



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION DENYING

EMERGENT RELIEF

OAL DKT. NO. EDS 9251-18

AGENCY DKT. NO. 2018-28400

M.F. on behalf of C.F.,

Petitioner,

v.

HAMILTON TOWNSHIP

BOARD OF EDUCATION,

Respondent.

M.F. on behalf of C.F., petitioner, pro se

Michael Pattanite, Jr., Esq., for respondent, Hamilton Township Board of Education (Leneck, Socey, Formidoni, Giordano, Cooley, Lang & Casey, attorneys)

Record Closed: July 2, 2018

Decided: July 3, 2018

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

By a request for emergent relief petitioner seeks to have her daughter, C.F. placed in the Katzenbach School, Ewing, New Jersey, which is a specialized school for

the hearing impaired, for Extended School Year (ESY). Respondent, Hamilton Township Board of Education (Hamilton or District) opposes this request and argues that free appropriate public education (FAPE) is being provided. This matter was transmitted to the Office of Administrative Law (OAL) on June 29, 2018, for an emergent relief hearing and a final determination in accordance with 20 U.S.C.A. §1415 and 34 C.F.R. §§300.500 to 300.587, and the Director of the Office of Administrative Law assigned me to hear the case pursuant to N.J.S.A. 52:14F-5. Oral argument on emergent relief was scheduled for July 2, 2018. Oral argument was held and arguments were made by both, the petitioner and the respondent, and the record closed. Exhibits were submitted by the parties.

FACTUAL DISCUSSION

For purposes of deciding this request for emergent relief, the following facts which form the basis for the determination herein, are not in dispute. Petitioner, C.F. is a sixteen-year-old child residing within the Hamilton Township School District and attends the Hamilton High School West, as a rising tenth grade student. She is classified as multiply disabled, due to the disabling conditions of cerebral palsy and auditory impairment. She receives special education services through attendance in the multiply disabled program, in an individualized manner specifically tailored to her unique needs. The student also receives access to her general education peers at Hamilton High School West.

Previously, C.F. attended the Mercer County Special Services School District from May 2012 until February 20, 2018. By consent amendment dated February 22, 2018, the student was brought back to Hamilton High School West to participate in the multiply disabled program outlined above. The parent specifically requested the student return to the District in February 2018 and felt the student needed to be challenged academically and socially.

The student's program addresses her speech/language, communication impairment, occupational, and physical therapy needs. Her "stay-put" program is delineated in the April 13, 2018 IEP. On that same date, the team met to discuss the

student's progress during the initial forty-five days in her new program. The Child Study Team (CST) and related service providers noticed progress in the C.F.'s academics and related service goals. Also, during the meeting, the parents expressed concerns regarding the student's adaptive and social skills, and further requested an FM auditory system to be used with her speech therapist.

The parents requested the team consider Katzenbach for the student's continued placement; however, the team rejected this placement because the student is not proficient in sign language, and there is no educational basis to conclude she will be successful in the deaf community where communication by sign language is common. The team also noted the parent had recently requested a return to District from MCSSD, and in essence had not given the District program a fair opportunity. The team agreed to consider Katzenbach as a placement for the 2018-2019 school year after consultation with the District's audiologist. Petitioner consented to the continuation of the student's program at Hamilton High School West at the conclusion of the April 13, 2018, meeting.

On June 6, 2018, the team met for the student's annual review meeting and the parents again requested Katzenbach citing socialization and the sign language program. The District's June 6, 2018 IEP proposed ESY for C.F to take place at the District and to continue support for the skills learned at the District during the school year as well as a consultation with the District's Teacher of the Deaf, and an Augmentive Assistive Technology evaluation.

The parents rejected the proposed IEP by the District, inclusive of ESY 2018 programming and filed a petition for due process, mediation only request which was received by the District on June 19, 2018. The mediation request invoked the "stay-put" provisions of the Code, and the student's program is that stated in the April 13, 2018, IEP. Also, the mediation request states C.F. will allegedly receive social benefits and academic benefits from Katzenbach. Additionally, the parent argues the student's Least Restrictive Environment (LRE) is actually the out-of-district placement Katzenbach, which has no general education students. No educational support or expert report is attached to the mediation request or petition for emergent relief.

Petitioner M.F. and through her advocates, Sharon DeVito and Kristin Sabo, argue that C.F. is being disadvantaged by not being educated in the Katzenbach hearing impaired setting. In fact, they claim the assistive device utilized by C.F. to communicate is inadequate and she is being “left behind.” It is their desire for C.F. to be “able to walk down the hallway” and communicate with her friends signing and using American Sign Language (ASL).

Respondent argues that, the mediation request and emergent application fails to address how a student who does not primarily communicate via sign language will be better educated in a school relying almost exclusively on sign language as a form of communication. Respondent contests the instant emergent application must be denied on the basis that petitioner cannot meet the stringent standard required for equitable emergent relief. Petitioner has not set forth a valid basis, as set forth within the Code to allow for emergent relief. Additionally, the emergent application does not address, and cannot meet, the four-prong standard necessary to receive emergent relief. As a result, the District requests the emergent application be denied, and dismissed as a matter of law.

Accordingly, I **FIND** no legitimate legal or factual basis to allow C.F. to participate in the out-of-district placement at the Katzenbach School.

LEGAL DISCUSSION

N.J.A.C. 1:6A-12.1(a) provides that the affected parent(s), guardian, district or public agency 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 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.

Here, the petitioner arguably seeks an order to place the minor student in an out-of-district placement pending the outcome of the mediation/due process hearing, as the petitioner believes the student is being left behind. Therefore, analyzing the application in the most favorable light to the movant, **I CONCLUDE** it has been established the issue concerns placement pending the outcome of the mediation/due process hearing.

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 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.) a balancing of the equities and interests that the party seeking emergent relief will suffer greater harm than the respondent. The petitioner bears the burden of satisfying all four prongs of this test. Crowe, 90 N.J. at 132-34. Arguably, the standard is a high threshold to meet and I will address each prong separately.

Irreparable Harm

Here, there has been no showing of irreparable harm to C.F. First, the petitioner argues irreparable harm is established because there is a tremendous risk of her being

left behind in her education. Harm is irreparable when it cannot be addressed with monetary damages. Id. This standard contemplates that the harm also be both substantial and immediate. Subcarrier Commc'ns, Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997). Irreparable harm has been described as “substantial injury to a material degree coupled with the inadequacy of money damages.” Judice's Sunshine Pontiac, Inc. v. General Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976) (citation omitted).

More than a risk of irreparable harm must be demonstrated, petitioner must make a “clear showing of immediate irreparable injury,” or a “presently existing actual threat; (an injunction) may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by common law.” Continental Group, Inc. v. Amoco Chemicals Corp., 614 F. 2d 351, 359 (D.N.J. 1980). Again, there is no evidence to any irreparable harm.

In light of the aforementioned, I **CONCLUDE** that the petitioner has not met her burden of establishing irreparable harm.

The Legal Right Is Settled

The petitioner has not demonstrated that the law favors her. Indeed, the law supports the Board’s position for continued placement pending the conclusion of the mediation/due process hearing. When the parties are unable to agree to a placement, a proposed placement by the District is effective to provide free appropriate public education (FAPE) in the least restrictive environment (LRE). If it is ultimately determined that the proposed placement does not meet FAPE and LRE, petitioner is entitled to seek compensatory education. Here, the placement was agreed to by the parties.

The District is obligated to educate the student in the least restrictive environment, with a program that is individually tailored to the student’s unique educational needs. Andrew F. v Douglas County School Dist. RE-1, 137 S. Ct. 968, 999 (2017). There is no well-defined legal right to an out-of-district placement, when the

proponent of the placement does not submit educational expert support for the sought placement. Furthermore, there is no well-defined legal right to obtain an out-of-district placement through an emergent application, when a district program is available and asserted as providing a free and appropriate education.

Thus, I **CONCLUDE** petitioner has met the second prong of the emergent relief standard in that a legal right underlying her claim is settled.

Likelihood of Prevailing on The Merits

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 assertions by petitioner are not persuasive. While petitioner believes the best opportunity for her daughter is in the Katzenbach School, this tribunal cannot conclude such result will benefit C.F. This tribunal will not compel the District without having the opportunity to contest that conclusion at a mediation/due process hearing.

Therefore, I **CONCLUDE** petitioner does meet the third prong of the emergent relief standard.

The Petitioner Will Suffer Greater Harm Than the Respondent

The next prong of the above test to be addressed is whether the equities and interest of the parties weigh in favor of granting the requested relief. The petitioner argues that C.F. will suffer greater harm if emergent relief is not granted. This argument is without merit and speculative. Here, the petitioner seeks an order to place the minor student at the Katzenbach School, pending the outcome of the due process hearing. However, albeit minimal evidence regarding the proposed out-of-district or interim placement was presented by the petitioner. The petitioner failed to demonstrate any potential harm C.F. would suffer and the Board successfully presented evidence that it was providing C.F. with FAPE. It is the undersigned's belief that if the requested emergent relief is granted, C.F. would suffer harm through a disruption to her education

and socialization. Thus, I **CONCLUDE** that the C.F. would suffer greater harm if the requested relief was granted.

ORDER

Having concluded that the petitioner has not satisfied any of the four requirements for emergent relief, the petitioner's request for emergent relief is **DENIED**.

DECISION AND ORDER

For the reasons stated above, I hereby **ORDER** that petitioner's application for emergent relief for C.F. to be placed in the Katzenbach School, Ewing, New Jersey, which is a specialized school for the hearing impaired, for Extended School Year (ESY) and the upcoming 2018-2019 school year is hereby **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.



July 3, 2018 _____

DATE

DEAN J. BUONO, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

mph

APPENDIX

WITNESSES

For petitioner:

M.F.
Sharon DeVito
Kristin Sabo

For respondent:

None

EXHIBITS

For petitioner:

P-1 Submissions from the emergent application

For respondent:

R-1 April 13, 2018 IEP
R-2 February 22, 2018 IEP
R-3 June 6, 2018 Proposed IEP
R-4 Emergent Application