State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDS 01033-22
AGENCY DKT. NO. 2022-33871

D.S. ON BEHALF OF M.S.,
Petitioner,
v.
HAMILTON TOWNSHIP BOARD
OF EDUCATION, MERCER COUNTY,
Respondent.

D.S. on behalf of M.S., petitioner, pro se

Michael A. Pattanite, Jr., Esq., for respondent (Lenox, Socey, Formidoni, Giordano, Lang, Carrig & Casey, attorneys)

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

STATEMENT OF THE CASE

This case arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1401 to 1484(a) and C.F.R. §§300.500. By a request for emergent relief, petitioner D.S. on behalf of M.S., seeks the immediate return of M.S. to her placement at Steinert High School (Steinert), Hamilton Township School District, or to Hamilton High School-West (HHSW), where she attended from September 2019 through March 2020, pending the outcome of expedited due process proceedings. Respondent Hamilton

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Township Board of Education, Mercer County (Board) opposes this request on the grounds that petitioner has not satisfied the requirements for obtaining emergent relief.

PROCEDURAL HISTORY

On February 7, 2022, petitioner filed a complaint for an expedited due process hearing with the New Jersey Department of Education, Office of Special Education, which was transmitted to the Office of Administrative Law (OAL) on February 9, 2022. In accordance with N.J.A.C. 6A:14-2.7(o), the expedited hearing was scheduled for March 4, 2022.

On February 14, 2022, petitioner filed a request for emergent relief directly with the OAL. Oral argument on emergent relief, including sworn testimony of minor child M.S., was held on February 22, 2022.

FACTUAL DISCUSSION AND FINDINGS

The following facts are not in dispute and form the basis for the below decision. Accordingly, I **FIND** as **FACTS:**

M.S. is a seventeen-year-old female who is eligible for special education (SE) and related services.[1] M.S. was initially found eligible for SE and related services in 2016. She has not attended school in the Hamilton Township School District (District) continually since 2016, but while enrolled in the District, has received such services.

M.S. began the 2021-2022 school year in 11th grade at Gateway High School in Florida, where she received instruction in a general education (GE) class pursuant to an

[1] Petitioner stated that M.S. is classified as "emotionally disturbed." Respondent stated that M.S. is classified with "emotional regulation impairment," one of the disabilities listed in the regulations as eligible for SE and related services. "Emotionally disturbed" is not a recognized category. See N.J.A.C. 6A:14-3.5(c).

individual education program (IEP) developed by the child study team (CST) at Gateway High School.

Since November 2021, M.S. has attended 11th grade at Steinert[2] in a GE class where she receives instruction pursuant to an IEP adopted on November 20, 2022.[3] M.S. spends more than forty percent of the school day in the presence of GE students.

On or about February 1, 2022, Steinert Principal Bridgette O'Neill (O'Neill) contacted D.S. by telephone to report that M.S. had been involved in a fight with A.C., another student.[4] M.S. was charged with the disciplinary infraction of "fighting/instigating a fight on February 1 in the Steinert library." Ltr. Br. of Respondent (February 21, 2022), Ex. B. O'Neill directed D.S. to pick up M.S., stated that M.S. would be suspended, and the term of suspension would be determined after an internal investigation was completed. On February 4, 2022, O'Neill spoke with D.S. by telephone, as confirmed by email, and stated that M.S. was suspended pending a discipline decision by respondent. With her email, O'Neill provided D.S. forms required for home instruction of M.S.

On February 7, 2022, D.S. was notified by email from Sharon Prowiser (Prowiser), Learning Disabilities Teacher-Consultant (LDTC), of two dates for a manifestation determination meeting with the members of M.S.'s child study team (CST). (Both parties appeared in the submitted correspondence and at the hearing fully knowledgeable that the purpose of a manifestation determination is to consider whether M.S.'s inappropriate behavior was a manifestation of her disability.) Further, Prowiser offered to conduct the meeting "in-person or virtually," at D.S.'s option, and requested additional dates and times for the meeting that would be convenient for D.S.

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[2] The District operates four high schools in four geographically separate parts of the township. Prior to enrolling M.S. at Steinert, D.S. applied for a "zone waiver," whereby M.S. would have attended HHSW though she lives in the part of the township which sends resident students to Steinert. That application was denied.

[3] Neither party provided the IEP prior to the emergent hearing, though it was made clear at the hearing that there is some dispute between the parties over certain provisions of the IEP.

[4] While there is some dispute regarding events leading up to the fight, petitioner acknowledged that M.S. was involved in a fight and that her action was a violation of the Steinert Student Code of Conduct.

By two return emails, sent within thirty minutes of Prowiser's email, D.S. effectively stated that she would not participate in this meeting. On February 8, 2022, Prowiser notified D.S. that the manifestation determination meeting would be held on February 10, 2022, at 9:30 a.m., within the ten-day period following M.S.'s removal from Steinert. The manifestation determination meeting was held on February 10, 2022; neither D.S. nor M.S. attended. The CST determined that M.S.'s behavior was not a manifestation of her disability, stating, in pertinent part:

> M.S. is classified with an Emotional Regulation Impairment.
>
> The incident that occurred on Tuesday, 2/1/22 is not typical of a student with Emotional Regulation Impairment, or [sic] is it typical of [M.S.'s] school behavior. [She] has a history of reacting impulsively ("temper outbursts") and this was not an impulsive act. She was in control of her actions on this day, as she had set up the situation before hand, and she went to the library for the sole purpose of confronting the student [with whom she fought].
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> [Br. of Respondent, Ex. E.]

Respondent offered home instruction to M.S.; D.S. initially declined home instruction pending the due process hearing in this matter. Working with District staff, M.S. has been able to get her assignments through "Google Meets," but has not had access to a live teacher through this platform.[5] For her part, M.S. stated that she does not do well in virtual instruction (as was provided for all students during the COVID-19 emergency) and that she is behind in her schoolwork. Being at home "brings [her] down," and her preference is to return to HHSW, where her guidance counselor cared about her and knew what was best for her.

D.S. stated that being kept out of school pending the Board's decision on proper discipline has been isolating for M.S. and is particularly troubling given that M.S. has previously attempted suicide.

[5] D.S. stated that the laptop provided to M.S. by respondent has a broken charger, which respondent refuses to replace due to a dispute over payment. Respondent countered that M.S. is able to access Google Meets using her cell phone and/or a personal laptop.

On February 15, 2022, respondent held a discipline hearing before a committee of the Board. D.S. testified at this hearing and cross-examined respondent's witnesses. The Board will make a decision on the appropriate discipline for M.S. at its regular meeting on February 23, 2022.

An expedited due process hearing is scheduled in this matter for March 4, 2022.

LEGAL ANALYSIS AND CONCLUSIONS

N.J.A.C. 1:6A-12.1(a) provides that the affected parent 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. 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 initiated due process proceedings to return M.S. to Steinert or HHSW, for a second manifestation determination meeting, for evaluations of M.S. by the CST, and for the development of an appropriate behavior intervention plan for M.S. Further, D.S. has requested emergent relief to return M.S. to her placement at Steinert pending the outcome of the due process proceedings.[6] Therefore, I **CONCLUDE** that petitioner has established that the issue in this matter concerns placement of M.S. pending the outcome of due process proceedings.

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

[6] It is possible that on February 23, 2022, respondent will issue a decision on discipline that makes this emergent proceeding moot.

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

To obtain emergent relief, petitioner must demonstrate more than a risk of irreparable harm to M.S. 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).

Petitioner contends that irreparable harm is established because M.S. has been kept out of school since February 1, 2022, when she was placed on long-term suspension and home instruction. Further, petitioner contends that home instruction has had a detrimental emotional impact on M.S., in that she is missing out on her education and is isolated from her peers. D.S. fears that the combination of isolation and discrimination[7] may result in suicidal ideation.

Respondent argues that petitioner has failed to show the risk of irreparable harm for two reasons. First, respondent has offered M.S. home instruction in academic

[7] Petitioner gave no specific examples of the discrimination suffered by M.S., though she alluded to a settlement of earlier litigation, and stated that respondent has been trying to "push" M.S. into an out-of-district placement.

subjects and, second, any harm to M.S. due to an alleged loss of instruction time can be remedied through the provision of compensatory education.

Petitioner relies on a recent case in which the petitioner school district, which had placed a kindergarten student on home instruction, was unable to show irreparable harm to the school from the alleged risk the student posed to the safety of staff and students. W. Windsor-Plainsboro Bd. of Educ. v. A.C. on behalf of Z.P., OAL Dkt. No. 00659-22, Final Decision (February 1, 2022). That case is distinguishable from this one in at least two important respects. First, the district did not conduct a manifestation determination meeting regarding the student at any time following the violent incident, making it difficult to prove the risk he presented, and second, the district as petitioner bore the burden of proving the risk of irreparable harm.

Typically, the availability of compensatory education is enough to prevent a finding of irreparable harm, but in this case, I am not so convinced. A brief review of M.S.'s current report cards makes clear that she is not doing well in school (and the decline in her grades between sixth and eleventh grades is staggering). Br. of Respondent, Ex. B. There is no dispute that the education being provided to M.S. while she is at home does not include live instruction, surprising in that all districts in New Jersey spent at least a year educating all children remotely (due to COVID-19). D.S. works full-time; to access her education while at home, M.S. is literally on her own in obtaining and completing on-line assignments, and there is no evidence that M.S. is so self-motivated. Given that she is in the second half of her junior year, M.S. will not have much time to make up the instruction that she is currently losing.

In light of the above, I **CONCLUDE** that the petitioner has met the burden of establishing that M.S. will experience irreparable harm if she is not returned to school. To prevail in an emergent proceeding, however, it is necessary to meet all the Crowe standards for emergent relief and, as explained below, petitioner is not able to do so.

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

The second consideration is whether the legal right underlying petitioner's claim is settled, N.J.A.C. 6A:3-1.6(b)(2), and then third, petitioner must make a preliminary showing of a reasonable probability of success on the merits. Crowe, 90 N.J. at 133. It is well-settled that the IDEA requires a school district to provide a free appropriate public education (FAPE) to all children with disabilities and determined to be eligible for SE. 20 U.S.C. §1412(a)(1)(A). When a child eligible for SE is subject to discipline, federal and state law provide certain safeguards. 20 U.S.C. §1415, codified at 34 C.F.R. § 300.530.

When, as here, a SE student is subject to discipline for violation of a code of student conduct, the district cannot remove the student from her placement for more than ten days unless a manifestation determination is performed. 20 U.S.C. §1415(k)(1)(E); N.J.A.C. 6A:16-7.3(a)(7). The goal of a manifestation hearing is to determine whether the conduct for which the child is being disciplined was a result of or affected by the student's disability or a failure to implement the student's IEP. In making a manifestation determination, the IEP team must consider all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parent to determine:

> If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
>
> If the conduct in question was the direct result of the [District's] failure to implement the IEP.
>
> [34 C.F.R. 300.530(e); 20 U.S.C. § 1415(k)(1)(E)(i), (ii).]

If the IEP team, which typically includes the parent, finds that the behavior was a manifestation of the student's disability, the IEP team must either conduct a functional behavioral assessment and implement a behavioral intervention plan, or review and modify any existing plan as necessary, and return the child to the placement from which she was removed, unless there is agreement that a change in placement is appropriate. 34 C.F.R. 300.530(f). If the manifestation-determination review does not

find one of the above criteria met, then the school may continue with the student discipline (including expulsion) just as it would for any pupil without an IEP, except that continued FAPE may be provided in an interim alternative educational setting. 20 U.S.C. §1415(k)(1)(C).

When the parent of a child with a disability disagrees with the manifestation determination, she may appeal the decision by requesting a hearing, as D.S. did here. 34 C.F.R. 300.532. There, pursuant to N.J.S.A. 18A:46-1.1, the ultimate issue to be decided is whether the Board can meet the burden of proving that the student's behavior was not a manifestation of her disability.

Petitioner claims that respondent failed to follow the requirements of federal and state law with respect to the notice she was provided, both of the decision to suspend M.S. pending the Board's decision on her discipline and of the scheduling of the manifestation determination meeting, a meeting she requested. D.S. contends that respondent gave her only a day or two to prepare for the manifestation determination meeting and that there was confusion over that meeting and the Board committee hearing on appropriate discipline. While there may be testimony presented at hearing to show otherwise, petitioner has not yet shown that she is likely to prove a due process violation in the conduct of the manifestation determination meeting. The regulations require advance notice to the parent of a manifestation determination meeting, but also require that the meeting be held within ten days of the behavior at issue, leaving respondent little choice with respect to dates. Respondent provided notice to D.S. of the meeting and attempted to reschedule – whether by date or by forum – at her request, but D.S. made it clear that she would not attend. Respondent acted appropriately in scheduling the manifestation determination meeting. Petitioner has already requested, and the OAL has already scheduled, an expedited hearing on the disputed determination of the CST that M.S.'s behavior was not a manifestation of her disability. See N.J.A.C. 6A:14-2.7(m).

At the expedited hearing, petitioner intends to challenge the decision of the CST, stating that if the meeting had been held properly, the CST would have determined that M.S.'s actions were a manifestation of her disability. Petitioner claims that respondent,

and in particular, Principal O'Neill, are lying about what transpired on February 1, 2022. While D.S. argues that M.S.'s actions were not "pre-meditated," she also contends that those actions were a justified response to unkind remarks made previously to M.S. by the "victim" of the fight at an extracurricular activity meeting. In other words, M.S. waited to "get back" at the other girl, which is the essence of pre-meditation. M.S.'s intent is underscored by M.S. turning on the video setting on her phone and asking a third student to film the altercation. Both parties can certainly argue over exactly what transpired on and leading up to February 1, 2022, and expert testimony has yet to be heard to support and/or to criticize the CST manifestation determination. Prior to a full hearing, however, petitioner has not yet demonstrated a likelihood of prevailing on the merits of her claims.

For the above reasons, I **CONCLUDE** petitioner does not meet 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 M.S. Petitioner argues that M.S. will suffer greater harm if emergent relief is not granted, such harm being that she is not in school, is isolated from her peers, and is falling further behind in her academic subjects. Petitioner urges respondent to move forward and work with her in M.S.'s best interest.

Respondent argues that granting emergent relief here would "thwart the disciplinary process" established and followed by respondent.

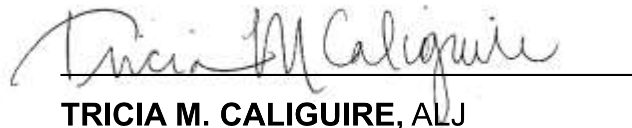
As D.S. stated several times in her written and verbal remarks, student fights are a recent problem at Steinert. This too underscores the compelling interest of respondent in ensuring safety and order in its four high schools by consistent and swift application of discipline consistent with the Code of Student Conduct and Board policies.

I **CONCLUDE** that respondent would suffer greater harm if the requested relief was granted. I **CONCLUDE** that petitioner's request for emergent relief does not satisfy the applicable requirements.

ORDER

For the reasons stated above, I hereby **ORDER** that petitioner's application for emergent relief seeking the immediate return of M.S. to her placement at Steinert while the due process proceeding is pending is hereby **DENIED.**

This order on application for emergency relief shall remain in effect until the issuance of the decision on the merits in this matter. This matter will not be returned to the Department of Education for a local resolution session, pursuant to 20 U.S.C. § 1415(f)(1)(B)(i), as respondent has previously declined to so participate. **The expedited hearing in this matter will proceed on March 4, 2022, at 9:30 a.m., via Zoom.**



February 23, 2022
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: ______________________

Date Mailed to Parties: ______________________

TMC/nmn