State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION ON
EMERGENT RELIEF
OAL DKT. NO. EDS 05482-18
AGENCY DKT. NO. 2018 27846

WILLINGBORO TOWNSHIP BOARD OF EDUCATION,
Petitioner,
v.
C.J. o/b/o A.D.,
Respondent.

Kim C. Belin, Esq., for petitioner (Florio, Perrucci Steinhardt & Fader LLC, attorneys)

Julie Warshaw, Esq., for respondent (Warshaw Law Firm LLC, attorneys)

Record Closed: April 25, 2018 Decided: April 26, 2018

BEFORE **JOHN S. KENNEDY**, ALJ:

STATEMENT OF THE CASE

In this matter Willingboro Township Board of Education (petitioner) brings an action for Emergent Relief against the (respondent) C.J. on behalf of A.D. asserting that the minor student is a danger and should be placed in an alternative placement pending the outcome of due process. Respondent opposes the relief requested and asserts that the minor student should be returned to the placement outlined in her most recent Individualized Education Plan (IEP).

PROCEDURAL HISTORY

Petitioner filed an application for emergent relief at the state Office of Special Education Programs (OSEP) on April 13, 2018. OSEP transmitted the matter to the Office of Administrative Law (OAL) on April 17, 2018, as a contested case seeking emergent relief placing A.D. in alternative placement pending the outcome of due process[1]. A.D. is currently being educated under an IEP, for the 2017-2018 school year, classified as auditorily impaired. The parties presented oral argument on the emergent relief on April 20, 2018, at the OAL offices in Atlantic City[2]. The record was held open until April 25, 2018 to allow the parties to supplement the record.

FACTUAL DISCUSSION

Petitioner asserts that A.D., who was born on April 15, 2003, was found by the board to have engaged in a harassment intimidation and bullying (HIB) activity including trying to encourage students to fight on December 14, 2017. As a result of this finding, sanctions were imposed against A.D. and a "no contact agreement" was signed by A.D. and the other student. A second HIB investigation was conducted against A.D. resulting in her being suspended for four days beginning January 31, 2018. As a result of a previous emergent relief application filed by C.J. (OAL Dkt. No. EDS 02573-2018)

[1] Only the application for emergent relief has been transmitted to the OAL at this time. The underlying due process petition remains at OSEP.C.J. filed a prior due process petition against the Board which is currently pending before this tribunal under OAL Dkt. No. EDS 04030-2018.

[2] The parties were permitted to present oral argument by telephone as an accommodation to respondent's attorney whom was dealing with a family medical emergency.

petitioner agreed to provide a "transporter" to protect A.D. in the halls between classes and also agreed to complete a Functional Behavioral Assessment (FBA). On March 26, 2018, an incident occurred between A.D. and the other student a party to the no contact agreement wherein a verbal argument ensued. Security was called and the disruption resulted in a school "lock down". An administrator was struck in this altercation but apparently not by A.D. A.D. was removed from school on March 27, 2018, without a board hearing and is currently receiving home instruction. The district has not yet started the FBA and is seeking that A.D. be placed in alternative placement for no longer that forty-five days pursuant to N.J.A.C. 6A:14-2.7(n).

The record was held open to permit both parties to submit video evidence to support the arguments regarding who started the verbal altercation. On April 25, 2018, respondent provided a video alleged to support the argument that another girl was requiting an "army" intended to fight A.D. The video, marked as R-1, merely shows part of a girls face speaking to a teen aged boy telling him he is in her "army". The boy refuses to get involved and the video does not explain why the girl is recruiting an "army". Respondent also provided an email from C.J. to the district dated, Saturday, March 24, 2018, advising the district that the other girl had been posting on social media that she was going to fight A.D. on March 26, 2018. (See exhibit attached to Warshaw letter, dated April 24, 2018) The District did not provide this court with any additional evidence. The district asserts that they conducted a manifestation determination on April 6, 2018, and determined that A.D.'s behavior on March 26, 2018, was not a manifestation of her disability and the child study team recommended a change in placement from her placement in an inclusion room with in class resources for all subjects to the Board's alternative school. Respondent asserts that A.D. has been diagnosed with maladjustment disorder but this has not been included in her IEP.

LEGAL ANALYSIS AND CONCLUSION

The district asserts that N.J.A.C. 6A:14-2.7(n) permits an ALJ to order a change in placement of a student with a disability to an appropriate alternative placement when school personnel maintain that it is dangerous for the student to be in the current placement and the parent does not agree to the change. This alternative interim

placement may be ordered for not more than forty-five days pursuant to 20 U.S.C. section 1415(k). 20 U.S.C. section 1415(k)(1)(G) provides that for the alternative interim placement to occur, one of the following must occur:

1. carrying or possessing a weapon in school or on school premises;

2. knowingly possessing or using illegal drugs or soliciting sale of a controlled substance while at school or on school premises; or

3. inflicting serious bodily injury upon another while at school or on school premises.

Serious bodily injury has been defined as:

1. substantial risk of death;

2. extreme physical pain;

3. protracted and obvious disfigurement; or

4. protracted loss or impairment of the function of a bodily member, organ or mental faculty. See, 34 CFR section 300.530(i)(3); 18 U.S.C. section 1365(h)(3)

In this case, it has not been established that anyone has been inflicted with serious bodily injury as a result of the incident on March 26, 2018. The district asserts that a teaching staff member being hit is enough to permit the alternative interim placement citing Lawrence Township BOE v. D.F. OAL Dkt. No. EDS 12056-06. It should be noted, however that there has been no evidence to support that A.D. instigated the verbal altercation that resulted in the teaching staff member being hit nor has any argument been made that A.D. was the individual that hit the teacher. Further, there has been no evidence to indicate the extent, if any, of the injuries sustained by the teaching staff member. In Lawrence, evidence revealed that D.F. physically beat another student on at least two occasions while on school premises. N.J.A.C. 6A:14-2.8(b) requires school district personnel, on a case-by-case basis, to consider any unique circumstances when determining whether or not to impose a disciplinary

sanction or order a change of placement for a student with a disability who violates a school code of conduct.

N.J.A.C. 1:6A-12.1(a) provides that the affected parent(s), guardian, board or public agency may apply in writing for emergency relief. An emergency relief application is required to set forth the specific relief sought and the specific circumstances that the applicant contends justify the relief sought. Each application is required to be supported by an affidavit prepared by an affiant with personal knowledge of the facts contained therein and, if an expert's opinion is included, the affidavit shall specify the expert's qualifications.

Emergent relief shall only be requested for the following issues pursuant to N.J.A.C. 6A:14-2.7(r):

i. Issues involving a break in the delivery of services;

ii. Issues involving disciplinary action, including manifestation determinations and determinations of interim alternate educational settings;

iii. Issues concerning placement pending the outcome of due process proceedings; and

iv. Issues involving graduation or participation in graduation ceremonies.

In this case, petitioners assert that there is a disciplinary action that requires an alternative placement pending the outcome of the due process proceedings. Respondents contend that A.D. is not a danger and the appropriate placement is in the general education setting pursuant to her current IEP. Therefore, I **CONCLUDE** it has been established that there exists an issue concerning placement pending the outcome of due process proceedings.

The standards for emergent relief are set forth in Crowe v. DeGoia, 90 N.J. 126 (1982), and codified at N.J.A.C. 6A:3-1.6, one of the Department's regulations governing special education. These standards for emergent relief include irreparable harm if the relief is not granted, a settled legal right underlying a petitioner's claim, a

likelihood that petitioner will prevail on the merits of the underlying claim and a balancing of the equities and interest that petitioner will suffer greater harm than respondent.

Petitioner bears the burden of satisfying all four prongs of this test. Crowe, supra, 90 N.J. at 132–34. First, there has been no showing of irreparable harm. While the district asserts that A.D. is a physical danger to herself, other students and staff members, there has been no indication that A.D. has in any way harmed or injured anyone since her enrollment at Willingboro High School. Although a verbal altercation occurred on March 26, 2018, which resulted in the District issuing a school lockdown, petitioner has not demonstrated that A.D. was the cause of this altercation. As such, I **CONCLUDE** petitioner has been unable to meet the burden of establishing irreparable.

The next prong of the above test to be addressed is whether there is a settled legal right underlying petitioner's claim. It is well-settled law that N.J.A.C. 6A:14-2.7(n) permits an ALJ to order a change in placement of a student with a disability to an appropriate alternative placement when school personnel maintain that it is dangerous for the student to be in the current placement and the parent does not agree to the change. However, this legal right must be supported by facts not found in this case, namely that A.D. is a danger to herself or others pursuant to 20 U.S.C. section 1415(k)(1)(G). Thus, I **CONCLUDE** that petitioner has not established a settled legal right for the relief requested.

The "stay put" provision of the Individuals with Disabilities Education Act (IDEA) provides in pertinent part:

> [D]uring the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents agree otherwise, the child shall remain in the then-current educational placement of the child.
>
> [20 U.S.C.A. § 1415(j).]

Furthermore, pursuant to the New Jersey Administrative Code, no changes are to be made to a child's classification, program or placement unless emergency relief is granted. N.J.A.C. 6A:14-2.7(u) specifically provides:

> Pending the outcome of a due process hearing, including an expedited due process hearing, or any administrative or judicial proceeding, no change shall be made to the student's classification, program or placement unless both parties agree, or emergency relief as part of a request for a due process hearing is granted by the Office of Administrative Law according to (m) above or as provided in 20 U.S.C. § 1415(k)4 as amended and supplemented.

The "stay put" provision acts as an automatic preliminary injunction, the overarching purpose of which is to prevent a school district from unilaterally changing a disabled student's placement. See Drinker, supra, 78 F.3d at 864. In terms of the applicable standard of review, the emergent-relief factors set forth in N.J.A.C. 6A:14-2.7(r)–(s), N.J.A.C. 1:6A-12.1, and Crowe v. DeGioia, 90 N.J. 126, 132–34 (1982), are generally inapplicable to enforce the "stay-put" provision. As stated in Pardini v. Allegheny Intermediate Unit, 420 F.3d 181, 188 (3d Cir. 2005), "Congress has already balanced the competing harms as well as the competing equities."

In Drinker, the court explained:

> "[T]he [IDEA] substitutes an absolute rule in favor of the status quo for the court's discretionary consideration of the factors of irreparable harm and either a likelihood of success on the merits or a . . . balance of hardships."
>
> [Drinker, supra, 78 F.3d at 864 (citations omitted).]

In other words, if the "stay put" provision applies, injunctive relief is available without the traditional showing of irreparable harm. Ringwood Bd. of Educ. v. K.H.J. ex rel K.F.J., 469 F. Supp. 2d 267 (D.N.J. 2006). Under those circumstances, it becomes the duty of the court to ascertain and enforce the "then-current educational placement" of the handicapped student. Drinker, supra, 78 F.3d at 865.

The purpose of "stay put" is to maintain stability and continuity for the student. The first preference for interim placement is one agreed to by the parties. However, when the parties are unable to agree, the placement in effect when the due process request was made, i.e., the last uncontroverted placement or program, is the status quo. In this matter, A.D.'s current IEP places her in an inclusion room with in class resources for all subjects. Therefore, I **CONCLUDE** that the IDEA's stay put provision requires A.D. to remain in that placement pending the outcome of the underlying due process petition. See, e.g., E.S. o/b/o J.S. v. Union Twp. Bd. of Educ., EDS 11355-07, Final Decision (Nov. 1, 2007) <http://njlaw.rutgers.edu/collections/oal/> (finding that stay put required the child to remain in her stay put placement despite allegations that the child had not made any academic or social progress and had become extremely uncomfortable with some teachers and students at the school and that the child was refusing to attend the stay put placement.)

For the foregoing reasons, the petitioner has not demonstrated entitlement to emergent relief. The relief sought is therefore **DENIED**.

ORDER

Having concluded that the petitioner has not satisfied two of the four requirements for emergent relief, the petitioner's request for emergent relief is **DENIED**.

I **FURTHER ORDER** that A.D. be returned to her stay put placement in an inclusion room with in class resources for all subjects pending the outcome of the underlying due process petition.

This decision on application for emergency relief shall remain in effect until the issuance of the decision on the merits in this matter. This matter is hereby returned to the Department of Education for a local resolution session, pursuant to 20 U.S.C.A. § 1415 (f)(1)(B)(i). 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 Programs.

April 26, 2018
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency:

Date Sent to Parties:

JSK/dm

APPENDIX

EXHIBITS

For Petitioner:

Petition for Expedited Relief, dated April 13, 2018

For Respondent:

Brief in opposition, dated April 16, 2018

Supplemental letter brief and exhibits, dated April 24, 2018

R-1 DVD received April 25, 2018