

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

EMERGENT RELIEF

OAL DKT. NO. EDS 10030-18

AGENCY DKT. NO. 2019/28459

J.O. and C.O. ON BEHALF OF M.O.,

Petitioner,

v.

WEST ORANGE BOARD OF EDUCATION,

Respondent.

J.O and C.O., petitioner, pro se,

Joseph D. Castelluci, Jr., Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: July 20, 2018

Decided: July 23, 2018

BEFORE **JULIO C. MOREJON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, J.O. and C.O. on behalf of M.O., seek an order by way of emergent relief to have the respondent, West Orange Board of Education, (District) provide M.O. individual speech language therapy three times weekly, physical therapy, and occupational therapy twice weekly for the Extended School Year (ESY) program, as contained in the IEP.

On July 9, 2018, petitioner filed a request for emergent relief with the Office of Special Education Policy and Procedure (OSEPP), alleging a break in the delivery of

services of M.O.'s ESY program, and seeking emergent relief pursuant to N.J.A.C. 6A-12.1 and N.J.A.C. 6A:14-2.7(r). The matter was transferred to the Office of Administrative Law (OAL) and received at the OAL on July 13, 2018, as an emergent and contested matter.

Oral argument was heard on the motion on July 20, 2018.

FACTUAL SUMMARY

The essential facts in this matter are not dispute. Petitioners are the parents of M.O., an eight-year-old student who resides within the District and is classified as eligible for special education and related services under the classification "Autistic." (See June 13, 2018 IEP attached to the District's brief as "Exhibit A."). On December 2017, M.O. commenced attending Celebrate the Children (CTC), which is a state approved private school located in Denville, New Jersey. M.O. will continue attending CTC for the upcoming school year, 2018-2019 and for his ESY services. Prior to attending CTC, M.O. attended Reed School.

On June 13, 2018, the District's Child Study Team (CST) and Petitioners met for triennial reevaluation of M.O., where the CST offered an IEP, which, offered the following services, and placed M.O. at CTC for his ESY services for summer 2018 (July 2, 2018 through August 31, 2018):

1. Special Class Multiple Disabilities at a rate of 5 times per week for 240 minutes;
2. Integrated Group Speech and Language Therapy, Occupational Therapy, and Physical therapy all at a rate of 2 times per week for 30 minutes per session;
3. Individual Behavior Intervention Consultation at a rate of 2 times per week for 60 minutes per session;
4. Individual Behavior Intervention services at a rate of 4 times per week for 120 minutes from July 2 through July 6, 2018;

5. Individual Behavior Intervention services at a rate of 3 times per week for 120 minutes from July 11 through August 10, 2018;
6. Individual Behavior Intervention services at a rate of 4 times per week for 120 minutes from August 13 through August 31, 2018, and
7. transportation services.

Petitioner's do not not dispute the IEP that was implemented on June 13, 2018, which provides for individual services. Petitioner requests individual services for M.O. under the ESY as program, as is provided during the school year. ¹ Petitioner argued that M.O. will regress in the current ESP program. ² The basis for this argument is that M.O. regressed in his development during ESY while attending Reed Academy. Petitioner is satisfied with M.O.'s progress so far under the IEP at CTC. Petitioner's sole argument for emergent relief is that individual services are not provided.

The District argues that there has been no break in services, and that Petitioners acknowledge that their only issue with the ESY services given to M.O. is that those services are not given at the same rate and frequency as they were provided to him over the 2017-2018 school year. Thus, this is truly a dispute over M.O.'s ESY services offered in the IEP rather than a dispute over a break in services, rendering the instant Request improper and incapable of relief.

The District argues further that both the IDEA, with its federal and state implementing regulations, and governing case law on this issue do not require public

¹ Petitioner argued for the first time that the ESY program is no M.O., with Behavioral Intervention Consultation (7/2/18-7/6/18); Behavioral Intervention Services-Individual (7/2/18-7/6/18 and 7/11/18-8/10/18). The same is provided by EPIC. Counsel for the District agreed to speak with the Director of Special Services and report back regarding the status of said services.

² The IEP stated under "Concerns of the Parent", that the District acknowledged Petitioner's concerns regarding M.O.'s regression during his break from the regular school year. The IEP states that the CST case manager reported that M.O.'s previous program (Reed Academy) noted M.O.'s behavioral regression after ESY ended to the start of the school year. The District was to obtain behavioral data taken before and after spring break to observe if behavioral regression occurred, and that the current IEP would be finalized once the data was provided. The IEP states that CTC provided behavioral data to the District on June 9, 2018. Said data demonstrated that M.O. experienced a behavioral decrease after a short break and not regression. The IEP states that M.O. does benefit from a consistent schedule with structure, and intensive instruction, sensory, communicative and behavioral supports. The IEP provides further that the District was to provide M.O. with pre-ESY and post-ESY services within the home to support M.O. as he transitions into classroom (Id., at page 9).

school districts to maintain the same level of programming as provided during a school year because ESY services are meant to address regression and recoupment.

DISCUSSION

N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief. The regulation instructs in salient part:

A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):

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 the 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.

[N.J.A.C. 6A:3-1.6(b).]

Petitioner has the burden of establishing each of the above requirements in order to warrant relief in his favor.

Turning to the first criteria, it is well settled that relief should not be granted except "when necessary to prevent irreparable harm." Crowe, 90 N.J. at 132. In this regard, harm is generally considered irreparable if it cannot be adequately redressed by monetary damages. Id. at 132-33. In other words, it 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). See New Jersey Dep't of Environmental Protection v. Circle Carting, Inc., 2004 N.J. AGEN LEXIS 968 (April 2, 2004) (finding no irreparable harm in connection with the

revocation of respondent's solid waste license in that financial loss is generally insufficient to demonstrate this requirement). The moving party bears the burden of proving irreparable harm. More than a risk of irreparable harm must be demonstrated. Continental Group, Inc. v. Amoco Chemicals Corp., 614 F. 2d 351, 359 (D.N.J. 1980). The requisite for injunctive relief is 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." Ibid. (citation omitted.)

In the instant matter, there has not been a showing of "immediate irreparable injury" or a "presently existing actual threat", if the District does not provide M.O. with individual speech language therapy three times weekly, physical therapy, and occupational therapy twice weekly for the ESY program, as contained in the IEP. There has not been a showing of a "break in services" by the District because of their decision to provide M.O. with the same services provided in the IEP, but in a group setting. Petitioner did not present any expert reports or findings to corroborate their argument that the ESY offered by the District in the IEP resulted in a break in services from the IEP.

Indeed, the ESY offered by the District acknowledged Petitioner's concerns of Petitioner's claim of M.O.'s behavioral regression during his prior ESY program, and the district offered individual Behavioral intervention services. Petitioner's concern that the ESY program did not provide individual services was not proven by Petitioner.

Although not raised in the original application for Emergent Relief, Petitioner C.O, argued that the District had not provided M.O. individual behavioral intervention services required by the ESY. In an attempt to substantiate her argument that said individual services were not provided, Petitioner presented copies of e-mail communications between Petitioner C.O., the CST and EPIC. As a result of Petitioner's argument, the undersigned requested that the District provide additional information concerning Petitioner's argument that the District failed to provide individual behavioral intervention services required by the ESY.

On July 23, 2018, counsel for the District provided a Supplemental Certification of Kristen Gogerty, (Ms. Gogerty) Director of Special Services for the District. Ms. Gogerty's certification reveals that M.O.'s in-home services were never discontinued but were delayed due to staffing issues with EPIC and a request for a new BCBA by Petitioner. Ms. Gogerty's certification acknowledges that the District recognizes that M.O. is owed twenty-five hours for behavior intervention and four hours for BCBA services, which are to be immediately provided by EPIC.

As a result of the District's representations as contained in Ms. Gogerty's Certification, **I CONCLUDE** that Petitioner has failed to show a break in services, and therefore emergent relief is not available.

For the foregoing reasons, **I CONCLUDE** that Petitioner has not demonstrated that M.O. will suffer irreparable harm if the requested relief is not granted.

I CONCLUDE that Petitioner has failed to demonstrate a likelihood of prevailing on the merits of the underlying claim. No evidence was offered to conclude that M.O. will regress in his development if not provided individualized services. To the contrary, the IEP reflects that the CST did consider Petitioner's concerns regarding M.O.'s alleged regression and concluded that it did not have sufficient data to confirm Petitioner's concern but did offer individual behavioral consultations and services.

As such, it is not clear that Petitioner has a likelihood of prevailing on the merits of the underlying claim. I must **CONCLUDE** that Petitioner has failed to demonstrate the likelihood of success on the merits of the case. For the same reason **I CONCLUDE** that Petitioner has failed to demonstrate that they will suffer greater harm than Respondent will suffer if the requested relief is not granted.

CONCLUSION

I CONCLUDE that Petitioner is not entitled to emergent relief because the proofs submitted fail to establish all of the necessary elements to grant emergency relief under N.J.A.C. 6A:3-1.6(b). Specifically, there has been no showing of irreparable harm by

Petitioner, no showing of the likelihood of prevailing on the merits, and no showing that Petitioners will suffer greater harm than Respondent will suffer if the requested relief is not granted. Therefore, I **CONCLUDE** that Petitioners have not met their burden of proof that they are entitled to such relief in this emergent application.

ORDER

It is hereby **ORDERED** that Petitioner's request for emergent relief to have the District provide M.O. individual speech language therapy three times weekly, physical therapy, and occupational therapy twice weekly for the ESY program, as contained in the IEP is **DENIED**.

This decision on application for emergency relief resolves all of the issues raised in the due process complaint; therefore, no further proceedings in this matter are necessary. This decision on application for emergency relief is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. § 1415(i)(2). 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 23, 2018

DATE

JULIO C. MOREJON, ALJ

Date Received at Agency

July 23, 2018

Date Mailed to Parties:

July 23, 2018

lr