

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

ON EMERGENT RELIEF

OAL DKT. NO. EDS 00451-20

AGENCY DKT. NO. 2020-31117

S.W. ON BEHALF OF M.W.,

Petitioner,

v.

**JACKSON TOWNSHIP BOARD
OF EDUCATION, OCEAN COUNTY,**

Respondent.

Robert Morello, Esq., for petitioner (Hoagland, Longo, Moran, Dunst & Doukas, LLP, attorneys)

Marc H. Zitomer, Esq., for respondent (Schenck, Price, Smith & King, LLP, attorneys)

Record Closed: January 15, 2020

Decided: January 16, 2020

BEFORE **JACOB S. GERTSMAN**, ALJ t/a:

STATEMENT OF THE CASE

Petitioner S.W. on behalf of minor student M.W., seeks emergent relief ordering the immediate return of M.W. to participation on the Jackson Liberty High School wrestling team. Respondent Jackson Township Board of Education, Ocean County (District) responded that petitioner has not set forth any emergent situation that would require reinstatement to the team, nor established any of the elements necessary for emergent relief to be granted.

PROCEDURAL HISTORY

On January 10, 2020, petitioner filed a petition for emergent relief with the Office of Controversies and Disputes of the New Jersey Department of Education (Department). On January 13, 2020, the emergent matter was transmitted to the Office of Administrative Law (OAL). Opposition was filed by the District on January 14, 2020. Supplemental filings were made by petitioner on January 14, 2020, and by respondent on January 15, 2020. Oral argument was held on January 15, 2020 and the record closed. The motion for emergent relief is now ripe for consideration.

FACTUAL DISCUSSION AND FINDINGS

I **FIND** the following as **FACT**, as it is undisputed:

1. M.W. is a twelfth-grade student, currently placed at Jackson Liberty High School, and a special education student receiving services through the District.
2. M.W.'s Individualized Education Program (IEP) classifies him as Other Health Impaired.
3. The statement of transition planning in the IEP states the following under student's strength, interests and preferences: "M.W.'s favorite class is history and his most difficult class is math. M.W. enjoys football and wrestling. He participates on a recreation football team and is on the school wrestling team."¹ [Brief of Rob Morello, Esq. (Morello Brief), Exhibit A at 10.]
4. The IEP lists "participate on a community sports team" and "participate in club/sport (wrestling)" under community experiences in the statement of appropriate measurable post-secondary goals and transition services. (Id. at 11-12.)

¹ While the IEP uses the student's full first name, his initials are used here for privacy purposes.

5. M.W. practiced with the wrestling team on December 5, 6, 9, and 10, 2019, ² but did not attend the practice on December 11, 2019.
6. During the December 11, 2019, practice, wrestling coach, Michael Eddy (Eddy) had a telephone conversation with M.W. to discuss his absence and his status with the team.³
7. On December 19, 2019, M.W. approached Eddy during the school day, where he apologized for his actions on the phone conversation. During the conversation, Eddy informed M.W. that notwithstanding his apology, he was not permitted to return as a member of the team.
8. Subsequent to M.W.'s conversation with Eddy, petitioner S.W., M.W.'s mother, spoke to Eddy and the school principal, seeking M.W.'s reinstatement on the wrestling team. Her requests were denied.
9. By letter dated January 1, 2020, (Id. Exhibit C), S.W. invoked the formalized appeal process outlined in the Jackson Liberty High School student handbook. (Id. Exhibit D.)
10. There are approximately one and one-half months remaining in the wrestling season for the 2019-2020 school year.

LEGAL ANALYSIS AND CONCLUSION

The regulations governing controversies and disputes before the Commissioner of Education provide that “[w]here the subject matter of the controversy is a particular course of

² M.W. additionally took part in a joint weight certification activity on December 7, 2019, and was excused from the practice immediately following the activity.

³ The details of the conversation between M.W. and Eddy are in dispute. Petitioner asserts that on the phone call, “the student indicated ‘I can’t do this’ in reference to his ability to cope with the upsetting nature of his teammates/ classmates conduct in making him feel uncomfortable.” (Morello Brief at 2.) Eddy claimed that “M.W. answered the telephone and told me that he quit the team because he did not like his teammates and he did not want to wrestle anymore.” (Certification of Michael Eddy at ¶16.) However, I make no determination as to the credibility of either statement as the issue of the circumstances leading to M.W.’s departure from the team are not relevant to the instant matter.

action by a district board of education . . . the petitioner may include with the petition of appeal, a separate motion for emergent relief or a stay of that action pending the Commissioner's final decision in the contested case.” N.J.A.C. 6A:3-1.6(a). The regulations further provide that the Commissioner may “[t]ransmit the motion to the OAL for immediate hearing on the motion.” N.J.A.C. 6A:3-1.6(c)(3).

At such a hearing, the petitioner must show that he or she satisfies the following four standards:

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.

N.J.A.C. 6A:3-1.6(b); citing Crowe v. DeGioia, 90 N.J. 126 (1982). The petitioner must prove each of these standards by clear and convincing evidence. Garden State Equal. v. Dow, 216 N.J. 314, 320 (2013) (citation omitted).

1. Irreparable Harm

As the Supreme Court explained in Crowe, 90 N.J. 126, “[o]ne principle is that a preliminary injunction should not issue except when necessary to prevent irreparable harm.” Id. at 132 [citing Citizens Coach Co. v. Camden Horse R.R. Co., 29 N.J. Eq. 299, 303 (E. & A. 1878)]. Indeed, the purpose of emergent relief is to “prevent some threatening, irreparable mischief, which should be averted until opportunity is afforded for a full and deliberate investigation of the case.” Ibid. [quoting Thompson ex rel. Bd. of Chosen Freeholders v. Paterson, 9 N.J. Eq. 624, 625 (Sup. Ct. 1854)].

The threshold standard for irreparable harm in education is showing that once something is lost, it cannot be regained. M.L. ex rel. S.L. v. Bd. of Educ. of Ewing, EDU 4949-09, Initial Decision (June 15, 2009), modified, Acting Comm'r (June 15, 2009), <http://njlaw.rutgers.edu/collections/oal/>. M.W. is a high school senior seeking reinstatement to the wrestling team for the final one and one-half months of the season. Notwithstanding petitioner's argument that his participation is required, it is clear that the inability to participate in the remaining portion of his last season as a student would leave him no future opportunity to participate as a member of the team. Accordingly, I **CONCLUDE** that the harm to M.W. is irreparable.

2. Settled Legal Right

Next, emergent relief "should be withheld when the legal right underlying plaintiff's claim is unsettled." Crowe, 90 N.J. at 133 (citing Citizens Coach Co., 29 N.J. Eq. at 304–05). Petitioner's argues that "[t]he settled legal right is M.W.'s entitlement to a Free Appropriate Public Education [FAPE] and the District's corresponding obligation to offer opportunities reasonable calculated to enable M.W. to make progress appropriate in light of his circumstances." See also, Andrew F. ex rd. Joseph F. Douglas City School District. Re-1, 137 S. Ct. 988 (2017) (Morello Brief at 5.) This argument is without merit. In the instant matter, the sole issue is whether the requirements of the IEP, which classifies M.W. as "Other Health Impaired", require his participation on the wrestling team. Upon examination of the IEP, it is clear that it does not. Wrestling is mentioned in the IEP's statement of transition planning as an activity that M.W. "enjoys" and as a "community experience" under "appropriate measurable post-secondary goals and transition services." In fact, M.W.'s participation on a "community sports team," over which the District does not maintain control, is also mentioned as a "community experience" in the IEP. Finally, the IEP details annual measurable academic and/or functional goals, which include benchmarks or short-term objectives for reading, writing, mathematics, and social/emotional/behavioral. Participation on the wrestling team is not included. Based on the foregoing, I **CONCLUDE** that M.W.'s participation on the wrestling team is not required by the IEP.

Additionally, petitioner argues that the District's action violates M.W.'s right to participate in athletics as set forth in the student handbook. (Morello Brief at 5.) Respondent counters that

“participation in athletics and extracurricular activities is a privilege, not a right.” See, Joye v. Hunterdon Cent. Reg’l High Sch. Bd. Of Educ., 176 N.J. 568, 611 (2003). [Brief of Marc H. Zitomer, Esq. (Zitomer Brief) at 7.]

Petitioner’s argument conflates the appeal process for an alleged violation of the handbook, with the appeal of the alleged failure to provide FAPE as required by M.W.’s IEP. As noted above, the sole issue here is whether the District violated the provisions of M.W.’s IEP. Any appeal of petitioner’s claim that the District has violated the provisions of the handbook must proceed pursuant to the provisions set forth therein. Accordingly, I **CONCLUDE** that these arguments are not ripe for determination in this proceeding.

Based on the foregoing, I **CONCLUDE** that the petitioner failed to meet her burden to show a well-settled legal right underpins her claim.

3. Likelihood of Success on the Merits

S.W. on behalf of M.W. has not demonstrated that they are likely to succeed on the merits of the underlying claim. Under this emergent relief prong, “a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits.” Crowe, 90 N.J. at 133 [citing Ideal Laundry Co. v. Gugliemone, 107 N.J. Eq. 108, 115–16 (E. & A. 1930)]. This typically “involves a prediction of the probable outcome of the case’ based on each party’s initial proofs, usually limited to documents.” Brown v. City of Paterson, 424 N.J. Super. 176, 182–83 (App. Div. 2012) [quoting Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 397 (App. Div. 2006)].

Here, as found above, M.W.’s IEP does not require his participation on the wrestling team. Further, any appeal of an alleged violation of the student handbook can only proceed pursuant to the process set forth in the handbook. Accordingly, I **CONCLUDE** that the petitioner has failed to meet her burden to demonstrate a reasonable probability of success on the merits.

4. Balancing the Equities

The fourth and final emergent relief standard involves “the relative hardship to the parties in granting or denying relief.” Crowe, 90 N.J. at 134 [citing Isolantite Inc. v. United Elect. Radio & Mach. Workers, 130 N.J. Eq. 506, 515 (Ch. 1941), mod. on other grounds, 132 N.J. Eq. 613 (E. & A. 1942)]. The District argues that granting the motion would have a negative impact on the Jackson Liberty Wrestling Team, including causing the coach to “lose the team.” (Zitomer Brief at 8.) This argument is wholly irrelevant. As Respondent conceded at oral argument, if the IEP did in fact require M.W.’s participation on the wrestling team, his reinstatement would be granted irrespective of any effect on the team. However, the instant matter does not concern any alleged violations of the student handbook with regard to M.W.’s participation on the wrestling team, it only concerns whether his IEP was violated. As found above, it does not.

Petitioner argues that only M.W. would be harmed by a denial of the motion for emergent relief. While petitioner has met her burden to demonstrate that the denial of the motion for emergent relief would cause irreparable harm to M.W., she has failed to meet the burden to both show a well-settled legal right underpinning her claim, or to demonstrate the likelihood of success on the merits. Accordingly, I **CONCLUDE** that the District will suffer greater harm should emergent relief be granted than the petitioner will suffer if the requested relief is not granted.

Based upon the foregoing, I **CONCLUDE** that the petitioner has failed to meet all of the requirements set forth in N.J.A.C. 6A:3-1.6(b) warranting an order for emergent relief in this matter.

ORDER

Accordingly, I **ORDER** that the petitioner’s application for emergent relief be and hereby is **DENIED**.

No further issues remain upon resolution of this emergent matter; 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

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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.

January 16, 2020

DATE

JACOB S. GERTSMAN, ALJ t/a

Date Received at Agency:

January 16, 2020

Date Mailed to Parties:

January 16, 2020

JSG/nd

c: Clerk OAL-T