



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION DENYING
EMERGENT RELIEF

OAL DKT. NO. EDS 11616-22

AGENCY REF. NO. 2023-35305

M.L. and M.L. ON BEHALF OF MINOR CHILD L.L.,

Petitioner,

v.

MIDDLETOWN TOWNSHIP BOARD
OF EDUCATION,

Respondent.

Sharon DeVito, Parent Advocate for petitioners, pursuant to N.J.A.C. 1:1-5.4(a)(7)

Jared Schure, Esq., for respondent (Methfessel & Werbel, P.C., attorneys)

BEFORE **JEFFREY N. RABIN**, ALJ:

Record Closed: January 4, 2023

Decided: January 5, 2023

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner seeks emergent relief in the form of a temporary order for home instruction with a teacher of the deaf who uses sign language. Petitioner also filed a due process petition seeking out-of-district placement at First Children's Deaf and Hard of Hearing Program. Respondent, the Middletown Township Board of Education

(Middletown, Board or District), opposed the request for emergent relief, and argued that the program offered by respondent in its December 15, 2022, Individualized Education Program (IEP) was appropriate pending the completion of the due process litigation.

The within motion for emergent relief was filed by petitioner on December 27, 2022, with the New Jersey Department of Education (DOE), Office of Special Education (OSE). The motion for emergent relief was transmitted to the Office of Administrative Law (OAL) on December 28, 2022. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Due to the ongoing Covid-19 pandemic protocols, an emergent hearing in this matter took place via Zoom on January 4, 2023, and the record closed.

FINDINGS OF FACT

Based on petitioner's Petition for emergent relief, respondent's brief, and the evidence and testimony offered by the parties and their representatives, and solely for the purpose of deciding this emergent appeal, I **FIND** the following to be the undisputed facts:

1. L.L. is a six-year-old kindergarten student who resides within the District and has been eligible for, and has received, special education and related services. Previously eligibility was under the classification of Auditory Impairment, but the District had proposed continued classification as Multiply Disabled. L.L. had diagnoses of bilateral sensorineural hearing loss and Becker's muscular dystrophy. He has bilateral cochlear implants which allow him to hear.
2. During the 2021-2022 school year, the District placed L.L. in the Neptune Township School District's Regional Deaf Education Program, known as the Summerfield Program ("Summerfield") via an IEP, but by June 2022 the District IEP Child Study Team (CST) found that Summerfield was no longer meeting L.L.'s needs.
3. On or about June 2, 2022, the petitioners and the CST convened for an IEP meeting, resulting in respondent proposing to place L.L. in a multiple

disabilities classroom in the District's Bayview Elementary School for the 2022-2023 school year. (Respondent's Exhibit A.)

4. On or about June 14, 2022, the petitioners filed a Petition for Due Process challenging the appropriateness of the proposed June 2, 2022, IEP. (Respondent's Exhibit B.)
5. In November 2022, petitioner and the District entered into a settlement agreement resolving the due process petition, wherein the District agreed to continue L.L.'s placement at Summerfield through June 2023. (Respondent's Exhibit C.)
6. On or about December 7, 2022, respondent received a letter from the Neptune Township School District advising that, due to a shortage of certified teachers of the deaf, Neptune would be unable to continue L.L.'s placement after December 23, 2022. (Respondent's Exhibit D.) The District scheduled an IEP meeting for December 15, 2022. On December 13, 2022, the District's special education counsel, Eric Harrison, Esq., emailed the petitioners' advocate, Sharon DeVito, asking her to confirm that, given the inability of continuing L.L.'s Summerfield placement, an IEP proposing to place L.L. in a different placement would not violate the parties' November 2022 settlement agreement. DeVito responded the same day and confirmed that "[a] revised IEP with an alternative placement won't violate the settlement agreement." (Respondent's Exhibit E.)
7. Pursuant to the December 15, 2022, IEP meeting, the District proposed an IEP that would place L.L. in a multiple disabilities classroom in the District's Bayview Elementary School for the duration of the 2022-2023 school year. (Respondent's Exhibit F.) The petitioners rejected the IEP and filed a new Petition for Due Process and Request for Emergent Relief.

TESTIMONY

For petitioner:

Melissa Phillips was a teacher of the deaf with experience in speech and language pathology. She was neither qualified as an expert witness nor offered as an expert witness. Her evaluation of L.L. took place two years ago, although she had worked with L.L. over the last few months. She never observed the District-proposed program, nor did she ever speak with members of L.L.'s CST about their proposed IEP.

She offered lay testimony that L.L. needed a teacher who employed sign language and understood deaf students. She stated that L.L. needed to be around peers and teachers who understood his needs.

Karen Noble was a teacher of the deaf, with a master's degree in special education. She was neither qualified as an expert witness nor offered as an expert witness. Her evaluation of L.L. took place two years ago and she had not seen L.L. since that time. She never observed the District-proposed program, nor did she ever speak with members of L.L.'s CST about their proposed IEP.

She offered lay testimony that L.L. is behind other students in learning words, that L.L. uses sign language, and that L.L.'s speech is incomprehensible to others. She offered no testimony or evidence that home schooling would be more efficient at helping L.L. with his vocabulary or speech skills. She offered no testimony or evidence that L.L. would be worse off in a classroom setting during the due process litigation. She stated that there is a "window of language learning," especially for children in the range of five to six years of age. She testified, without supporting documentation or other evidence, that if L.L. went to school instead of being home-schooled, there would be a regression of skills.

M.L. was L.L.'s mother. She discussed L.L.'s various diagnoses. She observed the District's proposed program in early November 2022, for approximately twenty-five minutes. The class she observed was very loud, and the room was not designed

acoustically correct; loud sounds would keep her son from focusing. She had no background in education or teaching, and offered only lay testimony.

M.L. acknowledged that L.L. would be receiving thirty hours of education per week at the District school but, in her opinion, it would be harmful for L.L. to only receive ninety minutes of teaching from a teacher of deaf students. L.L. needed a teacher who was familiar with L.L. and his needs, but did not explain how a teacher hired by the District for home-schooling would be fully familiar with L.L. or his needs.

Sharon DeVito offered lay testimony throughout the emergent hearing. Having L.L. go to school instead of receiving home schooling would create a break in services. L.L. would only be receiving thirty minutes of direct teaching by a teacher of the deaf three times per week. L.L. had behavioral issues that would have to be dealt with by a school.

DeVito acknowledged that she failed to address the N.J.A.C. 6A: 3-1.6 Crowe v. DeGioia four-prong test in any of her submissions. Regarding petitioner's likelihood of success at the due process hearing, the third prong of the test, she testified that there were many special education laws, but there was no caselaw on the within issues.

Even though Neptune could not locate a certified teacher of the deaf, they believed the District would be able to procure one for ten hours per week of direct teaching at L.L.'s home, but that petitioner had not identified a possible candidate. Having L.L. attend school instead of receiving home-schooling would "cause real problems."

LEGAL ANALYSIS

The issue is whether petitioners had proven by a preponderance of the evidence that they had met the standard for emergent relief, and that they were entitled to relief.

N.J.S.A. 18A:6-9 authorizes the Commissioner of Education to consider controversies between a parent and a school board. The OAL is the appropriate venue

for hearing an appeal of a school board's findings and OSE properly forwarded this matter to the OAL for this emergent appeal to be heard.

N.J.A.C. 6A:14-2.7(r) allows a party to apply in writing for a temporary order of emergent relief as part of a request for a due process hearing or an expedited hearing for disciplinary action. The request needed to be supported by an affidavit or notarized statement specifying the basis for the request for emergency relief. N.J.A.C. 6A:14-2.7(r)(1) lists the cases emergent relief is available for, which includes issues involving (i) a break in the delivery of services, (ii) disciplinary action, including manifestation determinations and determinations of interim alternate educational settings, (iii) placement pending the outcome of due process proceedings, and (iv) issues involving graduation or participation in graduation ceremonies.

Petitioners' Certification sought to address section (i), a break in the educational services provided to student L.L., and (iii) issues regarding placement, pending the outcome of a due process appeal.

I **CONCLUDE** that there would be no break in services because, under the District's proposed IEP, L.L. would be receiving thirty hours of education every week, with ninety minutes being direct teaching from a teacher of deaf students. Because L.L.'s educational programming was to change, and "stay put" was not available because Neptune could not find a teacher of the deaf to work with L.L., and because petitioner had simultaneously filed a due process appeal, I **CONCLUDE** that the within matter concerns itself with issues regarding placement, pending the outcome of a due process appeal and, therefore, petitioners' Petition met one of the threshold issues required to be eligible for emergent relief.

Next, as set out in the Certification in Lieu of Affidavit or Notarized Statement of Petitioners Seeking Emergent Relief (Certification) executed by petitioners' advocate DeVito, and pursuant to N.J.A.C. 6A: 3-1.6 and the case of Crowe v. DeGioia, 90 N.J. 126 (1982), a petitioner must show by a preponderance of the evidence that the four

prongs/prerequisites set forth therein had been met in petitioners' favor in order to be granted emergent relief.

A petitioner bears the burden of proving the four prongs for emergent relief. B.W. ex rel. D.W. v. Lenape Reg'l High Sch. Dist., OAL Dkt. No. EDS 06933-05, Agency Ref. No. 2006-10522E, at 8 (N.J. Adm); see also J.G. ex rel. Q.B. v. Bd. of Educ. of Lakewood, OAL Dkt. No. EDU 10073-03, Agency Ref. No. 466-12/03, at 6 (N.J. Adm); R.D. ex rel. C.D. v. Willingboro Bd. of Educ., 95 N.J.A.R.2d 190, at 2.

Per N.J.A.C. 6A: 3-1.6 and Crowe, emergent relief may be granted if the judge determines from the proofs that the following four prongs have been met:

- 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.

Despite having acknowledged the four-prong test by executing the Certification, however, petitioners failed to address the standards set forth in Crowe, as required by N.J.A.C. 6A:3-1.6(b), and failed to provide testimony addressing these standards. Petitioners executed a Certification in Lieu of Affidavit or Notarized Statement of Petitioners Seeking Emergent Relief, but failed to explain what irreparable harm would be suffered or provide anything evidencing such harm, and failed to address prongs i through iv. of the test. All four prongs of the test must be met.

Respondent argued that petitioners would not have met all four prongs of the Crowe test.

1. The petitioners will suffer irreparable harm if the requested relief is not granted.

Petitioners did not argue irreparable harm in their moving papers and, at the hearing, only argued that there would be some harm.

Respondent pointed out that the “irreparable harm” standard contemplated that the harm be both substantial *and* immediate. Subcarrier Communications, Inc. v. Day, 299 N.J.Super. 634, 638 (App. Div. 1997). Irreparable harm included that the occurrence of harm was imminent. A. Hollander & Sons, Inc. v. Imperial Fur Blending Corp., 2 N.J. 235, 249 (1949), but not where a mere inconvenience may occur. B&S Ltd. v. Elephant & Castle Intern, Inc., 388 N.J.Super. 160 (Ch. Div. 2006). Regarding special education, irreparable harm was shown when there was a substantial risk of physical injury to the child or when there was a significant interruption or termination of educational services. M.H. o/b/o N.H. v. Milltown Board of Education, 2003 WL 21721069 at *1.

Petitioners did not provide any expert testimony, expert reports, medical evidence, documentation, or any other evidence to show that L.L. would be substantially and immediately harmed were the District not to immediately place him on home instruction. Petitioners argued that there would be a break in services, but this would not be true because the District had offered thirty hours of schooling per week, albeit with only ninety minutes of direct teaching with a teacher of the deaf.

Petitioners did not qualify any of their witnesses as experts or provide expert reports from those witnesses. There was lay testimony that every student had a “window of language learning,” especially for children of the same age as L.L. One witness testified, without supporting documentation or other evidence, that if L.L. went to school instead of being home-schooled, there would be a regression of skills. She did not explain what depth of regression, how the regression might manifest over time, or how bad the regression would be if the due process litigation took, for example, ten months to be completed as opposed to three months. She intimated that this might keep L.L. behind in his studies, but was not clear on how quickly this regression could be quantified or whether any such regression could be overcome. She never testified that any regression

would be “irreparable.” Thus, it was not clear if there would be any immediate or substantial irreparable harm.

Conversely, the District’s CST was of the unanimous opinion that home instruction would be an inappropriate placement for L.L.

I **CONCLUDE** that petitioners failed to show that this first prong of the Crowe test for emergent relief had been met in favor of the petitioners.

2. The legal right underlying the petitioner’s claim is settled.

Petitioners, in their moving papers, failed to argue that the legal right underlying petitioners’ claim was settled. At the emergent hearing, regarding petitioners’ likelihood of success at the due process hearing (the third prong of the test), petitioners’ non-attorney advocate testified that there were a lot of special education laws, but did not offer citations for any statute or regulation that could support petitioners’ position. Ms. DeVito testified that there was no caselaw on the within issues. Therefore, if there was no statute or caselaw holding that parents were entitled to home schooling when they disagreed with a school district’s IEP, the legal right underlying petitioners’ claim was clearly not yet settled.

Respondent submitted that they were not aware of any legal precedent for the assertion that the parents were entitled to the placement of their choice under the current fact pattern.

Accordingly, I **CONCLUDE** that petitioners failed to show that the second prong of the Crowe test for emergent relief had been met in favor of the petitioner.

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim.

Despite the petitioners-advocate’s stated belief that petitioners will prevail at the underlying due process litigation, petitioners, in their moving papers, failed to argue that they were likely to prevail after a full hearing. As stated for the second prong at the

emergent hearing, Ms. DeVito testified that there were a lot of special education laws, but did not offer citations for any statute or regulation that could support petitioners' position. Ms. DeVito testified that there was no caselaw on the within issues. If the law in this area is not yet settled, it is possible petitioners may prevail in the due process hearing but have failed at the present time to evidence a "likelihood" of success.

Respondent argued that petitioners presented no evidence demonstrating that L.L. had any need, let alone legal entitlement, to the relief sought in petitioners' Request for Emergent Relief, and that petitioners failed to cite any evidence showing a likelihood of succeeding on the merits in the underlying due process matter. Respondent pointed out that petitioners' Petition for Due Process alleged that the District's proposed December 15, 2022, IEP was inappropriate based solely on the petitioners' own lay opinions, without at any point offering competent evidence to supplement the claim.

I **CONCLUDE** that petitioners failed to show that the third prong of the Crowe test for emergent relief had been met in favor of the petitioners.

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.

Petitioners, in their moving papers, failed to argue that when the equities and interests of the parties were balanced, the petitioners would suffer greater harm than the respondent would suffer if the requested relief was not granted. Petitioners failed to offer an argument regarding the balancing of equities at the emergent hearing.

Conversely, respondent argued that a balancing of the equities and the interests of the parties would weigh in favor of the District. The District offered in its IEP from December 15, 2022, a mechanism to ensure that L.L. would receive an appropriate education in the least restrictive environment during the time frame when the underlying due process litigation was taking place. Respondent argued that its CST found that home schooling was inappropriate for L.L.

While the balancing of equities did not clearly favor either party, I **CONCLUDE** that petitioner failed to show that the fourth prong of the Crowe test for emergent relief had been met in favor of the petitioner.

Therefore, I **CONCLUDE** that petitioners failed to show by a preponderance of the evidence that it met any of the four prongs of the Crowe test for emergent relief. I **CONCLUDE** that petitioners failed to prove that they were entitled to emergent relief in this matter.

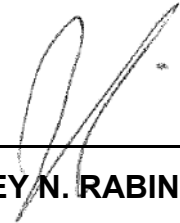
ORDER

Accordingly, I **ORDER** that the petitioners' application for emergent relief be and hereby 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.

January 5, 2023

DATE



JEFFREY N. RABIN, ALJ

Date Received at Agency

January 10, 2023

Date Mailed to Parties:

January 10, 2023

JNR/dw

APPENDIX

WITNESSES

For petitioner:

Melissa Phillips

Karen Noble

M.L., mother

Sharon DeVito, petitioners' advocate

For respondent:

None

BRIEFS/EXHIBITS

For petitioner:

Petition and Certification, dated December 23, 2022, with Certification in Lieu of Affidavit or Notarized Statement of Petitioner Seeking Emergent Relief Attached

Exhibit 1 and 1a IEP dated December 15, 2022

Exhibit 2 and 2a Speech and Language Evaluation dated March 29, 2021

Exhibit 3 and 3a Psychological Evaluation dated April 23, 2021

Exhibit 4, 4a and 4b Educational Evaluation dated March 18, 2021

Exhibit 5 Letter from Dr. Victoria Andre, Audiologist

Exhibit 6 Deaf Student's Bill of Rights

Exhibit 7 United States Policy Service Guidance Directive – Deaf Students Education Services

Exhibit 8 Emails between Alison DePetro and M.L. requesting observation of proposed classroom placement

For respondent:

Brief in Response to Petition for Emergent Relief dated November 3, 2022

Exhibit A IEP dated June 2, 2022

Exhibit B Request For Mediation dated June 14, 2022

Exhibit C Final Decision Approving Settlement dated November 10, 2022

Exhibit D Board letter dated December 7, 2022

Exhibit E Harrison email dated December 13, 2022

Exhibit F Proposed IEP dated December 15, 2022