State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION DENYING MOTION FOR EMERGENT RELIEF

OAL DKT. NO. EDS 02893-20

AGENCY DKT. NO. 2020-31330

Y.G. AND Y.G. ON BEHALF OF E.G.,

Petitioners,

v.

JACKSON TOWNSHIP BOARD OF EDUCATION,

Respondent.

_____

Michael I. Inzelbuch, Esq., for petitioners

Alexandra A. Stulpin, Esq., for respondent, (Comegno Law Group, P.C., attorneys)

Record Closed: March 6, 2020 Decided: March 9, 2020

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter arises under the Individuals with Disabilities Education Act, 20 U.S.C. § 1415 et seq. Petitioners, Y.G. and Y.G. on behalf of E.G., filed an emergent relief application dated February 26, 2020, seeking to compel the respondent, Jackson

Township Board of Education (the Board or the District) to make immediate application to an appropriate therapeutic program placement and immediate behavioral services by Brett DiNovi and Associates. The petition was transmitted to the Office of Administrative Law on February 28, 2020.[1] Oral argument on the request for emergent relief was held on March 4, 2020. At petitioner's request, the record remained open until March 6, 2020, to allow for completion and receipt of a new psychological evaluation of E.G. conducted by the Board.[2]

FACTUAL DISCUSSION

E.G. is a fourteen-year-old girl who has been found eligible for Special Education and Related Services pursuant to the classification of "Emotionally Disturbed."

She registered in the Jackson School District on October 19, 2018. E.G. has attended private/religious schools and has been provided with home instruction.[3] Attempted out of district placement at several schools have been unsuccessful. E.G. has a history of non-compliance and refusal to attend school.

Dr. Sajjad A. Zaidi, is a psychiatrist who has been treating E.G. since August 2017. In a September 13, 2018, letter, Dr. Zaidi indicated that E.G. presented with a "combination of Autistic Spectrum Disorder, Disruptive Mood Dysregulation Disorder, Specific Learning Disorder (Dyslexia) by history, Oppositional Defiant Disorder and Attention Deficit Hyperactivity Disorder (combined type), Sensory issues are also noted." Dr. Zaidi noted that "due to the severity of her diagnosis, I feel that [E.G.] belongs in a small, therapeutic setting that has the behavioral, emotional, social and academic components she needs for the multiple diagnosis." Dr. Zaidi recommended an out-of-district placement to better meet E.G.'s growing needs and to secure her future academic success. Id.

[1] The transmittal notice indicates that the underlying due process matter is to remain at "SPDR."

[2] The final date of testing for this evaluation was conducted on March 5, 2020.

[3] Petitioner contends that E.G. has been provided with home instruction since 2018.

Since 2018, E.G. has had numerous evaluations conducted by the District and independent evaluations conducted at request of her parents.

In a letter dated November 1, 2019, Dr. Zaidi noted that "given the fact that [E.G.] has not been successful in various school settings, including her most recent attendance at Sinai School[4]…" he recommended that she "be considered for boarding school, as they may have a more supervised and structured environment, which would be beneficial in addressing [E.G.'s] specific academic and behavioral needs." Id.

As a result of an IEP meeting held on February 5, 2020, E.G.'s current agreed upon placement is an out of district placement at Bankbridge Regional School (Bankbridge). Pursuant to the current IEP, E.G. is to have individualized transportation, with an aide, to and from school and a Board Certified Behavioral Analyst (BCBA) will assist E.G. at home in transitioning into Bankbridge, specifically to help desensitize her anxieties around driving far distances. The projected start date of the current IEP was February 20, 2020.

In a March 3, 2020, certification, Dr. Zaidi opined that it is his firm's opinion that E.G. "requires immediate residential placement for educational reasons." He further opined that "should E.G. not receive same she will continue to significantly regress, and, in all likelihood, develop additional school avoidance/phobia and her known and existing issues will only worsen." Id.

Consistent with the recommendation of Dr. Zaidi petitioners argue that E.G. requires immediate placement in a therapeutic residential program and that the District's failure to agree to an educational residential placement constitutes a denial of FAPE (free and appropriate public education).

Respondent, argues that petitioners' desire to place E.G. in a residential program is unrelated to her academic performance and based entirely on her medical need.

[4] Based on the record before me, it appears that E.G. was admitted to the Sinai School in September 2019. At oral argument on the application for emergent relief the parties were not in agreement regarding the nature/reason for E.G.'s discontinuation at that school.

Respondent contends that no evaluation conducted by either the District or independently conducted on behalf of petitioners have recommended a residential placement for E.G. Rather, the only recommendation for a residential placement is from E.G's treating psychiatrist. Respondent further argues that petitioners have not yet given the February 5, 2020, IEP, which provides for an out of district placement, an opportunity to determine whether it would provide E.G. with FAPE.

LEGAL ANALYSIS AND CONSLUSION

N.J.A.C. 1:6A-12.1(a) provides that a parent, guardian, board or public agency may apply in writing for emergency relief. An applicant for emergency relief must set forth in the application the specific relief sought and the specific circumstances they contend justify the relief sought.

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.

N.J.A.C. 6A:14-2.7(r)1.

The petitioners seek on an emergent basis, immediate application to and placement of E.G. in an appropriate therapeutic residential program.[5] Accordingly, I **CONCLUDE** that pursuant to N.J.A.C. 6A:14-2.7(r)1, this matter involves issues in which emergent relief may be requested.

[5] An appropriate therapeutic residential program for E.G. has not yet been identified.

Emergency relief may be granted pursuant to N.J.A.C. 1:6A-12.1(e), if the judge determines from the proofs that the following conditions have been established:

> i. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> ii. The legal right underlying the petitioner's claim is settled;
>
> iii. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> iv. 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.

See also N.J.A.C. 1:1-12.6, and Crowe v. DeGioia, 90 N.J. 126 (1982), which echoes the regulatory standard for this extraordinary relief. It is well established that a moving party must satisfy all four prongs of the regulatory standard to establish an entitlement to emergent relief.

Irreparable Harm

Petitioner argues that E.G. will suffer irreparable harm if she is not immediately placed in a therapeutic residential school. In support of their argument, petitioner relies on the March 3, 2020, certification of Dr. Zaidi, in which he opines that should E.G. not receive an immediate residential placement "she will continue to significantly regress, and, in all likelihood, develop additional school avoidance/phobia and her known and existing issues will only worsen."

Despite Dr. Zaidi's opinion, petitioners have failed to demonstrate that the alleged harm to be suffered by E.G. is either immediate or irreparable. As an initial matter, Dr. Zaidi's opinion that E.G. will "in all likelihood" develop additional school avoidance/phobia and that her existing issues will only worsen is speculative and relates to future harm that may likely occur to E.G. Additionally, the recommendation of Dr. Zaidi for immediate therapeutic residential placement, is not, at this time, supported by any other medical or educational professional or evaluation conducted of E.G. As a result, the Board is in disagreement with the recommendation for residential placement.

Moreover, in Komninos v. Upper Saddle River Bd. of Educ., 13 F.3d. 775 (3d Cir. 1994), the Third Circuit expressed doubt that "regression" per se constitutes irreparable harm and noted that "[i]t is our understanding that, in general, the skills lost in regression may be recouped, but that the disabled take longer than the non-handicapped to regain their previous achievements. Id. at 780. (citations omitted.) See also, L.V. v. Montgomery Twp. Sch. Dist. Bd. of Educ., No. 13-2595, 2013 U.S. Dist. LEXIS 78662 (D.N.J. June 5, 2013) (where petitioner failed to carry her burden of showing that the child will suffer anything more than possible regression and loss of skills.)

Accordingly, I **CONCLUDE** that based on the record before me, petitioners have not, at this time, met their burden of establishing irreparable harm.

Settled Legal Right of Underlying Claim

While petitioners' legal right to FAPE is well settled, the question of the appropriateness of the requested therapeutic residential placement presents issues of material facts that are in dispute, therefore, petitioners' legal right to residential placement upon an application of emergent relief is not well settled.

Residential placement can be appropriate, the analysis must focus on whether full-time placement may be "considered necessary for educational purposes, or whether the residential placement is a response to medical, social, or emotional problems that are segregable from the learning process." Kruelle v. New Castle County School Dist., 642 F.2d 687, 693 (3d Cir. 1981). A determination that a child needs residential placement requires a careful analysis of where the child's educational and non-education needs begin and end, and, thus, ordinarily requires a plenary hearing. See, D.M. o.b.o. A.M. v. Mountain Lakes Board of Education, OAL Dkt. No. EDS 11066-16 (August 2, 2016). See also, S.N. and G.N o.b.o. I.N. v. Washington Twp. Board of Education, EDS 7992-10 (August 6, 2010) (The issue of FAPE must be determined through testimony and documentation.)

In support of their legal argument for the emergent relief requested, petitioners cite to and rely on the following cases: Township of Bloomfield Bd. of Education v. S.C. o.b.o.

T.M., 2006 WL 2320029 (D. N.J. September 22, 2005), G.D. and G.D. o.b.o. A.D. v. Brick Twp. Board. of Education, EDS-2422-2014 (March 6, 2014), and R.D. o.b.o. D.D v. Old Bridge Board of Education, EDS-04682-15 (April 14, 2015). These cases are, however, distinguishable from the present matter. In Bloomfield, the issue for the Third Circuit was the question of law of "whether in the undisputed circumstances, of this case Bloomfield is obligated to pay for T.M.'s residential program." Bloomfield, supra, at 9.[6] Similarly, in the Brick Township matter, the parties, unlike here, were in agreement that the child required an immediate residential placement. There, the only question before the court was "not whether [the child] should be placed in a residential educational/therapeutic facility, but rather which therapeutic residential facility should [the child] attend." Brick Township, supra, see page 2. Finally, in the Old Bridge matter, the ALJ noted that the "District did not present any evidence to support its position that [the child] should not be ordered to be placed in a residential academic environment, which they admitted may very well be the case." The ALJ further noted, "the depth and breath of evidence submitted by the petitioner and basically not disputed by the District leads to a conclusion, at this point, that the parent is likely to prevail on the merits." Old Bridge, supra, see page 4.

Thus, these cases are factually distinguishable from the present matter and are unpersuasive.

Finally and moreover, the "stay put" section of the IDEA, 20 U.S.C.A. §1400 et seq. at §1415(j) requires that:

> During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

[6] Bloomfield was on an appeal that arose out of due process hearing in the Office of Administrative Law.

The language of this section unequivocally requires that a child shall remain in the then current educational placement until the completion of the due process proceeding. Drinker v. Colonial School District, 78 F.3d 859, 864 (3d Cir. 1996). This section of the IDEA functions, in essence, as an automatic preliminary injunction. It substitutes an absolute rule in favor of the status quo for a tribunal's discretionary consideration of the Crowe v. DeGoia factors, Drinker, at 865.

Here, pursuant to the February 5, 2020, IEP E.G.'s current educational placement is Bankbridge. Thus, E.G. should remain in this placement pending completion of the due process proceeding.

Accordingly, based on the above and upon the record before me, I **CONCLUDE** that petitioners have not met their burden of establishing that the legal right underlying their claim is settled.

Likelihood of Prevailing on the Merits

Having concluded, for the reasons set forth above, that petitioners are unable to establish that their legal right is settled, I similarly **CONCLUDE** that, based on the record before me, petitioners are unable to meet their burden of establishing a likelihood of prevailing on the merits of the underlying claim.

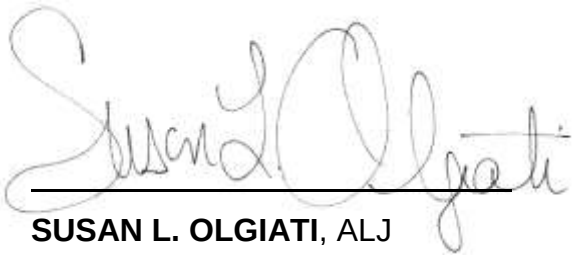
Greater Harm Suffered/Balancing of the Equities

As petitioners are required to satisfy all four prongs of the legal standard for emergent relief, and having concluded that they are unable to satisfy the first three prongs, I **CONCLUDE** that petitioners are unable to satisfy their burden under the standard for emergent relief. For this reason, I need not reach a conclusion as to whether, when the equities and the interests of the parties are balanced, petitioners will suffer greater harm than respondent if the requested relief is not granted. However, as I have concluded that petitioners have not, at this time, met their burden of establishing irreparable harm, it would appear that based on the record before me, they will similarly be unable to meet this fourth and final prong.

ORDER

Accordingly, I hereby **ORDER** that the 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 Policy and Dispute Resolution.



March 9, 2020
DATE

SUSAN L. OLGIATI, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

/vj