

# Special Education Law Update

## Recent decisions and trends impacting Special Education and how COVID-19 restrictions have impacted a District's ability to provide services set forth in IEPs.

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# Agenda

- New Jersey Special Education Law
- Legal updates
- Remote vs. Hybrid vs. In-person statistics
- How COVID restrictions have impacted FAPE/IDEA
- Parental concerns raised during COVID restrictions
- Thoughts on what the future holds for Districts in the mid/post-COVID environment

# New Jersey Special Education Law

New Jersey law has 9 “purposes” of its Special Education Code (N.J.A.C. 6A:14):

1. Ensure that all students with disabilities... including students who have been suspended or expelled... have available... a free, appropriate public education as... set under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400 et seq.);
2. Ensure that the obligation to make a free, appropriate public education available to each eligible student begins no later than the student's third birthday...;
3. Ensure that a free, appropriate public education is available to any student ...who needs special education..., even though the student is advancing from grade to grade
4. Ensure that the services and placement needed... to receive a free, appropriate public education are based on the student's unique needs and not on the student's disability;



# New Jersey Special Education Law

New Jersey law has 9 “purposes” of its Special Education Code (N.J.A.C. 6A:14):

5. Ensure that students with disabilities are educated in the least restrictive environment;
6. Ensure the provision of special education and related services ;
7. Ensure that the rights of students with disabilities and their parents are protected ;
8. Assist public and private agencies providing educational services to students with disabilities; and
9. Ensure the evaluation of the effectiveness of the education of students with disabilities.

# Case Law Updates

S.M. on behalf of J.D. v. Cape May County Special Services BOE et. al.

OAL DKT No. EDS 05533-20

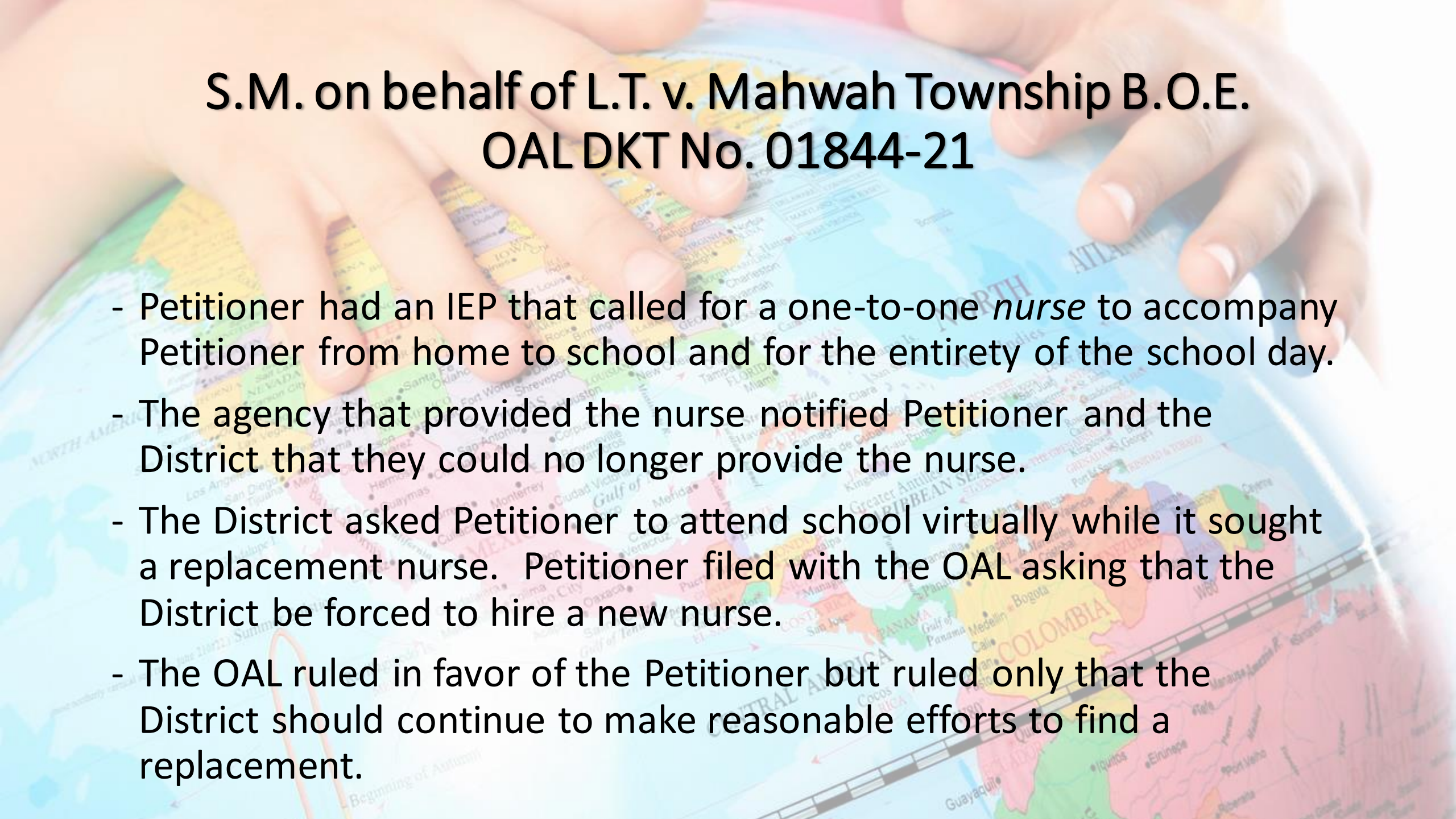
- Petitioner experienced homelessness and medical issues causing the ten year old student to miss over 150 days of school. Petitioner sued for failure to educate and sought compensatory education and monetary damages.
- The OAL concluded that the District's educational plan for the student was appropriate and the IEPs were appropriate. The District was not responsible for the causes of the absences and therefore were not liable.

# S.W. and J.W. on behalf of J.W. v. Elizabeth City B.O.E.

## OAL DKT No. EDS 01697-20

- Minor Petitioner had an IEP that called for “door to door” transportation due to elopement concerns.
- Petitioners lived on a dead-end street and as a result, for safety purposes, the bus stop was established at the closest intersection, 8 houses away from Petitioner’s house.
- The District argued that it was unsafe to ask the bus to move in reverse due to the dead-end road and that “door to door” was not literal.
- The OAL ruled in favor of the District.





## S.M. on behalf of L.T. v. Mahwah Township B.O.E. OAL DKT No. 01844-21

- Petitioner had an IEP that called for a one-to-one *nurse* to accompany Petitioner from home to school and for the entirety of the school day.
- The agency that provided the nurse notified Petitioner and the District that they could no longer provide the nurse.
- The District asked Petitioner to attend school virtually while it sought a replacement nurse. Petitioner filed with the OAL asking that the District be forced to hire a new nurse.
- The OAL ruled in favor of the Petitioner but ruled only that the District should continue to make reasonable efforts to find a replacement.

## J.S. on behalf of D.S. v. Lenape Regional H.S. B.O.E.

- Petitioner was an 18-year old student placed out of district due to a “multiply disabled” classification, to include issues with diabetes.
- While in the school one day per week (due to COVID), a one-to-one nurse was provided.
- Petitioner sought to have the nurse for the four days of remote learning.
- In a petition for emergent relief, the OAL held that the reasons set forth for Petitioner’s care-giver to need the nursing assistance were insufficient to require the District to provide the nurse at the in-home setting.



# Impact of COVID restrictions on school districts

## REMOTE VS. HYBRID VS. IN PERSON LEARNING (as of April 12, 2021)

- 496 districts are hybrid, 118 are remote, and 161 are fully in-person
- varies greatly by county/region (ex. Bergen – out of 107 District and specialized schools, only 5 are in-person **HOWEVER** in Burlington County-50 District and specialized schools, 35 are in-person)
- smaller districts appear more likely to be in-person with only 10 percent of student population of NJ being offered an in-person option

# Impact of COVID restrictions on school districts

- 24% of student population is still full remote
- At start of school year 2020-2021, in person learning was offered by 9.5 percent of schools with MANY more Districts being full remote in September 2020
- Currently, all schools still must provide an option for students to voluntarily learn virtually from home
- Unclear how many students are choosing to learn virtually as it varies greatly among the Districts (ex. 18 percent in unidentified Monmouth County Regional H.S. District versus 78 percent in Middlesex County K-12) as of September 2020
- Per NJ.com, Districts with larger minority populations tend to have more students elect for the full remote option at a rate of two times Districts with smaller minority populations

# HOW COVID RESTRICTIONS HAVE IMPACTED FAPE/IDEA

- Sudden impact due to State of Emergency Orders
- Districts had little time to outline a plan to educate students of varied learning abilities
- In an attempt to satisfy FAPE, N.J.A.C. 6A:14-1.1 and N.J.A.C. 6A: 14-3.9 were modified to address virtual and/remote learning
- Districts (sending or receiving) “shall ensure students with disabilities are provided the same educational opportunities provided to their nondisabled peers through electronic communications, virtual, remote, or other online platforms, as appropriate.”
- Opportunities provided to student with disabilities should be the same as those provided to typically developing peers – difficult in full remote environment
- Virtual learning evolved during the Spring 2020 (student guided versus teacher guided via live feed instruction)





# HOW COVID RESTRICTIONS HAVE IMPACTED FAPE/IDEA

- There are potential impediments to FAPE during full remote instruction for all students, in particular, those with special needs
- Technology issues (ownership of computer and knowledge of programs used for remote learning)
- WIFI access (socioeconomic considerations)
- Separate quiet/comfortable learning spaces in the home
- Supervision of students due to working parent(s) and/or single parent households
- Inequality in households
- Inability of students to be engaged in front of a screen for hours each day
- Lack of students' attention span and self-control
- Students turning off cameras so they cannot be seen by the teacher during remote learning

# Impact upon IEPs

- Increased difficulty complying with agreed upon accommodations and modifications
- NJ Department of Education says: “schools are required to implement student IEPs to the greatest extent possible during periods in which in-person instruction is not provided”
- IEP does not need to be amended to reflect remote instruction as part of District’s plan
- Not all services can be performed effectively via remote learning
- Some services can be provided in limited fashion (speech, mental health counseling)
- Specials are limited due to time spent with special education instructor
- If student has out of district placement per IEP, and the receiving District is in-person, sending District must still provide transportation
- Early intervention services for pre-school aged students due to age related limitations and need for parental supervision



# Addressing Parental Concerns

- Frustration with lockdowns and virtual instruction increases tensions
- Difficulties complying with IEPs in virtual or hybrid settings
- Remote learning not addressing needs of student
- Student cannot maintain attention span sitting in front of a computer for entire day
- Student not receiving related services (speech, OT, PT, ABA at home)
- Students regressing socially and emotionally
- Limited to no exposure to typically developing peers in social situations



# Addressing Parental Concerns

- Students need higher level of supervision causing parents to choose between their own employment and supervising remote school
- Many Districts went to a half day schedule which can also cause FAPE issues
- Limited time in general education setting due to focus being on special education instruction in a more restrictive environment (LRE)
- IEPs in hybrid settings
- Increased “in-school” time may cause privacy concerns-why is student X in school 5 days per week when my child is only in school 2 days per week? (beware of FERPA)

# Addressing Parental Concerns

## REAL LIFE EXAMPLE-Parent Concerns

L.S. is a working mother of 8 year old E.S. L.S. works remotely in the home and father is an essential worker who works overnight shift, thereby needing to sleep during the day. E.S. is in 2<sup>nd</sup> grade and has learning disabilities and ADHD. He is one of three children all are attending school remotely. He has an IEP with accommodations including speech; resource room (pull out) for math and ELA (reading); and OT. Social studies, science and specials were to be in “regular” education settings.

2<sup>nd</sup> grade curriculum was standardized and no modifications were presented -parents were concerned because there were no modifications made to the curriculum for E.S. In response to parent inquiry, mother was told if 2<sup>nd</sup> grade curriculum was too hard for E.S., then he could complete the 1<sup>st</sup> grade curriculum.

**??? IS THIS FAPE ???**

When the District returned to school for half days, E.S. was permitted to attend 5 days per week while his siblings were attending the same school just 2 days per week. E.S. was not provided any time in a regular education setting. He was not taught social studies or science in the regular education setting per his IEP and was expected to watch a video and complete assignments in those subjects on his own at home.

E.S.’ ADHD made it difficult to focus and stay on task. The parents voiced concerns and were told E.S. should attend virtual office hours for extra help and ask questions with other students-if E.S. did not have any questions, he was asked to log off the session. The parents received emails that they needed to supervise E.S. while he was attempting to complete the video assignments at home because E.S. was not completing them properly or at all. The District stated there were not enough hours in the shortened “half” school day to implement the IEP and have E.S. participate in the regular education class with his typically developing peers.

**??? IS THIS FAPE ???**

# What Does the Future Hold?

- **WHAT THE FUTURE HOLDS**

- a return to in person learning for school year 2021-2022
- students may take longer time to adjust to being in a school environment at start of school year due to length of time not in school
- increased need for in-person related services
- potential for teachers and students to seek medical exemptions for in person learning (may lead to ADA/NJLAD claims)
- compensatory education lawsuits
- limitations on class sizes
- cafeteria issues remain
- increased busing services due to limit of number of students on bus
- return of more extracurricular activities and events (with restrictions)



# Questions?

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