



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION GRANTING

EMERGENT RELIEF

OAL DKT. NO. EDS 09143-22

AGENCY DKT. NO. 2023-35055

**TRENTON PUBLIC SCHOOL DISTRICT
BOARD OF EDUCATION, MERCER COUNTY,**

Petitioner,

v.

C.C. ON BEHALF OF B.T.,

Respondent.

Elesia L. James, Esq., Assistant General Counsel, for petitioner (James Rolle, General Counsel, Trenton Board of Education/Trenton Public Schools, attorney)

Lacia Japp, Esq., for respondent (Disability Rights of New Jersey, attorneys)

Record Closed: October 21, 2022

Decided: October 24, 2022

BEFORE **TRICIA M. CALIGUIRE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

By a request for emergent relief and expedited relief, petitioner Trenton Public School District Board of Education (Board) seeks the immediate removal of B.T. from Stokes Elementary School (SES), Trenton Public School District (District) and his immediate placement on virtual home instruction for forty-five calendar days pursuant to 20 U.S.C. § 1415(k)(1)(G), N.J.A.C. 6A:14-2.7(n), (o), and (r), and N.J.A.C. 1:6A-12.1. The basis for the Board's request is that special circumstances support B.T.'s removal, specifically the use of scissors as a weapon in the classroom and the infliction of serious bodily injury on staff in the classroom. 20 U.S.C. § 1415(k)(1)(G)(i) and (iii). Alternatively, petitioner argues that by his behavior, B.T. presents a danger to himself and to others, disrupts the academic process, and all other less restrictive settings have proven inappropriate. Respondent C.C. opposes this request on the grounds that the Board has not satisfied the requirements for obtaining emergent relief and moves by cross-petition for an expedited hearing to contest the decision of the District child study team (CST) that B.T.'s behavior was not a manifestation of his disability.

This matter was transmitted to the Office of Administrative Law on October 12, 2022, for an emergent relief hearing and a final determination on an expedited basis, in accordance with 20 U.S.C. § 1415 and 34 C.F.R. §§ 300.500 to 300.587. Oral argument on emergent relief was held on October 21, 2022.

FACTUAL DISCUSSION AND FINDINGS

Based on the submissions of the parties, including the certifications of Nola Occhipinti-De Rita, District Supervisor of Special Education, and of respondent C.C., and arguments of counsel, I **FIND** the following statements as **FACTS**:

B.T. is an eight-year-old male who is eligible for special education and related services in the Autistic classification category. C.C. stated that B.T. was also diagnosed with attention deficit hyperactivity disorder (ADHD) and oppositional defiant disorder (ODD), but that she has not been provided with the associated medical documentation. Certification of C.C., Guardian of B.T. (October 18, 2022), ¶¶ 2, 3. Petitioner concurred

that information to support diagnoses of ADHD and ODD had not been provided by respondent to the CST, but that a full re-evaluation of B.T. is pending.

B.T. attended preschool in the District¹ from age three. Between ages three and five, B.T. attended and was removed from four separate preschools due to aggressive behavior, including striking, biting and throwing objects at other children; flipping chairs; jumping off cots; eloping; throwing keyboards; and hitting a child in the eye with a pencil.

At the beginning of the 2019–2020 school year, B.T. was placed at Garfield Park Academy, described by petitioner as a more restrictive program better suited to meet his needs, specifically his inability to control his aggressive behavior. In September 2021, at age seven, B.T. was suspended from Garfield Park for allegedly bringing a knife to school. Respondent counters that a knife was never found on B.T.² and this threat followed an incident in which he was allegedly touched inappropriately by his male 1:1 aide. Certification of C.C., ¶ 4. Petitioner states that a report of the alleged incident with the aide was not provided to the CST.

B.T. was placed on home instruction pending a subsequent placement. On October 21, 2021, B.T. used his Chromebook to hit his home instructor over the head, and then chased her as she exited his home, trying to hit her again.

B.T. was next placed at Mercer Elementary School, with a male teacher. Respondent claims that the CST had notice of the incident at Garfield Park and the resulting trauma, but petitioner stated that no such notice was provided. In January 2022, B.T. ran from the main office outside, into traffic. He threw objects at staff, hit and kicked adult staff members, threw a book at the school psychologist's head, threw a second heavy item at her after apologizing for the first, and broke a laptop. B.T.'s placement at Mercer Elementary was terminated on or about February 3, 2022, and he was placed on home instruction pending an alternate placement.

¹ Not all preschools which B.T. attended are part of the Trenton Public School District, but he was placed at all schools by the District.

² C.C. also states that the knife in question was a butter knife. Cert. of C.C., ¶ 4.

An attempt was made at virtual home instruction, but the CST acknowledged that B.T. needed a different format to maintain focus and learning. C.C. requested in-person home instruction. The home instructor reported that B.T. attacked him on three occasions between April 20, 2022, and May 5, 2022. C.C. admitted that on May 5, 2022, B.T. spit water onto the home instructor.

Respondent, B.T.'s grandmother, contacted petitioner seeking an in-person, rather than virtual, program for B.T. The Board attempted to place B.T. at the Yale School, where B.T. kicked the security guard prior to his intake interview. C.C. stated that the guard startled B.T. by holding a thermometer to his forehead without warning. Burlington County Special Services School District canceled B.T.'s intake interview.

On July 5, 2022, respondent notified petitioner that B.T. was scheduled for a psychiatric appointment on July 7, 2022, and she was expecting an update. By August 1, 2022, respondent stated that she was unable to get provider updates but also stated that based on the reports of B.T.'s providers, he was ready to return to in-person instruction.

On September 1, 2022, respondent provided petitioner with a letter from B.T.'s Behavioral Assistant (BA), Maurice E. Crump (Crump), who by then had held six sessions with B.T. for two hours per session. (R-4.) Crump stated that B.T. demonstrated distractibility and signs of aggression and often had to be removed from others so that he could focus. The BA recommended a one-to-one aide with "additional supports and resources," but did not describe those resources.

On September 1, 2022, respondent met with B.T.'s CST which proposed an IEP providing for placement at SES in a behavioral disabilities self-contained classroom, with group counseling and group speech and language therapy; and a one-to-one aide who would consult with the District Board-Certified Behavior Analyst (BCBA) for techniques to support B.T. (R-5.)

The IEP included a Behavior Intervention Plan (BIP) which describes limiting B.T.'s "access to others [outside the classroom] until he has established a relationship with [his

1:1 aide] and has displayed no aggressive behavior for at least 30 days”; “removing objects in his area that can be thrown and provide only paper-based material that will not cause injury to others”; and monitor “consistently so that he does not harm others[.]” (R-5.) The IEP includes a long list of modifications to the special education setting, including “provide maximum supervision of the student, gradually decreasing supervision over time.” (R-5.)

The most recent evaluations cited in the IEP were an educational assessment from April 2018, a neurodevelopmental evaluation from December 2017, and speech and collaborative evaluations from March 2017. No information was provided as to the failure to re-evaluate B.T. after three years. At the September 1, 2022, IEP meeting, respondent consented to a full re-evaluation of B.T. with assessments in education, psychological, social history, and speech and language, a functional behavioral assessment, and a neuropsychological evaluation. At the emergent hearing, counsel stated that a psychiatric evaluation of B.T. is scheduled to take place November 1, 2022 (with the report due on or about November 16, 2022).

B.T. began school on September 12, 2022. On September 13, 2022, B.T. eloped from the school building; hit a peer twice; and attempted to urinate at his desk until stopped by the BCBA.

On September 14, 2022, prior to entering the school building, B.T. kicked the registered behavior technician (RBT) at the entry, ran back to his grandmother’s car, returned to the building and threw his bag at the RBT. When the principal offered assistance, B.T. kicked him in the leg and ran back to the car. He did not return and was absent from school the next two days.

On September 21, 2022, while in school, B.T. cried and refused to join his class in gym. He returned to the classroom where the primary teacher was working at her desk. His one-to-one aide was not in the classroom, but three other adults were, including the BCBA. B.T. grabbed the teacher’s scissors from her desk, threatened three adults with the scissors, and stabbed the BCBA with the scissors while the BCBA attempted to take them. Certification of Nola Occhipinti-De Rita (October 10, 2022), ¶ 33. Petitioner

describes the injury that resulted as “a wound that required stitches.” Respondent stated that the school principal told her that two, not three, adults were in the classroom with B.T. at the time and that she understood only a bandage from the school nurse was required for the BCBA’s injury. (R-1 at ¶¶ 10, 11.)

By letter dated September 22, 2022, respondent was notified that B.T. was suspended. On October 4, 2022, the CST held a manifestation determination in which respondent participated. It was determined that B.T.’s conduct was not a manifestation of his disability³ and that his conduct met the special circumstances exception that would support his removal from school for up to forty-five days (use of a weapon with intent to cause harm). The IEP team concluded:

The conduct then, threatening staff and seeking out and obtaining an instrument to cause harm is not typical of [B.T.’s] disability. Additionally, the conduct was not a failure to implement the IEP because he threatened to harm and did harm staff despite attempts to redirect and stop this conduct.

This act of violence cannot be explained by [B.T.’s] disability nor a failure to implement the IEP, therefore the discipline remains, and he will remain on suspension pending psychiatric evaluation and a formal hearing.

[R-11.]

Both parties agree that an out-of-district placement at a school specializing in behavioral issues is appropriate for B.T. Respondent, however, disagrees with the interim alternative education setting of virtual home instruction.

LEGAL ANALYSIS AND CONCLUSIONS

The Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482 (IDEA), is designed to assure that disabled children may access a free appropriate public education (FAPE) that is tailored to their specific needs. 20 U.S.C. § 1400(c). While the IDEA recognizes that students with disabilities should not be punished for behaviors that are a manifestation of their disability, the IDEA and its implementing regulations permit a school

³ The disability considered was autism. (R-11.)

district to “remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child’s disability,” in cases where a child carries a weapon to school or possesses a weapon⁴ at school or inflicts serious bodily injury⁵ on another person while on school property. 20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g).

Here, the Board seeks an order authorizing a change in placement to an interim alternate educational setting for forty-five days, that being virtual home instruction pending an out-of-district behavioral placement, on the grounds that B.T. used “scissors as a weapon to inflict bodily harm on a contracted staff member on September 21, 2022.”

Should the action of a student not rise to the special circumstance described in 20 U.S.C. § 1415(k)(1)(G), including “possession of a weapon,” the IDEA also permits a change of placement to an interim alternative education setting for forty-five days on a finding that maintaining the student in his current placement “is substantially likely to result in injury to the child or to others.” 20 U.S.C. § 1415(k)(1) (3)(b)(ii)(II). Here, petitioner contends that it is substantially likely that an injury will occur to B.T., to another student, or to staff, should he remain at SES. See also N.J.A.C. 6A:14-2.7(n); N.J.A.C. 1:6A-14.2(a). This second inquiry is not required as B.T. used scissors in a manner that, though the intent may have been self-defense, resulted in injury and could have resulted in significant injury.⁶

As provided in the regulations, the Board requested an expedited due process hearing. 20 U.S.C. §1415(k)(3); 34 C.F.R. §§ 300.532(a) and (c); N.J.A.C 6A:14-2.7(n). With the request for an expedited hearing, or afterward, N.J.A.C. 1:6A-12.1(a) provides that the board of education may apply in writing for emergent relief by describing the specific relief sought and the specific circumstances that justify the relief sought. See also N.J.A.C. 6A:14-2.7(r). When, as here, the Board seeks emergent relief on the same

⁴ The regulation provides that a weapon for these purposes has the meaning of “dangerous weapon” found at 18 U.S.C. § 930 (g)(2), that being “a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 ½ inches in length.”

⁵ Here, “serious bodily injury” has the meaning found at 18 U.S.C. 1365(H)(3), “bodily injury which involves a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.”

⁶ There was no testimony or documentary evidence as to the size and relative strength of B.T.; all that is known is that he is eight years old.

basis by which it requests an expedited hearing, that special circumstances support the conclusion that it is dangerous for the child to remain in his placement, the judge may order a change in the placement of the student to an interim alternative educational setting for not more than forty-five days if the Board meets the standards for obtaining emergent relief (described below). N.J.A.C. 1:6A-12.1(e).

Emergent relief shall only be requested for specific issues, including a break in the delivery of services and/or placement pending the outcome of due process proceedings. N.J.A.C. 6A:14-2.7(r). Here, petitioner has requested an expedited due process proceeding to remove B.T. from his current placement, without regard to whether his conduct was a manifestation of his disability due to special circumstances, to the interim alternative educational setting of virtual home instruction pending identification of an appropriate out-of-district placement and an order compelling respondent to produce B.T. for completion of evaluations.⁷ Therefore, I **CONCLUDE** that petitioner has established that the issue in this matter concerns a change in placement for B.T.

The standards for emergent relief are set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), and are codified at N.J.A.C. 6A:3-1.6. The petitioner bears the burden of proving:

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. when the equities and the interests of the parties are balanced, the party seeking emergent relief will suffer greater harm than the respondent.

[Crowe, 90 N.J. at 132-34.]

Irreparable Harm

⁷ Respondent concurs in the decision to place B.T. out-of-district and recommends nine potential placements.

To obtain emergent relief, petitioner must demonstrate more than a risk of irreparable harm should B.T. remain at SES. Petitioner must make a “clear showing of immediate irreparable injury,” or a “presently existing actual threat; (an injunction) may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by common law.” Cont’l. Group, Inc. v. Amoco Chems. Corp., 614 F. 2d 351, 359 (D.N.J. 1980). In an educational setting, “irreparable harm may be shown when there is a substantial risk of physical injury to the child or others, or when there is a significant interruption or termination of educational services.” Ocean Twp. Bd. of Educ. v. J.E. and T.B. obo J.E., OAL Dkt. No. EDS 00592-04, 2004 NJ AGEN LEXIS 115, at *8 (February 23, 2004) (irreparable harm found where an eight-year-old’s “physical aggressiveness and disruptive behaviors [posed] a safety concern to himself and others, and the district’s behavior modification techniques [were] no longer effective”); Sparta Twp. Bd. of Educ. v. R.M. and V.M. obo C.M., OAL Dkt. No. 01975-20, 2020 NJ AGEN LEXIS, at *14 (February 21, 2020) (inappropriate interactions with other students and breaking a desk deemed “sufficient evidence of the risk of harm to [student], school staff, teachers and students that if [student] remained in school at this time, other incidents could occur involving the health, safety and welfare of any of these individuals”).

Petitioner contends that irreparable harm is established by B.T.’s “consistent record of violent and aggressive conduct towards staff and students” as shown by the undisputed behavior described above. Throwing items, hitting and otherwise assaulting staff and other students could and has resulted in injury to others. Petitioner also describes B.T.’s aggressive behavior as unpredictable, and notes that he has yet to be placed in a setting from which he has not been removed for violent behavior. Irreparable harm is also shown by the disruption B.T.’s behavior poses to his peers, all of whom have an equal right to be educated in a safe and secure environment.

While respondent concedes that B.T. has behaved in an aggressive manner, she notes that the CST failed on September 21, 2022, to follow B.T.’s BIP. He was not monitored closely, he was in a classroom in which he was able to get his hands on the teacher’s scissors (meaning all dangerous items had not been removed), and his one-to-one aide was not present.

I **CONCLUDE** that B.T.'s conduct meets the "special circumstances" contemplated by 20 U.S.C. §1415(k)(1)(G), in that he used scissors as a weapon and did inflict injury on a staff person using the scissors. I further **CONCLUDE** that there is sufficient evidence that B.T.'s behavior presents a substantial risk of injury to B.T., other students and staff and the Board has met the burden of establishing that irreparable harm may result if B.T. is returned to SES.

The Legal Right is Settled and Likelihood of Prevailing on the Merits

The second consideration is whether the legal right underlying the Board's claim is settled, N.J.A.C. 6A:3-1.6(b)(2), and then third, the Board must make a preliminary showing of a reasonable probability of success on the merits. Crowe, 90 N.J. at 133. As discussed above, federal and New Jersey law and regulations permit a board of education to change the placement of a disabled student on an interim basis when special circumstances exist, including when the student uses a weapon in the classroom and/or causes significant bodily injury to another person. Further, a change in placement is permitted when the school district determines the current placement presents a safety risk and the parents and district cannot agree on an alternative. 20 U.S.C. §1415(k)(4)(A); N.J.A.C. 6A:14-2.7(n).

The Board's underlying expedited due process claim seeks essentially the same relief as that sought on an emergent basis, that relief being the interim alternative placement of virtual home instruction for the forty-five days, while his evaluations are completed and the intake processes at potential out-of-district placements are conducted.⁸

As stated above, both parties agree that placement of B.T. at SES is not appropriate as it does not provide him with the highly structured support services he needs. It must be noted that petitioner has made numerous attempts to find an appropriate placement for B.T. but has failed to conduct appropriate evaluations under

⁸ While the end of COVID has reduced the need for virtual home instruction across the State, petitioner has shown that staff who are sent to B.T.'s home are no safer from his aggressive behavior than staff who encounter him at school, and therefore, virtual instruction is the requested option.

the timeframes anticipated by the IDEA.⁹ At the same time, and without speculating on the reasons for his aggressive behavior, it is not lost that respondent has not shared information generated by B.T.'s private practitioners with the CST, including documentation supporting diagnoses of additional developmental disabilities, thereby reducing the effectiveness of CST's efforts.

For the above reasons, I **CONCLUDE** that the Board meets the second and third prongs of the emergent relief standard.

Balance of Equities and Interests

The final prong of the above test is whether the equities and interests of the parties weigh in favor of granting the requested relief to the Board. Petitioner states that it is obligated to provide a safe educational environment to B.T., to his peers and to their staff, and at present, B.T.'s documented behavior creates a significant risk of injury to B.T., his peers, and the staff of SES.

Petitioner has agreed to meet its obligation to continue B.T.'s education through virtual home instruction pending identification of an appropriate interim alternative educational placement. Respondent argues with merit that virtual home instruction is akin to no instruction for B.T. Petitioner has shown it can work quickly to find alternative placements for B.T. throughout his short academic career and there is no reason for it not to do so here (at hearing counsel agreed to attempt to expedite B.T.'s psychiatric evaluation). The difficulty in identifying a school in which B.T. can remain has not been shown to be solely the fault of the educators. On balance, it appears unreasonable to risk harm to B.T., or to his classmates, or to the staff assigned to him while the search for the most appropriate placement continues and petitioner has shown to be unable to ensure the safety of its students and staff. Petitioner bears the obligation of providing all its students, particularly the classmates of B.T., an appropriate education in a safe and

⁹ See N.J.A.C. 6A:14-3.8, which states in pertinent part: Within three years of the previous classification, a multi-disciplinary reevaluation shall be completed to determine whether the student continues to be a student with a disability.

civil environment. Accordingly, I **CONCLUDE** that the Board would suffer greater harm if the requested relief was not granted.

I **CONCLUDE** the petitioner Board's request for emergent relief satisfies the applicable requirements. I further **CONCLUDE** that given the special circumstances, that B.T. used scissors in the classroom to inflict bodily injury on a staff person, permits petitioner to remove B.T. to the interim alternative educational setting for not more than forty-five school days without regard to whether the behavior is determined to be a manifestation of his disability. Accordingly, an expedited hearing on respondent's cross-petition challenging the manifestation determination is not needed. 20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g).

ORDER

For the reasons stated above, I hereby **ORDER** that the application for emergent relief of the Trenton Public School District Board of Education seeking the removal of B.T. from his placement at SES for forty-five days pending completion of evaluations and identification of an appropriate out-of-district placement is **GRANTED** and the cross-petition of respondent C.C. challenging the manifestation determination of the CST is **DISMISSED**.

This decision on application for emergency relief resolves all of the issues raised in the emergent and expedited relief applications; therefore, no further proceedings in this matter are necessary. This decision on application for emergency relief is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C.A. § 1415(i)(2). 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.

October 24, 2022 _____
DATE



TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

TMC/nn