State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 15077-16

AGENCY DKT. NO. 2017 24984

D.M. ON BEHALF OF M.M.,

Petitioner,

v.

KINNELON BOROUGH BOARD OF EDUCATION,

Respondent.

_____

D.M., pro se

Robert Merryman, Esq., for respondent, (Apruzzese, McDermott, Mastro, and Murphy, Attorneys)

Record Closed: January 25, 2017 Decided: January 27, 2017

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

In accordance with the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. § 1415, D.M. has requested a due process hearing on behalf of his son, M.M., who is classified as eligible for special education and related services under the category Emotionally Disturbed (ED). D.M. challenges a June 2016 Individualized Education Program (IEP), which he contends unfairly continues his son in a therapeutic out-of-district day school. The Kinnelon Board of Education (the Board), through its Child Study Team (CST), replies that M.M. is unready to transition to Kinnelon High

School, and that a free and appropriate public education (FAPE) could not be appropriately delivered to him at a comprehensive public high school.

PROCEDURAL HISTORY

M.M.'s request for a due process hearing was received by the Office of Special Education Programs on July 29, 2016. The contested case was transmitted to the Office of Administrative Law (OAL), where it was filed on October 5, 2016.

M.M. did not return to school in September 2016. As a result, the Board filed a request for emergent relief. In a settlement approved by Judge Michael Antoniewicz, A.L.J., on October 20, 2016, the parties agreed that they would explore three alternative out-of-district placements; that M.M. would attend one such placement; and that if he did so regularly for nine weeks, he would be reevaluated by Dr. Ellen Platt, a psychiatrist, to determine his readiness to attend Kinnelon High School. After visiting the proposed schools, M.M. and his father selected the Lakeview School, but M.M. attended for only one day. The Board urged that the settlement in the emergent matter rendered this due process petition moot, but D.M. strenuously disagreed, reiterating that M.M. refused to go to school anywhere but Kinnelon High School. So that a determination regarding M.M.'s educational future could be made, I directed that this matter proceed to hearing.

A hearing was conducted on January 3, 2016. Written summations were filed by the Board on January 24, 2017, and by D.M. on January 25, 2017, at which time the record closed.

FINDINGS OF FACT

M.M. is a seventeen-year-old eleventh grader, with a history of maladaptive behaviors and emotional issues that have long necessitated that he receive his education in a therapeutic setting. He has been diagnosed with a mood disorder, oppositional-defiant disorder, and attention deficit hyperactivity disorder (ADHD). Case manager Susan McFarlane provided the history that lead up to the present dispute. She was admitted as an expert in school psychology and the delivery of special education programming to students. Her testimony was largely uncontroverted, and I **FIND**:

In or about March 2014, M.M. was terminated from Chancellor Academy, an out-of-district special education placement. Chancellor felt that its program could no longer meet M.M.'s needs in the aftermath of repeated disciplinary incidents, including use of obscenities; defiance; failure to complete his work; nonattendance; tardiness; disrespect to other students and staff; and bringing an air gun to school. The school reported that the family was noncompliant with its request that M.M. be evaluated by a psychiatrist. An IEP dated March 1, 2014, placed M.M. on homebound instruction while the CST and the family explored next steps. He remained on homebound for the remainder of his eighth grade year. Correspondence from an attorney for the family in August 2014, expressed a desire for an independent psychiatric evaluation to assist in guiding the parties' educational decision-making. The attorney proposed Platt as a possible evaluator. This was agreed upon by the district.

M.M. started ninth grade on home instruction. On October 20, 2014, the then Director of Special Services wrote to the family's attorney and indicated that records had been sent to Platt; that arrangements to compensate her were likewise in place; but that no report had been forthcoming. The letter noted that, "in the interim attempts to provide home instruction have been frustrated by Michael's attitude and work output during the sessions and erratic attendance." A report was finally forwarded to the CST by the family's attorney via letter dated November 3, 2014. Platt felt that M.M. was unready for return to a public high school, but she was encouraged by his affect and demeanor, and opined that "if, and only if, he is successful in abiding by the behavioral

requirements of a therapeutic school setting, he may then have a gradual transition…to his district high school for the second half of the school year."

Per Platt's recommendations, the parties agreed via an IEP dated November 25, 2014, that M.M. would attend the Lakeland Andover School, a small, structured, therapeutic day school. At that time, M.M. and his father reiterated their goal of a return to Kinnelon High School. The IEP provided that "while it is the hope of the district to return [M.] to Kinnelon High School, it would be inappropriate to set a specific timetable as this schedule will be predicated on [M's] demonstrable progress and feedback from the out of district providers." The attorney for the family was in attendance at this meeting.

Both the evidentiary record, and D.M.'s demeanor and presentation at the hearing, confirm that he and his son were single-minded in their determination to return to Kinnelon High School. The documents and testimony also confirm that district personnel were well cognizant of the family's desires, and tried to work cooperatively with M.M. and his father toward attaining their goal; to include frequent IEP meetings, and scheduled visits to Kinnelon High School. But the record likewise reveals an inability by M.M. to conduct himself consistently in a manner that demonstrated his readiness for this transition.

McFarlane shared that M.M. made an adequate adjustment at Lakeland Andover, but often remained noncompliant. Emails during 2014-2015 year from Lakeland Principal Gary DeFoe describe ongoing inappropriate behaviors. These included refusing to remain on task for the duration of the class period; using his phone in class; failing to return to class from the restroom; defiance; disrespect to peers; use of profanity; wearing socks decorated with marijuana leaves after being asked not do so; and cutting class. A June 8, 2015, email related that, "[a]fter breakfast Mr. DeFoe was advised that [M.] and [another student, F.] were speaking in a German type accent saying 'you need to take a shower' in relation to the Holocaust, high stepping as in marching, and giving each other the 'Hile Hitler' sign." The email recounted that M.M. was spoken to about this conduct; but that he did not appear to appreciate its

inappropriateness. Although M.M. attended school with better regularity, records reveal that he was absent during the period from November 2014 through May 2015 for some 18-19 days.

In March 2015, the CST obtained consent for updated psychological and educational testing. It was determined that M.M. remained eligible for classification under the ED category. At an IEP meeting on March 26, 2015, D.M. renewed his request that his son be transitioned to the mainstream high school. But the CST felt that although M.M. sincerely desired to achieve this goal, he nonetheless remained noncompliant with behavioral and academic expectations in the therapeutic environment, making it unlikely that he would be able to experience success in the mainstream. The IEP stated that "[M.] presents as a student who continues to need the level of individual attention, supervision, structure, guidance and therapeutic support available in a small therapeutic educational setting." The IEP thus recommended that M.M. return to Lakeland Andover for his tenth grade year, with a gradual transition to the high school if he experienced success in complying with behavioral expectations. The IEP went unsigned by his father. In June 2015, M.M.'s mother signed an IEP addendum and agreed that M.M. remain at Lakeland Andover for the start of the 2015-2016 school year. The IEP stated that "[s]hould there be consistent improvement evidenced over the first marking period a phased return to district will be considered."

But M.M.'s behavioral issues persisted into the 2015-2016 school year. He was caught smoking without permission; was late to class; was defiant; used profanity; refused to remain on task in class; made racist comments about three cable workers in the school parking lot; and repeatedly used his phone in class in violation of school rules. The documentary evidence confirms that D.M. was repeatedly informed that his son was misbehaving in school. A March 23, 2016, IEP meeting was convened because the CST was advised that M.M. was unhappy at Lakeland Andover. It was agreed that his teachers would provide daily updates regarding his conduct in school, and that his educational plan would again be reviewed on April 25, 2016. These steps were taken in an effort to cooperate with D.M.'s wish that M.M. return to Kinnelon High School.

The parties met on April 25, 2016, as agreed. While his father felt that M.M. had made enough progress to begin a transition to Kinnelon High School, the CST did not agree, as M.M. continued to have inconsistent success in complying with behavioral expectations. The CST asked that M.M. be reevaluated by a psychiatrist, but his father declined to consent. On April 28, 2016, the Director of Special Services wrote to D.M. to express concern that M.M. had not returned to school since their meeting. In an effort to entice him to work toward his goal of transition to the public high school, a visit there took place on May 2, 2016. M.M. did not return to school for one week after this visit. After his return, it was intended that a follow up visit would take place during the last two weeks of June and that M.M. would actually attend two classes. D.M. strongly believes that school personnel were uncooperative with him and his son, yet the record reveals, and I **FIND** that McFarlane tried repeatedly to encourage M.M. to demonstrate readiness for the school change he sought. She met time and again with his father to discuss how to best work towards that goal.

Disciplinary updates for the period from May 9, 2016, through May 24, 2016, reveal that M.M. returned to school, and was generally compliant with behavioral expectations. But even though these reports were shared by his father to demonstrate that M.M.'s behavior was nearly perfect, this simply was not the case. The documents confirm ongoing concerns, albeit somewhat minor ones, about leaving class without permission; lateness; refusal to engage with the lesson, most specifically in mathematics; refusing to work and calling a lesson "stupid"; and leaving class early. The mathematics teacher wrote on May 19, 2016, that "[M.] is going to have a very hard time in any public school math class." (emphasis in original). And on May 26, 2016, a serious incident occurred that resulted in M.M.'s suspension.

M.M. posted a "snapchat" that read "I kill niggers for a living." While admitting that this was inappropriate, his father nonetheless attempted to excuse his son's conduct by urging that M.M. had a First Amendment right to express this point of view; urging that M.M. made the post at home, and not at school; and pointing out that it was a classmate who had shared it in the school setting. But school personnel both at

Lakeland and in Kinnelon were understandably concerned by this behavior, which spilled into the school environment and caused upset and disruption there. They felt, as do I, that M.M.'s statement was clearly intended to be shared by others, or he would not have posted it via social media. M.M. should have reasonably anticipated that a classmate might disseminate the post further. And the content is grievously inappropriate; and is insulting and threatening to an ethnic group whose members are represented at Lakeland Andover. Lakeland Andover personnel had to counsel and calm members of the school community, who were understandably offended and upset.

Via letter dated June 1, 2016, the Director of Special Services advised D.M. that M.M. did not appear ready to transition to Kinnelon High School. She stated unequivocally that "[t]he arrangement for [M.] to spend additional time at KHS is now off the table as it is unmistakable [M.] continues to demonstrate significant needs for a therapeutically supportive environment to address his emotional and academic needs." M.M. ended the 2015-2016 academic year having been absent from school for 66 days. An end-of-year report from Lakeland did include the encouraging comment that he had attended some 23 therapy sessions, and appeared engaged and prepared to discuss issues in his life at those sessions. But McFarlane opined at the hearing that M.M. is not yet ready to attend Kinnelon High School.

An IEP meeting took place on June 13, 2016. This IEP reiterated that transition to Kinnelon High School was the goal all around. The CST recommended a return to Lakeland Andover in September 2016 with a five-week review, and indeed, McFarlane felt that Lakeland Andover would have offered FAPE to M.M. The CST proposed that if attendance, behavior and academic progress were on track, a half day transition to Kinnelon High School would be set up. M.M. was present at the meeting, and indicated he was unsure he could return to Lakeland. Accordingly, three alternative schools were proposed for visitation, and M.M.'s mother signed a release of records. McFarlane shared that she investigated the possibility of applying to special programs housed within neighboring public high schools, but these schools would not entertain an application due to the history of M.M.'s behaviors. M.M.'s mother signed the IEP; his

father declined to do so. M.M. did not visit the proposed alternative schools, so Lakeland remained his placement for September 2016. He never returned there.

After the filing of the due process petition, the parties met for a resolution session. It was agreed that Platt would again evaluate M.M., and she did so on September 8, 2016. Platt was admitted as an expert in psychiatry at the hearing. She testified in a professional, consistent and persuasive manner. Her testimony and her report were alarming. The M.M. that Platt saw in 2016 had deteriorated substantially from the boy she had interviewed in 2014. In Platt's view, he was clearly decompensating, and M.M.'s overall affect was inappropriate. His speech was slurred; he was inappropriately groomed; he was sluggish; and failed to make eye contact. There was evidence of depression, based on M.M.'s flat tone, guarded demeanor, and slow movements. Platt described him as profoundly apathetic. Consistent with her view that M.M. was depressed, Platt reported that he was engaged in no productive activities. Relative to the snapchat incident, Platt reported that M.M. would not acknowledge that this was an inappropriate behavioral choice.

Platt strongly felt that M.M. was not ready to return to a public high school. Indeed, she instead believed he would be best served by a day psychiatric treatment program; writing that "[i]ntensive psychiatric and psychotherapeutic treatment is mandatory and must include regular monitoring for substances. A day treatment program, which includes multiple forms of therapy (group formats including CBT, DBT and mental health; individual and family psychotherapy) … is recommended." Platt explained that a day program would include an academic component, although its primary focus would be M.M.'s mental health. She opined that a return to Kinnelon High School would be ill-advised.

D.M. urged that I discount Platt's opinion because she was not privy to all of M.M.'s records, most specifically, the daily logs of his behavior in May 2016. He suggested that his son appeared depressed because he did not want to be examined by Platt; that essentially he was "putting on a show," that inaccurately reflected his true status. This argument was unpersuasive. Platt described a terribly troubled young

man. She is a skilled professional, who is trained to assess an individual's mental status. And the evidence on record is consistent with her impression. D.M. is clearly a concerned and loving father, but his presentation on his son's behalf consisted mostly of apologies for his son's behavior; and efforts to demonstrate that the district improperly calculated the percentages of time during which M.M. behaved once teachers at Lakeland Andover began to submit daily logs. He urged that M.M. should go to Kinnelon High School, but mostly because M.M. says he wants to do so, and not based on any expert advice that this would be in his son's best interest. It bears noting that M.M. is currently engaged in no private mental health therapies or interventions of any kind.

After the settlement of the emergent relief application filed by the Board, an IEP meeting was conducted on November 23, 2016. Since M.M. had indicated that he preferred the Lakeview School, the intent of the meeting was to formalize his placement there. A contract had been signed placing M.M. at Lakeview, and a bus route set up as early as October 31, 2016. But M.M. did not attend school until several weeks later, and then only for one day. A Lakeview representative, Jaqueline Swanson, attended the November IEP meeting, and together with the IEP Team developed goals and objectives for M.M.'s program there. D.M. did not attend; but M.M.'s mother was present and signed the IEP. D.M. made it plain that he felt an insufficient effort was made to choose a meeting time that was convenient for him. And although he had agreed via the emergent relief settlement to try an alternative therapeutic school, the IEP documents D.M. and M.M.'s ongoing insistence that enrollment at Kinnelon High School would be a better option.

Swanson confirmed that M.M. was appropriate for enrollment at her school. She is part of the team that makes admission determinations, and holds certificates in special education, psychology and administration. Her school is small, structured and therapeutic. It is approved by the Department of Education for special education services for behaviorally disturbed (BD) children. The school utilizes a token economy; focuses on relationship building; offers counseling; and works with families to maintain consistency of approach. In an effort to allow students to experience success, the

school rewards effort. Its student population is comprised of children with what Swanson described as "soft misbehaviors," such as depression, anxiety, and oppositional conduct. McFarlane concurred that Lakeview is appropriate for M.M.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

As a recipient of federal funds under the Individuals with Disabilities Education Act, 20 U.S.C.A. § 1400 et seq., the State of New Jersey must have a policy that assures all children with disabilities the right to a free appropriate public education (FAPE). 20 U.S.C.A. § 1412. FAPE includes special education and related services. 20 U.S.C.A. § 1401(9); N.J.A.C. 6A:14-1.1 et seq. The responsibility to deliver these services rests with the local public school district. N.J.A.C. 6A:14-1.1(d). Here, the Board will satisfy the requirement that M.M. receive FAPE by providing personalized instruction with sufficient support services to permit him to benefit from instruction. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 203, 102 S. Ct. 3034, 3049, 73 L. Ed. 2d 690, 710 (1982). Case law recognizes that "[w]hat the [IDEA] guarantees is an 'appropriate placement' not one that provides everything that might be thought desirable by loving parents.'" Walczak v Florida Union Free Sch. Dist., 142 F.3d 119, 132 (2d Cir. 1998). Indeed, "meaningful parental participation does not require deferral to parent choice." S.K. ex. rel. N.K. v Parsippany-Troy Hills Bd. of Educ., 2008 U.S. Dist. LEXIS 80649, at *34 (D.N.J. October 9, 2008).

I **CONCLUDE** that the District's placement of M.M. at Lakeview meets the requirements of the IDEA; affords M.M. FAPE as that term is defined by law; and constitutes the appropriate placement in the least restrictive environment. The placement proposed via the June 2016 IEP, at Lakeland Andover, was likewise appropriate, and offered FAPE to M.M. The evidential record, and the expert testimony, well supports the Board's view that M.M. is unready to transition to a busy public high school. While there is a clear preference in the law for mainstream placement, our courts have recognized that this is not always possible. The least restrictive environment for some students must be in a placement outside a regular classroom or school, if, as here, "a preponderance of the evidence [demonstrates] that

the child cannot be educated satisfactorily in a regular class with supplementary aids and services." Oberti v. Bd. of Educ. of Clementon Sch. Distr., 995 F.2d 1204, 1224 (3rd Cir. 1993). And while D.M. clearly and earnestly wants his son to succeed, the expert testimony simply does not support his view that attendance at Kinnelon High School is the path to such success.

Moreover, I am deeply troubled by Dr. Platt's report and testimony. This tribunal lacks the authority to compel D.M. to follow her advice. But I implore him to give serious consideration to her recommendations. If M.M. enrolls in a day psychiatric placement, the Board will be obliged to assist in providing educational services and/or tutoring in that setting, and I **CONCLUDE** that it should do so.

ORDER

Based on the foregoing, the petition is **DISMISSED**.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2015) 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.A. § 1415(i)(2); 34 C.F.R. § 300.516 (2015).

January 27, 2017

DATE

ELLEN S. BASS, ALJ

APPENDIX

Witnesses

For Petitioners:

D.M.

For Respondent:

Susan McFarlane
Dr. Ellen Platt
Jacqueline Swanson

Exhibits

For Petitioners:

P-1 Behavior reports

For Respondent:

R-1 Pediatric neurodevelopmental report, dated December 26, 2008
R-2 Psychoeducation report, dated December 23, 2011
R-3 Psychiatric report, dated February 20, 2012
R-4 IEP, dated February 28, 2014
R-5 Letter, dated August 27, 2014
R-6 Letter, dated October 20, 2014
R-7 Emails
R-8 Platt evaluation with covering letter, dated October 7, 2014
R-9 Letter, dated November 18, 2014
R-10 IEP, dated November 24, 2014
R-11 Letters from December 16, 2014 through March 9, 2015
R-12 Incident detail listing
R-13 Notice and consent, March 2015

R-14 Psychoeducational evaluation, dated March 17, 2015

R-15 Eligibility determination, March 2015

R-16 IEP, dated march 25, 2015

R-17 Attendance summaries

R-18 Transcript 2014-2015

R-19 IEP amendment, dated June 4, 2015

R-20 Goal and Objectives 2015-2016

R-21 Correspondence from September 15, 2015 through February 23, 2016

R-22 Incident detail listing

R-23 IEP, dated March 4, 2016

R-24 IEP, dated April 25, 2016

R-25 Request for additional assessment

R-26 Letter, dated April 28, 2016

R-27 Snap Chat documents

R-28 Lakeland Andover attendance records

R-29 Lakeland Andover transcript

R-30 Lakeland Andover final report

R-31 Letter, dated June 1, 2016

R-32 Emails

R-33 Letter enclosing IEP, dated June 13, 2106

R-34 Letter, enclosing Platt evaluation, dated September 2016

R-35 Letter, received September 30, 2016

R-36 Lakeland Andover attendance records

R-37 Settlement agreement, dated October 12, 2016

R-38 Letter, dated November 4, 2016

R-39 Letter enclosing IEP, dated November 23, 2016

R-40 McFarland resume

R-41 Platt CV

R-42 Not admitted

R-43 Swanson resume