State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
ON EMERGENT RELIEF
OAL DKT. NO. EDS 01862-20
AGENCY DKT. NO. 2020 31199

T.S. ON BEHALF OF J.W.,
Petitioner,
v.
TRENTON PUBLIC SCHOOL DISTRICT, BOARD OF EDUCATION,
Respondent.

Kerri Kane, Parent Advocate, for petitioner pursuant to N.J.A.C. 1:1-5.4(a)(7)

Elesia L. James, Esq., for respondent (Trenton Board of Education)

Record Closed: February 12, 2020 Decided: February 13, 2020

BEFORE **KIM C. BELIN**, ALJ:

STATEMENT OF THE CASE

By a request for emergent relief, petitioner T.S. seeks an out-of-district (OOD) placement for J.W. with respondent, Board of Education of the City of Trenton (Trenton) bearing the expense of the program. Trenton opposes this request and asserts that its proposed program is appropriate for J.W.

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PROCEDURAL HISTORY

This matter was filed at the Office of Administrative Law (OAL) on February 7, 2020, for an emergent relief hearing and a final determination in accordance with 20 U.S.C.A. §1415 and 34 C.F.R. §§300.500 to 300.587, and the Director of the Office of Administrative Law assigned me to hear the case pursuant to N.J.S.A. 52:14F-5. The emergent relief hearing was scheduled for oral argument on February 12, 2020. Oral argument was heard from both the petitioner and the respondent and the record closed.

FACTUAL DISCUSSION AND FINDINGS

J.W. is a nine-year-old child who is currently in the third grade. He is classified as Other Health Impaired (OHI), with Attention Deficit Hypertension Disorder (ADHD), and sensory and auditory processing disorders, and receives special education services from Trenton. At his most recent IEP meeting held on February 6, 2020, the parties agreed that J.W. needed a one-to-one aide (aide) and either the aide or classroom teacher would complete a data sheet designed by the case worker, and routinely submit the data sheet to T.S. A behavioral improvement plan (BIP) was already in place.

In her request for emergent relief petitioner states that Trenton has failed to provide the aide and the data sheets as mandated by the IEP. She further alleges that J.W. has been bullied by other students, has come home with a bruised eye and, that with the assaults and Trenton's failure to provide a proper program and services, he has become aggressive, and has regressed such that he is a grade level behind in reading and math. Although Trenton has secured an aide who started on February 10, 2020, petitioner requests that Trenton place J.W. at the private Newgrange School.

J.W. started the current school year (2019-20) in a general education classroom with supplemental aids and services. However, in December 2019, it was determined that a smaller more restrictive environment would be better, and J.W. was placed in an inclusion classroom on January 6, 2020, with a special education teacher, general education teacher and a new aide would start on January 21, 2020. The original aide was replaced because the aide did not have a strong command in speaking English and

J.W. had difficulty understanding him. The second aide was removed at petitioner's request for alleged inappropriate behavior. Trenton had difficulty securing a new aide resulting in J.W. not having an aide for approximately twelve days in January and February 2020. However, the principal provided additional support along with the two classroom teachers.

According to petitioner, and not disputed by respondent, J.W.'s teachers affirmed at the February 6, 2020, IEP meeting that the inclusion class was not an appropriate placement for him. Trenton admitted to not completing the data sheets as mandated by the IEP.

As T.S. feels Trenton has failed to abide by the IEP, and that J.W. has regressed, petitioner did not believe the inclusion program proposed by Trenton would address J.W.'s needs, nor is J.W. safe. She seeks the OOD at the Newgrange School as an alternative, stating that she had lost faith in Trenton to provide J.W. with the instruction that would allow him to make progress in a safe environment.

Conversely, Trenton, argued that it has secured the aide and has promised to ensure the data sheets are completed in accordance with the IEP. In addition, Trenton has offered to provide compensatory education services needed for any educational deprivation found as a result of its failure to have an aide for the twelve days and failure to provide the data sheets.

LEGAL ANALYSIS AND CONCLUSION

The standards to be met by the moving party in an application for emergent relief in a matter concerning a special needs child are set forth in N.J.A.C. 1:6A-12.1(e) and N.J.A.C. 6A-14-2.7(m)1. See also Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982). They provide that a judge may order emergency relief if the judge determines from the proofs that:

1. The petitioner will suffer irreparable harm if the requested 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.

In this matter, T.S. has raised significant issues regarding J.W.'s education in the Trenton district. Many of those issues will be part of the underlying due process petition. The only issue before me in this emergent application is whether the lack of an aide and the failure to provide data sheets warrant sending J.W. to an OOD at the Newgrange School. Applying the above four prong analysis required in an emergent application leads to a conclusion herein that petitioner has not met her burden for emergent relief.

Addressing the first prong of the test, petitioner has not shown that irreparable harm will result to J.W. if he does not attend the Newgrange School. While it is apparent that J.W. is in need of a program which addresses his reading and learning difficulties, it is also apparent that he is in need of behavioral supports to deal with his behaviors in a school environment. There is no indication that Newgrange will be implementing the types of supports set forth in his IEP. Additionally, petitioner did not present the nexus between J.W.'s specific needs and Newgrange's program which would sufficiently demonstrate how the Newgrange educational benefits would outweigh the benefits of the program proposed by Trenton. Although delayed, an aide has now been secured who can assist J.W. in the classroom environment and with transitions during the school day. T.S. has not shown that this new aide will be ineffective.

As to the second prong, while J.W.'s right to an aide is set forth in his IEP, his right to attend Newgrange is not settled. As noted previously, petitioner has not yet proven that the Newgrange program meets J.W.'s specific needs in a way that the Trenton

program does not. While T.S. may yet be able to do so in the underlying due process matter, she has not done so within the four corners of this emergent application.

The third prong of the test for emergent relief requires that petitioner has a likelihood of success on the merits. It may well be that as the facts in this matter are developed, petitioner may prove that J.W.'s needs are best met by the Newgrange program. However, the facts presented to date do not definitively show that such is the case and thus, petitioner has not met the third prong of the test.

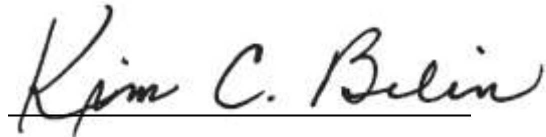
The final requirement for relief entails a balancing of the interests between the parties. In this matter, J.W. is not being denied an aide by Trenton, rather, the dispute is over the lack of data sheets and whether the new aide will be effective. Petitioner proposes an out-of-district program, while Trenton proposes allowing the new aide time to work with J.W. Trenton promises to complete and submit the data sheets to T.S. and provide compensatory services. Petitioner has not yet shown that on balance J.W. will suffer the greater harm with these services in place.

While petitioner has made a colorable argument that a program such as that at Newgrange may be more appropriate for J.W. than an in-district program at Trenton, she has not done so within the demanding confines of a request for emergent relief. As such her request for emergent relief is **DENIED**. Such denial however, is without prejudice to any claim regarding the Newgrange program or compensatory education she may have in the underlying due process matter.

DECISION AND ORDER

For the reasons stated above, I hereby **ORDER** that petitioners' application for emergent relief is **DENIED**.

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.



February 13, 2020
DATE

KIM C. BELIN, ALJ

Date Received at Agency ____________________________

Date Mailed to Parties: ____________________________

/vj

APPENDIX

WITNESSES

For petitioners:

D.W.

For respondent:

Dr. Mowatt

EXHIBITS

For petitioner:

None

For respondent:

None