State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON

EMERGENT RELIEF[1]

OAL DKT. NO. EDS 00866-19

AGENCY DKT. NO. 2019-29213

C.D. O/B/O J.K.,

Petitioner,

v.

MOUNT EPHRAIM BOROUGH BOARD OF EDUCATION AND GLOUCESTER CITY BOARD OF EDUCATION,

Respondents.

Jamie Epstein, Esq. for petitioner

Patrick Carrigg, Esq., for respondent, Mount Ephraim Borough Board of Education (Lenox Law Firm, attorneys)

Victoria Beck, Esq. for respondent, Gloucester City Board of Education (Parker McCay, attorneys)

BEFORE **MARY ANN BOGAN**, ALJ:

Petitioner C.D., legal guardian and grandmother of J.K., a special education student, seeks emergent relief in the form of an order enjoining respondents from

[1] Since the due process petition has the same docket number, this emergent relief application is an Order, and not a final decision.

removing J.K. from his stay-put placement by issuing short-term suspensions to him as a form of discipline resulting from his conduct which is a manifestation of his disability.

The respondents, in opposition, contend that J.K. is not being removed from his placement because his stay-put IEP requires that J.K. adhere to the school's code of conduct, and suspension can be used as a form of discipline to address J.K.'s behavior when he violates the school's code of conduct.

The Office of Special Education (OSE) transmitted the matter to the Office of Administrative Law, where it was filed on January 23, 2019, and scheduled for oral argument on January 28, 2019 at 9:30 a.m. A conference call was held on January 24, 2019, wherein the petitioner's attorney indicated that he was scheduled for oral argument before the New Jersey Supreme Court on January 28, 2019. The District represented that J.K. would be permitted to return to school from his four-day suspension on January 28, 2019. Accordingly, all counsel agreed to reschedule oral argument for February 4, 2019, on which day oral argument was conducted.

FACTUAL DISCUSSION

J.K. is eleven years old and is currently a 6th grade student. According to his Individualized Education Program (IEP) J.K. is enrolled as a tuition student at the middle school in Gloucester City Public Schools (Gloucester). Mount Ephraim Borough Board of Education (District) is the local educational authority responsible for J.K.'s education. J.K. is eligible for special education services under the classification Emotionally Disturbed (ED) having been diagnosed with Tourette Syndrome, Anxiety Disorder, PTSD and ADHD and Executive Function Deficits Syndrome. Pursuant to his stay-put IEP, dated November 2, 2018, Gloucester is the public school who provides J.K. with special education and related services. The IEP notes that J.K. exhibits significant behaviors that impede his educational performance as well as the learning of others, he requires a behavioral intervention plan, a self-contained placement/program, and since November 5, 2018, J.K. has had a 1:1 aide.

After being suspended for four school days on January 18, 2019, J.K. was returned to his stay-put placement and program at Gloucester. The suspension resulted in J.K. being suspended for more than ten cumulative school days. All parties agree that J.K. was returned to his stay-put placement and program at Gloucester, his IEP was implemented, and the remaining issue in this emergent request is- does stay-put enjoin the District from using short term suspensions, where the number of suspension days has cumulatively exceeded 10 school days, to address J.K.'s behavior which has been determined to be a manifestation of his disability. Petitioner is not requesting J.K. be exempt from discipline all together.

The respondents, by way of affidavit, urge that J.K. displayed serious behavior and there continue to be serious behavioral concerns that warrant suspension under the school conduct code. The current stay-put IEP does not prohibit the use of suspension as a form of discipline.

Petitioner urges that the stay-put standard and not the standard set forth in N.J.A.C. 1:6A-12.1 (e) emergency relief pending settlement or decision and Crowe v. De Gioia 90 N.J.126 (1982), is the applicable standard for this emergent application. Stay put is an automatic injunction and the District has no right to remove J.K. from placement unless he exhibits extreme behavior in accordance with 20 U.S.C. 1415(k).

LEGAL ANALYSIS AND CONCLUSION

N.J.A.C. 6A:14-2.7(r), provides in pertinent part that a party may apply in writing for a temporary order of emergent relief as part of a request for a due process hearing under very limited circumstance.

> 1. Emergent relief shall only be requested for the following issues:
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> i. Issues involving a break in the delivery of services;
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> ii. Issues involving disciplinary action, including manifestation determinations and determinations of interim alternate educational settings;
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> iii. Issues concerning placement pending the outcome of due process proceedings;
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> iv. Issues involving graduation and participation in graduation ceremonies.

Petitioner contends that for this emergent relief it is unnecessary to consider the criteria set forth in Crowe v. DeGioia, 90 N.J. 126 (1982). As previously stated, petitioner urges that the proper standard for relief is the "stay-put" provision under the Individuals with Disabilities Education Act ("ADEA"), 20 U.S.C. 1400 et seq. Drinker v. Colonial Sch. Dist., 78 F. 3d 859, 864 (3rd Cir. 1996) citing Zvi D. v. Ambach, 694 F. 2d 904, 906 (2d Cir. 1982) (stay-put "functions, in essence, as an automatic preliminary injunction.") The stay-put provision provides in relevant part that "during the pendency of any proceedings conducted pursuant to this section, unless the State of local educational agency and the parents otherwise agree, the child shall remain in the then current education placement of the child." 20 U.S.C. 1415(j)

Petitioner asserts that the cumulative intermittent short-term suspensions constitute a change of placement because the series of short-term removals, exceeded ten school days during the 2018-2019 school year. The District asserts that short-term suspensions do not constitute a change in placement because the stay-put IEP does not prohibit the use of suspension as a form of discipline to address J.K.'s behavior.

I **CONCLUDE** the petitioner's request for emergent relief shall be viewed in accordance with the standard set forth in N.J.A.C. 1:6A-12.1(e) emergency relief

pending settlement or decision and Crowe v. De Gioia 90 N.J. 126 (1982) ii disciplinary action, including manifestation determinations.

As set forth in N.J.A.C. 1:6A-12.1(e), N.J.A.C. 6A:3-1.6(b) and N.J.A.C. 6A:14-2.7(s), an application for emergent relief will be granted only if it meets the following four requirements:

1. The petitioners will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying the petitioners' claim is settled;

3. The petitioners have a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioners will suffer greater harm than the respondent will suffer if the requested relief is not granted.

See also N.J.A.C. 1:1-12.6(b), citing Crowe v. DeGioia, 90 N.J. 126 (1982), which echoes the regulatory standard for this extraordinary relief. It is well established that a moving party must satisfy all four prongs of the regulatory standard to establish an entitlement to emergent relief.

Turning to the first criteria, it is well settled that relief should not be granted except "when necessary to prevent irreparable harm." Crowe 90 N.J. at 126. In this regard, harm is generally considered irreparable if it cannot be adequately redressed by monetary damages. Id. at 132-33. Moreover, the harm must be substantial and immediate. Judice's Sunshine Pontiac, Inc. v. Gen. Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976) (citation omitted). More than a risk of irreparable harm must be demonstrated. Continental Group, Inc. v. Amoco Chems. Corp., 614 F.2d 351, 359 (D.N.J. 1980). The requisite for injunctive relief is a "clear showing of immediate irreparable injury," or a "'presently existing actual threat; (an injunction) may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by common law.'" Ibid. (citation omitted.)

Irreparable harm in special education cases has been demonstrated when there is a substantial risk of physical injury to the child, or others, or when there is a significant interruption or termination of educational services. M.H. o/b/o N.H. v. Milltown Board of Education, 2003 WL 21721069, OAL Dkt. No. EDS 4166-03.

In the instant matter, there has been no showing of "substantial risk of physical injury" to J.K., nor has there been a "significant interruption or termination of his educational services." The Board is ready and willing to educate J.K. in accordance with his stay-put placement IEP pending the due process hearing. In addition, under the facts herein, J.K. has behavioral issues that resulted in a series of short-term suspensions. After serving the suspension, J.K. returned to his placement. In addition, the petitioner did not seek to demonstrate that that J.K. experienced a cessation of services.

For the foregoing reasons, I **CONCLUDE** that petitioner has not demonstrated that J.K. will suffer irreparable harm if the requested relief is not granted.

Although all four standards for emergent relief must be met, the three remaining prongs of the standards for emergent relief will be addressed.

The second criteria, emergent relief "should be withheld when the legal right underlying petitioners' claim is unsettled." Crowe, 90 N.J. at 133 (citing Citizens Coach Co., 29 N.J. Eq. at 304-305. Here the legal right underlying J. K's claim is not settled. The primary purpose of the Individuals with Disabilities Education Act (IDEA) is to ensure that all disabled children will be provided a Free and Appropriate Education (FAPE). J.K. has returned to his stay-put placement after serving the short-term suspension. Under N.J.A.C. 6A:14-2.8(a) students with educational disabilities are subject to the same disciplinary procedures as non-disabled students. Therefore, school officials may suspend a student for up to ten consecutive or cumulative school days in a school year.

Removal of a disabled student from the student's current educational placement for disciplinary reasons constitutes a change of placement if: (1) the removal is for more than ten consecutive days; or (2) school officials, in consultation with the student's case manager, determine that a series of short-term removals, which cumulatively has exceeded ten school days, constitute a change of placement. N.J.A.C. 6A:14-2.8 (c). Here, the series of short-term suspension has not been proven to be a change of placement because J.K. returned to his placement after serving the short-term suspensions and there has been no evidence presented to demonstrate that the District acted in contravention of the stay-put IEP.

In addition, the District has conducted a manifestation determination and found the conduct to be a manifestation of the student's disability. Thereafter, respondents sought to conduct a functional behavioral analysis, and implement a behavioral intervention plan more suitable to J.K., but petitioner refused to consent.

For the foregoing reasons, I **CONCLUDE** that petitioner did not demonstrate a legal right to enjoin the District from issuing short-term suspension.

Under the third emergent relief prong, "a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits." Crowe, 90 N.J. at 133 (citing, Ideal Laundry Co. v. Gugliemone, 107 N.J. Eq. 108, 115-16 (E&A 1930)). Here, petitioner has not offered evidence to demonstrate a likelihood of success on the merits to enjoin the District from issuing discipline to J.K. for any future violations of the school discipline code of conduct while J.K. is a student at Gloucester.

For the foregoing reasons, I **CONCLUDE** that petitioners have not demonstrated a likelihood of success on the merits.

The final requirement relates to the equities and interests of the parties. Crowe, 90 N.J. at 134. Here, petitioner claims that other disciplinary measures should be issued since J.K.'s behavior is a manifestation of his disability. However, here again, the stay-put IEP requires that J.K. adhere to the code of conduct and does not eliminate

suspension as a means of discipline. Moreover, the District must ensure that the code of conduct is adhered to by its students.

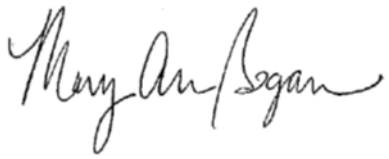
I **CONCLUDE**, that J.K. would not suffer greater harm than the District would if the requested relief is not granted. Accordingly, I **CONCLUDE** that petitioner did not satisfy all four requirements for emergent relief.

Therefore, I **CONCLUDE** that petitioner's request for emergent relief be **DENIED**.

ORDER

For the foregoing reasons set forth above, it is hereby **ORDERED** that petitioners' request for emergent relief in the form of an order enjoining the District from issuing any further suspensions is **DENIED**.

This order on application for emergency relief shall remain in effect until the issuance of the decision on the merits in this matter. If the parent or adult student feels that this order 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.



February 5, 2019
DATE

MARY ANN BOGAN, ALJ

Date Received at Agency:

Date Mailed to Parties:

MAB/lam

APPENDIX

EXHIBITS

For petitioners:

Brief

For respondent:

Brief