State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

EMERGENT RELIEF

OAL DKT. NO. EDS 06913-22

AGENCY DKT. NO. 2023-34827

S.M., o/b/o/ L.T.,

Petitioner,

v.

MAHWAH TOWNSHIP BOARD OF EDUCATION,

Respondent.

_____

S.M. o/b/o **L.T**. petitioner pro se

Nathanya G. Simon, Esq**.** for respondent (Scarinci and Hollenbeck, attorneys)

Record Closed[1]: August 17, 2022 Decided: August 18, 2022

BEFORE **ERNEST M. BONGIOVANNI,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, S.M., filed a petition for Due Process with the Office of Special Education Programs (OSE) in the New Jersey Department of Education (DOE) regarding the placement by the Mahwah Township Board of Education (Board) for her daughter L.T. for

[1] This matter is final with record closed only as to the Application for Emergent Relief. The due process petition remains at the OSE.

the 2022-2023 school year.[2] S.M. also made a request for emergent relief and interim order which was filed at the OSE on August 10, 2022, and then transferred to the Office of Administrative Law (OAL) on August 12, 2022. Petitioner's certification, exhibits and brief were submitted with the application and supplemented by filings at the OAL on August 17, 2022. Respondent (BOE) filed its responsive certification, exhibits and briefs with the OAL on August 15, 2022. Oral argument was held on August 17, 2022.

Petitioners' application for emergent relief concerns S.M.'s 12-year-old, daughter who will be attending school in 2022-23 as a grade L.T., seventh grade student, who is classified Multiply Disabled (MD), and who has been receiving special education services through out of district (OOD) placement for the last six years. For the past four years, she has been placed at the Inclusive Learning Academy (ILA), presently located at the Kinnelon Middle School.

While the underlying Due Process Petition is not before me, it was undisputed that there is a significant history of litigation between the parties. A hearing concerning the preceding school year is pending before the Honorable Thomas Betancourt in November 2022. As indicated in the Board's written response and as echoed by both sides during argument, the "concurrent dispute…deals with petitioner's demands for independent evaluations, revisions to L.T.'s behavioral intervention plan, changes to L.T.'s transportation services, changes to the implementation of L.T.'s related services, and reimbursement."

It is not also undisputed that the last agreed upon placement for L.T. was at the ILA. However, S.M. complains of changes both to her daughter and to the ILA which makes continued placement there inappropriate. Specifically, her request for emergent relief states:

1. L.T. will be the only kid in her class grade 6-8, most restrictive environment

[2] The due process petition remains at the OSE. There is related litigation for the 2021-2022 school year pending a hearing

2. The teacher would be A.B. No Special Education. Same teacher that restrained L.T.in conduct report attached.

3. Rigidity in Behavior Intervention Plan they wrote, refused independent behavior assessment for past one year…

S.M. elaborated that in addition to her complaints itemized in her petition for Emergent Relief that there is a break in services justifying an immediate temporary placement prior to conclusion of the Due Process Proceedings.

Respondent replies that Emergent relief should be denied for three reasons: (1) there has been to break in services, (2) the applicable stay put during the pendency of the underlying Due Process Petition is at the ILA, (3) petitioner cannot change placement by an emergent request but only through the due process hearing.

LEGAL ANALYSIS AND CONCLUSION

Normally if "stay put" is properly invoked, it operates as an "automatic injunction" against changing the child's placement during the pendency of any administrative proceeding regarding a due process complaint. 20 U.S.C. sec. 1415 (j); In Re Drinker v; Colonial School District, 78 F.3d 859 (3rd Cir. 1996). However, as the Board is not the moving party in the application or the underlying due process case, it is not completely clear that stay put can be or has been properly invoked. That, however, does not end the inquiry.

To be successful S.M.'s application for emergent relief, has to meet all "four prongs" of the test under Crowe v. Di Gioa, 90 NJ 126 (1982). Here petitioner argues the placement is no longer appropriate because this year L.T. will be the only child in her 6-8 grade class, which makes it the most restrictive environment for L.T. to be in. However, respondent replies at this time it can't be certain how many children will be enrolled in the 6-8 grade class, and that in the past it has been up to four students. School does not begin for another two-three weeks so right now it is impossible to be sure. Further additional placements can occur during the school year. I agree and concur that S.M.'s

concerns in this regard may be premature. However, more importantly she has presented no evidence to prove irreparable harm in the event L.T. is the only child in that class for part or even the entire year. She states she is fearful her child will "regress." She attached a 30-page Neuropsychological evaluation in support of her application, but that report was written in December 2010 when L.T. was in 5th grade, it does not state that placement at the ILA is inappropriate or represents a denial of FAPE, and it certainly does not address any need for temporary placement or any other kind of injunctive relief. Nor does an email to S.M. from the PHD who wrote 2020 neuropsychological report address the issues nor lends support to S.M.'s request for immediate relief. S.M. also cites to a conduct report from ILA dated July 25, 2022, which S.M. said shows that ILA inappropriately uses restraints on students and on this particular occasion made L.T. "clean up her urine" after L.T. urinated on the floor of the classroom. However, the conduct report which S.M. mistakenly indicated supports her complaint shows that to the contrary, while L.T. was having an episode throwing her sneakers at the teacher and hitting the teacher's arm, the teacher "gently held [L.T.'s] hands so that she could not hit or take off her orthotics." The report further states L.T. was "laying in" the urine and the teacher and another teacher (or paraprofessional) had to hold L.T. under her arms to get her away from the urine. The report in no way suggests that L.T. was made to clean the urine from the floor. Thus S.M.'s complaint lacks credibility as she was not a witness, and the witnesses said differently.

To be granted emergent relief the petitioner has the burden of proving by clear and convincing evidence that the child will suffer irreparable harm by continued placement. Here the "proof" was self-contradictory, and while dramatic and even concerning if true, barely credible. It does not meet the standard of clear and convincing evidence. Nor do S.M.'s purely subjective and unsupported concerns that L.T. will be the only student in the class this year constitute clear and convincing proof of irreparable harm. And certainly, the ongoing one hour twenty-minute bus ride to school complained of does not demonstrate a need for injunctive relief. Finally, S.M. utterly failed to show how the continued placement at ILA represents a "break in services" warranting consideration of an immediate new placement. S.M. seemed to concede that she intends to pull L.T. out of the school if there is no immediate change, so S.M.'s own actions would constitute the only break in services, at least as presented by the evidence.

Because the application for immediate relief requires the petitioner to satisfy all four prongs of the Crowe test, and she has utterly failed to prove the first prong, showing irreparable harm I shall only briefly discuss how she failed to meet any of the other prongs of the test.

As the last IEP and others prior to it resulted in agreement of placement at ILA, it can hardly be argued not those petitioner's underlying claim that the placement is inappropriate or a denial of FAPE or of meaningful education benefit, is well settled. Thus, petitioner does not meet the second prong of Crowe. Further, petitioner failed to show that she is likely to succeed on the merits of the due process claim. As pointed out by the Board, at present petitioner has failed to even identify an in district or out of district placement currently available to L.T. S.M. appears to be proceeding without academic or psychological proof by experts or others to substantiate her claim. Thus, the record so far can hardly be said to meet the third prong required by Crowe.

Finally, S.M. did not dispute although given ample opportunity to do so during argument, that L.T. has not made educational progress in the past four years. Her evidence of personal regression on L.T.'s part were unsubstantiated. So were the allegations that ILA a few weeks before the school year has commenced has now become inappropriate. Further I agree with the Board that if S.M. ultimately succeeds on the merits of her due process claim, compensatory education can be awarded. Therefore, I do not find that the fourth prong, that the balance of the equities clearly weighs in favor of petitioner. Therefore, while petitioner must meet all four prongs of the test to be successful in her application, here, she has not met any of them, and emergent relief must be denied.

ORDER

I **ORDER** that the emergent relief application, to immediately change L.T.'s continued out of district placement at the Inclusive Learning Academy, pending a final due process hearing, is **DENIED**.

The order on application for emergency relief shall remain in effect until issuance of the final decision in this matter. 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.

August 18, 2022

Ernest M. Bongiovanni

DATE

ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency 08/18/22

Date Mailed to Parties: 08/18/22

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