



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

EMERGENT RELIEF

OAL DKT. NO. EDS 10849-19

AGY REF NO. 2020-30450

S.C. AND S.C. ON BEHALF OF L.C.,

Petitioner

v.

HANOVER TOWNSHIP BOARD OF EDUCATION,

Respondent

Antoinetta L. Milelli, Esq., for Petitioners

Nathanya G. Simon, Esq., for Respondent (Scarinci & Hollenbeck, attorneys)

Record Closed: August 13, 2019

Decided: August 13, 2019

BEFORE THOMAS R. BETANCOURT, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner filed a motion for Emergent Relief with the Office of Special Education Policy and Procedure (OSEP) in the New Jersey Department of Education (DOE). The contested matter was transferred to the Office of Administrative Law (OAL), pursuant to N.J.A.C. 1:6A-12.1, where it was filed on August 8, 2019, to be heard on an emergent basis.

Petitioners seek an order placing the student in a regular education classroom with supplementary aides and services in kindergarten.

The request for emergent relief was heard on August 13, 2019.

FACTUAL BACKGROUND

L.C. is six years of age and is scheduled to be in first grade for the 2019/2020 school year. L.C. was referred by the Early Intervention System for an evaluation by the District Child Study Team (CST). L.C. was determined to be eligible for special education and related services under the category Preschool Child with a Disability. L.C. began attending the full day, self-contained MD-1 program with speech and language (S/L) and occupational therapies (OT).

When L.C. was school aged he was reevaluated and found eligible for special education and related services under the classification Other Health Impaired. L.C. was placed in the MD-2 program for Kindergarten during the 2018/2019 school year. He continued to receive S/L and OT therapies.

A Therapy Progress Report dated May 14, 2019 was prepared for L.C. which showed progress.

The CST held an annual IEP review meeting on May 14, 2019 with Petitioners present. Petitioners questioned the placement of L.C. in the MD-2 program versus a general education setting. Petitioners did not provide written consent to the implementation of the proposed IEP within fifteen days. Nor did they file for due process during the fifteen day period. Accordingly, the present placement in the IEP is the stay put placement.

LEGAL ANALYSIS AND CONCLUSION

Initially, it must be determined if petitioners are entitled to request emergent relief.

A party may only request emergent relief for the following reasons, in accordance with N.J.A.C. 6A:14-2.7(r)1:

- i. Issues involving a break in the delivery of services;
- ii. Issues involving disciplinary action, including manifestation determinations and determinations of interim alternate education settings;
- iii. Issues concerning placement pending outcome of due process proceedings; and
- iv. Issues involving graduation or participation in graduation ceremonies.

Respondent, in their brief, take the position that Petitioners are not entitled to seek emergent relief in the instant matter. While their argument has merit, I think it more prudent to find that this is an issue as to placement pending the outcome of a due process petition and proceed to the required analysis under Crowe v. DeGioia, 90 N.J. 126.

The New Jersey Supreme Court has set forth a four-prong test for determining whether an applicant is entitled to emergent relief. Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982) (enumerating the factors later codified at N.J.A.C. 6A:14.2-7(s)1).

The four factors (“the Factors”), include:

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 moving party bears the burden of proving each of the Crowe elements “clearly and convincingly.” Waste Mgmt of N.J. v. Union County Util. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

A review of the four factors is usually in order. Two elements that Petitioners have not satisfied are irreparable harm and likelihood of success.

Petitioners maintain that J.C. will suffer irreparable harm should he remain in the current placement, the MD-2 program for first grade. Rather, Petitioners assert that J.C. should repeat kindergarten, but in a general education setting with special education supports. However, what the irreparable harm may be is only conjecture on the part of Petitioners. There is no clear demonstration that there is, or will be, any irreparable harm.

It is certainly not clear that petitioners are likely to prevail on the merits of the underlying claim in the due process petition, as required in factor three. Petitioners are requesting that J.C. repeat kindergarten in a general education setting with appropriate special education supports and an aide. The appropriateness of such a placement can only be determined by a full hearing, with expert testimony regarding the same.

“A third rule is that a preliminary injunction should not issue where all material facts are controverted. Thus, to prevail on an application for temporary relief, a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits.” Crowe at 134. (citations omitted)

As the burden is upon petitioners to prove each element of Crowe, and I have concluded that petitioners are unable to satisfy factors one and three, no further analysis need be done.

I **CONCLUDE** that petitioner’s request for emergent relief be **DENIED**.

ORDER

It is hereby **ORDERED** that petitioner’s request 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.



August 13, 2019

DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

APPENDIX

List of Moving Papers

For Petitioner:

Request for Emergent Relief

Request for Mediation Only (attached to emergent relief application)

C.V. Holly Ledis Blumenstyk

Holly Ledis Blumenstyk report dated August 9, 2019

For Respondent:

Brief in opposition to Request for Emergent Relief with Exhibits A through J