State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
ON EMERGENT RELIEF
OAL DKT. NO. EDS 15556-18
AGENCY DKT. NO. 2019-28956

MILLVILLE BOARD OF EDUCATION,
Petitioner,
v.
S.L. ON BEHALF OF Z.B.,
Respondent.

Matthew J. Robinson, Esq., appearing for petitioner (Robinson & Robinson, LLC, attorneys)

No appearance by or for respondent

Record Closed: October 31, 2018 Decided: November 5, 2018

BEFORE **TAMA B. HUGHES**, ALJ:

STATEMENT OF THE CASE

The Millville Board of Education, (District or petitioner) seeks emergent relief pursuant to N.J.A.C. 6A:14-2.7(r), N.J.A.C. 6A:14-2.7(s) and N.J.A.C. 1:6A-12.1(e), to conduct evaluations (psychiatric) of Z.B., who is currently on home instruction, prior to returning to school to assist the District in determining whether Z.B. is eligible for

special education and related services and provide him with a free appropriate public education (FAPE). Z.B.'s mother, S.L. (respondent), has refused to give the District permission to evaluate Z.B.

PROCEDURAL HISTORY

On October 25, 2018, petitioner filed a Complaint for Due Process with the Office of Special Education Programs (OSEP). The Complaint was filed under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400 to 1482 and seeks to re-classify Z.B. and place him in an appropriate program and placement. Petitioner also filed a Request of Emergent Relief with the OSEP seeking to compel respondent to consent to a psychiatric evaluation of Z.B. prior to returning him to school as the student poses a potential danger to himself and others. The Request for Emergent Relief was transmitted to the Office of Administrative Law (OAL) on October 26, 2018, where it was set down for a hearing on October 31, 2018.

On October 31, 2018, respondent did not appear for the hearing.[1] Oral argument proceeded on the application in respondent's absence and the record closed. Subsequent to the hearing, the OAL received a call and correspondence from respondent requesting that the matter be rescheduled due to insufficient notice. This request was denied as respondent had received proper notice.

FACTUAL DISCUSSION

[1] The hearing was scheduled for October 31, 2018, at 9:30 a.m. Due to respondent's absence, the District was asked to reach out to respondent to see if she was going to appear. According to counsel, respondent stated in unequivocal terms that she was not going to appear. Counsel further represented that respondent was provided notice of the filing via regular mail, certified mail and email. None of these notices were returned as "undeliverable." Following the hearing, the OAL received a call from respondent who stated that she was unaware that a hearing had been scheduled and requested an adjournment. Respondent was told to place her concerns/request in writing, which she did. Through this letter, respondent represented that there was a miscommunication between herself and the District regarding the hearing date and requested an adjournment to allow her sufficient time to get time off from work and have her mother present.

In review of the notifications that were sent to respondent as it relates to this matter, it appears that OSEP sent respondent the transmittal documents on October 26, 2018 via email. Through this notice, respondent was informed that the OAL would be contacting her directly to schedule a hearing. On this same date, the OAL sent respondent notice of the October 31, 2018 hearing date via email and a confirming delivery notification was received. Therefore, notice was proper and complete.

In April 2018, Z.B., then a fourth grader, was transferred to the general education classroom. Prior to this transfer, Z.B. had been in a self-contained special education classroom having been classified with a communication impairment. Upon re-evaluation in April 2018, he was declassified. Despite his teacher's concerns that Z.B. may have other behavioral deficiencies which would require special education services, he was returned to the general education classroom. Prior to his move, the school scheduled several meetings with respondent to discuss their concerns however respondent refused to meet with the school representatives and cancelled the meetings. Within the first two months of his transfer, Z.B. was involved in eight to ten disciplinary incidents comprising of violent and aggressive behavior that included kicking, hitting and spitting. The last incident resulted in Z.B. being suspended and placed on home instruction. Concerned over the situation and believing that Z.B. may benefit from a special education environment based upon his past success, the Special Education Director reached out to respondent and requested permission to test Z.B. Respondent denied this request.

Over the summer, the District made several attempts to meet and/or speak with respondent regarding the upcoming school year and placement for Z.B to no avail. A meeting did occur in August 2018, at which time the District recommended that Z.B. remain on home instruction pending a psychiatric evaluation. Petitioner agreed to home instruction for Z.B. but refused to agree to a psychiatric evaluation.

The District filed a Request for Emergent Relief seeking an order to conduct a psychiatric evaluation of Z.B. prior to returning him to school as Z.B. poses a potential danger to himself and others. According to the petitioner, the evaluation would assist the District in transitioning Z.B. back into school environment and assist them assessing whether special education services and placement for Z.B. would be appropriate.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

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.

Here, the District asserts that there are issues involving a break in services and placement pending the outcome of the Due Process petition. Specifically, the District argues that Home Instruction was put in place as a "band aid" and never intended to extend into the 2018/2019 school year. It was conditioned upon Z.B. having a psychiatric evaluation. It was a stop-gap to allow the District the opportunity evaluate Z.B. to determine an appropriate placement and allow him safely back into school setting given the violent and aggressive behavior that had occurred the previous school year.

I **CONCLUDE** it has been established that there exists issues which warrant a request for emergent relief.

Pursuant to N.J.A.C. 1:6A-12.1(e) and Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982), emergency relief may only be granted if the judge determines from the proofs that:

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 equites 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.

Petitioner has the burden to establish that all four prongs are satisfied.

Irreparable Harm

In support of its application, the District argues that they are being denied the ability to provide Z.B. a FAPE which he is not receiving on home instruction. Home instruction was never intended to extend into the 2018/2019 school year. It was put in place as a temporary fix pending a psychiatric evaluation. The results of the evaluation would assist the District in transitioning Z.B. back into the school environment and provide an assessment for potential special education services and placement. However, the District also has an obligation to provide a healthy and safe environment to all its students without disruption. To allow Z.B. to come back into the school setting without an evaluation could cause irreparable harm to the District as Z.B. poses a potential danger to both himself and others. Respondents' continued refusal to provide consent prohibits the District from providing Z.B. a FAPE. It also exposes the District to irreparable harm should home instruction be terminated and Z.B. placed back into the general population classroom absent an evaluation.

Clearly, the District is caught between a rock and hard place and irreparable harm will occur if it is prevented from meeting its' obligations under State and Federal laws to provide Z.B. a FAPE. Additionally, the District is required to provide a healthy and safe environment for all its' students, including Z.B. It would be imprudent to bring Z.B. back into the school environment absent an evaluation – to do so otherwise may also cause the District to suffer irreparable harm.

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

The Legal Right Is Settled

According to N.J.A.C. 6A:14-3.3(a), a district board of education has an obligation to locate, refer, and identify students who may have disabilities due to physical, sensory, emotional, communication, cognitive, or social difficulties. Thereafter, a student may be referred to the child study team for an evaluation to determine eligibility for special education programs and services. N.J.A.C. 6A:14-3.3(e). If the child study team determines that an evaluation is warranted, the district must request and obtain consent to evaluate. N.J.A.C. 6A:14-3.4(b). If the parent refuses to provide consent to conduct the initial evaluation, the district may file for a due process hearing to compel the evaluation. N.J.A.C. 6A:14-3.4(c).

Here, in April/May 2018, the Special Education Director, concerned that Z.B. may have other behavioral deficiencies that required special education services, reached out to respondent and requested testing. Respondent denied this request. After the last disciplinary incident, Z.B. was suspended and placed on Home Instruction for the remainder of the school year. It was continued into the 2018/2019 school year pending a psychiatric evaluation which would assist in assessing what services and placement would be appropriate.

The District has a settled legal right to complete an evaluation plan, which may include, among other things, a psychiatric evaluation, in an effort to assess whether Z.B. is eligible for special education services and placement.

Thus, I **CONCLUDE** petitioner has met the second prong of the emergent relief standard in that a legal right underlying their claim is settled.

Likelihood of Prevailing on The Merits

Regarding whether the petitioner has a likelihood of prevailing on the merits of the underlying claim, there are no material facts in dispute that oppose petitioner's likelihood of success. It is well settled that the IDEA requires a school district to provide a free appropriate public education ("FAPE") to all children with disabilities and determined eligible for special education. 20 U.S.C.A. 1412(a)(1)(A). A district board of education is required to locate, refer, and identify any student who may have a disability due to physical, sensory, emotional, communication, cognitive, or social difficulties. N.J.A.C. 6A:14-3.3(a). This obligation is often referred to a school district's "child find" obligation.

As stated, a student may be referred to the child study team for an initial evaluation to determine eligibility for special education programs and services. N.J.A.C. 6A:14-3.3(e). If the child study team determines that an initial evaluation is warranted, the district must request and obtain consent to evaluate. N.J.A.C. 6A:14-3.4(b). If the parent refuses to provide consent, the district may file for a due process hearing to compel consent to evaluate. N.J.A.C. 6A:14-3.4(c). After parental consent for an initial evaluation is obtained, the evaluation, determination of eligibility for services, and the development and implementation of the IEP for the student must be completed within ninety (90) calendar days.

This office has a long history of granting a school district's request for emergent relief to compel parental cooperation in the evaluation process. See Trenton Bd. of Educ. v. S.P. o/b/o B.P., 2001 N.J. AGEN LEXIS 225, OAL Dkt. No. EDS 874-01,

Agency Dkt. No. 01-4968, Mar. 23, 2001; Dumont Bd. of Educ. v. G.C., 1995 N.J. AGEN LEXIS 137, OAL Dkt. No. EDS 1575-95, Agency Dkt. No. 95-6617E, Feb. 15, 1995; Gloucester City Bd. of Educ. v. A.H. o/b/o K.S., 2015 N.J. AGEN LEXIS 570, OAL Dkt No. EDS 09165-15, Agency Dkt. No. 2015-23030, July 14, 2015; Edison Twp. Bd. of Educ. v. M.B. and P.B. o/b/o M.B., 2007 N.J. AGEN LEXIS 181, OAL Dkt. No. EDS 2319-07, Agency Dkt. No. 2009-12114, Apr. 11, 2007; and Lawrence Twp. Bd. of Educ. v. D.F. o/b/o D.F., 2007 N.J. AGEN LEXIS 26, OAL Dkt. No. EDS 12056-06, Agency Dkt. No. 2007-11904, Jan. 9, 2007. Specifically, in Trenton Board of Education v. S.P. o/b/o B.P., Administrative Law Judge John R. Futey granted the school district's application for emergent relief to compel parental consent and cooperation for an initial evaluation of an eighth-grade student when the parents were uncooperative. Trenton Bd. of Educ. v. S.P. o/b/o B.P., 2001 N.J. AGEN LEXIS 225, OAL Dkt. No. EDS 874-01, Agency Dkt. No. 01-4968, Mar. 23, 2001. Furthermore, a school district's request for emergent relief must be granted when a parent has consented to specific evaluations and then fails to cooperate with the school district in producing the student for the evaluation. Dumont Bd. of Educ. v. G.C., 1995 N.J. AGEN LEXIS 137, OAL Dkt. No. EDS 1575-95, Agency Dkt. No. 95-6617E, Feb. 15, 1995.

Similarly, in Gloucester City Board of Education v. A.H. o/b/o K.S., Administrative Law Judge Sarah G. Crowley granted the school district's request for emergent relief to compel the parent and student to cooperate in the reevaluation of the student by scheduling the re-evaluations, ensuring that the student appears for the scheduled sessions, and participating in the re-evaluation process. Judge Crowley appropriately reasoned that the re-evaluation process is necessary to determine whether the student continues to be a student with a disability eligible for special education and the school district's failure to comply with the requirements pertaining to students with disabilities would expose the district to sanctions by the New Jersey Department of Education and Federal Government. Gloucester City Bd. of Educ. v. A.H. o/b/o K.S., 2015 N.J. AGEN LEXIS 570, OAL Dkt. No. EDS 09165-15, Agency Dkt. No. 2015-23030, July 14, 2015. Moreover, Judge Crowley determined that a "failure to comply [with the regulations] will also place the student at risk, as any lapse in special services may well cause the child to regress." Id.

As applied here, the District has demonstrated a likelihood of prevailing on the merits. Clearly, the District is unable to comply with its legal obligations and is at risk for sanctions resulting from noncompliance with established regulations. Respondent's lack of cooperation impedes the District from assisting Z.B., a student, which the District believes requires special education programs and services

Therefore, I **CONCLUDE** petitioner does meet the third prong of the emergent relief standard.

The Petitioner Will Suffer Greater Harm Than the Respondent

Given my findings as to the first three parts of the four-part test, it only follows that I **FIND** that when the equities and interests of the parties are balanced, petitioner will suffer greater harm than the respondent if the requested relief is not granted.

DECISION AND ORDER

For the reasons cited above, I **CONCLUDE** that the petitioner has established sufficient grounds for the granting of emergent relief. Accordingly, it is **ORDERED** that petitioner's application for emergent relief is **GRANTED**. It is further **ORDERED** that the District initiate and conduct a psychiatric evaluation of Z.B. It is also **ORDERED** that respondent cooperate fully and positively in that effort.

This decision on application for emergency relief shall remain in effect until issuance of the decision in the matter. The parties will be notified of the scheduled hearing dates. 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.

November 5, 2018
DATE

TAMA B. HUGHES, ALJ

Date Received at Agency:

Date Sent to Parties:

tat/lam