



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
INTERVENER'S MOTION
ON EXPEDIATED HEARING

OAL DKT. NO. EDS 01940-22

AGENCY DKT. NO. 2022-33916

K.R. AND J.W. ON BEHALF OF L.W.,

Petitioners,

v.

**FRANKLIN TOWNSHIP BOARD
OF EDUCATION,**

Respondent,

AND

Y.A.L.E. SCHOOL SOUTHEAST, INC.,

Intervener/Third-Party Respondent.

Regina Ann Smith, Esq., for petitioners K.R. and J.W. on behalf of L.W. (Disability Rights New Jersey, attorneys)

Amelia M. Lolli, Esq., for respondent Franklin Township Board of Education (Connor, Weber & Oberlies, attorneys)

Brittany R. Halpern, Esq., for intervener/third-party respondent Y.A.L.E. School Southeast, Inc. (Comegno Law Group, P.C., attorneys)

BY **KATHLEEN M. CALEMMO**, ALJ:

STATEMENT OF THE CASE

On April 6, 2022, the Y.A.L.E. School Southeast, Inc. (YALE) filed a motion requesting an expedited due process hearing pursuant to N.J.A.C. 1:6A-14.2(a) maintaining that it is dangerous for L.W. to continue as a student at YALE. YALE seeks an order that places L.W. in an appropriate interim alternative educational setting, because it contends that “maintaining the current placement [for L.W.] is substantially likely to result in injury to [L.W.] or to others.” See: N.J.A.C. 6A:14, Appx. A, citing 20 U.S.C. §1415(k)(1)(3)(A).

PROCEDURAL HISTORY

On February 20, 2022, petitioners filed a due process petition and motion for emergent relief. On February 25, 2022, the Honorable Catherine A. Tuohy granted petitioners’ request for emergent relief and ordered that under “stay put”, L.W. would remain at YALE until the parties agree to a change in placement. On March 11, 2022, YALE filed a motion to intervene and a motion for emergent relief to alter the “stay put” provision and withdraw L.W. from YALE’s programming. The contested case was transmitted to the Office of Administrative Law (OAL) on March 15, 2022.

After a telephone conference on March 18, 2022, I entered an Order granting YALE’s request to intervene as a third-party respondent. YALE’s request for emergent relief was resolved by a Settlement Agreement.¹

On April 6, 2022, YALE filed a motion for an expediated hearing. On April 10, 2022, petitioners filed a letter brief in opposition to YALE’s motion. I conducted a telephone conference on April 11, 2022, and scheduled the expediated hearing for April 25, 2022. The hearing was conducted via remote technology due to the Covid pandemic.

¹ The Settlement Agreement was signed by all parties on March 22, 2022, and approved by the Township Franklin Public Schools Board of Education on April 25, 2022.

FINDINGS OF FACT

This case presents a very narrow issue for determination; that is, whether maintaining L.W.'s placement at YALE is substantially likely to result in injury to him or others. To comply with the regulatory requirement that this matter be heard expeditiously, the parties agreed that Rachael A. Sautter, Ph.D. BCBA-D, would testify as an expert witness in behavior analysis, and the documentary evidence supplied by YALE would be accepted as evidence. Further, there is no disagreement that petitioners and their home district, Franklin Township Public Schools (Franklin) have been in search of an alternative placement for L.W. since October 2021. As of July 1, 2022, for the Extended School Year (ESY), L.W. will be placed at Bancroft School by agreement of the petitioners and Franklin. Further, there is no dispute to the following pertinent **FACTS** and accordingly, I **FIND:**

L.W. is a ten-year-old fourth grade student enrolled as an out-of-district placement at YALE since July 2016. L.W. is currently classified as eligible for Special Education Services under the category of Autism. The last Individualized Education Program (IEP) meeting was held on December 21, 2021. YALE noted in the IEP that L.W. was exhibiting significant behavioral challenges. His disruptive behaviors of property destruction, by throwing and swiping at materials, vocal disruption, aggression, and self-injury had become more frequent and intense. The parents noted their concerns that YALE was not meeting L.W.'s needs.

On February 9, 2022, YALE withdrew L.W. from its program. Franklin notified petitioners of YALE's decision to withdraw L.W. on February 16, 2022. While searching for an appropriate alternative placement, petitioners desired for L.W. to remain at YALE and filed an emergent application seeking stay put placement which was granted on February 25, 2022.

During the 2021-2022 school year, L.W. demonstrated disruptive, aggressive, and self-injurious behaviors during the school day and on the bus. These incidents are reported in YALE's Incident Reports and Y.A.L.E. School Bus Incident Reports entered in evidence. (Y-3.)

The primary concern among YALE's Board Certified Behavior Analysts (BCBA), who observed L.W. during this school year, is the unpredictability of his behavior. Dr. Sautter testified and documented in her Behavior Summary and Program Recommendation Report that "[L.W.] engages in intense levels of problem behaviors across a variety of antecedent conditions throughout the school day." (Y-4.)

Two paraprofessionals, who are each assigned to L.W. for fifty percent of the school day, Christina Viscidy and Gianna Visceglia, testified that they use blocking pads for protection. Recently, YALE provided them with thicker pads to protect them from L.W.'s aggression. L.W. recently started swinging with a closed fist and kicking with both feet from a seated position. Despite needing blocking pads and being on the receiving end of aggression from L.W., both paraprofessionals spoke lovingly of him. Ms. Viscidy and Ms. Visceglia have worked with L.W. for over three years. Their affection for him was genuine and sincere.

Ms. Visceglia became emotional when talking about L.W., whom she referred to as "my boy." She was upset by L.W. banging his head and attempting to injure himself. When L.W. is in crisis or becomes aggressive, the paraprofessionals take him to isolation in the former music room that has been fitted with protective padding. Ms. Visceglia stated that L.W. usually walks calmly with her when she needs to remove him for his safety or the safety of others. However, both paraprofessionals recounted times when a two-person transport or intervention from YALE's crisis team were needed to de-escalate L.W.'s behavior. All incidents of aggression and disruption must be documented, and the paraprofessionals described using clickers to record frequency. Ms. Viscidy and Ms. Visceglia expressed concern about L.W.'s attempts to bang his head on hard surfaces and noted that his behaviors are interfering with their ability to provide educational instruction. Despite working with L.W. for over three years and knowing his likes and dislikes, their greatest challenge during this school year has been the unpredictable nature of L.W.'s behaviors.

Barbara Dobzanski, Supervisor of Special Services for Franklin, has had limited involvement with L.W., who was already enrolled at YALE when his family moved to

Franklin Township in August 2021. To become familiar with L.W., Ms. Dobzanski participated in a virtual observation, due to COVID protocol, of L.W. at YALE in October 2021. She observed L.W. swatting with his hand and kicking. Next, she attended the December 2021, IEP meeting where it was agreed that L.W. would remain at YALE, while Franklin and petitioners explored alternative appropriate placements.

In March 2022, Ms. Dobzanski observed L.W. on two occasions in his school setting at YALE. She recalled that L.W. was good for about fifteen minutes before he needed to be escorted to the music padded room. He left calmly with only one paraprofessional. However, when in the music room, he laid on the mat and banged his head and hands. The second time, she was able to observe about forty-five minutes of instruction before L.W. escalated and hit a staff member in the face. He was escorted to the music padded room where he showed more aggression towards the staff members in the room with him.

Ms. Dobzanski acknowledged that Franklin does not have the ability to meet L.W.'s needs. None of its staff is certified in Applied Behavior Analysis (ABA), the instruction that L.W. has been receiving for the past six years at YALE. Franklin utilizes one BCBA for all three of its schools. YALE currently has six BCBA's on staff. Ms. Dobzanski explored other out-of-district placements and was only able to secure an appropriate placement for L.W. at Bancroft for ESY as of July 1, 2022. She researched home bound instructors and was able to secure ten hours a week from Gloucester County Special Services to work on IEP goals with L.W. However, the instructor would not be certified in ABA. Ms. Dobzanski also questioned the safety of sending one instructor into the home to work with L.W., who was having difficulty working with his qualified and known instructors at YALE.

On March 17, 2022, the parties attended a resolution session that led to the formation of a Settlement Agreement. (J-1.) Dr. Sautter participated in the resolution session and in formulating the terms included in the Settlement Agreement. One area of concern has been the lack of communication and cooperation between YALE's nursing staff and L.W.'s medical providers. This led to confusion regarding medication and the administration of medication to L.W., resulting in L.W. not receiving his afternoon dosage.

To address this concern, the parties agreed to a communication plan between YALE's on-site nurse and L.W.'s personal psychiatric nurse practitioner. The logistics of this plan has not yet been realized. Because communication between the parties had become strained, the parties agreed to a communication and shared data plan between YALE's and L.W.'s at-home behavioral specialists. As of the date of this hearing, only an initial meeting had occurred. To help with L.W.'s behaviors, an additional one-to-one aide to be staffed, supervised, and directed by YALE personnel but funded by Franklin was assigned to L.W. While YALE continues to pull its own staff to assist with L.W., a new aide has not yet been hired. The parties signed the settlement agreement on March 22, 2022, agreeing to the above terms for the remainder of L.W.'S tenure at YALE.

Dr. Sautter testified that despite their best efforts, YALE is no longer an appropriate placement for L.W. She strongly believes that L.W. requires a more intensive stabilization program and suggested Kennedy Krieger Institute in Baltimore, Maryland. She first made that recommendation to the parents at the December 2021 IEP meeting. Dr. Sautter noted that due to the challenging and unpredictable nature of L.W.'s problem behaviors, the interventions by YALE have not resulted in any significant reduction of his behaviors.

Dr. Sautter recounted an escalation in behavior incidents from March 11, 2022, through April 4, 2022, when YALE suspended L.W. for four days. (Y-3.) On April 4, 2022, YALE documented eighty-four episodes of self-injury and one-hundred and forty-four episodes of aggression toward staff. Id. L.W. threw his reinforcing items and attempted to hit his head on hard surfaces. He hit and kicked staff members, who needed to utilize a two-person transport to bring L.W. to the padded music room to de-escalate. After the suspension, a re-admittance meeting was held virtually on April 11, 2022, and L.W. returned to school on April 12, 2022. YALE suggested two new safety strategies, a harness for the bus and a helmet to protect L.W.'s head.

The parents expressed concerns regarding how the harness and helmet would be utilized. The harness for the bus is not being used because L.W.'s new bus aide appears to be helping with bus safety issues. Dr. Sautter acknowledged that there had not been enough time to know if the aide's efforts on the bus will be successful, but she admitted that L.W. had one good day with this change. Dr. Sautter also acknowledged that the

parents, after initial reservations, signed the consent form for the helmet. L.W. tolerated the helmet better than Dr. Sautter thought he would in trial settings.

As of the date of the hearing, there are twenty-eight days remaining in the school year. YALE contends that due to L.W.'s crisis level of behavior occurring daily, YALE is no longer an appropriate placement and Franklin should place L.W. on home instruction. There was no expert opinion indicating that home instruction would be an appropriate interim alternative educational setting. Ms. Dobzanski expressed her reservations about its effectiveness and appropriateness because it would not incorporate ABA instruction. YALE advocated an intensive stabilization program.

K.R. spoke lovingly of her son. She described his funny personality and playful nature. L.W. is the oldest of her four children and K.R. stated that the family has learned so much from him. The biggest obstacle and challenge for L.W. was COVID, which caused shutdowns and disruptions to his routine. L.W. did not understand why his bus did not come in the morning and he was not able to grasp on-line virtual instruction. L.W. is non-verbal and his communication frustrations increased with isolation and his behaviors escalated. COVID even affected the home support services for L.W. with reduction in staffing and hours. K.R. witnessed L.W. regressing, where prior to COVID he was thriving.

K.R. is very happy with L.W.'s medical team and L.W.'s psychiatric nurse practitioner, Dr. Lisa Alberts. During his spring break from YALE, L.W. was seen by Dr. Alberts. Because this hearing occurred on the first day of school after the break, K.R. had only just emailed L.W.'s list of medication to YALE, the night before the hearing.

L.W. has been a student at YALE for six years, and K.R. hoped he would stay there. She is open to explore new school options for L.W. and consented to his enrollment at Bancroft for ESY on July 1, 2022. K.R. does not support home instruction and feels it would be detrimental. The limited instruction that L.W. would receive would not be a replacement for school services. Home-bound is not an appropriate alternative placement for L.W. K.R. has consented to the various proposals by YALE to keep L.W.

and others safe. She accepted the terms of the Settlement Agreement as the means to keep L.W. at YALE until an alternative appropriate placement is found.

Having reviewed the evidence from YALE and considered the credible testimony of the witnesses, I **FIND** the following additional **FACTS**:

By December 2021, Dr. Sautter had credible concerns about L.W.'s behaviors. The data gathered by her team of BCBA's showed alarming trends of aggressive behavior. (Y-7.) In her report (Y-4) and testimony, Dr. Sautter noted that daily behaviors occur but not at the same intensity. Even when L.W.'s behaviors do not involve crisis management, they always involve at least one paraprofessional armed with blocking pads to keep L.W. and others safe. At YALE, L.W. is surrounded by competent and caring professionals who are motivated to keep L.W. and others safe. Most importantly, YALE has been successful in its efforts.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

YALE brought this petition pursuant to N.J.A.C. 6A:14-2.7(o), which provides for an expedited due process hearing when it believes that continuing a child in his current educational placement is "substantially likely to result in injury to the child or to others" in the school environment. Here, YALE has gathered data on L.W.'s aggressive behavior from September 8, 2021, through April 12, 2022. (Y-7.) The data shows an alarming increase in aggressive behavior spiking on March 16, 2022, but remaining unacceptably high.

Despite those trends, I **CONCLUDE** that the proofs do not demonstrate that continuing to allow L.W. to attend school is substantially likely to result in injury to him or others in the school setting. I **CONCLUDE** that while the conduct at issue is most concerning, the evidence showed that YALE can keep L.W. and others safe. The settlement agreement was an attempt to fix broken lines of communication and restore collaboration. Even Dr. Sautter acknowledged that there had not been enough time to determine whether the new measures would be effective. In the aftermath of some of the most troubling conduct recounted by YALE personnel, the evidence showed that L.W.

was always able to remain at school for the full day. The collaborative terms under the Settlement Agreement should provide YALE with more reinforcements through communication with L.W.'s medical and in-home ABA providers and an additional full-time aide, funded by Franklin.

In determining that I am unable to grant the relief sought by YALE, I am guided by the express statutory language contained at 20 U.S.C. §1415(k)(1)(3)(A). Our courts assume that the drafters of a statute intended to ascribe to words their ordinary meaning. Jablonowska v. Suther, 195 N.J. 91, 105 (2008). Moreover, and importantly, a court should strive for an interpretation that gives effect to all of a statutory provision, and does not render any language inoperative, superfluous, void or insignificant. State v. Reynolds, 124 N.J. 559, 564, 592 A.2d 194 (1991). The standard that must be met under the statute is thus an intentionally difficult one, as it requires a showing that a child is “substantially” likely to harm himself or others if not removed from his school setting. Here, the record reflects that YALE has a team of professionals who have kept L.W. from harming himself or others.

The use of the word “substantially” and the high standard set by that language, harmonizes with the overriding statutory preference for educating L.W. in the “least restrictive environment.” 20 U.S.C. § 1412(a)(5)(A) mandates that:

[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, 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.

The law describes a continuum of placement options, ranging from mainstreaming in a regular public school as least restrictive to enrollment in a non-approved residential private school as most restrictive. 34 C.F.R. §300.115 (2018); N.J.A.C. 6A:14-4.3. One of the most restrictive options in the continuum is “[i]ndividual instruction at home or in

other appropriate facilities, with the prior written notice to the Department of Education through its county office.” N.J.A.C. 6A:14-4.3(b)(9). As the law disfavors home instruction, I **CONCLUDE** that consistent with this view of home instruction, the standard for relief under 20 U.S.C. §1415(k)(1)(3)(A) is a stringent one that cannot be met unless supported by expert opinion. YALE’s proofs that it is no longer an appropriate placement for L.W. does not meet this stringent requirement.

I implore the parties to fully implement the terms of the Settlement Agreement. Petitioners are cautioned not to interpret this decision as an expression of my belief that the concerns raised by YALE are unreasonable. Without the proper interventions in place for L.W., it appears likely that the parties will be before this forum again to address the issue of L.W.’s ability to safely continue to attend school. This decision should not be interpreted as precluding YALE from taken any action authorized by law moving forward that it deems necessary to preserve L.W.’s safety or that of the school community.

ORDER

Based on the foregoing, together with the record as whole, YALE’s motion to remove L.W. for dangerousness is **DENIED**.

The underlying Due Process Petition is scheduled for a hearing beginning on May 23, 2022. The parties shall participate in a telephone conference call on May 9, 2022, at 4:00 p.m. using the dial in number 1-866-434-5269 and access code 9068611.



May 2, 2022
DATE

KATHLEEN M. CALEMNO, ALJ

KMC/jns/tat

cc: Clerk - OAL/Trenton

APPENDIX
WITNESSES

Petitioners:

K.R.

Respondent:

Barbara Dobzanski, Supervisor of Special Services

Intervener:

Christina Viscidy

Gianny Visceglia

Dr. Rachel Sautter

EXHIBITS

Joint

J-1 Settlement Agreement, dated March 22, 2022

Petitioners:

None

Respondent:

None

Intervener:

Y-1 Behavior Intervention Plan from IEP

Y-2 Historical Incident Reports

Y-3 March and April 2022 Incident Reports

Y-4 Behavior Summary and Program Recommendation Support

Y-5 Dr. Sautter's Resume and credentials

Y-6 Renamed to J-1

Y-7 Aggression data charts through April 14, 2022