State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

DECISION

EMERGENT RELIEF

OAL DKT. NO. EDS 13514-16

AGENCY DKT. NO. 2017-25133

K.R. ON BEHALF OF J.R.,

Petitioner,

v.

CHERRY HILL TOWNSHIP BOARD OF EDUCATION,

Respondent**.**

_____

K.R., petitioner, pro se

Robin Ballard, Esq., for respondent (Schenck, Price, Smith & King, LLP, attorneys)

Record Closed: September 13, 2016 Decided: September 15, 2016

BEFORE **ROBERT BINGHAM II**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner K.R. applied for emergent relief on behalf of her son, J.R., seeking an order for interim placement of J.R. at the Cherry Hill High School. On or about August 31, 2016, petitioner's request for a due process hearing was filed with the Office of Special Education Programs (OSEP), New Jersey Department of Education, along with an application for emergent relief. On September 7, 2016, the emergent matter was

filed with the Office of Administrative Law for oral argument, which was held on September 13, 2016, after which the record was closed.

FACTUAL DISCUSSION

J.R., petitioner's seventeen-year-old son, is currently enrolled in eleventh grade. He is classified as eligible for special education and related services under the category of multiply disabled, for the categories of emotionally disturbed, other health impaired (ADHD), cognitive impairment (mild), and specific learning disorder. (Resp. Brief at 2; R-1).[1]

During the 2015–16 school year, J.R. attended Cherry Hill High School East (Cherry Hill East) for tenth grade. In February 2016, the Individualized Education Plan (IEP) team at Cherry Hill East recommended that J.R.'s placement be changed to Malberg, an in-district alternative high school. Within fifteen days of the IEP meeting that led to this recommendation, K.R. requested due process to stop the implementation of the proposed IEP. At mediation, the parties resolved K.R.'s dispute over the IEP proposed in February 2016.

J.R. remained at Cherry Hill East through the conclusion of the 2015–16 school year. During this time, a Functional Behavior Assessment (FBA) was conducted on J.R. which found that his behaviors significantly interfered with his learning. According to his report card (P-2), his final grade averages for the academic school year, during which there were significant absences, ranged from 60 to 80.[2]

[1] Lacoyya Weathington, director of pupil services, certified that the facts set forth in the statement of facts of the Board's brief are true and accurate. Those facts are set forth above, unless noted otherwise.

[2] J.R. received the following final grade averages in the 2015–16 school year, and total absences for each class are indicated in parenthesis following the grade: Cooking Techniques-Sem – N/A (9), Health – 70 (20), Algebraic Concepts – 66 (31), App Tech 1 – 74 (40), Biology Concepts – 60 (35), Commercial Arts-Sem – 75 (23), English Concepts – 75 (33), Physical Education – 80 (16), U.S. History 1 Concepts – 60 (32). (P-2.)

On June 7, 2016, the IEP team held an IEP meeting and again recommended placement for J.R. at Malberg for the 2016–17 school year. The IEP (R-1) provided for special education programs and related services that included special classes for behavioral disabilities in math, English, science, and social studies, as well as special transportation. It also provided for a behavior intervention plan, modifications, testing accommodations, and supports for school personnel. Considerations for developing the IEP, under present levels of academic achievement and functional performance, included an August 2014 psychiatric evaluation noting "long-standing struggles in school in terms of academic functioning, learning, as well as behavioral and emotional control . . . ." (R-1.) The IEP also noted, "the Alternative High School provides a therapeutic learning environment with trained behavior specialists." (R-1.)

K.R. was unable to attend the June 7 IEP meeting. (Petition for Emergent Relief at 1.) However, K.R. did not request mediation or due process to challenge the IEP within fifteen days of the IEP meeting. (Resp. Brief at 2.) At oral argument, petitioner asserted that she had been ill during this period, and after returning to work, she consulted an (education) advocate.

On August 29, 2016, J.R. was assessed at Cherry Hill East for participation in the Cornerstone Wrap-Around Program (Cornerstone), which K.R. had previously discussed with the child study team (CST). (P-1.) K.R. feels that the assessment went well and that J.R. would benefit from participation in Cornerstone.

K.R. then filed a Petition for Due Process and the instant request for emergent relief with OSEP on or about August 31, 2016, seeking to change J.R.'s placement back to Cherry Hill East. The 2016–17 school year began on September 6, 2016, and J.R. did not arrive for school on that day and has not yet attended school during the 2016–17 school year.

By way of emergent relief, petitioner seeks immediate interim placement of J.R. at Cherry Hill East or Cherry Hill West. In particular, petitioner asserts that J.R. should be placed in the Cornerstone program, in either school. Petitioner contends that program in those schools, rather than Malberg, is most appropriate for J.R.'s education.

The Board argues that the June 6, 2016, IEP placing J.R. at Malberg, with the Cornerstone program, offers the education appropriate for J.R., rather than placement at Cherry Hill High School, where J.R. has not successfully matriculated and needed supports are unavailable. Further, petitioner does not meet the requisite criteria for the emergent relief sought.

LEGAL ANALYSIS AND CONCLUSION

A. Background - Stay Put

Pending the outcome of a due process hearing, no change shall be made to the student's placement without agreement of the parties. N.J.A.C. 6A:14-2.7(u). If the parent does not stop the implementation of a proposed IEP within fifteen days of receiving notice of the IEP, then the proposed IEP gets implemented and the placement in that IEP becomes the "stay-put" placement. T.B. and R.B. ex rel. T.B. v. Clearview Reg'l Bd. of Educ., EDS 06499-06, Final Decision (September 14, 2006), <http://njlaw.rutgers.edu/collections/oal/>.

Here, K.R. did not file for mediation or due process within fifteen days of the June 7, 2016, IEP to prevent implementation of the IEP under N.J.A.C. 6A:14-2.3(h)(3)(ii). Therefore, Malberg is J.R.'s stay-put placement.

However, under N.J.A.C. 6A:14-2.7(u) an administrative law judge ("ALJ") has discretion under the emergent relief standards to change a student's stay-put placement pending the outcome of the underlying dispute. T.B., supra, EDS 06499-06, Final Decision, <http://njlaw.rutgers.edu/collections/oal/>. Therefore, K.R.'s application for emergent relief is appropriate.

B. Standards for emergent relief

To prevail on an application for emergent relief petitioner must satisfy four criteria set forth in N.J.A.C. 1:6A-12.1(e). It must be determined from the proofs that:

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying the 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.
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> [N.J.A.C. 1:6A-12.1(e); T.B., supra, EDS 06499-06, Final Decision, <http://njlaw.rutgers.edu/collections/oal/>.]

Petitioner must meet all four criteria to prevail on this motion. See Crowe v. DeGioia, 90 N.J. 126 (1982); DEC Electric, Inc. v. Bd. of Educ. of the S. Gloucester County Reg'l High Sch. Dist. and USA Elec. Contractors, Inc., 96 N.J.A.R.2d (EDU) 789, 790 (citing DEC Electric, Inc. v. S. Gloucester Cnty. Reg'l High Sch. Dist. Bd. of Educ. and USA Elec. Contractors, Inc., OAL Dkt. No. EDU 10833-95, Order Denying Emergent Relief (Dec. 6, 1995), adopted, Comm'r (Dec. 26, 1995) (denied unsuccessful bidder's request for emergent relief because it was unable to establish that it would suffer immediate and irreparable harm, although it was able to establish a reasonable likelihood of success on the merits and that the parties opposing the motion would not suffer undue harm)). The moving party bears the burden of proving each of the Crowe elements "clearly and convincingly." Waste Mgmt. of N.J. v. Union Cnty. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

1. Whether J.R. will suffer irreparable harm if he is placed at Malberg pending the resolution of the dispute.

One of the principles for emergent relief is that relief should only be ordered to prevent irreparable harm to the petitioner(s). Crowe, supra, 90 N.J. at 132–32. Harm is irreparable when it cannot be addressed with monetary damages. Ibid. This standard contemplates that the harm also be both substantial and immediate. Subcarrier Commc'ns, Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997). "In certain circumstances, severe personal inconvenience can constitute irreparable injury

justifying issuance of injunctive relief." Crowe, supra, 90 N.J. at 133. "Pecuniary damages may be inadequate because of the nature of the injury or of the right affected." Ibid.

Here, after considering J.R.'s academic levels and the results of his FBA, Cherry Hill East's IEP team determined that Malberg was the appropriate placement for J.R. In the June 2016 IEP, the Cherry Hill Township School District (the District) recommended placement at Malberg because of the IEP team's determination that Malberg is the least-restrictive environment in which J.R. can be appropriately educated.

K.R. argues that there is a risk that J.R. will refuse to attend school altogether, and would "drop out" if not placed at Cherry Hill East or Cherry Hill West. K.R. also claims that J.R. would "pick up negative behaviors" from being placed in Malberg,[3] but does specify what types of "negative behaviors" he will be exposed to or pick up from this placement. The Board counters that Cherry Hill has measures in place to help students attend school, such as incentive programs, rewards, and positive reinforcement. Further, J.R. may actually suffer irreparable harm if returned to Cherry Hill East because the supports available there have been tried unsuccessfully and he requires a smaller, more therapeutic setting like that at Malberg.

One problem with K.R.'s argument is the fact that Malberg offers the very Cornerstone program that she wants for J.R. Also, beyond her lone observation of "students laying on desks," K.R. has not provided proof of the alleged "negative behaviors" at Malberg or the extent of any impact they would have on J.R.'s education. And neither party addressed the possibility of temporary home instruction if, in fact, J.R. absolutely refuses attendance at Cherry Hill during the pendency of the due process hearing.

Under the circumstances, K.R. has not satisfied her burden of proving that J.R. will suffer irreparable harm if he is placed at Malberg pending the outcome of the due process hearing. Thus, K.R. has not met the first standard for emergent relief.

[3] Petition for Emergent Relief at 1.

2. Whether the legal right underlying K.R.'s claim is well-settled.

A school district is obligated to provide written notice of the proposed IEP "at least 15 calendar days prior to the implementation of a proposed action." N.J.A.C. 6A:14-2.3(h)(2). The district then implements the proposed IEP unless a parent requests mediation or a due process hearing prior to the expiration of the fifteenth calendar day. N.J.A.C. 6A:14-2.3(h)(3)(ii). And no change shall be made to the student's placement pending the outcome of a due process hearing without agreement of the parties. N.J.A.C. 6A:14-2.7(u). That retention of the status quo is a "stay put." T.B., supra, EDS 06499-06, Final Decision, <http://njlaw.rutgers.edu/collections/oal/>. If the parent does not request mediation or due process within fifteen days of the proposed IEP, then the IEP gets implemented and the placement in that IEP becomes the "stay put" placement. Ibid.

Here, K.R. admittedly did not prevent the implementation of the June 7, 2016, IEP placing J.R. at Malberg by filing for mediation or due process within fifteen days of the proposed IEP. She argues that, at the time, she had been ill and therefore could not timely respond. She eventually appealed after returning to work and later consulting an advocate. But since, in any event, she did not prevent the implementation of this IEP, Malberg is the stay-put placement for J.R. Therefore, the legal right underlying K.R.'s claim that J.R. should be placed at Cherry Hill East pending the outcome of the dispute is not well-settled in K.R.'s favor. Because the legal right underlying K.R.'s claim is not well-settled, she has not satisfied her burden of proving the second element for emergent relief.

3. Whether K.R. is likely to be successful on the merits of the claim that Malberg is not an appropriate placement for J.R.

The primary purpose of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C.A. §§ 1400 to 1487, is to ensure that all disabled children will be provided a free appropriate public education ("FAPE"). 20 U.S.C.A. § 1400(d)(1)(A). New Jersey has also enacted legislation and adopted regulations that assure all disabled children the right to a FAPE. See N.J.S.A. 18A:46-1 to -46. In Hendrick Hudson District Board

of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982), the Court determined that, although the IDEA mandates that a state provide a certain level of education, it does not require states to provide services that will maximize a disabled child's potential. Rowley, supra, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690. The Court stated:

> Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. . . . The statutory definition of "free appropriate public education," in addition to requiring that States provide each child with "specially designed instruction," expressly requires the provision of "such . . . supportive services . . . as may be required to assist a handicapped child *to benefit* from special education." We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.
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> [Rowley, supra, 458 U.S. at 200–01, 102 S. Ct. at 3048, 73 L. Ed. 2d at 708 (citations omitted).]

The educational benefit conferred upon a child must be more than trivial or de minimis. Polk v. Susquehanna Intermediate Unit 16, 853 F.2d 171, 180–86 (3d Cir. 1988), cert. denied, 488 U.S. 1030, 109 S. Ct. 838, 102 L. Ed. 2d 970 (1989). In Polk the court held, to ensure a FAPE, the IDEA requires a satisfactory IEP to provide "significant learning" and confer "meaningful benefit." Polk, supra, 853 F.2d at 182–84.

A FAPE is provided through an IEP. See 20 U.S.C.A. § 1412(a)(4). The IEP is the "'centerpiece' of the IDEA's system for delivering education to disabled children." D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 557 (3d Cir. 2010). "An IEP consists of a specific statement of a student's present abilities, goals for improvement of the student's abilities, services designed to meet those goals, and a timetable for reaching the goals by way of the services." Holmes v. Millcreek Twp. Sch. Dist., 205 F.3d 583, 589 (3d Cir. 2000) (citing 20 U.S.C.A. § 1401(a)(20)). The IEP ensures that a student receives a "basic floor of opportunity," but not necessarily "the optimal level of services" a student

could receive. Id. at 590. "[A]t a minimum, '[t]he IEP must be reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential.'" Chambers v. Sch. Dist. of Philadelphia Bd. of Educ., 587 F.3d 176, 182 (3d Cir. 2009) (quoting Shore Reg'l High Sch. Bd. of Educ. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004)).

Here, the Board has provided an IEP placing J.R. in Malberg, an "Alternative High School" that "provides a therapeutic learning environment with trained behavior specialists." (R-1.) The Board asserts that Malberg was developed to educate students with behavioral issues. It offers smaller classes, behavioral specialization, and more consistency. It also offers the Cornerstone program, as well as the opportunity for a student to recover lost credits and thereby stay on track in his or her matriculation. Further, the program is immediately available, pursuant to the IEP placement. The IEP recommended Malberg on the basis that it provides J.R. with special education and related services that will benefit him and provide an appropriate education in the least-restrictive environment. The Board also asserts that it will prove that Cherry Hill's programs, on the other hand, are inappropriate for J.R.

K.R. does not submit any evidence showing that she is likely to be successful on the merits of the underlying claim that Malberg is not an appropriate placement for J.R. Instead, K.R. merely alleges that Malberg will foster negative behaviors and the District has not exhausted all other options in trying to help J.R. be successful. In particular, she asserts that the Cornerstone program is appropriate for J.R., but she appears to overlook the fact that Cornerstone is available at Malberg.

The District is not required to provide the optimal level of services that J.R. could receive, but only to provide an IEP reasonably calculated to enable J.R. to receive meaningful educational benefits. Based upon the foregoing, K.R. has not shown that the IEP placing J.R. at Malberg will not provide J.R. a meaningful educational benefit or otherwise result in a denial of a FAPE. Because K.R. did not demonstrate that Malberg likely will not provide J.R. with a meaningful educational benefit, she has failed to prove the third element for emergent relief.

4. Whether J.R. will suffer greater harm than the Board if Malberg is J.R.'s placement pending the resolution of this dispute.

K.R. claims that J.R. will pick up negative behaviors, or avoid school altogether, if he is placed at Malberg. However, while school attendance is crucial, the full extent of potential school avoidance and the impact of any potential negative behavior at Malberg are unclear, as discussed above. It is thus difficult to determine an exact measure of harm to J.R. if the "stay put" placement at Malberg continues pending the due-process hearing, rather than a return to Cherry Hill High School, as sought by K.R.

The Board claims that it, along with all New Jersey school districts, will suffer harm if K.R. can change J.R.'s placement on an emergent basis to her school of choice without a hearing establishing the appropriateness of such, as doing so would set a dangerous precedent. The Board further asserts that this is "particularly so when that placement is outside the parameters of J.R.'s stay-put IEP and Petitioner has offered no support for the appropriateness of her request." (Resp. Brief at 6.) The effect would arguably "subvert the IDEA," create unpredictability, and increase litigation, unnecessarily burdening the District's taxpayers. (Ibid.)

The Board's point is well taken. Malberg is the "stay put" placement by virtue of the June 2016 IEP and its implementation when petitioner did not request mediation or due process within the fifteen-day-time period. And K.R. has presented insufficient proof of irreparable harm, a likelihood of success on the merits, and the law being well-settled in her favor. Thus, a balancing of the interests weighs in favor of the Board.

Therefore, I **CONCLUDE** that petitioner has not satisfied the requisite criteria for emergent relief and thus is not entitled to such relief in the form of an interim placement at the Cherry Hill High School.

ORDER

Therefore, it is **ORDERED** that the petitioner's request for emergent relief is **DENIED** and, accordingly, the petition for emergent relief is hereby **DISMISSED**.

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 Programs.

September 15, 2016 _____

DATE **ROBERT BINGHAM II**, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

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LIST OF EXHIBITS

For petitioner:

P-1 Petitioner's request for emergent relief, dated August 31, 2016

P-2 J.R.'s Report Card, 4th Marking Period (2015–16), Cherry Hill High School East

For respondent:

Certification of Lacoyya Weathington, Director of Pupil Services

R-1 IEP, dated June 7, 2016