State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

EMERGENT RELIEF

OAL DKT. NO. EDS 09361-18

AGENCY DKT. NO. 2018/28372

J. C. ON BEHALF OF E.C.,

Petitioner,

v.

LIVINGSTON TOWNSHIP BOARD OF EDUCATION,

Respondent.

_____

Richard P. Flaum, Esq. for petitioner (DiFrancesco, Bateman, Coley, Yospin & Kunzman, attorneys)

Isabel Machado, Esq., for respondent (Machado Law Group, attorneys)

Record Closed: July 10, 2018 Decided: July 18, 2018

BEFORE **JULIO C. MOREJON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, J.C. on behalf of E.C., seeks an order by way of emergent relief to have the respondent, Livingston Township Board of Education, (District) provide E.C. 1:1 Orton Gilllingham services for the entire Extended School Year (ESY) program from June 25, 2018 through July 31, 2018, as contained in the IEP, and in addition, that the District provide and pay for the same from August 1 through August 30, 2018.

On June 27, 2018, J.C. filed a petition with the Office of Special Education Policy and Procedure (OSEPP), seeking emergent relief and due process hearing, pursuant to N.J.A.C. 6A-12.1 and N.J.A.C. 6A:14-2.7(r). The matter was transferred to the Office of Administrative Law (OAL) and received at the OAL on June 28, 2018, as an emergent and contested matter, and request for a due process hearing was retained by OSEPP. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

Oral argument was heard on the motion on July 10, 2018.

FACTUAL SUMMARY

The facts in this matter are not dispute. E.C. is a twelve-year old six-grade student who has been classified as eligible for special education and related services under the classification of Specific Learning Disability (SLD). The basis for the classification is a severe discrepancy between E.C.'s cognitive ability and her achievement in the areas of oral expression, listening comprehension, phoneme/grapheme knowledge, and math problem solving. On or about October 2, 2018, E.C. was referred to the District's Child Study Team (CST) in accordance with N.J.A.C. 6A:14. [1]

On December 5, 2017, the CST recommended that E.C. undergo the following evaluations: speech and language evaluation and a neurological evaluation. However, petitioner rejected consent to the same, indicating that they preferred for E.C. to undergo a speech and language evaluation and a neurological evaluation. An initial eligibility meeting was scheduled for January 24, 2018, which was canceled by petitioner. The initial eligibility was then rescheduled for March 5, 2018, at which time E.C. was found eligible for special education and related services under the classification of SLD.

[1] Although the underlying matter concerns the petitioner's challenge of a proposed IEP dated of June 2018, counsel for J.C. informed the undersigned that E.C. had received reading assistance from an Orton Gilllingham tutor in an earlier grade. A review of the proposed IEP provides information from J.C. that at the conclusion of kindergarten, E.C. was evaluated for speech serviced and was found eligible. A speech only IEP was developed and E.C. received speech therapy through the third grade. E.C. began working with a reading specialist in first grade and the service continue through fifth grade. J.C. reported to the District that E.C. received tutoring in reading from an Orton Gilllingham trained person and the parent reported improvement by E.C. (no time frame was provided in the IEP for said Orton Gilllingham tutor).

Following the March 5, 2018, initial eligibility meeting, the District presented J.C. with an IEP, which J.C. declined to sign as she was waiting for a Neuropsychological Evaluation Report from Dr. Lale Bilginer. As a result of petitioner's decision, the CST proposed providing E. C. with in-class support for reading and language arts; science, and social studies, placing E.C. in a pull-out resource replacement program for math. The proposed IEP called for E.C. to receive individual counseling twice monthly. The CST proposed and the proposed IEP did provide for E.C. to participate in the District's ESY program, which provided for placement in a pull-out resource replacement program for reading, writing and mathematics.

Following the March 5, 2018, initial eligibility meeting, there were several correspondences from the District or the District's counsel requesting a copy of Dr. Bilginer's report. On April 29, 2018, J.C. provided the District with a copy of Dr. Bilginer's report of February 9, 2018, Neuropsychological Evaluation. An IEP meeting was scheduled and held on June 18, 2018, at which time J.C. provided the CST with a copy of an Educational Evaluation report dated March 17, 2018, completed by Kathleen Carne.

The CST did not evaluate Ms. Carne's report as it was submitted the day of the IEP meeting. As for Dr. Bilginer's report, the CST notified J.C. of its concerns with the report and that the CST would not accept Dr. Bilginer's report as a result of the same.[2] J.C., along with her counsel, left the June 18, 2018 IEP without signing the proposed IEP. Thereafter, by correspondence dated June 20, 2018, counsel for J.C. informed the District that although she was not in agreement with the IEP as it did not provide E.C. with FAPE, J.C. signed the IEP, and file a due process petition and the within application for emergent relief.

It was represented during oral argument that petitioner has retained E.C. at home and she has not participated in the ESY program provided in the IEP. Petitioner did not submit proof that E.C. was receiving any home instruction during the summer months.

[2] The District's specific reasons for rejecting Dr. Bilginer's report are contained in the Report and Assessment Review prepared by the school psychologist on June 18, 2018 (District's brief, Exhibit H).

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, 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", if the District does not provide E.C. with 1:1 Orton Gilllingham services during the ESY program period of June 25, 2018 through August 30, 2018. Petitioner's Affidavit refers to the reports of Dr. Bilginer and Ms. Carne in arguing that the program offered by the District in the IEP is not appropriate for E.C. and that the IEP does not include, "appropriate services for her reading/language based disabilities including Dyslexia, ADHD and executive functioning difficulties a/k/a Dysgraphia. The program [IEP] specifically lacks 1:1 instruction and programming inclusion of an Orton Gilllingham based approach both for the future and related to the District's failure to provide appropriate services in the past resulting in E.C. being 4 grades behind in reading. The ESY program also ignores recommendations of Dr. Bilginer and Ms. Caren and does not provide for any 1:1 Orton Gilllingham instruction for the entire ESY timeframe." [emphasis supplied].

It was confirmed during oral argument that J.C. was seeking the requested emergent relief for the ESY program June 25, 2018 through August 30, 2018, and that once the school year commenced in September, petitioner would revisit the issue in the course of the due process petition filed in this matter. Petitioner argues that if E.C. is not provided with 1:1 Orton Gilllingham instruction for the ESY time frame and through August 30, 2018, her reading abilities will be further set-back. While it may be true that delay in implementing a reading program that will address E.C.'s specific needs may delay improvements, petitioner has not demonstrated that said delay will cause "immediate irreparable injury".

The reports of Dr. Bilginer and Ms. Carne lack any mention that failure to implement the Orton-Gilllingham instruction during the June 25 through August 30, 2018, ESY program will result in irreparable harm. Moreover, the reports do not state that Orton-

Gilllingham instruction is the sole form of instruction that should be utilized, and the District has stipulated in oral argument that members of its CST have training in Orton-Gilllingham instruction.

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

Petitioner has failed to demonstrate that Petitioner has a likelihood of prevailing on the merits of the underlying claim. The issue raised in petitioner's application for emergent relief are at the core of the due process petition and thus do not further warrant the relief sought herein. At this juncture a determination must be made as to which program will be the most appropriate placement for E.C. No evidence was offered to conclude that Orton-Gilllingham is either the only appropriate instruction for E.C. That is to the subject of a hearing on the merits. As such, it is not clear that Petitioner has a likelihood of prevailing on the merits of the underlying claim. I must **CONCLUDE** that Petitioner has failed to demonstrate the likelihood of success on the merits of the case. For the same reason I **CONCLUDE** that Petitioner has failed to demonstrate that they will suffer greater harm than Respondent will suffer if the requested relief is not granted.

CONCLUSION

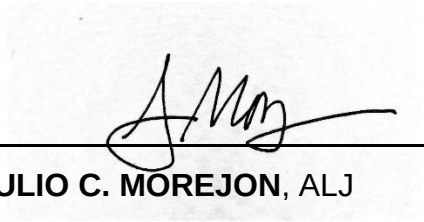
I **CONCLUDE** that Petitioner is not entitled to emergent relief because the proofs submitted fail to establish all of the necessary elements to grant emergency relief under N.J.A.C. 6A:3-1.6(b). Specifically, there has been no showing of irreparable harm by Petitioner, no showing of the likelihood 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. Therefore, I **CONCLUDE** that Petitioners have not met their burden of proof that they are entitled to such relief in this emergent application.

ORDER

It is hereby **ORDERED** that J.C.'s request for emergent relief to have the District provide E.C. 1:1 Orton Gilllingham services for the entire Extended School Year (ESY)

program from June 25, 2018 through July 31, 2018, and that District provide and pay for "those services" [ESY] from August 1-August 30, 2018 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.



July 12, 2018
DATE

JULIO C. MOREJON, ALJ

Date Received at Agency July 12, 2018

Date Mailed to Parties: July 12, 2018

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