



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION DENYING
EMERGENT RELIEF

A.S. and H.S. on behalf of A.S.,

Petitioner,

v.

SOMERVILLE BORO BOARD

OF EDUCATION,

Respondent,

OAL DKT. NO. EDS 7841-19

AGENCY DKT. NO. 2019-30086

A.S. and H.S. on behalf of A.S., petitioners, pro se

Allison Kenny, Esquire, on behalf of respondent (Schenck, Price, Smith & King, LLP)

Record Closed: June 14, 2019

Decided: June 17, 2019

BEFORE **DEAN J. BUONO**, ALJ:

STATEMENT OF THE CASE

A.S. and H.S. (petitioners) on behalf of A.S., bring an action for emergent relief against Somerville Boro Board of Education (respondent/Board), seeking an order for emergent relief of a more appropriate Extended School Year (ESY) services for A.S. geared toward social interaction and age appropriate skills for at least four hours a day.

The respondent opposes the relief requested and asserts that the petitioner should be required to continue A.S.'s placement and program with free, appropriate public education (FAPE).

PROCEDURAL HISTORY

Petitioner filed a request for emergency relief and a due process hearing at the State Office of Special Education Programs (OSEP). On June 11, 2019, OSEP transmitted the matter to the Office of Administrative Law (OAL) as a contested case seeking emergent relief for the petitioner. The parties presented oral argument on the emergent relief application on June 14, 2019, at the OAL and the record closed.

FACTUAL DISCUSSION

In the request for emergent relief, petitioner, A.S. is A.S.'s parent and argues that A.S. is an eight-year-old child with a disability and a primary diagnosis of Autism. A.S. is eligible for special education and related services under the Individuals with Disabilities Education Act, 20 U.S.C. §§1400 et seq. ("IDEA") and protection under Section 504 of the Rehabilitation Act, 29 U.S.C. §794 ("§504"); the Americans with Disabilities Act, 42 U.S.C. §12101 et. seq. ("ADA"); New Jersey's Special Education Law, N.J.S.A. 18A:46-1 et seq.; and the New Jersey Law Against Discrimination, N.J.S.A. §10:5-1 et. seq. ("NJLAD").

A.S. is a general education student but he receives speech and OT multiple times per week and he is involved in social club on a weekly basis. Petitioners argue that the ES wipe program the school is offering has been drastically reduced to two hours a day four times per week. The entire program also is only for four weeks. In prior years, the program has been offered to A.S. and for at least four hours per day four days per week. Also, there was an option for transportation. In the past, speech and OT were also included in the program, yet, this year it is not. "We feel he benefits greatly from being in this type of setting and it is in [A.S.'s] best interest to receive more than the school is offering. We feel this can be resolved by placing him in a more appropriate program that is geared towards social interaction for at least 4 to 6 hours a day. We don't want him to

digress and not be ready for the upcoming school year. We had suggested an additional program after ESY because it was so short. A summer program that would focus on social and other age-appropriate skills. That request has been denied.”

Respondent argues that A.S. is in an age and academically appropriate ESY program and any other implementation would be inappropriate.

Both parents appeared for oral argument and it was obvious that they had nothing but good intentions for their son’s educational opportunities. They conceded that the District is providing an appropriate education to him but simply believes that additional education during ESY would be better to ensure that he doesn’t educationally and socially regress prior to rising to the third grade. I agree. However, the law does not.

LEGAL ANALYSIS AND CONCLUSION

N.J.A.C. 1:6A-12.1(a) provides that the affected parent(s), guardian, district or public agency may apply in writing for emergent relief. An emergent relief application is required to set forth the specific relief sought and the specific circumstances that the applicant contends justify the relief sought. Each application is required to be supported by an affidavit prepared by an affiant with personal knowledge of the facts contained therein and, if an expert’s opinion is included, the affidavit shall specify the expert’s qualifications.

Emergent relief shall only be requested for the following issues pursuant to N.J.A.C. 6A:14-2.7(r):

- 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 petitioners seek an order for increased programming for ESY. Despite my agreeing with the parents' substantive request for increased ESY, the law is not as accommodating and lenient. The standards for emergent relief are set forth in Crowe v. DeGoia, 90 N.J. 126 (1982), and codified at N.J.A.C. 6A:3-1.6, one of the Department's regulations governing special education. These standards for emergent relief include 1.) that the party seeking emergent relief will suffer irreparable harm if the requested relief is not granted; 2.) the existence of a settled legal right underlying the petitioner's claim; 3.) that the party seeking emergent relief has a likelihood of prevailing on the merits of the underlying claim; and 4.) a balancing of the equities and interests that the party seeking emergent relief will suffer greater harm than the respondent. The petitioners bear the burden of satisfying all four prongs of this test. Crowe, 90 N.J. at 132-34. Arguably, the standard is a high threshold to meet and I will address each prong separately.

Irreparable Harm

Here, there has been no showing whatsoever of irreparable harm to A.S. First, the petitioners argue irreparable harm is established because there is a tremendous risk of him digressing in his learning. To prevail under this prong, the harm must be substantial and immediate; risk of harm or a "feeling" alone is not sufficient. Continental Group v. Amoco Chemicals Corp., 614 F.2d 351 (D.N.J. 1980). There is no evidence presented that there is even a scintilla risk of harm. Again, the risk of harm alone is not sufficient. **I FIND** as fact that there is no risk of harm to A.S.

In light of the aforementioned, **I CONCLUDE** that the petitioners have not met their burden of establishing irreparable harm.

The Legal Right Is Settled

The petitioners have not demonstrated that the law favors them. There is nothing in the record except purported speculation that anything has or will happen to A.S.'s progress in learning. Remember, speculation is insufficient and that is all the petitioners

have here. Conversely, the law supports the Board's position for continued placement. A.S. needs to be educated. Period. When the parties are unable to agree to a placement, a proposed placement by the District is effective to provide free appropriate public education (FAPE) in the least restrictive environment (LRE). If it is ultimately determined that the proposed placement does not meet FAPE and LRE, petitioners are entitled to seek compensatory education. That is the purpose of a due process hearing.

Thus, **I CONCLUDE** petitioners have not met the second prong of the emergent relief standard in that a legal right underlying the claim is settled.

Likelihood of Prevailing on the Merits

Regarding whether the petitioners have a likelihood of prevailing on the merits of the underlying claim, there are no material facts in dispute that indicate petitioners' likelihood of success. In fact, the speculative assertions by petitioners are not at all persuasive. While petitioners believe the best opportunity for A.S. is in an expanded ESY program, this tribunal cannot conclude such result will benefit A.S. based on the petitioners' speculation. This tribunal will not compel the District without affording them the opportunity to contest that conclusion at a due process hearing.

Therefore, **I CONCLUDE** petitioners do not meet the third prong of the emergent relief standard.

The Petitioners Will Suffer Greater Harm Than the Respondent

The next prong of the above test to be addressed is whether the equities and interest of the parties weigh in favor of granting the requested relief. The petitioners argue that A.S. will suffer greater harm if emergent relief is not granted. This argument is without merit and speculative. Here, the petitioners seek an order to place the minor student in an expanded ESY program. However, no evidence regarding the proposed ESY instruction was presented by the petitioners. The petitioners failed to demonstrate any potential harm A.S. would suffer and the Board successfully presented evidence that it was and could provide A.S. with FAPE. It is the undersigned's belief that if the petitioners'

requested emergent relief is granted, A.S. would suffer harm through a disruption in education and socialization. Thus, **I CONCLUDE** that the A.S. would suffer greater harm if the requested relief was granted and therefore petitioners have failed to also meet the final prong of the analysis.

ORDER

Having concluded that the petitioners have not satisfied any of the four requirements for emergent relief, the petitioners' request for emergent relief is **DENIED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2018) 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. § 1415(i)(2); 34 C.F.R. § 300.516 (2018). 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.



June 17, 2019

DATE

DEAN J. BUONO, ALJ

Date Received at Agency

Date Mailed to Parties:

mph

APPENDIX

WITNESSES

For petitioner:

A.S.

For respondent:

None

EXHIBITS

For petitioner:

None

For respondent:

None