312-22

New Jersey Commissioner of Education

Final Decision

L.H. and S.H., on behalf of minor children, L.H. and S.H.,

Petitioners,

v.

Board of Education of the City of Burlington, Burlington County,

Respondent.

Synopsis

Pro se petitioners L.H. and S.H. filed an emergent relief petition challenging the determination of the respondent Board that their children – who allegedy became homeless after the family lost their house in Burlington – are no longer eligible to receive a free public education in Burlington because they have been living with S.H.'s mother in Willingboro for several years. Petitioners accused school administrators of harassment and defamation in their handling of this residency matter. The Board contended that petitioners are no longer homeless and Willingboro has become the district of residence; accordingly, the children should be enrolled in the Willingboro school district.

The ALJ found, *inter alia*, that: the case was transmitted to the Office of Administrative Law (OAL) on an emergent basis, with the sole issue for determination being residency; petitioners' family had previously lived in Burlington, but lost their residence and attributed this to "unstable housing"; in October 2021, the Board received notification from the Willingboro Township Board of Education that the family had been residing in Willingboro and were no longer considered homeless; petitioners' children were allowed to finish out the 2021-2022 school year in Burlington, but thereafter the District required petitioners to enroll in the Willingboro school district. The ALJ concluded that petitioners are no longer domiciled in Burlington, and are now domiciled in Willingboro; further, petitioners failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982). Accordingly, the ALJ ordered the emergent relief petition denied, and affirmed the Board's residency determination.

Upon review, the Commissioner concurred with the ALJ that petitioners failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C*. 6A:3-1.6. However, the portion of the Initial Decision affirming the Board's residency determination was rejected, as such determinations are fact-specific and require evidence beyond what was submitted as part of the emergent proceedings. Accordingly, the matter was remanded to the OAL for further proceedings consistent with the Commissioner's decision.

312-22
OAL Dkt. No. EDU 08135-22
Agency Dkt. No. 231-9/22

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Respondent.

The record of this matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the Initial Decision of the Administrative Law Judge (ALJ) have been reviewed and considered. The parties did not file exceptions

Upon review, the Commissioner concurs with the ALJ, for the reasons detailed in the Initial Decision, that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

However, the record does not contain sufficient information to determine on the merits whether petitioners' children are domiciled in Burlington or whether they are entitled to a free public education in Burlington schools. Residency determinations are fact-specific and require evidence beyond what has been submitted as part of the emergent proceedings to date.

Accordingly, the portion of the Initial Decision denying petitioners' application for emergent relief is adopted for the reasons stated therein. The portion of the Initial Decision affirming the Board's residency determination is rejected, and this matter is remanded to the OAL for further proceedings consistent with this decision.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 14, 2022
Date of Mailing: November 16, 2022

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 08135-22

AGENCY DKT. NO. 231-9/22

L.H. AND S.H. ON BEHALF OF MINOR CHILDREN L.H. AND S.H.,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF BURLINGTON, BURLINGTON COUNTY,

Respondent.

L.H. and S.H., petitioners, pro se

Alicia D'Anella, Esq., for respondent, Board of Education of the City of Burlington (Parker McCay, P.A., attorneys)

Record Closed: September 26, 2022 Decided: September 27, 2022

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

STATEMENT OF THE CASE

Petitioners L.H. and S.H. filed and a perfected Petition of Appeal in the form of Emergent Relief with the Department of Education on or about September 19, 2022, from the determination of the Board of Education ("District" or "Board") of the City of Burlington ("Burlington") dated September 7, 2022, that their family is not domiciled in the City of Burlington and that her children (also named L.H. and S.H.) cannot continue to attend its schools.

PROCEDURAL HISTORY

The Department of Education Office of Controversies and Disputes transmitted the Request for Emergent Relief to the Office of Administrative Law (OAL) on or about September 19, 2022. The transmittal was in the form of an emergent application only and the sole issue to be decided in the case is residency. This matter was assigned to the undersigned for oral argument on the emergency request, which was held through Zoom technology, consistent with the OAL Covid-19 Emergency provisions, on September 26, 2022, and the record closed on that date.

FINDINGS OF FACT AND TESTIMONY

Petitioners appeal was accompanied by a writing that articulated their thoughts. The undersigned determined that petitioners were pro se and their writing warrants repeating for determination as evidence in the record. Without objection from the District this is their recitation.

L.H. and S.H. filed this complaint because they felt that the vice principal and/or school administrator used their position of power to bully, intimidate, harass and defame the family's character by belittling the children and family through knowingly lying over a petition of filing with the Department of Education division of controversies. This was directed by the school board, vice principal (Nicholas Rancani) and the school's attorney to file in a written letter, dated August 1,2022. Seven days after the decision was made

giving them twenty-one days to appeal the rule. L.H. and S.H. filed an appeal on August 16, 2022, mailing the appeal to Trenton, while making a copy of the form for their records. L.H. and S.H. received a letter to attend orientation for their daughter. Which was attended and they also set up the children's online school portal for the year.

On the first day of school, September 7, 2022, when the children arrived at school, they were denied entry by the school principal which stated to L.H. that they were dropped from enrollment. L.H. and S.H. returned them back home while they tried to resolve the matter with the Burlington City school district and their department of education.

The following day L.H. and S.H. received a hand delivered letter stating that they were being reported to the New Jersey Department of Children and Family. On September 9, 2022, a case worker from the New Jersey Department of Children and Family came to the home. A report was filed with their office claiming the children weren't enrolled in school and were truants. L.H. and S.H. showed her documents from the school portal showing that the children were enrolled in school and explained to her what was going on. Also, that day a truancy officer came from Willingboro Township, a district where the children never attended school.

A school board member from the City of Burlington came to where they "temporarily stay" to hand deliver a letter. L.H. and S.H. filed the complaint for several reasons including that the children were never unenrolled from school. L.H. and S.H. also claim that there was no truancy violation because the school denied entry and they did not have fifteen days of unexcused absences from school. They claim the District filed a false child endangerment complaint with the New Jersey Department of Children and Family. They allege that the "City of Burlington school district and vice principal Nicholas Rancani or someone acting on their behalf knowingly shared private, confidential and privileged information about L.H. and S.H.'s minor children without written consent".

They further allege that Vice Principal Nicholas Rancani used his position to "attempt to bully…and harass the family by knowingly misrepresenting how the appeal process worked and by filing a report with the New Jersey Department of Children and

Family. That deprived the children of a stable family environment. While bullying our family with tactics, Nicholas Rancani used his position as a school administrator to misrepresent his authority by denying access to school which are publicly funded. He knowingly misrepresented the school appeal process which was set by the New Jersey Department of Education."

They feel this action was taken due to their "ethnicity and their beliefs that I am disenfranchised person. Their action already caused social embarrassment to our family especially since L.H. is a volunteer coach on our son's youth football team."

L.H. and S.H. testified that they did not receive a lot of the documentation from the District. They conceded that they "lost the housing in Burlington due unstable housing" and moved to Willingboro to live with S.H.'s mother. However, when S.H.'s mother has "psychotic breaks" they have to stay away for a while.

Respondent claims that petitioners are seeking emergent relief on a residency matter involving their two children, L.H. and S.H., and they submitted a page of unsubstantiated attacks on the school employees who have been trying to assist them. In support of its opposition, and in light of the absence of facts in petitioners' pleadings, the Board submits and relies on the certification of Superintendent, Dr. John Russell. ("Russell Certification.")

Petitioners are known to the Board as a family having been homeless for several years. As they were residing in the City of Burlington when they became homeless, the children L.H. and S.H. were permitted to remain enrolled in the District's schools. In October of 2021, the Board received a copy of a letter that had been sent to petitioners by the Willingboro Township Board of Education ("Willingboro"). (Russell Certification ¶ 2.) The letter stated that petitioners had been residing at 52 Country Club Road in Willingboro ("Willingboro Property") for over a year and were no longer considered homeless. The letter directed the petitioners to withdraw their children from the District and register them in Willingboro. Id. Willingboro also provided the District with a copy of a McKinney-Vento Parent/Guardian Contact Report, dated May 5, 2021, from the

Gloucester County Special Services School District. (Id. at ¶ 3.) That report confirmed that petitioners had been residing at the Willingboro Property since 2018. (Id. at ¶ 3.) Based on the information received from Willingboro, the District informed petitioners that they were no longer considered to be "intransition" under the McKinney Vento Act in light of their stable residence at the Willingboro Property since 2018. (Id. at ¶ 4.) Petitioners were advised that their children could continue school in the District until December 23, 2021, but that the District would no longer be providing transportation. Id. Throughout the remainder of 2021, the District had multiple conversations with petitioners regarding their children's enrollment status through various staff members. (Id. at ¶ 5.) In early January of 2022, petitioner L.H. met with Dr. Russell to discuss the children's continued enrollment. (Id. at ¶ 6.) In light of the educational disruptions caused by the COVID-19 pandemic, Dr. Russell agreed to allow the children to continue attending school in the District through the end of the 2021-2022 school year. (Id. at ¶ 6.) Dr. Russell made clear to L.H. that the District would move forward with removal of petitioners' children at the conclusion of the 2021-2022 school year, should petitioners refuse to enroll them in Willingboro. Id. The children finished the school year enrolled in the District but did not receive transportation. Id. Petitioners never appealed or contested the loss of transportation. Id. Petitioners took no action to withdraw their children from the District or enroll them in Willingboro. Therefore, on July 20, 2022, the District sent petitioners an Initial Notice of Ineligibility, advising them that the children were no longer eligible to attend school in the District based on their residency in Willingboro, and advising of their right to request a hearing before the Board. (Id. At ¶ 7.)

Petitioners requested a hearing, and the Board held by committee on July 25, 2022. (Id. at ¶ 8.) During this hearing, petitioners admitted that they have been living at the Willingboro Property since 2019. Id. They confirmed much of the information in the Parent/Guardian Contact Report from the Gloucester County Special Services School District, specifically that the Willingboro Property was owned by S.H.'s parents, and that petitioners had moved in after S.H.'s father passed away in order to help take care of her mother. Id.

After the hearing, the District sent a Final Notice of Ineligibility to petitioners on August 1, 2022. (Id. at ¶ 9.) The letter was hand-delivered by a staff member, and petitioners acknowledged their receipt of same on August 4, 2022. Id. Because petitioners did not appeal the Board's final determination within twenty-one (21) days, the District sent a disenrollment letter to petitioners on September 8, 2022. (Id. at ¶ 10.) It was not until their children were unable to attend school on September 7th, well beyond the twenty-one (21) day timeframe, that petitioners filed their Petition. The Gloucester County Special Services School District provides McKinney-Vento related services to students from districts in Gloucester, Camden, Atlantic and Burlington Counties. While petitioners made this representation during the hearing, all of the documentation related to this case suggests petitioners actually lived at the Willingboro Property since 2018. Petitioners filed this Appeal with the Office of Controversies and Disputes on September 7, 2022. (Id. at ¶ 11.) They enrolled the children in Willingboro, where they are currently attending. (Id. At ¶ 12.)

FACTUAL DISCUSSION

Based upon the testimony of the witnesses and the documentary evidence presented, and with the opportunity to assess the credibility of the witnesses, **I FIND** the following:

L.H. and S.H. lived in Burlington City. In October of 2021, the Board received a letter that had been sent to petitioners by the Willingboro Township Board of Education stating that they had been residing at 52 Country Club Road in Willingboro and were no longer considered homeless. Petitioners were advised that their children could continue school in the Burlington City District until December 23, 2021, but that the District would no longer be providing transportation. In light of the educational disruptions caused by the COVID-19 pandemic, Dr. Russell allowed the children to continue attending school in the District through the end of the 2021-2022 school year. The children finished the school year enrolled in the Burlington City District. Thereafter, the District required petitioners to enroll in the school district of their domicile. **I** so **FIND** as **FACT** that

petitioners do not have domicile in Burlington City. **I** so **FIND** as **FACT** that petitioners are domiciled in Willingboro.

I must make credibility determinations with regard to these potentially material facts. A credibility determination requires an overall assessment of the witness' story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Daiichi Pharm. Co. v. Apotex, Inc., 441 F. Supp. 2d 672 (D.N.J. 2006). After carefully considering the testimonial and documentary evidence presented, and having had the opportunity to listen to the testimony and observe the demeanor of the witnesses, I am convinced that petitioners' testimony was credible but was somewhat exaggerated in some of the insignificant details.

Petitioners' testimony did not hang together or make sense in light of the mailings or some of the communications, and **I** so **FIND**. However, I do not believe that it was intentional. **I FIND** that the petitioners are attempting to provide a stable environment for their children, and **I** so **FIND** that as **FACT**.

These findings are further supported by the lack of the usual documentary indicia of residence and occupancy, such as utility bills, pay stubs, insurance, construction invoices. I concur with the District that the lack of production of this common evidence by the petitioners generate, at the very least, a rebuttable presumption that their production would not have helped her case.[1] Petitioners carry the burden of proving their domicile in Burlington City for eligibility for free public education there and their lack of documentary evidence or buttressing testimonial proof weighs against them in this case. See State by Comm'r of Transp. v. Council in Div. of Res. Dev., etc., 60 N.J. 199, 202 (1972) (litigant's failure to produce may be inferred to have been prompted by a conscious appreciation that the evidence would or might be hurtful to his position), citing Interchemical Corp. v. Uncas Printing & Fishing Co., 39 N.J. Super. 318, 328 (App. Div. 1956).

[1] Insofar as there has been no demonstration of bad faith or destruction, nor is this a jury trial, a formal sanction of an "adverse inference" is not appropriate, nor has it been sought. See, e.g., Bozic v. City of Wash., 912 F. Supp. 2d 257 (W.D. Pa. 2012).

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

The standards which must be met by the moving party in an application for emergent relief are embodied in N.J.A.C. 6A:3-1.6(b), and Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982). Emergency relief may only be granted if the judge determines that petitioner has proved all of the following:

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

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

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

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.

Irreparable Harm

Regarding the requirement that the petitioner must show that irreparable harm will result if emergent relief is not granted, "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 Communications v. Day, 229 N.J. Super. 634, 638 (App. Div. 1977) Continental Group v. Amoco Chemicals Corp., 614 F.2d 351 (D.N.J. 1980). 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/. 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., EDU 5433-12, Order Granting Emergent Relief (May 2, 2012).

In the petition of appeal, L.H. and S.H. failed to describe the irreparable harm that could result. Although I disagree that every speculative event satisfies the irreparable harm standard, I note that the action taken by the Board may in fact result in irreparable harm if the children were currently not in school and not being educated.

In New Jersey, the obligation of each school district to provide free and appropriate public education generally extends only to those children domiciled within the district and, therefore:

> [I]f in the judgment of the board the parent or guardian is not domiciled within the district, or the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child . . . the board may order the transfer or removal of the child from school. The parent or guardian may contest the board's decision before the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. The board of education shall, at the time of its decision, notify the parent or guardian in writing of his right to contest the decision within 21 days. No child shall be removed from school during the 21-day period in which the parent may contest the board's decision or during the pendency of the proceedings before the commissioner.
>
> [N.J.S.A. § 18A:38-1 (emphasis added).]

As petitioners stated, the Board "denied entry" of the children to the school. Even if we concede that the Board acted appropriately, the intent of the law is to prevent the exact situation that has resulted here: children, one of whom allegedly receives special education services, are not in school anywhere. I question if the Board ignored the procedure the Legislature established to protect children from losing academic ground during the course of this residency dispute.

I CONCLUDE that the action of the Board to refuse entry to children that do not live in the district is not a violation of N.J.S.A. § 18A:38-1 but will result in irreparable harm

to them if they are not being properly educated. Although the petitioners testified that the children are being educated in Willingboro, they intimated that one of the children is simply placed and not being properly educated.

The Legal Right Is Settled and Likelihood of Prevailing on the Merits

To grant a motion for emergent relief in advance of a plenary hearing, a judge also must be satisfied that "[t]he legal right underlying petitioner's claim is settled [and] that petitioner has a likelihood of prevailing on the merits of the underlying claims." N.J.A.C. 6A:3-1.6(b)(2), (3). Regarding whether the petitioner has a likelihood of prevailing on the merits of the underlying claim, there are no material facts in dispute that indicate petitioner's likelihood of success. In fact, the speculative assertions by petitioners of ethnicity and their beliefs that they are disenfranchised people are not at all persuasive. Petitioners' unsupported beliefs are not enough for this tribunal to conclude on unsupported speculation. As stated above, children have the right to a free and appropriate public education in the district in which they are domiciled. N.J.S.A. 18A:38-1(a). If, however, the parents cannot produce evidence to prove that the children actually are domiciled in the District, they will be responsible to pay "the resident tuition for the student prorated to the time of [each] student's ineligible attendance in the school district." N.J.S.A. 18A:38-1(b)(1).

Petitioners testified that they "lost their housing in Burlington City due to unstable housing". Also, they claim that they moved the children to Willingboro on a permanent basis but, never changed their permanent residence. Despite the explanation given by petitioners at oral argument, the fact remains that the documented address is now in Willingboro. **I CONCLUDE** that the action of the Board to refuse entry to children that do not live in the district is not a violation and I am not able to conclude that petitioners demonstrated that a legal right is settled, nor have they established a likelihood of prevailing on the merits.

The final prong of the above test is whether the equities and interests of the parties weigh in favor of granting the requested relief. The petitioners argue that at least one of the children has "special learning needs" and will suffer.

Respondent spoke of the harm to the taxpayers, who would essentially be funding the education of children who do not live in the District. This is a strong argument; the taxpayers trust the Board to make fiscally responsible decisions, to keep costs as low as possible, and to ensure continued strong academic performance by the students who live in the community.

It is not lost on me that both parents are loving and want to provide for their children. In the end, though, the children are most likely to suffer if not properly educated. Of course, parents want their children in the strongest academic environment that they can find.

ORDER

Accordingly, it is **ORDERED** that petitioners' emergent appeal from the Burlington City Board of Education residency determination is hereby **DENIED** for failure to satisfy Crowe v. DeGoia and the determination of the Burlington City Board of Education on residency is **AFFIRMED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 27, 2022 _____

DATE

DEAN J. BUONO, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

DJB/cb

APPENDIX

WITNESSES

For petitioners

L.H.

S.H.

For respondent

None

EXHIBITS

For petitioners

P-1 Gloucester County Special Services Migrant Education Program

P-2 Certified Mail Receipts

P-3 Pro Se Appeal

For respondent

R-1 Willingboro Public Schools correspondence, October 5, 2021

R-2 Gloucester County Special Services Migrant Education Program Report

R-3 Burlington City Public Schools correspondence, October 20, 2021

R-4 Burlington City Public Schools correspondence, July 20, 2022

R-5 Burlington City Public Schools correspondence, August 1, 2022

R-6 Burlington City Public Schools correspondence, September 8, 2022