



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 02691-23

AGENCY REF. NO. 2023-35639

MIDDLETOWN TOWNSHIP
BOARD OF EDUCATION,

Petitioner,

v.

I.H. ON BEHALF OF N.J.,

Respondent.

Jared S. Schure, Esq., for petitioner (Methfessel & Werbel, attorneys)

I.H., respondent, pro se

Record Closed: April 19, 2023

Decided: April 28, 2023

BEFORE **DEAN J. BUONO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner filed a due process petition and motion for emergent relief with the Office of Special Education (OSE) in the New Jersey Department of Education (DOE). The contested matter was transferred to the Office of Administrative Law (OAL), pursuant to N.J.A.C. 1:6A-12.1, where it was filed on March 28, 2023.

The motion for emergent relief sought an Order that would place the student with a disability in an interim alternative placement on home instruction for not more than forty-five calendar days because it is dangerous for the student to be in his current placement, as the student poses a danger to himself and others. The Board and the parent did not agree to the placement therefore the request for emergent relief was heard on March 29, 2023. At the hearing, none of the respondents appeared. Only the petitioner gave an argument.

I granted the order for emergent relief and Ordered that N.J. be placed in the appropriate interim alternative education setting (IAES) of home instruction for forty-five calendar days because N.J.'s current placement is substantially likely to result in injury to N.J. or others. I further Ordered that the respondent was compelled to enable the District to obtain, release, and/or exchange N.J.'s student records.

The Due Process Hearing was held on April 19, 2023, wherein again, none of the respondents appeared. The record closed that day.

FACTUAL BACKGROUND

Petitioner

I.H. is the parent of N.J. who is a fourteen-year-old eighth-grader who resides within the District and has been eligible and receiving special education and related services. He is presently eligible under the classification category of Specific Learning Disability. N.J. moved into the District from Ohio and enrolled in the District's Thorne Middle School, on November 17, 2021, as a general education student.

He began being cited for discipline issues as soon as November 19, 2021. Due to academic concerns and behavior concerns, he was referred to Thorne's Child Study Team ("CST") on March 11, 2022. The CST evaluated him and found that he was eligible for special education and related services under the classification category of Specific Learning Disability in the areas of math calculation, math problem solving, and written expression.

An Individualized Education Plan (IEP) was proposed at an IEP meeting held on June 20, 2022; I.H. consented to its implementation. At the meeting, N.J.'s case manager stated that the District wanted its psychiatrist to evaluate N.J. due to the emotional and anger issues he had been displaying in school. The District scheduled two appointments with the psychiatrist, and I.H. and N.J. skipped both of them without informing the District in advance. N.J. finished the 2021–2022 school year having failed all four of his major academic subjects, and having accrued forty-two absences, thirty-four tardies, and twenty-two incidents for infractions including substance abuse, class disruption, and inappropriate behavior. This is set forth in the March 21, 2023, case summary by case manager Frees, LDT-C, EXHIBIT A.

N.J. currently attends the District's Thorne Middle School, where he is placed in pull-out resource replacement courses for all major academic subjects and receives both group and individual counseling. See February 23, 2023, IEP, EXHIBIT B.

N.J. finished the third marking period with a grade of 0 in American Sign Language, a grade of 25 in Language Arts, a grade of 66 in Pre-Algebra, a grade of 72 in Science, a grade of 71 in Social Studies, and a grade of 0 in Coding/Robotics. See progress report, third marking period, EXHIBIT C. During the first half of the 2022–2023 school year, N.J. accrued twenty-seven absences and fourteen tardies. See second marking period attendance report and report card, EXHIBIT D. N.J.'s poor academic performance and attendance are of a piece with his behavioral problems, which are so severe at this point that they necessitated the instant Petition for Due Process.

Specifically, on September 20, 2022, N.J. took another student's water bottle, sprayed the other student with it, sprayed the other student's pants with it, followed the other student out of class and sprayed his backpack with it, then followed the other student into the boy's locker room, which N.J. did not have permission to enter, and dumped the water from the other student's water bottle on the other student, and threw the other student's water bottle at the other student. See discipline log, EXHIBIT E.

On September 28, 2022, one of N.J.'s teachers instructed him to go to the main office because he was being disruptive in class. In response, N.J. continuously repeated the words, "these nuts, these nuts, these nuts" in front of the entire class. Later that day, N.J. shoved another student into his locker from behind, causing that student to fall into another student, and causing one of those students to have to go home due to an injured ear.

On October 24, 2022, N.J. insulted and made inappropriate comments towards several students in his advisory class. On November 4, 2022, N.J. arrived late to his sign language class. When he arrived, the other students had already begun taking a quiz. N.J. acted in a disruptive manner during the administration of the quiz. When the teacher took his quiz away, he began jumping on the classroom's radiator and tried to remove the metal grates from the top. He began screaming that he was a "parkour champion." When his teacher told him to go to the main office he responded, "I'm not going, there is only 3 minutes left of class." He then told his teacher, "I don't f***ing need ASL in my life. This class f***ing sucks!" He then left the classroom, but never went to the main office as directed. That same day, N.J. splashed water on a female peer as they were leaving the cafeteria.

On November 17, 2022, N.J. repeatedly entered a class he did not belong to and disturbed the students in it. On November 29, 2022, N.J. asked to leave his class and then never returned. He later admitted to cutting the class. On December 7, 2022, N.J. would not stop talking to his peers while the teacher was trying to teach. When one of his peers told him to be quiet, he responded to her by saying, "You shut up. You are annoying with your ugly yellow f***ing teeth."

On December 16, 2022, N.J. chased after two students while threatening to put water on them, despite being repeatedly asked to stop. He was also cited for "constantly using inappropriate language towards his peers, around teachers." On January 3, 2023, N.J. disrupted his class by refusing to put his Chromebook away and, when asked to do so, raising the volume on a video he was watching. He insulted a female peer when she walked into the class from the bathroom. He used foul language

like “s****” and “f****” in class, then threatened that he would “roast” his teacher, at which point N.J. had to be removed from the classroom.

On January 6, 2023, N.J. slapped two peers in the crotch. When a staff member told him to report to the main office he responded, “F*** you, b****.” He also told a peer, “F*** you, you sound like a nasally b****” several times. On January 24, 2023, N.J. threw a piece of bread in the cafeteria, and it hit a teacher in the head.

On February 1, 2023, N.J. sat in the back of his classroom tapping a pencil. When the teacher offered to help him with his assignment, he responded that he would not do his assignment and that he didn’t “give a s***.” When the teacher asked if he wanted to go to the main office, he responded by saying, “F*** this,” and proceeded to throw a book across the room, tip over a desk, and knock over a chair. On February 10, 2023, N.J. was running in a hallway. When a teacher told him to stop, N.J. responded, “Shut up.” Later, N.J. approached a male peer and pretended that he was going to shake his hand, and then proceeded to hit the peer in the groin. On February 22, 2023, N.J. was cited for disruptive behavior, ignoring reprimands, “totally inappropriate behavior” towards a teacher, “constant comments,” and “disruptive noises.” On February 23, 2023, N.J. refused to close his Chromebook despite having been directed multiple times by his teacher to do so. While on his Chromebook, N.J. accessed Instagram and five additional sites that he was not permitted to use. Id.

On March 10, 2023, N.J. began screaming at a female peer, telling her that she was “f****ing annoying” and that she could “go f*** herself.” He then stormed out of class. That same day, N.J. grabbed a peer’s neck with his two hands. At this time, it is the judgement of the school-based members of Thorne Middle School’s IEP team that the District is presently unable to handle N.J.’s significant behavioral needs in his current placement. On March 13, 2023, an IEP meeting was held during which the school-based members of the IEP team recommended to I.H. that N.J. be placed on home instruction via an IEP for up to forty-five days while the parties explore an appropriate out-of-district placement. IEP, EXHIBIT F.

Despite N.J.'s manifest dangerousness and the risks he poses to the Thorne Middle School community, I.H. refused to consent to the implementation of the proposed IEP. I.H. also refused to consent to the release of N.J.'s student records to potential out-of-district placements. To protect its students and staff, the District had no recourse but to seek this Court's intervention.

Testimony

Chalimar Frees testified that she is employed by the Middletown Township Board of Education as a learning disabilities teacher consultant (LDT-C). She was qualified as an expert in LDT's, special education and as a case manager.

She has been N.J.'s case manager and recommended that he be in pullout resources and then on home instruction due to his behavior. His behavior is well documented and causes a significant issue in the district not only for N.J. but also for his peers and faculty. His most recent IEP was developed on March 13, 2023. Faculty was there as well as I.H. It was at that meeting that the decision to place him on homebound instruction was made. As always that decision is never taken lightly because it is a serious placement for an individual's education. However, here, home instruction is the only option to provide free appropriate public education (FAPE) to N.J. in the least restrictive environment (LRE). The home instruction in this case is only an interim solution until the District can find an appropriate out-of-district placement.

Respondent

Neither I.H. nor N.J. appeared for the hearing.

FINDINGS OF FACT

It is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. Credibility is the value a fact finder assigns to the testimony of a witness, and it contemplates an overall assessment of the witness's story considering its rationality, consistency, and how it comports with other evidence. Carbo v. United

States, 314 F.2d 718 (9th Cir. 1963); see, In re Polk, 90 N.J. 550 (1982). Credibility findings “are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record.” State v. Locurto, 157 N.J. 463 (1999). A fact finder is expected to base decisions of credibility on his or her common sense, intuition, or experience. Barnes v. United States, 412 U.S. 837 (1973). A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super 282, 287 (App. Div. 1958).

In determining credibility, I do not believe that District employees want to deprive N.J. of a program that augments his educational opportunities while working within the parameters of the law and regulation. I am also aware that I am sure the parent wants the best educational opportunity for N.J. Here, I don’t know what the parent believes but the District believes in home instruction and ultimately an out-of-district placement. It is for me to decide.

In this case, I do not find that there is necessarily an issue of credibility as much as there is an issue of experience and knowledge of the law regarding declassification. As such, I accept the information set forth by the District. **I FIND as FACT** that the testimony of the witness was credible to the extent of considering and implementing home instruction. Here, the information provided by the District is clearly the overriding factor and ample proof that FAPE was provided, and all arguments were considered when pursuing home education. As such **I FIND** them all as **FACT**.

LEGAL ANALYSIS AND CONCLUSIONS

The Individuals with Disabilities Education Act (IDEA or the Act), 20 U.S.C. §§ 1400 et seq., requires New Jersey to effectuate procedures that ensure that all children with disabilities residing in the state have available to them a FAPE consisting of special education and related services provided in conformity with an IEP. 20 U.S.C. §§ 1401(9), 1412(a)(1). A purpose of the IDEA is:

[T]o ensure 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.

[20 U.S.C. § 1400(d)(1)(A).]

Under 20 U.S.C. § 1412(a)(1), any state qualifying for federal assistance under the IDEA must adopt a policy that assures all children with disabilities the right to a free appropriate public education. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 180-81, 102 S. Ct. 3034, 3037, 73 L. Ed. 2d 690, 696 (1982). State regulations track this requirement that a local school district must provide FAPE as that standard is set under the IDEA. N.J.A.C. 6A:14-1.1. New Jersey follows the federal standard requiring such entitlement to be “sufficient to confer some educational benefit,” although the State is not required to maximize the potential of handicapped children. Lascari v. Ramapo Indian Hills Reg. High Sch. Dist., 116 N.J. 30, 47 (1989) (citing Rowley, 458 U.S. at 200, 102 S. Ct. at 3048, 73 L. Ed. 2d at 708). Third Circuit decisions have further refined that standard to clarify that such educational benefit must be “meaningful,” “achieve significant learning,” and confer “more than merely trivial benefit.” T.R. v. Kingwood Tp. Bd. of Educ., 205 F.3d 572 (3d Cir. 2000); Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238 (3d Cir. 1999); Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 183-84 (3d Cir. 1988), cert. den. sub. nom., Ctr. Columbia Sch. Dist. v. Polk, 488 U.S. 1030, 109 S. Ct. 838, 102 L. Ed. 2d 970 (1989). The Third Circuit has re-emphasized the importance of the inquiry into whether the placement proposed by a district will provide the student with a “meaningful educational benefit.” S.H. v. State-Operated Sch. Dist. of Newark, 336 F.3d 260 (3d Cir. 2003). The quantum of educational benefit necessary to satisfy the IDEA varies with the potential of each pupil. N.E., 172 F.3d at 247.

The basic tenant for that education is an education which offers the student an opportunity for meaningful learning, considering the child’s potential. Ridgewood, 172 F.3d at 247 wherein the Court found that meaningful education must be more than de minimis. New Jersey has adopted the standards set forth by the United States Supreme Court and the Third Circuit. Lascari, 116 N.J. at 47-48, wherein it was found that the District is not required to provide the best education available. See R.D. and

A.D. for C.D. v. Delran Board of Education, 2001 WL 830871 (N.J. Adm. 2001). Therefore, if the District through the applicable IEP is reasonably calculated to provide more than a de minimis benefit, then the school district has met its obligation under the IDEA. CV.J. and D.J. o/b/o B.J. v. Ocean City Board of Education, 2004 WL 763590 (N.J. Adm. 2004).

Thus, the issue is whether the IEP proposed and implemented by the District during the school year was appropriate for N.J. to provide home instruction and offered FAPE in the least restrictive environment.

The witness proffered by petitioner, was qualified and very familiar with the IEP and educational services provided by the District. She testified regarding N.J.'s progress. The District in conducting the required reevaluation of N.J. determined that he was still a student with a qualifying disability and was in need of home instruction because of his unpredictable and violent behavior. Here, the District presented competent evidence from an expert in special education that FAPE in the LRE for N.J. is home instruction.

I CONCLUDE that based on the persuasive testimony presented by the District, and the lack of evidence from respondents, the home instruction provided to N.J. was reasonably calculated to offer him FAPE in the least restrictive environment and was not in any way violative of any law.

ORDER

For the reasons set forth above, it is **ORDERED** that the Due Process petition of the petitioner is **GRANTED** and N.J. is to remain on home instruction as FAPE in the LRE until such time as an appropriate out-of-district placement is achieved.

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.

April 28, 2023 _____

Date



DEAN J. BUONO, ALJ

Date Received at Agency

April 28, 2023 _____

Date Mailed to Parties:

April 28, 2023 _____

DJB/cb

APPENDIX

WITNESSES

For petitioner

Chalimar Frees, LDT-C

For respondent

None

EXHIBITS

For petitioner

- 1 Petition for Due Process
- 2 Referral to Child study team
- 3 Educational evaluation
- 4 Psychological evaluation
- 5 severe discrepancy estimators
- 6 MP2 report card
- 7 IEP
- 8 MP3 progress report
- 9 behavior incident log
- 10 Proposed home instruction IEP
- 11 Background statement from case manager
- 12 Order granting emergent relief
- 13 Chalimar Frees, LDT-C

For respondents

None