State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION ON
EMERGENT RELIEF

S.L. on behalf of G.L.,
Petitioner,
v.
CALDWELL—WEST CALDWELL BOARD OF EDUCATION,
Respondent.

OAL DKT. NO. EDS 06550-22
AGENCY DKT. NO. 2022-34543

S.L. on behalf of G.L. petitioner, pro se

Marc G. Mucciolo, Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: August 18, 2022 Decided: August 19, 2022

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

STATEMENT OF THE CASE

S.L. (petitioner) on behalf of G.L., brings an action for emergent relief against Caldwell—West Caldwell Board of Education (respondent/Board), seeking an order to permit G.L. to participate in football. The respondent opposes the relief requested due to a significant behavioral incident that occurred in June 2022 that required him to be placed on home instruction.

PROCEDURAL HISTORY

Petitioner filed a request for emergency relief and a due process hearing at the State Office of Special Education Programs (OSEP). On August 11, 2022, 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 August 18, 2022, at the OAL and the record closed. The Due Process hearing is not yet scheduled as petitioner requested an adjournment of the settlement conference.

FACTUAL DISCUSSION AND TESTIMONY

Petitioner

The following facts are not in dispute and as such **I FIND AS FACT** that in June 2022, G.L. was an eighth-grade student who attended the Grover Cleveland Middle School in Caldwell—West Caldwell Board of Education. He has a classification under the Individuals with Disabilities Act (IDEA) as "other health impaired" due to learning and behavioral weaknesses. He was diagnosed as autistic in June 2021.

An IEP meeting took place on April 29, 2022 where an Individualized Education Plan (IEP) was developed that called for the continued placement at Cleveland Middle School but did not call for a Behavioral Intervention Plan (BIP).

On June 3, 2022, G.L. was initially suspended from school for four days. The suspension was the result of his actions in drawing swastikas and writing "KAG" (which stands for "kill all gays") on the sixth-grade bathroom wall. It was also discovered that he did the same thing on the eighth-grade bathroom wall several days later. At least one of the incidents depicted a cartoon caricature killing of an individual. This seemed to be related to pride month. G.L. admitted to the incidents.

The district held an IEP meeting on June 7, 2022 and determined that based on G.L.'s behaviors an alternative placement in a therapeutic setting was his Least

Restrictive Environment (LRE) and proposed home instruction pending the new placement. The district provided the parent a release of records for several approved out of district placements and school-based counselling was added to his IEP. Conklin Cert., ¶ 7. On June 8, 2022, G.L. was suspended for an additional ten days after it was uncovered that he had made terroristic threats to a student and threatened the school. Specifically, another student reported to the administration that G.L. threatened to kill him, referenced the "Red Army," by stating "there's going to be a show on June 13th." Id., Conklin Cert. ¶ 8.

S.L. recalled that a mediation was held on August 2, 2022, where the mediator (Dan Spearing) "told us that an option was for [G.L.] to go to an alternative school and be able to play a sport for his school district. Although we have not gotten through the intake process for the alternative school, my son is aware that football practice" already began. "[He] has been receiving text messages from Coach and Sunny Cuzo that included 'reminders' about the date, time, and location. [He] has also completed the concussion test. I contacted Essex Valley school for intake last Thursday and one of the directors, Allen, advised, yes that is correct. Essex Valley school does not have a football team so he would play for his district. That being said, I sent an email to mediator, Dan Spearing advising him I was in the process of intake at Essex Valley School, and we would take this option because G.L. has been training for football. Going to multi-directional and speed training. Now he is getting texts about preparing for practice and practice is starting tomorrow." (P-1.)

She testified and questioned why Caldwell--West Caldwell Board of Education intended to continue to punish her son. She received word via email on June 10, 2022, that G.L. was not able to play football for the district.

S.L. Is "shocked and very confused at this information being that myself, my son and our support have been doing everything so that we can resolve this matter and move forward for [his] sake…. Cleats and athletic wear have been purchased. To take a sport away from him would be very very upsetting and literally break his stride and confidence. This will affect [him] in more ways than everyone thinks. He keeps telling me he just wants to get back to a normal life. To keep this going through a hearing is going to

devastate [him]. Let's just come to an amicable term. Let the kid play football. The school year ended traumatically for [him]." (Id.)

S.L. further testified that a lot of procedures that the district did was done to confuse her and G.L. G.L. is "distraught and depressed" because he is not being treated as a disabled peer. "They want to send him out of district." "He has been medically cleared to not being a danger to others or self." G.L. never played high school football but he did play for the local recreational team during his eighth-grade season. S.L. also read a letter into the record from her son where he expressed remorse.

Respondent

Respondent argues that G.L. is currently fourteen (14) years of age and is eligible for special education and related services under the classification category of Other Health Impaired. G.L. is diagnosed with Attention Deficit Hyperactive Disorder and Autism and is a rising ninth grader who was originally scheduled to attend Caldwell—West Caldwell High School for the 2022-2023 school year. See Conklin Cert., ¶ 3. Prior to the instant filing, G.L. attended Grover Cleveland Middle School in the district for eighth grade. See Conklin Cert., ¶ 4.

In early June 2022, it was brought to the middle school administration's attention that G.L. wrote several inappropriate things on the walls of one of the school bathrooms. Specifically, G.L. drew swastikas on the wall and wrote "KAG," which he later admitted stood for "Kill All Gays." See Exhibit 1 attached to Conklin Cert., Conklin Cert. ¶ 5. G.L. was witnessed by several other students engaging in this reprehensible endeavor, and when he spoke to the principal, admitted that he did it and showed little to no remorse for his conduct. In fact, when asked why he wrote "KAG" on the bathroom walls, G.L. responded "Because I have a problem with those kinds of people." G.L. was suspended on June 4, 2022, for four (4) days due to this conduct. Id., Conklin Cert. ¶ 6.

The district held an IEP meeting on June 7, 2022 and determined that based on G.L.'s behaviors an alternative placement in a therapeutic setting was his LRE and proposed home instruction pending the new placement. The district provided the parent

a release of records for several approved out-of-district placements and school-based counselling was added to his IEP. Conklin Cert., ¶ 7.

On June 8, 2022, G.L. was suspended for an additional ten days after it was uncovered that he had made terroristic threats to a student and threatened the school. Specifically, another student reported to the administration that G.L. threatened to kill him, referenced the "Red Army," and stated, "there's going to be a show on June 13th." Id., Conklin Cert. ¶ 8. On June 15, 2022, the Child Study Team (CST) held a manifestation determination meeting. At that meeting, the CST determined that G.L.'s conduct was not a manifestation of his disability and noted that he would receive home instruction for the remainder of the school year, while the district conducted a search for an approved appropriate therapeutic placement to meet G.L.'s needs for the 2022-2023 school year. See Exhibit 2 attached to Conklin Cert., ¶ 9. G.L. remained on home instruction for the remainder of the 2021-2022 school year. Conklin Cert., ¶ 10. On June 21, 2022, the parent filed a due process petition against the district requesting that G.L. not be placed out-of-district and attend Caldwell—West Caldwell High School for ninth grade under stay put. Conklin Cert., ¶ 11.

On August 2, 2022, the parties appeared for a mediation session offered through the New Jersey Department of Education. After a long discussion, the parent consented to sending G.L.'s student records to several therapeutic placements, including Essex Valley High School, Shepard Academy, and Chapel Hill Academy. See Exhibit 3 attached to Conklin Cert. The parties scheduled a settlement conference for August 17, 2022, to discuss settlement further. Conklin Cert., ¶ 12.

On August 8, 2022, the parent reached out to the district and this office, mentioning a discussion held with the mediator where G.L. would attend an out-of-district placement but still be permitted to participate in extracurricular activities in his home school, specifically football. The parent asked if G.L. could be allowed to start practicing with the freshman football team for the 2022 season. In discussing the proposal with the district, the district reiterated its position that due to his inappropriate conduct, G.L. was not permitted to participate in football for the 2022 season, and that out-of-district therapeutic placements would continue to be explored. This was communicated to the parent via

email on August 9, 2022. See Exhibit 4 attached to Conklin Cert., ¶ 13-14. The petitioner filed the instant request for emergent relief on August 10, 2022, requesting that G.L.'s stay put include his participation in football for the 2022 season at Caldwell—West Caldwell High School. Conklin Cert., ¶ 15.

The Board's position is that the request for emergent relief is insufficient for adjudication before the OAL, as it does not fall under one of the specifically enumerated categories for emergent relief as set forth under N.J.A.C. 6A:14-2.7(u). In addition, G.L. is not entitled to stay put of a specific extracurricular activity at a different school than where he previously attended. Despite petitioner's statements to the contrary, there is no break in the delivery of services necessitating the district to allow G.L. to participate in football at Caldwell-West Caldwell High School on an emergent basis.

LEGAL ANALYSIS AND CONCLUSION

The regulations governing controversies and disputes before the Commissioner of Education provide that "[w]here the subject matter of the controversy is a particular course of action by a district board of education . . . 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." N.J.A.C. 6A:3-1.6(a). The regulations further provide that the Commissioner may "[t]ransmit the motion to the OAL for immediate hearing on the motion." N.J.A.C. 6A:3-1.6(c)(3).

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 petitioner seeks an order that G.L. be permitted to attend football at his home district Caldwell—West Caldwell High School.

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. N.J.A.C. 6A:3-1.6(b); citing Crowe v. DeGioia, 90 N.J. 126 (1982). The petitioner must prove each of these standards by clear and convincing evidence. Garden State Equal. v. Dow, 216 N.J. 314, 320 (2013) (citation omitted). Arguably, the standard is a high threshold to meet, and I will address each prong separately. Also, bear in mind that "participation in athletics and extracurricular activities is a privilege, not a right." See, Joye v. Hunterdon Cent. Reg'l High Sch. Bd. Of Educ., 176 N.J. 568, 611 (2003). This fundamental concept is paramount here and controls the outcome of this basic application.

Irreparable Harm

As the Supreme Court explained in Crowe, 90 N.J. 126, "[o]ne principle is that a preliminary injunction should not issue except when necessary to prevent irreparable harm." Id. at 132 [citing Citizens Coach Co. v. Camden Horse R.R. Co., 29 N.J. Eq. 299, 303 (E. & A. 1878)]. Indeed, the purpose of emergent relief is to "prevent some threatening, irreparable mischief, which should be averted until opportunity is afforded for a full and deliberate investigation of the case." Ibid. [quoting Thompson ex rel. Bd. of Chosen Freeholders v. Paterson, 9 N.J. Eq. 624, 625 (Sup. Ct. 1854)].

In L.A. o/b/o R.A., et als. v. Board of Education of the Township of Wayne, EDU 14241-11, the Honorable Ellen S. Bass, A.L.J., denied three (3) students' requests that they be able to play football for Wayne High School in a specific game due to their involvement in a fight at a weekend party. Specific to irreparable harm, Judge Bass found that the only reason the students might be irreparably harmed is because, as seniors, they were missing the last game of their high school careers. This is certainly not the case here. G.L. is not even a member of the football team at Caldwell—West Caldwell High School, and is certainly not being deprived of the singular and unique opportunity that was presented to the petitioners in R.A.

In another decision by an ALJ specific to student participation in football, the Honorable Douglas Hurd denied a student's request for emergent relief to be allowed to play football based upon the student's assault on a school staff member and removal to an alternative educational placement. A.R. and A.R. o/b/o A.R. v. Hamilton Township Board of Education, EDS 8370-08 (August 2008). Specifically, Judge Hurd found that the application did not meet the irreparable harm standard and held that "there is simply no credible evidence that A.R. will suffer irreparable harm by missing three games during the football season. In fact, one could argue - given his alleged assault - that it would be more harmful to A.R. if he did play those three games and did not learn that his actions have consequences." Id.

The threshold standard for irreparable harm in education is showing that once something is lost, it cannot be regained. M.L. ex rel. S.L. v. Bd. of Educ. of Ewing, EDU

4949-09, Initial Decision (June 15, 2009), modified, Acting Comm'r (June 15, 2009), http://njlaw.rutgers.edu/ collections/oal/. G.L. is a rising freshman in the high school and has not ever participated in high school football. Notwithstanding petitioner's argument that his participation is required, it is clear that the inability to participate in this season would still leave him a future opportunity to participate as a member of the team. Accordingly, **I CONCLUDE** that the harm to G.L. is not irreparable.

2. Settled Legal Right

Next, emergent relief "should be withheld when the legal right underlying plaintiff's claim is unsettled." Crowe, 90 N.J. at 133 (citing Citizens Coach Co., 29 N.J. Eq. at 304–05). Petitioner argues that "[t]he settled legal right is G.L.'s entitlement to a Free Appropriate Public Education [FAPE] and the District's corresponding obligation to offer opportunities reasonable calculated to enable G.L. to make progress appropriate in light of his circumstances." See also, Endrew F. ex rd. Joseph F. Douglas City School District. Re-1, 137 S. Ct. 988 (2017). However, in the instant matter, the sole issue is whether the district is required to have G.L. participate on the football team. Participation on the football team is not included in his educational plan and is simply not a legal right in the State of New Jersey. G.L. has no property interest in playing football, as doing so is a privilege. While he is entitled to be treated fairly and with courtesy, the actions of the Board do not need to comport with formal due process. See, Palmer v. Merluzzi, 689 F. Supp. 400, 410 (D.N.J. 1998), aff'd 868 F. 2d 90 (3rd 3Cir. 1990). Decisions by the Commissioner subsequent to Palmer have continued to emphasize that continued participation in sports is a privilege, and not a right. See, D.M. o/b/o E.M. et als. v. Northern Highlands Reg'l Bd. of Educ., EDU 7677 and EDU 7708, Initial Decision at pages 14-15 (October 1, 2001) aff'd Commissioner (October 22, 2001) (emphasis added). Based on the foregoing, **I CONCLUDE** that G.L.'s participation on the football team is not required by the IEP.

Additionally, petitioner seemingly argues that the district's action violates G.L.'s right to participate in athletics because he has prepared and trained for football. (S.L. submission.) Respondent counters that "participation in athletics and extracurricular activities is a privilege, not a right." See, Joye v. Hunterdon Cent. Reg'l High Sch. Bd. Of

Educ., 176 N.J. 568, 611 (2003). A Board of Education may, but is not required by law to, allow a child educated elsewhere than at school to participate in curricular and extracurricular activities or sports activities. Before deciding to do so, however, a Board of Education may wish to consult with its attorney to consider the full implications of such participation.

Petitioner's argument conflates and minimizes his offensive conduct at the end of the school year that required a fourteen-day suspension. Accordingly, **I CONCLUDE** that G.L. has no right to play football. Based on the foregoing, **I CONCLUDE** that the petitioner failed to meet her burden to show a well-settled legal right underpins the claim.

3. Likelihood of Success on the Merits

S.L. on behalf of G.L. has not demonstrated that they are likely to succeed on the merits of the underlying claim. Under this emergent relief prong, "a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits." Crowe, 90 N.J. at 133 [citing Ideal Laundry Co. v. Gugliemone, 107 N.J. Eq. 108, 115–16 (E. & A. 1930)]. This typically "'involves a prediction of the probable outcome of the case' based on each party's initial proofs, usually limited to documents." Brown v. City of Paterson, 424 N.J. Super. 176, 182–83 (App. Div. 2012) [quoting Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 397 (App. Div. 2006)].

It is well-settled that a Board may deny participation in extra-curricular activities such as athletics as a disciplinary sanction "where such measures are designed to maintain the order and integrity of the school environment." N.J.A.C. 6A:16-7.1(e). G.D.M. and T.A.M. o/b/o B.M.M. v. Board of Education of the Ramapo Indian Hills Regional High School District, EDU 11597-09, Commissioner's Decision (September 13, 2010). Same is absolutely the case here – the district has demonstrated to the school and local community, who are well aware of the incidents and for which this is a particularly sensitive subject that the district does not tolerate or rewards this type of behavior by allowing students to participate in preferred activities when they have violated the Code of Conduct. Our courts have held that "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration,

even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199–200 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974). Thus, at plenary hearing, petitioner will have to demonstrate that the district acted in bad faith, or in utter disregard of the circumstances before it in disciplining G.L. for his behavior. T.B.M. v. Moorestown, supra, EDU 2780-07.

Here, as found above, G.L.'s IEP does not mention nor require his participation on the football team. Also, the home district is not required by law to acquiesce to participation by a player. Petitioner has not met her burden of demonstrating that the actions of the district were induced by improper motives or were taken in utter disregard of the circumstances before it. Accordingly, **I CONCLUDE** that the petitioner failed to meet the burden to demonstrate a reasonable probability of success on the merits.

4. Balancing the Equities

The fourth and final emergent relief standard involves "the relative hardship to the parties in granting or denying relief." Crowe, 90 N.J. at 134 [citing Isolantite Inc. v. United Elect. Radio & Mach. Workers, 130 N.J. Eq. 506, 515 (Ch. 1941), mod. on other grounds, 132 N.J. Eq. 613 (E. & A. 1942)]. The district argues that granting the motion would have a negative impact on the football team, including supporting his negative conduct in the spring.

Respondent argues that potential harm may come to the Caldwell—West Caldwell Board of Education, as well as other similarly situated school districts in the future, if the requested relief is granted is great. "Allowing this type of abhorrent behavior would undermine the entire discipline process as afforded to school districts to ensure a learning environment free from bigotry and intolerance as established by law. In essence, to award Petitioner the requested relief now would subvert the entire purpose of discipline in the school setting and would establish a very dangerous precedent." I agree. As stated by Judge Bass in the R.A. decision, "the rights of the petitioners are less weighty than those of the Board because participating in sports is a privilege. Petitioners have no right to play football…, and for this reason the Commissioner noted that applications such as

this one frequently fail because a petitioner cannot demonstrate a harm weighty enough to tip the balance in favor of a grant of extraordinary relief…. Conversely, the Board has a strong and valid interest in the effective and orderly operation of its schools."

Accordingly, **I CONCLUDE** that the district will suffer greater harm should emergent relief be granted than the petitioner will suffer if the requested relief is not granted.

Based upon the foregoing, **I CONCLUDE** that the petitioner failed to meet all of the requirements set forth in N.J.A.C. 6A:3-1.6(b) warranting an order for emergent relief in this matter and the motion for emergent relief is hereby **DENIED**.

ORDER

Having concluded that the petitioner has not satisfied all of the four requirements for emergent relief, the 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.

August 19, 2022
DATE

DEAN J. BUONO, ALJ

Date Received at Agency:

Date Mailed to Parties:

DJB/cb

APPENDIX

WITNESSES

For petitioner:

S.L.

For respondent:

Counsel for district

EXHIBITS

For petitioner:

P-1 Petitioners' submission accompanying the Emergent Application

For respondent:

R-1 Incident Report

R-2 Disciplinary Action Manifestation Determination

R-3 June 7, 2022 "Do not consent to placement"

R-4 Emails

R-5 Conklin Certification