



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
ON EMERGENT RELIEF

OAL DKT. NO. EDS04904-21
AGENCY DKT. NO. 2021-32766

(CONSOLIDATED)

WEST WINDSOR-PLAINSBORO
REGIONAL BOARD OF EDUCATION,

Petitioner,

v.

A.C. on behalf of Z.P.,

Respondent,

And,

A.C. on behalf of Z.P.,

Petitioner,

v.

WEST WINDSOR-PLAINSBORO
REGIONAL BOARD OF EDUCATION,

Respondent.

OAL DKT. NO. EDS 05335-21
AGENCY DKT. NO. 2021-32864

Denise Lanchantin Dwyer, Esq., for petitioner¹ (Law Office of Denise Lanchantin
Dwyer, LLC, attorneys)

Marc G. Mucciolo, Esq., for respondent (Methfessel & Werbel, attorneys)

BEFORE **SARAH G. CROWLEY**, ALJ:

¹ For ease of reference, A.C. will be referred to as petitioner; West Windsor-Plainsboro Regional Board of Education will be referred to as respondent.

STATEMENT OF THE CASE

Petitioner A.C. (A.C. or mother), on behalf of her minor son Z.P. (Z.P. or student), filed a Motion for Emergent Relief against the West Windsor-Plainsboro Regional Board of Education (District) seeking to compel a meeting to develop a Behavior Intervention Plan (BIP) for A.C. The request for relief seeks an order “directing the school district to develop a behavior intervention plan for Z.P., immediately using currently available assessment data with the assistance of Dr. Lindsay Hilsen and allow Dr. Hilsen to participate in implementing that plan, with the district paying Dr. Hilsen’s work for this fee.”

The due process petition in this matter, scheduled for a hearing in this matter on December 9, 2021, likewise seeks “the development of a behavior intervention plan.” That matter also sought to have the district conduct a functional behavior assessment(FBA). The other pending matter between the parties involved the denial by the District of a request for an independent evaluation in Occupational Therapy. The parties have agreed to have these matter consolidated herein.

After several conference calls, the exchange of discovery and a prior emergent motion filed by the petitioner relating to transportation issues, the matter was scheduled for a due process hearing before the undersigned via zoom for December 9, 13, 16 and 22, 2021. The district agreed to conduct a behavior assessment and obtained the consent of the petitioner to conduct same on October 18, 2021. A meeting between the petitioner and the District to discuss a behavior intervention plan was scheduled for November 11, 2021. The matter was rescheduled by the District to December 6, 2021, as a result of several child study team members wanting to consult with a union representative prior to such a meeting due to pending institutional abuse claims filed by the petitioner.² It is this delay of a few weeks for this meeting that precipitated the filing of an emergent motion.

PROCEDURAL HISTORY

² A third petition bearing OAL Dkt. No. EDS 07076-21 was filed after the child was deemed ineligible for special education services to invoke stay-put pending the outcome of all three matters. The parties have requested that this matter remain with Judge Fritch and not be consolidated with the within matters.

On November 17, 2021, petitioner filed a Motion for Emergent Relief seeking to compel a meeting to develop and implement a behavior intervention plan. This meeting is currently scheduled for December 6, 2021. A recorded conference call was conducted on November 19, 2021 to discuss issues related to consolidation as well as the timing for opposition to be filed on the emergent motion. Opposition was filed by the District on November 22, 2021, a subsequent letter brief was filed by the petitioner, and the record closed with respect to the emergent motion at that time. The due process hearing remains scheduled for December 9,13,16 and 22, 2021.

FACTUAL BACKGROUND

A.C. is five years old and has been in school in-person since September of this year. There have been a number of issues related to A.C.'s behavior, which have required the District to used restraints on him for his safety on several occasions. The petitioner alleges that that A.C. has an issue with elopement which also presents safely issues. The parents have filed several institutional abuse cases against individuals in the District a result of actions taken by the District to ensure the child's safety. As a result of these complaints, a new Board-Certified Behavior Analyst (BCBA) had to be assigned to the case due to charges pending against the prior BCBA. In addition, as a result of the pending institutional abuse claims, the initial meeting date of November 11, 2021, to discuss the BIP was delayed due to the child study team members need to consult union representatives and/or counsel prior to attending a meeting with A.C.'s parents. The meeting is scheduled for December 6, 2021.

In support of the petition, A.C. has provided a certification outlining the issues that have arisen since the September of this year. The issues relate to A.C.'s behavior and elopement issues. Issues relating to A.C.'s behavior have been the subject of prior litigation and a prior decision was issued regarding these issues as recent as March 2021. The due process filed by the petitioner in the within matter seeks, inter alia, an FBA and a BIP to address the issues that have arisen with A.C. The District agreed to conduct the FBA and the parents provided their consent for same just one month ago, on October 19,

2021. Thereafter, a meeting was set up to discuss the FBA a BIP for November 11, 2021. However, due to complaints filed by the parents with the New Jersey Institutional Abuse Investigation Unit, several of the team members requested union representation which led to the rescheduling of the meeting to December 6, 2021. The due process hearing to determine an appropriate BIP, and other issues is scheduled to begin on December 9, 2021.

The emergent application seeks an immediate meeting to discuss a BIP for the child. In support of the emergent nature of the motion, petitioner alleges that there has been a break in services, discipline imposed and that the petitioner is in need of a placement pending the outcome of this matter. It is unclear from the papers, the conference call with the parties, or the follow-up correspondence from counsel for the petitioner what the break in services is that has been alleged, as the child remains in school with the current IEP as stay-put. It is similarly unclear what discipline petitioner is alleging has been imposed or what placement is sought pending the outcome of the underlying due process matter, which is scheduled for a hearing on December 9, 2021. When asked to articulate the relief being requested, the petitioner urged that a behavior intervention plan be ordered by the undersigned without the benefit of testimony. Counsel then suggested that notwithstanding the impending meeting and hearing date, which was very difficult to schedule with the two attorneys, that I take testimony from the experts on the issue of the behavior intervention plan in connection with the within emergent motion. It is unclear how this could possibly take place prior to the meeting on December 6, 2021, given the Thanksgiving holiday this week.

LEGAL ANALYSIS AND CONCLUSION

N.J.A.C. 1:6A-12.1(a) provides that the affected parent(s), guardian, district, or public agency may apply in writing for emergent relief. An emergent relief application is required to set forth the specific relief sought and the specific circumstances that the applicant contends justify the relief sought. Each application is required to be supported by an affidavit prepared by an affiant with personal knowledge of the facts contained

therein and, if an expert's opinion is included, the affidavit shall specify the expert's qualifications.

Emergent relief shall only be requested for the following issues pursuant to N.J.A.C. 6A:14-2.7(r):

- i. Issues involving a break in the delivery of services.
- ii. Issues involving disciplinary action, including manifestation determinations and determinations of interim alternate educational settings;
- iii. Issues concerning placement pending the outcome of due process proceedings; and
- iv. Issues involving graduation or participation in graduation ceremonies.

The petitioner seeks an order that requires the District to have an immediate meeting to discuss a behavior intervention plan for A.C. or in the alternative have the undersigned order a behavior intervention plan without the benefit of testimony. The meeting to discuss this plan is currently scheduled for December 6, 2021, and a full hearing on all the issues, including the BIP is scheduled for December 9, 13, 16, and 22, 2021. The petitioner also seeks placement pending the outcome of the matter. However, the child is in a stay-put placement and no alternative placement has been suggested by petitioner.

The standards for emergent relief are set forth in Crowe v. DeGoia, 90 N.J. 126 (1982), and codified at N.J.A.C. 6A:3-1.6, one of the Department's regulations governing special education. These standards for emergent relief include 1.) that the party seeking emergent relief will suffer irreparable harm if the requested relief is not granted; 2.) the existence of a settled legal right underlying the petitioner's claim; 3.) that the party seeking emergent relief has a likelihood of prevailing on the merits of the underlying claim; and 4.) a balancing of the equities and interests that the party seeking emergent relief will suffer greater harm than the respondent. The petitioner bears the burden of satisfying all four prongs of this test. Crowe, 90 N.J. at 132-34. Arguably, the standard is a high

threshold to meet, and I will address each prong separately. Moreover, the petitioner has not established the threshold right to emergent relief under N.J.A.C. 6A:14-2.7.

Irreparable Harm

Here, there has been no showing of irreparable harm to A.C. The District has conducted an assessment, has included the petitioner's expert in meetings and is seeking to have a meeting to discuss an appropriate behavior intervention plan on December 6, 2021. If there had been an issue regarding the safety or harm to A.C. as a result of alleged incidents that have been occurring since September, it is curious why petitioner waited until three weeks before the hearing to file such a motion. Notwithstanding the timing of same, there has been no irreparable harm demonstrated.

I therefore **CONCLUDE** that petitioner has not met the burden of establishing irreparable harm.

The Legal Right Is Settled

The legal right at issue in this matter is the petitioner's right to a meeting and an appropriate behavior intervention plan. This issue is part of the due process claim which is to be resolved after hearing testimony from the experts from both parties in the underlying due process hearing. The issue of the petitioner's right to such a plan and the nature of such a plan is yet to be determined and is unsettled.

Thus, I **CONCLUDE** petitioner has not met the second prong of the emergent relief standard.

Likelihood of Prevailing on the Merits

Regarding whether the petitioner has a likelihood of prevailing on the merits of the underlying claim, the merits involve whether the petitioner is entitled to an immediate meeting to discuss a BIP. The right to an FBA and a BIP is the subject matter of the underlying due process proceeding, and there has been no demonstration of a likelihood of success on the merits of either of these claims. The meeting to discuss the same is scheduled for December 6, 2021, and the hearing to determine the right to an FBA and a BIP are scheduled to commence on December 9, 2021. There is no legal basis to demand such a meeting at this time. Notwithstanding the issue of the entitlement to an FBA and a BIP, the District has conducted an FBA and has included the petitioner's behavior expert in their discussion and has scheduled a meeting to discuss a BIP for December 6, 2021.

Therefore, **I CONCLUDE** petitioner does meet the third prong of the emergent relief standard.

Z.P. Will Suffer Greater Harm Than the Respondent

The next prong of the above test to be addressed is whether the equities and interest of the parties weigh in favor of granting the requested relief. The petitioner has not established that Z.P. is entitled to a BIP. Notwithstanding same, the District has conducted an FBA and scheduled a meeting to discuss a BIP for December 6, 2021. Thus, **I CONCLUDE** that petitioner has failed to meet the final prong of the analysis, and the emergent motion has no merit.

ORDER

Having concluded that the petitioner has failed to satisfy all four requirements for emergent relief, the petitioner's request for emergent relief is **DENIED**.

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 Policy and Dispute Resolution.

November 23, 2021

DATE



SARAH G. CROWLEY, ALJ

Date Received at Agency

Date Mailed to Parties:
