

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

DECISION ON APPLICATION

FOR EMERGENCY RELIEF

OAL DKT. NO. EDS 2382-08

AGENCY DKT. NO. 2008 13405

S.T. AND S.T. ON BEHALF OF P.T.,

Petitioners,

v.

MATAWAN-ABERDEEN REGIONAL

BOARD OF EDUCATION,

Respondent.

Michael I. Inzelbuch, Esq., for petitioners

Gabrielle A. Pettineo, Esq., for respondent (Kenney, Gross, Kovats and
Parton, attorneys)

Record Closed: April 7, 2008 Decided: April 14, 2008

BEFORE JOSEPH F. FIDLER, ALJ:

Petitioners seek emergency relief, pursuant to N.J.A.C. 6A:14-2.7 and N.J.A.C. 1:6A-12.1. Student P.T. is a fifteen year old student who is eligible for special education and related services. The primary disability adversely affecting his educational performance is autism, and pervasive developmental deficits significantly impact P.T.'s verbal and nonverbal communication and social

interaction. P.T.'s current Individualized Education Program provides for his placement out of district in a residential program at Woods Services, the Woodlands Education Center, in Langhorne, Pennsylvania. Alleging abuse, neglect, and regression, petitioners removed P.T. from his residential placement on March 14, 2008, and he has been at home without educational services since that date. On March 28, 2008, petitioners filed a petition for due process and request for emergency relief with the Office of Special Education Programs, New Jersey State Department of Education. They seek an interim program and placement pending a plenary due process hearing to determine an appropriate program and placement.

OSEP transmitted the matter to the Office of Administrative Law on April 3, 2008, and oral argument on the request for emergency relief was heard on April 7, 2008. In addition to the parties' arguments, I have considered the certifications and documents submitted before and during the oral argument.

Pursuant to N.J.A.C. 1:6A-12.1(e) and N.J.A.C. 6A:14-2.7(s)1, emergency relief may be granted if the judge determines from the proofs that:

- i. The petitioner will suffer irreparable harm if the requested relief is not granted.
- ii. The legal right underlying the petitioner's claim is settled;
- iii. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
- iv. 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.

Petitioners assert that the foregoing standards have been satisfied. Their core contention is that P.T. has suffered abuse, neglect, and intolerable regression in an inappropriate residential program at Woods Services. On an emergent basis, they seek educational programming provided by Verbal Behavior Network, LLC, asserting that the only time P.T. made educational progress was during an intensive, eleven hours per day, seven days per week program VBN provided for eight weeks during the summer of 2007. That program arose from a Consent Order settlement placed on the record before Administrative Law Judge Patricia M. Kerins on May

7, 2007. A forty-seven page transcript of that proceeding is an attachment to the present due process petition, as is a seven page Amended Agreement of July 12, 2007, that clarified and superseded all the terms of the earlier settlement.

P.T.'s success in the intensive VBN program led to his admission to a day placement in the Brick School District pursuant to the Amended Agreement. There was a problem, however, in hiring staff and P.T.'s start in that program was delayed. The newly hired staff member then resigned. After attending only nine days, P.T. was terminated from the program for reasons that included his unpredictable and intense behaviors. In a certification submitted with the emergent relief papers, mother S.T. averred that the only impediment to P.T.'s placement in a public school setting was the action of the Brick School District and its inability to provide the agreed upon placement. The parents reluctantly accepted P.T.'s placement in the residential program at Woods Services, with no intention that it be a long term or custodial placement. In a letter to Case Manager Dr. Barbara Chas of respondent school district dated October 10, 2007, Mrs. S.T. summarized the family's position:

This decision has not been easy for our family, and given the current situation of being home for the past two weeks with no interim plan and no programming and watching [P.] deteriorate, we want to make certain that we are making all decisions and plans based on [P.'s] needs and what has been proven effective for him rather than on any sense of urgency due to fear for his safety or ours. Each day that goes by without a school and behavioral program shows more behavioral regression. While it is a desperate situation, we feel strongly that [P.] will make progress with the appropriate programming and want to make sure that he gets exactly what he needs. We never anticipated our son leaving the family home and we are in no way giving up on him but rather redoubling our commitment and efforts to help him reach his full potential.

In their due process petition and request for emergent relief, petitioners identify several instances of alleged abuse and neglect P.T. suffered while at Woods Services. These include discovering on December 29, 2007, that P.T. was covered in bruises and exhibited indicia of dehydration. His jacket and shoes were missing. On January 25, 2008, P.T. appeared to be in a state of severe dehydration and his head

had been closely shaved over the parents' objections. P.T. was wearing a diaper even though he had been toilet trained since the age of four. On March 14, 2008, morning staff at Woods Services discovered that P.T. had recently been shaven on his underarms and pubic area. This incident was reported to the Pennsylvania Office of Children, Youth, and Families, and the staff member who admitted shaving P.T. was suspended from employment.

In support of their regression contention, petitioners submitted the April 6, 2008, certification of Ida Palmieri, a Board Certified associate Behavior Analyst. She holds a Master's degree in special education and a New Jersey certificate as a teacher of the handicapped. As P.T.'s primary teacher, Ms. Palmieri instructed him from June 2007 through August 2007 for approximately 30 hours per week. She also observed P.T. in his residential placement at Woods Services. Ms. Palmieri averred that as of August 2007, P.T. was able to spontaneously request things he wanted without prompting an average of 37 times per day, using language skills. Currently, however, he uses exaggerated gestures and guttural sounds to get things or to get attention, representing behavioral regression. In the academic areas of reading and math, P.T. is no longer able to phonetically identify a variety of sounds and sound blends and has trouble counting to ten and telling time to the hour on a digital clock, which were mastered skills in August 2007.

Ms. Palmieri stated in her certification that the area of self help and life skills is where P.T. shows the most regression. He has become prompt dependent in daily living skills previously mastered independently, including getting dressed, cleaning the sink, doing the laundry, and making the bed. Ms. Palmieri opined that the loss of these skills will limit P.T.'s ability to meet his full potential. She also observed that P.T. was exhibiting some new self-stimulatory behaviors and ticks not previously exhibited. Her discussion with the parents and her review of documented photos suggested to her that during his time at home over the past three weeks, P.T. has engaged in dangerous, aggressive behavior toward himself, others, and property. It is Ms. Palmieri's opinion that P.T. needs a behavior intervention plan which addresses his specific needs and that he has the ability to learn and to decrease his problem behavior if a well-developed and individualized program of no less than 30 hours per week is provided by trained instructors and in accordance with an individualized plan. Otherwise P.T. will experience further regression.

Respondent school district contends that petitioners have not established the four elements required for emergency relief. In particular, it argues that petitioners have not shown that irreparable harm will be suffered if the requested relief is not granted, nor have they shown that the legal right underlying their claim is settled. Respondent emphasizes that there are factual disputes concerning regression and the appropriateness of the Woods Services residential placement. Relying upon P.T.'s report card for the second marking period, respondent contends that he was making progress there academically, vocationally, and socially.

Respondent submitted the certification of Helen Rappaport, its Director of Special Services. She averred that the Child Study Team believed the residential placement was appropriate for P.T. at the time of a November 16, 2007, IEP meeting and that it is still appropriate. P.T. requires a consistent, educationally appropriate program where he can receive functional academic skills, behavior management, and personal development, and a residential placement is appropriate because such a program must be provided in a setting where he can be monitored throughout the day and evening.

It is Director Rappaport's opinion that P.T. should be returned to his residential placement immediately because Woods Services can accommodate his needs. She noted that the district continues to pay Woods Services for P.T.'s program and services and he could return immediately with a new aide who would be approved by Woods Services and petitioners. If petitioners remain unwilling to have P.T. return to Woods Services, the district will immediately place applications with other residential programs, provided petitioners consent to transmission of P.T.'s records. Until an alternate residential placement is secured, P.T. could return to Woods Services on a temporary basis. In the alternative, the district is willing to provide two hours of home services per day until a residential placement is secured. This instruction will include verbal behavior, reading, and math, and will be provided by teachers and an aide.

In regard to petitioners' allegations of abuse and neglect, Director Rappaport acknowledged that Woods Services filed an incident report on March 14, 2008, confirming that an aide improperly shaved P.T. on his underarms and pubic area. It is her understanding that the aide has been terminated. As to the other alleged abuses, Director Rappaport averred that she was never informed of any incidents or problems having occurred, and she received no incident reports to sustain the

allegations. In its oral argument on petitioners' application for emergency relief, respondent asserted that P.T.'s bruises had been described as self-inflicted. The use of diapers was described as a mistake by an aide at Woods Services, and the alleged dehydration was addressed by asserting that a physician at Woods Services had limited P.T.'s liquids at meal time because of vomiting.

Having considered the parties' arguments and submissions, it is my view that petitioners are entitled to emergency relief but not in the form they seek. There is a clear dispute between the parties concerning the adequacy of P.T.'s program and placement out of district in a residential setting at Woods Services. Likewise, the parties disagree concerning the appropriateness of the program sought by petitioners. Verbal Behavior Network has informed petitioners that it can provide P.T. fifty-five hours a week or more of educational programming, beginning July 1, 2008, and may be able to provide some interim services before that date. Petitioners assert that 30 hours of such programming would suffice for emergency relief. Absent agreement between the parties, however, resolution of placement and program disputes of this nature requires consideration of fact and expert opinion evidence in a plenary proceeding.

While petitioners have no settled legal right to thirty hours of VBN's educational programming, there is no doubt that P.T. is entitled to special education and related services provided at public expense. Further, as respondent school district candidly agrees, P.T. suffers harm while he is receiving no educational services. This is the harm which must be remedied now, while balancing the equities and interests of the parties. Returning P.T. to his residential placement at Woods Services at this time is wholly inappropriate, given the abusive violation of his rights occurring there on March 14, 2008. Under these circumstances, the appropriate interim measure pending determination of an appropriate placement and program is provision of home instruction, pursuant to N.J.A.C. 6A:14-4.8.

Under N.J.A.C. 6A:14-4.8(a)4, no fewer than ten hours of instruction at home or in another appropriate setting shall be provided per week. Given the asserted understanding of the school district's Child Study Team that P.T. requires a consistent, educationally appropriate residential placement where he can receive functional academic skill, behavior management, and personal skill development, I CONCLUDE that the district's proposal to temporarily provide the minimum of two hours of home instruction per day is inadequate to prevent regression. I further

CONCLUDE, based upon P.T.'s apparent needs, that respondent school district should provide P.T. with home instruction for fifteen hours per week, including verbal behavior, reading, and math, pending determination of an appropriate program and placement in a plenary proceeding. If an appropriate program and placement has not been determined within thirty days from the date of this decision, the duration of home instruction to be provided P.T. should increase to twenty-five hours per week.

I so ORDER.

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).

DATE **JOSEPH F. FIDLER**, ALJ

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