# *State of New Jersey*

OFFICE OF ADMINISTRATIVE LAW

**DECISION**

**EMERGENT RELIEF**

OAL DKT. NO. EDS 11446-14

AGENCY DKT. NO. 2015 21720

**E.B. ON BEHALF OF B.A.,**

Petitioner,

v.

**BURLINGTON CITY BOARD OF EDUCATION,**

Respondent.

_____

**E.B.**, petitioner pro se

**Tracey L. Schneider**, Esq., for respondent (Parker McCay, PA, attorneys)

Record Closed: September 19, 2014 Decided: September 22, 2014

BEFORE **ROBERT BINGHAM II**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner E.B., on behalf of her daughter, B.A., requests an emergent order providing home instruction pending a due-process hearing. On September 9, 2014, petitioner filed a request for a due-process hearing with the New Jersey Department of Education, Office of Special Education Programs (OSEP), along with a request for emergent relief. On September 11, 2014, the emergent matter alone was filed with the Office of Administrative Law for oral argument. The matter was heard on September 19, 2014, at which time the record closed.

## FACTUAL DISCUSSION

Based upon a review of the pleadings, and the parties' written submissions and attached exhibits, I **FIND as FACT** the following.

B.A. is a twelve-year-old seventh-grade student who is eligible for special education and related services under the classification of specific learning disability, in the area of listening comprehension. During the 2013–14 school year she was placed at the Wilbur Watts Intermediate School (Wilbur Watts), where her program consisted of a self-contained class for language arts and science and a general education inclusion class for math, social studies, physical education/health and lunch. Pursuant to an IEP dated July 21, 2014, following tri-annual re-evaluations, respondent (the Board) recommended a transition and placement in the resource program at the Burlington City High School (Burlington) for the 2014–15 school year.[1] However, to address parental concerns, the Board also offered a self-contained program at Burlington. According to the Board's child study team supervisor, Suzanne Cote, nothing in the evaluations indicated any safety issues for B.A., as are now asserted by petitioner.

Petitioner has withheld B.A. from attending Burlington altogether since the beginning of the 2014–15 school year, causing the Board to level truancy charges. On September 9, 2014, a safety plan was prepared for B.A., through the "Children's Mobile Response and Stabilization System." (P-1.) It indicates that she was anxious and depressed and lists "Risks/Triggers" as "school." (P-1.) By letter dated September 18, 2014, her pediatrician, Pascale Bastien, M.D., indicated that B.A. is diagnosed with anxiety disorder. The letter states, "based on multiple incidents that have occurred in school in the past four years, it would be detrimental to [B.A.'s] health for her to stay in the Burlington City school district. I recommend that she be moved to a district that will better follow her IEP." (P-3.)

[1] B.A. was placed in the resource program for math, language arts, science and social studies, and in general education for physical education, specials, and lunch/recess.

A psychological evaluation dated June 25, 2014, prepared by school psychologist Ricky Reid, Ed.S., NCSP, (P-2) summarized that B.A. was in the low-average range for overall cognitive ability (problem solving), the average range for verbal comprehension, the borderline range for perceptual reasoning (nonverbal), the low-average range for working memory and the borderline range for processing speed. A behavioral rating scale completed by her teacher at that time placed her in the "at-risk range" on the BASC-II, which measures positive and negative behaviors that may be exhibited in class and at home. Petitioner also completed the evaluation and rated B.A. in the low range. B.A.'s scores indicated that she was "not engaging in any problematic or disruptive behaviors at home." (P-2.) In the evaluation interview, B.A.'s mood, affect, and interactions were appropriate. She reported that she did not like school because "school is boring." All recommendations related to improving her vocabulary, reading, verbal reasoning, and/or visual-spatial skills.

Petitioner argues that B.A.'s safety and welfare are at risk at Burlington because she was harassed at Wilbur Watts, her IEP was not followed and she has regressed, and District staff has been nonresponsive. The harassment purportedly came from a teacher who spoke at or about her in an upsetting manner and who neglected her needs, such as having to go to the bathroom. However, no harassment, intimidation or bullying (HIB) complaint was filed and petitioner is unaware whether that teacher has transferred from Wilbur Watts to Burlington. The school's failure to follow her IEP included such things as not using the FM system, not getting her snack, and not allocating sufficient pullout resource-room space. And at the beginning of the current school year, petitioner requested homework and books but has not received them. Petitioner asserts that B.A. is a young twelve-year-old with low self-esteem. She is concerned about B.A. co-mingling with the eleventh- and twelfth-graders and walking home alone. Her overall concern is based upon a lack of confidence with school staff.

Respondent argues that no safety or welfare issues had been reported and adequate safeguards are provided through the proposed IEP. As a preliminary matter, petitioner has not made a threshold showing required for emergent relief in a special education case. What is more, she has not satisfied the general four-prong criteria for emergent relief. First, there is no proof of irreparable harm, as the safety plan is not

school-related and any anxiety can be addressed within the proposed program and placement. Second, there is no evidence that the legal right underlying petitioner's claim, which is vague, is well settled. Third, there is no substantial likelihood of prevailing on the merits because there is nothing in school records to suggest that B.A.'s health and safety are at risk. And, finally, a balance of the equities favors respondent.

## LEGAL ANALYSIS AND CONCLUSION

The standards that must be met by the moving party in an application for emergent relief in a matter concerning a special-needs child are embodied in N.J.A.C. 6A:14-2.7(r)–(s), N.J.A.C. 1:6A-12.1, and Crowe v. DeGioia, 90 N.J. 126, 132–34 (1982). As a preliminary matter, the request for emergent relief must pertain to one of the following issues:

> 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; and
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> iv. Issues involving graduation or participation in graduation ceremonies.
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> [N.J.A.C. 6A:14-2.7(r)(1).]

Here, the application for emergent relief concerns an issue of placement pending the outcome of the due-process hearing, N.J.A.C. 6A:14-2.7(r)(1)(iii), notwithstanding respondent's argument that petitioner may lack sufficient proofs to prevail.

As set forth in Crowe, N.J.A.C. 1:6A-12.1(e) and N.J.A.C. 6A:14-2.7(s), an application for emergent relief will be granted only if all four of the following requirements are met:

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.

[N.J.A.C. 6A:14-2.7(s).]

"Each of these factors must be clearly and convincingly demonstrated" by the moving party. Waste Mgmt. of N.J. v. Union Cnty. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

Here, petitioner does not satisfy the above criteria for emergent relief. Regarding the first prong, petitioner has not clearly established that B.A. will suffer irreparable harm if she is not placed on home instruction. As conceded by petitioner during oral argument, her concern is what may occur at Burlington, based upon B.A.'s age and her deficits, her experience at Wilbur Watts, and petitioner's lack of confidence with school staff. However, school records do not indicate any risk to B.A.'s safety or welfare and there is no documentation in the record to indicate a pattern of past harassment at Wilbur Watts. Respondent correctly notes that the safety plan is not actually school related, as B.A. is yet to even attend Burlington and interact with students or staff. Further, Dr. Bastien's opinion is vague and conclusory and shows no indication of a familiarity with B.A.'s proposed educational program and placement for the 2014–15 school year. Additionally, there is no showing that the proposed program at Burlington would not be sufficient to support B.A. in any potential situation relative to her anxiety. In short, there is no showing of a substantial risk of physical injury or unavoidable significant interruption of educational services. C.B. v. Jackson Twp., EDS 4153-09, Order Granting Emergent Relief (September 9, 2009), <http://njlaw.rutgers.edu/collections/oal/>.

Regarding the third prong, petitioner also has not demonstrated a likelihood of success on the merits of the underlying claim. Her petition generally asserts that the Board's proposed program and placement are not designed to allow for B.A. to "meet her educational potential," and that her welfare and safety would be in danger given the student population at Burlington.

In defining the contours of a free appropriate public education (FAPE), the Supreme Court explained that an appropriate IEP does not need to maximize a student's potential or provide the best possible education at public expense, but instead must be "reasonably calculated to enable the child to receive educational benefits." Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 207, 102 S. Ct. 3034, 3051, 73 L. Ed. 2d 690, 712 (1982); see also Munir v. Pottsville Area Sch. Dist., 723 F.3d 423, 426, 434 (3d Cir. 2013) (reaffirming the meaningful-educational-benefit standard). It is often stated that the IDEA requires a board of education to provide the educational equivalent of a "serviceable Chevrolet" to special education students, it does not require provision of a "Cadillac" of education. C.T. and T.T. ex rel R.T. v. Robbinsville Bd. of Educ., EDS 04682-10, Decision (January 14, 2011), <http://njlaw.rutgers.edu/collections/oal/>; Doe v. Bd. of Educ. of Tullahoma City Schs., 9 F.3d 455, 459–60 (6th Cir. 1993); see also J.C. and E.C. ex rel K.C. v. Warren Hills Reg'l High Sch. Bd. of Educ., EDS 11048-02, Decision (August 12, 2003), <http://njlaw.rutgers.edu/collections/oal/>.

Further, a board of education is required to educate a child with an educational disability in the least restrictive environment (LRE). 20 U.S.C.A. § 1412(a)(5)(A); 34 C.F.R. § 300.114 (2014). Thus, disabled children should be placed in regular education classes to the maximum extent appropriate, and removed from the regular education environment only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C.A. § 1412(a)(5)(A); see Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036 (5th Cir. 1989); Oberti v. Bd. of Educ. of Clementon Sch. Dist., 995 F.2d

1204 (3d. Cir. 1993).[2] A determination of the LRE must, however, include consideration of any potential harmful effects that the placement would have on the child. 34 C.F.R. § 300.116(d) (2014); N.J.A.C. 6A:14-4.2(a)(8). For instance, it is recognized that bullying can create a hostile environment that interferes with a student's learning ability, and thus result in a denial of FAPE. There must, however, be sufficient competent evidence of the hostility and interference with the student's ability to learn. Shore Reg'l High Sch. Bd. of Educ. v. P.S. ex rel P.S., 381 F.3d 194, 197 (3d Cir. 2004); L.S. ex rel C.S. v. Cent. Jersey Arts Cmty. Sch. Bd. of Educ., EDS 09573-07, Decision (October 11, 2007), <http://njlaw.rutgers.edu/collections/oal/> ; see also H.S. and N.S. ex rel A.S. v. Moorestown Twp. Bd. of Educ., EDS 10210-07, Decision (March 20, 2008), <http://njlaw.rutgers.edu/collections/oal/> ; L.T. and L.T. ex rel K.T. v. Neptune Twp. Bd. of Educ., EDS 11709-11, Decision (March 1, 2012), <http://njlaw.rutgers.edu/collections/oal/> .

Here, petitioner has not presented sufficient evidence to show a probability that the program and placement proposed by the Board fail to offer a free appropriate public education in the least restrictive environment. Indeed, home instruction is much more restrictive. Similarly, there is insufficient expert opinion or conclusive data that there exists a risk to B.A.'s welfare or safety that would require a change in placement. Therefore, it cannot be said that there is a likelihood of success on the merits of the underlying claim.

Under the facts and circumstances presented, further analysis is not required because petitioner is unable to meet all four criteria required for emergent relief.

[2] In Oberti, the Third Circuit used a two-prong test to determine if a district is complying with the mandate to provide FAPE within the LRE. First, a court must determine "whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily." Oberti, supra, 995 F.2d at 1215. Factors the court should consider in applying this prong are: (1) the steps the school district has taken to accommodate the child in a regular classroom; (2) the child's ability to receive an educational benefit from regular education; and (3) the effect the disabled child's presence has on the regular classroom. Id. at 1215–17. Second, if the court finds that placement outside of a regular classroom is necessary for the child's educational benefit, it must evaluate "whether the school has mainstreamed the child to the maximum extent appropriate, i.e., whether the school has made efforts to include the child in school programs with nondisabled children whenever possible." Id. at 1215.

Therefore, I **CONCLUDE** that petitioner has not proved that B.A. will be irreparably harmed if emergent relief is not granted. I further **CONCLUDE** that petitioner has not sufficiently demonstrated a likelihood of prevailing on the merits. Accordingly, I **CONCLUDE** that petitioner has not established the necessary criteria for emergent relief.

## DECISION AND ORDER

Therefore, the petitioner's request for emergent relief is **DENIED**. Accordingly, it is hereby **ORDERED** that the petition for emergent relief is hereby **DISMISSED**.

## ORDER

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 parent, 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 feels that this decision is not being fully implemented with respect to the program or services, this concern should be communicated in writing to the Director, Office of Special Education.

September 22, 2014 _____

DATE **ROBERT BINGHAM II**, ALJ

Date Mailed to Parties: _____

/bdt

## APPENDIX

## WITNESSES

**For Petitioners**:

None

**For Respondent**:

None

## EXHIBITS

**For Petitioners**:

P-1 Children's Mobile Response and Stabilization System Safety Plan, dated September 9, 2014

P-2 Confidential Psychological Evaluation by Child Study Team, dated June 25, 2014

P-3 Letter from Pascale Bastien, M.D., dated September 18, 2014

**For Respondent**:

R-1 IEP, dated July 21, 2014