State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION ON EMERGENT RELIEF

OAL DKT. NO. EDS 12349-18

AGENCY DKT. NO. 2019-28712

L.S. ON BEHALF OF Q.S.,

Petitioners,

v.

ATLANTIC CITY BOARD OF EDUCATION,

Respondent.

L.S., petitioner, pro se

Tracy L. Riley, Esq., for respondent (Law Offices of Riley & Riley, attorneys)

Record Closed: August 29, 2018 Decided: August 29, 2018

BEFORE **JOHN S. KENNEDY**, ALJ:

STATEMENT OF THE CASE

In this matter L.S. (petitioner) brings an action for emergent relief against the Atlantic City Board of Education (respondent) on behalf of Q.S., asserting that respondent has failed to provide door to door transportation for her minor son in his Individualized Education Program (IEP). Respondent opposes the relief requested and asserts that the petitioner signed the IEP and thereby agreed to the provisions regarding transportation.

PROCEDURAL HISTORY

Petitioner filed a request for emergent relief at the state Office of Special Education Programs (OSEP) on August 27, 2018. OSEP transmitted the matter to the Office of Administrative Law (OAL) on that date as a contested case seeking emergent relief for Q.S. The parties presented oral argument on the emergent relief on August 29, 2018, at the OAL offices in Atlantic City and the record closed on that date.

FACTUAL DISCUSSION

Petitioner asserts that her son, Q.S., who was born on August 31, 2005, should be transported to school by way of door to door pick up due to safety concerns. Q.S. has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and is eligible for special education services under the classification "other health impaired".

Q.S. has been attending school in Atlantic City since April 2018, when he and L.S. moved from Newark, New Jersey. His IEP from his school in Newark included door to door transportation. Respondent prepared an IEP in April 2018, which provided door to door transportation for Q.S. The April 2018, IEP was for the remainder of the 2017-2018 school year and ended on June 30, 2018.

On June 6, 2018, respondent sent L.S. a letter to her home address advising that an IEP meeting would be conducted on June 13, 2018. (R-2.) L.S. asserts that she did not receive the letter and did not attend the meeting. On June 15, 2018, L.S. signed and picked up the IEP from school and signed the consent to implement the IEP. (R-1.) L.S. claims that on June 15, 2018, she picked up a draft IEP and signed the April 2018, IEP. She was informed that transportation would be provided.

The June 13, 2018, IEP provides that Q.S. will attend the Pennsylvania Avenue School for the 2018-2019 school year. The closest school to his residence is the Martin Luther King Junior School (MLK). The IEP does not provide for transportation. MLK is less than two miles away from Q.S.'s home. Respondent will provide busing between

MLK and the Pennsylvania Avenue School but Q.S. will have to walk to MLK in the morning and home from MLK in the afternoon.

Petitioner asserts that Q.S. will be at risk because it is not safe for him to walk to and from MLK due to his ADHD. The route from home to MLK requires Q.S. to walk over two separate bridges spanning a waterway. Respondent argues that the need for transportation was considered at the IEP but was found to be not applicable.

LEGAL ANALYSIS AND CONCLUSION

N.J.A.C. 1:6A-12.1(a) provides that the affected parent(s), guardian, board or public agency may apply in writing for emergency relief. An emergency 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 and, if an expert's opinion is included, the affidavit shall specify the expert's qualifications.

Emergent relief shall only be requested for the following issues pursuant to N.J.A.C. 6A:14-2.7(r):

i. Issues involving a break in the delivery of services;

ii. Issues involving disciplinary action, including manifestation determinations and determinations of interim alternate educational settings;

iii. Issues concerning placement pending the outcome of due process proceedings; and

iv. Issues involving graduation or participation in graduation ceremonies.

In this case, petitioners assert that Q.S. should be provided door to door transportation out of a concern for his safety. It has never been asserted that there is an issue involving a break in the delivery of services. This is particularly true since the school year has not yet started and therefore Q.S. has not missed any school as a

result in the transportation issue. There is also no issue concerning placement pending the outcome of due process proceedings as neither the emergent relief application nor the petition for due process seek an alternative placement. There has also been no testimony that the transportation issue involves a disciplinary action or graduation. Therefore, I **CONCLUDE** it has not been established there exists an issue that would justify emergent relief.

Although it has been determined that there has been no issue raised that can justify emergent relief, it is nonetheless prudent to analyze the standards for emergent relief are set forth in Crowe v. DeGoia, 90 N.J. 126 (1982), and codified at N.J.A.C. 6A:3-1.6, one of the Department's regulations governing special education. These standards for emergent relief include irreparable harm if the relief is not granted, a settled legal right underlying a petitioner's claim, a likelihood that petitioner will prevail on the merits of the underlying claim and a balancing of the equities and interest that petitioner will suffer greater harm than respondent.

Petitioner bears the burden of satisfying all four prongs of this test. Crowe, 90 N.J. at 132–34. First, there has been no showing of irreparable harm. While L.S. asserts that Q.S. will be in physical danger as a result of having to walk to MLK, there has been no indication that Q.S. has been unable to successfully navigate his way to the school. However, this tribunal need not wait until harm comes to the child to understand the potential safety issue which surrounds the proposition of requiring a student with ADHD to walk approximately one mile to school over two separate bridges.

The next prong of the above test to be addressed is whether there is a settled legal right underlying petitioner's claim. It is well-settled law that a parent's failure to object to a proposed IEP within fifteen days of written notice of same results in the implementation of the proposed IEP by the District. See T.P. and P.P. ex rel. J.P. v. Bernards Twp. Bd. of Educ., EDS 6476-03, Final Decision (March 12, 2004), <http://njlaw.rutgers.edu/collections/oal/> (if petitioners were unclear or dissatisfied with some detail in the proposed IEP, they were obliged to express that and demand modifications). Specifically, in Carlisle Area School v. Scott P. By and Through Bess P., 62 F.3d 520, 583, n.8 (3d Cir. 1995), the court held that:

> At the threshold, we note that this argument may have been waived. The parents apparently did not contest the appropriateness of the 1991–92 IEP at the time it was offered. . . . Because appropriateness is judged prospectively, we have declined the parents' invitation to play "Monday morning quarterback" by judging the 1991–92 IEP in hindsight. Although we do not construe the parents' failure to press their objections to the IEP when it was offered as a waiver, it casts significant doubt on their contention that the IEP was legally appropriate . . . .
>
> [Citation omitted.]

Similarly, in Fuhrmann ex rel. Fuhrmann v. East Hanover Board of Education, 993 F.2d 1031, 1040 (3d Cir. 1993), the Third Circuit explicitly held that "the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date."

Here, petitioners had legal right to reject the June 13, 2018, IEP within fifteen days of the meeting. See N.J.A.C. 6A:14-2.3(h)(3)(ii) (proposed IEP will be implemented after fifteen days unless the parent requests mediation or a due process hearing). Petitioners took no action to reject any aspect of the IEP within fifteen days. Even if it is believed that L.S. thought she was signing a draft of the IEP and not the actual IEP to be implemented for the 2018-2019 school year, she did not object to the IEP until she filed her petition for emergent relief on August 27, 2018. Thus, I **CONCLUDE** that petitioner has not established a settled legal right for the relief requested.

The next prong of the emergent relief analysis is whether there is a likelihood of success on the merits of petitioner's claim. As set forth above, the law regarding challenges to an IEP is clear that such challenges are to be made within fifteen days of written notice of the proposed IEP. As a result, petitioner has not established a likelihood of success on the merits to overcome the test for emergent relief to be granted.

For the foregoing reasons, the petitioner has not demonstrated entitlement to emergent relief. The relief sought is therefore **DENIED**.

ORDER

Having concluded that the petitioner has not satisfied at least two of the four requirements for emergent relief, 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.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 Programs.

August 29, 2018
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: _____

Date Sent to Parties: _____

JSK/dm

APPENDIX

EXHIBITS

For Petitioner:

None

For Respondent:

R-1 IEP, dated June 13, 2018

R-2 June 6, 2018, letter advising of IEP meeting