request herein.

While a District's failure to implement an IEP can be remedied by compensatory education, this Due Process Petition seeks a remedy based on premise without legal support. Therefore, I **CONCLUDE** that the parties would be best served by a dismissal of the Due Process Petition with the direction that the IEP Team promptly reconvene and talk in earnest about how to best educate A.M. If the parties are unable to reach an accord, the due process procedures are always available.

Respondent filed a Motion for Partial Summary Decision. Within respondent's motion was an alternative request that the matter be dismissed pursuant to N.J.A.C. 1:1-1.3(a) and R. 4:6-2. Upon consideration of the briefs, arguments of counsel, legal authority, and upon consideration of the claims within the Due Process Petition, I **CONCLUDE** that the Due Process Petition must be dismissed for failure to state a claim upon which relief can be granted.

### **ORDER**

Accordingly, the respondent's motion is **GRANTED** and the petitioner's March 11, 2022, Due Process Petition 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.

October 11, 2022  
DATE

  
**KATHLEEN M. CALEMMO, ALJ**

Date Received at Agency: \_\_\_\_\_

Date Mailed to Parties: \_\_\_\_\_

KMC/jns