State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

DECISION

OAL DKT. NO. EDS 15608-14

AGENCY DKT. NO. 2015 22038

WASHINGTON TOWNSHIP BOARD

OF EDUCATION,

Petitioner,

v.

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

Respondents.

_____

Sanmathi Dev, Esq., for petitioner (Capehart Scatchard, attorneys)

R.M. and V.M. on behalf of J.M., respondents pro se

Record Closed: December 22, 2014 Decided: January 13, 2015

BEFORE **ROBERT BINGHAM II**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On November 24, 2014, petitioner, Washington Township Board of Education (the Board), filed with the Office of Special Education Programs (OSEP), New Jersey Department of Education, an expedited petition for due process, seeking an order placing student J.M., daughter of petitioners R.M. and V.M., in an alternative interim placement for forty-five days due to dangerousness. On December 2, 2014, the matter was filed with the Office of Administrative Law for expedited hearing, which was held on December 22, 2014, after which the record was closed.

FACTUAL DISCUSSION

J.M. is a sixteen-year-old student who resides within the Washington Township School District (the District). Since August 2011 she has been eligible for special education and related services under the classification of emotionally disturbed, having been diagnosed with oppositional defiant disorder and mood disorder. (P-G.) Since June 2013 she has attended a number of out-of-district placements, including the Strang School[1] and the East Mountain School (tenth grade).[2] In March 2014, petitioners removed J.M. from East Mountain and, pursuant to an agreed-upon individualized education plan (IEP) dated April 24, 2014, that included a behavior plan, she was placed out of district at the Brookfield Academy (Brookfield). An IEP meeting on June 3, 2014, resulted in the continued agreed-upon placement at Brookfield for the remainder of the 2013–14 school year and for the 2014–15 (eleventh-grade) school year.

Between September and October 23, 2014, Brookfield issued a number of disciplinary infractions based upon J.M.'s alleged disruptive conduct. Consequently, an IEP meeting was held on October 27, where the District agreed to conduct additional assessments, as requested by petitioners, who rejected the idea of a change of placement. On October 29, J.M. signed a behavior contract to "ensure that [she] remains in good standing and continues to make progress in her Brookfield Academy placement." (P-E.)[3] By letter dated November 5, 2014, Brookfield's principal, Patrick

[1] The Strang School is located in Alloway, New Jersey, and specializes in behavioral management for students with emotional and behavioral disabilities. It is an on-site educational facility affiliated with Ranch Hope, a residential treatment facility. J.M. attended the Strang School for an extended school year during the summer of 2013, following ninth grade.

[2] The East Mountain School is located in Belle Mead, New Jersey, and specializes in management and therapeutic services for adolescents with behavioral and psychiatric disorders. It is an on-site educational facility affiliated with the Carrier Clinic, a residential treatment facility that J.M. attended simultaneously.

[3] Pursuant to the contract, J.M. would "avoid any [p]hysical, [v]erbal, [e]lectronic [p]rovocations, [t]hreats, [b]ullying, or [i]ntimidation," and would "refrain from all verbal and/or physically threatening activities, provocations, threats, intimidations, or harassments of her peers or adults, either directly or indirectly, at school or on the school bus." Further, she would be given one warning regarding "out of area" in the school and would "respond to redirection from staff to get back in area." J.M. would also follow Brookfield's cell-phone policy, and promptly arrive at, remain in, and participate in each class.

Kiernan, recommended a change in placement, citing the following behaviors: (1) non-compliance and refusal to respond to redirection, (2) refusing to consistently attend and remain in scheduled classes, (3) disruption of other students and school environment, (4) unauthorized use of school and staff computers and computer searches of inappropriate topics, and (5) student-contract violation. (P-F.)

The District convened an IEP meeting on November 10, 2014, where it recommended out-of-district placement at Creative Achievement Academy (Creative Achievement). According to the IEP (P-G), J.M.'s 2014 psychiatric assessment indicated a diagnosis of "mood control disorder and possible anxiety disorder," and her 2014–15 discipline report indicated fourteen infractions in eight days of attendance, through October 23, 2014. The rationale for removal from general education indicated that the benefits of the recommended out-of-district program include "a high degree of support and structure required to meet the individual needs of this student." The IEP further indicated that, despite Brookfield's efforts, [J.M.'s] "oppositional and noncompliant behaviors cannot be maintained in this setting." Instead, "Creative Achievement is appropriate and is in the least restrictive environment because it offers additional therapeutic support to address [J.M.'s] behavioral needs, which are severely impacting her education." According to the District's case manager, Kelly Graham-Owens, Creative Achievement has accepted J.M. and she could start immediately. However, petitioners disapprove of Creative Achievement as J.M.'s educational placement.

On or about November 18, 2014, within two weeks of the November 10 IEP meeting, Brookfield's assistant principal, Nacovin Norman, suspended J.M. for eight days for alleged drug distribution to other students on the school bus, resulting in one student being rushed to a hospital emergency room. A second eight-day suspension was also issued at that time for alleged verbal/terroristic threats to another student ("Student A").[4] Also, on November 17, 2014, Cherry Hill police reportedly arrested J.M.

[4] School records indicate that the alleged threats involved J.M. attempting to enlist Student A in "shooting up everyone," "shooting the enlisted student" and "shooting herself," as reported by Student A and her mother, which was considered as a threat against the school as well as the student. (P-D; P-L.)

at Brookfield following an investigation into alleged threats that she made against Student A and the school.

On November 21, 2014, following the suspension, a manifestation-determination meeting and IEP meeting was convened by the District. J.M.'s conduct was determined to be a manifestation of her emotional disability, but the District proposed her immediate removal to Creative Achievement as a forty-five-day alternative interim placement due to dangerousness. According to the IEP dated November 21, 2014 (P-L), which essentially supplemented the November 10 IEP, Creative Achievement was the proposed placement, and it maintained its acceptance of J.M. despite the more recent incidents.

The parties stipulate as to the above facts, which are undisputed.[5] Additionally, the Board submitted several certifications of school staff or administrators,[6] and both petitioner R.M. and J.M. submitted certifications as well.[7]

[5] The second suspension, for alleged threats to another student (Student A), was not specifically included among the stipulated facts, but the fact that the suspension was issued is uncontested.

[6] Nacovin Norman, Brookfield's assistant principal, did not testify but certified that on the morning of November 17, 2014, the parent of Student A reported to her that Student A was rushed to the emergency room on Thursday, November 13, 2014, as a result of taking Xanax and Percocet that was distributed to her by J.M. Norman's investigation revealed that J.M. had distributed Xanax and/or Percocet, for which she has no prescription, to at least two students, including Student A. Further, Student A told Norman that it was not the first time that J.M. had distributed pills to her. Student A's mother reported J.M.'s mother, V.M., as having told her that "J.M. must have taken [V.M.'s] pills again." Also, on November 17, Student A told Norman that J.M. had discussed with her a "suicide mission" to "kill her, and then kill herself while shooting up the school." Student A said J.M.'s Instagram account is all about killing. Norman immediately notified the Cherry Hill police, who responded to the school and interviewed Student A and her mother, J.M., and Norman. According to Norman, Cherry Hill police then arrested J.M. and removed her from the premises. And Norman suspended J.M. for eight days "as a result of J.M. distributing drugs." At the November 21, 2014, manifestation determination/IEP meeting, Norman indicated that the staff and students were concerned for their safety and that J.M. could not return to Brookfield; she agreed with the District's determination to change her placement.

[7] J.M. did not testify, but her certification (R-L) indicates, in pertinent part, that she never made any terroristic threat against Brookfield via any social media, including Instagram. Her Facebook account is "public" and her Facebook account contains no references to "serial killers" or "mass murderers." She has never assaulted another student or staff at Brookfield (or any other school) and was never disciplined for any physical or verbal aggression at Brookfield (or any other school). However, she had been assaulted at Brookfield by three different students, and each time she chose to retreat. "Student A" has been her friend since April 2014, when J.M. began attending Brookfield, though they had differences at times. But J.M. never told her anything that could be construed as a terroristic threat against Brookfield or any other school. J.M. was evaluated by the District's psychiatrist on July 7, 2011, and again on May 22, 2014, when she discussed with him her "social media interests" in detail.

Patrick Kiernan, Brookfield's principal, testified that his certification dated December 11, 2014, (P-C) was true and accurate. In pertinent part, it stated that since the beginning of the 2014–15 school year, J.M. has engaged in continuous disruptive, protest, and unsafe behavior that has negatively impacted her education and the education of Brookfield students. She has been open about her fascination and fixation with serial killers, as reflected by her activity on social media, which includes numerous references to the Columbine High School shooting, murders, murderers, and killing on her Facebook and Instagram accounts.

Consistent with his certification, Kiernan further testified that on September 30, 2014, he and assistant principal Nacovin Norman met at Brookfield with Cherry Hill police, who stated that the Washington Township police contacted them and reported a direct threat against Brookfield made by J.M. via Instagram.[8] An emergency staff meeting was held to assure staff of their safety and that police would maintain a presence. Police voluntarily kept two squad cars at Brookfield during the following week, amid student and staff concerns.

According to Kiernan's certification, on October 21, 2014, J.M. was reprimanded for misuse of a school computer by searching for Facebook pages and photos of Columbine suspects and autopsy reports, as well as other serial killers. Kiernan testified that he became aware of the incident when a graphic-arts teacher sent him a freeze-frame screenshot. Also, on October 23 she was disciplined for loitering in an unauthorized area, where she searched a teacher's computer for one of the Columbine suspects and changed the computer's desktop photo to that Columbine suspect holding his shotgun during the shooting, and then—as shown by surveillance video—directed other students to view it. Both incidents are referenced in J.M.'s discipline report (P-D).

J.M. further certified that she never possessed, used or distributed any illegal drugs or prescription medication at Brookfield or any other school. And she has "never been suspected or questioned about drug possession, use, or distribution" at school. She also has neither been questioned by nor given any statements to "any law enforcement agency about any terroristic threats or about any use, possession, or distribution of any of illegal or prescription drugs." J.M. intends to graduate high school and attend college.

[8] Kiernan's certification describes a "Columbine-like threat."

On October 29, 2014, J.M. signed a behavior contract but, according to Kiernan, immediately broke it during a discussion with him and her therapist, yelling and stating, "F--- this, this is stupid," and then storming out of the room.

Kiernan issued a letter dated November 5, 2014, (P-F) indicating that Brookfield was not appropriate for J.M. He issued the letter because as the official charged with the health and safety of students and staff, he determined that there had been "enough red flags." They specifically included J.M.'s "Columbine behaviors," and her threat to another student, including specifics of "how they would end it" (that J.M. would shoot the student and then herself),[9] all of which threatened health and safety, as it made staff uneasy.

On November 17, 2014, Kiernan observed police at the school after being notified of their presence by Norman. Kiernan believed their presence was due to "an additional threat" and distribution of prescription medication to another student. On that day Student A met with Kiernan and showed him a screenshot of a message from J.M. (P-I) that stated, "I am not even kidding . . . I'm going to fuck you up so bad the next time I see you and your lying ass." Kiernan learned from Norman that the same student, Student A, had gone to the emergency room after being given prescription drugs by J.M., but Student A said nothing of that incident to Kiernan.[10]

Kiernan explained that J.M.'s Columbine-like threats to hurt students and staff, as well as involvement with drugs, raised safety concerns. Staff and students expressed their uneasiness to Kiernan and Norman. The circumstances caused apprehension among staff and students, and some had expressed an unwillingness to return.

On cross-examination, Kiernan testified that he would have to defer to Norman as to whether there was a thorough and complete investigation regarding alleged

[9] Again, this involved J.M. attempting to enlist "Student A" in "shooting up everyone," "shooting the enlisted student" and "shooting herself," as reported by "Student A" and her mother to Norman who, in turn, informed Kiernan.

[10] According to Kiernan, Student A's mother had told Norman that J.M.'s mother said her prescription medication had been taken.

threats and drug distribution by J.M. Though the Cherry Hill police did respond to a complaint and remove J.M. from the school, Kiernan was "not involved, unaware" regarding any contraband on J.M. He admittedly was not aware of any discipline for fighting "under his watch," had not seen her with illicit drugs or contraband, and does not personally know of her having distributed drugs. As to anything leading him to believe that J.M. is a physically violent person, Kiernan testified, "just the threat to the other student." Kiernan conceded that he had no direct knowledge of J.M. distributing drugs or making threats; "the incident was reported [to him] by the assistant principal who handled the entire matter."

Ed Travis, director of admissions/supervisor of special education at Brookfield, testified that, as director of student services, he became familiar with J.M., and that his certification dated December 11, 2014, (P-B) was true and accurate. His testimony was consistent with the certification's description that J.M. had exhibited disruptive, protest, and refusal behavior on a continuous basis since the beginning of the 2014–15 school year.[11] Travis was aware of her conduct because he had "reached out" to explore behavior intervention. He is also aware of and agrees with the District's proposal to change placement because Brookfield is no longer conducive for J.M., as it is not a "self-contained" model, but rather an "individual schedule" model, and is less restrictive than other programs.[12] Travis's knowledge of J.M.'s discipline regarding threats and drugs was based upon having been "alerted to those instances" by the principal and director of student services, who had more "direct contact."

[11] The certification further described that during that time J.M. had been disciplined for conduct including: a verbal/terroristic threat to a student, distribution of drugs, refusing to respond to direction, being "out of area," smoking, defacing property, computer misuse, and loitering in unauthorized areas. Further, she has been open about her fascination and fixation with serial killers, as reflected by her activity on social media, which includes numerous references to the Columbine High School tragedy, murders, and killing on her Facebook and Instagram accounts. Despite signing a behavior agreement on October 29, 2014, J.M. continued exhibiting disruptive and protest/refusal behavior that Brookfield could no longer manage. Brookfield had provided the following interventions: a student behavior contract, unlimited visits to Brookfield's social worker, and informal meetings/counseling by administrators with J.M. regarding her behavior, all in addition to the services and supports set forth in her IEP. Travis was also made aware of alleged drug distribution and a second threat to the school, and concluded that J.M.'s actions were causing significant disruption to the education of Brookfield students and that Brookfield could no longer accommodate and meet her needs.

[12] Travis noted that Brookfield cannot provide escorts during the changing of classes, and the addition of an assigned aide would not prevent J.M.'s behavior, as Brookfield is not a hands-on intervention facility.

On cross-examination, Travis testified that the "unsafe behavior" described in his certification consisted of J.M.'s threat toward the school, its students and its staff. Travis conceded that the only knowledge he had regarding the threat or the drug allegation was from his discussions with the principal and the director of student services. He has never witnessed J.M. distribute or even be under the influence of drugs, and has not witnessed her making any written or verbal threats. He had not seen her Instagram or Facebook accounts or any document generated from them, and his description (in his certification) of her fascination with serial killers and Columbine suspects was based upon what was told to him by other staff. He further testified that her fascination raised safety concerns, but again conceded that the information came from other staff rather than from personal knowledge.[13]

Kelly Graham-Owens, a school psychologist and case manager employed by the District, testified that her certification dated December 11, 2014, (P-A) was true and accurate. In pertinent part, it stated that she was familiar with the numerous infractions that J.M. received since September 2014, based upon communications with Brookfield administrators and/or staff, as well as a review of her discipline report. Her certification further stated that Brookfield also had reported a "Columbine-like threat" via social media that involved the Cherry Hill Police Department, and misuse of school computers, including the inappropriate access of Columbine-related topics.[14] Graham-Owens testified that she had attended J.M.'s 2014-15 IEP meetings, including that held on November 21, 2014, when Brookfield considered her to be a threat and contemplated placement at Creative Achievement. Notably, at that time, the parent advocate who

[13] On other points, Travis further testified that upon J.M.'s admission to Brookfield, the school would have received evaluations and her IEP, but "typically" would not have received discipline reports, unless specifically requested. According to Travis, Brookfield imposes discipline as a consequence of inappropriate behavior, not based upon a student's disability.

[14] Graham-Owens's certification further indicated that the District convened an IEP meeting on October 23, 2014, and it was then agreed that the District would conduct additional assessments and a student behavior contract would be implemented for J.M. The District convened an additional IEP meeting on November 10, as well as a manifestation review and IEP meeting on November 21, 2014. On both occasions, it proposed placement at Creative Achievement as a forty-five-day alternative interim placement. According to Graham-Owens, the services, modifications and accommodations set forth in J.M.'s previous IEPs for Brookfield can be delivered at Creative Achievement, and placement at Creative Achievement is available immediately.

was in attendance began discussion of a one-to-one aide, with the notion of "prevent[ing] hearsay between the student and any other students or the teachers." According to Graham-Owens, "it just wasn't appropriate because we weren't sure whether or not there would still be hearsay between the aide and the student." The November 21 IEP indicates that the IEP team considered but rejected a one-to-one aide for J.M., based upon Brookfield's determination that a one-to-one aide would not address her behaviors, and Graham-Owens agreed with that assessment.

Graham-Owens further testified that, based upon her familiarity with Creative Achievement, that school is "more restrictive" and able to handle the behaviors J.M. exhibited.[15] It has a care management officer (CMO) who works directly with students and families in crisis, and offers intensive therapy with family counseling. Graham-Owens was able to arrange for J.M.'s immediate acceptance at Creative Achievement, as reflected in the November 21, 2014, IEP (P-L) that proposed a forty-five-day interim placement.[16]

Graham-Owens regularly communicated with out-of-district administrators, and became aware of J.M.'s threats when Brookfield contacted her. Kiernan told her Washington Township police contacted a vice principal, reporting a Columbine-like threat, as well as Cherry Hill police, who then went to Brookfield's administrators. On cross-examination, she testified that her "personal knowledge" regarding threats or drug distribution by J.M. was "just what was conveyed" by Brookfield. As for corroboration of those charges, rather than mere hearsay, Graham-Owens stated that the administrator reported to her what had occurred. However, she personally does not know J.M. to be violent and has never seen her with or under the influence of drugs. Also, there is nothing leading her to believe that J.M. poses any physical threat, other than her verbal threats, specifically, that she would "shoot up the school." In other words, she has no

[15] In other words, it provided more services to handle "serious-threats" behavior, such as: student advocacy with the police; individual counseling once weekly; redirection through an alternative day program with one-on-one teaching/counseling; and even equine therapy, which would benefit J.M.

[16] Graham-Owens described parental participation at the November 21 IEP meeting as including a discussion regarding appropriate placement. The parents had admittedly rejected Creative Achievement even before J.M. attended Brookfield. The District also considered other potential options, but they did not include the parents' later preference, the Yale Academy.

knowledge of J.M. being physically aggressive, but considers her verbally aggressive based upon staff reports and the police presence. Though an email from Kiernan described a (social media) threat to another student, Graham-Owens has never seen J.M.'s Instagram or Facebook accounts. And she does not know the source of the information relayed to Washington Township police and subsequently the Cherry Hill police.

R.M. signed a certification dated December 21, 2014, (R-K)[17] and testified as follows. J.M. did not have any drugs, prescribed or otherwise, at the time that she is alleged to have distributed drugs to another student. R.M.'s knowledge in this regard is based upon the fact that on that November day, though he does not recall the date, he and his wife drove her to school and signed her in around 10:00 a.m., after taking her to a doctor's appointment in Philadelphia. She had not been given any medication and she was not carrying any items. She did catch the bus home but, to his best recollection, did not bring anything home. R.M. later questioned her in detail about the drug allegation and she told him that she neither had drugs nor gave any to another

[17] R.M. certified, in pertinent part, that, as J.M.'s parent, he periodically reviews her social-media accounts, and on September 29, 2014, he noticed two suspicious messages posted on her Instagram page "by someone unknown to J.M." One referred to the "Columbine" shooting and being a "hero," the other referenced being successful by "memorizing the layout of the school." With over 400 people worldwide following J.M.'s Instagram, he was concerned whether the postings were local, and contacted the Washington Township Police Department. He gave them a printout of the messages and suggested contacting the Cherry Hill Police Department in the event the poster was a Brookfield student. According to R.M., J.M. made no terroristic threats against any school via Instagram or Facebook. Further, Brookfield was familiar with J.M.'s issues when she was accepted to the school, and she should not be disciplined for behavior that results from her disability.

R.M. further certified that no police report exists and no charges were filed regarding a threat made against the school from J.M. via her Instagram account. Kiernan said at the November 10 IEP meeting that he may have misunderstood from the Cherry Hill police who actually made the alleged threat. R.M. documented by letter dated November 19, 2014, his understanding that Kiernan would correct that information. According to R.M., J.M. was never interviewed or drug-tested by Brookfield staff and there was generally a lack of substantiation for the allegations against her. J.M. has never assaulted any student or staff, though she twice had been assaulted by Brookfield students and chose to retreat.

A psychiatric evaluation report by James L. Hewitt, M.D., dated May 22, 2014, (R-K attachment) diagnosed J.M. with mood disorder and possible anxiety disorder. According to Hewitt, she had logical and goal-directed thinking and there were no signs of psychosis. Though she did show signs of mood disorder, she had never had any psychotic episodes. She admittedly gets upset easily, but denied sadness. Prior medications included Abilify, Topamax, Prozac, and Geodon. She had not responded well to Prozac, and Hewitt "would be open to" utilizing long-acting Xanax. Dr. Hewitt concluded that "there are obvious issues with her personality and temperament. I still hold out hope that the proper medication would allow her to be more comfortable in her own skin and to then be able to make an effort to learn, get along with people, and prepare herself for college."

student, namely Student A with whom J.M. had an on/off friendship. According to R.M., any medicine in the home was kept under lock and key in the parents' master bedroom and there was no Percocet in the house.

As for the alleged threat by J.M. against Brookfield, R.M. found suspicious postings that referenced Columbine and successfully "learn[ing] the school layout" on her Instagram account. He relayed his concerns to Washington Township police (who contacted Cherry Hill police) and recommended to them that Brookfield be notified. R.M. explained that J.M.'s Instagram account was public, with approximately 400 followers. R.M. stated that nothing on the posting showed that it was made by J.M., who when confronted told him that it was a random posting. Kiernan had even said at the IEP meeting that he may have misunderstood (who posted the information), and R.M. sent him a follow-up letter (R-F) to have him correct any reference to J.M. as being responsible for the posting.

Regarding a specific threat to Student A, someone at Brookfield told R.M.'s wife that J.M. had made a threat on Facebook. When R.M. questioned J.M., she said that Student A had threatened her; so, it appeared to R.M. to be "a back-and-forth type thing" that was common in their on/off relationship. R.M. did not see the message, as it would have been a private message on J.M.'s Facebook account.

R.M. further testified that J.M.'s fascination with serial killers and mass murderers was an interest that she has had for quite some time, and psychiatrists that she has seen have not indicated any alarm in that regard. According to R.M., the school psychiatrist, Dr. Hewitt, did not see any related issues and his report (attached to R.M.'s certification) did not reflect any concerns. Further, J.M. has never been disciplined for assault upon a teacher or student, or involved in a fight either in school or out of school. She typically retreats in the face of any potential physical conflict.

On cross-examination, R.M. testified that J.M.'s Facebook account does have private settings, though the public aspect allows everyone, including her parents, to view what is posted. Admittedly, the name of one of her Instagram accounts is (or was) "The perks of being a serial killer," an account on which she may have changed the

name to "Killing for fun." Both R.M.'s and J.M.'s certifications deny any reference to serial killers or mass murderers on her Facebook account. R.M. believes that her Facebook account states that she studied guns at Cornell University, not Columbine High School, but he conceded when shown a page from J.M.'s Facebook account (P-N) that it indicates: "About . . . 'Greeter at The Gates Of Hell,' 'Studied Guns at Columbine High School,' 'Lives in Littleton, Colorado.'"

Regarding the (Instagram) threat against Brookfield, R.M. did not have a police report indicating that he contacted Washington Township police, and had no knowledge of anyone else contacting them. However, he showed the posting to Washington Township police, who still have the device; hence, he did not show it to Brookfield. As to when he had taken J.M. to the doctor, it was either a Monday or Tuesday, but he could not be sure. And he did not speak to any students or to Student A's parent(s) regarding the alleged distribution of Xanax.

The only knowledge that R.M. had about J.M.'s alleged threat to "shoot up the school" was her denial to him of any such conversation. Admittedly, J.M.'s conversations with Dr. Hewitt were prior to the alleged distribution of drugs, and the conclusions in his reports are not based upon the allegations concerning threats or distribution of drugs. Also, R.M. concededly assisted J.M. with her certification that resulted from their conversations concerning the allegations. Further, R.M. denied that J.M. was ever interviewed by any law-enforcement personnel, but admitted that he was not present at the school when police arrived there. Finally, R.M. denied that J.M. was responsible for either the threats or the distribution of drugs, but his only personal knowledge was based upon his conversations with J.M.

Summary

Judicial rules of evidence generally do not apply to administrative-agency proceedings, N.J.R.E. 101(a)(3), and under the residuum rule, hearsay is admissible to corroborate or support competent evidence. N.J.A.C. 1:1-15.5(b). Under this rule, hearsay "may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final

analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it." Weston v. State, 60 N.J. 36, 51 (1972). Thus, the ultimate finding must be supported by a residuum of competent evidence.

Further, making factual findings requires a weighing of the credibility of the witnesses, i.e., "an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it 'hangs together' with other evidence." Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "The interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.) (citation omitted), certif. denied, 10 N.J. 316 (1952).

Here, each of the witnesses appeared candid and straightforward. However, the majority of the crucial evidence material to the ultimate finding was based upon uncorroborated hearsay. In this regard, the knowledge of Travis and Graham-Owens primarily relied upon information from Kiernan and/or Norman (who did not testify), and Kiernan's basis of knowledge was primarily what he learned from Norman. What is more, Norman's basis of knowledge was whatever was imparted to her from students and at least one parent (who presumably relied upon that student's representations). Similarly, R.M.'s basis of knowledge primarily came from what J.M. told him and, like other students, she did not testify.

Having had an opportunity to observe the appearance and demeanor of the witnesses, and consider the testimonial and documentary evidence, including whether hearsay evidence has been corroborated, I further **FIND** as **FACT**:

1. Between September and October 23, 2014, J.M. repeatedly exhibited disruptive, protest, and refusal behaviors and Brookfield issued numerous disciplinary infractions, including: refusing to respond to direction, being "out of area," smoking, defacing property, computer misuse, and loitering in unauthorized areas. In November she was suspended for: verbal/terroristic threat to a student, and distribution of drugs.

2. By ninth grade, J.M. had developed a fascination with serial killers and mass murderers. On September 30, 2014, Kiernan and assistant principal Nacovin Norman met at Brookfield with Cherry Hill police regarding a perceived threat against Brookfield that referenced Columbine (shootings) and was posted on J.M.'s Instagram account. R.M. had found suspicious postings that referenced Columbine on her Instagram account and had relayed his concerns to Washington Township police, who then contacted Cherry Hill police. Cherry Hill police kept two squad cars at Brookfield during the following week, amid student and staff concerns.

3. On October 21, 2014, J.M. was reprimanded for misuse of a school computer by searching for Facebook pages and photos of Columbine suspects and autopsy reports, as well as other serial killers. And on October 23 she was disciplined for loitering in an unauthorized area, where she searched a teacher's computer for one of the Columbine suspects and changed the computer's desktop photo to that Columbine suspect holding his shotgun, and then directed other students to view it. Kiernan had seen a freeze-frame screenshot of the October 21 incident and surveillance video showing a portion of the October 23 incident. Both incidents are referenced in J.M.'s discipline report (P-D).

4. On November 17, 2014, Kiernan observed police at the school. On that day, Student A met with Kiernan and showed him a (Facebook) screenshot of a message from J.M. that stated, "I am not even kidding . . . I'm going to fuck you up so bad the next time I see you and your lying ass."

5. Kiernan had no direct knowledge of J.M. distributing drugs or making threats, though he observed an uneasiness among some of the staff and students in the wake of these incidents. Similarly, Travis had no such knowledge and has never witnessed any involvement with drugs, or making of threats, on the part of J.M. And Graham-Owens has no "personal knowledge" regarding threats or drug distribution by J.M. She personally does not know J.M. to be violent or pose a physical threat, except for what she regards as verbal aggression, or to be involved with drugs.

6. Despite J.M.'s disciplinary history, there is no evidence of any incidents or history of physical violence toward either students or school staff. There is likewise no history of use, solicitation, or distribution of drugs on school premises or at a school function.

7. R.M. confronted J.M., who denied possessing or distributing drugs and making threats on her Instagram account. The only knowledge that R.M. had about J.M.'s alleged threat to "shoot up the school" was her denial to him of any such conversation. She did not deny to him, however, posting a threat to another student on her Facebook account (P-I), and did in fact post that threat.

8. The District recommended an interim change in placement primarily based upon a perceived threat to the safety and welfare of Brookfield's staff and students, including J.M., stemming from the incidents relative to threats and drugs between late September and November 2014, but also based upon consideration of the behaviors described in Kiernan's letter dated November 5, 2014 (non-compliance and refusal to respond to redirection, refusing to consistently attend and remain in scheduled classes, disruption of other students and school environment, unauthorized use of school and staff computers and computer searches of inappropriate topics, and student-contract violation), as well as the view that Creative Achievement rather than Brookfield was the appropriate placement to meet the individual needs of J.M. based upon her oppositional and noncompliant behaviors.

In support of the request for expedited relief, the petitioning Board asserts that the removal of J.M. to an interim placement for forty-five days is warranted based upon three serious threats made by her and the distribution of drugs to at least one other student, who consequently was taken to the hospital. The Board cites the ongoing duty to maintain a safe school environment and an ongoing risk of harm or dangerousness posed by J.M.'s presence, based upon her "verbal" (rather than physical) threats. Further, the District has offered an appropriate placement at Creative Achievement, a program that is more structured and better equipped to service J.M.'s behavioral and therapeutic needs, and that placement is available immediately.

On the other hand, respondents argue that the charges underlying petitioner's removal of J.M. from Brookfield are totally unsubstantiated. There is no corroboration of the hearsay allegations that she distributed drugs on school property or threatened either the school or any other student.

LEGAL ANALYSIS AND CONCLUSION

Under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C.A. §§ 1400–1482, and its implementing regulations, a school district "may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability" if the child brings a weapon to school, inflicts serious bodily injury on another person at school, or "knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function." 20 U.S.C.A. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g) (2014); see also N.J.A.C. 6A:14-2.8(d), (f). If the school district believes that maintaining the child's current placement is substantially likely to result in injury to the child or others, the school district may request an expedited due-process hearing. 20 U.S.C.A. § 1415(k)(3), (k)(4)(B); 34 C.F.R. § 300.532(a) and (c) (2014); see also N.J.A.C. 6A:14-2.7(n); N.J.A.C. 1:6A-14.2(a). In such a case, a hearing officer may "return a child with a disability to the placement from which the child was removed" under certain circumstances or "order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others."[18] 20 U.S.C.A. § 1415(k)(3)(B)(ii); 34 C.F.R. § 300.532(b)(2) (2014); see also N.J.A.C. 1:6A-14.2(e).

Under State law, the school district bears the burden of proof and the burden of production in any due-process hearing held in accordance with the IDEA with respect to

[18] The child shall remain in the interim alternative educational setting until an administrative law judge (ALJ) renders a decision or until the expiration of the forty-five-day removal period, whichever occurs first. 20 U.S.C.A. § 1415(k)(4)(A); 34 C.F.R. § 300.533 (2014); see also N.J.A.C. 6A:14-2.7(u); N.J.A.C. 6A:14-2.8(f).

"the identification, evaluation, reevaluation, classification, educational placement, the provision of a free, appropriate public education, or disciplinary action, of a child with a disability." N.J.S.A. 18A:46-1.1. In a due-process hearing before the OAL, "[t]he judge's decision shall be based on the preponderance of the credible evidence, and the proposed action of the board of education or public agency shall not be accorded any presumption of correctness." N.J.A.C. 1:6A-14.1(d). As indicated above, hearsay evidence is generally admissible in hearings before the OAL. N.J.A.C. 1:1-15.5. If admitted, hearsay evidence "shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability." N.J.A.C. 1:1-15.5(a). And, "[n]otwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." N.J.A.C. 1:1-15.5(b).

Here, while the District determined that J.M.'s behavior was a manifestation of her disability, it seeks removal to an alternative interim placement on the basis of her alleged drug distribution and conduct posing dangerousness. At the hearing, Brookfield's principal, its director of admissions/supervisor of special education, and the District's school psychologist/case manager testified on behalf of the Board with respect to J.M.'s recent disciplinary history, including the alleged threats and drug distribution, while J.M.'s father, R.M., testified on her behalf. However, the majority of the testimony regarding the threats and drug distribution was based upon uncorroborated hearsay. While there is credible evidence that J.M. threatened Student A on Facebook, there is an absence of competent evidence that J.M. threatened the school on her Instagram account, that J.M. discussed with Student A a "suicide mission" to "kill [Student A], and then kill herself while shooting up the school," or that J.M. distributed controlled substances to Student A or any other student. That is, the District did not offer any legally competent evidence to corroborate the hearsay evidence regarding two alleged threats made by J.M. and the alleged distribution of drugs by J.M., as is discussed more fully below.

I. The Board has failed to show that maintaining J.M.'s placement at Brookfield is substantially likely to result in injury.

The Board has failed to show by a preponderance of the credible evidence that J.M.'s recent conduct supports a finding that maintaining her current placement is substantially likely to result in injury, and that J.M. should be removed to an interim alternative educational setting for forty-five days. While the IDEA and its implementing regulations do not include factors for determining whether maintaining a child's current placement is "substantially likely to result in injury," a review of several administrative and judicial decisions shows the type of conduct that decision-makers have found to meet this standard.[19] First, proof of physical violence toward staff members or classmates has been deemed sufficient for a finding that maintaining a student's current placement is substantially likely to result in injury. In Lawrence Township Board of Education v. D.F. ex rel. D.F., EDS 12056-06, Final Decision (January 9, 2007), <http://njlaw.rutgers.edu/collections/oal/>, an ALJ found that maintaining in his current placement a teenage boy who physically attacked other students in two separate incidents was substantially likely to result in injury to others, and ordered the child's removal to an interim alternative educational setting.

In San Leadro Unified School District, 114 LRP 550 (CA SEA December 16, 2013), a hearing officer determined that an eight-year-old boy's continued presence in his current placement was substantially likely to result in injury due to numerous incidents of physical violence toward staff and students, including chair-throwing, punching, and kicking, lunging at a classmate with a plastic clay-sculpting tool, threatening to stab a teacher with four pencils and lunging at her, and hitting a classmate in the face with a metal lunch pail, and ordered his placement in an interim alternative educational setting.

In Rialto Unified School District, 114 LRP 1023 (CA SEA November 19, 2013), a hearing officer ordered the forty-five-day removal of an eight-year-old boy who had a

[19] In promulgating rules under the IDEA, the Department of Education explained that "[h]earing officers have the authority under [34 C.F.R.] § 300.532 to exercise their judgments after considering all factors and the body of evidence presented in an individual case when determining whether a child's behavior is substantially likely to result in injury to the child or others." 71 Fed. Reg. 46540, 45722 (August 14, 2006).

long history of physical violence toward staff and other children, including an incident in which the boy threatened to bring a knife to school and kill a staff member, and who, in several incidents in the weeks leading up to his removal, attempted to bite an aide, kicked another aide, and threw a chair; held a pair of scissors to a classmate's face and threatened the classmate; threw tacks and a white board at a staff member, kicked him in the leg and head, and spat on two other staff members; "mule-kicked" an aide in the leg, causing her to be placed on modified duty for a month; and, threw a chair and swung his belt at staff, stabbed a staff member with a pencil, and used a nail to threaten staff members.

Finally, in Smithton R-VI School District, 110 LRP 22863 (MO SEA April 8, 2010), a hearing officer found that maintaining the current placement of a student was substantially likely to result in injury to himself or others because he had a long history of physically violent behavior toward staff and other students, including incidents in which he pinched, slapped, punched, kicked, scratched, and pushed staff members or classmates, and an incident in which he threatened to kill himself, and ordered his removal to an interim alternative educational setting for forty-five days.

In contrast, an absence of, or minimal, physical violence, even if a student has threatened staff members or classmates, is unlikely to result in a finding that maintaining the student in his or her current placement is substantially likely to result in injury. In Clinton County R-III School District v. C.J.K., 896 F. Supp. 948 (W.D. Mo. 1995), the court held that, even though he repeatedly threatened staff members and students, including threatening to make a teacher "black and blue," threatening to place an explosive device in the principal's car, and warning a student he knew where she lived, maintaining a student's current placement was not substantially likely to result in injuries because there were "relatively few recorded perceptions of physical danger" with respect to the student's behavior.

In Sharon Public School, 45 IDELR 75, a hearing officer found that a school district failed to show that maintaining the current placement of a student who allegedly pushed a desk against a substitute teacher's thighs and "punched her wrist downward with his fist" was substantially likely to result in injury because the record indicated that

this was an isolated incident of physical violence and because, although the student was involved in other, verbal confrontations with teachers, staff members "were far more concerned with [his] refusal to do homework than his potential dangerousness."

Finally, in Saddleback Valley Unified School District, 52 IDELR 56 (CA SEA January 7, 2009), a hearing officer found that a school district was not entitled to remove a student for an additional forty-five days after his initial forty-five-day removal for bringing knives to school even though in the weeks leading up to the expedited hearing the student was involved in a physical altercation with one classmate and threatened to pull out another classmate's earrings and "rip his neck off." In denying the district's request for another forty-five-day removal, the hearing officer noted that bringing knives to school is a serious offense, but also noted that the assistant principal did not believe that the incident alone was enough to show that the student was dangerous; that the physical altercation was the result of teasing, and not anger or aggression; and, with respect to the verbal threat to another student, the hearing officer noted that the "[s]tudent's recent threat to another child is also of grave concern. However, there is no indication that it was anything more than words. If there had been any physical contact or a series of threats, the situation might be different, but the threat standing alone is not enough to show a substantial likelihood of injury."

Here, like in Clinton, Sharon, and Saddleback Valley, the Board, which bears the burden of proof, has failed to show that maintaining J.M. at Brookfield is substantially likely to result in injury. The Board has made several allegations against J.M. in support of her removal to an interim alternative educational setting. The most serious allegations involve verbal or written threats against another student and Brookfield, and the distribution of illegal drugs to another student. However, such allegations involve conduct that does not meet the applicable standard for removal and/or are based on hearsay evidence, and are not supported by some legally competent evidence that the incidents actually occurred.

First, the verbal or written threats against Student A and Brookfield are insufficient to show a substantial likelihood of injury because J.M. has never exhibited any physical violence or other behavior indicating that she would follow through with her

threats. Like in Clinton, Sharon, and Saddleback Valley, the alleged threats made by J.M. are very serious, but in the absence of evidence that J.M. is physically violent, the District cannot show that, based on the threats alone, maintaining J.M. at Brookfield is substantially likely to result in injury.

In addition, while there is sufficient proof that J.M. threatened Student A on Facebook, there is an absence of legally competent evidence to support the allegation that J.M. actually made a threat against Brookfield on her Instagram account, or that J.M. had discussed with Student A a "suicide mission" to "kill [Student A], and then kill herself while shooting up the school." The Facebook threat, alone, is insufficient to show a substantial likelihood of harm. J.M. has an admitted fascination with serial killers and mass murderers, and any alleged threats against other students or staff members must be taken seriously. However, J.M. has no history of physical violence, and the Board has not shown that any verbal or written threats made by J.M. are substantially likely to result in injury to J.M., other students, or staff members.

II. The Board has failed to show that J.M. distributed drugs while at school, on school premises, or at a school function.

The alleged distribution of drugs by J.M. is likewise unsupported by legally competent evidence. In South Lyon Community School, 50 IDELR 237 (MI SEA April 11, 2008), the hearing officer found that the school district was not allowed to remove an emotionally disturbed student to an interim alternative educational setting for forty-five days for drug solicitation under 20 U.S.C.A. § 1415(k)(1)(G). In that case, the student exchanged notes in class with another student indicating that she had drugs, but she did not indicate her intent to distribute them, and the principal did not find any illegal drugs when she searched the student and her belongings. Nonetheless, the manifestation determination team assumed that she had had drugs in her possession and intended to distribute them. According to the hearing officer, "application of Section 1415(k)(1)(G) would require the student to have been found to have actually solicited the sale of a controlled substance, a finding that is not supported by the record in this case."

Similarly, here, there is insufficient evidence to support a finding that J.M., as alleged, distributed drugs to Student A or any other student. The Board presented no direct evidence that J.M. actually distributed drugs, and none of the hearsay evidence submitted by the Board with respect to the drugs is supported by legally competent evidence. Thus, the Board has failed to sufficiently show grounds for removal on the basis of distributing drugs to another student. It thus follows that there is also insufficient proof that J.M.'s alleged distribution of drugs to another student supports a finding that maintaining J.M. at Brookfield is substantially likely to result in injury.

Therefore, I **CONCLUDE** that the Board cannot remove J.M. to an interim alternative educational setting for forty-five days because the Board has failed to prove any special circumstance for removal of a child whose conduct is determined to be a result of her disability, in this case, that J.M. distributed drugs while at school, on school premises, or at a school function, 20 U.S.C.A. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g) (see also N.J.A.C. 6A:14-2.8(d) and (f)), or that maintaining J.M.'s current placement is substantially likely to result in injury to her or others. 20 U.S.C.A. § 1415(k)(3)(B)(ii); 34 C.F.R. § 300.532(b)(2) (2014); see also N.J.A.C. 1:6A-14.2(e).

ORDER

Accordingly, it is hereby **ORDERED** that J.M. promptly be returned to her placement at Brookfield.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2014) 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 (2014). 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.

January 13, 2015
DATE

ROBERT BINGHAM II, ALJ

Date Received at Agency

Date Mailed to Parties:

/bdt

APPENDIX

WITNESSES

For Petitioners:

Patrick Kiernan
Ed Travis
Kelly Graham-Owens

For Respondent:

R.B.

EXHIBITS

For Petitioners:

P-A Certification of Kelly Graham-Owens, Case Manager at the Washington Township School District

P-B Certification of Ed Travis, Director of Admissions/Supervisor of Special Education at Brookfield Academy

P-C Certification of Patrick Kiernan, Director of Admissions/Supervisor of Special Education at Brookfield Academy

P-D Discipline report for J.M.

P-E Behavior contract

P-F Correspondence from Patrick Kiernan, Principal of Brookfield, dated November 5, 2014

P-G IEP, dated November 10, 2014

P-H Certification of Nacovin Norman, Assistant Principal of Brookfield Academy

P I Facebook message from J.M. to student

P-J Correspondence from Brookfield Academy to parents regarding suspension

P-K Parent request for due process, dated November 18, 2014

P-L IEP, dated November 21, 2014

P-M Correspondence from Kelly Graham-Owens to R.M., dated November 25, 2014

P-N Public page from J.M.'s Facebook account

For Respondent:

R-F Letter from R.M. to Patrick Kiernan, dated November 19, 2014

R-H Excerpts from IEP, dated October 27, 2014

R-K R.M.'s Certification, dated December 21, 2014

R-L J.M.'s Certification, dated December 21, 2014

The non-sequential numbering of exhibits reflects the fact that numerous pre-marked exhibits were not identified in the record and/or not offered into evidence.