State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION DENYING EMERGENT RELIEF

OAL DKT. NO. EDS 9070-19

AGENCY REF. NO. 2020-30307

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

Petitioner,

v.

WILLINGBORO TOWNSHIP BOARD OF EDUCATION,

Respondent.

L.A., petitioner, pro se

Patrick Madden, Esq., for respondent (Madden and Madden, attorneys)

Record closed: July 11, 2019 Decided: July 12, 2019

BEFORE **JEFFREY N. RABIN**, ALJ:

STATEMENT OF THE CASE

Petitioner, L.A., on behalf of minor student, J.A., filed for emergent relief seeking an order placing J.A. in Burlington County Special Services School (BCSSSD) without a one-to-one nurse, and for respondent, the Willingboro Township Board of Education (Board or District) to provide an Individualized Education Program (IEP) reflecting J.A.'s developmental needs. The Board asserted that BCSSSD did not have an appropriate

program for J.A., that petitioner had agreed to cooperate in identifying an out-of-district placement, and that the Board had offered an IEP that comports with J.A.'s educational needs.

PROCEDURAL HISTORY

On April 22, 2019, petitioner filed a petition for due process with the Office of Special Education Policy and Procedure (OSEPP), Department of Education (DOE).[1] The underlying due process petition was transmitted to the Office of Administrative Law (OAL), where it was filed on May 23, 2019, to be heard as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14 F-1 to -13.

A telephone hearing on the underlying due process petition was held on June 10, 2019, at which time a discovery schedule was set between the parties, and a second telephone hearing was scheduled for August 6, 2019. By letter dated July 8, 2019, petitioner unilaterally requested an adjournment of the August 6, 2019, telephone hearing, stating that she needed more time to prepare for discovery, and that she did not have the financial ability to be prepared for a telephone hearing by that date. Petitioner's request for additional time was not granted, and she was advised that she would need to receive the consent of respondent in order to have the telephone hearing adjourned.

Before seeking respondent's consent to an adjournment of the August 6, 2019, telephone hearing in the underlying due process petition, petitioner filed the within petition for emergent relief with OSEPP/DOE, which was transmitted to the OAL and filed on July 8, 2019, to be heard as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14 F-1 to -13. By letter dated July 11, 2019, petitioner requested an adjournment of the August 6, 2019, telephone hearing in the underlying due process petition, stating that she needed more time to prepare for discovery, and that she did not have the financial ability to be prepared for a telephone hearing on August 6, 2019, and that respondent-counsel had agreed to the adjournment.

[1] Docketed as EDS 6986-19, herein referred to as the "underlying due process petition."

Petitioner provided no documentation, legal memorandum or briefs prior to the within emergent hearing. Respondent submitted a brief dated July 10, 2019. The emergent hearing in the within matter was held on July 11, 2019, and the record closed on that date.

FINDINGS OF FACT

Based on the testimony at the hearing and the brief submitted by respondent, I **FIND** the following to be the undisputed facts:

1. Respondent, L.A., was the mother of minor student, J.A., a fourteen-year-old student born on June 13, 2005. J.A. was a student eligible for special education under the classification of "Multiply Disabled."

2. J.A. attended BCSSSD from 2008 through 2017. J.A. did not have a one-to-one nurse at BCSSSD. Petitioner removed J.A. from BCSSSD in 2017 because of alleged problems with J.A.'s feeding tube which began in the 2015-2016 school year, as well as other alleged issues with J.A.'s feeding, personal hygiene, and medications.

3. J.A. attended the Kingsway Regional School District (Kingsway) during the 2017-2018 school year. J.A. had a one-to-one nurse at Kingsway. J.A.'s most recent IEP approved by L.A. was dated March 2, 2018. L.A. removed J.A. from Kingsway on August 8, 2018.

4. J.A. did not attend school during the 2018-2019 school year.

5. On or about February 4, 2019, the parties participated in mediation, resulting in L.A. consenting to the Board sending J.A.'s student records to four schools for purposes of potential enrollment. The Board sent J.A.'s records to four schools; Bancroft, YALE, and BCSSSD responded that they either did not have an appropriate program for J.A. or did not have openings available. Mercer County Special Services School District (MCSSSD) agreed to accept J.A.

6. An IEP meeting was conducted on April 12, 2019, resulting in a proposed IEP calling for J.A. to be enrolled at MCSSSD, with a one-to-one nurse; petitioner rejected the proposed IEP.

7. J.A. is not currently receiving any home nursing, although L.A. claimed she was entitled to sixteen hours per day of home nursing.

8. L.A. is an unemployed registered nurse. L.A. stated that she had received a letter from a Dr. Christina Ott stating that J.A. required a one-to-one nurse.

LEGAL ANALYSIS

Emergent Relief

N.J.A.C. 6A:14-2.7(r) allows either party to apply in writing for a temporary order of emergent relief as part of a request for a due process hearing or an expedited hearing for disciplinary action. The request shall be supported by an affidavit or notarized statement specifying the basis for the request for emergency relief. N.J.A.C. 6A:14-2.7(r)(1) lists the cases emergent relief is available for, which includes issues involving (i) a break in the delivery of services, (ii) disciplinary action, including manifestation determinations and determinations of interim alternate educational settings, and (iii) placement pending the outcome of due process proceedings.

Petitioner's Parental Request For Mediation/Due Process Hearing/Expedited Due Process Hearing (Request) sought to address a break in the educational services provided to student J.A. Petitioner claimed that J.A. had received no educational services for over one year, because petitioner did not want J.A. to attend MCSSSD, and because respondent required that J.A. have a one-to-one nurse with her at MCSSSD.

Accordingly, because of the break in educational services provided to J.A. I **FIND** that petitioner's Request met one of the threshold issues required for the granting of emergent relief.

For emergent relief to be granted, the petitioner must comply with the requirements of N.J.A.C. 6A:3-1.6.[2]

N.J.A.C. 6A:3-1.6 provides for emergent relief or stay as follows:

> (a) Where the subject matter of the controversy is a particular course of action by a district board of education or any other party subject to the jurisdiction of the Commissioner, the petitioner may include with the petition of appeal, a separate motion for emergent relief or a stay of that action pending the Commissioner's final decision in the contested case.
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> (b) A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):
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> 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.
>
> [See also N.J.A.C. 1:1-12.6.]

[2] As further required by N.J.A.C. 6A:14-2.7(s)(1.)(i through iv.).

For emergent relief to be granted, the petitioner must satisfy all four prongs of the Crowe test by clear and convincing evidence, a "particularly heavy" burden. Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 396 (App. Div. 2006) (quoting Punnett v. Carter, 621 F.2d 578, 582 (3d Cir. 1980)); see also Guaman v. Velez, 421 N.J. Super. 239, 247–48 (App. Div. 2011).

Petitioner failed to proffer any letter memorandum or brief addressing the standards set forth in Crowe, as required by N.J.A.C. 6A:3-1.6(b), or testimony addressing these standards. Petitioner offered no evidence that she or J.A. would suffer irreparable harm if emergency relief was not granted. Nothing had happened recently that had changed J.A.'s situation from the time the two parties met for mediation. In fact, on the morning of the emergent hearing, petitioner requested additional time to prepare her case, and therefore there was no emergency requiring immediate relief. At the emergent hearing, respondent offered to place J.A. at MCSSSD on a temporary basis pending the result of the underlying due process petition, so that J.A. might again begin to receive educational programming, but petitioner refused respondent's offer.

Of note is the fact that petitioner is not currently receiving any home nursing assistance, even though she believed that J.A. was entitled to sixteen hours per day of home nursing. Petitioner asserted that if she started receiving sixteen hours per day of home nursing, then the eight hours per day of one-to-one nursing at school would cause her to lose eight hours per day of home nursing. Because J.A. was not currently receiving any home nursing, this argument was moot. The Board's offer would have at least provided J.A. with eight hours per day of one-to-one nursing at school. Further, there was no irreparable medical harm, because petitioner herself was a registered nurse, currently unemployed, who had provided full-time healthcare to her daughter at home during the 2018-2019 school year. Although petitioner felt J.A. was being harmed because she was not receiving schooling or the accompanying socialization, it was petitioner's decision to keep J.A. out of school because she disagreed with the doctors who opined that J.A. required a one-to-one nurse at school. Petitioner's basis for keeping J.A. out of school

was also made moot because the doctor that she went to for an opinion, Dr. Christina Ott, opined by way of a "485 Form" that J.A. required one-to-one nursing.[3]

Regarding the remaining standards for emergent relief, petitioner had not addressed the legal rights underlying her claim. Petitioner did not formally address any problems with the IEP process, did not specify any problems she had with the most recent proposed IEP except for the nursing issue, and did not provide any documentation that the school she preferred for J.A., BCSSSD, would be capable of providing J.A. with the educational programming she required. Nothing had been offered by petitioner to contradict respondent's claim that their most recent proposed IEP would provide J.A. with the educational services she needed. Petitioner did not discuss respondent's legal responsibilities to provide a free and appropriate public education (FAPE) and/or whether respondent failed to comply with any such legal responsibilities. Petitioner did not assert any statute or regulation to support her position.

Petitioner offered no evidence of a likelihood of prevailing on the merits of the underlying due process petition. Petitioner had not responded to or promulgated any discovery, and several times at the emergent hearing stated that her preparation was incomplete and that she required more time in order to prepare for a hearing on the underlying due process petition. Accordingly, petitioner failed to meet this prong of the Crowe test. It was respondent who provided information indicating that it would be the Board with the greater likelihood of success at the underlying due process petition hearing. Both the Board's doctor and the doctor for petitioner found that J.A. required a one-to-one nurse. Respondent made the point that J.A. had been attending BCSSSD for ten years without a one-to-one nurse, yet petitioner was unhappy with the services provided at BCSSSD. Petitioner herself testified that she was not happy with BCSSSD, yet the relief sought by petitioner in both her underlying due process petition and this duplicative petition for emergent relief would be for J.A. to return to BCSSSD. Additionally,

[3] Petitioner asserted, without providing any evidence, that there was a conspiracy between the Board and the various doctors, to ensure that J.A. only went to a school where she would have a one-to-one nurse. Petitioner further asserted that a Dr. Del Rosario from DuPont Nemours Children's Hospital in Delaware had opined that no one-to-one nurse would be required; however, petitioner provided no evidence of such opinion, and refused a Board request to access the DuPont Nemours records.

BCSSSD sent a letter indicating that they did not have an appropriate program to provide for J.A.'s needs, and therefore the relief sought by petitioner was not available.

As neither party had completed discovery, and petitioner had failed to provide any legal memorandum or brief addressing the standards for emergent relief, it would be difficult to weigh the equities in this case. This is an unfortunate matter, pertaining to a student with several medical issues that required constant attention. Respondent's attempts at resolving this issue and returning J.A. to school encountered continued resistance from petitioner. Conversely, L.A. is a registered nurse with intimate knowledge of her daughter's medical needs. Whether L.A.'s medical knowledge is greater than that of the doctors who had previously opined regarding J.A. is a matter that must be parsed through as part of the underlying due process petition. Petitioner pointed out that J.A. was not receiving educational programming and was starting to suffer from lack of socialization, but felt that J.A.'s medical issues were the primary concern. The Board had also taken the issue of J.A.'s education and health very seriously and, unfortunately, its proposed resolution did not jibe with that sought by petitioner. There appeared to be no "winner" in this matter, and therefore a balancing of the equities did not favor one side or the other.

As petitioner had failed to address the standards set forth in Crowe for emergent relief, and because it was unlikely that petitioner would have met the standards set forth in Crowe, I **CONCLUDE** that petitioner failed to meet her burden of showing by clear and convincing evidence that emergent relief may be granted.

ORDER

The petitioner's motion for emergent relief is **DENIED**.

This decision on application for emergency relief shall remain in effect until issuance of the decision in the matter. The parties will be notified of the scheduled hearing dates. 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, 2019 _____

DATE **JEFFREY N. RABIN**, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

JNR/dw

APPENDIX

WITNESSES

For petitioner:

L.A., petitioner

For respondent:

None

EXHIBITS

For petitioner:

None

For respondent:

Brief, dated July 10, 2019