State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

DECISION ON

EMERGENT RELIEF

OAL DKT. NO. EDS 16366-17

AGENCY DKT. NO. 2018-27100

K.T. ON BEHALF OF B.T.,

Petitioner,

v.

WASHINGTON TOWNSHIP BOARD OF EDUCATION,

Respondent.

Bradly Flynn, Esq., for petitioner (Montgomery Law, attorneys)

Sanmathi Dev, Esq., for respondent (Capehart Scatchard, P.A., attorneys)

Record Closed: November 17, 2017 Decided: November 28, 2017

BEFORE **DOROTHY INCARVITO-GARRABRANT**, ALJ:

STATEMENT OF THE CASE

Petitioner K.T., the mother of B.T., filed a request for relief with the Department of Education, Office of Special Education Programs (OSEP) to compel respondent Washington Township Board of Education (WTBOE or District) to provide educational services, including homebound instruction, to return B.T. to the classroom, and to require respondent to complete a "behavior assessment or behavioral plan." The petitioner is also seeking emergent relief regarding current receipt of educational services.

PROCEDURAL HISTORY

On November 2, 2017, Petitioner filed this Emergent Petition with OSEP, which transmitted the matter to the Office of Administrative Law, where it was filed on that date and scheduled for oral argument on November 6, 2017.

On November 6, 2017, respondent submitted a Brief in Opposition to the Order to Show Cause with supporting documentation, and Certifications of Angela Costello, Grades 9-10 Assistant Principal, and Jennifer Grimaldi, Director of District School Counselling. A Pre-Hearing Conference was conducted on November 6, 2017, at which time both parties advised that a Disciplinary Hearing was scheduled before respondent on Monday, November 9, 2017, the result of which could resolve or materially impact a decision in this proceeding. Both parties consented to an adjournment of the Oral Argument for one week to receive respondent's disciplinary decision. That decision, which upheld the administration's recommended discipline, was received on November 14, 2017. B.T. was removed from WTHS through the end of the third marking period, pending the results of the Child Study Team evaluations.

Oral argument was conducted on November 17, 2017, at the OAL offices in Mercerville. On November 16, 2017, respondent submitted supplemental Certifications from Angela Costello and Jennifer Grimaldi with supporting documentation and a written legal argument. No written submissions were provided by Petitioner.

FACTUAL DISCUSSION

For purposes of deciding this application for emergent relief, the following facts are undisputed and **I FIND** them as **FACT**.

B.T. is tenth grade general education student with a Section 504 accommodation plan at Washington Township High School (WTHS).[1] On October 12, 2017, B.T. was

[1] On April 7, 2017, respondent found B.T. eligible for a Section 504 accommodation plan for major depression disorder and oppositional defiance disorder. Accommodations provided to B.T. included being able to miss homeroom and sign in by 7:30 a.m. at the attendance office and extended time for homework

suspended from school for cutting class, being in an unauthorized area, disruption of the educational process, provoking a fight, physically violating the rights of others, and defiance of authority after she attempted to assault another student. (R-1 at 3.) During that incident, B.T. aggressively and violently went after another student who, she believed, was involved in a separate incident with one of her friends. This resulted in juvenile charges being issued to B.T. for Aggravated Assault on a Police Officer, Aggravated Assault on the School Security Guard, Disorderly Conduct, and Resisting Arrest. (R-1 at G).

On October 16, 2017, the District notified B.T.'s parents that she was suspended effective October 12, 2017, pending a disciplinary hearing and that B.T. would receive home instruction pending the outcome of the hearing. (R-1 at H). On October 23, 2017, the District held a manifestation determination meeting. It determined that B.T.'s conduct on October 12, 2017, was not a manifestation of her disability and therefore, B.T. could be disciplined as a general education student. (R-1 at I). Relative to the instant Order to Show Cause, no competent evidence was presented by petitioner to demonstrate that B.T. lacked the capacity to appreciate the egregious nature of her actions or that they were excusable.

On October 27, 2017, B.T. was referred to the Child Study Team. On November 6, 2017, an initial evaluation planning meeting was held to determine if B.T. should be formally evaluated. The Child Study Team determined that B.T. should be evaluated and petitioner consented to same. (R-1 at L). Four evaluations are scheduled, including a psychiatric evaluation on December 27, 2017.

Pending the disciplinary hearing, the District offered to educate B.T. in an alternative school program, the "Ombudsman Program," which is located on the WTHS grounds or to provide home instruction. Petitioner declined placement in the alternative school program. Petitioner maintained that such a placement would isolate her daughter from her peers and cause her to be ostracized, both of which would cause her depression

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and exams. (R-1 at A). This 504 plan was amended on September 20, 2017, to accommodate tardiness in response to a request from B.T.'s treating physician who advised that B.T. was having "extreme difficulty getting to school on time." (R-1 at B).

to worsen. As a result, the District sought to schedule home instruction during the weekdays after school and evenings because the instruction would be provided by teachers currently employed at WTHS, who are teaching their subjects in school during the day. Petitioner interfered with the scheduling of the homebound instruction by insisting that the instruction occur during the school day, and if it was to occur in the evening then only on certain days as B.T. works a part-time job in a restaurant on Wednesday and Friday nights. Petitioner contended that it is important for B.T. to have peer interactions and her job is her only opportunity for such experiences because she has been suspended from school. Therefore, petitioner rejected any home instruction on those nights. Petitioner memorialized her prioritization of B.T.'s participation in her part-time job over the home instruction in emails to respondent. (R-1 at M).

Additionally, home instruction was required to begin on October 18, 2017. Respondent acted in good faith and attempted to establish a schedule meeting the petitioner's demands. The history of the home instruction is as follows: On October 24, 2017, no parent was continuously present during the scheduled home instruction session, even though petitioner was advised of this requirement before home instruction began. On November 6, 2017, no one was home at the petitioner's residence when the teacher arrived. Neither petitioner nor her husband, B.T.'s father, could be reached by telephone. On November 7, 2017, petitioner cancelled the home instruction scheduled for that day. As a result, B.T. only received four hours of instruction between October 18, 2017 and November 8, 2017. On November 14, 2017, B.T.'s home instruction had to end prematurely because B.T.'s father had to leave the home.

On November 13, 2017, respondent held a disciplinary hearing relative to B.T.'s actions and long-term suspension. On November 14, 2017, respondent upheld the administration's recommended discipline. B.T. was removed from WTHS through the end of the third marking period, pending the results of the Child Study Team evaluations. Respondent provided petitioner and B.T. with the option to attend the "Ombudsman Program" in the alternative school, located on WTHS property, during the school day or continue with homebound instruction in the evenings. To limit the scheduling difficulties, respondent provided petitioner with a home instruction schedule which included

weekdays after school and weekend days, and did not include Wednesday and Friday evenings so that B.T.'s work schedule could be accommodated. Respondent also offered to allow B.T. to take her courses through an online program called Educere. Petitioner declined the alternative school program and the online program.

Arguments

For petitioner

Petitioner argued that although OCEP only transmitted one issue, whether B.T. was receiving educational services, she requested relief that included B.T. receiving educational services and returning B.T. to the general education setting. Petitioner argued that B.T.'s last placement at WTHS was in the general education setting. Petitioner alleged that she advised the District in July 2017, that her daughter needed a functional behavioral evaluation. Petitioner alleged that B.T. suffered trauma and resulting difficulties after she had been beaten by several adults. Petitioner contended that because she had advised the District that B.T. needed to be evaluated that she was a student who should be considered to be a special education student and afforded the protections provided by "stay put" law. Therefore, petitioner concluded that B.T. should be returned to the general education setting because that was her last placement. The discipline materially changed B.T.'s last agreed-upon placement in the general education setting without petitioner's consent. Petitioner argued that "stay put" negated the discipline implemented by respondent after the disciplinary hearing.

Additionally, Petitioner asserted that although OCEP tasked this tribunal with determining one issue, whether the minor student is currently not receiving educational services, petitioner's Order to Show Cause requested B.T. be returned to the classroom and that issue must be determined through an analysis applying "stay put."

Alternatively, petitioner argued that she satisfied the requirements of Crowe v. DeGoia, 90 N.J. 126 (1982), and was entitled to have the relief she requested granted. In this regard, petitioner also argued that the suspension through the third quarter will cause

irreparable harm to B.T. B.T. will be isolated from her classmates, school activities, and her peers. This will exacerbate B.T.'s depression and oppositional defiance diagnoses and cause her to suffer harm. Petitioner stated that respondent is not providing educational services and BT has received only four hours of educational services since October 12, 2017.

Additionally, respondent is not providing educational services in the least restrictive environment. Partially for this reason, petitioner declined the alternative high school. Petitioner asserted that attendance at the alternative school will stigmatize and ostracize B.T. Petitioner submitted that the alternative school program was a "warehousing" of students who listen to music on their earbuds all day. Petitioner argued that B.T. did not need to be isolated with students who have behavioral issues and be stigmatized by attending that program in the separate alternative school building on campus. Petitioner continued to maintain this position even when questioned about the fact that petitioner asserted that B.T. required a functional behavioral analysis, and believed that B.T. had behavioral issues. Petitioner admitted that the alternative school program was designed to provide a supportive and accommodating educational environment for students with behavioral problems. However, petitioner contended that the alternative school program was inappropriate for B.T.

Petitioner argued that the legal right underlying petitioner's claim is well settled. "Stay put" required the District to maintain B.T. in her last placement because the District was aware that BT was a student who required services. B.T. has a right to be educated in the least restrictive environment. Suspension and home instruction created the most restrictive environment. Additionally, petitioner asserted that the manifestation determination hearing was materially flawed because a functional behavioral assessment had not been performed.

Petitioner argued that she has a likelihood of success on the merits. Respondent is required to return B.T. to the general education setting because that was her last placement. Alternatively, respondent failed to provide home instruction to B.T. as evidenced by the fact that she had only four hours in three weeks.

Finally, petitioner argued balancing the interests of the parties shows that B.T. will suffer greater harm than the respondent if the relief requested by petitioner is not granted. B.T.'s mental health and well-being will be harmed if she is not returned to the classroom and is isolated from her classmates at home. Further, B.T. has suffered and will continue to suffer harm because she has not been provided educational services. Last, there is no evidence that B.T. is a danger to anyone in the school. B.T. had a reaction because of the trauma she suffered previously and her actions were an isolated event. The District has no evidence to show that petitioner will repeat the behavior or that any other student or the District will be harmed by B.T.'s return to the classroom.

For respondent

Respondent incorporated its submissions and the arguments made in its briefs. Additionally, respondent argued that this tribunal only has jurisdiction over the issue transmitted by OCEP. That issue is whether the minor student is currently not receiving educational services. Although petitioner, who filed her Order to Show Cause and a separate Due Process Compliant *pro se* may have requested that B.T. be returned to the general education setting, that was not transmitted by OCEP to the OAL for a determination on this motion. Relative to educational services, those services have either been provided or the respondent has attempted in good faith to provide them. Respondent provided alternative options to home instruction all of which petitioner declined. Also, petitioner and her husband interfered with the home instruction. This resulted in fewer number of hours actually provided between the suspension and this proceeding.

Respondent argued that Petitioner's reliance on "stay put" was misplaced. "Stay put" does not preclude the District from taking appropriate disciplinary actions when it is warranted. "Stay put" applies to special education students. B.T. is a general education student. Protections afforded by "stay put" do not attach to Section 504 plans and accommodations.

However, assuming "stay put" was controlling, respondent followed the procedures and is permitted to suspend B.T. In this regard, respondent held a manifestation determination meeting in which it was determined that conduct of BT which led to the suspension, was not a manifestation of her disability. As a result, B.T. could be disciplined as a general education student. Additionally, "stay put" does not reverse proper disciplinary actions and require that B.T. be returned to the general education setting.

Respondent argued that petitioner failed to satisfy her burden under Crowe, supra. First, the petitioner will not suffer irreparable harm. B.T.'s educational services have not been terminated or significantly interrupted. Respondent made diligent efforts to schedule services as soon as possible and to accommodate petitioner's and B.T.'s schedule. It was petitioner and her husband who materially interfered with the home instruction by failing to remain in the home with the instructor and B.T., by failing to be at home during scheduled instruction times, and by cancelling instruction sessions. Additionally, any missed instruction can be made up by the respondent and B.T. Therefore, there is no irreparable harm.

To the contrary, if B.T. is returned to the general education setting, then the respondent will suffer harm. B.T.'s conduct on October 12, 2017, warranted immediate removal from the general education setting due to the aggressive and violent nature of her behavior which resulted in juvenile charges including two for aggravated assault. Respondent must maintain a safe and orderly environment.

Second, the legal right is well settled in respondent's favor and not petitioner's favor. Petitioner failed to cite any legal authority supporting her position that the legal right is well settled in her favor. "Stay put" does not apply.

N.J.A.C. 6A:16-7.1 and 7.3 permit the respondent to impose a long-term suspension on students for misconduct. The suspension imposed on B.T. was reasonable given the egregious nature of her conduct. Furthermore, the District

conducted a manifestation determination meeting because B.T. had been recently referred to the Child Study Team on October 27, 2017, and currently receives a Section 504 plan. The District did not find that the conduct was a manifestation of her disability. Therefore, the District is entitled to impose a long-term suspension on B.T. pursuant to U.S.C. Section 1415(k)(1)(C).

Third, petitioner failed to show that she has a likelihood of prevailing on the merits of this claim because she failed to show that the legal right is well settled in her favor.

Fourth, a balance of the equities and the interests of the parties do not weigh in favor of the petitioner. The respondent fully understands its obligation to provide alternative educational services to B.T. while she serves her long-term suspension and has committed itself to providing the requisite hours. The respondent has attempted to schedule the hours, to provide alternatives including attendance at the alternative school program (the Ombudsman Program, located at WTHS), and to provide scheduled instruction. Petitioner has declined or interfered with same. After balancing these facts with the analysis above, the scale tips in favor of the respondent and against granting the relief sought by petitioner.

LEGAL DISCUSSION AND CONCLUSIONS

The only emergent issue transmitted by OCEP for determination by this tribunal is whether the minor student is currently not receiving educational services.

Petitioner's arguments that the emergent relief she requested was to return B.T. to the general education setting and that this is the issue for determination herein were unpersuasive. Even if that was the issue for determination, petitioner's reliance upon "stay put" was inappropriate.

The purpose of "stay put" is to maintain stability and continuity for the **special education student.** B.T. is a general education student with a Section 504 plan. B.T.'s general education setting changed as a direct result of her actions and the

resulting discipline. B.T. is not a special education student; therefore, stay put does not apply.

In fact, assuming *arguendo,* that "stay put" did apply, petitioner's argument still lacks merit. A student with an Individual Education Plan can be disciplined. Because B.T. receives a Section 504 plan, respondent conducted a manifestation determination meeting on October 23, 2017. It concluded that B.T.'s conduct on October 12, 2017, was not a manifestation of her disability. Therefore, B.T. could be disciplined as a general education student. (R-1 at I). "Stay put" does not stand for the proposition that a special education student's placement cannot be impacted by proper disciplinary action.

Finally, on October 27, 2017, B.T. was referred to the Child Study Team. On November 6, 2017, an initial evaluation planning meeting was held to determine if B.T. should be formally evaluated. The Child Study Team determined that B.T. should be evaluated and petitioner consented to same. (R-1 at L). Four evaluations are scheduled, including a psychiatric evaluation on December 27, 2017. Respondent's actions to address concerns in this regard were reasonable and prudent. Contrary to petitioner's arguments, respondent's actions in this regard do not entitle B.T. to "stay put" protections or require a return of B.T. to the general education setting. Respondent's actions address a legitimate concern raised after the October 12, 2017 incident, and are to aid and support B.T. prospectively by determining whether B.T. is in fact a student in need of special education services.

Therefore, I **CONCLUDE** that "stay put" is inapplicable to these circumstances.

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.

Pursuant to N.J.A.C. 1:6A-12.1(e) and N.J.A.C. 6A:14-2.7(s)(1), emergency relief may be granted if the judge determines from the proofs that all of the following have been established:

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

Alternatively, petitioners argue that they are entitled to injunctive relief under Crowe, supra. However, even if the four factors set forth in Crowe are applied, it is clear that petitioner has not met her burden.

First, there has been no showing of irreparable harm. While petitioner alleged that B.T.'s depression diagnosis will worsen by her exclusion from school and isolation from her peers, petitioner presented no competent evidence to substantiate this position. Similarly, no competent evidence was presented supporting petitioner's arguments that B.T. will be irreparably harmed by placement in the alternative school's "Ombudsman program," which in part is to support and accommodate students with behavioral issues and which would permit B.T. to attend school with her peers. However, despite this fact and that petitioner requested evaluations and a functional behavioral analysis of B.T., petitioner refused to permit B.T. to attend the alternative school pending outcome of the evaluations. This undermined petitioner's position that the suspension and home instruction will cause petitioner's mental state to

decompensate. Petitioner cannot credibly maintain that the suspension and home instruction are the most restrictive educational setting and therefore violative of B.T.'s rights causing her harm, and refuse alternatives which would be less restrictive. The two positions are inconsistent.

Additionally, petitioner failed to establish that B.T. has suffered irreparable harm because she only received four (4) hours of instruction between October 18, 2017 and November 6, 2017. Respondent did not fail to provide or terminate home instruction. Petitioner and her husband materially interfered in establishing a schedule for the instruction and cooperating with the respondent so that B.T.'s home instruction could occur. Petitioner wanted instruction during the school day, which was infeasible because the WTHS teachers, who were providing B.T.'s home instruction, work at WTHS during the day. When petitioner's demands for a return of B.T. to the general education setting and home instruction during the school day and not during B.T.'s part-time work schedule in the evenings were not granted, petitioner and her husband frustrated B.T.'s home instruction in what appears an attempt to force the District to comply with their demands.[2]

Respondent did not refuse to provide educational services to B.T. It also did not cease or terminate those services. To the contrary, respondent provided numerous options for educational services during B.T.'s suspension, all of which were declined or frustrated by petitioner. Respondent has provided a schedule for home instruction, which includes making up any missed hours.

Finally, it is clear that the respondent will suffer harm if B.T. is returned to the general education setting, at this time. B.T.'s aggressive and violent conduct on October 12, 2017, resulted in the following juvenile charges Aggravated Assault on a Police Officer, Aggravated Assault on the School Security Guard, Disorderly Conduct, and Resisting Arrest. (R-1 at G). Both parties agreed that B.T. initially attempted to confront a fellow student, who, she believed, had been involved in a separate incident with her friend, when the school resource officer was forced to intervene resulting in B.T.

[2] It is concerning that petitioner has prioritized B.T.'s need to work part-time over B.T.'s need to receive educational services.

assaulting him. Respondent established that more than simply a risk to the safety and order of their education setting exists if B.T. is returned to the classroom at this time.

Second, petitioner has not shown that her legal right to the relief is well settled. "Stay put" does not apply. Petitioner is a general education student. Respondent provided educational services to B.T. It was petitioner and her husband who prevented with B.T.'s educational services from occurring as scheduled.

Third, petitioner failed to show that she has a likelihood of prevailing on the merits in this matter because she failed to show any irreparable harm to B.T., and that she has a well-settled legal right to the requested relief.

As to the balancing of equities and interests, the scale weighs in favor of the respondent. Respondent established that it is has acted in good faith and is committed to providing B.T. with the requisite educational services during her suspension. Respondent provided several options for educational services. Respondent provided home instruction. Even though the missed hours of educational services were not a result of its actions, respondent represented that it will make up the missed hours. Petitioner caused the missed home instruction and prevented B.T. from attending the alternative school.

Furthermore, respondent has an obligation to provide a safe and orderly educational environment for its students. Respondent conducted a manifestation determination meeting on October 23, 2017. It concluded that B.T.'s conduct on October 12, 2017, was not a manifestation of her disability. B.T. is in tenth grade and of sufficient years to understand that her actions have resulted in discipline. No competent evidence was submitted by petitioner to demonstrate that B.T. lacked the capacity to appreciate the egregious nature of her actions or that they were excusable.

As petitioner has also failed to meet the four-pronged test for injunctive relief, the petitioner's application for emergent relief is, therefore, **DENIED**.

CONCLUSION AND ORDER

For the foregoing reasons, I **CONCLUDE** that petitioner is not entitled to an order determining that respondent ceased or terminated educational services to B.T. or returning B.T. to the general education setting. I **ORDER** that petitioner's Motion for Emergent Relief is **DENIED**.

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 Programs.

November 28, 2017
DATE

DOROTHY INCARVITO-GARRABRANT, ALJ

Date Received at Agency: _____

Date Sent to Parties: _____

DIG/tat/lam

LIST OF EXHIBITS

For petitioner:

None

For respondent:

1. R-1 – Brief, dated 11/6/17
    a. Supporting documentation Exhibits A-M
    b. Certification of Angela Costello, dated 11/6/17
    c. Certification of Jennifer Grimaldi, dated 11//17

2. R-2 – Brief dated 11/16/17
    a. Supporting documentation Exhibits N-R
    b. Supplemental Certification of Jennifer Grimaldi, dated 11/16/17