State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER-EMERGENT RELIEF

OAL DKT. NO. EDS 10444-14

AGENCY DKT.NO. 2015 21597 E

W.K and E.B. o/b/o J.K.,

Petitioners,

v.

MILLBURN TOWNSHIP

BOARD OF EDUCATION,

Respondents.

_____

Beth A. Callahan, Esq., for petitioners (Callahan & Fusco, attorneys)

Paul E. Griggs, Esq., for respondent (Lindabury, McCormick, Estabrook & Cooper, attorneys)

Record Closed: August 27, 2014 Decided: August 27, 2014

BEFORE **JESSE H. STRAUSS**, ALJ:

Petitioners WK and EB o/b/o JK seek emergent relief for an order directing immediate placement out-of-district because the student will be released from his current program and the Millburn Township Board of Education (District) allegedly has not offered an appropriate program or timely responded to requests for an IEP meeting.

The Office of Special Education Programs (OSEP) transmitted petitioner's application for emergent relief to the Office of Administrative Law (OAL) on August 15, 2014. On August 18, 2014, the District filed papers in opposition to the emergent relief application. Petitioners replied on August 25, 2014.

I heard the matter on August 27, 2014, and closed the record on that day.

Petitioners' Position

JK is a sixteen-year-old student. He was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) by a pediatric psychiatrist in first grade, a condition that was reconfirmed in fourth grade. In fourth grade JK was classified and given an Individualized Education Plan (IEP) under the classification of ADHD/Other Health Impaired. He received various academic accommodations. JK attended social skills programs at Well Being Therapy Center in Short Hills from the fall of 2013 through the winter of 2014.

JK began engaging in substance abuse in 2012 before beginning ninth grade. JK's mother stated that JK has great difficulty with anxiety and depression, and she believes he utilized illicit substances to self-medicate. In **January 2014** at age sixteen, JK deliberately cut his arm, overdosed on Xanax and blood pressure medication. He was admitted to and remained in Morristown/Hoboken University Medical Center for five days. At that time JK's psychiatrist reported that JK was "borderline Bipolar." Following discharge he attended Dialectic Behavior group therapy at GenPsych three days a week. **In March 2014** JK was again hospitalized, this time at St. Claire's Hospital, for suicidal ideation and self-injurious behavior. Following discharge JK attended a step-down program at GenPsych for five days. In **May 2014** JK attempted suicide again and was subsequently hospitalized for a third time, again at St Claire's Hospital.

On May 10, 2014, JK was admitted to American Addiction Centers' The Academy Campus in Florida. Psychologist Kelly Everson evaluated JK at The Academy on May 29, and June 2, 2014, and presented a certification for this proceeding. She found that JK meets the criteria for: Major Depressive Disorder, Moderate, Recurrent, with Anxious Distress; ADHD, Combined Presentation, Moderate; Social (Pragmatic) Communication Disorder; Alcohol Use Disorder; Cannabis Use Disorder; Anxiolytic Use Disorder; Other Hallucinogen Use Disorder; and Tobacco Use Disorder. Dr. Everson's recommendations

included one that JK attend a facility which can provide him with a higher level of care aimed towards mental health treatment with comorbid substance use care until his emotional regulation significantly increases or he can be stabilized. "Specifically, it is recommended that [JK] attend a residential treatment facility, with special education support, which will address his emotional, behavioral, executive functioning, organizational, and attention issues."

JK moved from The Academy Campus and is currently at the Redcliff Assent Wilderness Treatment Program in Utah. Morgan Robak, MSW, is JK's therapist in his current program at Redcliff. Consistent with the recommendation of Everson, Robak, in her certification, recommends that,

> "JK would benefit from attending Discovery Connections as it is a structured program that has high staff to student ratios. JK needs structure outside the Redcliff Assent Wilderness Treatment Program and would benefit from being slowly reintroduced into society by having a job and working toward gaining independent living skills. The work portion would be in addition to his self-contained structured special education program whereby he could receive a high school diploma. Structure and supervision can be provided in this environment to help JK to succeed and keep him safe."

Discovery Connections is also in Utah and provides a residential/academic environment for high risk children. Although specific details of the Discovery Connections program was not presented, counsel for petitioners represented that she has had New Jersey matters where children had been placed there. In addition to therapeutic services, the students receive academics from certified teachers that will meet the graduation requirements of the state of each sending district.

On June 12, 2014, counsel for petitioners wrote to Juliana Kusz, the District's Director of Special Services and to Rose Aquavia, Case Manager, advising that, as they knew, JK was then at The Academy where some evaluations were to be completed shortly and shared with the District. Counsel further advised that petitioners were currently researching Therapeutic/Special Education programs for JK "and would

appreciate the district's input on programs they believe could meet his needs. Please schedule an IEP meeting in this matter on any of the following dates. I will be in attendance with my client. I am available on June 27th, July 7th or 8th. I understand that the entire team may not be available so we would be amenable to releasing certain members that were not relevant." Counsel for the District was copied on the letter.

On July 3, 2014, counsel for petitioners wrote to counsel for the District enclosing "the promised psychological evaluation." Counsel advised that JK was currently in a wilderness program for the summer but will need a placement starting in September of 2014. "Please schedule an IEP meeting for this student as soon as possible."

On July 18, 2014, counsel for petitioners e-mailed counsel for the District as follows:

> "As you know my client is currently completing a wilderness program. He will receive some HS credit for the program. We have asked for and been denied an IEP meeting for him and it is critical that a therapeutic placement be established before he completes his current program. I am again requesting that an IEP meeting be scheduled immediately. I am available Tuesday, Thursday or Friday of next week. . . . If not receiving the appropriate special education and support could result in significant regression an in fact him being a danger to himself and possibly others. Please call me if you would to discuss this matter."

On August 8, 2014, petitioners filed the instant application for emergent relief. Petitioners argue that despite the above communications, the District has refused to hold an IEP meeting.

District's Position

As a result of a November 20, 2012, meeting, the District implemented an IEP which provided that JK receive special education services in the listed instructional areas and related services in the form of individual counseling. The District implemented an IEP as of November 19, 2013, providing JK with special education services in the listed instructional areas and related services in the form of individual counseling two times per month for twenty minutes each. The counseling report contained in this IEP provides as follows:

> The past year was challenging to [JK], as he was involved in multiple incidents with peers during which he did not handle conflict appropriately. When feeling antagonized or angered by peers, [JK] has not consistently sought adult support. It has been difficult to address these situations with [JK] in counseling. Sessions have been frequently postponed due to either absences or [JK's] need to remain in Study Skills for academic support. Following a conflict with peers, [JK] tends to feel that his actions were justified, and he is typically unable to take responsibility for his behavior or identify alternate ways of responding to confrontational situations."

The parties held another IEP meeting on January 29, 2014. This IEP noted that JK was discharged from an inpatient psychiatric hospitalization and was medically cleared to return to school, and that he would be attending an outpatient program at Gen Psych in Livingston three days per week for twelve weeks. JK's mother expressed concern at the IEP meeting that [JK] needed more structure upon his return to school and wanted to have an additional study skills class added to his schedule. This IEP was amended by adding 440 minutes of study skills.

After petitioners filed their application for emergency relief on August 8, 2014, counsel for the District wrote to counsel for petitioners on August 12, 2014, advising that an IEP meeting can be held on August 28, 2014. Petitioners' counsel responded on August 14 advising that petitioners will meet on August 28 if the matter is not resolved at

the OAL "but this meeting will be designated as a resolution meeting not an IEP meeting since the district failed to conduct an IEP meeting."

I have carefully reviewed the papers and supporting documents submitted by the parties and have considered the arguments made**.**

N.J.A.C. 6A:14-2.7(s) provides that emergent relief may be granted if an administrative law judge determines from the proofs that: The petitioner will suffer irreparable harm if the requested relief is not granted; the legal right underlying the petitioner's claim is settled; the petitioner has a likelihood of prevailing on the merits of the underlying claim; and, 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. All of these elements must be satisfied before emergent relief can be granted.

With regard to the elements necessary to establish entitlement to emergent relief, I **CONCLUDE** that petitioners have shown irreparable harm. Even without the benefit of a plenary hearing, it is evident that JK is in a serious crisis situation which has significantly spiraled since the last IEP meeting of January 29, 2014. There is no comfort in the District's response to the irreparable harm element that there is currently an IEP in place for the 2014-15 school year. That IEP is fundamentally inadequate to address JK's academic needs in conjunction with the need for the structured environment recommended in Dr. Everson's twenty-two page report. Given JK's recent history, the denial of the requested emergency relief for a highly structured environment might very well place JK at risk of suffering an irreparably harmful episode. It is legitimate to prevent the damage that could be done during the pendency of the underlying due process petition. The possibility of future injury is not remote. Fears and apprehensions of future harm are well placed in light of multiple events over a five month period.

I **CONCLUDE** that petitioners have demonstrated that the legal right to the underlying claim is well-settled, and the petitioners have a reasonable probability of success on the merits.

A school district must develop and implement an appropriate IEP in order to provide a Free Appropriate Public Education (FAPE). N.J.A.C. 6A:14-3.7. As indicated above JK's circumstances have dramatically changed since the creation of the January 2014 IEP. I am convinced that that IEP is no longer appropriate to address the specific needs of JK by providing the necessary structure. All that it provided was counseling twice a month in a general education setting. The academic year is scheduled to commence within a week. As early as June 12, 2014, petitioners requested that the District convene an IEP meeting in light of JK's current crisis. N.J.A.C. 6A:14-2.3 (h) (5) requires of the District that, "[u]pon receipt of any written parental request to initiate or change the referral, identification, classification, evaluation, educational placement or the provision of a free, appropriate public education, a response . . . shall be provided to the parent within 20 calendar days, excluding school holidays but not summer vacation." Inexplicably, the District not only failed to respond to petitioners' June 12 request within twenty calendar days, it failed as well to convene an IEP meeting after the July 3 and July 18 communications to it. The District finally offered to convene an IEP meeting on August 28 only after petitioners were compelled to file the instant emergent relief application and but one week before the commencement of the 2014-15 academic year. N.J.A.C. 6A:14-3.7 (a) (4) requires a district to ensure that there is no delay in implementing a student's IEP. The District does not dispute this timeline. Rather than work collaboratively with petitioners to identify or locate an appropriate therapeutic/special education program for JK as requested as early as June 12, petitioners were left on their own. They have identified an academic program called Discovery Connections that is associated with the Redcliff Assent Wilderness Treatment Program where JK has been spending the summer.

Although the District concedes that it did not timely respond to petitioners' request for an IEP meeting throughout the summer, it argues that a procedural violation of the IDEA does not automatically result in a denial of a FAPE. It is correct that not all procedural violations amount to a substantive deprivation of FAPE. P.C. & S.C. o/b/o J.C. v. Harding Twp. Bd. of Educ., EDS6708-10, (August 10, 2011) <http://njlaw.rutgers.edu/collections/oal/>,

Under 20 U.S.C. § 1415 (f) (3) (E) (ii):

> In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies—
>
> (I) impeded the child's right to a free appropriate public education;
>
> (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
>
> (III) caused a deprivation of educational benefits.

There has been a sufficient showing of a denial of a FAPE here to support a likelihood of success on the merits. The law also is well settled that, where a district has significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, it has violated the IDEA. The District's delay here was clearly significant. It did not offer an IEP meeting until August 28, one week before the start of the academic year and more than sixty days after the request by petitioners. The District's reliance on P.C. & S.C. o/b/o J.C. v. Harding Twp. Bd. of Educ., supra is misplaced. In that case, there was a procedural violation of the IDEA because the district did not have an IEP in place at the beginning of the school year. However, the ALJ specifically found that the district had not sat on its hands and done nothing before the start of the school year. It conducted evaluations throughout the summer and started the IEP creation process with the full participation of the parents. In the instant matter, the District's inactivity in the face of requests from petitioners to engage in a participatory process has left them on their own. This is not a case where the parents bear some blame by not approaching a district for relief until the last minute. Nor is it a situation where a district had demonstrated a consistent willingness to develop an IEP, but where the parents terminated the process by filing for due process. See, C.H. v. Cape Henlopen School District, 606 F.3d 59 (3d Cir. 2010).

I further **CONCLUDE** that the balancing of the equities tips to petitioners. JK is in a crisis situation. His parents have identified a program consistent with his current setting. The District has offered nothing yet as an alternative for comparison purposes. Despite the District's offer to hold an IEP meeting on August 28, 2014, as stressed above, the current IEP is wholly inadequate in light of changed conditions. If the District were to offer FAPE through an as yet to be presented IEP, it may eventually prevail. However, at this time, the equities balance in favor of JK's need for an immediate placement different from that set forth in the last IEP.

ORDER

It is **ORDERED** that petitioners' application for emergent relief be **GRANTED.**

It is further **ORDERED** that the District place JK at the Discovery Academy, a residential treatment facility in Utah at least until the underlying due process petition is resolved.

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.

August 27, 2014

DATE JESSE H. STRAUSS, ALJ

Date Mailed to Parties: 8/27/14

id