122 LRP 5913

West Windsor-Plainsboro Board of Education

New Jersey State Educational Agency

EDS 00659-22

February 1, 2022

Related Index Numbers

250. HOME INSTRUCTION AND HOMEBOUND SERVICES

150.025 Relationship between Misconduct and Disability

150.040 Violent Students

Ruling

A New Jersey ALJ held that a district was not entitled to emergent relief when it sought to change a kindergartener with autism's placement to home instruction pending an out-of-district placement after he struck his teacher with a closed fist. The district's motion was denied.

Meaning

Emergent relief is a high standard. When a district seeks emergent relief, it must prove 1) the district will suffer irreparable harm if the relief is not granted; 2) the legal right underlying its claim is settled; 3) the district is likely to prevail on the underlying claim's merits; and 4) the district will suffer greater harm than the student. If a district cannot prove each of these elements, emergent relief cannot be granted. This district could not prove it would suffer harm if the student remained in his current placement.

Case Summary

A New Jersey district's requested emergent relief and sought to move a student to home instruction, but the motion was denied. A kindergartner with autism was placed in the general education classroom. He received three days' suspension after he kicked and hit his teacher. The district filed a request for emergent relief to move the student to home instruction until it secured an out-of-district placement. The district believed that the student's behavior posed a risk to the safety of others and that it lacked the proper supports to address his behavioral needs. To prevail, the district needed to prove that it would suffer irreparable harm if the requested relief was not granted, the legal right underlying its claim was settled, it had a likelihood of succeeding on the merits of the underlying claim, and it would suffer greater harm than the student if the relief was not granted. The ALJ found that the district could not prove each element. The district could not prove that it would suffer irreparable harm. In fact, the ALJ found that placing the student in home instruction would remove him from his least restrictive environment. The injuries the student caused did not require any medical attention, the ALJ noted. Moreover, the harm from being separated from his peers outweighed the potential harm of having him in school, especially since the behavioral intervention plan was not implemented at the time of the incident. Other evidence suggested the student's behavior improved significantly after the incident. The ALJ then concluded that the district did now show it used all available services to maintain a safe environment. The ALJ found that the district could not clearly prove that it was likely to prevailing on the underlying claim's merits, so it did not satisfy the third prong. Finally, the district did not prove that it would suffer a greater harm than the student. The ALJ noted that the disruptive behavior caused minimal injury. The ALJ denied the request.

Full Text

Final decision

On emergent relief

Statement of the case

By a request for emergent relief, petitioner West Windsor-Plainsboro Board of Education (Board or petitioner) seeks a change in placement to home instruction pending an out-of-district (OOD) placement for Z.P. Respondent A.C., mother of Z.P., opposes this request on the basis that home instruction is not the least restrictive environment.

Procedural history

This matter was filed at the Office of Administrative Law (OAL) on January 26, 2022, for an emergent relief hearing and a final determination in accordance with 20 U.S.C. §1415 et seq., and 34 C.F.R. §§300.500 to 300.587, and the Director of the Office of Administrative Law assigned me to hear the case pursuant to N.J.S.A. 52:14F-5. Oral argument was held on January 31, 2022, and the record closed on that date.

Factual discussion and findings

In addition to the parties' arguments, I have considered the documents submitted before and at the oral argument. Z.P. is a kindergarten student residing in boundaries of the West Windsor-Plainsboro school district. He was deemed eligible for special education and related services with a classification of autism. Z.P.'s most current placement for the 2021-22 school year was at the Dutch Neck Elementary School. However, he was suspended for three days from January 24, 2022 through January 26, 2022, for hitting his teacher with a closed fist in the abdomen, right arm, and kicking her in the leg in violation of the code of student conduct. On January 27, 2022, the Board unilaterally extended Z.P.'s suspension pending the outcome of the instant emergent relief petition. Counsel for the respondent requested a conference call with the undersigned on January 27, 2022, and during the conference call the undersigned initially agreed with extending the suspension because of the petitioner's safety concerns. However, on January 28, 2022, the undersigned convened another conference call with the parties and ordered that Z.P. be returned to school on January 31, 2022, because Z.P. had completed the mandated suspension.

In its request for emergent relief, petitioner asserts that Z.P.'s escalating maladaptive behavior poses a safety risk to other students and staff and the Board does not have the proper supports to address his behavioral needs. As a remedy, petitioner seeks immediate placement on home instruction pending an OOD placement for Z.P. Petitioner forecasts that the home instruction period will be short-term because the parties have identified several potential out of district placements and Z.P. was approved by the Y.A.L.E. School.

Conversely, respondent asserts that petitioner failed to conduct a manifestation determination prior to imposing the short-term suspension in violation of the Individuals with Disabilities Act (IDEA), 20 U.S.C. §1415 et seq., and violated N.J.S.A. 18A:37-2a which prohibits school districts from suspending kindergarteners except for "conduct that is of a violent or sexual nature that engenders others." Respondent contends that "violent" is not defined by that statute. However, in the relevant federal regulations, school personnel are permitted to remove a student with a disability to an interim alternative educational setting for not more than forty-five days if the child has "inflicted serious bodily harm upon another person while in school." 34 C.F.R. §300.530(g)(3). "Serious bodily injury" is defined as bodily injury that involves: "a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." 18 U.S.C. §1365(h)(3). Respondent contends that her son's behavior did not fit that definition.

In addition, respondent asserts that the petitioner failed to provide notice of Z.P.'s suspension by the end of the school day in violation of N.J.A.C. 6A: 16-7.2(a)3, and failed to notify the respondent of her due process rights in violation of N.J.A.C. 6A: 16-7.2(a)3iv. As a remedy, the respondent wants Z.P. immediately returned to school, a manifestation determination assessment to determine if the complained of conduct was a manifestation of his disability, the petitioner to comply with the IDEA's procedural requirements providing notice of the suspension and her due process rights, and for the petitioner to retain the respondent's private behavioral expert, Dr. Lindsay Hilsen, to "assist in refining and implementing a behavioral intervention plan for Z.P. immediately and include it in his individualized education plan ("IEP")."

Legal analysis and conclusion

The standards to be met by the moving party in an application for emergent relief in a matter concerning a special needs child are set forth in N.J.A.C. 1:6A-12.1(e) and N.J.A.C. 6A-14-2.7(s)1. They provide that a judge may order emergency relief if the judge determines 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;

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.

It is important to note that all four prongs must be satisfied. *Crowe v. DeGoia*, 90 N.J. 126, 132-34 (1982).

Addressing the first prong of the test, petitioner contends irreparable harm exists because Z.P.'s behavioral issues present a safety risk to school district staff and students. Petitioner asserts it is "ready, willing and able" to provide home instruction for Z.P. until a suitable out of district placement is found. The IDEA mandates that students with disabilities are to be educated in the "least restrictive environment." See, 20 U.S.C. §1412(a). "The least restrictive environment is the one that, to the greatest extent possible, satisfactorily educates disables children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled." *Carlisle Area Sch. v. Scott P. et al.*, 62 F.3d 520, 535 (3d Cir. 1995), cert. den. sub. nom,. *Scott P. v. Carlisle Area Sch. Dist.*, 517 U.S. 1135, 116 S. Ct. 1419, 134 L.Ed.2d 544 (1996).

To support its contention that home instruction is a viable option, the petitioner here relies upon A.D. *o/b/o I.D. v. Cherry Hill Bd. of Ed.*, OAL Dkt. No. EDS 10009-09 (September 25, 2009), and *Collingswood Boro Bd. of Ed. v. A.C. o/b/o D.F., OAL Dkt*. No. EDS 10586-09 (April 1, 2010). In these decisions, the Administrative Law Judges upheld home instruction pending an OOD. However, both decisions are distinguishable. In A.D., the petitioner was a high school student, not an elementary student like Z.P. In addition, I recognize my colleague determined there was no irreparable harm because the school district was providing home instruction, however, I am not persuaded that home instruction fits the definition of least restrictive environment. In Collingswood, the injury inflicted by the student, who was in first grade, required medical attention, which is not present in the instant matter. The harm of being excluded from his peers is greater to Z.P. than the potential harm of having him in school especially since the behavioral intervention plan (BIP) developed by the Child Study Team after repeated requests from the respondent, has not yet been implemented. Moreover, respondent stated that during the intake meeting held remotely with the Y.A.L.E. school, the petitioner's Board Certified Behavior Analyst (BCBA) and Z.P.'s case manager stated that "Z.P.'s behavior had improved significantly to the point where she was only on call rahtan than providing 1:1 support."[1] Accordingly, I CONCLUDE that the petitioner has not satisfied the first prong.

As to the second prong, petitioner asserts that it has a duty to maintain a safe school environment for all its students and it cannot do so if Z.P. remains in the school. However, as stated above, the petitioner has not exhausted its options to address Z.P.'s behavioral needs. 20 U.S.C. §1412(a)5(A) provides "separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." Petitioner has not used all the supplementary aids and services at its disposal. Thus, while the petitioner may yet be able to prove that its legal right underlying its claim is settled in the underlying due process matter, it has not

done so within the four corners of this emergent application.

The third prong of the test for emergent relief requires that petitioner has a likelihood of success on the merits. *Petitioner relies upon South Brunswick Bd. of Ed. v. W.T. o/b/o W.T., OAL Dkt.* No. EDS 633-02, 2002 N.J. AGEN LEXIS 45, (February 26, 2002), in which the Administrative Law Judge upheld the school district's emergent request to release the pupil's records to out of district placement and place the student on home instruction because the student was disruptive. This case, however, is also inapposite as it involved a middle school student who was being home schooled by a parent and not receiving any instruction from the school district. It may well be that as the facts in this matter are developed, petitioner may prove that Z.P.'s needs are best met in an OOD placement. However, the facts presented to date do not definitively show that such is the case and thus, petitioner has not met the third prong of the test.

The final requirement for relief entails a balancing of the interests between the parties. Petitioner asserts that no harm will come to Z.P. if the relief requested in granted. It is undisputed that Z.P. has engaged in disruptive behavior; however, the injury did not require medical attention or fit within the definition of serious bodily injury. Keeping him at home, the most restrictive environment, until a suitable placement is found will indeed cause him harm in the loss of opportunities to interact with his non-disabled peers which is the goal of providing a free and appropriate education. The respondent contends that if the petitioner had developed and implemented the BIP sooner, Z.P.'s behaviors may not have escalated. This may be true. Nevertheless, there is still opportunity to assess whether the BIP or other intervention effectively descalates and reduces the maladaptive behavior. Thus, I CONCLUDE petitioner has not yet shown that on balance it will suffer the greater harm than the respondent.

Having considered the parties' arguments and submissions, I CONCLUDE petitioner has failed to meet all four prongs of the standard for entitlement to emergency relief. As set forth above, all four prongs must be met in order to grant the motion for emergent relief. For the foregoing reasons, I CONCLUDE that the petitioner's request for emergent relief is DENIED. I also at this time strongly urge the parties to collaborate together to the fullest extent possible in the best interests of Z.P. so he can overcome his behavioral difficulties and also obtain the best education possible consistent with the law.

Decision and order

For the reasons stated above, I hereby ORDER that petitioners' application for emergent relief is DENIED.

This decision on application for emergency relief is final pursuant to 20 U.S.C. § 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. § 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 Programs.

.February 1, 2022//signedDATEKIM C. BELIN, ALJDate Received at AgencyDate Mailed to Parties:KCB/lam

Appendix

Witnesses

For petitioners

None

For respondent

None

Exhibits

For petitioner

Motion and Letter Brief for Emergency Relief with exhibits

For respondent

Memorandum of Law in Opposition to Motion for Order of Emergent Relief with exhibits

[1]A.C.'s certification, dated January 30, 2022, ¶48.

Statutes Cited

20 USC 1415
18 USC 1365(h)(3)
20 USC 1412(a)
20 USC 1412(a)(5)(A)
20 USC 1415(i)(1)(A)
20 USC 1415(i)(2)

Cases Cited

90 N.J. 126 -- Followed
62 F.3d 520 -- Followed
517 U.S. 1135 -- Followed

