State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 01044-20

AGENCY DKT. NO. 2020-31152

E.H. ON BEHALF OF N.H.

Petitioners,

v.

FRANKLIN LAKES BORO BOARD OF EDUCATION,

Respondent.

Dr. Eileen Hansen, petitioner, pro se

Robin S. Ballard, Esq., for Franklin Lakes Boro Board of Education (Schenck, Price, Smith & King, attorneys)

Record Closed: January 28, 2020 Decided: January 29, 2020

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

STATEMENT OF THE CASE

Petitioner, E.H. on behalf of her daughter N.H., seeks an emergent Order compelling the Franklin Lakes School District to reinstate home instruction, and permit N.H. to remain home without attending school, pending the outcome of a Child Study

team review and a mental health transition plan to be recommended by the daughter's private health care professionals.

PROCEDURAL HISTORY

Petitioner filed the within emergent application on January 23, 2020, seeking an Order compelling the Franklin Lakes School District to reinstate home instruction, which was terminated December 18, 2019.

A related substantive due process petition is still pending before the Department of Education and has not yet been forwarded to the Office of Administrative Law. The district challenges both applications on the basis of failure to state a claim upon which relief can be granted, and is lacking in form and substance.

Oral argument was conducted on January 27, 2020, the record was left open for twenty-four hours for petitioner to try to obtain a supplemental medical report. Petitioner requested additional time, but as of the filing of this decision, nothing else has been received.

DISCUSSION and TESTIMONY

Petitioner filed an Emergent petition against the Franklin Lakes School District. The relief petitioner seek includes reinstatement of home instruction and permission for N.H. to continue to remain home pending further mental health evaluations and child study team evaluations. Also sought, is an out of district placement at the Fusion Academy, with eighty hours of compensatory education, and modifications and accommodations to complete assignments. An extension for the completion of first marking period assignments is also sought. She contends the district is not meeting its obligations to N.H. under FAPE.

At the beginning of the proceeding, the child's father, R.H. was contacted by the undersigned and allowed to listen and participate on the record by telephone, as he was not advised of the commencement of the action by E.H. The couple are divorced.

Respondents through their witness, Director of Special Services, Janet Cash, contend that the emergent petition should be dismissed, as the relief petitioner is seeking has no basis or support from experts or medical professionals. The District relies on the fact that despite numerous attempts to schedule and complete the Child Study team review in the statutory required ninety days, only one of three, (the psychological has been completed) and the ninety-day period ends January 30, 2020. They blame E.H. for her continued failure to meet scheduled appointments as the cause of the delay. According to the District, currently, there is no medical or mental health documentation which support's E.H.'s decision to allow N.H. to remain home.

Further, due to the number of missed days from school, a truancy proceeding is scheduled for February 5, 2020, and the Division of Child Protection and Permanency, (DCP&P) has opened an investigation involving E.H. and L.H.

Both parties agree that L.H. successfully attended and completed school through the sixth grade. Within two weeks of starting 7th grade, L.H. became ill, and petitioner provided a physician's letter regarding the illness. When L.H. did not return to school, the principal offered to visit with her at home to get her ready to return. Petitioner declined the offer. When asked during the proceeding what suddenly happened to keep L.H. from going back, petitioner was unable to explain why she would not return but pointed to several notes from mental health professionals provided at two week intervals as further justification to keep her home.

Recognizing that the absences were jeopardizing L.H.'s right to receive an education, the District on its own initiative, referred her to the Child Study team for evaluation. Working with petitioner, on October 17, 2019, an evaluation plan consisting of psychological, psychiatric and educational assessments was set up and scheduled to

be completed as required by law in ninety days. The clock for completing the evaluations started on November 1, 2019.

For reasons partly explained by E.H. and the rest unknown, she did not produce N.H. for the first evaluation until December 20, 2019. Although the psychological report was essentially completed, which showed N.H. functioning at average or above average educational levels, petitioner did not return the Behavior Assessment, which the district maintains is a key component of the evaluation. Missing from the report, however, is a line of questioning and explanation as to why N.H. will not return to school.

Several dates scheduled for evaluations with the psychiatrist and education evaluators were either cancelled by petitioner or not attended. The district would not accept the last note submitted on behalf of N.H. because it came from a licensed clinical social worker, not a psychologist or psychiatrist. And prior notes, from mental health professionals to the district were just that, notes, not reports as to N.H.'s condition.

Petitioner was informed the notes were not sufficient, and that a full evaluation report was needed. Petitioner contends she did not know what was needed and blames the district for not fully explaining what they required.

At the conclusion of the hearing, petitioner was offered and asked for an additional 24 hours to see if the clinical psychologist from Turn the Mind, where N.H. was now being treated and would provide a report. As of the filing of this decision, no such report has been received, and due to the emergent nature of this proceeding, petitioner's request for a further extension was denied. However, towards the end of the proceeding, the district did express a willingness to extend the ninety-day evaluation period for another thirty days, on the condition that petitioner would produce N.H. at the assigned times for evaluation. Petitioner would not commit to this without knowing the days and times of the appointments.

Petitioner comes before me and seems genuinely loving and concerned for the welfare of her child. But there are aspects of her testimony that do not seem completely

credible, especially the reasons given why there were so many delays and cancellations in completing the child study team assessments, which is a key component to determining what, if any additional services N.H. would be entitled to receive. Petitioner's conduct has led to the initiation of truancy and DCP&P proceedings. Also, the fact that N.H. has been seen and treated by four different mental health professionals over a period of less than three months creates a question as to what the real cause of her school anxiety is.

While some of the district's answers were also unsatisfactory, especially why the psychologist did not explore the underlying alleged anxiety condition that caused the child to want to avoid school, Ms. Nash's testimony was credible in all respects, and she seems to have genuinely tried, and is still willing to try to complete the child study team assessments for N.H., so that either an underlying condition can be confirmed, or other conditions can be ruled out. But without more cooperation from the petitioner, and with DCP&P and truancy proceedings pending, it is unknown if the assessments can ever be completed.

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.
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> [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 her emergent application, petitioner contends that the district is obligated to support N.H. and provide her an education toward her return to the Franklin School. But N.H. has not yet been classified as a student entitled to special education services, nor

she entitled to a placement. D.A. o/b/o T.A. v. Caldwell-West Caldwell Bd. of Ed. OAL Dkt. No. Eds 7645-06 (2006). The same applies what in essence is petitioner's emergent application loosely deemed "stay put" in the form of a request for reinstatement of home instruction.

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. N.J.S.A. 18A-35. It is not disputed that N.H. has not been attending school since September, and as such, without proper medical and mental health documentation, and without completing the requisite child study team evaluations, she is not entitled to home instruction and/or an out of district placement.

Moreover, even if she was attending school and/or was classified, in order to be successful on an emergent application, petitioner has to meet the four prongs of Crowe v. DeGioa 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 here do not allege immediate and irreparable harm. There is insufficient medical and mental health documentation that would justify the District allowing N.H. to remain home on home instruction, and petitioner failed to cooperate in completing the child study team review in a timely fashion.

Given all of the aforementioned factors, it seems extremely unlikely that petitioner will prevail on the merits.

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.H. is a thirteen-year-old girl, who has not yet been classified or deemed eligible for special education services.

2. In September 2019, after missing three days of school due to illness, N.H. did not return to school.

3. After noticing multiple absences, the school principal offered to visit the child at home, which was rejected by the petitioner.

4. Eventually, in mid-October 2019, the district initiated a child study team assessment, the start of which was delayed by waiting for consent from both parents.

5. The district agreed in mid-October to provide home instruction, provided petitioner would supply a medical backup every two weeks concerning N.H.'s condition.

6. Several appointments were cancelled or delayed by petitioner, and the first report, the psychological was completed on December 20, 2019. The results of this report do not seem to indicate that N.H. is eligible for special education services, but the district was willing to make this final determination pending receipt of the psychiatric and educational assessments.

7. At the time of the hearing, neither of the remaining two assessments had been started, and several appointments had been cancelled by petitioner.

8. N.H. has been treated by four different therapists since September 2019, and although some have documented some condition in general terms, none have provided a full report which is required by the district in order to justify the continuation of home instruction.

I therefore **FIND** that giving every favorable inference to petitioners under IDEA, FAPE and Section 504 of the Rehabilitation Act, petitioner has not met her burden under Crowe v. Degioia that N.A has suffered irreparable harm as a result of actions by school officials, and that she is not likely to prevail on the merits when the substantive due process petition is heard.

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, on behalf of N.H. is not entitled to emergent relief.

ORDER

Based on the foregoing, it is hereby **ORDERED** that certain relief sought by petitioner is **DENIED,** and the emergent application is hereby **DISMISSED.**

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2019) 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 (2019).

January 29, 2020

DATE

ANDREW M. BARON, ALJ

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APPENDIX

Witnesses

For Petitioners:

E.H.

For Respondent:

Janet Cash

Exhibits

For Petitioners:

P-1 Miscellaneous medical and treatment notes from 9/24/19-12-22-19 together with emails between petitioner and the district.

For Respondent:

R-1 Package of Exhibits marked as 1-5 including letters and emails between the district and petitioner, and a chronology of scheduled and cancelled appointments for assessments.