



*State of New Jersey*  
OFFICE OF ADMINISTRATIVE LAW

**FINAL DECISION**

**EMERGENT RELIEF**

OAL DKT. NO. EDS 07900-18

AGY DKT. NO. 2018 27988

**A.L. and I.L. o/b/o L.L.,**

Petitioner

v.

**TEANECK BOARD OF EDUCATION,**

Respondent

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**Beth A. Callahan**, Esq., for Petitioner Callahan & Fusco, LLC, attorneys

**Isabel Machado**, Esq., for respondent (Machado Law Group, attorneys)

Record Closed: June 15, 2018

Decided: June 18, 2018

BEFORE **ELISSA MIZZONE TESTA**, ALJ:

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

Petitioners filed a Motion for Emergent Relief with the Office of Special Education Policy and Procedure (OSEP) in the New Jersey Department of Education (DOE). The contested matter was transmitted to the Office of Administrative Law

(OAL), pursuant to N.J.A.C. 1:6A-12.1, where it was filed on June 4, 2018, to be heard on an emergent basis.

Petitioners seek immediate out of district placement at a residential facility as the minor student, L.L., poses a danger to self and others. As to the due process petition, petitioners argue that L.L. has been denied FAPE and is seeking therapeutic out of district placement and compensatory education. Only the Motion for Emergent Relief is to be considered at this time.

The request for Emergent Relief was heard on June 15, 2018.

### **FACTUAL BACKGROUND**

L.L. was born on September 5, 2006 and was adopted by I.L. and A.L. at age three from Ethiopia. L.L.'s legal initials are N.L. and L.L. and is gender fluid. L.L. is diagnosed with Neurodevelopmental Disorder: Intellectual Disability, or at best, Borderline Intellectual Functioning. L.L. is also diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"), Reactive Attachment Disorder, Oppositional Defiant Disorder, and Post Traumatic Stress Disorder (PTSD). L.L. is currently classified and eligible for Special Education and Related Services from the Teaneck Board of Education under the classification of "Other Health Impaired". L.L. has been classified as eligible for such services since April 1, 2011.

The most recent Individualized Education Program ("IEP") was held on April 17, 2018. The Child Study Team ("CST") proposed placing L.L. in the Language Disabilities Class at Thomas Jefferson Middle School for the 2018-2019 school year. Pursuant to the proposal, L.L. would receive Pull-Out Resource Replacement Instruction in Language Arts. Additionally, L.L. would continue to receive the following services; group counseling once per week; individual counseling once per week; speech and language services once per week; the services of a 1:1 aide; and Extended School Year Services.

It should be noted that on April 16, 2018, just prior to the IEP meeting, Petitioners provided a letter from Julie N. Saperstein, LSW, L.L.'s treating therapist, to the CST on L.L.'s behalf. The letter was to inform the CST that the years of outpatient psychological therapies, medication management, and in home services, across a multitude of therapeutic modalities, had resulted in little to no improvement. In sum, L.L. required an out of district, specialized, residential, special education/therapeutic setting. The recommendation was for the Villa Santa Maria School, a Therapeutic Residential School in Cedar Crest, New Mexico.

At the April 17, 2018 IEP meeting the District also proposed that L.L. undergo a complete evaluation, including multiple evaluation plans which the respondent claims were presented to the petitioners and refused.

On May 3, 2018, the Teaneck Police Department was called to the Petitioners' home because L.L. had run outside the house and was throwing rocks at the house. L.L. ran down the street and the police officers were able to detain L.L. and return L.L. back to the house. Petitioners allege that L.L. has had multiple incidents of aggression, dangerous, and inappropriate behavior. On May 9, 2018, petitioners, through their attorney, provided the District with a second letter from Ms. Saperstein, who indicated that "L.L.'s low distress tolerance, high frustration, aggression and irritability, emotional dysregulation, impulsivity, and poor judgment...all come together to create a dangerous daily occurrence in which L.L. and the family are at risk."

In response to the serious concerns raised by Ms. Saperstein, the District immediately wanted to conduct a risk assessment of L.L. to ensure her safety, which they allege was refused by the Petitioners. They further allege that a copy of the police report which was provided to the District by petitioners, indicated that there were no further problems after L.L. was returned home and that the New Jersey Department Family Services ("DCPP") did not have to be contacted because it was deemed not to

be an emergency. Further, there had been no request made for hospitalization or for a local screening center.

L.L. attended school on May 3 and 4, 2018; and further review by the District of L.L.'s attendance record showed that L.L. was not absent from school the week before, during, or after the May 3, 2018 incident. At oral argument on June 15, 2018, counsel for petitioners and respondent were unable to present any incidences involving L.L. at the home or at the school which had occurred post May 3, 2018 to the present. Counsel for petitioner mentioned that there may have been some minor incidences at school. For example, petitioners were contacted by the school because L.L had brought "slime" into school which is not permitted.

In sum, the petitioners have alleged that L.L.'s symptoms have increased, behavior has regressed and this combination has manifested in escalating problems and safety concerns. Further, L.L. is a danger to self and family, and the school district has failed to address any of parents' concerns, including but not limited to the privately conducted Neuropsychological Report Fairleigh Dickenson University Center for Psychological Services in November and December 2017 which does not recommended an out of district residential placement and the recommendations set forth by Ms. Saperstein, the Social Worker.

### **LEGAL ANALYSIS AND CONCLUSION**

Initially, it must be determined if petitioners are entitled to request Emergent Relief.

A party may only request Emergent Relief for the following reasons, in accordance with N.J.A.C. 6A:14-2.7(r)1:

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

- ii. Issues involving disciplinary action, including manifestation determinations and determinations of interim alternate education settings;
- iii. Issues concerning placement pending outcome of due process proceedings; and
- iv. Issues involving graduation or participation in graduation ceremonies.

Petitioners claim issues concerning placement pending outcome of the due process proceedings. They allege that the minor child, L.L. poses a danger to self and others and must be placed in an out of district residential placement. Therefore, petitioners have met the threshold question of being entitled to seek Emergent Relief.

The New Jersey Supreme Court has set forth a four-prong test for determining whether an applicant is entitled to Emergent Relief. Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982) (enumerating the factors later codified at N.J.A.C. 6A:14.2-7(s)1.

The four factors (“the Factors”), include:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying 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.

The moving party bears the burden of proving each of the Crowe elements “clearly and convincingly.” Waste Mgmt of N.J. v. Union County Util. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

A review of the four factors is in order.

Factor One. The petitioner will suffer irreparable harm if the requested relief is not granted. I cannot reach this conclusion. Petitioners’ assertion of irreparable harm is speculative at best. Petitioners cite to a May 3, 2018 incident as a basis for their claim that L.L. requires immediate placement at a residential therapeutic placement. From what has been presented, this level of an incident is an isolated incident and too remote in time to conclude that L.L will suffer irreparable harm if not immediately placed at the residential facility, the Villa Santa Maria School. While I appreciate petitioners un-wavering and heart felt concerns for their child’s well-being, this placement does not need to be imminent and can be addressed with the underlying due process petition. Petitioners posit that should L.L. not be immediately placed at the residential facility, L.L.’s conduct will increase and worsen and get to a point where L.L. can longer be helped. It seems apparent that Petitioners are more concerned of L.L. becoming a danger to self and to others in the future if not immediately placed at a residential facility. These concerns are speculative presently and do not meet the standard of irreparable harm set forth in Crowe.

Factor Two. The legal right underlying petitioners’ claim is settled. The legal right underlying the claim is well settled. Respondent is required to provide FAPE, and petitioners can certainly bring a claim as to the same; which they have done. On May 9, 2018, the petitioners, through their counsel, filed for due process because they allege that the District program is inappropriate to meet L.L.’s individualized needs and L.L. requires a small structured therapeutic residential environment.

Factor Three. Petitioners have a likelihood of prevailing on the merits of the underlying claim. The underlying claim of failure to provide a FAPE is set forth in the

due process petition, claiming, among other things, that L.L. has a right to FAPE and, to date, the District has failed to place L.L. in an appropriate residential placement. I have determined that there is an IEP and has been implemented. Perhaps that IEP does not provide FAPE. Perhaps it does. This underlying claim cannot be determined in this forum. There are considerable factual disputes regarding the education of L.L. which cannot adequately be addressed in an emergent petition and will necessarily require a plenary hearing.

Factor Four. 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 will not be granted. At present, if required to do this analysis, the equities would be in equipoise. Maintaining L.L. in the current placement at the local school district and maintaining the status quo pending a full due process hearing will ensure that neither the District or L.L. will experience irreparable harm.

Petitioners' cannot satisfy Crowe.

I **CONCLUDE** that petitioners' request for Emergent Relief should be **DENIED**.

**ORDER**

It is hereby **ORDERED** that petitioners' 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.



June 18, 2018

DATE

ELISSA MIZZONE TESTA, ALJ

Date Received at Agency

June 18, 2018

Date Mailed to Parties:

sej



**APPENDIX**

List of Moving Papers

For Petitioner:

Request for Emergent Relief

Petitioners Brief in Support of Emergent Relief with attached Exhibits

For Respondent:

Brief in Opposition to Request for Emergent Relief with Attached Exhibits