

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING

EMERGENT RELIEF

OAL DKT. NO. EDS 08632-16

AGENCY DKT.NO. 2016-24583

E.T. AND R.T., ON BEHALF OF MINOR CHILD E.T.,

Petitioners,

v.

RIDGEWOOD VILLAGE BOARD OF EDUCATION,

Respondent.

Lisa K. Eastwood, Esq. for Petitioners (Eastwood, Scandariato & Steinberg, attorneys)

David B. Rubin, Esq., for Respondent (David B. Rubin, P.C., attorneys)

Record Closed: June 15, 2016

Decided: June 16, 2016

BEFORE **LELAND S. McGEE**, ALJ:

Petitioners brings this emergency relief-only action seeking an order compelling Respondent to immediately place E.T. in the Educational Partnership for Instructing Children (EPIC) program for a 2016 Extended School Year (ESY), and for the 2016-2017 school year. Petitioner also seeks compensatory services, 40 hours per week Applied Behavioral Analysis (ABA) for 12 months per year, transportation, parent training, home program and related services. On June 10, 2016, the Office of Special Education Programs transmitted the matter to the Office of Administrative Law (OAL).

On June 15, 2016, a hearing on the request for Emergent Relief was held.

STATEMENT OF FACTS

Petitioners moved to the Village of Ridgewood in April 2014. On or about April 10, 2014, Petitioners sought an appropriate placement for their son E.T. from Respondent, Ridgewood Village Public School District (RPS). E.T. was diagnosed with Autism Spectrum Disorder at age 2. In July 2016, E.T. will be 7 years old.

During the summer of 2014, E.T. was enrolled in Alpine Outreach (Alpine) pursuant to the current Individual Education Plan (IEP). The parents provide for additional services for E.T. beyond that of Alpine. The parties agreed that Alpine was a temporary placement until his behavior stabilized to the point where the parties could explore an appropriate school setting. By January 2016, E.T.'s behavior had sufficiently improved to warrant a search for a school placement. The staff at Alpine recommended that E.T. be placed at the EPIC School in Paramus.

In February 2016, RPS sent E.T.'s records to approximately ten potential programs including EPIC. EPIC is the only program that accepted E.T.'s application. RPS did not support placement at EPIC because of its concern as to whether EPIC provided the "related services" that the parties agreed were necessary.

In May 2016, RPS provided an additional list of prospective placement programs to Petitioners. Petitioner filed the within application for emergent relief seeking, inter alia, the immediate placement of E.T. at EPIC.

DISCUSSION

N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief. The regulation instructs in salient part:

A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards be met for granting such relief pursuant to Crowe v. Degioia, 90 N.J. 126 (1982):

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 the 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.

[N.J.A.C. 6A:3-1.6(b).]

Petitioner has the burden of establishing each of the above requirements in order to warrant relief in his favor.

Turning to the first criteria, it is well settled that relief should not be granted except "when necessary to prevent irreparable harm." Crowe, supra 90 N.J. at 132. In this regard, harm is generally considered irreparable if it cannot be adequately redressed by monetary damages. Id. at 132-33. In other words, it has been described as "substantial injury to a material degree coupled with the inadequacy of money damages." Judice's Sunshine Pontiac, Inc. v. General Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976) (citation omitted). See New Jersey Dep't of Environmental Protection v. Circle Carting, Inc., 2004 N.J. AGEN LEXIS 968 (April 2, 2004) (finding no irreparable harm in connection with the revocation of respondent's solid waste license in that financial loss is generally insufficient to demonstrate this requirement). The moving party bears the burden of proving irreparable harm. More than a risk of irreparable harm must be demonstrated. Continental Group, Inc. v. Amoco Chemicals Corp., 614 F. 2d 351, 359 (D.N.J. 1980). The requisite for injunctive relief is 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, be those rights protected by statute or by common law." Ibid. (citation omitted.)

In the instant matter, there has not been a showing of “immediate irreparable injury” or a “presently existing actual threat.” Petitioner did not submit any affidavits or other documents with the Petition in support of the claim that if the relief sought is not granted, E.T. will suffer immediate, irreparable harm. In fact the current placement was agreed to by both parties and there is every indication by both parties that E.T. has made progress through the services rendered by Alpine. Petitioner now asserts that if E.T. continues in this placement, he *will* suffer irreparable harm because it is a restrictive environment. This assertion *may* intuitively be accurate however it is mere speculation and there is no evidence as to how long it would take for irreparable harm to occur. In no event is this indicia of “irreparable harm.”

For the foregoing reasons, I **CONCLUDE** that Petitioner has not demonstrated that E.T. will suffer irreparable harm if the requested relief is not granted.

Petitioners have failed to demonstrate that Petitioners have a likelihood of prevailing on the merits of the underlying claim. There is no dispute that another, less restrictive placement is warranted for E.T. At this juncture a determination must be made as to which program will be the most appropriate placement for E.T. No evidence was offered to conclude that EPIC is either appropriate or inappropriate for E.T. That is to be the subject of a hearing on the merits. As such, it is not clear that Petitioners have a likelihood of prevailing on the merits of the underlying claim. I must **CONCLUDE** that Petitioners have failed to demonstrate the likelihood of success on the merits of the case. For the same reason I **CONCLUDE** that Petitioners have failed to demonstrate that they will suffer greater harm than Respondent will suffer if the requested relief is not granted.

CONCLUSION

I **CONCLUDE** that Petitioners are not entitled to emergent relief because the proofs submitted fail to establish all of the necessary elements to grant emergency relief under N.J.A.C. 6A:3-1.6(b). Specifically, there has been no showing of irreparable harm by Petitioners, no showing of the likelihood of prevailing on the merits, and no showing

that Petitioners will suffer greater harm than Respondent will suffer if the requested relief is not granted.

Petitioner did not offer any support for compensatory services, 40 hours per week Applied Behavioral Analysis (ABA) for 12 months per year, transportation, parent training, home program and related services. Therefore, I **CONCLUDE** that Petitioners have not met their burden of proof that they are entitled to such relief in this emergent application.

ORDER

For the foregoing reasons, Petitioners' request for relief is **DENIED**.

This decision on application for emergency relief resolves all of the issues raised in the due process complaint; therefore, no further proceedings in this matter are necessary. This decision on application for emergency relief is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C.A. § 1415(i)(2). 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.

June 16, 2016
DATE

LELAND S. McGEE, ALJ

Date Received at Agency

June 16, 2016

Date Mailed to Parties:

June 16, 2016

lr