State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION
ON EMERGENT RELIEF
OAL DKT. NO. EDS 05792-18
AGENCY DKT. NO. 2018-27869

A.D. ON BEHALF OF I.C.,
Petitioner,
v.
ELIZABETH BOARD OF EDUCATION,
Respondent.

A.D., pro se

Richard Flaum, Esq. on behalf of respondent

Record Closed: April 27, 2018 Decided: April 27, 2018

Petitioner, A.D. applied for emergent relief on behalf of her son, I.C., seeking an order for alternate placement out of district. The Office of Special Education Programs (OSEP), New Jersey Department of Education, transmitted the emergent matter only where it was filed with the Office of Administrative Law for oral argument, which was held on April 27, 2018, after which the record was closed.

I.C., petitioner's seventeen-year-old son on (May 10, 2018), is currently enrolled in eleventh grade. He is classified as eligible for special education and related services. In April 2018, I.C. was involved in an altercation with another student on school grounds. A Manifestation hearing was conducted and it was determined that the student's disability was the cause of the incident and his suspension was revoked. A Functional Behavior Assessment (FBA) and other assessments in conjunction with the FBA was discussed with the parent and the case manager and the parent refused to return I.C. to school. The District seeks to have the student return to school as soon as possible to conduct the assessments and implement a plan accordingly.

A.D. contends that when her son was a student at Halsey High School in Elizabeth, he received a cognitive program until it was no longer offered. The District, in agreement with A.D. transferred I.C. to Edison High School in Elizabeth on December 9, 2017, with an aide. Because the aide did not speak English, A.D. asked for the aide to be removed. On February 2, 2018, I.C. was involved in an altercation with another student during school hours. April 11, 2018, her son was involved in another altercation with no security officer or teachers present. She is very concerned about her child's safety and his need for a cognitive program.

To prevail on an application for emergent relief petitioner must satisfy four criteria set forth in N.J.A.C. 1:6A-12.1(e). It must be determined from the proofs that:

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
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> 2. The legal right underlying the petitioner's claim is settled;
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> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
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> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.
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> [N.J.A.C. 1:6A-12.1(e); T.B., supra, EDS 06499-06, Final Decision, <http://njlaw.rutgers.edu/collections/oal/>.]

The standards which must be met by the moving party in an application for emergent relief in a matter concerning a special needs child are embodied in N.J.A.C. 6A:14-2.7(m)1, N.J.A.C. 1:6A-12.1, and Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982).

In the case of a special education matter, irreparable harm is generally substantiated when there is a substantial risk of physical injury to the child, or others, or when there is a significant interruption in or termination of educational services. M.H. v. Milltown Board of education, 2004 WL 2266890 1, (OAL Dkt. No. EDS 8411-03). As set forth in the M.H. case, the parents of a five-year-old preschool student sought to change their child's placement to include attendance at a private out of district school through emergent relief. The ALJ held that the parents were not entitled to emergent relief as the student would not experience irreparable harm if the requested relief was not granted. In the decision on the underlying due process matter in that case, the ALJ found that during the emergent relief hearing, he could not make a preliminary determination on the appropriateness of the IEP to find irreparable harm. Id. at 1. Accordingly, a hearing on the merits was required to determine irreparable harm, based upon the inappropriateness of an IEP, before a change in placement could be justified.

Here, petitioner argues that her child would suffer irreparable harm if not placed in an out-of-district school for safety reasons after being involved in two altercations at the Edison High School. This is not irreparable per se and was not demonstrated to be a common occurrence. She refuses to permit the District to conduct a FBA or any further assessments. Given these arguments, and the absence of any argument or evidence to support A.D.'s belief that the district program is incapable of meeting her son's needs, I **CONCLUDE** that the petitioner has failed to demonstrate that I.C. would suffer irreparable harm were he to return to either Edison or Halsey High School, both options being offered by the District based upon the result of the assessments.

Considering the forgoing, I **CONCLUDE** that the petitioner has therefore not demonstrated a likelihood of success on the merits of the underlying claim. There are open issues, and the petitioner has sincere concerns, regarding the placement of I.C.

which are the subject of the due process matter, and a full plenary hearing is likely necessary before the full merits of her claim can be determined.

The District will conduct an IEP meeting as soon as possible, as agreed by the parties, to discuss I.C.'s placement and his return to school. Petitioner has not met her burden required to obtain emergent relief based upon all prongs that are needed. Consequently, the petitioner's request for emergency relief is **DENIED**.

DECISION AND ORDER

For the foregoing reasons, I **CONCLUDE** that the petitioner is not entitled to the requested emergent relief and that the petitioner's request for emergency relief is **DENIED**.

This decision on application for emergency relief only shall remain in effect until the issuance of the decision on the merits in this matter. The emergent hearing having been requested by the parent, 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 27, 2018 Joann LaSala Candido

DATE **JOANN LASALA CANDIDO**, ALAJ

Date Received at Agency April 27, 2018

Date Mailed to Parties:

ljb