



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION DENYING

EMERGENT RELIEF

OAL DKT. NO. EDS 08645-20

AGENCY DKT. NO. 2021-32079

L.S. AND J.S. ON BEHALF OF C.S.,

Petitioners,

v.

**MIDDLESEX BOROUGH BOARD
OF EDUCATION,**

Respondent.

Amy Pujara Esq., for petitioners (DiFrancesco, Bateman, Kunzman, Davis, Lehrer and
Flaum, attorneys)

Rita Barone, Esq., for respondent (Purcell, Mulcahy and Flanagan, attorneys)

Record Closed: September 22, 2020

Decided: September 24, 2020

BEFORE **SUSAN L. OLGATI**, ALJ:

STATEMENT OF THE CASE

This case arises out of a request for emergent relief, bought by petitioners, L.S. and J.S. on behalf of C.S., (petitioners) seeking respondent, Middlesex Borough Board of Education (Board)

to provide immediate transportation services to and from the SEARCH School's (SEARCH), Ocean campus during the pendency of the due process proceeding.

PROCEDURAL HISTORY

On September 17, 2020, petitioners filed a complaint for due process and a request for emergent relief with the N.J. Department of Education, Office of Special Education Policy and Dispute Resolution. On the same date, the emergent petition was transmitted to the Office of Administrative Law (OAL) for an emergent hearing.¹ Oral argument on emergent relief was held on September 22, 2020, and the record closed.

FACTUAL DISCUSSION

C.S. is a six (6) year old student currently eligible for special education and related services. The parties were involved in a dispute concerning special services for C.S. during the 2019-2020 school year. On or about October 14, 2019, the parties entered into a settlement agreement which provided for C.S.'s placement at SEARCH in Marlboro, N.J. for the 2019-2020 academic year through the 2021-2022 academic year. The settlement agreement further provided that C.S. would attend Extended School Year (ESY) for the summer 2020 and 2021 at the Marlboro and/or Ocean campus. For the duration of the agreement, petitioners agreed to be responsible for the transportation of C.S. to and from the SEARCH placement.

In or about February 2020, petitioners were informed that SEARCH's Marlboro Campus would be closing effective June 30, 2020, and that C.S. would be placed at the Ocean campus. The Ocean campus is further away from petitioners' home than the Marlboro campus. In February 2020, petitioners met with respondent's Director of Special Services and C.S.'s case manager to discuss the closing of SEARCH's Marlboro campus and its impact on C.S.'s program. At that time petitioners' requested respondent to provide transportation to the Ocean campus. Upon closing of the Marlboro campus, petitioners transported C.S. to the Ocean campus for ESY. Petitioners continue to transport C.S. to the

¹ The Transmittal from the NJ Department of Education, Office of Special Education Policy and Dispute Resolution notes that only the request for Emergent Relief is sent at this time.

Ocean campus in the 2020-2021 academic year. Petitioners contend that due to the longer commute, C.S. has developed behavioral problems which make their continued transport to and from the Ocean campus unsafe. They further contend that the closing of the Marlboro campus constitutes a change in circumstance of the terms of the settlement agreement entered into. Petitioners also contend that respondent's offer to provide them with a harness to assist in the safe transport of C.S. will not address the safety issues because the harness would be too restrictive on C.S. As a result, petitioners seek the Board to provide C.S. with transportation to and from the Ocean campus along with an aide to support him during the commute.

Respondent argues that petitioners voluntarily waived their right to transportation services and this tribunal should not vacate the settlement agreement entered into by the parties.

LEGAL ANALYSIS AND CONCLUSIONS

N.J.A.C. 1:6A-12.1(a) provides that the affected parent may apply in writing for emergent relief. N.J.A.C. 6A:14-2.7(r) further provides that emergent relief shall only be requested for the following issues:

- 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.

At oral argument, petitioners argued that this matter properly falls within the category of issues for which emergent relief may be requested because the move of C.S. from Marlboro to the Ocean campus impacts his placement. More specifically, petitioners contended that C.S. is not being provided with a 1:1 classroom aide at the Ocean campus. The issue of C.S. being

provided a 1:1 classroom aide, however, is the subject of petitioner's due process petition. The due process petition has not yet been transmitted to the OAL.² Therefore, I **CONCLUDE** that petitioners have not demonstrated that this matter involves an issue in which emergent relief may be requested.

Even if petitioners had demonstrated that this matter is the proper subject of a request for emergent relief, they must also satisfy the standards for entitlement to emergent relief. These standards are set forth in Crowe v. DeGioia, 90 N.J.126, 132-134 (1982), and are codified at N.J.A.C. 6A:3-1.6.

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 petitioner must prove each of these elements by clear and convincing evidence. Garden State Equal. v. Dow, 216 N.J. 314, 320 (2013) (citation omitted).

Irreparable Harm

As to the first element, 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, 299 N.J. Super. 634, 638 (App. Div. 1977).

² See footnote #1. Additionally, the Transmittal lists the nature of the emergent relief sought as "Petitioners obo student seek immediate provision of transportation to and from the SEARCH school."

Petitioners contend that irreparable harm is established because C.S.'s developing behavioral issues while being transported by his parents to the Ocean campus pose extreme danger and possible physical harm to C.S. and others. While I am not unsympathetic to petitioners' genuine concerns regarding the safety issues posed, these issues could be addressed through monetary damages. Petitioners could hire an aide to assist in their transport of C.S. and if they are successful in the due process proceeding, they can obtain reimbursement/damages for their costs incurred. Additionally, while petitioners' fears for their son's safety are sincere, they are at this point somewhat speculative. Petitioners have rejected respondent's offer of a harness to assist in the transport of C.S. seemingly without receiving or viewing the harness or having any details relating to its nature or use³.

In light of the above, I **CONCLUDE** that the petitioners have not met their burden of establishing irreparable harm.

Settled Legal Right and Likelihood of Prevailing on the Merits

Next, to obtain emergent relief, the petitioners must demonstrate that the legal right underlying their claim is settled and there is a likelihood of prevailing on the merits. Petitioners contend their legal right to related services in the form of transportation services is well settled. Petitioners however not only seek transportation services but also seek for this tribunal to set aside the 2019 settlement agreement between the parties due to changed circumstances. Respondent contends that New Jersey has a strong policy in favor of settlements.

Petitioners also contend that respondent's refusal to provide transportation services to C.S. deprives him of his rights under the Individuals with Disabilities Education Act (IDEA), and thus they are likely to prevail on the merits. Respondents argue that petitioners waived their rights by voluntarily agreeing to provide for C.S.'s transportation to SEARCH. It further argues that C.S.'s individual circumstances have not changed, rather, only the location of his school has changed and petitioners' subsequent dissatisfaction with the agreement does not affect its enforceability.

³ No testimony was offered or taken at the oral argument on the emergent hearing. Issues relating to the safe transport of C.S. to and from SEARCH need to be fully developed at the due process hearing in this matter.

Here, there are factual issues concerning the claimed changed circumstances, including the increased commute to the Ocean campus and C.S.'s developing behavioral issues, that must be fully developed at the due process/plenary hearing in this matter to determine if petitioners' legal right is settled and if they have a likelihood of success on the merits.

For the above reasons, I **CONCLUDE** that petitioners have not met their burden of establishing that their legal right is settled or that they have a likelihood of prevailing on the merits of the underlying claim.

Balance of Equities and Interests

The final element for obtaining emergent relief is whether petitioners can demonstrate that when balancing the equities and interests of the parties, they will suffer the greater harm if the relief is not granted. Petitioners argue that the serious safety and health concerns facing C.S. during his commute to and from school weigh in their favor. Respondent argues that the interests of governmental entities in entering into settlement agreements to avoid the unpredictability of litigation, and the burden on both school districts and judicial resources if such agreements were to be vacated, particularly without the benefit of a plenary hearing, weigh in its favor.

As previously indicated, while I am not unsympathetic to petitioners' safety concerns, the balancing of the equities and interests of the parties weighs in favor of the Board as a ruling to the contrary, absent a full evidentiary hearing, would undermine the certainty of settlement agreements entered into by the Board and could open the floodgates for additional claims.

Accordingly, I **CONCLUDE** that petitioners have not met their burden of demonstrating that they would suffer the greater harm if the requested relief was not granted. Based on the foregoing, I further **CONCLUDE** that petitioners have failed to meet the required elements for emergent relief.

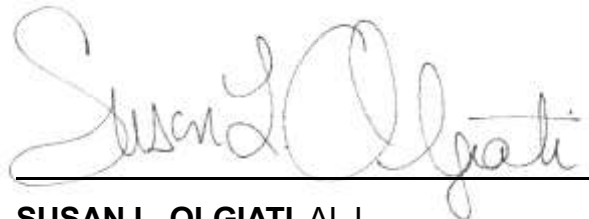
ORDER

For the reasons stated above, I hereby **ORDER** that petitioners' application for emergent relief seeking the Board to provide immediate transportation services to and from the SEARCH Ocean campus during the pendency of the due process proceeding, 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. § 1415(f)(1)(B)(i). If the parents 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 Policy and Dispute Resolution.

September 24, 2020 _____

DATE



SUSAN L. OLGATI, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

SLO/vj

APPENDIX

DOCUMENTS RELIED UPON

Petitioners' letter brief in support of the application for emergent relief, September 16 ,2020, and Certification of L.S., September 8, 2020.

Respondent's letter brief in opposition to the applicant for emergent relief, September 21, 2020.

Petitioners' letter brief in response to Respondent's opposition, September 22, 2020, and Certification of L.S.,[undated].