



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION ON
EMERGENT RELIEF

OAL DKT. NO. EDS 08291-19

AGENCY DKT. NO. 2019-30130

J.V. ON BEHALF OF R.G.,

Petitioner,

v.

MAGNOLIA BOROUGH

BOARD OF EDUCATION,

Respondent.

J.V., petitioner, pro se

Susan Hodges, Esq., for respondent (William C. Morlok, Esq., on the brief)
(Parker McCay, attorneys)

Record Closed: June 24, 2019

Decided: June 25, 2019

BEFORE **DOROTHY INCARVITO-GARRABRANT**, ALJ:

STATEMENT OF THE CASE

Petitioner, J.V., requests an emergent order seeking an out-of-district placement for her son R.G. at Bankbridge School, the Gloucester County Special Services School District (GCSSSD), or Cherrywood School for the 2019 extended school year (ESY).

PROCEDURAL HISTORY

On June 19, 2019, petitioner's request for a due process hearing was filed with the Office of Special Education Programs (OSEP) of the New Jersey Department of Education, along with a request for emergent relief seeking an out-of-district ESY placement. On June 19, 2019, the emergent matter alone was filed with the Office of Administrative Law for oral argument, which was held on June 24, 2019.

FACTUAL DISCUSSION

R.G. is a three-year-old student who is eligible for special education and related services under the classifications of Pre-school child with a disability and Autistic. (R-1 at RG063, RG033.) R.G. has been diagnosed with Autism spectrum disorder, childhood disorder of social functioning, coordination problem, delayed developmental milestones, missed receptive-expressive language disorder, and sensory processing difficulty. (P-1.) R.G. attended respondent's pre-K program from late April 2019 through June 13, 2019. Respondent's school is a pre-K through 8th grade school, which has one school building.

Prior to enrollment in respondent's school (Magnolia), R.G. attended a private full-day daycare program. In February 2019, R.G. turned three years old. Petitioner enrolled him in respondent's district. Evaluations were performed by respondent. An Individualized Education Program (IEP) meeting was held on February 20, 2019, which proposed a half-day school program five days per week, with speech therapy (ST), occupational therapy (OT), physical therapy (PT), and a one-to-one aide (1:1). (R-1 at RG063-087.) The half-day program was from 9:00 a.m. to 11:00 a.m., or from 1:00 p.m. to 3:00 p.m. Petitioner objected to the proposed IEP and especially the half-day school program. She filed a due process petition. Petitioner believed R.G. required services each day and a longer program to meet his particular needs. Petitioner was also concerned about her inability to accommodate the half-day schedule because she works.

This petition resolved through mediation. Respondent hired an aide to attend to R.G. between the two half-day sessions and created a program for R.G., for which he would attend both the morning and afternoon half-day sessions.

A second IEP meeting occurred on May 16, 2019. (R-1 at RG033-062.) Petitioner participated in the meeting. The IEP provided for the agreed upon full-day program five days per week, a 1:1, and ST, OT, and PT once per week. (R-1 at RG053.) The IEP proposed that ESY services were to be determined at a subsequent meeting. (R-1 at RG052.)

A third IEP meeting occurred on June 10, 2019. (R-1 at RG004-32.) Petitioner participated in the meeting. Petitioner requested an increase in the number of sessions per week for ST, OT, and PT. The proposed IEP incorporated this request increasing the number of sessions per week for each of these services. (R-1 at RG026.)

It is in this proposed IEP that ESY was addressed. The proposed IEP provided for ESY in-district three days per week from 9:00 a.m. to 12 p.m. between July 9, 2019 and July 25, 2019 and two days per week between August 6, 2019 and August 21, 2019. (R-1 at RG025.) Respondent created the August ESY program for R.G. Prior to this year, no August ESY program existed in respondent's district. There will be two classrooms for ESY each having three or four students in the Magnolia school building, which R.G. attends. The program will be staffed by one teacher, one full-time aide, and one registered behavioral technician who will work with both classes.

This proposed June 10, 2019, IEP was rejected by petitioner and is the subject of the underlying due process action.

Petitioner also rejects the proposed ESY program based primarily on her argument that R.G. requires a full-day, five days per week school program to meet his needs. This was noted in the February 20, 2019 proposed IEP (R-1 at RG066), and the accepted May 16, 2019 IEP (R-1 at RG036.) Additionally, in each, it was further noted

that petitioner “shared that this would, secondarily, be more accommodating to her schedule as well.” Petitioner believes that R.G. requires full-day out-of-district ESY with wrap around services, such that there would be no break from school among the school year’s end and beginning, and ESY. ¹

Petitioner cites to an Initial Neurological Evaluation dated October 31, 2018 completed by Evalina Okouneva, D.O. recommending that ST, OT, and other therapies available through early intervention be provided three times per week and that R.G. be placed in a program with a small student to teacher ratio. Petitioner submits that during the regular school year program R.G. lost weight because respondent’s staff failed to feed him lunch. Petitioner states that the staff provided too many drinks at school causing R.G. not to eat and to urinate on himself each day requiring a change of clothes. Additionally, respondent failed to provide the required therapies, and failed to document when the required therapies were provided. Petitioner rejected the proposed IEP because she does not believe the in-district program is appropriate for her son and her son did not make progress during his two month attendance at Magnolia. As a result of these experiences, petitioner does not believe the ESY program will be any different. Petitioner is also concerned that the ESY program will not provide consistency to R.G. because there is no guarantee he will have the same teacher he had in the school year program.

Petitioner contends that her son has received a break in the delivery of services as a result of the summer vacation break between the end of the school year, June 13, 2019, and the beginning of ESY on July 9, 2019. As a result of this break, she has hired babysitters and accepted help from family to care for R.G., while she is working. The transition from one caregiver to another is upsetting to R.G.. Some of the caregivers are not diligent in feeding R.G. lunch and in preventing R.G. from walking away from their homes. This stress manifests itself in a reduction of R.G.’s appetite. It

¹ In petitioner’s emergent application, petitioner requests R.G. be placed at Bankbridge, which has a “full-day program.” Bankbridge’s program is not a full-day program and has hours from 9:00 a.m. to 1:00 p.m., one hour longer than respondent’s program. At argument, petitioner no longer wanted R.G. to attend Bankbridge. Instead, she wanted R.G. to be placed at GCSSSD or Cherrywood. Petitioner further indicated that Cherrywood would provide in-home services for R.G. in addition to the school and ESY program. However, petitioner was unable to identify what in-home services R.G. needed.

also causes petitioner to be concerned for his safety and well-being. As a result, petitioner asserts that R.G. should be provided with full-day, five days per week ESY.

Relying largely upon the certification of Jennifer Pontarelli, the Supervisor of Curriculum and Instruction, and the Child Study Team, the respondent argues that its proposed ESY complies fully with R.G.'s proposed IEP, providing small-group classroom instruction, 1:1, and ST, PT, and OT three times weekly. R.G. showed "significant progress" during the school year. Despite the fact that the June 10, 2019 proposed IEP was rejected by petitioner, respondent remains committed to providing the proposed ESY program and ST, OT, and PT three times per week instead of once per week as provided for in the May 16, 2019 accepted IEP. R.G. will receive all related services and accommodations listed in the proposed IEP. Ms. Pontarelli notes that ESY takes place in R.G.'s school building and, most likely, he will be with students from his school year classroom. This provides consistency. R.G. is reported as happy and content at school. Finally, respondent argues that it understands summer time poses child care challenges for parents and submits this is part of petitioner's basis for requesting an out-of-district full-day ESY placement.

CONCLUSIONS OF LAW

N.J.A.C. 1:6A-12.1(a) provides that the affected parent(s), guardian, board or public agency may apply in writing for emergency relief. An emergency relief application is required to set forth the specific relief sought and the specific circumstances that the applicant contends justify the relief sought. Each application is required to be supported by an affidavit prepared by an affiant with personal knowledge of the facts contained therein and, if an expert's opinion is included, the affidavit shall specify the expert's qualifications.

Emergent relief shall only be requested for the following issues pursuant to N.J.A.C. 6A:14-2.7(r):

- 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.

[Emphasis added]

Petitioner alleges that her son has received a break in the delivery of services as a result of the summer vacation break between the end of the school year, June 13, 2019 and the beginning of ESY on July 9, 2019. Petitioner alleges that as a result of this break, she has hired babysitters and accepted help from family to care for R.G., while she is working. This transition from one caregiver to the other is upsetting to R.G.. This stress is manifesting itself in a reduction of R.G.'s appetite and an increase in petitioner's concerns for R.G.'s safety. As a result, petitioner asserts that R.G. should be provided with a full-day, five days per week ESY program.

The standards which must be met by the moving party in an application for emergent relief in a matter concerning a special needs child are embodied in N.J.A.C. 6A:14-2.7(m)1, N.J.A.C. 1:6A-12.1, and Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982). Emergency relief may only be granted if the judge determines that:

1. The petitioner will suffer irreparable harm if the relief is not granted;
2. The legal right underlying the 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 satisfy all four prongs of the Crowe test.

Both parties agree that R.G. is eligible for and requires an ESY program. Despite the fact that the last agreed upon IEP did not provide for ESY, respondent maintains that it will provide ESY in-district as provided for in the proposed June 10, 2019 IEP, which is in dispute.

Petitioner argues that her child would suffer irreparable harm were he to attend the program proposed by the district. She cites the facts that petitioner feels that respondent did not provide an appropriate education to R.G. during his two months of school year enrollment and that respondent is incapable of meeting R.G.'s needs. In this regard, petitioner states that R.G. did not make progress, and lost weight because no one fed him lunch. However, the proposed June 10, 2019 IEP indicates that R.G. did make progress. No specific evidence was submitted to the contrary. Similarly, no specific evidence documenting R.G.'s weight loss and causally linking it to respondent's failure to feed him at lunchtime was submitted.

No specific statement of the irreparable harm that would be visited upon R.G., were he to participate in the district's proposed ESY, was made beyond the fear that he would not meet his goals and would not adjust to the transition among caregivers in the summer. This is not irreparable per se. Alternatively, petitioner's inferred argument that full-day, five-day-per week ESY services are required to regain what was lost from April through June 2019, appears to be closer to a compensatory education claim. This is not the purpose of the ESY, and presumes a factual conclusion that cannot be made absent the evidentiary and testimonial process provided by a due process hearing.

Additionally, petitioner's expert, Dr. Okouneva recommended that R.G. receive ST, OT, and related therapies and services three times per week in a classroom program with small teacher to student ratio. (P-3.) Pursuant to the proposed June 10, 2019 IEP those services are to be provided in the in-district ESY program in July.² Dr.

² These services will be reduced in the August ESY sessions to twice per week. It is unknown at this time what impact may result as a result of this reduction, if any. However, the program was developed by respondent for R.G.. This tribunal will not speculate as to the possible impact of the reduction, at this time. That argument may be better made in the underlying due process matter.

Okouneva and the respondent's evaluators did not recommend that R.G. require those services five days per week during the school year.

Given these arguments, and the absence of any argument or evidence to support petitioner's belief that the in-district program is incapable of meeting R.G.'s needs, I **CONCLUDE** that petitioner has failed to demonstrate that R.G. would suffer irreparable harm were he to attend the in-district ESY placement as developed and proposed in the proposed June 10, 2019 IEP.

N.J.A.C. 6A:14-4.3(c) provides that:

The IEP team shall make an individual determination regarding the need for an extended school year program. An extended school year program provides for the extension of special education and related services beyond the regular school year. An extended school year program is provided in accordance with the student's IEP when an interruption in educational programming causes the student's performance to revert to a lower level of functioning and recoupment cannot be expected in a reasonable length of time. The IEP team shall consider all relevant factors in determining the need for an extended school year program.

The regulations provide that an ESY must be produced in accordance with the IEP. Reviewing the certification of Jennifer Pontarelli, Supervisor of Curriculum and Instruction and the Child Study Team for respondent, it is clear that the respondent is offering an ESY, and is taking steps to ensure it is consistent with the special and related services in R.G.'s proposed IEP of June 10, 2019. Despite expressing her sincere concern that the proposed ESY would not be appropriate, and describing her concerns about the effects of transitioning among caregivers on R.G.'s appetite and his safety during the summer months, petitioner has not demonstrated through expert opinion or evidence that R.G.'s performance has regressed, since the end of the school year on June 13, 2019. As a result, a change in ESY placement to an out-of-district, full-day, five-day-per-week ESY in place of the in-district ESY developed in the proposed IEP is not warranted.

Considering the forgoing, I **CONCLUDE** that petitioner has therefore not demonstrated a likelihood of success on the merits of the underlying claim. There are open issues, and petitioner has genuine concerns regarding the June 10, 2019 IEP, which are the subject of the due process matter. A full plenary hearing is likely necessary before the full merits of her claims can be determined. Whether an out-of-district placement provides an appropriate setting, or whether an in-district placement is an appropriate program, is not at issue in this emergent proceeding unless and until petitioner has demonstrated a likelihood that the respondent's proposed setting would be found inappropriate. Such is not the case in the current matter.

While it is possible that an out-of-district placement may further the goals included in R.G.'s IEP, that does not by itself show that the respondent's proposed ESY is an inappropriate extension of special education and related services beyond the school year. The facts that no evidence beyond assertion is offered that R.G. will suffer irreparable harm if he participates in the district's proposed ESY, and the failure to demonstrate a likelihood of success on the merits as to the ESY placement cause me to **CONCLUDE** that petitioner has not met the burden required to obtain emergent relief.

DECISION AND ORDER

For the foregoing reasons, I **CONCLUDE** that petitioner is not entitled to the requested emergent relief and that the petitioner's request for emergent relief is **DENIED**.

This decision on application for emergent relief shall remain in effect until the issuance of the decision on the merits in this matter. The hearing having been requested by the parent, 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 25, 2019

DATE



DOROTHY INCARVITO-GARRABRANT, ALJ

Date Received at Agency

Date Mailed to Parties:

/lam

APPENDIX

LIST OF EXHIBITS

For Petitioner:

- P-1 Evelina Okouneva, DO letter, dated January 4, 2019
- P-2 Tresa McSween, MD letter, dated January 4, 2019
- P-3 Children's Specialized Hospital report, dated October 31, 2018
- P-4 Children's Specialized Hospital ND/Neuro DC Instructions, dated October 31, 2018

For Respondent:

R-1 Respondent's Opposition Exhibits

- 1. ESY 2019 program information – pages RG001-003
- 2. Proposed June 10, 2019 IEP & supporting documents - pages RG004-032
- 3. May 16, 2019 IEP & supporting documents – pages RG033-062
- 4. February 20, 2019 IEP & supporting documents – pages RG063-087