State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

EMERGENT RELIEF

OAL DKT. NO. EDS 02920-18

AGENCY DKT. NO. 2018-27443

B.C. AND J.S. ON BEHALF OF C.S.,

Petitioners,

v.

WEST ORANGE BOARD OF EDUCATION,

Respondent.

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

Eric Harrison, Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: May 14, 2018 Decided: June 11, 2018

BEFORE **LESLIE Z. CELENTANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, petitioners B.C. and J.S., on behalf of their son, C.S., seek emergent relief as a part of a due process petition against respondent West Orange Board of Education, in accordance with N.J.A.C. 6A:14-2.7. This matter was filed with the Department of Education, Office of Special Education Programs (OSEP) which transmitted the matter to the Office of Administrative Law where it was filed on February

26, 2018. The emergency petition sought the return to school of the general education, non-classified student, who had been suspended for cyberbullying a fellow student in a YouTube video. In support of the application, petitioner filed a brief, and respondent submitted a brief in opposition.

FACTUAL DISCUSSION

C.S., a ten-year-old male student previously attended Kelly Elementary School in the district. C.S. was previously classified as eligible for special education and related services under the classification of "other health impaired," however on September 8, 2017, B.C., C.S.'s mother, requested that C.S. no longer receive special education services. B.C. was informed of her parental rights by C.S.'s case manager who explained the differences between general education and C.S.'s then-current placement and offered to meet with B.C. which B.C. declined to do. B.C. was also advised that she would be taking full responsibility for the absence of special education services in his program by declassifying her son and B.C. fully acknowledged that responsibility in her correspondence of September 7, 2017. Following these discussions with B.C. and the receipt of written withdrawal of consent for C.S. to receive special education services, the district declassified him and C.S. continued in his fifth-grade year in a general education setting.

Several weeks after his declassification, on October 25, 2017, C.S., using a school Chromebook, shared a "dis track" video at school from his private YouTube account. The title of "dis track" was "FUCKDOM" and included a direct reference to one of his classmates whose name was Domenic and which included vulgar language, racial slurs, and references to bestiality and rape. C.S. admitted to making the dis track.

C.S. was suspended on October 26, 2017 for cyberbullying, and placed on home instruction. No hearing was requested before the Board concerning the reasonableness of the suspension and as a general education student, C.S. was not entitled to a manifestation determination hearing, reserved for special education students.

Petitioner brought an emergent relief application which was heard by ALJ Antoniewicz on February 1, 2018, which resulted in a settlement providing for additional hours of home instruction and that petitioners cooperate with the necessary evaluations to determine C.S.'s eligibility to return to school. That settlement included an agreement and understanding by B.C. and J.S. that if C.S. was not cleared to return to school then there would be an additional independent evaluation conducted by a mutually agreeable evaluator and that C.S. would remain on home instruction.

Before the results of the agreed upon evaluations were received, petitioners filed a second emergent relief application, improperly attempting to invoke a "stay put" of their declassified son's general education program[1], ignoring the agreement that C.S. needed to be declared eligible to return to school by the appropriate professionals before doing so. The evaluations were delayed as petitioners initially refused their consent. When consent was finally obtained, C.S. was evaluated by the professionals and when the psychiatric clearance was received, C.S. returned to school; notably to a new school at petitioners' request.[2]

LEGAL DISCUSSION AND CONCLUSIONS

Under the Individuals with Disabilities in Education Act (IDEA), 20 U.S.C. §§ 1400-1482, state and local educational agencies "shall establish and maintain procedures . . . to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education . . ." 20 U.S.C. 1415(a). Under New Jersey's special education regulations implementing the IDEA, "[f]or students age three through 21 years, a due process hearing may be requested when there is a disagreement regarding identification, evaluation, reevaluation, classification, educational placement, the provision of a free, appropriate public education, or disciplinary action." N.J.A.C. 6A:14-2.7(a). Moreover, "[e]ither party may apply in writing for a temporary order of emergent relief as a part of a request for a due process hearing

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[1] The IDEA's stay put provision does not apply to a declassified, general education student. 20 U.S.C. 1415(j); N.J.A.C. 6A:14-2.6(d); N.J.A.C. 6A:14-2.7(u).

[2] By virtue of the settlement reached in the first emergent relief application heard on February 1, 2018, and the withdrawal of cross-motions for emergent relief, that motion is rendered moot.

. . ." N.J.A.C. 6A:14-2.7(r). An emergent relief application may be entertained if it concerns issues regarding a break in the delivery of services, disciplinary action, placement pending the outcome of due process proceedings, or graduation or participation in graduation ceremonies. N.J.A.C. 6A:14-2.7(r)(1)(i)-(iv).

Generally, "[s]chool personnel . . . may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days . . ." 20 U.S.C. § 1415(k)(1)(B). However, the school district must determine "if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability [manifestation determination]," and the child must continue to receive special education services." 20 U.S.C. §§ 1415(k)(1)(D) and (E). Except for special circumstances, "[s]chool personnel 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 . . ." 20 U.S.C. § 1415(k)(1)(G).

Under 20 U.S.C. § 1415(k)(5)(A), "[a] child who has not been determined to be eligible for special education and related services under this part . . . and who has engaged in behavior that violates a code of student conduct, may assert any of the protections provided for in this part . . . if the local educational agency had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred." However, "[a] local educational agency shall not be deemed to have knowledge that the child is a child with a disability if the parent of the child has not allowed an evaluation of the child . . . or has refused services under this part . . . or the child has been evaluated and it was determined that the child was not a child with a disability under this part . . ." 20 U.S.C. § 1415(k)(5)(C). And "[i]f a local educational agency does not have knowledge that a child is a child with a disability . . . prior to taking disciplinary measures against the child, the child may be subjected to disciplinary measures applied to children without disabilities who engaged in comparable behaviors . . ." 20 U.S.C. § 1415(k)(5)(D).

Based on these provisions, I **CONCLUDE** that petitioners may not assert the IDEA's procedural protections as part of this emergent application because, prior to the behavioral incident at issue, the Board did not have knowledge that C.S. was a child with a disability due to his parents' refusal of special education services. B.C. reached out to the district of her own volition and advised that she wished to withdraw C.S. from special education and related services, which she later confirmed by written request dated September 7, 2017.[3] A special education dispute cannot be asserted by a general education student declassified at his parents request. Therefore, petitioners' emergent application is dismissed for lack of jurisdiction.

For similar reasons, I **CONCLUDE** that petitioners' due process petition must also be dismissed because they assert a dispute relating exclusively to non-special education matters, and as such, their petition fails to satisfy the criteria of N.J.A.C. 6A:14-2.7(a). A controversy or dispute arising under the school laws which does not meet the threshold requirements of N.J.A.C. 6A:14-2.7(a) cannot be asserted in a due process petition, as such disputes fall within the exclusive jurisdiction of the Commissioner of Education. See N.J.A.C. 6A:3.-1.3(a); N.J.A.C. 6A:3-1.14(a). In addition, there is no jurisdiction at the Office of Administrative Law to award attorney's fees which are also sought in the due process petition.[4] Moreover, as B.C. had previously revoked consent for C.S.'s classification, the request for compensatory education during his time out of school would also be unavailable, as he was a general education student.

Even if petitioners' application for emergent relief were properly here, petitioners fail to satisfy the criteria for such relief. N.J.A.C. 6A:14-2.7(s) sets forth the standards governing motions for emergent relief and instructs in pertinent part:

> Emergent relief may be granted if the administrative law judge determines from the proofs that:

[3] Notably, the two decisions cited by petitioners in support of their position were both decided prior to the 2004 amendments to the IDEA, which amendments included the knowledge exceptions above, 20 U.S.C. 1415(k)(5)(c).

[4] Petitioners seek "prevailing party" status. Petitioners acknowledge in correspondence dated April 18, 2018 that "the second Emergent Relief action was settled, as the district agreed to allow my client back to school…" They add, "[i]n order for me to pursue attorney's fees on an emergent relief action, I must have a determination by a Judge that my clients were correct…"

i. The petitioner will suffer irreparable harm if the requested relief is not granted;

ii. The legal right underlying the petitioner's claim is settled;

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

iv. 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 Crowe v. Degioia, 90 N.J. 126 (1982). Petitioner must satisfy all four prongs in order to establish entitlement to emergent relief.

With regard to the standards that must be met by the moving party in an application for emergent relief, each of the enumerated factors "must be clearly and convincingly demonstrator" by the moving party. Waste Mgmt. of N.J. v. Union County Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008). Considering the enumerated factors for emergent relief, I **CONCLUDE** that petitioner does not satisfy the four criteria. Specifically, petitioner has not satisfied the first prong required for relief because there has been no clear and convincing demonstration that C.S. will suffer irreparable harm; indeed, the credible evidence reveals that following an unchallenged suspension and a settlement providing for a psychiatric evaluation, C.S. was returned to school. Additionally, petitioner has not met the criteria of demonstrating a likelihood of success on the merits on of the underlying claim. C.S. is not classified and is not entitled to the protection of the IDEA. The suspension was never challenged nor was an appeal filed with the Commissioner of Education; rather only a manifest determination was sought which is unavailable to a student who has been declassified.

Under the facts and circumstances presented, further analysis is not required because petitioner is unable to meet all four criteria required for emergent relief. Nothing in the petitioners' recitation of what they believe the facts or law to be support entitlement to any of the relief sought.

ORDER

It is therefor **ORDERED** that the petition for emergent relief and the due process petition are hereby **DISMISSED**.

This decision on application for emergency relief resolves all of the issues raised in the due process complaint; therefore, no further proceedings in this matter are necessary. This decision on application for emergency relief is final pursuant to 20 U.S.C. § 1415(i)(1)(A) 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. § 1415(i)(2). 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.

June 11, 2018
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: June 11, 2018

Date Mailed to Parties:

dr