State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER

MOTION FOR EMERGENT RELIEF

OAL DKT. NO. EDS 03270-15

AGENCY DKT. NO. 2015 22392

ELIZABETH BOARD OF EDUCATION,

Petitioner,

v.

T.D. ON BEHALF OF E.D.,

Respondent.

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Jessika Kleen, Esq., for petitioner (Machado Law Group, attorneys)

T.D., respondent, pro se

Record Closed: March 27, 2015 Decided: March 27, 2015

BEFORE **MICHAEL ANTONIEWICZ,** ALJ:

This matter arises under the Individuals with Disabilities Education Act, 20 U.S.C. § 1415 et seq. On February 26, 2015, petitioner filed an emergent relief petition and a request for due process, if applicable, on behalf of the Elizabeth Board of Education seeking home instruction for E.D. and evaluations of E.D. for special education. The petition was transmitted to the Office of Administrative Law (OAL), where it was filed on March 9, 2105. The petitioner seeks an Order finding that E.D. demonstrated that she is unable to conform to school rules; that E.D. has demonstrated that she is unable to act in a manner that does not significantly disrupt the operations of the school; finding that E.D.'s discipline record reflects that she has been unable to meet the requirements

of School District Policy 5114; finding that E.D.'s behavior negatively impacts the safety, security and well being of other students, staff and school property; authorizing the District to complete a full child study team evaluation to determine E.D.'s needs; authorizing the District to place E.D. in an interim alternative educational setting through the end of the 2014–2015 school year and to provide home instruction pending such a placement, pending plenary hearing. E.D. is not currently a classified student and thus is not eligible for special education services at this time.

This matter was first scheduled for an emergent relief hearing on March 12, 2015, however, T.D. requested a two week adjournment in order to provide time to obtain the services of an attorney. As of this date, this office has not received any responsive papers from T.D. on behalf of E.D. to the District's application nor has this office heard from any attorney representing T.D. on behalf of E.D in this matter. At the time of this hearing, both T.D. and E.D. appeared and made statements on the record regarding the issues in this case.

The District asserts that the history of E.D.'s serious behaviors, (the list is both lengthy and detailed and is included herein by reference) requires an emergent order directing the respondent to comply and cooperate with a full child study team evaluation as well as an order placing E.D. on home instruction pending her acceptance into an appropriate alternative educational setting. Based on the lack of filing by the respondent, the factual allegations set forth in the petitioner's filing should be accepted as truthful and as fact.

My determination is controlled by N.J.A.C. 1:6A-12.1 and N.J.A.C. 6A:14-2.7(r), which provides that a judge may order emergency relief pending issuance of the final decision in a special education matter if it appears 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;
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> 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.

See also N.J.A.C. 1:1-12.6, and Crowe v. DeGioia, 102 N.J. 50 (1986), which echoes the regulatory standard for this extraordinary relief. It is well established that a moving party must satisfy all four prongs of the regulatory standard to establish an entitlement to emergent relief. See also: Crowe at 132-35. It appears that the petitioner has satisfied all four prongs necessary to be granted emergent relief.

Irreparable Harm

The petitioner argues, and I agree, that if the requested relief is not granted, both the School District and E.D. will suffer irreparable harm. E.D.'s extreme behavior prevents both E.D. and her fellow student from obtaining the benefits of a structured education. Petitioner asserts that E.D. is suffering from an emotional/mental disability and yet respondent has refused to permit E.D. to be evaluated in order to determine the exact nature of her needs for E.D.'s good and the good of all students and the educational staff in the School District. An order requiring home instruction will ensure the safety of E.D. and the students in the School District and the staff, pending a full child study team evaluation and then placement in an appropriate alternative education setting.

Law is Well Settled and Mandates Emergent Relief

It is clear that the law is well settled and mandates the emergent relief as requested by the petitioner. The petitioner is responsible for maintaining a safe school environment for all the students. When it is determined that it is dangerous for a student to be in the current placement, the District has an obligation to place that student in a different educational setting so long as the decision is not arbitrary or capricious. It is argued that E.D.'s behavior is impeding the School District's ability to provide a meaningful education to all students. N.J.A.C. 6A:14-2.7(p) permits a School District to request an Administrative Law Judge to order a student to be placed in an

interim alternative educational setting. The School District is permitted to request emergent relief when there are issues involving a break in the delivery of service and/or issues involving disciplinary action and the determination of interim alternate educational settings, pursuant to N.J.A.C. 6A:14-2.7(r)(1).

In addition, it is well settled that a School District may file for due process seeking initial evaluations be conducted absent parental consent, pursuant to N.J.A.C. 6A:14-2.7(b). In this case, E.D. has clearly demonstrated significant behavioral concerns and has obtained a diagnosis of mental illness which leads to the conclusion that a child study team evaluation is required.

T.D. has basically raised issues regarding this matter. T.D. stated that she had eight children and thus home instruction could be problematic. It was agreed that the School Board would work with T.D. in order to provide home instruction agreeable to all parties. It was T.D.'s position that her daughter was healthy and fine, however stated that at one time she was diagnosed as having ODD. T.D. was not against evaluations per se. In fact, T.D. also stated that she planned on having a psychiatric exam for E.D. on April 24, 2015, and the School Board agreed that if they received a copy of such an exam, they would waive that part of their evaluations of E.D.

Although not specifically denying the detailed allegations contained in the School District's Emergent Relief request documentation, including the certifications of Wilnes Jilus and Dr. Dorothy McMullen, it was T.D.'s belief that her daughter was "singled out" even when she did nothing wrong.

Clearly though if even only half the allegations of misbehavior are the truth, this represents a red flag calling for a thorough evaluation of E.D. in order to enable the District to obtain a roadmap in order to provide E.D. with a proper educational program. E.D. is young enough that if the parties (parent, child and school district) work together there can be provided to E.D. FAPE which can lead to a bright future for this young lady.

District has a Likelihood of Prevailing on the Merits

From a review of the evidence presented at this hearing, the District is likely to prevail in this case on the merits. There is no harm to E.D. to be properly evaluated and, in fact, can only help her in obtaining a proper education. It is also clear that E.D. presents a risk to herself and those fellow students around her if she continues to go to school. Thus, home instruction is an appropriate solution for the benefit of E.D., fellow students and the staff.

It is settled in New Jersey that a safe and civil environment in school is necessary for students to learn, and disruptive or violent behaviors are conducts that disrupts a school's ability to educate its students in a safe environment. N.J.S.A. 18A:37-13. The further placement of E.D. at Dwyer Technology Academy would seriously jeopardize the general right of all students to obtain a proper education and does not serve E.D. in any way.

In addition, there has been some information that can lead one to believe that E.D. may have a disability and, accordingly, falls under the Individuals with Disabilities Education Act (IDEA) until a proper evaluation is completed.

With regard to students who may pose a threat to themselves or others, an Administrative Law Judge (ALJ) has the authority to:

> Order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the [ALJ] determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.

See 34 C.F.R. 300.532(b)(2)(ii) and N.J.A.C. 6A:14-2.8(f). An ALJ is to ". . . exercise his or her judgment in the context of all the factors involved in an individual case." 71 Fed. Reg. 46,724 (2006). An ALJ has the authority to order a change of placement of the child if it is determined that maintaining the current placement of the child is substantially likely to result in injury to the child or to others. West Orange, 42 IDELR

254 (Dkt. No. EDS 11962-04, 2004). The facts in this case clearly support a change of placement for E.D.

In addition, the School District is also likely to prevail regarding its request to compel evaluations of E.D. The School District is seeking Psychological, Educational, Social and Psychiatric evaluations. With the information these evaluations will provide, the School District will be able to provide a proper placement for E.D. and thus provide E.D. with FAPE in the least restrictive environment. There is no doubt that a School District may file for due process when it is unable to obtain the required parental consent to evaluate a student. N.J.A.C. 6A:14-2.7

When Equities of the Parties are Balanced,
the District and E.D. Will Suffer Greater Harm
than Respondent if Relief is Denied

There can be little argument that the balance of equities favors the School District. It is clear that E.D. has demonstrated an inability to conform to student code of conduct and fails to provide any respect for authority. E.D. has demonstrated often violent behavior and is not obtaining any real degree of educational benefit in the current environment. In addition, she is taking from other students their educational benefits. Without a proper evaluation of E.D., there is little that the School District can do to assist E.D. to obtain a FAPE.

I **CONCLUDE** that relief must be granted to petitioner to ensure that E.D.'s education continues uninterrupted pending plenary hearing. E.D.'s right to an educational program is well-settled, and she will be irreparably harmed by any further disruption to her educational programming. Like all children, E.D. should be receiving an education. A local school district is obligated to take reasonable steps to evaluate a child, like E.D., who exhibits signs that she needs some assistance. L.W. v. Toms River Bd. of Educ., 189 N.J. 381 (2007); N.J.S.A. 18A: 37-13.1, et seq. I **CONCLUDE** that the petitioner is likely to prevail at the hearing and that the equities and interests of the parties are balanced, the School District and E.D. will suffer greater harm if the requested relief is not granted.

I **CONCLUDE** that E.D. should be placed in an interim alternative educational setting at Somerset School or an alternative appropriate placement, through the end of the 2014–2015 school year and to provide home instruction pending acceptance by such a placement. I heard no justification for T.D.'s refusal to accept this relief. Clearly, petitioner and E.D. will suffer greater harm than respondent if the requested relief is not granted.

I **CONCLUDE** that in the event that T.D. completes any relevant evaluations which would be otherwise duplicative of the School Board's exams, the School Board would no longer need to complete the evaluations already performed by proper professionals on behalf of the parent.

I **CONCLUDE** that E.D. has demonstrated that she is unable to conform to school rules and conduct herself in a manner that is necessary for her to access an education; that E.D. has demonstrated that she is unable to act in a manner that does not significantly disrupt the operations of the school and impact other student's ability to access an education; that E.D.'s discipline record reflects that she has been unable to meet the requirement of School District Policy 5114 and N.J.S.A. 18A:37-2; that E.D.'s behavior negatively impacts the safety, security and well-being of other students, staff and school property at Dwyer Technology Academy High School pursuant to N.J.S.A. 18A:25-2 and N.J.S.A. 18A:37-2.

Accordingly, I **ORDER** that all of the requested emergent relief be granted. I **ORDER** that the School District is authorized to complete a full child study team evaluation (less those provided by T.D. to the School District and done by proper professionals prior to the School Districts evaluations) to determine the exact nature of E.D.'s needs pursuant to N.J.A.C. 6A:14-2.7(b) and to place E.D. in an interim alternative educational setting at Somerset School or an alternative appropriate placement through the end of the 2014–2015 school year and to provide home instruction pending acceptance by such a placement. The details as to when, where and how the home instruction will be provided will be worked out between the parties.

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 School District, 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 school district, 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.

March 27, 2015

DATE

MICHAEL ANTONIEWICZ, ALJ

Date Mailed to Parties:

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