State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

DECISION

EMERGENT RELIEF

OAL DKT. NO. EDS 11818-14

AGENCY DKT. NO. 2015-21729

J.W. o/b/o. M.S.,

Petitioner,

v.

GREATER EGG HARBOR REGIONAL HIGH BOARD OF EDUCATION,

Respondent.

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Catherine Reisman, Esq., for petitioner (Freeman, Carolla, Reisman and Gran, attorneys)

Louis Greco, Esq., for respondent

Record Closed: September 22, 2014 Decided: September 23, 2014

BEFORE **W. TODD MILLER:**

PROCEDURAL BACKGROUND AND FACTUAL SUMMARY

On September 12, 2014, petitioner filed a request for emergent relief with the New Jersey Department of Education, Office of Special Education Programs (OSEP). Petitioner requested that her daughter, M.S., be permitted to return to Cedar Creek High School for the 2014-2015 school year – as a special needs student or with a 504 accommodation. M.S.'s home school is Absegami High School, based upon her

residence in Egg Harbor City. Cedar Creek is one of three high schools within the regional district, Absegami and Oakcrest High Schools being the other two. M.S. attended Cedar Creek High School for her freshman and sophomore years. She was enrolled in a magnet program for environmental sciences but failed out of the program at the end of her sophomore year. School policy requires that she be returned to her home district within the regional school system if she failed out of the magnet program.

The matter was transmitted and filed to the Office of Administrative Law on September 17, 2014, to be heard as an emergent contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. On September 22, 2014, oral argument was on emergent relief filings. For the reasons stated below, the emergent relief sought by petitioner is **DENIED**.

M.S. is a sixteen-year-old student that is entering eleventh grade. Petitioner's household experienced several hardships and tragedies in recent years. There was a death of a stepbrother due to a drug overdose and another stepbrother suffers from drug addiction.

W.S. enrolled in the Cedar Creek High School's environmental sciences magnet program as an incoming freshman and has attended Cedar Creek ever since. The regional district's policy provides that if a magnet student receives a failing grade in the magnet program before the conclusion of their sophomore year, they will be removed from the program and returned to their home district. Students and parents are advised of this school policy before they accept admission into the magnet program.

In this case, M.S. failed her environmental science course during her sophomore year (2013-2014) and therefore had to leave Cedar Creek High School and return to Absegami High School.

M.S. "refuses[1]" to transfer back to Absegami High School for the 2014-2015 school year claiming that she bonded with her peers while at Cedar Creek High School. An involuntary or forced return to Absegami High School will seriously undermine her emotional health and academic progress, according to petitioner and her experts. Petitioner contends that M.S. is suffering from, inter alia, depression and that if ordered back to Absegami, she will refuse to go to school. Petitioner has not returned to school (Absegami) since the beginning of the year. Home schooling is being designed and will be offered in the near future, including retroactive or compensatory instruction back to beginning of the school year.

M.S. was not classified or receiving special education services prior to this action. Petitioner contends that M.S. is eligible for special education services or 504 accommodations due to a diagnosis of Attention Deficit Hyper Activity Disorder (ADHAD) and/or depression. Petitioner further avers that M.S. has had these deficits for an extended period and that the district failed to diagnose or classify her. Petitioner primarily relies upon academic testing performed by Diane DeMaio-Feldman, PhD., Certified Clinical Neuropsychologist in the spring of 2014 (Petitioner's Exhibit B). M.S. is experiencing difficulty both cognitively and emotionally according to DeMaio-Feldman. Petitioner further argues, based upon her expert's submissions that M.S. is in a fragile mental state due to her ADHD, depression, and family history. Any disruption of her school setting will aggravate these conditions.

SPECIAL EDUCATION LAW

State and federal laws require local public school districts to identify, classify and provide a free and appropriate public education to children with disabilities. 20 U.S.C.A. §1412. N.J.S.A. 18A:46-8, 9. A "free appropriate public education" is special education and related services that are provided at public expense, under public supervision and direction, without charge; meeting the standards of the State educational agency; include an appropriate preschool, elementary, or secondary school education; and provided in conformity with an IEP as required under 20 U.S.C.A. §1414(a)(5). 20

[1] Petitioner's memorandum of law at page 3 states that petitioner is **refusing** to go back to Absegami High School. It could be construed that petitioner is being offered a free and appropriate pubic school education but is making a conscious choice to reject same.

U.S.C.A. §1401(a)(18). "Special education" is specially designed instruction meeting the educational needs of students with disabilities including, but not limited to, subject-matter instruction, physical education and vocational training. Id. at (16); c.f. N.J.A.C. 6A:14-1.3.

The education of a child with a disability must be tailored to the unique needs of each child through an Individualized Education Program (IEP). The provisions of the IEP must be reviewed and, if appropriate, revised periodically, but not less than annually. 20 U.S.C.A. §1414(a)(5). An IEP is a written plan setting forth measurable annual goals and short-term objectives or benchmarks and describing an integrated, sequential program of individually designed instructional activities and related services necessary to achieve the stated goals and objectives. The IEP must establish the rationale for a pupil's educational placement, serve as the basis for program implementation, and comply with the mandates set forth in N.J.A.C. 6A:14-1.1 to -10.2. N.J.A.C. 6A:14-1.3.

A board of education is **required to educate a child with an educational disability in the least restrictive environment possible (LRE)**. When an IEP does not describe specific restrictions, the **student shall be educated in the school he or she would attend if not disabled.** N.J.A.C. 6A:14-4.2(a)7 [emphasis added].

Federal law is complied with when a local school board provides a handicapped child with a personalized educational program and sufficient support services to confer some educational benefit on the child. Hendrick Hudson Dist. Bd. of Ed. v. Rowley, 458 U.S. 176 (1982). The Third Circuit Court of Appeals indicated that the appropriate standard is whether the IEP offers the opportunity for "significant learning" and "meaningful educational benefit." Ridgewood Bd. Of Educ. v. N.E., 172 F.3d 238 (3d. Cir., 1999).

The burden of proving unreasonableness for actions that is within the management's prerogative for a local board of education is on petitioner. G.M. v. Roselle Park Borough Board of Education, 95 N.J.A.R. 2d. (EDU) 107, 109. It will not be "usurped or assumed by the Commissioner of Education absent a definitive showing

of bad faith or arbitrary actions taken in bad faith without a rational basis." Ibid. Local boards of education have reasonable discretion for various managerial matters. Local boards of education's authority to design school attendance area boundaries is "well-established." Hoffman v. Board of Education of the Twp. of Cherry Hill, 1973 S.L.D. 406, 408 (citations omitted.) A board's determination in that respect will be upheld if such action were not arbitrary, capricious, or discriminatory. See, Hoffman, at 409; J.A.P. v. Moorestown Board of Education, 1988 S.L.D. 2065, 2070 (citation omitted). The import of the aforementioned authorities is that a board of education is free to utilize its' management prerogative when dealing internal matters involving curriculum, attendance and other similar areas so long as it is rationally based and free from any arbitrary action.

EMERGENT RELIEF

Petitioner carries the burden in seeking emergent relief. The standard is set forth in Crowe v. DeGioia, 90 N.J. 126 (1982). See also, N.J.A.C.[2] 1:6A-12.1(e). Crowe requires a showing of **each** of the four specific criteria:

1. The relief must not be granted except when necessary to prevent irreparable harm, or harm for which there is no adequate legal remedy;

2. Relief should not be granted when the legal right underlying the applicant's claim is unsettled;

3. The applicant for relief must make a preliminary showing of a reasonable probability of ultimate success on the merits; and

4. The relative hardship to the parties in granting or denying relief must be considered. Crowe at 32-34.

[2] N.J.A.C. 1:6A-12.1(e) embodies the New Jersey emergent special education criteria. The movant must establish 1. The applicant has a reasonable probability of ultimately prevailing on the merits; 2. Either serious physical harm will result to the student if the relief is not granted, or the student's education program will be terminated or interrupted; and 3. The relief requested is narrowly defined to prevent the specific harm from occurring and will not cause unreasonable expense and substantial inconvenience.

I **CONCLUDE** that petitioner has not met elements numbers 1 and 3 above. M.S. failed an environmental sciences course and has been removed from the magnet program, in accordance with school policy. This policy was made clear to petitioner before M.S. accepted admission into the magnet program. Petitioner claims that returning M.S. to her home school (within the same regional district) will be detrimental to her. This claim is unclear from this emergent record that did not include testimony, credibility determinations and independent evaluations.

Management has the prerogative set the jurisdictional boundaries for its students in terms residency, budgets, teacher-student ratios, transportation, and the like. This prerogative should not be disturbed by this tribunal, unless this is a compelling reason to do so. If M.S. is truly in need of special education services, there were no proofs that her home school (Absegami) is in any way inferior to the magnet school (Cedar Creek). M.S. will not be disadvantaged or irreparably harmed by attending Absegami. Each school has a special education department with professional and capable staff that falls under the management of the regional district. Here Absegami is the LRE for M.S., assuming she is otherwise eligible for special education services. N.J.A.C. 6A:14-4.2(a)7. Therefore, I **CONCLUDE** no irreparable harm will result if M.S. is required to attend Absegami is a special education or similar program, over Cedar Creek, as directed by management.

Petitioner contends that it is not in M.S.'s best interests to be forced to return to Absegami, because it will aggravate her sensitive emotional state, since she is depressed. I agree that relocating students can be unsettling. M.S. will lose contact with the students she bonded with over the last two years. I am mindful, even without an expert opinion, that changing schools or programs disrupts student relationships with their peers and can be upsetting. It is certainly cognizable that any material program change would create some hesitation or concern for students and parents. But, if this were the standard applied to these facts, no change in the school setting, programs, or location would ever be permitted once the student claimed they were upset. And in this case, the change is not nearly as drastic because M.S. will be returning to her home

district (i.e. LRE) which includes many of the same students she bonded with during elementary and junior high school.

The proposed change must have credible, material and detrimental clinical or educational significance to warrant overriding management. Management is not convinced that petitioner is truly depressed and that M.S.'s return to Absegami will be detrimental as petitioner claims. M.S. is not receiving any treatment for depression, is not in any counseling program and is not being proscribed any mediations for depression. Her depression has not been diagnosed as organic or genetic. Rather it appears to be from disappointment related to failing out of the magnet program.

The timeline corroborates that this is what happened. Petitioner was warned by letter,[3] dated February 25, 2014, that she was failing the magnet program and at risk of losing her placement at Cedar Creek. Immediate intervention was suggested to prevent this from happening (Certification of John Ragan – Supervisor of Special Services). In response, petitioner commenced a strategy to neutralize S.W.'s potential removal from Cedar Creek, if she failed the magnet program, by claiming an emotional strain, if she was moved back to Absegami. Her evaluations by DeMaio-Feldman did not start until April 2014. I the first paragraph of the DeMaio-Feldman reports it is noted that M.S. is at risk of being transferred from Cedar Creek to Absegami due to failing the magnet course. Petitioner wants to have it her way and stay at Cedar Creek under the guise of special education and/or depression claims.

I **CONCLUDE** that petitioner has not satisfied the likelihood of success on the merits standard. Petitioner may have some educational deficits as described by DeMaio-Feldman, or underlying depression, but these can be addressed by an IEP or in a 504 plan at Absegami. Indeed, if M.S. is clinically depressed, there was no suitable explanation why she is not receiving treatment.

The DeMaio-Feldman's studies appear to have been primarily academic in nature by virtue of the test administered, and that her findings of depression were incidental to her primary task. The summaries and recommendations barely discuss

[3] Petitioner claims she did not receive this letter, according to her attorney.

depression; fail to recommend a significant course of treatment for depression; and as admitted by petitioner, M.S is not involved in any ongoing treatment; albeit medication or counseling. If a sixteen-year old is experiencing depression that is clinically established and organic in nature, an extensive discussion of this disorder would be expected and a treatment plan or referral accepted by M.S.

The absence of actual treatment indicates that M.S.'s depression is more likely related to not getting her way (i.e. failing out of the magnet program and having to return to Absegami). Absent more persuasive clinical evidence, petitioner has not met its burden of proofs regarding the likelihood of success on the merits or of irreparable harm.

It is worth emphasizing that the conclusions reached herein are being made pursuant to the standard for emergent relief. These conclusions are subject to change when the case is fully presented. If petitioner is determined to be suffering from clinical depression after a full presentation, much more assistance will be needed. Depression is not something to be taken lightly and will not be remedied merely by shuffling a student back to the school of her choice.

Finally, respondent offered to fund a myriad of independent evaluations, including psychiatric studies, and to fund evaluations by petitioner's own expert (James B. Gillock, a licensed psychologist). If these studies and reports indicate a need for further services, change in program, or placement back at Cedar Creek, respondent agreed evaluate and consider same.

ORDER

Based upon the forgoing, it is **ORDERED** that petitioner's request for emergent relief, seeking an immediate placement back at Cedar Creek High School, is **DENIED**. The respondent shall immediately provide home schooling to S.W., should she refuse to attend Absegami High School, pending the outcome of a hearing on the merits. The home schooling ordered herein shall end once there is a determination on the merits of the underlying claim or the hearing process is otherwise concluded.

It is further **ORDERED** that the Emergent Case is resolved and the matter will be returned to OSEP in accordance with OSEP's letter, dated September 12, 2014.

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.

September 23, 2014 _____

DATE **W. TODD MILLER**, ALJ

Date mailed to Agency: _____

Date Mailed to Parties: _____

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DOCUMENTS CONSIDERED

For Petitioner:

Pleadings, Emergent Submissions, dated September 11, 2014, and Exhibits

For Respondent:

Respondent's Brief in Opposition, dated September 18, 2014, and Exhibits