State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

EMERGENT RELIEF

OAL DKT. NO. EDS 1994-18

AGENCY DKT. NO. 2018-27499

C.J. ON BEHALF OF Y.D.,

Petitioner,

v.

WILLINGBORO TOWNSHIP BOARD OF EDUCATION,

Respondent.

C.J., petitioner, pro se

Patrick J. Madden, Esq., for respondent, Willingboro Township Board of Education (Madden and Madden, PA, attorneys)

Record Closed: February 13, 2018 Decided: February 14, 2018

BEFORE **MARY ANN BOGAN**, ALJ:

On February 5, 2018, petitioner C.J. on behalf of Y.D. filed a request for emergent relief with the Department of Education, Office of Special Education (OSE). Specifically, C.J., who is Y.D.'s mother and legal guardian, seeks emergent relief because there is a break in the delivery of services, and to return Y.D. to school. The

District maintains that petitioner is enrolled in homebound instruction and any break in the delivery of services was caused through her own actions. Pursuant to its responsibility to establish procedural safeguards to ensure the opportunity for an impartial hearing, the Department has relied on 34 C.F.R. 104.36 for authority to designate the Office of Administrative Law (OAL) as the agency responsible for conducting hearings on contested issue in Section 504 matters and has chosen to conduct those hearings pursuant to the requirements of the IDEA. Accordingly, the OSE transmitted the matter to the Office of Administrative Law, where it was filed on February 6, 2018, and scheduled for oral argument on February 13, 2018. Oral argument was conducted on that date and the record closed.

FACTUAL DISCUSSION

Y.D. is a seventeen-year-old, eleventh grade student, who has been determined to be eligible for a 504 Accommodation Plan as set forth in a current medical evaluation. Y.D. attends the District's High School. On January 3, 2018, Y.D. was involved in an incident at the high school during the school day. According to an Incident Report, during morning intake procedures inside of the school building, Y.D. displayed an act of open defiance of authority when she did not remove her winter coat and hoodie as directed by the security officer. The report sets forth that Y.D. stated to the officer, "[I]t's too early for this", "this is stupid", "she gets on my nerves" (referring to the Officer). When a second officer attempted to intervene, Y.D. stated "I don't know why yall always stressing over this dumb shit. I'm gonna put it back on, you need to tell your own fucking kids to take their fucking jacket off." The record also reflects that Y.D.'s sibling, A.D. approached the Officer who asked Y.D. to remove her coat, and, with a smile, used profanity towards the Officer who asked Y.D. to remove her coat.

In support of her emergent relief, C.J. argues it was too cold outside for Y.D. to be required to remove her coat. Furthermore, Y.D. has not received homebound instructions consistent with the regulations and she should be returned to school.

As a result of the incident, Y.D. was suspended for five days. Pursuant to the District's policy a student's return to school is conditioned upon the appearance at a "remand hearing" to determine the conditions of the student's return. At the conclusion of her suspension, the petitioner was served with a Notification of Evidentiary Hearing for Remand Process, (Remand Notice). The initial remand hearing was postponed. The parties disagree as to whether or not the District provided the petitioner with proper notice. The second hearing was postponed after petitioner arrived at the hearing with family support without notifying the District in advance. The petitioner maintains that the Remand Notice does not require advance notification of a family support participation. The next remand hearing was scheduled for February 12, 2018. The petitioner was provided with the Remand Notice but neither Y.D. or C.J. attended the hearing. The District contends that the administrative remedies must be exhausted before emergent relief can be granted.

Y.D. has not attended the District's high school since the January 3, 2018 incident. C.J. has four children who have attended or are attending the District's schools, and acknowledged that she is familiar with the remand hearing process.

I **FIND** that the Remand Notice does not require advance notification be made to the District when participating with a family support person.

Dr. Alegria, Director of Special Services for the District attended the hearing, and stated that Y.D. was suspended from school for five days and homebound instruction was scheduled for Y.D. within five days of the suspension, consistent with the District's Code of Conduct. She explained, any delay in the delivery of services has been caused by the family who has not cooperated with the school's efforts to schedule the instruction.

In addition, on January 12, 2018, the District conducted an Initial Identification and Evaluation Planning meeting on behalf of Y.D. It was determined that "the student is not suspected of having a disability which adversely affects the student's educational performance, and is not in need of special education and related services or speech-

language services only." Furthermore, the District contends that administrative remedies must be exhausted before emergent relief can be granted.

LEGAL ARGUMENT 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:
>
> 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;
>
> iv. Issues involving graduation and participation in graduation ceremonies.

Petitioner contends that emergent relief may be requested in this situation pursuant to N.J.A.C. 6A:14-2.7(r)1 because there is a break in the delivery of services to Y.D. Under the circumstances, petitioner may seek emergent relief pursuant to N.J.A.C. 6A:14-2.7(r)1i.

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 petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying the petitioner's claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

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.

See also: N.J.A.C. 1:1-12.6, and Crowe v. DeGioia, 102 N.J. 50 (1986), 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. See also: Crowe at 132-35.

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 132. 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. General 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 Chemicals 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.)

In the instant matter, there has been a showing of "immediate irreparable injury" or a "presently existing actual threat." Y.D. has served a short term five-day suspension, and has not been returned to school. The District has not demonstrated the right to keep Y.D. out of school.

For the foregoing reasons, I **CONCLUDE** that petitioners have demonstrated that Y.D. will suffer irreparable harm if the requested relief is not granted.

The second prong of the test is to address the legal right underlying petitioner's claim. In this matter petitioners have moved for emergent relief under Section 504 of the Rehabilitation Act of 1973.

Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794 (Pub. L. 93-112. Title V, §504, as amended), provides:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under a program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978.
>
> [29 U.S.C. §794(a).]

The purpose of Section 504 and its implementing regulations is to prohibit discrimination against disabled individuals by "recipients" of federal funds. A review of the Act and its implementing regulations reveals that it provides a broader range of coverage than does the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1487. However, like the IDEA, Section 504 and its implementing regulations also guarantee school age pupils who meet the eligibility criteria the right to a free, appropriate public education (FAPE) that is comparable to that required under the IDEA. See, 34 C.F.R. § 103.34, discussed *infra*. As previously stated, the New Jersey Department of Education has relied on the authority of 34 C.F.R. 104.36 to designate the OAL as the agency responsible for conducting hearings on contested issues in Section 504 matters.

Accordingly, I **CONCLUDE** that since Y.D. has an undisputed qualified right under Section 504, to this claim of relief.

The third prong is whether the petitioner has a likelihood of prevailing on the merits of the underlying claim. The rights of student suspended for not more than ten consecutive days is set forth in Short-term suspensions. N.J.A.C. 6A:16-1.3 a short-term suspension means removal of a student for one, but not more than 10 consecutive school days from the general education program or the special education program, in accordance with N.J.A.C. 6A:14-2.8, but not the cessation of the student's educational services.

Purusant to N.J.A.C. 6A:14-2.8(a) for disciplinary reasons, school officials may order the removal of a student with a disability from his or her current educational placement to an interim alternative educational setting, another setting, or a suspension for up to 10 consecutive or cumulative school days in a school year. Such suspensions are subject to the same district board of education procedures as nondisabled students. However, at the time of removal, the principal shall forward written notification and a description of the reasons for such action to the case manager and the student's parent(s).

In accordance with N.J.A.C. 6A:16-7.2 regarding nondisabled students, students are to be returned to school at the completion of a short-term suspension.

Accordingly, I **CONCLUDE** petitioner has a likelihood of prevailing on the merits of this case.

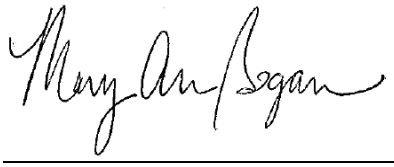
The final requirement relates to the equities and interests of the parties. N.J.A.C. 6A:3-1.6(b)4. Y.D. has been out of school for well over one month after serving a short-term suspension. The District did not provide any compelling evidence to demonstrate any reason for extending the time Y.D. remains out of school. I **CONCLUDE**, Y.D. would suffer greater harm than the District would if the requested relief is not granted. Accordingly, I **CONCLUDE** that petitioner satisfies all four requirements for emergent relief. Therefore, I **CONCLUDE** that petitioner’s request for emergent relief be **GRANTED**.

ORDER

It is **ORDERED** that emergent relief is **GRANTED**. Y.D. shall immediately be returned to the Willingboro Public High School.

I further **ORDER** that a "remand hearing" shall be scheduled within the next seventy-two hours. It is further **ORDERED** that C.J. and Y.D. are hereby required to cooperate with, attend, and participate at the "remand hearing."

This decision on application for emergency relief shall remain in effect until the issuance of the decision on the merits in this matter. The hearing having been requested by the parents, 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.



February 14, 2018
DATE

MARY ANN BOGAN, ALJ

Date Received at Agency:

Date Mailed to Parties:

MAB/cb