State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION-EMERGENT RELIEF
OAL DKT. NO. EDS 09804-14
AGENCY DKT.NO. 2015 21546 E

HANOVER PARK REGIONAL HIGH
SCHOOL BOARD OF EDUCATION,
Petitioner,
v.
F.S. o/b/o S.S.,
Respondents.

Athina Cornell, Esq., and **Dennis McKeever**, Esq., for petitioner (Lindabury McCormick, Estabrook & Cooper, attorneys)

Anthony J. Accardi, Esq., for respondent (Accardi & Mirda, attorneys)

Record Closed: August 11, 2014 Decided: August 12, 2014

BEFORE **JESSE H. STRAUSS**, ALJ:

Petitioner (or District) seeks emergent relief for an order permitting it to send records of S.S. to out-of-district placements and directing that S.S. undergo a neuropsychological evaluation. Respondent opposes this application and files its own cross-petition for emergent relief seeking an order directing the District to immediately reinstate S.S. to Hanover Park Regional High School and to permit him to participate in extra-curricular activities including athletics and to enjoin the District from conducting any disciplinary hearings involving S.S. pertaining to the events of May 5, 2014.

The Office of Special Education Programs (OSEP) transmitted the District's application for emergent relief to the Office of Administrative Law (OAL) on August 1, 2014. On August 7, 2014, OSEP notified respondents that it was returning its request for an emergent due process hearing because "the petition appears to challenge the discipline of student by the district. Such an action must be filed with the Bureau of Controversies and Disputes."

I heard the matter on August 11, 2014 and closed the record on that day.

District's Position

S.S. will be a junior at Hanover Park Regional High School for the 2014-15 school year. He is classified as eligible for special education and related services under the category Specific Learning Disability due to a severe discrepancy between his intellectual ability and academic achievement in the area of math calculation. The District detailed a history of aggressive behavior including a May 2014 incident it describes as "attacking an unsuspecting student (J.G.) from behind, punching him in the head multiple times, throwing him to the ground and continuing to punch him in the head until S.S. was physically pulled off the victim." J.G. suffered a concussion and did not return to school for the remainder of the school year.

During the Grade 9 2012-13 school year, S.S.: received demerits for misbehaving during class; was ejected from a wrestling match and suspended for two matches for punching his opponent several times during the match; and received demerits for engaging in harassment, intimidation and bullying against a female student as a result of unwanted tapping and blowing in her face. During the Grade 10 2013-12 school year, S.S.: was suspended for two football games after he ran onto the field of play from the sidelines during a scrimmage and punched an opponent; was suspended for two more football games after being ejected by officials during a District football game for punching an opponent; was suspended from school for three days after assaulting a student after a District hockey game; was again suspended from school for three days for disorderly conduct after proceeding to head butt a door-window shattering the glass after losing a

wrestling match; received detention for cutting class; and was charged with aggravated assault arising out of the above May 5, 2014, incident.

On May 7, 2014, the District conducted a manifestation determination and concluded that the May 2 aggravated assault was not the result of S.S.'s disability. On May 15 the parties convened a meeting and developed an Individualized Education Program (IEP) placing S.S. on home instruction. On May 22, 2014, a parent signed a "Consent to Amend an IEP Without a Meeting" which states, "[S] will be exempt from taking all final exams for SY 2013-2014." It also states, "[S] has been placed on home instruction until further review. Since it is unsure, at this point, when he may return to school, [S] may miss the full rigors of his courses and may not be present during the review for his final exams." Those statements are also contained in an IEP page entitled, "Modifications and Supplementary Aids and Services in the General Education Classroom. " "[S] has been placed on home instruction as of May 5, 2014, until further review. [S] will miss the full rigors of his courses and may not be present for the preparation and review for finals. Therefore, he will be exempt from taking all final exams for SY 2013-2014."

On June 9, 2014, the Honorable Donald G. Collester issued an Order of Disposition on the criminal charge requiring no contact between S.S. and J.G., substance abuse testing, anger management counseling and a mandatory four days in the juvenile detention center.

On May 28, 2014, Psychiatrist Dr. Ellen Platt evaluated S.S. She summarized that S.S. presents himself with minimal verbal responsiveness and the appearance of minimal social problem solving skills. He has utilized physical aggression as a problem-solving tool. He projects that he does not expect to be able to negotiate and does not indicate in his interview that he has the cognitive or verbal capacity to do so. She observed that S.S. was unable to express remorse for his actions and that his father agreed that S.S. does not acknowledge remorse. Dr. Platt observed that S.S.'s reactions are based upon immediately rising anger and, once angry, he portrays himself as if he is impelled to act out with no intervening behavioral filter or conscience. "His anger, impulse control, and

potential for affective volatility are seriously impaired and are commingled with an inappropriate sense of grandiosity and self-focus." "[S] is not likely to be highly responsive to traditional psychotherapy. In order for this behavior pattern to be addressed, he will need a very intensive combination of individual and family therapy, a CBT approach and anger management. He will likely require long term, well-monitored treatment with similar behavior requirements at home and in school." Dr. Platt opined that, "at this particular point in time there is insufficient information for diagnosis other than meeting DSM-V criteria for: Encounter for mental health services as perpetrator of violence. Additional diagnostic assessment should occur in the future." Finally Dr. Platt recommended that, "[S] is a high-risk student who requires very close supervision in a small, well-monitored classroom situation with reduced, stimulation along with a very strong psychotherapeutic component because if he returns to his current school setting, similar behavior is likely to result due to [S] being over stimulated in that setting. . . . it is safest to make educational arrangements in a less stimulating setting for [S] with more behavioral controls for [S] that incorporate maximal safety considerations for everyone concerned."

S.S.'s parents also had him submit to a psychiatric evaluation by Brian Fennelly, M.D. on June 5, 2014. He referenced an August 13, 2013, Psychological Evaluation where S.S. expressed that, "when I get angry, I want to hurt someone." Dr. Fennelly noted S.S.'s history of problems at athletic events and recites a comment from S.S.'s mother that he becomes angry when told he is not allowed to go out with his friends and has thrown his phone against the wall. Dr. Fennelly described S.S.'s psychiatric history as one of aggression in response to taunting or perceived threat. "He also has a history of predatory aggression as evidenced by the most recent event. He has a history of poor impulse control. . . . His self-reported opinions regarding his anger raised concern with the school psychologist. He has no history of anxiety, obsessions or compulsions." Dr. Fennelly observed that S.S. displayed extraordinarily poor judgment regarding the May incident and its potential consequences. He exhibited an extraordinarily poor capacity for empathy. He almost mocked the victim's mother for her response to her son being beaten. Dr. Fennelly gave a diagnostic impression of Possible Attention Deficit Hyperactivity Disorder and Intermittent Explosive Disorder but suggested further

interviews to confirm the diagnosis. He recommended psychotherapy. "Although [S] has demonstrated aggressive incidents over the course of the year, his current experience with the legal system and recently starting therapy will assist him in making appropriate choices in the future. . . . [S] is psychiatrically cleared to return to academic instruction in a general education school."

The parents have denied consent to send records and to have S.S. undergo a neuropsychological evaluation.

The District contends that there will be irreparable harm if the relief is not granted because it will be unable to satisfy its obligations to provide an appropriate program for S.S. under the IDEA in light of Dr. Pratt's recommendation of a small, closely-monitored program with a strong therapeutic component for S.S. The District stresses that the school year is quickly approaching and, absent parental consent, it will be unable to secure a program. It also cites an inability to comply with Judge Collester's no contact order if S.S. returns to the same school that J.G. attends. The District also argues that the legal right underlying its claim is well settled and that it has a reasonable probability of success on the merits as cases support the proposition that a district must have the maximum amount of data possible to ensure that the unique needs of a child are met, i.e. the neuropsychological evaluation. The District finally argues that the balancing of the equities are on its side since, without the ability to transmit student records, the District is unable to establish an appropriate program for the upcoming year.

Respondents' position

Respondents do not deny the May 5, 2014, incident but stress that it was a reaction by S.S. to the victim reportedly persuading a fifteen-year-old female friend of S.S. to consume alcohol for the purpose of having her engage in sexual activity with a friend of the victim, J.G. Respondents protest that no action has been taken by the District with regard to J.G.'s conduct. They also protest the District's characterization of the attack as a "premeditated aggravated assault" since no such finding was ever made in a court of

competent jurisdiction and that there has been no medical proof submitted that J.G. suffered a concussion.

With regard to the District's determination that S.S.'s conduct was not a manifestation of his disability, the District suspended S.S. from class from May 5 through May 16. The parents understood that S.S. would serve a ten-day suspension and return to school without any action necessary regarding the previously agreed to IEP. However, one day after the manifestation determination, S.S.'s parents received a letter from a law firm indicating that it was representing J.G. and his mother in investigating damages arising out of the May 5, incident. According to respondents, J.G.'s mother has been relentless in her efforts to persuade the District to have S.S. removed from the District. Consequently School Principal Callanan notified the parents of a decision to extend the suspension and home instruction without first seeking authorization from the Board of Education.

When the parents agreed to consent to amend the IEP without a meeting regarding continued home instruction, they understood this to mean only until S.S. took his final exams. They read the agreement to state that S.S. may miss the rigors of his courses and may not be present during the review period for his final exams. They deny, however, that the document indicated that S.S. may not be present in school for the taking of his final exams.

The Amended IEP notes that, commencing on September 4, 2014, S.S. would be reverting back to his original placement. It was with this limiting understanding that they agreed to sign the amended IEP.

Respondent also stresses that Judge Collester, in his deferral of disposition of the charges against S.S., issued a "no contact order" between S.S. and J.G. which is far different from a restraining order.

With regard to Dr. Fennelly's report, respondents stress the reference in the report to an earlier Child Study Team assessment that noted that S.S. was respectful in general

to adults and not a general discipline problem in school. Dr. Fennelly also found that, "S.S. does not consistently violate the rights of others, engage in delinquent behavior on a regular basis, use drugs, run away, or defy authority to the extent that one would see in a child suffering from 'Conduct Disorder.'" Respondents describe Dr. Fennelly's report as balanced as opposed Dr. Platt's report, which they describe as one-sided and biased.

Respondent further argues that the District's efforts to place S.S. out of District are being driven not what is best for him, but rather because of threatened litigation against the District by those representing the interests of J.G.

I have carefully reviewed the papers and supporting documents submitted by the parties and have considered the arguments made**.**

N.J.A.C. 6A:14-2.7(s) provides that emergent relief may be granted if an administrative law judge determines from the proofs that: The petitioner will suffer irreparable harm if the requested relief is not granted; the legal right underlying the petitioner's claim is settled; the petitioner has a likelihood of prevailing on the merits of the underlying claim; and, 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. All of these elements must be satisfied before emergent relief can be granted.

Separately, the "stay put" section of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §1400 et. seq. at §1415(j) requires that:

> During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

The language of this section is unequivocal in that it states plainly that the child shall remain in the then current educational placement until the completion of the due process proceeding. Honig v. Doe, 484 U.S. 305 (1988); Drinker v. Colonial School District, 78 F3d 859, 864 (3rd Cir. 1996). Additionally, this section of the IDEA functions, in essence, as an automatic preliminary injunction. It substitutes an absolute rule in favor of the status quo for a tribunal's discretionary consideration of the factors of irreparable harm and either a likelihood of success on the merits or a fair ground for litigation and a balance of the hardships. Drinker, supra at 865.

The District is seeking an order directing respondents to make S.S. available for a neuropsychological examination and permitting it to send S.S.'s student records to potential placements in the event that such placement is warranted if and when S.S.'s classification for special education changes. Respondents seek an order that primarily directs the District to immediately reinstate S.S. to Hanover Park Regional High School. The respondents' demand implicates the-stay put aspect of the IDEA discussed above.

Although the parents contend that, when they signed the May 16, 2014, "Consent to Amend an IEP Without Meeting," which states that "[S] has been placed on home instruction until further review," they did so with the understanding that this amendment to the IEP only applied up until the time S.S. would have taken final exams and that he would resume his regular classroom assignments at Hanover Park in September. Had they understood that the home instruction would be ongoing, they contend that they never would have agreed to the amendment. This position is belied by other language in the May 16 document that "[S] will be exempt from taking final exams for SY 2013-14." This language establishes that he would not be taking final exams. Respondents also rely on a document provided to them by the District, that they included in their certification, which contains information on an actual IEP form providing for classes at Hanover Park from April 4, 2014 to June 24, 2014, and September 4, 2014 to April 4, 2015. However, this document is the formal amendment to the April 4, 2014, IEP as it references at the top, "Other AMENDMENT 5/16/14." That could only reference the aforementioned amendment signed by a parent of S.S. on May 16, 2014. Accordingly, I **FIND** that the stay put for S.S. is home instruction until the parties either agree on another placement or

until a party unhappy with this placement can prevail in a due process hearing that another placement is an appropriate one. The IEP, as amended upon a parent's May 22 signature, constitutes the stay-put. That is home instruction. Since home instruction is a very restrictive environment, there is a compelling argument in favor of emergent relief in order to move this matter forward expeditiously with the aim of finding a least restrictive environment.

Additional comment must be made with regard to the determination of the Child Study Team for S.S. on May 7, 2014, that his May 5 conduct was not a manifestation of his disability. That was a correct determination because, as of that time, his classification was "eligible for special education and related services under the category of Specific Learning Disability due to a severe discrepancy between his intellectual ability and academic achievement in the area of math calculation." Although his several pre-May 5, 2014, behaviors did not cause the Child Study Team to re-evaluate the nature and extent of S.S.'s disability or disabilities, the May 5 incident reasonably warranted a new assessment of S.S. as to whether his current classification was adequate. That process was moved forward by the parents' May 22 agreement to an Amended IEP. The District's effort to obtain a neuropsychological evaluation of S.S. is an attempt to arrive at a proper classification for S.S., which, in turn, might warrant a change in placement.

With regard to the elements necessary to establish entitlement to emergent relief, I **CONCLUDE** that the District has shown irreparable harm. If the relief is not granted, the District will be irreparably harmed because it will be unable to satisfy its obligation to provide a free appropriate public education for S.S. for lack of an updated evaluation and survey of potential placements. See K.P. o/b/o K.A. v. Maple Shade Bd. of Educ., EDS 8871-09, (September 8, 2009) <http://njlaw.rutgers.edu/collections/oal/>, where a child who displayed aggression was placed on home instruction, which became the stay-put, and the parent refused to agree to cooperate in the evaluation process and allow the release of records.

I **CONCLUDE** that the District has demonstrated that the legal right to the underlying claim is well-settled, and the District has a reasonable probability of success

on the merits. In an effort to determine the services needed to confer a Free Appropriate Public Education (FAPE), the District is obligated to assess each student in all areas of suspected disability. N.J.A.C. 6A:14-2.5 (a) (3). S.S.'s current classification certainly does not address the concerns arising out of the May 5 incident coupled with prior acts of aggression. Although the psychiatric reports of Dr. Platt and Dr. Fennelly diverge on the issue of program placement, they both recognize a concern that has not been evaluated and programmatically addressed in the past. Indeed, petitioner's own psychiatrist has diagnosed possible ADHD and Intermittent Explosive Disorder.[1] I am mindful that S.S. has already been subjected to recent evaluations by two psychiatrists. It has been represented that the requested neuropsychological evaluation is of a different type than those done by Platt and Fennelly. The intrusion that an additional evaluation may impose on S.S. is outweighed by the District's obligation to assess areas of suspected disability. Evaluations should be authorized over parental objections where the provider of services expresses concern for the need for such evaluations. A legitimate basis for concern has been laid. The law is settled in this area as set forth in the above regulation. Accordingly, the District is likely to succeed on this application. The law is also settled with regard to the obligation of a district to explore appropriate placements as an adjunct to updating a child's classification. K.P. o/b/o K.A. v. Maple Shade Bd. of Educ., supra; Washington Tp. Bd. of Educ., EDS 250-04 (February 11, 2004) <http://njlaw.rutgers.edu/collections/oal/>. In the event that there is a change in S.S.'s classification, the District must develop an IEP reasonably calculated to confer meaningful educational benefit and determine an appropriate placement. In such event the District should identify an appropriate alternative as expeditiously as possible. As previously indicated the current stay-put of home instruction is a restrictive environment. In order to anticipate possible program changes, the District should be allowed to be proactive by sharing student records with possible placements subject to the privacy protections that apply to student records. If the parents disagree with the program offered by a future IEP, they reserve the right to pursue relief through due process.

[1] It is not appropriate in an emergent proceeding to make specific findings as to the circumstances of the prior and May 7 incidents. I need not do so in light of the comments and concerns of both psychiatrists.

I further **CONCLUDE** that, as in Maple Shade, the balancing of the equities tip to the District. Without the requested evaluation and without the transmission of student records to potential placements, the District will be unable to fulfill its obligation to offer S.S. a FAPE. Submission to the proposed evaluation, although perhaps frustrating and somewhat intrusive and inconvenient to S.S. is not so invasive or potentially deleterious as to tip the balance of the equities to respondents. Additionally, as previously mentioned, the transmittal of student records to out-of-district placements does not mean that respondents are compelled to agree to such a placement or forfeit their right to challenge the placement through due process.

ORDER

I **ORDERED** that the District's application for emergent relief be **GRANTED.**

It is further **ORDERED** that the District may release S.S.'s student records to out-of-district programs.

It is further **ORDERED** that respondents make S.S. available for a neuropsychological evaluation and that S.S. cooperate with same.

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.A. § 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.A. § 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.

August 12, 2014

DATE **JESSE H. STRAUSS**, ALJ

Date Mailed to Parties: 8/12/14

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