State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

DENYING EMERGENT RELIEF

OAL DKT. NO. EDS 00693-23

AGENCY DKT. NO. 2023-35384

J.L. ON BEHALF OF J.L.,

Petitioner,

v.

HAMILTON TOWNSHIP

BOARD OF EDUCATION,

Respondent.

_____

Staci J. Greenwald, Esq., for petitioner (Sussan, Greenwald & Wesler, attorneys)

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

Record Closed: January 27, 2023 Decided: January 30, 2023

BEFORE **SUSAN L. OLGIATI**, ALJ:

STATEMENT OF THE CASE

Petitioner, J.L., on behalf of her son J.L.[1] filed a request for emergent relief seeking an Order directing the respondent, Hamilton Township Board of Education (hereinafter referred to as the "District") to participate in an intake at Garden Academy

[1] As petitioner and her son share the same initials, petitioner J.L. is referred to herein as (petitioner) and her son is referred to as J.L

and to provide placement there pending resolution of the underlying due process proceeding.

PROCEDURAL HISTORY

On or about January 20, 2023, petitioner filed a request for emergent relief and a due process petition with the New Jersey Department of Education, Office of Special Education (OSE). The OSE transmitted the emergent request to the Office of Administrative Law (OAL), for hearing as an emergent contested matter.[2] N.J.S.A. 52:14B-1 to B-15; N.J.S.A. 52:14F-1 to F-23. Oral argument on the emergent request was heard on January 27, 2023, via Zoom remote video platform and the record closed.

FACTUAL DISCUSSION AND FINDINGS

Based on the record before me including the parties' written submissions in support of and in opposition to the request for emergent relief, the following facts are not in dispute. Accordingly, I **FIND** them as **FACT**:

J.L. is currently sixteen years old (D.O.B. September 2006). He is eligible for special education and related services under the classification category of Autism.

J.L. currently attends school at the Mercer County Special Services School District—an out of district placement. He has been in this placement since 2019.

Petitioner filed a prior due process petition (OAL Dkt. No. EDS 08660-21) seeking placement in an appropriate out of district program.

The parties subsequently entered into a Settlement Agreement (Agreement) in that matter wherein the District agreed to send applications and relevant materials to Princeton Child Development Institute (PCDI) and Garden Academy for placement of J.L. beginning in July or September 2022.

[2] The transmittal notice to the OAL provides that "Only Emergent Relief" is being transmitted at this time.

The District agreed to send the appropriate documentation to the two schools in February 2022 and again in May 2022.

The parties agreed that if J.L. was accepted at either PCDI or Garden Academy, the District would amend his IEP to reflect that placement for the 2022-2023 school year (SY).

The parties also agreed that if either PCDI or Garden Academy did not have a placement for J.L. in July or September 2022, they would meet in June to discuss J.L.'s IEP and programing for the 2022-2023 SY.[3]

The parties further agreed and acknowledged that the Agreement was made without admission of liability or responsibility by any party and that the Agreement did not constitute an admission by the District that any modifications, accommodations, supports or services provided by the District were not appropriate.

The Agreement was approved in a March 4, 2022, Final Decision issued by the undersigned.

The District sent the agreed upon materials to both PCDI and Garden Academy in February and May 2022, however, neither school had an age-appropriate opening for J.L. at the time. As a result, J.L. has remained in his placement at MCSSSD.

Garden Academy recently advised of a potential age-appropriate opening and sought to schedule an intake during January 2023.

LEGAL ANALYSIS

In special education matters, emergent relief shall only be requested for the following issues:

i. Issues involving a break in the delivery of services;

[3] The parties acknowledge that the referenced meeting occurred.

> ii. Issues involving disciplinary action, including manifestation determinations and determinations of interim alternate educational settings;
>
> iii. Issues concerning placement pending the outcome of due process proceedings; and
>
> iv. Issues involving graduation or participation in graduation ceremonies.
>
> [N.J.A.C. 6A:14-2.7(r)(1).]

Here, the petitioner seeks emergent relief relating to placement pending the outcome of the underlying due process proceeding. Accordingly, I **CONCLUDE** that the request for emergent relief is consistent with the provisions of N.J.A.C. 6A:14-2.7(r)(1) and appropriate for consideration herein.

Under Crowe v. De Gioia, 90 N.J. 126, 132–35 (1982), and N.J.A.C. 1:6A-12.1(e), emergency relief may be granted if the judge determines from the proofs that each of the following elements have been established:

> 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.

The moving party must satisfy all four prongs of this standard to establish an entitlement to emergent relief.

As to the first prong of the standard, petitioner must show that irreparable harm will result if emergent relief is not granted. "Irreparable harm" is defined as the type of harm "that cannot be redressed adequately by monetary damages." Crowe, 90 N.J. at 132-33. In addition, the irreparable harm standard contemplates that the harm be both substantial

and immediate. Subcarrier Communications v. Day, 299 N.J. Super. 634, 638 (App. Div. 1977).

Petitioner contends that J.L. will suffer irreparable harm if the requested relief is not granted because his current program is not appropriate to address his unique needs. As a result, petitioner contends that J.L. has regressed in his current placement. In support of her position, petitioner appears to generally rely on the neuropsychological evaluation of Dr. Marcantuono, PhD, FACFE, which found that "J.L. is not able to acquire information through more traditional special education methods as what is currently being provided to him in the [MCSSSD]" and recommended, among other things, that J.L. required a structured academic environment and a smaller environment that provided 1:1 instruction in a distraction free setting.[4] Petitioner further contends that Garden Academy has long waiting lists and extremely limited opportunities for older students. Therefore, if the District does not participate in the requested intake at this time, J.L. is at "high risk of losing this placement permanently." Petitioner contends she is financially unable to pay for J.L.'s placement at Garden Academy. At oral argument, petitioner, through counsel, further argued that Garden Academy has appropriate post twenty-one-year-old programming for which J.L. is also at risk of losing.

Petitioner additionally argues that the District's refusal to participate in the intake with Garden Academy is not in compliance with the terms of the Settlement Agreement and constitutes a violation of the Agreement. At oral argument, petitioner's counsel, further argued that the Agreement provided for the placement of J.L. during the 2022-2023 SY and that the terms of the Agreement should not be limited to the four corners of the document.

Finally, petitioner urges that monetary damages would not compensate J.L. for the educational time he "stands to lose" and for the social, emotional, behavioral, and academic impact the deprivation of an appropriate program will continue to have on J.L.

[4] The report is undated but reflect that J.L. was fourteen years of age and that the dates of services were 11/04/2020, 12/17/2020, 12/18/2020, and 1/21/2021.

The District argues that it fulfilled its obligations under the Agreement, and that there is nothing preventing the petitioner from forwarding J.L.'s student records and unilaterally placing J.L. at Garden Academy.[5] It maintains that J.L.'s current placement at MCSSSD is appropriate and that it does not support J.L.'s current potential placement at Garden Academy. Finally, the District argues there is no legal authority for the requested relief.

Here, despite petitioner's contentions, she presented no evidence of regression or of the other harm alleged. Additionally, petitioner's claims that J.L. is at high risk of permanently losing the opportunity for placement at Garden Academy and that he is also at risk of losing the opportunity for participation in Garden Academy's post twenty-one programing are speculative and relate to potential future harm. Thus, petitioner has failed to demonstrate that the harm alleged is either immediate or substantial. Further,, petitioner's arguments regarding non-compliance with the Settlement Agreement are unpersuasive.[6] Accordingly, I **CONCLUDE** that petitioner has failed to demonstrate irreparable harm.

As to the second and third prongs of the standard for emergent relief, the parties are in agreement that petitioner has a settled legal right to a free and appropriate public education (FAPE). However, the question of whether J.L.'s current program and placement at MCSSSD provide him with FAPE and, if not, whether he is entitled to placement at Garden Academy can only be determined through a full evidentiary plenary hearing.

Petitioner also argues that the District previously agreed to amend J.L.'s IEP if he were accepted at Garden Academy in the 2022-2023 SY and contends that the District's prior agreement indicates its belief that Garden Academy was an appropriate placement. These arguments are however unpersuasive as they are unsupported by any legal authority and appear to be in conflict with, or an expansion of, the express

[5] At oral argument, petitioner's attorney represented that Garden Academy did not maintain J.L.'s records that were previously provided by the District as there was no available placement at the time. The parties further acknowledged and agreed that Garden Academy would not consider J.L.'s records if the District did not agree to support/fund the placement.

[6] Additionally, to the extent petitioner argues a violation of, or non-compliance with, the Agreement/ Final Decision approving same, N.J.A.C. 6A:14-2.7(t) outlines the appropriate mechanism for seeking enforcement.

terms of the Agreement.[7] Accordingly, I **CONCLUDE** the petitioner has failed to demonstrate that the legal right of the underlying claim is settled. I also **CONCLUDE** that petitioner has failed to demonstrate a reasonable probability of success on the merits.

As to the fourth prong of the standard, petitioner argues that a balancing of the hardships favors J.L. Petitioner contends there is no dispute as to J.L.'s need for the specialized programing and supports offered at Garden Academy. She argues that J.L. will continue to decline and suffer academically, behaviorally, socially, and emotionally if he were to remain in his current placement. Petitioner further contends that the District is already paying for J.L.'s out of district placement at MCSSSD and that it would be no great burden for the District to pay for the cost of placement at Garden Academy.[8]

The District argues it will suffer the greater harm because the requested relief will force it to participate in a placement it does not support.

While the District previously agreed to a placement of J.L. at Garden Academy beginning in July or September 2022, it contends that his placement at MCSSSD is appropriate and therefore does not support his current possible placement at Garden Academy. Thus, contrary to petitioner's arguments there is a dispute as to J.L.'s need for the programing and supports at Garden Academy. Having considered the equities and interests of the parties and for the reasons previously set forth herein, I **CONCLUDE** that petitioner has failed to demonstrate that J.L. will suffer greater harm if the requested emergent relief is not granted pending the outcome of the underlying due process proceeding.

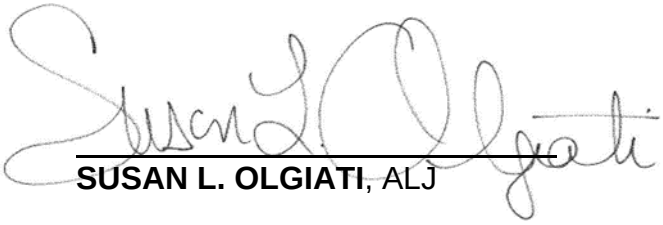
Based on the above, I further **CONCLUDE** that the petitioner has not satisfied the standard for emergent relief and that her request should therefore be **DENIED**.

[7] See footnote 5.
[8] There is no information in the record before me of the cost to the District relating to J.L.'s current placement or his possible placement at Garden Academy.

ORDER

I hereby **ORDER** that the petitioner's request for emergent relief seeking an Order directing the District to participate in an intake and provide placement at Garden Academy pending resolution of the due process proceeding, 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. § 1415(f)(1)(B)(i). If the parents 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 Policy and Dispute Resolution.



January 30, 2023
DATE

SUSAN L. OLGIATI, ALJ

Date Received at Agency: January 30, 2023

Date Mailed to Parties: January 30, 2023

SLO/dw