State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION DENYING EMERGENT RELIEF

OAL DKT. NO. EDS 00783-24

AGENCY REF. NO. 2024-36952

M.G. ON BEHALF OF MINOR CHILD L.G.,

Petitioner,

v.

MONTGOMERY TOWNSHIP BOARD OF EDUCATION,

Respondent.

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

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

Record Closed: January 25, 2024 Decided: January 26, 2024

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, M.G., seeks emergent relief in the form of an order for "stay put" instead of the temporary home instruction deemed necessary by the respondent, Montgomery Township Board of Education (respondent, Board, or District), due to a disciplinary issue with minor student L.G. Petitioner also seeks emergent relief in the form of an order

requiring the respondent to pay for an independent psychiatric evaluation to be conducted by petitioner's current psychiatrist and a functional behavioral assessment.

By letter dated January 11, 2024, Mary Patricia Publicover, Interim Director of Special Services for respondent, advised petitioner that due to student L.G.'s behavior and actions on January 3, 2024, (the Incident) resulting in serious bodily harm to another student, L.G. would be removed to an interim alternative education setting for a forty-five-day period, that being home instruction, and that a manifestation determination would be conducted by L.G.'s Individualized Education Plan (IEP) team. A manifestation determination has been completed, finding that L.G.'s behavior was a result of his autism and/or attention deficit hyperactivity disorder (ADHD).

Petitioner filed for mediation on January 9, 2024. The within motion for emergent relief was filed by petitioner on January 17, 2024, 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 January 19, 2024. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. A pre-hearing telephone conference was conducted on January 23, 2024. An emergent hearing in this matter took place on January 25, 2024, and the record closed.

FINDINGS OF FACT

Based on petitioner's petition for emergent relief and letter-brief, respondent's letter-brief, and the testimony offered by the parties and their representatives, and solely for the purpose of deciding this emergent appeal, I **FIND** the following to be the undisputed facts:

1. L.G. is a fourteen-year-old high school student who resides within the District and has been eligible for, and has received, special education and related services. L.G. has been diagnosed with autism and ADHD. L.G. has an IEP dated December 7, 2023, calling for him to attend classes at Montgomery Township High School.

2. L.G. was responsible for improper behavior resulting in injury to other students on September 14, 2023, September 21, 2023, October 2, 2023, October 3, 2023, October 17, 2023, November 15, 2023, November 16, 2023, November 21, 2023, and December 6, 2023. The most recent incident was on January 3, 2024, the Incident, when L.G. stomped on another student during a gym class, causing that student to miss classes and experience limitations in and out of school, and to suffer a brain impairment. (Respondent Exhibits A and B.)

3. Petitioner attended an IEP meeting on January 5, 2024, when petitioner was advised that respondent sought to move L.G. to home instruction pending the procurement of out-of-district placement.

4. Respondent sought to start home instruction on January 5, 2024, but petitioner refused entry to the home instructor, as it did not fit with petitioner's work schedule.

5. Petitioner filed for mediation on January 9, 2024. At a meeting on January 23, 2024, petitioner requested home instruction for L.G. for between 9 a.m. and 3 p.m. daily.

6. L.G. was provided two hours per day of home instruction commencing on January 18, 2024, and on January 23 and January 24, 2024.

TESTIMONY

For petitioner

M.G. testified that the Individuals With Disabilities Education Act (IDEA) was violated by respondent, stating that L.G. was moved to home instruction when the victim of L.G.'s behavior during the Incident did not suffer serious bodily injury as required by IDEA. IDEA, 20 U.S.C. § 1415(k)(1)(G), allows a school board to remove a student for an interim forty-five-day period, whether or not the behavior was a manifestation of the student's condition, when that student had inflicted serious bodily injury on another.

Petitioner cited to N.J.S.A. 34:15-37.6, the worker's compensation statute, for a definition of serious bodily injury, but did not offer a definition from New Jersey or federal school or education law. Further, petitioner offered no evidence disputing that L.G.'s victim from the Incident had suffered serious bodily injury. Conversely, respondent counsel proffered that the Incident victim suffered a brain impairment causing the student to miss classes and experience limitations in and out of school, which respondent had deemed a serious bodily injury.

For respondent

Rita Barone presented respondent's case, with the assistance of **Mary Patricia Publicover**, Interim Director of Special Services for respondent.

Petitioner met none of the four Crowe v. DeGioia, 90 N.J. 126 (1982) prongs required for the granting of emergent relief. It was petitioner who refused to allow home instruction to commence on January 5, 2024. On January 8, 2024, respondent offered out-of-district placement at CEA School at South Hunterdon to L.G., but this was refused by petitioner.

LEGAL ANALYSIS

The issue is whether petitioner had proven by a preponderance of the evidence that they had met the standard for emergent relief, and that they were entitled to relief.

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 the 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 needs 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 in Lieu of Affidavit or Notarized Statement of Petitioner Seeking Emergent Relief (Petitioner's Certification) sought to address section (ii), disciplinary action, including manifestation determinations and determinations of interim alternate educational settings.

I **FIND** that this matter is meant to address a disciplinary action and determination of an interim alternate educational setting, and therefore petitioner's petition met one of the threshold issues required to be eligible for emergent relief.

Next, as set out in Petitioner's Certification executed by petitioner M.G. on January 17, 2024, 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 all been met:

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

ii. The legal right underlying 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, and acknowledging his responsibility to comply with the requirements set forth in Petitioner's Certification during the telephone conference on January 23, 2024, petitioner failed to address the standards set forth in Crowe, as required by N.J.A.C. 6A:3-1.6(b), and was unprepared to testify as to these standards, even when prompted by this court. Petitioner executed a Certification in Lieu of Affidavit or Notarized Statement of Petitioner Seeking Emergent Relief (Petitioner's Certification) but failed to explain what irreparable harm would be suffered, failed to offer anything evidencing such harm, and failed to address prongs i through iv of the test. All four prongs of the test must be met.

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 did not argue irreparable harm in his moving papers or when testifying at the hearing.

Petitioner's argument was that the injuries to the student from the January 3, 2024, Incident were exaggerated, and that there were in fact no serious injuries or any life-threatening problems.

Petitioner failed to address L.G.'s nine disciplinary and behavioral incidences prior to the January 3, 2024, Incident in his moving papers, only acknowledging them in his reply letter-brief of January 25, 2024, in which he objected to the Board raising those numerous incidences.

The only claim of harm to L.G. offered by petitioner was that home instruction would add stress to L.G. and his family. There was no medical, expert, or documentary evidence provided to show that L.G. was prone to stress, no evidence that any stress had actually been suffered, and no evidence that any such potential mental stress was imminent. Nothing was introduced by petitioner to indicate that such stress would be irreparable. Such claim of harm was merely speculative. Further, any loss of educational services mentioned by petitioner would have been addressed if petitioner and respondent could have had a meeting of the minds over a resolution to the within issues. No evidence was proffered showing a significant interruption of educational services. In fact, it was petitioner who refused to allow a home instructor to commence home instruction on January 5, 2024. Home instruction did take place on January 18, January 23 and January 24, 2024, and therefore there was no significant break in educational services due to any actions by respondent.

Respondent argued that there would be no irreparable harm to L.G., and that by switching to home instruction while an out-of-district placement was sought, L.G. would suffer no break in educational services.

"Irreparable harm" contemplates that the harm be both substantial and immediate. Subcarrier Commc'ns, Inc. v. Day, 299 N.J. Super. 634, 638 (App.Div. 1997). Irreparable harm included that the occurrence of harm was imminent (A. Hollander & Sons, Inc. v. Imperial Fur Blending Corp., 2 N.J. 235, 249 (1949)), but not where a mere inconvenience may occur. B&S Ltd. v. Elephant & Castle Intern, Inc., 388 N.J. Super. 160 (Ch. Div. 2006). Regarding special education, irreparable harm was shown when there was a substantial risk of physical injury to the child or when there was a significant interruption or termination of educational services. M.H. o/b/o N.H. v. Milltown Board of Education, 2003 WL 21721069 at *1.

Petitioner did not provide any expert testimony, expert reports, medical evidence, documentation, or any other evidence to show that L.G. would be substantially and immediately harmed were the respondent to immediately place him on home instruction.

In fact, L.G. had already received three days of home instruction, and no evidence was submitted showing that he suffered any stress or other irreparable harm as a result.

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, in his moving papers, testimony, and letter-brief, failed to argue that the legal right underlying petitioner's claim was settled. Petitioner failed to show that he had a legal right to have the respondent pay for L.G.'s current psychiatrist to conduct an independent psychiatric evaluation of L.G. Petitioner failed to show how a currently treating doctor could be deemed "independent." When given the opportunity to provide the name of an independent doctor to perform a psychiatric evaluation, petitioner failed to provide any names until just before the within hearing began.

Petitioner claimed that one case supported his request for stay put, C.C. and L.K. o/b/o C.C. v. Kinnelon Boro Board of Education, OAL Dkt. No. EDS 01352-23. However, this was not a reported case, and petitioner was unable to represent whether or not this had been appealed further and, if so, he did not provide a citation for any appellate action. Respondent argued that C.C. and L.K. was not a similar fact pattern to the within matter and that the case did not provide precedent.

A reading of C.C. and L.K. indicated that the petitioners in that case were challenging a school district's change to an IEP where the parents had not received timely notice. In that case, the student had committed a wrongful act against another student and received a ten-day suspension to be served at home, with the district offering home instruction during that ten-day period. In the within case, petitioner has not alleged that he did not receive proper notice of a change to an IEP. Petitioner M.G. clearly received timely notice of the January 5, 2024, IEP meeting, because he was in attendance at that meeting. At that meeting a potential change to L.G.'s IEP was discussed, that being a change to out-of-district placement due to his behavioral issues, but such change had not yet been effectuated. Unlike in C.C. and L.K., the within case involved a school board

availing itself of the IDEA's forty-five-day interim change in educational placement rule due to actions resulting in serious bodily harm. The ten-day suspension in C.C. and L.K. differed from the temporary interim home instruction deemed necessary by respondent in the within matter. I **FIND** that the case of C.C. and L.K. differed from the case at hand and had no precedential value to the within matter. Even if this one case had, arguendo, reached the conclusion sought by petitioner, one unreported case by itself would not be sufficient to indicate that the law was clearly settled in petitioner's favor in this matter.

Respondent relied on the language of 20 U.S.C. § 1415(k)(1)(G) to support its position that it was settled law that a school board may remove a student for an interim forty-five-day period, whether or not the behavior was a manifestation of the student's condition, when that student had inflicted serious bodily injury on another student. Although respondent offered no caselaw to support this argument, in the within matter the burden of proof was with the petitioner, not the respondent.

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.

Similarly, petitioner, in his moving papers, testimony, and letter-brief, failed to argue that he had a likelihood of prevailing on the merits of the underlying claim at a full due process hearing. Petitioner did not offer a single legal precedent, either via caselaw or statute, which could be used to show that he had a likelihood of success. He offered no caselaw or statutory support for his claim that he was entitled to have the respondent pay for a psychiatrist of petitioner's choosing to perform a psychiatric evaluation. He offered no legal support for a currently treating doctor to provide an independent evaluation. He offered no legal arguments to support his argument that respondent acted improperly in removing a student with behavioral issues from their school and requiring home instruction. Petitioner's moving papers failed to acknowledge the number of behavioral incidences in which L.G. was involved, incidences where he caused harm to other students. Aside from these ten incidences of malfeasance by L.G. which caused

harm to other students, L.G. had also had a recent incident of misbehavior against his current home instructor.

In fact, respondent indicated that petitioner was open to having home instruction for L.G. if done during hours convenient to petitioner, thus undermining petitioner's arguments against home instruction.

Respondent offered no legal argument, via caselaw or statute, to show that it had a likelihood of prevailing on the legal merits of the case, except its reliance on the forty-five-day removal language of IDEA, but again, in the within matter, the burden of proof lies with the petitioner, not the respondent.

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, in his moving papers and letter-brief and at the emergent hearing, failed to argue that when the equities and interests of the parties were balanced, the petitioner would suffer greater harm than the respondent would suffer if the requested relief was not granted. Petitioner failed to offer an argument regarding the balancing of equities at the emergent hearing, even when prompted by the court.

Conversely, respondent argued that a balancing of the equities and the interests of the parties would weigh in favor of the Board. There was no harm to L.G. by switching to home instruction. Yet, there was a threat of imminent harm to other students at L.G.'s school; there were ten incidences when L.G. threw things at other students, or hit or spit at other students, one of which caused a student to suffer a brain impairment. While protecting other students at Montgomery Township High School from L.G.'s actions, respondent's plan for home instruction still ensured that L.G. would suffer no break in educational services or other harm.

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 it met any of the four prongs of the Crowe test for emergent relief. I **CONCLUDE** that petitioner failed to prove that they were 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. § 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.

January 26, 2024 _____

DATE **JEFFREY N. RABIN**, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

JNR/jm

APPENDIX

WITNESSES

For petitioner:

M.G., parent of student L.G.

For respondent:

Mary Patricia Publicover, Interim Director of Special Services for respondent

BRIEFS/EXHIBITS

For petitioner:

Petition and Certification, dated January 17, 2024, with Certification in Lieu of Affidavit or Notarized Statement of Petitioner Seeking Emergent Relief Attached

Reply Letter-Brief, dated January 25, 2024

For respondent:

Letter-Brief in Response to Petition for Emergent Relief, dated January 24, 2024