

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION ON
EMERGENT RELIEF

OAL DKT. NO. EDS 16940-14

AGENCY DKT. NO. 2015 22134

B.D. and N.D. on behalf of S.D.,

Petitioners,

v.

JACKSON TOWNSHIP

BOARD OF EDUCATION,

Respondent.

B.D. and N.D. on behalf of S.D, petitioners, pro se

Joanne Butler, Esq., for respondent (Schenck, Price, Smith & King, attorneys)

Record Closed: January 7, 2015

Decided: January 9, 2015

BEFORE **LISA JAMES-BEAVERS, ALJ:**

STATEMENT OF THE CASE

Petitioners, B.D. and N.D. on behalf of their minor child, S.D., seek emergent relief in the form of an out-of-district placement that is appropriate to meet S.D.'s needs.

PROCEDURAL HISTORY

Petitioners filed an emergent relief application and due process petition with the Office of Special Education programs on December 22, 2014. Respondent Jackson Township Board of Education filed an answer; but I did not receive it until the oral argument on the emergent relief application on January 7, 2015. I heard oral argument on January 7, 2015, and attempted to have the parties come to an amicable resolution. However, they did not resolve the case. I now deny the application for emergent relief.

FACTUAL DISCUSSION

Student S.D. is a ten-year-old fourth grade student (D/B 8/24/04) at Howard C. Johnson Elementary School in the respondent school district. S.D. has been diagnosed with Autism, Attention Deficit Hyperactivity Disorder (ADHD), and Sensory Processing Disorder. S.D.'s last agreed-upon Individualized Education Plan (IEP) of September 18, 2014, provides a placement for S.D. in a self-contained multiply disabled class for Language Arts and Social Skills, pull-out resource replacement for Math and in-class resource support for Social Studies and Science. For related services, S.D. receives occupational therapy, group physical therapy, and speech-language therapy. S.D. also receives transportation with a paraprofessional.

Petitioners had a dispute with the bus aide in October 2014, wherein they contacted case manager Lisa Melamed to complain about the bus aide separating S.D. from his sister on the bus. Although the Transportation Supervisor did not find that the bus aide had done anything wrong, he said that the siblings would continue to be able to sit together if the parents desired. The parents believe that the bus aide discriminates against them because of their income and where they live. They are seeking another bus aide.

In 2011, S.D. wandered out of the school building and was lost for about an hour. Petitioners believe that the Child Study Team has not adequately taken into consideration that S.D. is a wanderer and believe that he is not safe at school. Petitioners allege that S.D. is regressing physically and mentally in his education. They state that he is forced to work independently even when he is struggling. Petitioners

state that S.D. is depressed and hears voices.

Petitioners provided a doctor's note stating that S.D. needs a one-to-one aide; however, Dr. Cerco denied ever seeing the note at either of the IEP meetings that were held in December. Petitioners stated that when they gave it to Ms. Melamed, she gave it back to them without considering it.

CONCLUSIONS OF LAW

Petitioners seek an out-of-district placement for mental and physical reasons as well as his safety. They also seek removal of S.D.'s bus aide and an end to the discrimination that they believe that they have been subject to based on housing and income. Pursuant to N.J.A.C. 1:6A-12.1(e) and Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982), emergency relief may only be granted 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. I explained to the petitioners that the standard is difficult to meet.

In support of their application, petitioners argue that the irreparable harm is that S.D. is regressing. The resource teacher does not know how to teach an Autistic child

and meet his educational needs. Petitioners assert that S.D. cannot read or write at close to his grade level. He is in fourth grade, but reads at a second grade level. In his last IEP, he had met only one goal. Petitioners state that the IEP and the assessments performed support that S.D. is doing worse now than he was when he was in the private school. The educational evaluation states that S.D. has a tendency to give up when he does not know something. Documentation supports that his IQ has also diminished. Petitioners also assert that the safety issue is irreparable harm. They allege that S.D. comes home crying as a result of interactions with the bus aide and also that the failure of the child study team to acknowledge that he is a wanderer means that he is in constant danger of wandering off. Petitioners want him placed at Alpha, a school for disabled children that they believe knows how to handle children with special needs like S.D.

Respondent disputes that S.D. has regressed and points to the narratives of S.D.'s teachers in the IEP to say that he is progressing, albeit slowly. The teachers do not feel that he is in need of a self-contained math class at this time and that he is doing fine in the resource class. Petitioners, however, note that the teachers say the same thing about how well S.D. is doing every year. Yet, they see no progress. They assert that he is not getting the help and support that he needs.

Even if petitioners were able to meet the irreparable harm standard based on the regression and safety issues, which are highly contested by the respondent, the legal right underlying petitioners' claim is far from settled. A discrimination complaint is not appropriate for decision by way of an application of emergent relief. Further, in seeking an out-of-district placement, petitioners have to show that the placement that they are seeking, here Alpha, is appropriate for S.D. Thus, petitioners cannot meet the second prong of the emergent relief standard that the legal right underlying their claim is settled.

Regarding whether petitioners have a likelihood of prevailing on the merits of the underlying claim, there are too many material facts in dispute to determine petitioners' likelihood of success. Petitioners state that S.D. has regressed, but respondent states that he is progressing nicely although slowly. Such a dispute can only be resolved by

hearing the experts, viewing the district's documentation and studying their evaluations of S.D. I cannot determine petitioners' likelihood of success on the basis of the record currently before me. Therefore, petitioners do not meet the third prong of the emergent relief standard.

Last, petitioners have to show that when the equities and interests of the parties are balanced, they will suffer greater harm than the respondent will suffer if the requested relief is not granted. Respondent has a duty to educate S.D. in the least restrictive environment, which the respondent feels it would be abdicating if it were to place the child in a school for disabled children. However, one cannot say that such harm to respondent would be greater harm than petitioners' harm if S.D. is placed out of district. If petitioners are able to show that S.D. has not made adequate yearly progress and has in fact regressed as a result of being educated in the respondent school district, then petitioners will suffer greater harm if the out-of-district placement is not granted than respondent will suffer. Therefore, although the facts are speculative at this point, when the equities are balanced, petitioners will suffer greater harm than respondent will suffer if petitioners are not granted the out-of-district placement.

Based on the foregoing, I **CONCLUDE** that petitioners have not met all four prongs of the standard required for emergent relief. Consequently, the petitioners' request for emergency relief is **DENIED**.

DECISION AND 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 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.

January 9, 2015

DATE

LISA JAMES-BEAVERS, ALJ

Date Mailed to Agency:

January 9, 2015

Date Mailed to Parties:

January 9, 2015

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