State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION DENYING EMERGENT RELIEF

M.N. and Y.W. on behalf of Z.N.,
Petitioners**,**
v.
CHERRY HILL TOWNSHIP BOARD OF EDUCATION,
Respondent,

OAL DKT. NO. EDS 05674-21
AGENCY DKT. NO. 2022-33113

M.N. and Y.W. on behalf of Z.N., petitioners, pro se

Robin Ballard, Esquire, on behalf of respondent (Schenck, Price, Smith & King, LLP, attorneys)

Record Closed: July 16, 2021 Decided: July 19, 2021

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

STATEMENT OF THE CASE

M.N. and Y.W. on behalf of Z.N. (petitioners) bring an action for emergent relief against Cherry Hill Board of Education (Board/District), seeking an order for emergent relief including a determination that the stay-put placement is a resource program. The respondent opposes the relief requested.

PROCEDURAL HISTORY

Petitioners filed a request for emergency relief and a due process hearing at the State Office of Special Education Programs (OSEP). On July 8, 2021, OSEP transmitted the matter to the Office of Administrative Law (OAL) as a contested case seeking emergent relief for the petitioners. The parties presented oral argument on the emergent relief application on July 16, 2021, via Zoom teleconferencing system due to COVID-19 restrictions.

FACTUAL DISCUSSION

Petitioners argue in the request for emergent relief that petitioner, Z.N. born May 28, 2016, attended Evesham Twp Schools for about a half year. The family is moving to Cherry Hill and Z.N. will be transferring to the Cherry Hill Public Schools after his summer program in town during the later summer or fall.

Z.N.'s initial IEP in Evesham placed him in the inclusion pre-kindergarten in Evesham in December 2020. Evesham conducted evaluations for "turning 5" and wrote an IEP draft for Z.N. (draft was provided on June16, 2021). Cherry Hill had an eligibility meeting on 6/17, 2021, and supplied petitioners with an IEP draft on June 21, 2021. Petitioners allege "several misjudgements and oversights" that Cherry Hill and Evesham have had, relating to Z.N.'s class placement.

Evesham wanted to place Z.N. in a "multi-disabilities classroom", while Cherry Hill wants Z.N. to receive education in the most restrictive environment and be placed in a self-contained classroom. Petitioners are advocating for Z.N. to be placed in an inclusion ICR classroom with a paraprofessional to assist in carrying out his IEP. They claim that Cherry Hill Public Schools was not listed "as a sample or example group for implementing proper training and executing LRE for children with disabilities." It is their opinion that "Cherry Hill is behind the 8-ball on this one and has a lot of catching up to do." "I believe that just because there are systemic issues, I am not going to allow my son to be in a classroom that clearly does not fit him." "An IEP is an education plan for individual students. While Z.N. will have to take part in state tests in a few years that test NJ-CCSS,

his 2 educational goals are created and carried for him alone. This is besides the fact that his disabilities might be more manageable by the time he needs to take high stakes tests." Petitioners' list, what they call "substantial and verifiable reasons" behind having Z.N. in LRE ICR inclusion classroom:

1. Last year and a half was interrupted by remote learning and not fully representative of a typical learning environment.

2. Despite that, he still made progress as noted.

3. He is only classified at Communication Impaired— and bring [sic] that he is an ELL, that's not even that surprising.

4. He has the support at home if he begins to struggle.

5. He is only 5.

6. His goals are kindergarten level.

7. LRE is the law. The parents (us)want to try it, and it is open to a trial period. . . .

8. Z.N.'s pediatrician, Dr. Melissa Chase, clearly wrote in her letter that Z.N. would benefit from a classroom with neurotypically developing peers.

9. Z.N.'s learning abilities and intelligence put him within the (low, but) average range compared to neurotypically developing peers.

10. As per NJ Law N.J.A.C. 6A:14, Special Education (p. 108), "A program for students with autism . . ."—meaning that an autism classroom is meant for children with autism. Z.N. does not have autism! Not appropriate!

Cherry Hill Public Schools told petitioners that they have the most support in an ASD classrooms, but they neglected the fact that peer-to-peer interaction, especially during play, would be the most important factor in Z.N.'s development. Sufficient support should be provided in an LRE setting.

Dr Megan Cox testified that she has a PhD. in Urban Education and a master's degree in Special Education. She testified that if not done correctly the wrong curriculum "could do irreparable harm" because he is already "slightly behind." Despite the fact that she has never evaluated Z.N. and never observed any classroom in the Cherry Hill School District, she is "concerned." M.N. testified that "we believe there may be harm done" and his "development could potentially be in danger."

Respondent argues that Z.N. was born on May 28, 2016, and is bilingual in Mandarin and English. Z.N. was initially classified as a preschool student with a disability by the New York City Public Schools and had an IEP since November 11, 2019. Currently, Z.N. is classified as eligible for special education and related services under the category of Communications Impaired.

His last IEP developed for Z.N. by the New York City Public Schools on November 6, 2020, placed him in a special class integrated setting. Z.N. was fully remote for his instruction at that time. Thereafter, the family moved to Evesham Township in New Jersey.

Z.N. began attending school in Evesham on December 1, 2020. On March 30, 2021, a behavior consultation was prepared for Z.N. by Evesham. The results of that consultation indicated that a behavior intervention plan was needed for him. Also, in May and June of 2021, Evesham had a reevaluation completed of Z.N. as he would be aging out of classification as a preschool student with a disability, consisting of occupational therapy, educational, psychological and speech/language assessments. All of the assessments were conducted by bilingual evaluators or with an interpreter present.

The occupational therapy evaluation indicated the presence of significant sensory processing challenges in Z.N. See Occupational Therapy Evaluation dated May 5, 2021 (Respondent Exhibit 1). The psychological evaluation revealed that Z.N. had very low Verbal Comprehension Index and Visual Spatial Index scores, with an average Fluid Reasoning Index and an overall IQ score in the low average range. Psychological Evaluation dated May 26, 2021 (Respondent Exhibit 2). The speech/language assessment revealed receptive and expressive delays in Chinese, which were even more significant when Z.N. was tested in English. See Speech/Language Evaluation dated June 4, 2021 (Respondent Exhibit 3).

Petitioners were invited to an eligibility/IEP meeting with Evesham on June 16, 2021. Invitation for Reevaluation Eligibility Determination with Annual Review dated June 8, 2021 (Respondent Exhibit 4). At that meeting, in reviewing the data from the

reevaluation, Evesham found Z.N. to meet criteria to be classified as eligible for special education and related services under the category of Communications Impaired. For the 2021-2022 school year, Evesham proposed for Z.N. to attend a special class placement with a personal aide for the entire school day with speech/language therapy, occupational therapy and behavior intervention consultation. The IEP included an extensive behavior intervention plan for behaviors of dropping, eloping, property destruction, crying, self-stimulatory behavior and dumping of objects. Evesham also determined that Z.N. required ESY programming to avoid undue regression. Evesham IEP dated 6/16/2021 (Respondent Exhibit 5). Petitioners acknowledged receipt of this IEP in their moving papers.

In June of 2021, Z.N. transferred to Cherry Hill. After reviewing the IEP prepared by Evesham for Z.N. on June 16, 2021, Cherry Hill held an IEP meeting for Z.N. on June 17, 2021. The IEP developed at that meeting offered Z.N. placement in a special class with a personal aide, speech/language therapy, occupational therapy, behavior intervention consultation, a behavior intervention plan and ESY programming. Cherry Hill IEP dated 6/17/2021 (Respondent Exhibit 6). The special class program proposed in the IEP dated June 17, 2021, offered Z.N. programming designed to address the behavioral and communication needs identified in the Evesham IEP.

Though Cherry Hill invited Z.N. to attend the ESY program, petitioners declined, reportedly opting instead for Z.N. to attend a camp. Petitioners requested mediation against Evesham and Cherry Hill on June 21, 2021, claiming that Z.N. needed to be placed in an inclusion in-class resource (ICR) classroom with a paraprofessional. At petitioners' request, the mediation request filed against Evesham was closed on June 29, 2021. E-mail correspondence from Office of Special Education Policy and Procedure dated 6/29/2021 (Respondent Exhibit 7).

The parents and Cherry Hill participated in mediation on July 1, 2021. When no agreement was reached, petitioners converted their mediation request into a Petition for Due Process. In another attempt to resolve the matter, the District conducted a resolution session with the parents on July 8, 2021. That also did not result in an agreement between the parties. That same day, petitioners filed the instant application for emergent relief

through which they ask that the District be ordered to place Z.N. in an inclusion ICR class with a paraprofessional and other supports while the due process petition seeking the same relief is pending. It is the Board's position that petitioners cannot meet any of the criteria necessary for the award of emergent relief and as such, this application should be denied, without relief and with prejudice. I agree.

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 that the stay-put placement is a resource program. 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 petitioner bears 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 Z.N. First, the petitioner argues irreparable harm is established because there is a tremendous risk of regressing in learning. To prevail under this prong, the harm must be substantial and immediate; the risk of harm to Z.N. is not sufficient. Continental Group v. Amoco Chemicals Corp., 614 F.2d 351 (D.N.J. 1980). Dr Megan Cox testified that if not done correctly the wrong curriculum "could do irreparable harm" because he is already "slightly behind." Despite the fact that she has never evaluated Z.N. and never observed any classroom in the Cherry Hill School District she is "concerned." M.N. testified that "we believe there may be harm done" and his "development could potentially be in danger." 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 actual proven risk of harm to Z.N.

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

The Legal Right Is Settled

The petitioners have not demonstrated that the law favors Z.N. There is nothing in the record except purported speculation that anything has or will happen to Z.N.'s progress in learning or that Cherry Hill will not provide the services. Be mindful that Z.N. has not even enrolled or attended any educational setting in Cherry Hill. Speculation is insufficient and that is all the petitioners have here. Conversely, the law supports the Board's position.

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 assertion by petitioners is not at all persuasive. While petitioners' unsupported belief that the best opportunity for Z.N. is a stay-put placement in a resource program, this tribunal cannot conclude such result will benefit Z.N. based on the petitioners' unsupported speculation. This tribunal will not compel the District without affording them the opportunity to contest that conclusion at a due process hearing. This argument is not appropriate for emergent need.

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

Z.N. 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 Z.N. will suffer greater harm if emergent relief is not granted. This argument is without merit and speculative. Here, petitioners failed to demonstrate any potential harm Z.N. would suffer. Thus, **I CONCLUDE** that the Z.N. 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 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 Policy and Dispute Resolution.

July 19, 2021 _____

DATE **DEAN J. BUONO**, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

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APPENDIX

EXHIBITS

For petitioner:

Affidavits

For respondent:

Affidavits