State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
ON EMERGENT RELIEF
OAL DKT. NO. EDS 12599-23
AGENCY DKT. NO. 2024-36731

J.V. and H.V. ON BEHALF OF D.V.,
Petitioners,
v.
CHERRY HILL TOWNSHIP
BOARD OF EDUCATION,
Respondent.

Andrew Parsinitz, Esq., for petitioners (Davis & Mendelson, LLC, attorneys)

Eric L. Harrison, Esq., for respondent (Methfessel & Werbel, P.A., attorneys)

Record Closed: November 17, 2023 Decided: November 20, 2023

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

By a request for emergent relief petitioners seek an order that D.V. be immediately provided with home-based instruction until a final decision is rendered in the underlying due process claim, as well as the immediate release of D.V.'s educational records to any potential out-of-district placements as directed by petitioners, and to provide Dr. Anita

Breslin with previously requested documents regarding D.V. and to permit Dr. Breslin to conduct staff interviews, and, provide Dr. Breslin with the immediate opportunity to observe D.V. in math class in his current educational setting. Respondent Cherry Hill Township, Board of Education (Board or respondent) opposes the request for emergent relief and argues that a free and appropriate public education (FAPE) is being provided under the current Individualized Education Plan (IEP).

This matter was transmitted to the Office of Administrative Law (OAL) on November 14, 2023, for an emergent relief hearing and a final determination in accordance with 20 U.S.C.A. §1415 and 34 C.F.R. §§300.500 to 300.587, and the Director of the Office of Administrative Law assigned me to hear the case pursuant to N.J.S.A. 52:14F-5.

An oral argument on emergent relief was heard on November 17, 2023, and the record closed on that date.

FACTUAL DISCUSSION

Petitioners filed a request for emergent relief on behalf of their minor child, D.V., who is eligible for special education and related services pursuant to the federal eligibility category of “Autism Disorder”, “Sensory Processing Disorder”, and “Anger Management” issues. D.V. is a six (6) year old rising first grade student who is attending Woodcrest Elementary School pursuant to an existing Individualized Education Plan (IEP) developed by the Board. D.V. also suffers from a gastrointestinal condition and “relies upon Gastrointestinal-tube (G-tube) feedings,” and requires a one-on-one nurse accompany him to school. Finally, D.V. also has an assigned Registered Behavioral Technician (RBT) broadly stated, the petitioners maintain that the nurse and the RBT employed and assigned by respondent to monitor D.V. are ineffective, and unable to control D.V. which has prevented him from regularly attending school on “numerous occasions.”

Petitioners offer the following two examples in support of these contentions:

- November 1, 2023; J.V. asserts in her certification that D.V. had a meltdown because he did not want to leave the bathroom where there is a "Koala Kare" logo that he is "obsessed with." Upon being removed from the bathroom D.V. was in the hallway where he had a "meltdown." It is alleged that D.V. tore another student's artwork off the wall and "destroyed" it, he also "threw" himself on the floor and began to flail "his arms around for everyone to get away from him."

- November 3, 2023; J.V. asserts that D.V. experienced a "meltdown" and he refused to let the school nurse feed him through his G-tube. This resulted in J.V. being called to the school. There was a second meltdown that again necessitated J.V. being called to the school a second time. While J.V. was at the school she witnessed D.V. attempt to elope from the nurse's office. D.V. also attempted to elope from the school auditorium until she intervened.

Petitioners argue that these incidents support the conclusion that it "is no longer safe for D.V. to go to school at Woodcrest as" the assigned RBT is unable to "maintain control, correct or rectify" D.V.'s behavior and the assigned nurse is "unable to ensure that D.V. "is able to eat during school."

The petitioners also assert that the Board has "refused to provide" their expert Dr. Breslin with "necessary and important information and/or documentation" which are integral for the completion of her report. Finally, the petitioners assert that the Board has refused to release D.V.'s educational records to potential out-of-district placements. Petitioners are seeking the release of these records as additional relief.

According to Trina Ragsdale (Ragsdale), the Board's Supervisor of Special Services, D.V.'s current IEP offers D.V. a free and appropriate public education (FAPE) in the least restrictive environment. Further, D.V. has made meaningful progress under

this program and with his one-on-one nurse and assigned RBT he is safe. Ragsdale noted that at the beginning of the school year it was delayed in implementing the IEP because D.V.'s parents did not accept the one-on-one nurse offered by the nursing agency. During this time the Board offered home instruction to D.V. in lieu of in-person instruction. Once an acceptable nursing candidate was found, D.V. began in-person instruction at Woodcrest.

The Board points out that J.V. was not present at Woodcrest on November 1, 2023, and therefore does not have firsthand knowledge as to what occurred. The Board disputes J.V.'s version of events but acknowledges that D.V. exhibits "challenging behaviors." However, according to Ragsdale, D.V.'s behavior is "managed appropriately using Applied Behavioral Analysis (ABA), as set forth in his current IEP, and thus he is easily redirected." The Board acknowledged that on November 3, 2023, there was communication from D.V.'s one on one nurse to J.V. regarding an issue about feeding D.V. However, the Board rejects the characterization that D.V. had meltdowns or attempted to elope on this date. Ragsdale opined that the staff can adequately address D.V.'s behavioral issues as they arise. It was also Ragsdale's professional opinion that the current IEP is appropriate and puts supports in place that ensure D.V. will be safe and receive an appropriate education.

The Board denies not providing Dr. Breslin with the necessary documents and notes that Dr. Breslin was permitted to observe D.V. while he is in school. The Board admits that it refused Dr. Breslin's request to conduct one-on-one interviews with staff members.

ARGUMENTS

The petitioners seek home instruction for D.V. pending the Final Decision in the underlying due process matter, arguing that D.V. is not safe while he is attending Woodcrest. The petitioners maintain that their version of the events that occurred on November 1, 2023, and November 3, 2023, supports this conclusion. Further, the petitioners point out that home instruction was previously provided for approximately five months out of the last sixteen months, therefore, there is no hardship to the Board. Also, as part of the emergent application the petitioners seek to compel the Board to provide D.V.'s educational records to any out-of-district placement that requests the same. Lastly, the petitioners seek to compel the Board to provide Dr. Breslin with previously requested documents regarding D.V. and to permit Dr. Breslin to conduct staff interviews.

The Board disputes petitioners' unsubstantiated detail of the events of November 1, 2023, and November 3, 2023, and argues that they have failed to establish any of the criteria necessary for granting emergent relief. Further, the Board submits that the current IEP, which includes both an RBT and one-on-one nurse, provides D.V. with FAPE in the least restrictive and safe environment. The Board argues that it is willing to provide D.V.'s parents with a complete copy of his educational records that can be copied and provided to any out-of-district institution they wish. Lastly, the Board argues that it has provided Dr. Breslin with D.V.'s educational records and is willing to allow her to observe D.V. in his classroom setting. The Board refuses to set up one-on-one interviews of its staff members.

LEGAL ANALYSIS AND 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;

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.

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).

In seeking emergent relief, the movant has 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;

2. The legal right underlying petitioner's claim is settled;

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

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 petitioners 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).

The petitioners' strongest argument relates to the risk that D.V. may have an issue regarding feedings via his G-tube. It is also argued that the Board cannot maintain proper control over D.V. when he has "meltdowns" or tries to elope from the classroom or the school grounds. However, these arguments are speculative at this juncture of the proceedings. The petitioners have provided no medical or educational opinions in support of this consideration. While J.V.'s certification reveals the potential that safety issues could occur, petitioners have failed to show that D.V. will suffer irreparable harm if his placement is not immediately changed, especially considering that the Board is implementing the 2023–2024 IEP. The fact that D.V. has both a RBT and one-on-one nurse during his school day provides a credible argument that he is in safe hands while in attendance at Woodcrest.

Petitioners' additional requests to compel the Board to release D.V.'s educational records to out-of-district placements and to provide Dr. Breslin with previously requested documents regarding D.V. and to permit Dr. Breslin to conduct staff interviews do not rise to the level of irreparable harm and thus are not deemed as "emergent." These issues should be resolved by the OAL Judge assigned to hear the due process petition.

Accordingly, I **CONCLUDE** that petitioners have not met their burden of satisfying the irreparable harm standard for emergent relief.

The second consideration is whether the petitioners have shown that their claim for home instruction until a Final Decision is rendered in the due process matter to be well settled. Here, the petitioners maintain that D.V. is not currently receiving the free, and appropriate public education he is entitled to because the Board is unable to provide D.V. with a competent one-on-one nurse. The incidents of November 1, 2023, and November 3, 2023, are offered as proof as to this claim.

The Board disputes the petitioners' characterization of the events of November 1, 2023, and November 3, 2023. The Board maintains that the current IEP provides D.V. safety while he is at Woodcrest and further that D.V. is showing meaningful progress.

In general, the doctrine of "stay-put" applies while the due process claim is pending. In practice, "stay-put" is often invoked in a particular context. In the typical case, a school district will propose a change to a child's educational program. If the parents disagree with the proposed change, they can file a due process petition. In this instance, "stay-put" entitles the child to remain in their "then-current educational placement" while the due process hearing is pending. 20 U.S.C. 1415(j). The child's "then-current educational placement" is the IEP that is "actually functioning" at the time the parents invoked "stay-put." Drinker v. Colonial Sch. Dist., 78 F.3d 859, 867 (3d Cir. 1996) (internal citations omitted). Thus, "stay-put" maintains the status quo and effectively blocks "school districts from effecting unilateral change in a child's educational program." Susquenita Sch. Dist. v. R.S., 96 F.3d 78, 83 (3d Cir. 1996).

Accordingly, I **CONCLUDE** that petitioners' claim for "home instruction" is not well settled.

The third consideration is whether petitioners have a likelihood of prevailing on the merits.

The petitioners argue that D.V. should be allowed home instruction until a Final Decision is rendered in the underlying due process petition. The Board argues that the current IEP provides FAPE to D.V.

It is well settled that in order to meet its obligation to confer FAPE upon a student the Board must offer an IEP that is "reasonably calculated" to enable the child to make meaningful progress. Here the respondent argued that FAPE is being provided to D.V. in the least restrictive environment. More importantly Ragsdale asserted in her certification that "meaningful progress" by D.V. is being made.

No evidence beyond the alleged events of November 1, 2023, and November 3, 2023, has been offered by petitioners. These events (which are disputed) do not establish the likelihood of success by petitioners. Petitioners may establish during the due process hearing that Ragsdale's conclusion that D.V. has achieved "meaningful success" is wrong. However, at this stage of the proceedings there is no such proof that the IEP is not providing FAPE. Accordingly, I **CONCLUDE** that petitioners' claim for "home instruction" is not likely to prevail on the merits.

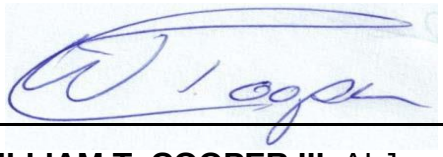
Regarding balancing of the equities, the petitioners argue that D.V. will suffer irreparable harm if the request for relief is not granted. Respondent argues that if relief is granted it would undermine the IEP developed by the Board. I **CONCLUDE** that the equities weigh in favor of the petitioners.

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

ORDER

It is **ORDERED** that petitioners' 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.



November 20, 2023
DATE

WILLIAM T. COOPER III, ALJ

Date Received at Agency

Date Mailed to Parties:

WTC/am