State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING
EMERGENT RELIEF
OAL DKT. NO. EDS 02220-23
AGENCY DKT. NO. 2023-35573

PARAMUS BORO BOARD
OF EDUCATION,
Petitioner,
v.
J.C. AND I.A. ON BEHALF OF N.A.,
Respondents.

Stephen Fogarty, Esq. (Fogarty and Hara, attorneys) for Petitioner

Michele Newton, Esq. (Northeast New Jersey Legal Services) for Respondent

Record Closed: March 27, 2023 Decided: March 29, 2023

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

STATEMENT OF THE CASE

Petitioner, Paramus Board of Education, brings an emergent action against respondent and respondents' child N.A. seeking an Order requesting a change of "stay put" by implementing home instruction for the remaining balance of the 2022-23 school year within which N.A. would not be able to return to school.

PROCEDURAL HISTORY

Petitioner filed the within emergent application on February 10, 2020, seeking an Order compelling respondent and their child C.M. to continue home instruction, and remain away from the high school.

Currently, there is a related substantive due process petition filed by respondent J.C. on behalf of N.A. pending before the Department of Education and has not yet been forwarded to the Office of Administrative Law.

The matter was originally conferenced on March 16, 2023, and the parties were encouraged to communicate with their respective clients through Tuesday March 21st to see if an amicable resolution could be reached. Those efforts were unsuccessful, and the matter proceeded with testimony from limited witnesses for each side on March 23, 2023, March 24, 2023 concluding March 27, 2023.

DISCUSSION and TESTIMONY

Petitioner Paramus Board of Education filed the within petition, emergent petition against the respondents. The relief petition seeks an emergent Order includes home instruction and a complete bar of access to the school for the balance of the 2022-23 school year.

Respondents contend that by barring him from school for the remainder of the 2022-23 school year the District is not meeting its obligations to N.A. under FAPE, IDEA and Section 504 of the Rehabilitation Act.

Petitioner through its witness Jenna Esdale contends that the emergent petition should be granted, as the child, N.A., a sophomore at the high school, is a threat to himself, other students, teachers and staff. The District relies on the fact that there were at least ten (10) prior incidents over a four (4) month period leading up to the January 24th assault wherein N.A.'s behavior required a range of discipline from administrative

detention through suspension. The most serious incident which occurred on January 24, 2023 involved another student and school security officer who tried to restrain N.A. The student and security guard were injured and needed to seek medical attention. Related to this but not before me is an action filed by the injured student's family which is before another forum.

Were N.A. to return to school, even in a smaller classroom, the district fears it cannot control him, and an incident of a similar nature or worse would occur.

Testifying for N.A. was his mother J.C. While she acknowledged the district's concerns about the January 24th incident, she expressed genuine concerns on behalf of N.A. that the district was not meeting its mandatory education obligations to him during the course of the suspension, and even before. Moreover, she contends that N.A.'s and her due process rights were violated, by virtue of the school never sending an independent suspension letter with what N.A. would have to do or show to be eligible to return, holding an IEP meeting without her, and despite agreeing on January 5, 2023 to have a psychiatric examination conducted, the report itself, was not completed and made available until March 14, 2023, a month after the IEP meeting which recommended out of district placement was held.

J.C. further contends that the home instruction program itself is deficient, and although a minimum of ten (10) hours a week is required, N.A. has at best gotten four (4) hours, and sometimes two after one of the instructors said he is no longer able or willing to continue to work with N.A. He was not replaced, but Mr. DeLuca did continue to work with N.A. which was still short of the ten hours a week.(The other hours which were offered through the online program "Educere, were not pursued as N.A. who was diagnosed with ADD, had the same computer related focus problems he experienced while the school was online during the pandemic).

To supplement N.A.'s learning during the home instruction period, J.C. has hired a tutor for math and physics, Elizabeth Smeardon, who works for the District, but not in the high school, and a behaviorist Don Aranovich who meets with N.A. twice a week.

According to J.C., both of these in person supplements, which offset the lack of hours from the district, have been very beneficial to N.A.

When J.C. asked the district during the home instruction period to help her pay for these services, the district declined.

The District now says, for the balance of the school year, the home instruction will be handled by "live" instructors, one to one which they secured through the Bergen County Special Services Commission. J.C. has rejected the two out of district placements that have accepted N.A., and the two that she found more suitable, Barnstable and Fusion, are unwilling to accept N.A. at this time, without more behavioral and psychiatric data.

The discussion turned to the District's psychiatric report, which was prepared by Shirley Sostre-Oquendo, M.D.-J.D., which was dated March 14, 2023. The four-page report, which was primarily based on a one-hour interview, outlined problems at school that have been present for several years. Dr. Oquendo pointed out that as early as the end of 2020, it was recommended that N.A. required an out of district therapeutic placement, but after being placed on medication, he remained in district for the balance of that school year. As the 2021-2022 school year commenced, his behaviors became concerning, and a behavior plan was implemented. The report further indicates that by January 2022, an out of district placement was again recommended, but no action was taken, and N.A. continues to exhibit forms of hyperactivity, impulsivity and other related behaviors, some of which J.C. denies.

Interestingly, the report further indicates that N.A. himself acknowledges having trouble thinking things through before acting on them, trouble with authority and losing his temper at home.

Dr. Oquendo did not speak with any of N.A.'s medical or mental health professionals, nor did she attempt to speak with the tutor or behaviorist hired by J.C. for N.A. Dr. Oquendo relies on the prior incidents and the days of suspension in this school year alone to reach the conclusion that not only will it be difficult to meet N.A.'s academic

needs, but were he to return to school, it will be equally difficult to keep those around him safe, which is a critical concern of the district.

She recommends that he be placed in a therapeutic setting, with behavioral support.

Prior to the conclusion of the hearing, J.C. was offered the opportunity to produce a recent psychiatric report from N.A.'s treating psychiatrist, in order to give her the opportunity to counter or explain some of the things cited in Dr. Oquendo's report, and which might alleviate some of the concerns about N.A.'s behavior, were he allowed to return to school. No other report was provided, instead, a one paragraph letter was offered from N.A.'s counselor Chris Whitehead, indicating that it was safe for him to return to school so he can "be with his friends." **I FIND** that letter itself did not include a history, discuss the January 24th incident, or explain the rationale for its conclusion, and that relying on the need to "be with his friends" without a thorough discussion of the other aspects of N.A.'s challenges and how he may have improved and can handle the daily challenges of being in school with his peers is not sufficient to overcome the concerns expressed by the district and Dr. Oquendo.

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). N.H. 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).

In a due process hearing in New Jersey, the district bears the burden of proof under N.J.S.A. 18A:46-1.1 to demonstrate that it is providing a free, appropriate public education in the least restrictive environment to a student whose family is pursuing a due process petition.

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 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).

In its emergent application, the district contends that there are valid reasons to impose a forty-five day period of home instruction without access to teachers and other students.

All students are entitled to receive free educational services from their local board of education. N.J.S.A. 18A:38-1. In order to receive a free education, attendance at school is mandatory, or in the alternative, the school is required to create a home instruction program when attendance at school is not feasible.

In order to be successful on an emergent application, petitioner has to meet the four prongs of Crowe v. DeGioia, 90 N.J. 126 (1982). Under this seminal case, a petitioner seeking emergent relief must demonstrate:

i- The petitioner will suffer irreparable harm if the requested relief is not granted
ii- The legal right underlying petitioner's claim is settled.
iii- The petitioner has a likelihood of prevailing on the underlying merits, and
iv- When the equities and interest of the parties are balanced, the petitioner will suffer greater harm than the respondent will if the relief is not granted. See also: Subcarrier Communications Inc. v. Daycomm, Inc. 299 N.J. Super 634, (1997).

The pleadings allege immediate and irreparable harm. There is sufficient documentation that would justify the District having N.A. remain on home instruction, while his medications are monitored and revised by his own treating psychiatrist, none of whom submitted reports for this proceeding.

There is sufficient evidence of the risk of harm to N.A. himself, school staff, teachers and students that if he returned to school at this time, other incidents could occur involving the health, safety and welfare of any of these individuals. While it is noted that there is also irreparable harm to N.A. by not returning to school for the balance of the 2022-23 school year, any potential harm to him is outweighed by the potential harm to other students, teachers and staff, at least until more psychiatric and behavioral assurances can be received from medical and mental health professionals.

The revisions to the current home instruction plan, which as testified to by Ms. Esdale, will include ten (10) hours of one-to-one instruction if properly implemented for the balance of this school year will satisfy the district's obligations under FAPE, IDEA and Section 504 of the Rehabilitation Act.

Given all of the aforementioned factors, and the need for more psychiatric and behavioral data, as well as the two prior recommendations for an out of district placement in the two previous school years, it seems likely that petitioner will prevail on the merits.

My role here is limited to making a determination as to whether the applicant has met its burden under the four factors of Crowe. Though I find that they have done so, I

remain concerned that some of the other requests made by J.C. on behalf of N.A. which could have been easily implemented were declined, possibly leaving him in a worse position for the beginning of the next school calendar year. Many of those requests, such as an independent psychiatric report, and compensatory reimbursement for the tutor and the behaviorist can be addressed in J.C's. expedited due process petition which has not yet been transmitted, but set forth below, in accordance with this application by the district, I am **ORDERING** that some of her requests which were made as part of this proceeding, and which also appear in her own petition, be granted now, so we do not get to the end of this school year without what appears to be some critical and missing data, which other out of district programs would be looking for in order to evaluate N.A.'s eligibility for their programs.

Based on the testimony of the witnesses, and the record of evidence presented, I **FIND** the following **FACTS** in this case:

1. By way of background, N.A. is a fifteen-year-old boy, who is a freshman at Paramus High School.
2. He suffers from ADD and anxiety.
3. N.A. is involved in some extracurricular activities, including basketball and baseball.
4. His freshman year included eleven documented incidents over a four-month period, requiring a range of discipline, the last of which and most serious was an assault on another student in which the student and a school safety officer leading the district to bring this action to have him formally removed from attending school with home instruction for the balance of the school year.
5. N.A's. mother oppose this application at least in part, suggesting that he can handle and should be allowed to return to school, as the two proposed out of district placements for the balance of this school year are not suitable for N.A.
6. Out of district placements were previously recommended but for reasons unknown, were not implemented at the end of the 2020 school year, and again during the 2021-22 school year.

7. In February 2023, the district conducted a new IEP meeting due to a change of circumstances. J.C. was unable to attend the meeting, and the meeting went forward without her, and without her input.
8. A psychiatric report which J.C. agreed to have conducted on January 5, 2023 was not completed or produced until March 14, 2023. A Behavioral Analysis, which was agree upon at the same meeting was never conducted, with the district saying it could not be completed because N.A. was no longer in school. As such, N.A. has retained and is paying for her own behaviorist who is part of the "Pops" program, Don Aranovich.
9. The school does not believe they are able to put necessary protections in case to avoid another incident. I **AGREE** and **FIND** N.A. should not return from school thorough the end of this school year, and his "stay put" status should be changed to home instruction, until another IEP meeting can be held before the end of the 2022-23 school year.

I therefore **FIND** that giving every favorable inference to petitioners under IDEA, FAPE and Section 504 of the Rehabilitation Act, petitioner has met its burden under Crowe v. DeGioia that the district and Paramus High School will suffer irreparable harm as a result of actions of N.A., unless his "stay put" status is changed to home instruction for the balance of this school year. **I FURTHER FIND** that when the equities are balanced, the petitioner school district, which has an obligation to protect the safety of its entire student body and staff, will suffer more harm than the respondent N.A. if he is physically allowed to return to school, that the law is settled on this issue, and it is likely that the petitioner will prevail on the merits, with what is known at the present time.

As a condition of this Order, **I FURTHER FIND and ORDER** that since placement will be an issue for the 2023-24 school year, an Independent Psychiatric Assessment is warranted, since the report of Dr. Oquendo is brief and does not include testing or discussions with N.A's treating mental health professionals. As such, **I HEREBY ORDER** the attorneys for both parties to confer and select an Independent Psychiatrist within the next fourteen days, which will be paid for by the district.

I FURTHER FIND AND ORDER, that another IEP meeting shall be conducted with J.C. present on or before June 15, 2023, to address, among other things, N.A.'s placement for the 2023-24 school year, and an expanded list of out of district schools that are suitable for N.A.'s including but not limited to Barnstable and Fusion shall receive packages, the Independent Psychiatric Report, and any other documentation that may be relevant. This process can and should start even before the next IEP meeting.

I FURTHER FIND AND ORDER, that since the district contends it is unable to conduct a Behavioral Analysis at this time, and it seems one is required in order for certain other schools to consider N.A., effective April 3, 2023, the district shall pay for and/or reimburse J.C. for the funds she is outlaying for a behaviorist, Don Aranovich to see N.A and any written report that he or the Pops program may be able to provide for consideration by other out of district programs. (through her own due process petition, N.A. may further seek retroactive reimbursement for these services, as well as other relief including compensatory reimbursement for the money she continues to pay for the tutor, which was also declined by the district, even though the required ten hours a week were not being provided.)

CONCLUSION

Based on a review of the pleadings, the submissions, and the documents attached by both sides, and giving every favorable inference to petitioners, for the reasons set forth herein, I **CONCLUDE** that the petitioner, Paramus Board of Education. is entitled to emergent relief, essentially preventing N.A. from physically attending Paramus High School for the remainder of the 2022-23 school year during which time he will remain on home instruction for a minimum of ten hours a week, on a one-to-one basis.

ORDER

Based on the foregoing, it is hereby **ORDERED** that certain relief sought by petitioner is **GRANTED,** with the additional conditions set forth above, including an Independent Psychiatric Evaluation, another IEP meeting on or before June 15, 2023, and payment/reimbursement effective April 3, 2023 for the behaviorist hired by J.C. for

N.A. since the district represents that it is unable to conduct a Behavioral Assessment which was agreed upon January 5, 2023 at this time.

The parties are also **ORDERED** to continue to meet and confer no later than June 15, 2023, and hold another IEP, as to next steps for N.A.'s possible re-entry to school, and/or placement with an outside program, beyond Windsor and Valley which have been rejected as not suitable for N.A.'s needs.

This order on application for emergency relief shall remain in effect until issuance of the decision in the matter. The parties will be notified of the scheduled hearing dates. 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.

March 29, 2023
DATE

ANDREW M. BARON, ALJ

Date Received at Agency: March 29, 2023

Date E-Mailed to Parties: March 29, 2023

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