State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 04212-23

AGENCY DKT. NO. 2023-35560

J.C. AND I.A. ON BEHALF OF N.A.,

Petitioners,

v.

PARAMUS BORO BOARD OF EDUCATION,

Respondent.

Michelle A. Newton , Esq., for petitioner (Legal Services of New Jersey, attorneys)

Stephen R. Fogarty, Esq., for respondent (Fogarty & Hara, attorneys)

Record Closed: July 29, 2024 Decided: October 1, 2024

BEFORE **WILLIAM COURTNEY**, ALJ:

STATEMENT OF THE CASE

Petitioners seeks to overturn a decision made by the Paramus Boro Board of Education that an alleged assault committed by N.A. on January 25, 2023 was not a manifestation of his disability.

PROCEDURAL HISTORY

On March 6, 2023, Petitioner filed a Request for Expedited Due Process seeking, among other things, a determination that an altercation N.A. had at school on January 24, 2023 was in fact a manifestation of his disability. On or about April 17, 2024, the parties participated in a settlement conference before the Honorable Barry E. Moscowitz, Acting Director and Chief ALJ, that resolved all issues in the Expedited Due Process Petition except for the present issue as to whether N.A.'s behavior on January 24, 2023 was a manifestation of his disability. A hearing was held on July 22, 2024 and the record closed on July 29, 2024 at the request of the parties so that written summations could be submitted, and the parties made a joint decision as to whether they would be submitting additional evaluations for the court's consideration.

ISSUE

The sole issue before the Court is whether the District's February 2, 2023 determination, that N.A.'s actions on January 24, 2024 were not a manifestation of his disability, was correct.

FACTUAL DISCUSSION AND FINDINGS OF FACT

On January 24, 2023, N.A. was a 9th grade high school student with diagnoses of Autism Spectrum Disorder (mild), Attention Deficit Hyperactivity Disorder, Generalized Anxiety Disorder, and Post-Traumatic Stress Disorder. He had and continues to have an Individualized Education Program ("IEP") containing the classification of Emotional Regulation Impairment ("ERI").

On the morning of January 24, 2023, petitioner J.C. accompanied her son N.A. to school to attend a "re-entry meeting" in the office of Vice Principal, Mr. Montuori. Also in attendance was Ms. Amy Lebia, N.A.'s case worker. N.A. was retuning to school that day

from a short-term suspension resulting from his inappropriate reaction to school personnel who sought to search his locker.

Ms. Leiva testified that the purpose of the re-entry meeting was to:

> Just have the student kinda give their input if there was anything they were feeling that they needed to come back to school, just to make sure that we all start off on the right foot, and get them back in the [routine] of coming to school. Just not make sure the student feels comfortable returning to school and they know where their supports are and who they can go to if they need anything.

There was, however, no testimonial or documentary evidence provided by the District to show what school administrators did or said at the re-entry meeting to make certain N.A. felt comfortable about returning to school or if they did anything to let N.A. know where his supports were and who he could go to if he needed anything. The only testimony offered by the District concerning what was or wasn't said at the re-entry meeting was Ms. Leiva's response a very narrow question posed by the District's attorney during direct examination. When she was asked if N.A. said anything at the re-entry meeting about being fearful or anxious about anybody making threats towards him, she responded by saying, "He did not". She did however reveal, in another part of her testimony, that she did have a communication with J.C. the day N.A. returned to school. She testified that J.C. told her that N.A. was feeling uneasy about returning to school because of things that had occurred over the past weekend. When asked if she was given any details concerning what had happened over the weekend, she testified that she couldn't recall. She did however recall that J.C. had indicated that another student was involved, she could not recall if J.C. had given her the name of the other student.

When Ms. Lieba was asked what she did after she was given this information by J.C., she testified that she did not recall but she probably said, "I would check on him throughout the day."

J.C.'s recollection of what was discussed the morning N.A returned to school was much clearer and **I FIND** was more credible then Ms. Leiva's recollection. J.C. testified that she accompanied N.A. to school on January 24, 2024 and attended the re-entry meeting. Without any hesitation or lack of ability to recall, J.C. testified as to what occurred that morning and what she told Mr. Montuori and Ms. Leiva about N.A.'s state of mind. She stated:

> [N.A.] was afraid of going to school , he sat in the car with me, he didn't want to get out of the car, and he kept pointing to a boy the boys that were going into the school, saying that's the size of the boy who is going to beat me up, that's his brother's friends, those kids want to beat me up. And he didn't want to go into school. I said well I'm going to walk you in anyway and we are going to meet with Mr. Montuori and Ms. Leiva and we will discuss with them how you are feeling, And so we went in, he was hesitant but we went in. And I told them exactly how he felt. I was very specific, I told them why, with whom, and that he was afraid….I told them that [another student][1] ("X.Y.") had threatened him, that N. A. was supposed to go to the party and he was embarrassed because he was unable to go and that he was nervous that day because he was being threatened by older boys.

J.C. went onto testify that the threat of physical harm to N.A. came after X.Y. had refused to give N.A. back the money he had paid towards the expenses of the party. She reported to Mr. Montuori and Ms. Leiva that X.Y. threated to have his older brothers beat up N.A. if he continued to ask for his money back.

I **FIND** the testimony of J.C. concerning what was disclosed to the District representatives at the re-entry meeting to be highly credible. **I further FIND** that there is no evidence that the District took any action to address the concerns raised by J.C. at the re-entry meeting and no attempt make N.A. comfortable as he transitioned back into school after his suspension. When Ms. Leiva was asked what she did after she was

[1] J.C. specifically disclosed the name of the other student to Mr. Montuori and Ms. Leiva. This other student was also the same student that N.A. had the altercation with later that day.

given this information by J.C., she testified that she did not recall but that she probably said, " I would check on him throughout the day." However, Ms. Leiva went on to testify that she had not seen N.A. prior to the altercation which took place during N.A.'s lunch period.

The altercation between N.A. and X.Y. was documented by security camera and a recording of the altercation was played at the hearing. The security footage shows N.A. approaching X.Y. and a group of other students in a non-threatening manner. It appears from the video that N.A. was encouraging X.Y. to leave the group of students and speak with him in the boy's rest room which was located just around the corner. After his attempts to separate X.Y. from the group failed, N.A. again approached X.Y. in a manner that did not appear threatening. After he approached X.Y. it was clear from the video that X.Y. said something to N.A. that resulted in N.A. throwing several punches at X.Y. Shortly thereafter, safety officers, who were stationed at the school broke up the altercation.

While the security footage clearly show that N.A. was the first person to throw a punch during the altercation and that he appeared to hit X.Y. several times before the fight was stopped, there was no sound recording of what was said by or between the two students.

Immediately after the incident, N.A. was taken to Vice Principal Montuori's office where he was questioned about the incident. Although Mr. Montuori did not testify at the hearing, the two administrators who did testify relied heavily on a memo prepared by Mr. Montuori concerning his discussion with N.A.(R-5). In the memo, dated the day after the incident, Mr. Montuori first indicates that N.A. refused to give a written statement but that he did speak to N.A. about the incident. The memo appears to consist of summaries of what N.A. said in response to questions posed by or comments made by Mr. Montuori. The memo is not specific regarding the questions asked or comments made to N.A. that resulted in the summarized responses. The Memo also does not address the verbal exchange between N.A. and X.Y. just prior to the incident. The memo does, however,

confirm that the reason N.A. approached X.Y. that afternoon was not because of something that had happened the prior weekend, but rather because of a rumor that he learned was circulating at school just prior to the incident .

The only person who testified at the hearing who discussed with N.A. the reason for the altercation on January 24th was his mother, J.C. She testified that N.A. informed her there were 3 boys (M, A, and C) who approached N.A. in the cafeteria just prior to the incident. The boys informed N.A. that X.Y. had told them that he beat up N.A. in school "that day". After hearing this, N.A. left the cafeteria and walked out to the common area and approached X.Y. He attempted to talk to X.Y. in private about why he was spreading rumors about him but X.Y. refused to follow him into the boy's bathroom to discuss the issue in private. According to the testimony of J.C., when N.A. approached X.Y. to discuss why he was spreading the rumor, X.Y. stated, "I didn't but you're a bitch anyway". That is when, according to J.C. 's testimony, that N.A. hit X.Y.

When the IEP team met on February 3, 2023 to determine whether N.A.'s actions on January 24 , 2023 was a manifestation of his disability, it appears that all the IEP team members who attended the Manifestation Determination Review ("MDR"), except for J.C., believed that N.A. assaulted X.Y. because of the dispute that had taken place the weekend prior to his return to school. Due to the amount of time that had passed between the prior weekend and the time of the assault, the team members concluded the assault was premeditated and spontaneous and therefore not a manifestation of his disability. There was no testimony that would indicate that there was any discussion at all at the meeting concerning what X.Y. said to N.A. just before the incident and whether that comment could have caused N.A.'s spontaneous reaction. Although there was testimony presented through the District's witnesses that the video was viewed numerous times by the IEP team members prior to the MDR meeting, there was no testimony that there was any investigation into what X.Y. said to N.A.[2]

[2] Although the video of the incident clearly revealed many students were present at the time of the incident, there was no credible evidence presented indicating that any of these witnesses, who were close enough to hear what was being said, were ever interviewed.

J.C. testified that she was not informed of the existence of a video of the altercation prior to the MDR meeting and that she first learned of its exitance during the meeting. The video was not shown at the meeting and J.C. had no opportunity to observe what had occurred just prior to the altercation before the manifestation determination. J.C.'s first opportunity to view the video was after the MDR meeting and after the IEP team members who participated in the MDR had already concluded that N.A. actions on January 24th were not a manifestation of his disability. Even when she was able to view the video, she was only permitted to view it on time, and unlike all the IEP team members, was not permitted to rewind the video to focus in on what she was viewing. It was also clear for the testimony presented by the District that other IEP team members had access to and viewed other surveillance video's from that day which were not made available to J.C. I **FIND** that these undisclosed videos were highly relevant to the District's ultimate manifestation decision because the District witnesses indicated the videos revealed that N.A. was "circling" the area prior to the attack which they claim provided support for the District's decision that N.A.'s actions were premeditated and not spontaneous. These other videos were not offered into evidence.

During her testimony, Ms. Leiva opined that the assault was not provoked and was not spontaneous. She testified that no threats were made to N.A. that day, that X.Y. did not embarrass him, call him out publicly, or do anything that day to X.Y. that could remotely justify N.A.'s actions. I **FIND** however, that the testimony of J.C. in combination with the video evidence strongly supports the petitioner's position that the assault was a direct result of what was said to N.A. immediately prior to the incident was in fact both provoked and spontaneous.

Leiva and the District's only other witness Jenna Esdale, inaccurately testified that the so-called rumor occurred over the prior weekend, at least two or three days before the assault which justified the District's belief that the assault was premeditated. There was, however, no credible evidence presented to support the testimony offered by the District, that the rumor that X.Y. had beat up N.A., was circulating at any time prior to minutes before the altercation. I **FIND** that the statement contained in the Montuori memo

indicating ”[N.A.] had heard a rumor that [X.Y.] was telling other students that he had ‘beat [N.A.’s] ass’ this weekend” cannot reasonably be interpreted to mean the rumor itself was circulating as far back as the prior weekend. The reference being made in the Montuori memo is to the “weekend” when the alleged ”beating up” occurred , not when the rumor was circulating. There was no evidence presented, that challenges N.A.’s explanation as to why he approached X.Y. on January 24, 2024 or that he hit X.Y. in response to his calling him a “bitch” in front of his friends and classmates. I Therefore **FIND** that N.A.’s alleged assault of X.Y. was provoked and was spontaneous.

LEGAL ANALYISIS

It is well-settled that the IDEA requires a school district to provide a free appropriate public education (FAPE) to all children with disabilities and determined to be eligible for Special Education and Related Services (“SE”). 20 U.S.C. §1412(a)(1)(A). When a child eligible for SE is subject to discipline, federal and state law provide certain safeguards. 20 U.S.C. §1415, codified at 34 C.F.R. § 300.530.

When, as here, a special education student is subject to discipline for violation of a code of student conduct, the district cannot remove the student from his placement for more than ten days unless a manifestation determination is performed. 20 U.S.C. §1415(k)(1)(E); N.J.A.C. 6A:16-7.3(a)(7). In this case, a manifestation determination was made and the sole issue presented is whether that determination was correct.

In reviewing a decision with respect to a manifestation determination, the administrative law judge shall determine whether the district board of education has demonstrated that the child’s behavior was not a manifestation of the student’s disability consistent with the requirements of 20 U.S.C. §1415(k) and its implementing regulations at 34 C.F.R. §§300.1 et seq.“ N.J.A.C. 6A:14-2.7(p). 20 U.S.C. §1415(k) provides that,

> “Except as provided in subparagraph (B) [addressing alternative placements or suspensions lasting less than 10 days], within 10 school days of any decision to change the

> placement of a child with a disability because of a violation of the code of student conduct, the local educational agency, the parent, and relevant members of the IEP team (as determined by the parent and local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine –
>
> (I) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
>
> (II) If the conduct in question was the direct result of the local agency's failure to implement the IEP." 20 U.S.C. §1415(k)(1)(E)(ii).

If either of the above sub-clauses are applicable, then "the conduct shall be determined to be a manifestation of the child's disability." Ibid.

If the IEP team, which typically includes the parent, finds that the behavior was a manifestation of the student's disability, the IEP team must either conduct a functional behavioral assessment and implement a behavioral intervention plan, or review and modify any existing plan as necessary, and return the child to the placement from which she was removed, unless there is agreement that a change in placement is appropriate. 34 C.F.R. 300.530(f). If the manifestation-determination review does not find one of the above criteria met, then the school may continue with the student discipline (including expulsion) just as it would for any pupil without an IEP, except that continued FAPE may be provided in an interim alternative educational setting. 20 U.S.C. §1415(k)(1)(C).

When the parent of a child with a disability disagrees with the manifestation determination, she may appeal the decision by requesting a hearing, as J.C. did here. 34 C.F.R. 300.532. At the hearing , pursuant to N.J.S.A. 18A:46-1.1, the ultimate issue to be decided is whether the Board can meet the burden of proving that the student's behavior was not a manifestation of her disability.

To sustain its burden of proof that N.A.'s behavior on January 24, 2023 was not a manifestation of his disability, the District must come forward with sufficient evidence to support its finding.

Much of the evidence presented by the District related to their mistaken belief that the altercation between N.A. and X.Y. was the direct result of something that occurred the prior weekend. While it is true that there was an incident that occurred the prior weekend between the two students, there was no credible evidence presented at the hearing to indicate that the altercation had anything to do with what had occurred the prior weekend or to support the District's belief that the altercation was premeditated. On the contrary, the key piece of evidence presented at the hearing – the security video- indicated that the assaultive behavior was a direct result of something that X.Y. had said to N.A. seconds before N.A. assaulted X.Y. The video also did not indicate that N.A. was doing anything aggressive or threatening towards X.Y. prior to X.Y. calling N.A. a derogatory name. N.A.'s actions on the video support his position that he was attempting to discuss with X.Y., in private, why he was spreading a rumor that he had beat up N.A. that day at school.

There is no dispute that N.A. qualifies for special education and related services based on a classification of "Emotional regulation impairment" ("ERI"). N.J.A.C. 6A:14-3.5 (c)5 defines an "Emotional regulation impairment" as a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a student's educational performance due to:

> i. An inability to learn that cannot be explained by intellectual, sensory, or health factors;
>
> ii. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
>
> iii. Inappropriate types of behaviors or feelings under normal circumstances;
>
> iv. A general pervasive mood of unhappiness or depression; or

> v. A tendency to develop physical symptoms or fears associated with personal or school problems.

There is also no dispute that N.M.'s psychiatric evaluation from November of 2020 indicated that his diagnosis of ADHD had been present since third grade and that he is still "hyperactive, moderately distractable and very impulsive." There is also no dispute that his diagnosis also includes Disruptive Mood Dysregulation Disorder ("DMDD") with resulting symptoms of verbal rages and physical aggression against people and property at home , in school and in the community. R-14.

It is clear from J.C.'s testimony that N.A. was experiencing an overwhelming anxiety and fear of returning to school on the day at issue because he believed he was going to be assaulted by other students. I **FIND** that fear, which was disclosed to school officials the morning of the incident, was directly related to his ERI classification because he was exhibiting fears associated with personal / school problems and has difficulty with relationships with peers and teachers. Combined with the impulsivity component of his ADHD and potential of verbal rage and physical aggression resulting from his DMDD, there was ample reason for school personnel to take extra precautions to ensure N.A.'s safety as well as the safety of the other students. The facts presented however, reveal that no precautions were taken by school officials.

After being clearly warned of N.A.'s fragile condition the morning of the incident, there was no testimony from the District's witnesses that anyone checked on N.A. prior to the incident at lunch. Although Ms. Leiva testified that she believed she told J.C. that she would check on N.A., she also testified that she did not check on him before the incident.

N.A.'s impulsive and aggressive behavior in a stressful situation was the reason he was suspended less than a month prior the January 24th incident. The District's investigation into that prior incident, where N.A. became aggressive when the Vice principle requested to search his backpack, resulted in a finding that N.A.'s behavior was

a manifestation of his disability. To distinguish the two incidents, Jenna Esdale, Supervisor of Special Services for the District, testified that in the prior incident "there was an immediate reaction to a present antecedent". She explained that "there was a stimulus right in front of [N.A.], a person who wanted to search his backpack ,that's something he did not want to do at the time, and he immediately reacted to the vice principal. It was something he [didn't know was going to happen]." Ms. Esdale went on to explain that the January 24th incident was different because N.A. knew days before what was said and he had time to "stew on it".

It is clear for Ms. Esdale's testimony that the District's conclusion, that N.A.'s conduct was not a manifestation of his disability, was based on a misunderstanding of what triggered N.A.'s actions on January 24th. There was no credible evidence presented at the hearing that would indicate N.A. was "stewing over" what had happened the prior weekend. Nor was there any credible evidence presented that he was somehow fixated on some wrong that had occurred the prior weekend. I **FIND** that the credible testimony presented by J.C. reveals that N.A. was anxious and fearful for his safety that day because he believed he was going to be beat up. Immediately prior to the incident, N.A. was speaking with X.Y., in a manner that did not appear to be aggressive, and the incident occurred only when X.Y. made a derogatory comment directed at him. I also **FIND** that N.A.'s actions on January 25th constituted an immediate reaction to a present antecedent. The antecedent was X.Y. calling N.A. a derogatory name and the immediate impulsive action was N.A. punching him. I **FIND** no difference in the causal relationship between N.A.'s actions and his disability on January 24th and the causal relationship between his actions and disability less that 3 weeks earlier which the District found to be a manifestation of his disability.

Based on my findings above, I **CONCLUDE** that N.A.'s assault of X.Y. on January 24th was either caused by or had a direct and substantial relationship to his disability and that the District's February 2, 2023 finding to the contrary is not supported by the evidence presented.

In addition to concluding that N.A.'s behavior on January 24th was either caused by or had a direct and substantial relationship to his disability, I also **CONCLUDE** that the conduct in question was the direct result of the district's failure to implement N.A.'s IEP. N.A.'s IEP was amended with parental consent on or about December 19, 2022. That amendment added a 1:1 aide with a frequency of "1/Daily" and a duration of "All Day". (See Statement of Special Education and Related Services ("SSERS",P-9 at p.4). The District argues that "All Day" did not include lunch breaks because N.A. had the ability to leave the school during his lunch period. I **CONCLUDE**, based on the plain language contained in the SSERS, that "All Day" meant the entire day. There was no exception for lunch period or any other indication that the assistance of the 1:1 aide was limited to when N.A. was receiving classroom instruction. Indeed, the SSERS described the "location" where the 1:1 aide would be present was "Various" and was specifically not limited to instructional classrooms. Had the IEP been followed, and the aide was present, this entire unfortunate event could have been avoided.

Based upon my review of all the evidence, I **CONCLUDE** that the District has not come forward with sufficient evidence to support its findings and therefor has not met its burden of proving that N.A.'s behavior was not a manifestation of his disability.

ORDER

For the reasons set forth above, **IT IS** on this 30th day of September, 2024, **ORDERED** that:

1. The District's February 2, 2023 Manifestation Determination is **REVERSED;** and
2. N.A.'s conduct on January 24, 2023 was a manifestation of his disability.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2024) 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 (2024). 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.

October 1, 2024
DATE

WILLIAM COURTNEY, ALJ

Date Received at Agency

Date Mailed to Parties:

db

APPENDIX

List of Witnesses

For Petitioner:

1. J.C.

For Respondent:

1. Jenna Esdale, Supervisor of Special Services
2. Amy Leiva, School Psychologist and N.A.'s Case Manager

List of Exhibits

For Petitioner:

P-3: Manifestation Determination dated January 5, 2023

P-5: Signed IEP Amendment for 1:1 aide

P-8: Letter by K. Bersch, LCSW, dated February 26, 2023

P-9: E-Mail dated February 24, 2023 re: Special Education Code

P-10: Consent to Evaluate and Notice of Evaluation Plan, dated January 5, 2023

For Respondent:

R-1: Manifestation Determination dated February 2, 2023

R-2: Confirmation of remote Manifestation Determination Meeting

R-3: N.A. Individualized Education Program dated September 6, 2022

R-4: Written Proposal to Amend IEP dated December 16, 2022

R-5: E-Mail dated January 25, 2023 from Thomas Montuori to Amy Leiva (over objection)

R-6: E-Mails dated February 7, 8, 2024, between J.C. and Jenna Esdale and Thomas Montuori, cc: Amy OGorman

R-7: E-Mails dated February 7, 8, 2024, between J.C. and Jenna Esdale, cc: Amy OGorman, Thomas Montuori

R-8: Social Assessment, Date of Evaluation: February 25, 2019 (incorrect date, likely 2020)

R-9: Functional Behavioral Analysis, Behavior Intervention Plan, Date of Evaluation: October 19, 2021

R-10: Learning Disabilities Teacher/Consultant Evaluation, Date of Testing: March 15, 21, 2022

R-11: Educational Evaluation, Date of Evaluation: February 19, 2020

R-12: Psychological Evaluation, Date of Evaluation: February 26, 2020

R-13: Psychiatric Evaluation, Date of Evaluation November 23, 2020

R-14: Psychiatric Evaluation, Date of Evaluation November 23, 2020

R-15: Video footage from school security system, no audio (over objection)