



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING

EMERGENT RELIEF

OAL DKT. NO. EDS 03829-21

AGENCY DKT. NO. 2021-32674

B.S. and A.S. ON BEHALF

OF A.S.,

Petitioners,

v.

LEBANON TOWNSHIP BOARD

OF EDUCATION,

Respondent.

John C. Vermitsky, Esq., for petitioners (Morrow Porter Vermitsky & Taylor,
PLLC, attorneys)

Rita F. Barone, Esq., for respondent (Flanagan Barone O'Brien, attorneys)

BEFORE DAVID M. FRITCH, ALJ:

STATEMENT OF THE CASE

The petitioners, B.S. and A.S., filed a due process petition in April 2021 seeking, among other remedies, the establishment and funding of a “compensatory education fund” to be directed by the petitioners and funded by the respondent to provide educational opportunities for their son, A.S., as well as “to compensate his parents for their expended and opportunity costs including, inter alia, transportation, educational,

occupational therapy, speech therapy, behavioral therapy, and private instruction costs, parents' employment losses, and reimbursement for personal time Parents have spent providing [A.S.] education.” (Pet. Due Process filing at 2.) The petitioners filed the present petition for emergent relief in August 2021, seeking in-home instruction, therapy services, and other relief for their minor child A.S. from the respondent, the Lebanon Township Board of Education (BOE) during the pendency of their underlying due process petition. Due to the multiple medical conditions A.S. has been diagnosed with, the petitioners assert that the provision of these in-home educational services requires the respondent to also provide paraprofessional care to A.S. to supplement his in-home learning and therapeutic environment. Although the respondent has offered to provide the requested in-home education and therapy services as well as the services of a registered nurse to serve as a paraprofessional to assist A.S. in the in-home learning environment and therapy, the petitioners contend that “the only person capable of providing the medically necessary paraprofessional services for an effective administration of FAPE [(Free Appropriate Public Education)] is the minor child’s mother, A.S.” (Mother). (Pet. Br. at 2.) Unless the petitioners contend, the respondent is required to retain Mother “to provide paraprofessional services during all of the therapeutic and academic hours required by the minor child,” and compensate her at “the service rate of \$50 per hour” for these services, A.S. will be left without a means of receiving “education other than by forced unpaid paraprofessional labor by the minor child’s mother.” (Pet. Br. at 2.) The petitioners are seeking an order requiring the respondent to provide in-home therapeutic and educational services and to require the respondent to retain and pay Mother to provide these paraprofessional services to her son at a rate of \$50 per hour pending the determination of the underlying due process matter.¹ (Id. at 3.)

¹ The petitioner’s motion also sought an order for the respondent to retain a specific instructor to provide home instruction to the child, as well as provide occupational, speech, and cognitive behavioral therapy to the child, however, the respondent has already offered to provide the instruction and therapy sought by the petitioner leaving the sole remaining issue on emergent relief the provision of paraprofessional services. (See Resp. Br. at 7 (noting “[t]he IEP has been agreed upon other than the demand to pay the mother for her presence”).)

PROCEDURAL HISTORY

On April 8, 2021, the New Jersey Department of Education Office of Special Education Policy and Dispute Resolution (OSEP) received the petitioners' request for a due process hearing. The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on April 26, 2021. N.J.S.A. 52:14F-5(e), (f), and (g) and N.J.A.C. 1:6A-1 through 18.5. A mediation session on the due process petition was held on April 30, 2021, and a settlement conference was held with the parties through the OAL on May 6, 2021. On August 12, 2021, the petitioners filed the present request for emergent relief pending the resolution of the underlying due process petition pursuant to N.J.A.C. 16A-12.1. Following a conference call with the parties on August 19, 2021, where a briefing schedule and hearing date were established, the respondent submitted a brief in opposition to the motion, which was received on August 24, 2021. Oral argument on the motion was held on August 26, 2021, and the record on the request for emergent relief was closed on that date.

FACTUAL DISCUSSION

A summary of the pertinent evidence presented is as follows, and I **FIND** the following **FACTS**:

1. A.S. is a ten-year-old boy with multiple diagnoses and a long history of complex medical needs and developmental difficulties. A.S.' current medical diagnoses include Epilepsy, Sensory Processing Disorder, Pediatric Acute-onset Neuropsychiatric Syndrome (PANS)², Dyspraxia,³ PDD-NOS,⁴ Generalized Anxiety

² "Pediatric Acute-onset Neuropsychiatric Syndrome (PANS) is a clinical diagnosis given to children who have a dramatic – sometimes overnight – onset of neuropsychiatric symptoms including obsessions/compulsions or food restriction. They are often diagnosed with obsessive-compulsive disorder (OCD) or an eating disorder, but the sudden onset of symptoms separates PANS from these other disorders." Stanford Medicine, PANS: Pediatric Acute-onset Neuropsychiatric Syndrome, available at <https://med.stanford.edu/pans.html> (last visited August 26, 2021).

³ Dyspraxia is a "disorder that is characterized by difficulty in muscle control, which causes problems with movement and coordination, language and speech, and can affect learning." Learning Disabilities of America, Dyspraxia, available at <https://ldaamerica.org/disabilities/dyspraxia/> (last visited August 26, 2021).

Disorder, OCD,⁵ Disorders in Auditory and Visual Processing, and multiple learning disorders. (See Due Process Complaint at 1.)

2. Since August 2018 through January 2021, A.S. was a student on home instruction status through Valley View Elementary School in Califon, New Jersey. In January 2021, A.S.' parents withdrew him from school to be home schooled by his mother. (See Resp. Br. at Ex. A.)

3. The child's last IEP with the District was from 2018. The District proposed an IEP for A.S. in December 2020, however, that IEP was challenged by A.S.' parents when they withdrew A.S. from the District in January 2021.

4. As a result of his challenges, it is undisputed that A.S. requires education in a home-based learning environment with dedicated special education instruction, and therapy services. The respondent has offered to provide these required education and therapeutic services to A.S. in a home-based environment.⁶ (See Resp. Br. at 1 (noting "the services necessary for A.S. to receive an appropriate and thorough education have been agreed to, with one important exception.")) The respondent is currently providing in-home occupational therapy and speech therapy services to the petitioners.

5. In addition to the home-based education and therapy services, A.S. requires paraprofessional care during his therapeutic and academic sessions to watch him for seizure symptoms and administer medications as necessary, ease his anxiety, and to provide assistance in the provisioning of therapeutic and educational services.

⁴ "PDD-NOS stands for Pervasive Developmental Disorder-Not Otherwise Specified. PDD-NOS was one of several previously separate subtypes of autism that were folded into the single diagnosis of autism spectrum disorder (ASD) with the publication of the DSM-5 diagnostic manual in 2013." Autism Speaks, What is PDD-NOS?, available at <https://www.autismspeaks.org/pervasive-developmental-disorder-pdd-nos> (last visited August 26, 2021).

⁵ "Obsessive-Compulsive Disorder (OCD) is a common, chronic, and long-lasting disorder in which a person has uncontrollable, reoccurring thoughts (obsessions) and/or behaviors (compulsions) that he or she feels the urge to repeat over and over." National Institute of Mental Health, Obsessive-Compulsive Disorder, available at <https://www.nimh.nih.gov/health/topics/obsessive-compulsive-disorder-ocd> (last visited August 26, 2021).

⁶ The petitioners, in their pleading, outlined a number of therapeutic and educational requests—seeking a minimum of 12 hours of home instruction by a teacher of their selection, 2 hours of occupational therapy per week, 30 minutes of speech therapy per week, and 45 minutes of cognitive behavioral therapy per week. (Pet. Br. at 3.) During the hearing on this motion, the respondent confirmed that they agreed to provide each of these requested services to the child during the pendency of the underlying due process motion.

(See Resp. Br. at 2 (nothing that, due to his seizure disorder, A.S. is “unable to use a computer screen or a white board”); Pet. Br. at 1-2.)

6. The respondent has offered to provide a registered nurse (RN) to provide paraprofessional services to A.S. during his educational and therapeutic sessions. (Id. at 2.) Because the petitioners have not accepted the services of an RN, the respondent has not identified a specific individual to provide these services.

7. The petitioners contend that “the only person capable of providing the medically necessary paraprofessional services for effective administration of FAPE” is his mother, A.S. (Id. at 3.)

8. Mother does not have formal training or certification in special education or formal medical training and certification beyond a master’s degree in psychology, “some medical school,” and prior experience as an emergency medical technician (EMT). Mother also works as a registered doula.⁷

9. Unless the respondent agrees to retain the services of Mother to provide these paraprofessional services to her son and pays Mother “her service rate of \$50 per hour,” the petitioners contend that Mother would be required to provide “forced unpaid paraprofessional labor” once the school year begins in two weeks. (Pet. Br. at 2.)

LEGAL DISCUSSION

N.J.A.C. 1:6A-12.1 provides that the affected parent(s), guardian, board or public agency may apply in writing for emergent relief. An emergency relief application is required to set forth the specific relief sought and the specific circumstances the applicant contends justify the relief sought. N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief:

A motion for stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the

⁷ “A doula is a professional labor assistant who provides physical and emotional support to you and your partner during pregnancy, childbirth and the postpartum period.” MayoClinic.org, What are the benefits of having a doula?, available at <https://www.mayoclinic.org/healthy-lifestyle/labor-and-delivery/expert-answers/doula/faq-20057910> (last visited August 26, 2021).

following standards to be met for granting such relief pursuant to Crowe v. De Gioia, 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.

The petitioners have the burden of establishing all of the above requirements in order to warrant relief in their favor. D.I. and S.I. on behalf of T.I. v. Monroe Township Board of Education, 2017 N.J.Agen LEXIS 814, 7 (OAL Docket No. EDS 10816-17, October 25, 2017). While the petitioners have failed to address the above standards specifically in their submission, it shall be reviewed and decided based upon the Crowe standard. The moving party bears the burden of proving each of the Crowe elements "clearly and convincingly." Waste Mgmt. of N.J. v. Union Cnty. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

Beginning with the first requirement, it is well-settled that relief should not be granted except "when necessary to prevent irreparable harm." Crowe, 90 N.J. at 132-33. 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 v. General Motors Corp., 418 F.Supp. 1212, 1218 (D.N.J. 1976) (citation omitted).

The moving party bears the burden of proving irreparable harm. More than a risk of irreparable harm must be demonstrated. Continental Group v. Amoco Chemicals Corp., 614 F.2d 351, 359 (D.N.J. 1980). The requisite for injunctive relief requires "a 'clear showing of immediate irreparable injury,' or a 'presently existing actual threat; (an injunction) may not be used simply to eliminate the possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by common law.'"

Id. (citations omitted). The petitioner's brief requested a number of educational and therapeutic services to be provided to A.S. on an in-home basis. (See Pet. Br. at 3 (seeking an order for respondent to provide in-home education, occupational therapy, speech therapy, and cognitive behavioral therapy).) Although the respondent has agreed to continue providing these services and, with respect to the occupational therapy and speech therapy are already providing these services, the petitioners nonetheless seek an order requiring them to continue doing so in the event that the respondent ceases to continue providing these services at some time in the future. I **CONCLUDE**, however, that the speculative nature of the potential harm of the respondent determining to stop providing these services to A.S. at some point in the future is a purely speculative potential harm which is not appropriately addressed by an emergent relief petition as such potential harm does not qualify as irreparable harm under the applicable emergent relief standards. Continental Group, 614 F.2d at 359.

The remaining relief sought is the provision of a paraprofessional to assist the child during his therapeutic and academic services. (Pet. Br. at 3.) While the need for this service is undisputed and the respondent has also agreed to provide this service through the use of a registered nurse, the petitioners seek this service to be provided by Mother and for her to be compensated by the respondent for this service a service rate of \$50 per hour. (Id.) The appointment of Mother to serve as the designated paraprofessional has not been agreed to by the respondent. The petitioners, however, clearly indicated that Mother would continue to provide paraprofessional services to her child regardless of whether or not she was formally appointed to do so by the respondent or whether they provided a registered nurse to perform that role. Although, at the hearing, the petitioners indicated that they would be willing to forego the issue of financial compensation for Mother until the determination of the underlying due process hearing, the sole remaining issue in this motion is the question of whether or not Mother should be receiving hourly compensation for her services.

The risk of harm in this sole remaining issue in this motion is one that is expressed in purely monetary terms which is insufficient to meet the irreparable harm requirement under the provisions of De Gioia. Should the respondent not comply with the petitioners' demands, namely that the respondent retain and financially compensate

Mother for providing supervision for her child's instruction and therapeutic sessions during the pendency of the underlying due process petition, it is asserted that Mother would still provide the required services but would be required to do so through "forced unpaid paraprofessional labor" to ensure her son's education during this period. (Pet. Br. at 2.) The precise measure of harm alleged in this emergent action was pled by the petitioners in their briefing as a financial loss of \$50 per hour as the lost compensation payable to Mother at the "service rate" for her services should the relief sought not be granted and Mother not be financially compensated for her time participating in the therapy and educational services being provided by the respondent to her son.⁸ (Pet. Br. at 4.)

The irreparable harm requirement cannot be satisfied where monetary relief is capable of adequately addressing the alleged harm. Crowe, 90 N.J. at 132-33. The loss of potential compensation to Mother for providing paraprofessional services to assist in her son's education and therapy is something that can clearly be compensated adequately by monetary damages awarded after a plenary hearing, making the harm pled in this matter not considered irreparable to justify the emergent relief sought. Id. at 133 (finding "reduction to poverty can be compensated adequately by monetary damages awarded after a distant plenary hearing" and not justification for emergent relief). Therefore, I **CONCLUDE** that the petitioners have failed to meet their burden of establishing a clear showing that they will suffer immediate irreparable harm unless the requested relief is granted.

Because all four of the Crowe v. De Gioia standards as codified in N.J.A.C. 6A:3-1.6 must be met in order for emergent relief to be granted and, for the reasons set forth above, the petitioners have failed to meet the requirements of the first of the four required standards, I need not address the motion on the merits with respect to the remaining three requisite prongs. For the reasons detailed above, I **CONCLUDE** that

⁸ Similar financial damages were pled by the petitioners in their underlying due process petition, where they are seeking, in part, funding of a "compensatory education fund" which would, in part, "compensate his parents for their expended and opportunity costs" as well as "reimbursement for personal time Parents have spent providing the education that the school district would not." (Pet. Due Process Petition at 2.)

the petitioners have failed to meet the requirements set forth in N.J.A.C. 6A:3-1.6(b) warranting a stay or emergent relief in this matter.

ORDER

Accordingly, I **ORDER** that the petitioners' application for emergent relief be and hereby is **DENIED**.

This order 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 Policy and Dispute Resolution

August 26, 2021
DATE


DAVID M. FRITCH, ALJ

Date Received at Agency: August 26, 2021

Date Mailed to Parties: August 26, 2021

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