



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON MOTION
FOR EMERGENT RELIEF
OAL DKT. NO. EDS 4683-20
AGENCY DKT.NO. 2020 31493

C.D. ON BEHALF OF T.D.,

Petitioner,

v.

WARREN HILLS BOARD OF EDUCATION,

Respondent.

Ester Canty-Barnes, Esq., for petitioners (Rutgers Law School Education
and Health Law Clinic, attorneys)

Eric Harrison on behalf of **Marc Macciolo, Esq.** for respondent
(Methfessel & Werbel, P.C.)

Record Closed: October 6, 2020

Decided: October 7, 2020

BEFORE **KIMBERLY A. MOSS, ALJ:**

Petitioner brings this action seeking an order for the following:

T.D. be eligible and classified for special education and related services; a
determination that T.D. requires an appropriate placement or alternatively

that the section 504 Plan requires T.D. to be placed in an appropriate placement to meet his brief; that T.D. meets IDEA criteria of a child with a disability; T.D. meets the criteria of disabled under section 504 of the rehabilitation act; that T.D. is entitled to FAPE under section 504 of the rehabilitation act; that T.D. is entitled to FAPE under IDEA; and order that T.D. be placed at the New School or an appropriate placement with related services and transportation.

On May 13, 2020, the Office of Special Education Programs transmitted the matter to the Office of Administrative Law (OAL) under Docket No. EDS 04683-20. Petitioner filed a motion for emergent relief on September 21, 2020. Respondent filed opposition on September 28, 2020. Petitioner filed a reply to respondents' opposition on October 5, 2020. Oral arguments were held on October 6, 2020.

FACTUAL DISCUSSION

I **FIND** the following **FACTS**:

T.D. was home schooled until the age of thirteen. At that time due to behavioral difficulties, he was enrolled in the Saint Phillip and James private school. He struggled academically there and the Phillipsburg School District (Phillipsburg) agreed to evaluate T.D. in the Spring of 2018. Only psychological and educational evaluations were done. Phillipsburg determined that T.D. did not qualify for special education services. Petitioners transferred T.D. to the catholic boarding school Gregory the Great. T.D. was expelled from this school after four months due to disruptive behavior.

In January 2019, T.D. became enrolled in the Warren Hills School District (District). T.D. was ADHD. A 504 meeting was held on February 21, 2019. A 504 Plan was designed for T.D. In March 2019, T.D. was suspended for substance abuse issues. His grades were ten percent in Algebra, fifteen percent in Environmental Science, sixty-six percent in Financial Literacy and fifty-six percent in Sales and Marketing. An evaluation

planning meeting was held on March 13, 2019, at which time the District declined to evaluate T.D., due to his substance abuse issues but revise the 504 Plan. The only revision was to include oppositional defiant disorder as one of T.D.'s disabilities.

In April 2019, T.D. was admitted to Carrier Clinic due to his emotional and behavioral state. He was placed in Daytop, but he was discharged from Daytop four months later for behavior threatening the environment. The behaviors included substance abuse, destruction of property and refusal to cooperate in group activities. On July 31, 2019, T.D. was court ordered to attend Bonnie Brae, a residential treatment facility for boys with significant addiction, mental health, learning and behavioral challenges.

An evaluation planning meeting was held with the district in August 2019. Prior to the meeting petitioner provided the District with a neurodevelopmental evaluation for T.D. from Children's Specialized Hospital, a developmental evaluation from St. Peter's Hospital and a letter from T.D.'s neurologist. The district declined to evaluate T.D. based on his significant history of substance abuse. It believed that T.D. did not evidence a disabling condition that impacted his education to the extent that a special education evaluation was necessary.

Petitioner attempted to have T.D. evaluated by the District in September 2019. The District again declined to evaluate T.D. Petitioner also requested that the District pay for the Bonnie Brae placement since she believes that T.D. is a student with a disability. The New Day school is the school that Bonnie Brae recommended T.D. attend.. The District declined to pay but provided T.D. with a home instruction plan of five days a week, three hours a day. This was not successful.

The District met with New Day/Bonnie Brae administrators and petitioner on November 18, 2019 to discuss T.D.'s educational difficulties. Petitioner again requested T.D. be evaluated. The District declines because T.D. was an active user. The District's alternative was to transport T.D. to and from Warren Hills for general education

instruction. Petitioner and the New Day/Bonnie Brae administrators did not find this to be appropriate. The District's other alternative was that T.D. use a Chromebook which was rejected by New Day/Bonnie Brae.

The District again provided home instruction at Bonnie Brae to T.D. fifteen hours per week. T.D. did not attend all the home instruction. Due to Covid 19, home instruction was no longer allowed at New Day/Bonnie Brae. T.D. was provided with packets of work for home instruction.

Petitioner requested independent evaluations for T.D. The District filed a Due Process petition. Petitioners obtained an independent evaluation. On March 2, 2020, ALJ Ellen Bass determined that the District's reliance on the existing data from Phillipsburg constituted an evaluation which petitioner could disagree with and request an independent evaluation. Judge Bass ordered the District to reimburse petitioners for the independent evaluation. Petitioner provided the independent evaluation to the District. She requested that the independent evaluation be used to determine T.D.'s eligibility for special education and related services. The District refused and requested it be allowed to conduct all evaluations. Petitioner agreed for the District to conduct a psychiatric evaluation and a social history assessment.

The District selected Dr. Fennelly to do the psychiatric evaluation. Dr. Fennelly's office sent petitioner a consent for medical records authorization to be signed and returned to his office. The evaluation was scheduled for March 30, 2020. Petitioner would not sign the medical records authorization for Dr. Fennelly. She believed that it was too broad. Dr. Fennelly would not do the evaluation without the signed medical records authorization. The March 30, 2020 evaluation was cancelled.

In May 2020 petitioner filed a motion for emergent relief requesting T.D. be found eligible for special education and related services, develop an IEP reflecting his out of district placement at Bonnie Brae and for the District to pay for the educational component

of the placement. On May 26, 2020, ALJ Margaret Monaco, denied petitioners motion for emergent relief.

On May 12, 2020, petitioners sent a letter to the District requesting an appropriate consent form from Dr. Fennelly. Subsequent letters were sent to the District on June 3, 2020 and June 12, 2020 with no reply from the District. After the May 22, 2020, Order of Judge Monaco, the District attempted to secure the psychiatric evaluation with Dr. Fennelly, but his office was unresponsive. The District attempted to find another provider who could do the evaluation telephonically. The District made petitioner aware of the change in provider in August 2020.

Petitioner would not allow T.D. to be interviewed for the social history assessment.

T.D. was released from Bonnie Brae on August 3, 2020. On August 3, 2020, the petitioner again requested T.D. be eligible for special education services and that he be placed in the New Day School. The District offered the following:

1. T.D. be placed at New Day as a general education student and reimburse the parent up to \$1,000 for transportation of T.D. to and from school.
2. The District would have a psychiatric evaluation done as soon as possible then proceed with a potential classification of T.D. If he is classified the District would move forward with placement at New Day as a special education student.
3. Provide T.D. with access to virtual learning platform and schedule.

LEGAL DISCUSSION AND CONCLUSION

The standards for the granting of emergent relief are set forth in N.J.A.C. 6A:3-1.6(b). Emergent relief may be granted 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 the instant case, after hearing the arguments of petitioner and respondent and considering any other documentation submitted, I **CONCLUDE** that petitioner is not entitled to emergent relief because the proofs submitted have failed to establish the necessary elements to grant emergency relief under N.J.A.C. 6A:3-1.6(b). Specifically, petitioner has not shown that T.D. will suffer irreparable harm if the requested relief is not granted. The District has stated that it needed a psychiatric and social history evaluation to determine eligibility of T.D. for special education and related services. Petitioner signed a consent for the evaluations. However, petitioner would not sign the consent that Dr. Fennelly sent for T.D.'s medical records, therefore Dr. Fennelly did not do the evaluation. In addition, the social history evaluation could not be completed because petitioner would not allow the T.D. to be interviewed for the it. Although there was a considerable time from when petitioner would not sign the consent of Dr. Fennelly because she believed it was too broad. The District has agreed to facilitate a psychiatric evaluation of T.D. as soon as possible, place him at New Day as a general education student and provide T.D. with virtual schooling until the evaluation is complete.

I **CONCLUDE** that T.D. will not suffer irreparable harm if it is not ordered that he is eligible for special education and related services or that the section 504 requires placement at New Day.

The evaluations needed for classification have been delayed. Part of the reason for the delay is that petitioner, although consenting to the evaluations, did not sign the consent for the psychiatric evaluation and did not allow T.D. to be interviewed for the social history assessment. The determination of whether T.D. should be eligible and classified for special education and his placement whether through IDEA or section 504 is a question of fact which requires opinion evidence in a plenary proceeding. The District did not waive its rights to evaluations due to the delay since one reason for the delay was petitioner's refusal to sign a consent and have T.D. be questioned for the social history assessment. In addition, petitioner requests that T.D. be placed at New Day without providing information regarding the educational programs or staff at New Day. Petitioner has not proved that the likelihood that petitioner will prevail on the merits or that the legal right underlying petitioners claim is settled.

I note that the requirements are stated in the conjunctive and, consequently, petitioner must meet all four requirements in order to prevail. Failure to even one of the requirements defeats the application.

Having heard the arguments of petitioner and respondent, and considering all the affidavits, certifications and documents submitted, I enter this **ORDER** in favor of respondent. Petitioner's motion for emergent relief is therefore **DENIED**.

This decision on application for emergency relief shall remain in effect until the issuance of the decision on the merits in this matter.

October 7, 2020



DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency

October 7, 2020

Date Mailed to Parties:

October 7, 2020

ljb