State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER-EMERGENCY RELIEF

OAL DKT. NO. EDS 14420-15

AGENCY DKT.NO. 2016 23466

K.J. o/b/o D.O.,

Petitioner,

v.

MIDDLESEX BOROUGH BOARD OF EDUCATION,

Respondent.

_____

Dana Carney, Parent Advocate for petitioner

Rita Barone, Esq., for respondent (Purcell, Mulcahy, O'Neill & Hawkins, attorneys)

Record Closed: October 7, 2015 Decided: October 7, 2015

BEFORE **JESSE H. STRAUSS**, ALJ:

Petitioner, K.J. o/b/o D.O, seek emergency relief from the Middlesex Borough Board of Education (Board or District) for an out-of-district placement at the Y.A.L.E School Cherry Hill Campus.

Petitioner filed its application on September 14, 2015, and the Office of Special Education Programs of the New Jersey Department of Education transmitted this matter to the Office of Administrative Law (OAL) on September 17, 2015. I heard the Emergency Relief application on October 7, 2015.

Petitioner's position is as follows:

D.O. is a six-year-old high functioning Autistic child, who is also diagnosed with ADHD and Sensory Processing disorder and who is eligible for special education and related services from the District. While attending kindergarten at the Parker Elementary School in 2014-2015, the staff repeatedly punished and suspended D.O. for his behaviors associated with ADHD and Sensory Processing and language struggles. By June 2015, the District's Child Study Team (CST) finally agreed to evaluate D.O. In August 2015 the CST decided to change D.O.'s school placement to the District's Hazelwood School without any special education supports to provide him a Free Appropriate Public Education (FAPE) and without prior written notice. The District spent the entire 2014-2015 school year collecting data via an Intervention and Referral Service (I&RS) referral but refused to agree to a CST evaluation, causing irreparable harm to D.O. socially, emotionally, and academically. The administration was often made aware by the parents and teachers that D.O. was struggling. The Parker Elementary School's staff's unqualified and unauthorized use of behavioral modification therapy such as use of a weighted blanket and headphones in the classroom without oversight from a qualified Occupational Therapist, recklessly placed D.O. in a position to be mocked and bullied.. D.O. is now afraid to go to school fearing that he will get into trouble and be punished. Petitioner seeks interim relief ordering that D.O. be entitled to be placed at the Y.A.L.E. School Cherry Hill Campus, a private approved and accredited school for students with disabilities.

The **District's** position is as follows:

D.O.'s teacher referred him to the CST for an evaluation in June 2015. At a July 2, 2015, planning meeting, the parties agreed to a psychological, educational, and social

assessment. Although a language pathologist was present at this meeting, neither party believed that a speech evaluation was then warranted. These assessments were conducted between July 8 and 17. Before the referral D.O. received behavioral interventions and individual and small-group counseling through an I&RS. Following the above evaluations, the CST held an initial eligibility and IEP meeting on August 20, 2015. The CST recommended "Other Health Impaired" as D.O.'s category of classification with a program to begin on September 8 in a small language learning disability (LLD) class at the Hazelwood Elementary School. Without seeking information from the CST about the proposed program, petitioner rejected the program outright and wanted an out-of-district placement. Although the District's Director of Student Services could not meet with petitioner on August 20, she met with petitioner and her advocate on August 25 and explained that additional assessments needed to be considered by the entire IEP team and she hoped to set up a meeting for petitioner to discuss the LLD program with the team and the principal of Hazelwood School. Due to contractual constraints the CST could not attend a meeting prior to the start of the school year. On September 4, Hazelwood's principal discussed with petitioner her option to send D.O. to Hazelwood's mainstream first grade classroom on the September 8 start-of-school date, because petitioner had not consented to the implementation of the proposed IEP. This was never intended to be an IEP meeting.

D.O. did not attend school on September 8. On September 9, the District sent petitioner another notice for September 16 for another evaluation planning and IEP meeting. The meeting was rescheduled to September 18 by petitioner (after the filing of the instant Emergency Relief application). On September 18 the District offered additional evaluations in the areas of speech and language, occupational therapy and a functional behavior assessment and sought to discuss concerns and changes to the IEP with petitioner. The District explained its proposal to conduct another meeting after the opportunity for an Occupational Therapy evaluation that required an in-class observation of D.O. It also explained that its recommended program included a Behavior Intervention Plan (BIP) based on a classroom-wide behavior model and an Applied Behavior Analysis (ABA) component if warranted by the Certified Behavior Consultant who would conduct

the assessment. At the September 18 meeting, the District emphasized that D.O.'s learning would be differentiated in the LLD class at a pace that was consistent with his own needs and strengths, which would be delivered by a special education teacher in a small environment. The District continues to disagree that D.O. needs an ABA program to address his academic strengths and needs. This meeting ended because petitioner was focusing on the allegations of delay in child find from the previous school year rather than the components of the proposed LLD program. The District scheduled a September 21 opportunity for petitioner to observe the LLD program, and it intended to tender changes to the IEP to include changing the classification recommendation to Autistic. Since petitioner rescheduled the September 21 meeting to September 25, the revised IEP was mailed to petitioner on September 21. The District received a signed IEP on September 23. Nonetheless petitioner failed to appear for the September 25 program observation and has not sent D.O. to school.

I have read the submissions of the parties and heard their oral arguments.

N.J.A.C. 6A:14-2.7(s) provides that Emergency Relief may be granted if an administrative law judge determines from the proofs that: The petitioner will suffer irreparable harm if the requested relief is not granted; the legal right underlying the petitioner's claim is settled; the petitioner has a likelihood of prevailing on the merits of the underlying claim; and, 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.

An application for equitable relief requires that all four of the above-indicated elements be satisfied. Based on what is before me in this expedited proceeding, I **CONCLUDE** that petitioner has not satisfied all of these elements and is not entitled to Emergency Relief. Without a plenary hearing, I am not in a position to determine that the IEP offered by the District (an LLD program at the Hazelwood School) is so inherently defective that there is a likelihood of success on the merits with regard to whether the tendered IEP will confer a FAPE on D.O. Many factual disputes were raised in the respective arguments of the parties. Issues of FAPE concerning program

or placement are not appropriate subjects for Emergency Relief, but rather require a plenary due process hearing. E.B. and M.B. o/b/o Alpine Bd. of Educ., EDS 12330-07. Emergency Order, (December 21, 2007), http://njlaw.rutgers.edu/collections/oal/. Petitioner has not presented evidence to persuade me that that the LLD program is inappropriate for D.O. or that he needs an ABA program for non-behavioral issues. That is not to discount or dismiss such issues. Rather, they are more appropriately addressed in a plenary hearing. Petitioner cannot argue a lack of meaningful benefit from a program that D.O. has not even tried. Moreover, the application for Emergency Relief is moot in light of petitioner's signing of the IEP on September 22, 2015. It is baffling that a party would sign an IEP and simultaneously reject its terms and refuse to allow it implementation. Emergency Relief shall only be requested for issues involving a break in the delivery of services; involving disciplinary action; concerning placement pending the outcome of due process proceedings; and involving graduation. There is no pending disciplinary action or graduation issue. By virtue of the execution of an IEP, there is no break in the delivery of services or a lack of placement. N.J.A.C. 6A:14-2.7(r). Additionally, petitioner has failed to demonstrate how D.O. will suffer irreparable harm if he attends the in-district LLD program. If it is ultimately determined that this program failed to provide a FAPE, petitioner can seek compensatory redress. Also the LLD program is in a different school and not in a general classroom, thereby addressing concerns of harm due to bullying and teasing that D.O. allegedly experienced at Parker Elementary School.

It is on this 7th day of October, 2015

ORDERED that petitioner's application for Emergency Relief be **DENIED.**

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.

October 7, 2015

DATE

JESSE H. STRAUSS, ALJ

Date Received at Agency 10/7/15

Date Mailed to Parties:

id