State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 01975-20

AGENCY DKT. NO. 2020-31239

SPARTA TOWNSHIP BOARD OF EDUCATION,

Petitioner,

v.

R.M. AND V.M. ON BEHALF OF C.M.,

Respondents.

Katherine A. Gilfillan, Esq., for petitioner (Schenck, Price, Smith & King) Sparta Township Board of Education

Mariann Crincoli, respondents (Sussan, Greenwald, & Wesler, attorneys)

Record Closed: February 19, 2020 Decided: February 21, 2020

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

STATEMENT OF THE CASE

Petitioner, Sparta Township Board of Education, brings an emergent action against respondents and respondents' child C.M. seeking an Order implementing home

instruction for a period of forty-five days within which C.M. would not be able to return to school, and would prevent him from participating in extra-curricular activities.

PROCEDURAL HISTORY

Petitioner filed the within emergent application on February 10, 2020, seeking an Order compelling respondent and their child C.M. to commence home instruction, and remain away from the high school, including extracurricular activities for a period of forty-five days.

Currently, there is no related related substantive due process petition pending before the Department of Education and has not yet been forwarded to the Office of Administrative Law.

Oral argument was conducted on February 19, 2020, and limited testimony was taken. The record was left open through February 20th if counsel for the district desired to submit a post hearing summation. Counsel for respondents provided an oral summation at the conclusion of testimony. The District submitted an additional certification post-hearing which was not considered as it was of a testimonial nature which respondent had no ability to respond.

DISCUSSION and TESTIMONY

Petitioner Sparta Board of Education filed the within petition, emergent petition against the respondents. The relief petitioner seeks includes home instruction and a complete bar of access to the school and the extracurricular activities in which C.M. is involved and which he is dependent on for social interaction.

Respondents contend that by barring him from extracurricular activities, the District is not meeting its obligations to C.M. under FAPE, IDEA and Section 504 of the Rehabilitation Act.

Respondents through their witnesses contend that the emergent petition should be granted, as the child C.M., 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 two recent incidents wherein C.M.'s behavior could not be controlled, causing other students to be concerned about interactions with him, and an incident in which he had to be restrained by a security guard and the assistant principal.

Petitioner's first witness was Dr. Lee J. Suckno, who was engaged as an outside psychiatrist for the District, met with C.M. for only forty-five minutes at the end of January. Based on this one-time meeting and without the benefit of background documents concerning C.M., Dr. Suckno opined that he should not be allowed to return to school or participate in extra curricular activities at this time. While Dr. Suckno has impressive credentials, his testimony, while sincere, did not carry a lot of weight, as he candidly admitted he was without documents that gave rise to his opinion, and his report was primarily based on what he was told by others.

Testifying for the family was Dr. David Mitnik. Dr. Mitnik is a psychiatrist, with a background and expertise in child adolescence. He has known C.M. for approximately three years. He is of the belief that C.M.'s recent behavior that caused the school to file the within action is the result of panic attacks. According to Dr. Mitnik, C.M. has the same normal desire like his peers to develop relationships with friends, and particularly girls, but he lacks the social savvy to pick up cues from peers and to know when someone does not want to be a friend or have a close relationship. He partly blames the school for not having the appropriate behavioral training in place or the right aide suitable to address C.M.'s needs.

Dr. Mitnik also said he was in the process of revising the types and amounts of medications C.M. was taking and could not predict when C.M. would be deemed stable. But he was of the belief that with the right supports in place, he could return to school in this school year.

However, Dr. Mitnik also expressed his opinion that separate from the in class education, C.M.'s participation in extra-curricular and activities outside school serve an important social purpose for him, and to the extent feasible, some of them should be resumed as soon as possible so C.M. was not completely isolated from his peers. With help from C.M.'s parents while present, he was of the belief that C.M. could handle some of these activities without incident and should be encouraged to do so.

The outside activities in which C.M. hoped to participate include; Golf Team, Special Olympics, Key Club and Strings.

The next witness who testified was Gerald Carter, who is a special education and history teacher at Sparta High School. Mr. Carter, who has been teaching since 1995, was also the coach of the school bowling team, of which C.M. was a member. Other than a couple of minor things, he said C.M. was well behaved, and he was able to actively participate as a member of the team.

Mr. Carter is also the coach of the school Golf team, that is scheduled to start training and tryouts the second week of March. He was asked directly, if C.M. was allowed to attend practice and tryouts if he felt as coach, he could handle the situation. Coach Carter responded affirmatively, thought it would be helpful for C.M. to participate on the condition that his father be with him at all times in case something upsetting occurred which could give rise to an overreaction by C.M.

The next witness was Jennifer Schtok, who serves as one of the coaches of the Special Olympics team for the school, which currently has eleven members. She candidly stated that she would not be comfortable at this time allowing C.M. to participate, as she was concerned for the safety and welfare of the other team members, some of whom are girls.

The next witness was school principal Ron Spring. Mr. Spring, who had a prior career as an attorney also gave credible testimony as he shared his concerns about C.M.'s ability to resume extracurricular activities. Key Club, which involves some of the

girls who apparently felt threatened, is a school service organization. The Strings, which is a part of the music program, practices both during and after school, neither of which he felt comfortable at this time allowing C.M. to resume activities.

Mr. Spring remained concerned about C.M. even doing golf, but he agreed to speak with the athletic director and Coach Carter to make sure certain protections were in place should C.M. be allowed to participate in this activity.

Coach Carter was kind enough to offer that even if C.M. did not make the golf team, he would be welcome to work with him on Saturdays at a nearby golf club where he serves as the golf pro, so C.M. could try to improve his skills.

The last witness who testified was R. M., C.M.'s father. Mr. M. who is retired, is deeply involved in C.M.'s life and frequently accompanies him to school and outside activities, to some extent acting as a means of assurance to C.M. should some disturbance arise.

At the beginning of his testimony, he complained to some extent that the decision to return C.M. to the high school was made with the understanding that the school had the appropriate officials in place, specifically a behavioralist and a shadow/aide for C.M. which would enable him to integrate himself back into the school population, from another outside placement. Among other things, he indicated that he felt the school was responsible for some of the incidents as certain protections were not appropriate, including but not limited to the loss of a behavior specialist for two months, and an aide whose skillset was not designed to handle. C.M.

Following that, he expressed concerns that C.M. should not be completely cut off from his peers and believed he could handle all of the aforementioned activities during the forty-five day home instruction period, even if C.M. was not allowed to attend school. He agreed to accompany C.M. to golf practice, tryouts and tournaments if he made the team.

Towards the end of his testimony, he was more open to sharing records with alternate programs in the event at the end of the forty-five days, there was no agreement on a transition back to school during this school year.

Mr. M. also agreed to cooperate with the completion of an updated Child Study team review with the remaining professionals designated by the school, which is necessary before a new IEP can be created for C.M.

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, forty-five8 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, forty-five8 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, forty-five8 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 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 medical and mental health documentation that would justify the District allowing C.M. to remain home on home instruction, while his medications are monitored and revised by Dr. Mitnik.

There is sufficient evidence of the risk of harm to C.M. school staff, teachers and students that if he remained in school at this time, other incidents could occur involving the health, safety and welfare of any of these individuals.

The creation of a forty-five day home instruction plan, overseen by a special education teacher as testified to by Mr. Spring, the school principal, satisfies the district's obligations under FAPE, idea and Section 504 of the Rehabilitation Act.

Given all of the aforementioned factors, it seems likely 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, C.M. is a fifteen-year-old boy, who is a sophomore at Sparta High School.
2. He is on the autism spectrum but is highly functioning and does well academically in school.
3. C.M. is involved in several extracurricular activities, including bowling, Key club, Special Olympics, Music Strings, and is a candidate to join the school Golf team.
4. Over a year ago, C.M. who had been attending the Shepard School, outside the district, was asked to transition back to Sparta as he entered freshman year of high school.
5. C.M.'s parents were assured that with a behaviorist in place and an aide, C.M. could handle high school, which is attended by approximately 1000 students.

6. His freshman year seemed to be somewhat successful, but he ran into some problems, mostly socially driven in November/December 2019, and January 2020, leading the district to bring this action to have him formally removed from attending school with home instruction.
7. C.M.'s parents oppose this application at least in part, suggesting that he can handle and should be allowed to participate in extra curricular activities, even if he cannot be in school.
8. At least two separate incidents gave rise to this application, the first being an over-reaction and obsessiveness in inter-actions with some girls at the school, including excessive testing etc. and the second being breaking a desk giving rise to the need to restrain C.M. by a security guard and the assistance principal.
9. C.M. has been under the care of Dr. Mitnik since 2017, whose expertise is in child adolescence. He continues to see C.M. and monitor his medications.
10. The school psychiatrist, Dr. Suckno, rendered an opinion supporting the school's application, but he only met C.M. once for forty-five minutes and had no records available.
11. Gerald Carter, a teacher of 25 years and the bowling and golf coach, believes C.M. should be given the opportunity to at least practice and try out for the spring golf team, provided C.M.'s father is present at all times, and separate transportation not involving the team bus is provided. I **AGREE**.
12. Ron Spring the school principal and Ms. Spricht, the Special Olympics Coach, do not believe C.M. can handle these activities at this time, or the Strings, and do not believe they are able to put necessary protections in case of another incident. I also **AGREE** and **FIND** C.M. should be barred from these activities at this time, other than Golf.

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 Sparta High School will suffer irreparable harm as a result of actions of C.M., unless he is temporarily placed on home instruction, with permission to participate with the Golf team as an outside activity

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, Sparta Township Board of Education. is entitled to emergent relief, essentially preventing C.M. from physically attending school for a period of forty-five days, with the understanding that Sparta will immediately create a meaningful home instruction program, overseen by a special education teacher for C.M.; but I further **CONCLUDE** that will oversight from the Golf Coach Gerald Carter, C.M. may participate in golf practice, tryouts at the driving range and at the course, and should he make the team, he may participate as a member of the team, as long as his father R.M. accompanies him to all activities at all times, and provides separate transportation for him independent of the team bus.

C.M. may not participate in other school outside activities, such as Key Club, Special Olympics and Strings, until such time as Dr. Mitnik, a school psychiatrist and the coordinators of those activities are sufficiently comfortable that he can safely resume and handle the responsibilities associated with those activities.

ORDER

Based on the foregoing, it is hereby **ORDERED** that certain relief sought by petitioner is **GRANTED,** with the allowance to participate in golf team activities only**,** and the emergent application is hereby **GRANTED.**

The parties are also **ORDERED** to continue to meet and confer as to next steps for C.M.'s possible re-entry to school, and/or placement with an outside program.

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).

February 21, 2020 _____

DATE

ANDREW M. BARON, ALJ

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APPENDIX

Witnesses

For Petitioners:

Dr. Lee Suckno

Mrs. Spricht

Gerald Carter

Ron Spring

For Respondent:

R.M.

Dr. David Mitnik

Exhibits

For Petitioners:

None

For Respondent:

None