State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
ON EMERGENT RELIEF
OAL DKT. NO. EDS 02099-2022
AGENCY DKT. NO. 2022-33902

G.E. & J.E. ON BEHALF OF H.E.,
Petitioners,
v.
FREEHOLD REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION,
Respondent.

Michael I. Inzelbuch, Esq, for petitioners

John B. Comegno, Esq., for respondent (Comegno Law Group, P.C. attorneys)

Record Closed: August 1, 2022, Decided August 3, 2022

BEFORE: **WILLIAM T. COOPER III**, ALJ:

The request for emergent relief was received by the Office of Special Education on or about July 7, 2022, and transmitted to the Office of Administrative Law on July 13, 2022. The matter was conferenced on July 19, 2022, at which time a briefing schedule and hearing date were discussed. Oral argument and testimony regarding the application for emergent relief was conducted on August 1, 2022, and the record on the request for emergent relief closed on that date.

DECISION ON APPLICATION FOR EMERGENCY RELIEF

G.E. and J.E. ("petitioners") filed a request for emergent relief on behalf of their son, H.E., who is eligible for special education and related services pursuant to the federal eligibility category of “Autism”. H.E. is a thirteen-year-old student who has attended and recently graduated the eighth grade from the Clifton T. Barkalow Middle School, which is part of the Freehold Township K-8 School District (this entity is not a party to this emergent relief application). H.E. as of July 1, 2022, is a student enrolled in the Freehold Regional High School District (District). H.E. has an approved Individualized Education Program dated September 10, 2021, (2021 IEP) and while a student in the Freehold Township K-8 School District, from third grade to eight grade was placed in the multiple disability program. In anticipation of H.E.’s transition to high school a subsequent IEP dated February 4, 2022, (2022 IEP) was developed, wherein, H.E. would be placed into a self-contained autism class at the Howell High School (Howell) commencing July 1, 2022. The parents objected to this IEP and filed a due process claim against the Freehold Township K-8 School District. The due process claim was subsequently amended by consent on June 9, 2022 to include the District.

The parties submitted legal memorandum together with supporting documents and in the interest of obtaining accurate information, the tribunal allowed Dr. Jessica Howland and J.E. (H.E.’s mother) to testify at the hearing on August 1, 2022.

It is undisputed that the “stay-put” IEP is the 2021 IEP. Through this IEP H.E. was placed in the Multiple Disability Program. It is also undisputed that the District does not have a Multiple Disability Program. The District has an “Autism Program” in the Howell High School as well as a “Cognitive Mild” program in the Freehold High School. Therefore, a program matching the 2021 IEP placement does not exist thus a “stay-put” order requires placing H.E. in a program that is substantially similar to the “Multiple Disability” program. The issue here then is which of the two existing programs are comparable to the Multiple Disability program. Petitioner argues that H.E. is better suited for the “Cognitive Mild” program and the District argues that H.E. is best served in the “Autism Program”.

Petitioners note that the District did not conduct any new studies or evaluations of H.E. and did not engage them in a collaborative effort. Petitioner's concern is that placing H.E. in an Autism program will lead to intellectual and/or behavioral regressions. J.E. was afforded an opportunity to observe students in the "Autism Program" and observed physical behavior by students that H.E. does not currently exhibit, and her fear is that H.E. will imitate that if he is exposed to same. In addition, she felt that the District was not willing to engage the family in a meaningful discussion concerning H.E.'s placement and unwilling to discuss the reasons for same. It is J.E.'s belief that the "Cognitive Mild" program is comparable to the "Multiple Disability" program and thus better suited to his educational needs.

Based upon petitioner's belief that H.E. has been wrongly placed in the "Autism Program" the parents have not allowed H.E. to attend the ESY classes that began on July 1, 2011.

In support of the emergent request the written opinions of Dr. Patricia Manfredovia and Dr Steven Dykman were provided. Dr. Manfredovia is H.E.'s pediatrician and notes that H.E. has never been placed in an Autism classroom and opines that such a setting is not appropriate for him. Dr. Manfredovia has concern that H.E. would regress if he were placed in an Autism classroom. Dr. Dykman is a Board-Certified Psychiatrist who consulted with the family, interviewed H.E., and reviewed the IEP's as well as other available reports and his opinion is that H.E. must remain in a "Multiple Disability" type program and further that the "Cognitive Mild" program is comparable to such a program.

The medical reports from both medical professionals failed to address the curriculum of either the "Autism Program" or the "Cognitive Mild" program. Further, neither report discussed the goals for H.E, as outlined in the 2021 IEP or how the "Cognitive Mild" program would meet H.E.'s specific educational needs.

Dr. Jessica Howland is the Director of Special Services for the District and her opinion is that the "Autism Program" is comparable to the "Multiple Disability Program" as it addresses H.E.'s educational needs outlined in the 2021 IEP. Dr. Howland noted that

the “Autism Spectrum Program” prepares students to maximize achievements and skills according to their individual potential in the areas of language pragmatics and communication, social interaction, academic course work is individualized within the program. Using a behavioral approach, the program seeks to increase a student’s independent functioning within the school, home, and community. In contrast the “Cognitive Mild” program is designed to provide a departmentalized program that offers students’ academic and social skills required for post-secondary experiences. Opportunities for mainstreaming are encouraged on an individual basis. Students are provided with vocational opportunities to acquire job related skills through the district’s Student Transition Employment Program and the Monmouth County Vocational School.

Dr. Howland indicated that the District completed a detailed comparison of both of the available programs and determined that the “Autism Program” is the most appropriate placement for H.E. and is a comparable program to H.E.’s previous program and functioning levels. According to Dr. Howland the “Autism Program” is fundamentally designed to address the 2021 IEP goals while the “Mild Cognitive” program is not.

CONCLUSIONS OF LAW

Pursuant to N.J.A.C. 6A:14-2.7(r), emergent relief shall only be requested for the following issues:

> i. Issues involving a break in the delivery of services;
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> ii. Issues involving disciplinary action, including manifestation determinations and determinations of interim alternate educational settings;
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> iii. Issues concerning placement pending the outcome of due process proceedings; and
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> iv. Issues involving graduation or participation in graduation ceremonies.

Here, the application for emergent relief concerns placement pending the outcome of due process proceedings in accordance with N.J.A.C. 6A:14-2.7(r)(1)(iii).

Before analyzing the legal criteria for emergent relief, it is important to recognize the "stay-put" provision under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C.A. § 1400, et seq.; 20 U.S.C.A. § 1415(j). That provision and its counterpart in the New Jersey Administrative Code require that a child remain in his or her current educational placement "during the pendency of any administrative or judicial proceeding regarding a due process complaint." 34 C.F.R. § 300.518(a); N.J.A.C. 6A:14-2.7(u). The stay-put provision functions as an automatic preliminary injunction and it assures stability and consistency in the student's education by preserving the status quo of the student's current educational placement until the proceedings under the IDEA are finalized. Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864--65 (3d Cir. 1996).

Petitioners, who are seeking to alter the status quo or change the stay-put placement, have the burden of satisfying the requisite emergent relief standards. As set forth in N.J.A.C. 1:6A-12.1(e), N.J.A.C. 6A:14-2.7(s), and N.J.A.C. 6A:3-1.6(b), codifying Crowe v. DeGoia, 90 N.J. 126 (1986), an application for emergent relief will be granted only if it meets all four of the following requirements:

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
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> 2. The legal right underlying petitioner's claim is settled;
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> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
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> 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.

The first consideration is whether petitioner will suffer irreparable harm if the requested relief is not granted. "Irreparable harm is shown when money damages cannot adequately compensate plaintiff's injuries." Hornstine v. Twp. of Moorestown, 263 F. Supp. 2d 887, 911 (D.N.J. 2003) (citing Sampson v. Murray, 415 U.S. 61, 90 (1974)). "More than a risk of irreparable harm must be demonstrated." Cont'l Grp., Inc. v Amococ Chemicals Corp., 614 F.2d 351, 359 (3rd Cir. 1980). "The requisite for injunctive relief has been characterized as 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 protected by statute or by common law." Id. This was further explained by the New Jersey District Court:

> "A party seeking a preliminary injunction must make a clear showing of immediate irreparable injury… Establishing a risk of irreparable harm is not enough. A plaintiff has the burden of proving a clear showing of immediate irreparable injury…Mere speculation as to an injury that will result, in the absence of any facts supporting such a claim, is insufficient to demonstrate irreparable harm." See Spacemax Int'l LLC v. Core Health & Fitness, LLC No. CIV.A. 2:13-4015-CCC, 2013 WL 5817168, at 2 (D.N.J. Oct. 28, 2013) (internal citations and quotations omitted).

Petitioners' strongest argument relates to the risk that H.E. may regress in his learning and or behavior without an immediate intervention to change his placement. However, this argument is speculative at this juncture of the proceedings. Petitioner provided medical opinions in support of this consideration, but neither of those opinions touched upon the course curriculum or why same was not appropriate. This tribunal does not make light of the potential for regression, but petitioners have failed to show that H.E. will suffer irreparable harm if his placement is not immediately changed, especially considering the school year has yet to commence. I **CONCLUDE** that petitioners have not met their burden of satisfying the irreparable harm standard for emergent relief.

The second consideration is whether petitioner has shown his claim to be well settled. Here, the parties agree that the doctrine of "stay-put" applies. However, that doctrine cannot be readily applied here since H.E. is transitioning from grade school of the Freehold K-8 district to a high school in the District and therefore, the same programming is not available. Thus, the issue is which of the two available programs is substantially similar to the "Multiple Disability" program. Petitioner argues that the "Cognitive Mild" program is comparable and the District argues that the "Autism Program" better addresses H.E.'s needs. Based upon the credible evidence submitted thus far in the proceedings it appears that the "Autism Program" is most comparable to the "Multiple Disability" program. I **CONCLUDE** that the petitioners have not met their burden of establishing that their claim is well settled.

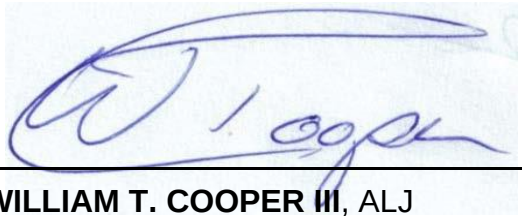
The third consideration is whether petitioner has a likelihood of prevailing on the merits. Petitioners argue that H.E. should be placed in the "Cognitive Mild" program as opposed to the "Autism" program. The credible evidence submitted at this juncture of the proceedings, however, reveal that such a placement may not be best suited to address the H.E.'s educational goals and needs. Consequently, I cannot **CONCLUDE** that petitioner has a likelihood of prevailing on the merits at this point in the proceedings.

Regarding balancing of the equities, the Petitioner argues that H.E. will suffer irreparable harm if this tribunal does not grant the request for relief. Respondent argues that if relief is granted it would undermine the District's ability to make program determinations for each student. I **CONCLUDE** that the equities weigh in favor of petitioner.

Since petitioners have not satisfied all of the requisite emergent relief standards, I **CONCLUDE** that the application for emergency relief must be denied.

It is **ORDERED** that petitioner's motion for emergent relief is **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 Programs.



August 3, 2022
DATE

WILLIAM T. COOPER III, ALJ

Date Received at Agency: August 3, 2022

Date Mailed to Parties: August 3, 2022

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