



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION DENYING
EMERGENT RELIEF

OAL DKT. NO. EDS 01035-22

AGENCY REF. NO. 2022-33885

K.K.¹ ON BEHALF OF MINOR CHILD L.H.,

Petitioner,

v.

MEDFORD LAKES BORO BOARD
OF EDUCATION,

Respondent.

K.K., on behalf of L.H., petitioner, pro se

Jeffrey Catalano, Esq., for respondent (Parker McCay, PA, attorneys)

Record Closed: February 14, 2022

Decided: February 14, 2022

BEFORE **JEFFREY N. RABIN**, ALJ:

¹ Petitioner's name appeared throughout the documentation, fully spelled out (but shown here by initials), alternatively as K.K., K.K-B.H., K.K.H. and K.H. This emergent matter was filed and transmitted to the OAL referring to the parent of L.H. as "K.K." K.K. is not the sole parent of L.H.; she opted to file this without L.H.'s father being a party to this litigation.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner has challenged the decision of the respondent Medford Lakes Boro Board of Education (Board or Medford Lakes) denying petitioner's request that L.H. be immediately returned to school with an exemption to the State and Board's mask requirement.

The within motion for emergent relief was filed by petitioner on February 8, 2022, with the New Jersey Department of Education (DOE), Office of Special Education(OSE). The motion for emergent relief was transmitted to the Office of Administrative Law (OAL) on February 10, 2022. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Due to the Covid-19 pandemic, an emergent hearing in this matter took place via Zoom on February 14, 2022. Simultaneous to the within emergent matter, petitioner also filed for a due process hearing seeking a revision to L.H.'s Individualized Education Plan (IEP); that due process request has been retained by OSE and not forwarded to the OAL.

FINDINGS OF FACT

Based on petitioner's Petition for emergent relief and respondent's Answer, and the documentation and testimony proffered by both parties, and solely for the purpose of deciding this emergent appeal, I **FIND** the following to be the undisputed facts:

1. New Jersey Governor Philip Murphy instituted a mandate that all public school students must wear masks indoors in schools due to the Covid-19 pandemic, with certain exceptions, by way of Executive Order #251, effective August 9, 2021. Exceptions included when wearing a mask would inhibit the individual's health, and when a student's documented medical condition or disability as shown in a 504 Plan or Individualized Education Plan (IEP) precluded the wearing of a mask. Respondent Board adopted the Governor's mandate.
2. Petitioner, K.K., is one of the parents of minor child, L.H., born August 8, 2018. L.H. was to begin a preschool program for three-year-old children in Medford Lakes on January 18, 2022. On January 14, 2022, the Board

offered an IEP to L.H., offering special education services for a “Preschool child with a disability” due to “developmental delay.” The Board offered an accommodation on January 18, 2022, wherein L.H. could receive speech therapy without wearing a mask as long as other Covid-19 protocols were complied with, i.e., proper social distancing. K.K. rejected this accommodation and kept L.H. home from school.

3. K.K. submitted to the Board a note dated January 13, 2022, from Dr. John Kraynock at ABC Pediatric Associates, stating, “Please excuse pt [patient] for wearing mask due speech issues delay.” By email dated January 18, 2022, the Board denied petitioner’s request for a mask exemption.
4. K.K. submitted to the Board a letter dated February 5, 2022, from a Dr. Eck, stating that L.H. had been diagnosed with expressive and receptive speech delays and a social pragmatic communication disorder, that his pediatrician recommended that he not wear a mask, and that there was “ample evidence that covering the lower half of the face reduces the ability to communicate.” Dr. Eck concluded her letter by stating, “Please release [L.H.] from any requirement to wear a mask.” The Board again denied petitioner’s mask exemption request.

TESTIMONY

For petitioner:

K.K. served as her own counsel and as a witness. She read into the record the contents of her “Oral Argument” for L.H.’s emergent hearing, submitted to the Court just before the hearing on February 14, 2022. She also testified that the Board doctor who reviewed and rejected her doctor’s notes was only a D.O. (Doctor of Osteopathic Medicine) and not an M.D. (Doctor of Medicine). K.K. acknowledged that the disorders borne by L.H. were learning disorders, not medical disorders. L.H. did not suffer any medical conditions. She testified that L.H. already had Covid-19 once and suggested that he was therefore no longer a threat to again get or spread Covid-19, although she offered no evidence that her assertions were factually correct.

K.K. acknowledged that she failed to address the N.J.A.C. 6A: 3-1.6 Crowe v. DeGioia four-prong test in any of her submissions.

For respondent:

Respondent counsel, **Jeffrey Catalano**, Esq., presented the Board's case. He cited to N.J.A.C. 6A: 14-2.7(r)(i) to support the respondent's position that a litigant could not rely on a self-created break in services to meet the threshold eligibility requirements for emergent relief. In this case, the Board offered educational services to L.H., and offered an accommodation of mask-free speech therapies, which were rejected by petitioner. Petitioner kept L.H. home from school due to her dissatisfaction with the Board's enforcing of the Governor's mask mandate, thus creating her own break in services.

The two studies referenced by petitioner failed to evidence irreparable harm to the student. One study stated that any harm to a child's learning due to wearing a mask was only temporary and would subside once masks were no longer worn. The other study stated that not enough research had been conducted to conclude that masks caused irreparable harm.

Petitioner failed to proffer testimony from either of the doctors whose mask-exemption notes were submitted to the Board by petitioner. Petitioner offered no evidence that legal issues pertaining to mask mandates had been settled in her favor. There was no evidence that any court had overturned Governor Murphy's mask mandate.

The second doctor who submitted a note on behalf of L.H., Dr. Eck, was an internist, not a pediatrician.

LEGAL ANALYSIS

The issue is whether petitioner has proven by a preponderance of the evidence that she has met the standard for emergent relief, and that she was entitled to relief.

Petitioner submitted two doctors' notes to the Board, both stating that L.H. should not wear a mask, but the Board denied an exemption to the State and Board's mask requirement on both occasions. Petitioner submitted a copy of Governor Murphy's Executive Order #251, which allows for a medical exemption, but did not submit or cite to any other statutory or regulatory authority or caselaw to support her opinion that L.H. was entitled to the mask requirement exemption. Petitioner acknowledged that L.H. had no medical conditions and that the grounds for the doctors' notes were learning disorders, not medical conditions.

N.J.S.A. 18A:6-9 authorizes the Commissioner of Education to consider controversies between a parent and a school board. The OAL is the appropriate venue for hearing an appeal of a school board's findings and OSE properly forwarded this matter to the OAL for this emergent appeal to be heard.

N.J.A.C. 6A:14-2.7(r) allows a party to apply in writing for a temporary order of emergent relief as part of a request for a due process hearing or an expedited hearing for disciplinary action. The request needed to be supported by an affidavit or notarized statement specifying the basis for the request for emergency relief. N.J.A.C. 6A:14-2.7(r)(1) lists the cases emergent relief is available for, which includes issues involving (i) a break in the delivery of services, (ii) disciplinary action, including manifestation determinations and determinations of interim alternate educational settings, (iii) placement pending the outcome of due process proceedings, and (iv) issues involving graduation or participation in graduation ceremonies.

Petitioner's Certification sought to address section (i), a break in the educational services provided to student L.H., claiming he received no educational services from his scheduled first school day, January 18, 2022, through the date of the within hearing.

Respondent correctly argued, however, that petitioner could not rely on a self-created break in services in order to establish eligibility for emergent relief under N.J.A.C. 6A:14-2.7(r)(i), asserting that to do so would establish a break in services every time a student was unwilling to attend school. In the within matter, petitioner kept L.H. home from school due to her dissatisfaction with the Board's enforcing of the Governor's mask mandate.

Additionally, the Board has indicated that it offered speech therapy for L.H., but that K.K. had been uncooperative with school personnel in starting those sessions. Rather than parse through whether K.K. had in fact failed to return telephone calls or emails from the school, it is more telling that the Board offered petitioner the reasonable accommodation of allowing L.H. to remove his mask during speech therapy as long as he complied with other Covid-19 protocols, which accommodation K.K. rejected.

More importantly, L.H. attended speech therapy services on February 11, 2022, and was scheduled for speech therapy services again on February 14, 16, 23, 25, and March 2 and 4, 2022. Therefore, the Board had in fact offered and provided educational services to L.H.

Accordingly, as petitioner did not argue that any of the other three categories for emergent relief were applicable aside from (i), I **FIND** that petitioner's Petition failed to meet any of the threshold issues required to be eligible for emergent relief.

Next, as set out in paragraph 5 of the Certification in Lieu of Affidavit or Notarized Statement of Petitioner Seeking Emergent Relief (Certification) executed by petitioner K.K. and submitted with her Request for Emergent Relief (the Petition), and pursuant to N.J.A.C. 6A: 3-1.6 and the case of Crowe v. DeGioia, 90 N.J. 126 (1982), a petitioner must show by a preponderance of the evidence that the four prongs/prerequisites set forth therein had been met in petitioner's favor in order to be granted emergent relief.

A petitioner bears the burden of proving the four prongs for emergent relief. B.W. ex rel. D.W. v. Lenape Reg'l High Sch. Dist., OAL Dkt. No. EDS 06933-05, Agency Ref. No. 2006-10522E, at 8 (N.J. Adm); see also J.G. ex rel. Q.B. v. Bd. of Educ. of Lakewood,

OAL Dkt. No. EDU 10073-03, Agency Ref. No. 466-12/03, at 6 (N.J. Adm); R.D. ex rel. C.D. v. Willingboro Bd. of Educ., 95 N.J.A.R.2d 190, at 2.

Per N.J.A.C. 6A: 3-1.6 and Crowe, emergent relief may be granted if the judge determines from the proofs that the following four prongs have been met:

- i. The petitioner will suffer irreparable harm if the requested relief is not granted;
- ii. The legal right underlying the petitioner's claim is settled;
- iii. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
- iv. 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.

Despite having acknowledged the four-prong test by executing the Certification, however, petitioner failed to proffer any letter, memorandum or brief addressing the standards set forth in Crowe, as required by N.J.A.C. 6A:3-1.6(b), or testimony addressing these standards. Petitioner offered two letters entitled "Oral Argument For [L.H.'s] Emergent Relief Hearing, neither of which addressed the four-prong test.

Respondent argued that petitioner would not have met all four prongs of the Crowe test.

1. The petitioner will suffer irreparable harm if the requested relief is not granted.

Petitioner failed in her filings and at the hearing to offer any evidence of irreparable harm to L.H. resulting from the Board's denials of her request for a mask exemption or to result if this court did not overturn the Board's exemption request denial.

Petitioner submitted a first doctor's note from Dr. Kraynock at ABC Pediatric Associates. However, Dr. Kraynock stated nothing beyond "Please excuse pt [patient]

for wearing mask due speech issues delay.” He did not identify himself as L.H.’s pediatrician or state that he was currently treating L.H. He did not state what medical reasons there were for why L.H. could not wear a mask, or whether “speech issues delay” was a medical diagnosis. There was no evidence provided by Dr. Kraynock that delayed speech develops from, or is exacerbated by, two hours of mask wearing while in a classroom setting. There was no evidence provided that any potential delayed speech could not be addressed through further accommodation/speech therapy services in the future. He did not specify how a mask would affect L.H., did not state how the doctor reached his conclusion, and also failed to show that the doctor had found there would be irreparable harm.

Petitioner then went to a second doctor seeking a mask exemption letter. She submitted to the Board a letter dated February 5, 2022, from a Dr. Eck, stating that L.H. had been diagnosed with expressive and receptive speech delays and a social pragmatic communication disorder, that his pediatrician recommended that he not wear a mask, and that there was “ample evidence that covering the lower half of the face reduces the ability to communicate.” Dr. Eck concluded his letter by stating, “Please release [L.H.] from any requirement to wear a mask.” However, that letter did not specify how that doctor reached that conclusion or whether that doctor was qualified to opine on a child’s learning abilities. Dr. Eck did not state a medical reason for his conclusion, but merely reported that another doctor had diagnosed L.H. with expressive and receptive speech delays and a social pragmatic communication disorder, and Dr. Eck did not state that those disorders were medical disorders. The only medical reference was his conjecture, without any medical or scientific proof or support, that children with allergic rhinitis could be harmed by wearing a mask; however, he did not diagnose L.H. as having allergic rhinitis. There was no evidence provided by Dr. Eck that delayed speech develops from or is exacerbated by two hours of mask wearing while in a classroom setting. There was no evidence provided that any potential delayed speech could not be addressed through further accommodation/speech therapy services in the future. Nowhere did Dr. Eck conclude that irreparable harm would be caused if L.H. were forced to wear a mask.

Neither doctor testified at the within hearing.

Neither side provided evidence regarding the effectiveness of wearing masks, aside from Dr. Eck's unsubstantiated assertion that there was not a lot of data to show that masks were effective. Regardless, I **FIND** that masks may be a valuable tool in stopping or limiting the spread of a contagious disease like Covid-19, based on the guidelines promulgated by the Center for Disease Control (CDC), American Academy of Pediatrics, and Dr. Anthony S. Fauci, Director of the National Institute of Allergy and Infectious Diseases (NIAID) and Chief Medical Advisor to President Donald J. Trump and President Joseph R. Biden. Preventing death and debilitating disease is the opposite of irreparable harm; it is a life-affirming benefit.

Accordingly, I **CONCLUDE** that petitioner failed to show that this first prong of the Crowe test for emergent relief had been met in favor of the petitioner.

2. The legal right underlying the petitioner's claim is settled.

Petitioner did not address the legal right underlying her claim in either her Petition or Certification or during the hearing.

Petitioner did not state any legal grounds for her position that the Board's imposition of the Governor's mask mandate was improper and should be overturned. She acknowledged that New Jersey courts had not yet settled the propriety of mask mandates.

Mask mandates are a new and unique issue, resulting from the current Covid-19 pandemic. These are cases of first impression before the New Jersey judiciary, and neither party offered any precedential caselaw setting out legal guidelines concerning mask mandates. Petitioner failed to proffer any caselaw which supported her position, or which purported to show that this matter was settled with regards to schools in New Jersey. Until the legal rights underlying petitioner's claims regarding mask policies in schools are settled, relief cannot be provided on an emergent basis.

Accordingly, I **CONCLUDE** that petitioner failed to show that the second prong of the Crowe test for emergent relief had been met in favor of the petitioner.

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim.

Petitioner did not address her likelihood of prevailing on the merits of her underlying claims. She offered no evidence to support her claim or to show a likelihood of success in a full due process hearing. She set out no caselaw showing that this matter has been decided elsewhere in New Jersey in such a way as to serve as precedent in the within manner. Petitioner offered no caselaw, statute or regulation demonstrating that the Board's denials of her exemption requests were done improperly or arbitrarily and capriciously. In fact, it has long been held that local governmental entities have a great deal of discretion when taking action to promote the health, safety and welfare of its citizens.

Accordingly, I **CONCLUDE** that petitioner failed to show that the third prong of the Crowe test for emergent relief had been met in favor of the petitioner.

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.

Petitioner failed to address this fourth prong of the Crowe test. She claimed that wearing a mask interfered with L.H.'s ability to learn and to keep pace with his peers, but she failed to argue that such an issue would outweigh any harm to respondent.

Without medical evidence of harm since implementation of the mask mandate by the Board, the within balancing test is therefore between a student's and parents' liberties and concerns for that student's education, versus the public health and welfare, in particular the spread of a contagious disease which has killed over 900,000 Americans, and for which vaccines had only just become available for those age twelve and under.

Petitioner failed to prove by a preponderance of the evidence that the mask policy and enforcement of same by the respondent caused specific irreparable harm to her son. Conversely, prevailing medical guidelines were for masks to be worn by unvaccinated people in order to stop the spread of Covid-19. Of the millions of people who have contracted Covid-19, close to a million Americans have lost their lives. Balancing the

saving of students' lives throughout the school system against one student's unproven claims of harm, the balancing clearly leans in favor of the respondent Board's position.

Accordingly, I **CONCLUDE** that petitioner failed to show that the fourth prong of the Crowe test for emergent relief had been met in favor of the petitioner.

Therefore, I **CONCLUDE** that petitioner failed to show by a preponderance of the evidence that she met any of the four prongs of the Crowe test for emergent relief. I **CONCLUDE** that petitioner failed to prove that she was entitled to emergent relief in this matter.

ORDER

The petitioner's motion 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.

DATE



JEFFREY N. RABIN, ALJ

Date Received at Agency

February 14, 2022

Date Mailed to Parties:

February 14, 2022

JNR/dw

APPENDIX

WITNESSES

For petitioner:

K.K., pro se petitioner and witness

For respondent:

none

BRIEFS/EXHIBITS

For petitioner:

Petition and Certification, dated February 8, 2022

“Oral Argument” for L.H.’s Emergent Hearing, received February 11, 2022

“Oral Argument” for L.H.’s Emergent Hearing, received February 14, 2022

For respondent:

Brief in Response to Petition for Emergent Relief, dated February 11, 2022

Certification of Jennifer Summerville, dated February 11, 2022