



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON EMERGENT RELIEF

OAL DKT. NO. EDS 16948-18

AGENCY DKT. NO. 2019-29075

**PISCATAWAY TOWNSHIP BOARD
OF EDUCATION,**

Petitioner,

v.

T.S. o/b/o H.S.,

Respondent,

And

T.S. o/b/o H.S.,

Petitioner,

v.

**PISCATAWAY TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 16979

AGENCY DKT. NO. 2019-29048

(Consolidated)

David B. Rubin, Esq., for petitioner/respondent Piscataway Board of Education

T.S., parent, pro se

BEFORE **CARL V. BUCK III**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415 et seq. Petitionerⁱ filed an emergent relief petition and a request for due process, if applicable, on behalf of the Piscataway Board of Education (Petitioner or Board) seeking home instruction for H.S. pending the outcome of a Child Study Team (CST) evaluation. The petition was transmitted to the Office of Administrative Law (OAL), where it was filed on November 28, 2018. Pending completion of the CST evaluation, the petitioner seeks an Order placing H.S. on home instruction, finding that H.S. poses a danger to himself and/or others in that H.S.'s behavior negatively impacts the safety, security and well-being of other students, staff and school property. H.S. is currently an unclassified student and thus, is not eligible for special education services at this time.

There is a cross-petition wherein the parent, T.S., disputes the Board's recommendation of home instruction and seeks that the CST evaluation be expedited along with a functional behavior assessment and the immediate return of her son to his most recent classroom setting.

Notwithstanding an overlay of issues and facts, this order will deal solely with the Emergent Relief sought by the Board. The other issues will be dealt with at the conclusion of the subsequent due process hearing.

As the two within matters concern the same parties and events, I **CONCLUDE** that the interests of efficiency and economy will be served by consolidation.

Therefore, it is **ORDERED** that these matters be **CONSOLIDATED** for all purposes including this oral argument, due process hearing and disposition.

ⁱ For clarity this Order will pertain to the Motion for Emergent Relief filed by the Piscataway Board of Education. Therefore, the petitioner is the Piscataway Board of Education and the respondent is T.S. on behalf of H.S.

FACTUAL BACKGROUND

This matter was assigned to me on Wednesday, November 28, 2018. Oral argument on the motion for emergent relief was scheduled for Friday, November 30, 2018 at 9:30 a.m. A telephone conference was scheduled for, and occurred on, Wednesday, November 28, 2018 at 3:00 p.m.

During the telephone conference, the parties discussed the matters. I informed the parties that, as I had not had the time to adequately review both files, I would only be dealing with the emergent matter during the hearing scheduled for Friday, November 30, 2018. The separate due process claim would remain to be scheduled in the normal course of business. Mr. Rubin, counsel for Piscataway requested clarification whether or not testimony should be provided in support of their motion in addition to their filing and supporting documentation. I replied that should Piscataway be relying on information and assertions of their claims for the motion, they should take the need to provide testimony into consideration.

On Friday, November 30, 2018, petitioner T.S., her son H.S. and S.T.ⁱⁱ - the father of H.S., attended the hearing. Counsel for Piscataway, David Rubin, appeared with the following individuals from the Dwight D. Eisenhower Elementary School in Piscataway:

1. Dr. Laura Heimlich, Principal;
2. Stacey Thomas, Teacher;
3. Sara Haarburger, School Psychologist;
4. Dierdre Ortiz, Director, Special Services.

ⁱⁱ The father's initials are "T.S." In an attempt to avoid confusion, I have transposed them to be "S.T." for purposes of this decision.

Mr. Rubin commenced stated that the Board relied on the filing, affidavits and attachments submitted as their motion. However, in the interest of providing a clearer picture for the Board's position, he would also present testimony.

Mr. Rubin stated that since beginning kindergarten in September 2018, H.S. is classified as a General Education (GE) student. Notwithstanding H.S. is a GE student, under the present circumstances, the student would be treated as a special education student under the provisions of 34 C.F.R. section 300.534. (P-1). Therefore, in this case, student is presumed as eligible for special education services.

Mr. Rubin also referenced the New Jersey statute prohibiting a K-2 student from being suspended, "...except when the suspension is based on conduct that is of a violent ... nature that endangers others." N.J.S.A. 18A:3-2a.

TESTIMONY

For Petitioner

Dr. Laura Heimlich testified to the following: She is in her second year as principal of the Eisenhower Elementary school. She detailed her qualifications and certifications, as having previously been both the school psychologist and behavioral school psychologist at Eisenhower. Therefore, she has a background in matters such as the one at hand. She testified to the Certification in Support of Emergent Relief and the attachments thereto (P2, P2a, P2b, and P2c) and she personally had been called to deal with escalation of incidents involving H.S. She has observed and has been aware of the continuing pattern of H.S.'s behavior from the beginning of the school year. She testified regarding Exhibit P2c - a series of incident reports in the "Student Conduct Referral Form." She testified that discipline was imposed as a last resort in this matter. The incident reports document, among other things, H.S. kicking, punching and choking different students, biting staff members, climbing on filing cabinets, and throwing and destroying classroom items.

After the first few weeks of school, she consulted with Mrs. Haarburger, the school psychologist, to create and implement a behavioral plan for dealing with H.S.

On September 26, 2018 a STAR meeting was held where formalized interventions were established. A referral was made to “The Haven” for unsafe behavior in school and feelings that H.S. discussed relating to his father living far away with other siblings. (P2a). T.S. has not used the referral to “The Haven.” In this plan, earning reinforcement was set at a very high level, so to reinforce positive behaviors. However, the positive reinforcement did not work. She also testified as to the impact that H.S.’s negative behaviors had on the other students. Specifically, the teacher would have to stop the lesson plan and students may have to be removed from the classroom. As a result of these interruptions to the classroom, the teacher, Ms. Thomas, was two weeks behind in phonics instruction. Dr. Heimlich stated that H.S. was kicking, scratching, and biting. H.S. also punched her in the face and pulled at her earrings. When questioned on whether this was normal behavior, she stated that it was not typical for a five-year-old to evidence this type of behavior on this level. Further, H.S. telegraphed his intent to act out. Dr. Heimlich did not believe that assigning an aide to H.S. would resolve his negative behavior. On cross-examination by T.S., Dr. Heimlich stated that H.S. was given multiple breaks per day. In addition, a plan was being formulated by the CST that in the event that H.S. was to be returned to the general classroom setting, he would not be placed around his peers due to safety concerns.

Stacey Thomas testified that she has been a kindergarten and GE teacher with certification in English Second Language (ESL) for nine years. Prior to that she had two years’ experience in preschool and prior to that, six additional years at a preschool level. H.S. has been a student in her class since September. During the first week of school, she spoke with Ms. Haarburger regarding issues concerning H.S. During the second week, she had additional concerns on how H.S.’s actions were intruding on

other children. They then arrived at a plan of positive reinforcement, but unfortunately this plan did not work.

At the September 26, 2018 meeting, an intervention was placed into effect using Spider-Man materials. In this plan, H.S. would be able to reflect what he wished to have as a “reward.” She expressed that her concern was that H.S. be “safe with his body.” When he was expressing positive behavior, he would be rewarded, by giving H.S. a Spider-Man sticker or allow some other activity with a Spider-Man doll placed in the classroom.

Ms. Thomas stated that while H.S. was given breaks, the breaks were implemented that H.S. did not know he was taking a break. Ms. Thomas would take H.S. out of the classroom on the pretext of needing his assistance on a task. He would encounter Dr. Heimlich or another school employee, who would give H.S. positive reinforcement. She stated that these methodologies of giving H.S. jobs in the classroom, badges or superhero stickers that he could pick from items which were part of her “tool kit” of remedies, but the “tool kit” were ultimately exhausted.

She also stated that due to the needed time with H.S., she was behind on her general instruction with the class. If incidents occurred where someone got hurt, Ms. Thomas automatically involved the nurse’s office and sent any injured students to the nurse for evaluation. On cross-examination, she clarified that the student behavioral log began on September 11, and that behaviors expressed by H.S. were personally witnessed by her. She further testified that H.S. bit two staff members when he was being removed from the class on November 14, 2018.

Further, Ms. Thomas began a notebook which was supposed to go back and forth to T.S. to relay any concerns with H.S.’s behavior. The communication log between T.S., Ms. Thomas and Dr. Heimlich was a notebook sent back and forth from September 26 to October 8, 2018. The exchange stopped on October 8, 2018, as the notebook was sent out but not returned from T.S.

Ms. Thomas also testified that a referral to the CST was made on October 10, 2018, which study is currently underway. The reason for referring to the CST was behaviors and those discussed at the CST meeting of October 10, 2018.

For Respondent:

T.S. then testified on behalf of her son, H.S. She testified that the school documents never stated that H.S. needed an evaluation due to concerns for the safety of himself or to others. (R-1.) In the event H.S. were to be suspended, she was concerned as to the length of the suspension. Since she was not provided answers to these questions and reached out to Dawn Brzozoskwi.

On cross-examination by Mr. Rubin, T.S. stated that when she had sent the information which is contained in R-2, she had already filed for this hearing. She stated her further concern because she related to Dawn Brzozoskwi that T.S. was told by Dr. Heimlich that he was not allowed back in the building because H.S. has a suspected disability.

T.S. stated that she had not received any home instruction for H.S. since this process began and as she personally is a clinician with various certifications she understands home instruction. T.S. stated that her request is that H.S. be placed in the least restrictive environment, adding that home instruction is the most restrictive environment. As T.S. she worked all day, she did not have placement for H.S. until 3:00 o'clock. She asserted that, under the Individuals with Disabilities Education Act (IDEA) and Free and Appropriate Public Education (FAPE), a student was to be educated with his or her peers and home instruction did not allow for that. She further stated that the issue of suspension was not given prior to these discussions as an alternative - but more of a threat. It would be a hardship on her and her family should H.S. receive home instruction. T.S. further stated that she did not believe the

information contained in the reports regarding the alleged actions of her son. She stated it was a “their word against mine” situation.

S.T., the father of H.S. then testified. He stated that he does not believe that these issues arise from a problem other than, as a kindergartener, H.S. is not experienced in dealing with other children and that he does not know how to share. H.S. was in a daycare program last year, but the program was not as structured as kindergarten. H.S. has three additional siblings, which he does not frequently see, and has not evidenced any problem with those siblings.

H.S.

Finally, T.S. wished to have H.S. speak to the court.

H.S., who had not been present for any testimony presented, was brought into the courtroom. The undersigned sat next to him, introduced myself, and attempted to put him at ease. H.S. appeared to be a typical five-year-old child. When questioned by T.S., H.S. admitted that he had bitten Dr. Heimlich. He explained that he did this because she was blocking the door between four and five. He stated that he regretted his actions and that he wished to return to school.

After reviewing the submission of the Board (P1), the Certification in Support of Emergent Relief (and attachments) of Dr. Laura Heimlich (P2a, P2b, P2c), and the testimony presented, I **FIND** the following as **FACT**:

H.S. is a five-year-old kindergarten student at the Dwight D. Eisenhower Elementary School in Piscataway. He is a GE student who is currently under a CST evaluation and thereby covered by the disciplinary procedural protections of the IDEA. 34 C.F.R. 300.534. During the past three months, H.S. has evidenced behavioral problems beginning on or about September 13, 2018. These problems were first recorded in a student behavioral notebook which began on September 13, 2018.

Negative behavior, such as kicking students, punching students and staff, choking, and biting a student and staff, climbing on filing cabinets, throwing items and classroom materials was documented. H. S. also eloped from staff, threw items with saliva on them at other students, destroyed classroom materials and otherwise engaged in behavior unacceptable to a GE kindergartner. The student behavioral notebook documents these negative activities from September 13 through October 14, 2018, listing twenty-three separate entries.

These negative behaviors were the reason why H.S. was referred for a CST evaluation on October 10, 2018. The initial planning meeting and consent to evaluate H.S. occurred on October 25, 2018. The educational assessment was completed on November 28, 2018. The psychology assessment was completed on November 28, 2018. The social assessment was completed on November 2, 2018. The speech assessment was completed on November 19, 2018. The last report to be completed, which is a neurological assessment, is scheduled for December 12, 2018. A projected eligibility meeting should be scheduled on either December 19 or December 20, 2019.

Negative behaviors continued to occur after October 25, 2018. H.S. was suspended from Eisenhower on November 14, 2018, as a result of an incident in which H. S. was removed from his classroom, thereafter he bit Dr. Heimlich, and possibly one additional staff member. The school attempted to contact T.S. regarding this incident but T.S. did not respond. At that time, the emergency contact was called and informed that H.S. was to be picked up immediately from school due to his unsafe behaviors.

On November 15, 2018, Dr. Heimlich contacted T.S. to inform her that H.S. was to stay home due to his unsafe behaviors in the classroom and that solutions to this problem were being considered. On November 16, 2018, Dr. Heimlich contacted T.S. to recommend home instruction pending the completion of the CST evaluation. Dr. Heimlich informed T S. that the school was not prepared to ensure a safe environment for students and faculty in the event that H.S. were to return to school. T.S. expressed concern that H.S. would not be with other students as well as the negative impact to her

family in the event that H.S. was to be placed on home instruction. On November 19, 2018, H.S. attended Eisenhower, was removed from the student body and assigned to a paraprofessional. Dr. Heimlich spoke with T.S. and informed her that H.S. would have to remain at home as he was not permitted to be in a classroom setting due to his continuing behavioral concerns. On November 19, 2018, Dr. Heimlich contacted T.S. to discuss options including placing H.S. on home instruction pending completion of the CST evaluation or alternatively implementing an eight-day suspension. T.S. refused home instruction and the Board moved forward with this emergent action.

Simultaneously the CST has been moving forward with receipt of information with a goal towards completing the CST evaluation within the next few weeks.

LEGAL ANALYSIS

Emergent Relief

N.J.A.C. 6A:14-2.7(r) allows either party to apply in writing for a temporary order of emergent relief as part of a request for a due process hearing or an expedited hearing for disciplinary action. The request shall be supported by an affidavit or notarized statement specifying the basis for the request for emergency relief. N.J.A.C. 6A:14-2.7(r)(1) lists the cases emergent relief is available for, which includes issues involving (i) a break in the delivery of services, (ii) disciplinary action, including manifestation determinations and determinations of interim alternate educational settings, and (iii) placement pending the outcome of due process proceedings.

Petitioner's Petition for Emergent Relief and for Continuing Due Process sought to address a concern of violent behavior by H.S. which could prove to be a danger to himself or to others. That behavior has led to the recommendation that evaluation of H.S. by the CST which is underway. It stemmed from disciplinary proceedings based on H.S.'s activities sought continuing due process in adjudicating issues regarding H.S.'s appropriate program and school placement based on the results of the CST evaluation. Accordingly, this Petition meets the threshold issues required for the

granting of emergent relief.

For emergent relief to be granted, the petitioner must comport with the requirements of N.J.A.C. 6A:3-1.6.ⁱⁱⁱ

N.J.A.C. 6A:3-1.6 provides for emergent relief or stay as follows:

(a) Where the subject matter of the controversy is a particular course of action by a district board of education or any other party subject to the jurisdiction of the Commissioner, the petitioner may include with the petition of appeal, a separate motion for emergent relief or a stay of that action pending the Commissioner's final decision in the contested case.

(b) A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying 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.

ⁱⁱⁱ As further required by N.J.A.C. 6A:14-2.7(s) (1.) (i through iv.).

[See also N.J.A.C. 1:1-12.6.]

For emergent relief to be granted, the petitioner must satisfy all four prongs of the Crowe test by clear and convincing evidence, a “particularly heavy” burden. Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 396 (App. Div. 2006) (quoting Punnett v. Carter, 621 F.2d 578, 582 (3d Cir. 1980)); see also Guaman v. Velez, 421 N.J. Super. 239, 247–48 (App. Div. 2011).

Here, the petitioner seeks injunctive relief to compel a period of home instruction for H.S. while the CST evaluation is completed. The documents provided show that the Board believes H.S. represents a danger to himself and others. Petitioner argues that placing H.S. on home instruction while the CST evaluation is completed would allow H.S. to move forward with his education while the CST review is completed.

I. The petitioner will suffer irreparable harm if the requested relief is not granted.

As to this first requirement, that the petitioner will suffer irreparable harm if the requested relief is not granted, the petitioner has asserted that harm is generally considered irreparable in equity if it cannot be redressed adequately by money damages. As a school district, petitioner has sought to carry out its Constitutional duties to provide a thorough and efficient education to respondent and to protect students in its care from continuing danger.

H.S. admitted that he bit Dr. Heimlich. However, a tempering factor to this action **must** be taken due to H.S.’s level of comprehension, as he is only five-years old. This act, in itself, does not satisfy the requirement of irreparable harm. But, in the light of all negative activity contained in the student notebook, the cumulative effect is that the Board may be irreparably harmed in its efforts to maintain a safe school atmosphere if H.S. were permitted to return to Eisenhower before the full import of the CST evaluation can be known. Petitioner cannot be made whole through monetary relief.

II. The legal right underlying petitioner's claim is settled.

Petitioner's claim is that a public school has the right to discipline students and maintain its schools as part of its responsibility to provide a free and appropriate public education (FAPE) for all students. As to the second requirement of the Crowe test, that the legal right underlying petitioner's claim is settled, petitioner has cited N.J.S.A.18A:37-2a(b), which authorizes school districts to suspend a student in grades K-2 when the suspension "is based on conduct that is of a violent ... nature that endangers others" whose conduct constitutes a continuing danger to the physical well-being of other students. Accordingly, petitioner has demonstrated that the law is settled in its favor.

III. The petitioner has a likelihood of prevailing on the merits of the underlying claim.

The Honorable Joseph Martone, ALJ, in West Windsor v. J.D., 95 N.J.A.R. 2d (EDS) 146 stated that, "Escalating misconduct may warrant home instruction pending an out-of-placement for behavioral modification. The emergency implementation of a home schooling plan can provide a satisfactory interim education for a disabled student during the pendency of a mediation process." M.F. v Toms River Regional Board of Education, 96 N.J.A.R. 2d (EDS) 67. The situation at hand is analogous and there is evidence of a need to remove H.S. from the GE setting during the pendency of the CST evaluation. Accordingly, petitioner has met this third prong of the Crowe test.

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.

As to the balancing of the equities of the situation and the interests of the parties, it is the Board that would suffer the greater harm if the relief sought was not granted.

Petitioner has a Constitutional obligation to provide a thorough and efficient education to the students of Piscataway Township. To meet that obligation, behavioral supports such as effective discipline must be imposed when necessary. In the within matter, petitioner has imposed a suspension of a student for disruptive activities. The Board has undertaken a CST review and, pending the results of that investigation, wishes to provide H.S. with an interim alternative placement of home instruction. In this matter, the overriding need is for the Board to provide a safe environment for its students and staff pending the review and analysis of the CST investigation.

Student H.S. would suffer little to no harm by an interim placement of home schooling. He, as a five-year-old, has not had much formal education and a short period of home instruction would create no harm. H.S.'s mother argues that H.S. should be placed in the least restrictive educational environment and should be with his peers. Considering the circumstances and the pending CST investigation, I disagree. The safety of the school, the students and staff are paramount in this instance of consideration.

Petitioner not only has a Constitutional responsibility to provide all students in the District with a FAPE, it has a responsibility to provide H.S. with a FAPE. The Board has begun the CST investigation in order to obtain a more accurate overview of H.S.'s educational, personal and psychological condition.

Accordingly, when the equities and interests of the parties are balanced, it would be the petitioner which would suffer the greater harm. Therefore, petitioner has met its burden of showing by clear and convincing evidence that emergent relief may be granted to petitioner. Pending the outcome of the CST investigation, the District shall provide H.S. with home instruction, thus being a FAPE.

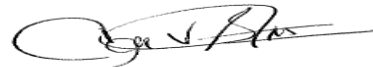
ORDER

The petitioner's motion for emergent relief is **GRANTED**. It is **ORDERED** that H.S. shall be provided with home instruction pending the outcome and analysis of the CST investigation.

It is further ordered that the Board shall take any and all action necessary to obtain all studies necessary for the completion of the CST investigation and analysis thereof for the appropriate placement of H.S. These studies should be completed to facilitate an appropriate placement of H.S. no later than the commencement of the Spring Semester at the Piscataway School District in January 2019.

A telephone prehearing in the due process is scheduled for January 9, 2019, at 4:00 pm, which Mr. Rubin will initiate, and the due process hearing is scheduled for January 16, 2019, commencing at 9:00 am. Notices will be send to the parties under separate cover.

This order on application for emergency relief shall remain in effect until issuance of the decision in the matter. The parties will be notified of the scheduled hearing dates. 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.



December 5, 2018

DATE

CARL V. BUCK III, ALJ

Date Received at Agency

Date Mailed to Parties:

/lam

WITNESSES

For Petitioner:

Dr. Laura Heimlich, Principal
Stacey Thomas, Teacher
Sara Haarburger, School Psychologist
Dierdre Ortiz, Director, Special Services

For Responent:

T.S., mother
S.T., father
H.S., student

APPENDIX

List of Moving Papers

For Petitioner:

P-1 November 27, 2018, Letter requesting due process and emergent relief
P-2 Certification of Laura Heimlich
P-2a Summary
P-2b Student Behavior Log
P-2c Piscataway Township School Student Conduct Referral Form

For Responent:

R-1 September 24, 2018 Email

R-2 November 20, 2018 Email

R-3 Section IV-Due Process/Suspension Procedures