State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION DENYING EMERGENT RELIEF

OAL DKT. NO. EDS 03209-24

AGENCY REF. NO. 2024-37182

D.N. ON BEHALF OF MINOR CHILD S.M.,

Petitioner,

v.

WILLINGBORO TOWNSHIP BOARD OF EDUCATION,

Respondent.

D.N., on behalf of S.M., petitioner, pro se

Lester Taylor, Esq., for respondent (Taylor Law Group, LLC, attorneys)

Record Closed: March 15, 2024 Decided: March 19, 2024

BEFORE **JOAN M. BURKE**, ALJ:

STATEMENT OF THE CASE

Petitioner D.N., on behalf of her minor child, S.M., seeks an Order Granting Emergent Relief, pursuant to N.J.A.C. 1:6A-12.1(a), N.J.A.C. 6A:14-2.7(l), and 20 U.S.C. § 1415(k)(2), in the form of temporary home instruction and continuation of occupational therapy and counseling pending resolution for the due process.

PROCEDURAL HISTORY

On March 8, 2024, the New Jersey Department of Education (DOE) received petitioner's request for a due process hearing and a request for emergent relief. The emergent relief request was transmitted to the Office of Administrative Law (OAL), where it was filed on March 11, 2024. N.J.S.A. 52:14F-5(e), (f), and (g) and N.J.A.C. 1:6A-1.1 through -18.5. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. On March 13, 2024, the respondent, Willingboro Township Board of Education (Board), submitted to the OAL a "Sufficiency Challenge to Petitioner's complaint." (R-1.) A pre-hearing telephone conference was conducted on March 14, 2024. At the pre-hearing conference, I informed the parties that I did not have the authority to determine the Sufficiency Challenge, as the due process petition was not transmitted to the OAL. On the transmittal document for the emergent relief, the Office of Special Education Programs (OSEP) stated: "Underlying expedited due process to remain at OSE until the end of the 15-day resolution period." (See transmittal document.) The respondent sent a copy of the due process that was filed to the OAL. Respondent explained that based on the due process complaint, the petitioner waived her right to a resolution period. I declined to hear the Sufficiency Challenge because there was no formal document submitted to the OAL for the due process complaint. An emergent hearing in this matter took place on March 15, 2024, and the record closed.

FACTUAL DISCUSSION

Testimony

For petitioner

D.N. testified that she applied for emergency relief because she has exhausted all options. She has contacted the superintendent, the assistant superintendent, and administrative personnel regarding the services that her son is to receive as per his independent education program (IEP). She argues that there is no accountability at James A. Cotten Intermediate school (JAC). D.N. testified that the IEP submitted in the

respondent's response for September 25, 2023, is "bogus" and the one on January 29, 2024, was also "bogus." She testified that she moved to Willingboro from New York to buy her first home. She testified that while in New York, her son received annual IEP reviews in January of each year. D.N. testified that her son was diagnosed with ADHD and not ADD, which was written in the documents she had received from the Board.

D.N. testified that the IEP meeting that was discussed by respondent as having been conducted in January never took place. The letter that advised her of the hearing date for the IEP meeting was dated January 22, 2024, but the letter was mailed January 30, 2024. (P-1.) D.N. testified that she was under the impression that her son's IEP that was done in New York in January 2023 was still in place since no IEP was done in September 2023. D.N. presented emails contemporaneous with the date of the September scheduled IEP from Eric Flecken, the school psychologist, who relayed that there was a blackout at the school on September 25, 2023, and the IEP meeting had to be cancelled.

D.N. testified that S.M. was not receiving the services that he got in New York, such as counselling and occupational therapy (OT), which she testified helped her son. When queried as to what services S.M. did not receive, D.N. vacillated between claiming that S.M. had not received any counselling and claiming that the counselling he had received was not what she thought and that her discussions with the OT who may have met with him a few times were not what she thought an OT should be doing. D.N. testified that no one knew her son had a disability. D.N. testified that when she speaks with anyone at the school, all she gets are "apologies." There is no supervision of the students at JAC. D.N. testified that her son has been bullied and that she has never seen the behavior he is now exhibiting. She said she is afraid for her son's return to school. However, she did not remove him from the school.

D.N. reiterated that the IEP dated September 25, 2023, that was attached to the respondent's response and the January 2024 IEP referenced at the hearing by respondent are "bogus." D.N. testified that her son will suffer irreparable harm if relief is not granted because her son is discriminated against, he is singled out, and no support is provided to him. D.N. testified that the legal rights underlying her claim are settled

because the school was to provide an IEP and they did not do so. On the "likelihood of prevailing on the merits," D.N. testified that she did not know how to answer that requirement. D.N. testified that when the equities are balanced, her son will suffer greater harm than respondent because he has lost valuable time based on being suspended for five days; in addition, he has lost his self-esteem, and because S.M. was not receiving the services listed on his IEP, he has suffered as a result.

For respondent

Respondent argues that the petitioner did not meet any of the four Crowe v. DeGioia, 90 N.J. 126 (1982), prongs required for the granting of emergent relief. Respondent argues that the petitioner has not shown how her son would be irreparably harmed. In referencing the September 25, 2023, IEP, respondent points to an email from Dr. Flecken to the petitioner dated September 28, 2023, discussing scheduling a next meeting. (P-1.) Respondent points out that in the IEP dated September 25, 2023, it states that S.M. is to receive occupational therapy two times monthly for thirty minutes and counseling services once a week for thirty-five minutes. Since petitioner argues that she was never present for the September 2023 IEP and that she never received it, presumably, she was never in agreement with it. Therefore, how can she now argue that the District has not complied with the IEP or that the very services in the IEP were never received by S.M?

Respondent read from the proposed January 29, 2024, IEP wherein it states "a discussion was held as to whether S.M. may not perform better in a self-contained setting, but D.N. did not feel that such a move would be beneficial at this time, it would have a negative impact on S.M.'s learning. He will therefore remain in an inclusionary setting for the 2024–2025 school year." Petitioner was present for this IEP; however, she is now requesting that her child be placed in a self-contained setting, which is what home schooling is. Notwithstanding the IEP issue, respondent argues that the petitioner has not set forth evidence that is responsive to the four prongs under N.J.A.C. 1:6A-12.1. The administrative issues she described regarding communications with the superintendent and other administrators and failing to receive documents requested do not rise to the high standard in Crowe for emergent relief. Additionally, petitioner's statement that S.M.

is not receiving the services in the IEP without showing the impact behaviorally or socially on him is vague, illusory, and conclusory.

Findings of Fact

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

1. S.M. is a ten-year-old fifth-grade student who resides within the District.

2. S.M. is eligible for special education and related services.

3. S.M. attends James A. Cotten Intermediate school operated by the Board.

LEGAL ANALYSIS

N.J.A.C. 1:6A-12.1(a) provides that the affected parent 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.

Emergent relief shall only be requested for specific issues, namely i) issues involving a break in the delivery of services; ii) issues involving disciplinary action, including alternate educational settings; iii) issues concerning placement pending the outcome of due process proceedings; and iv) issues involving graduation. N.J.A.C. 6A:14-2.7(r). Petitioner's Certification in Lieu of Affidavit or Notarized Statement of Petitioner Seeking Emergent Relief (Petitioner's Certification) sought to address section (i), issues involving break in service; and section (ii), disciplinary action, including manifestation determinations and determinations of interim alternate educational settings. While petitioner argues that her son was suspended for five days, there was nothing else that supports a break in service. However, the petitioner is requesting temporary home

instruction with continuation of OT and counseling. Therefore, I **CONCLUDE** that petitioner has established that the issue in this matter concerns a determination of interim alternate settings and therefore the petitioner has met one of the threshold issues required to be eligible for emergent relief.

The standards for emergent relief are set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), and are codified at N.J.A.C. 6A:3-1.6. The petitioner bears the burden of proving:

> 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. when the equities and the interests of the parties are balanced, the party seeking emergent relief will suffer greater harm than the respondent.
>
> [Crowe, 90 N.J. at 132–34.]

The petitioner must establish all the above requirements in order to warrant relief in their favor and must prove each of these Crowe elements "clearly and convincingly." Waste Mgmt. of N.J. v. Union Cnty. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008); D.I. & S.I. ex rel. T.I. v. Monroe Twp. Bd. of Educ., 2017 N.J. AGEN LEXIS 814, at *7 (October 25, 2017).

With regard to the first required prong, "irreparable harm" is defined as the type of harm that "cannot be redressed adequately by monetary damages." Crowe, 90 N.J. at 132–33. In addition, the irreparable harm standard contemplates that the harm be both substantial and immediate. Subcarrier Commc'ns v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997). However, pecuniary damages may sometimes be inadequate because of the nature of the injury or the right affected. Crowe, 90 N.J. at 133. For example, in Crowe, the Court determined neither an unwarranted eviction nor reduction to poverty could be compensated adequately by monetary damages awarded after a distant hearing. Ibid.

The threshold standard for irreparable harm in the area of education is showing that once something is lost, it cannot be regained. M.L. ex rel. S.L. v. Bd. of Educ. of Ewing, OAL Dkt. No. EDU 04949-09, Emergent Relief (June 15, 2009). Since money damages are not available in education cases and compensatory education is the only relief available, the analysis to be used is that if compensatory education provided at a later date cannot remedy the situation, then the harm is irreparable. Howell Twp. Bd. of Educ. v. A.I. & J.I. ex rel. S.I., OAL Dkt. No. EDU 05433-12, Emergent Relief (May 22, 2012). By only that as he was not able to verify the need for same.

Petitioner argues that her son would be irreparably damaged if he was to return to the school. He has been singled out because she has made complaints. In addition, she feels that no one at the school has empathy for S.M. D.N. contends that her son has digressed significantly. The support he got in New York with counselling and OT seems to differ at JAC. She contends that even if he is getting the services, i.e., counselling and OT, it is not enough. She thinks her son is being retaliated against, as he has been suspended two times in three weeks. Petitioner did not address any of the issues that lead to the suspension of S.M.

Petitioner has not presented any letter from an expert or a physician or documentary evidence to show that S.M. has been physically harmed or emotionally harmed because he has not received the allotted services in his IEP. Nothing was introduced by petitioner to indicate that remaining in school or not receiving the amount of support she claims he has not received would be irreparable. Such a claim was merely speculative. No evidence was proffered showing a significant interruption of educational services.

Respondent argued that there would be no irreparable harm to S.M. based on the administrative issues described by the petitioner regarding communications and failure to receive requested records from the respondent. In fact, the director of Special Services, Andrea Moore, at the Board, stood ready to hold a meeting with D.N. to discuss any issues with the IEP, which petitioner rebuffed at the hearing. S.M. remains in school. He was suspended five times for behavior-related issues.

"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 includes that the occurrence of harm is imminent (A. Hollander & Son, Inc. v. Imperial Fur Blending Corp., 2 N.J. 235, 249 (1949)), but not where a mere inconvenience may occur. B&S Ltd., Inc. v. Elephant & Castle Intern, Inc., 388 N.J. Super. 160 (Ch. Div. 2006). Regarding special education, irreparable harm is shown when there is a substantial risk of physical injury to the child or when there is a significant interruption or termination of educational services. M.H. ex rel. N.H. v. Milltown Bd. of Educ., 2003 N.J. AGEN LEXIS 1646 (June 18, 2003).

Petitioner did not provide any expert testimony, expert reports, medical evidence, documentation, or any other evidence to show that S.M. would be substantially and immediately harmed were he to remain in school.

I **CONCLUDE** that petitioner has not satisfied the first prong of the Crowe test for emergent relief.

The petitioner must also demonstrate that the legal right underlying her claim is settled. The District's responsibilities under the Individuals with Disabilities Education Act to provide S.M. with a free appropriate public education (FAPE) are well defined in state and federal law. 20 U.S.C. § 1415(k)(5)(B); N.J.A.C. 6A:14-4.2. After a child is determined eligible for special education, an IEP is put in place that establishes the rationale for the student's educational placement and serves as the basis for program implementation. N.J.A.C. 6A:14-1.3, -3.7. Every student receiving special education from a school district shall have an IEP in effect at the beginning of each school year. N.J.A.C. 6A:14-3.7(a)(1); 20 U.S.C. § 1414(d)(2)(A). The petitioner claims that no IEP meeting occurred on September 25, 2023. The certification of Andrea Moore states, "[A]t the September 25, 2023 team meeting, the team placed S.M. in an In-class Resource program for Other Health Impairment at the in-district school James A. Cotten Intermediate School." (Moore Certification at ¶ 5.) However, the petitioner submitted an email dated September 25, 2023, from the school psychologist stating that the IEP meeting could not be done because of a "power outage." (P-1.) On September 28, 2023, Mr. Flecken reached out to petitioner in an attempt to schedule an IEP meeting. On

October 22, 2023, a Mr. Patel from JAC texted the petitioner to see if there was any update regarding S.M.'s IEP meeting, to which D.N. responded, "I haven't received any updates regarding rescheduling or any iep [sic] updates yet." (P-1.) Respondent asserts that one did occur in October, but the petitioner disputes it as well. What is clear is that no IEP meeting was held on September 25, 2023. It is still not clear when and if an IEP meeting occurred in October.

Accordingly, I **CONCLUDE** that the petitioner has satisfied the second prong.

The third prong of the test for emergent relief requires that petitioner has a likelihood of success on the merits. The petitioner in her certification, papers, and testimony failed to argue that she had a likelihood of prevailing on the merits of the underlying claim at a full due process hearing. Petitioner did not understand what this meant and offered no response.

Respondent argues that it is unlikely that the petitioner will prevail on the merits of the underlying claim because they have submitted a Sufficiency Challenge to the court. Respondent's Challenge argues that the "petition lacks a sufficient description of the nature of the problem, any facts related to the problem, and a sufficient description of how the problem can be resolved." (Resp't's Br. at 3.) It may well be that as the facts in this matter are developed, respondent may prove that the complaint is contrary to 34 C.F.R. § 300.508(b) (2023); however, in the within matter, the burden of proof lies with the petitioner, not the respondent.

I CONCLUDE that the petitioner has not met the third prong of the Crowe test for emergent relief.

The final requirement for relief entails a balancing of the interests between the parties. Petitioner asserts that if S.M. is to return to school, she is afraid that he will be retaliated against. D.N. further asserts that the five days of suspension have resulted in the loss of valuable education and the loss of his self-esteem, and thus he would be better with home instruction. Respondent argues that S.M. still attends school and that the Board is ready and prepared at any time to have a discussion with the petitioner.

S.M. is ten years old. Keeping him at home, the most restrictive environment, will indeed cause him harm in the loss of opportunities to interact with his non-disabled peers, which is the goal of providing a free and appropriate education. Additionally, petitioner noted in her certification that she received a letter that S.M. will be attending a Summer Enrichment Program to avoid retention. (P-1.) D.N. notes that S.M. "has not received a failing grade." (Ibid.) He appears to be doing well in his academics and not showing the issues raised by D.N. I therefore **CONCLUDE** that the petitioner has not shown that on balance, S.M. will suffer greater harm.

ORDER

Having considered the parties' arguments and submissions, I **CONCLUDE** that the petitioner has failed to meet three of the four prongs of the standard for entitlement to emergency relief. As set forth above, all four prongs must be met in order to grant the motion for emergent relief. For the foregoing reasons, I **CONCLUDE** that 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. § 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.

March 19, 2024
DATE

JOAN M. BURKE, ALJ

Date Received at Agency: March 19, 2024

Date Mailed to Parties: March 19, 2024

JMB

APPENDIX

WITNESSES

For petitioner:

D.N., parent of student S.M.

For respondent:

Andrea Moore, Director of Special Services for respondent

BRIEFS/EXHIBITS

For petitioner:

Certification in Lieu of Affidavit or Notarized Statement of Petitioner Seeking Emergent Relief dated March 8, 2024

P-1 Petitioner's submission with attachments

For respondent:

Letter Brief in Response to Petition for Emergent Relief, dated March 14, 2024

Gonzalez, Maria [OAL]

From:	Gonzalez, Maria [OAL]
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Judith Lieberman, ALJ

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