



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING

EMERGENT RELIEF

J.S. on behalf of D.S.,

Petitioner,

v.

LENAPE REGIONAL HIGH SCHOOL

DISTRICT BOARD OF EDUCATION,

Respondent,

OAL DKT. NO. EDS 09332-20

AGENCY DKT. NO. 2021-32175

Sean Benoit, Esquire, for petitioner (Community Health Law Project)

R. Taylor Ruilova, Esquire, on behalf of respondent (Comegno Law Group, LLP)

BEFORE **DEAN J. BUONO**, ALJ:

STATEMENT OF THE CASE

J.S. (petitioner) on behalf of D.S., brings an action for emergent relief against Lenape Regional High School Board of Education (Board/District), seeking an order for emergent relief including an at-home nurse during virtual learning for D.S. The respondent opposes the relief requested.

PROCEDURAL HISTORY

Petitioner filed a request for emergency relief and a due process hearing at the State Office of Special Education Programs (OSEP). On October 6, 2020, OSEP transmitted the matter to the Office of Administrative Law (OAL) as a contested case

seeking emergent relief for the petitioner. The parties presented oral argument on the emergent relief application on October 13, 2020, via Zoom teleconferencing system due to COVID-19 restrictions.

FACTUAL DISCUSSION

Petitioner argues in the request for emergent relief that petitioner, D.S. is an eighteen-year-old, twelfth-grade student in the Lenape Regional High School District who resides with petitioner. He is eligible for special education and related services under the classification “multiply disabled.” D.S. attends Kingsway Learning Center (“Kingsway”), an out-of-district placement located in Voorhees, New Jersey.

D.S. qualifies as disabled because he suffers from cerebral palsy, global developmental delays, epilepsy and diabetes. Due to the COVID-19 pandemic, petitioner elected that D.S. receive virtual\remote instruction for the 2020–2021 school year. His IEP calls for him to receive a one-to-one individual nurse during the school day at the school. Petitioner alleges that the nurse is essential for him during his at-home instruction. In fact, they indicate “D.S. cannot participate in schooling at home without the nursing service.” (Certification of J.S. at 11.) Petitioner claims irreparable harm from a break in service because he “could regress and compensatory education provided at a later date would not compensate for the delay in services.” Also, petitioner alleges that D.S. has a legal right underlying in this claim due to the COVID-19 pandemic order by Governor Murphy. Petitioner claims that “all students are eligible for full-time remote learning” and that “shall be consistent with the student’s IEP to the most appropriate extent possible.”

Respondent argues that D.S. turned eighteen on January 30, 2020, and is thereby classified as an adult student. D.S.’s IEP provides that he receive a one-to-one, individual nurse during the day at school, primarily due to his diabetes. D.S.’s IEP states that he “requires a one-to-one nurse to monitor his seizure activity and glucose levels.” (Piserchia Cert. ¶8.) D.S. does not require any regular or active medical interventions beyond such monitoring and the provision of a nurse is not necessary in order for D.S. to access his educational programming and/or related services. (Piserchia Cert. ¶9.) Accordingly, his

IEP only provides for this monitoring which is limited to “keep him safe” in school, per documentation that was submitted to the District regarding D.S.’s medical needs. Further, the nurses provided for D.S. while he is in his in-school program communicated to Kingsway staff that they did not want to nor should they be assisting with educational programming during the school day, as their primary focus is D.S.’s medical needs. (Piserchia Cert. ¶11.)

Due to the COVID-19 pandemic, petitioner unilaterally elected for D.S. to participate in virtual/remote learning for the entirety of the 2020-2021 school year. (Piserchia Cert. ¶12.) However, D.S. physically attends Kingsway once per week in order to receive in-person related services of physical therapy, occupational therapy, and augmentative communication services. (Piserchia Cert. ¶13.) The District has, and continues to provide, a one-to-one nurse for D.S. to monitor him and ensure his safety while participating in educational programming and/or related services in that school setting. (Piserchia Cert. ¶ 14.)

On September 9, 2020, the District’s Director of Special Services, Patricia Piserchia, spoke to petitioner regarding the District’s provision of a nurse while D.S. participates in virtual or remote instruction in his home. (Piserchia Cert. ¶15.) During that conversation, Ms. Piserchia explained to petitioner that D.S.’s IEP was written for in-person instruction in a school setting, and D.S.’s IEP only requires the nurse to ensure his safety when physically attending his out-of-district placement. (Piserchia Cert. ¶16.)

Petitioner subsequently indicated to Ms. Piserchia that she personally serves as D.S.’s nurse during the night, and requested that the District provide a nurse so she could get some sleep during the day while D.S. is participating in virtual or remote instruction in his home. (Piserchia Cert. ¶17.) Ms. Piserchia informed petitioner that it was not the District’s responsibility to provide a nurse so she can sleep during the day, while D.S. is participating in virtual or remote instruction in his home. (Piserchia Cert. ¶ 18.) Given that D.S.’s documented need for a nurse in the school setting is purely medical, rather than educational, Ms. Piserchia recommended that petitioner seek to secure a nurse for his medical needs in the home through private insurance. (Piserchia Cert. ¶19.) Therefore, petitioner does not meet the stringent requirements for emergent relief. I agree.

LEGAL ANALYSIS AND CONCLUSION

N.J.A.C. 1:6A-12.1(a) provides that the affected parent(s), guardian, district or public agency may apply in writing for emergent relief. An emergent 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.

Here, the petitioners seek an order for an at-home nurse during remote learning. The standards for emergent relief are set forth in Crowe v. DeGoia, 90 N.J. 126 (1982), and codified at N.J.A.C. 6A:3-1.6, one of the Department's regulations governing special education. These standards for emergent relief include 1.) that the party seeking emergent relief will suffer irreparable harm if the requested relief is not granted; 2.) the existence of a settled legal right underlying the petitioner's claim; 3.) that the party seeking emergent relief has a likelihood of prevailing on the merits of the underlying claim; and 4.) a balancing of the equities and interests that the party seeking emergent relief will suffer greater harm than the respondent. The petitioner bears the burden of satisfying all four prongs of this test. Crowe, 90 N.J. at 132-34. Arguably, the standard is a high threshold to meet and I will address each prong separately.

Irreparable Harm

Here, there has been no showing whatsoever of irreparable harm to D.S. First, the petitioner argues irreparable harm is established because there is a tremendous risk of regressing in learning. Petitioner claims the nurse is essential to education to monitor his glucose and possible seizures. To prevail under this prong, the harm must be substantial and immediate; the risk of harm or the desire for J.S. to nap during the day is not sufficient. Continental Group v. Amoco Chemicals Corp., 614 F.2d 351 (D.N.J. 1980). There is no evidence presented that there is even a scintilla risk of harm. Again, the risk of harm alone is not sufficient. **I FIND** as fact that there is no actual proven risk of harm to D.S.

In light of the aforementioned, **I CONCLUDE** that the petitioner has not met the burden of establishing irreparable harm.

The Legal Right Is Settled

The petitioner has not demonstrated that the law favors J.S. and D.S. There is nothing in the record except purported speculation that anything has or will happen to D.S.'s progress in learning. Speculation is insufficient and that is all the petitioner has here. Conversely, the law supports the Board's position for continued placement. J.S. and D.S.'s desire to be educated at Kingsway is being honored.

Thus, **I CONCLUDE** petitioners has not met the second prong of the emergent relief standard in that a legal right underlying the claim is settled.

Likelihood of Prevailing on the Merits

Regarding whether the petitioner has a likelihood of prevailing on the merits of the underlying claim, there are no material facts in dispute that indicate petitioner's likelihood of success. In fact, the speculative assertions by petitioner are not at all persuasive. While petitioner's unsupported belief that the best opportunity for D.S. is with an at-home nurse, this tribunal cannot conclude such result will benefit D.S. based on the petitioner's unsupported speculation. This tribunal will not compel the District without affording them the opportunity to contest that conclusion at a due process hearing. This argument is not appropriate for emergent need.

Therefore, **I CONCLUDE** petitioner does not meet the third prong of the emergent relief standard.

D.S. Will Suffer Greater Harm Than the Respondent

The next prong of the above test to be addressed is whether the equities and interest of the parties weigh in favor of granting the requested relief. The petitioner argues that D.S. will suffer greater harm if emergent relief is not granted. This argument is without merit and speculative. As his mother, J.S. admittedly performed the same duties after hours. Here, petitioner failed to demonstrate any potential harm D.S. would suffer. Thus, **I CONCLUDE** that the D.S. would suffer greater harm if the requested relief was granted and therefore petitioner has failed to also meet the final prong of the analysis.

ORDER

Having concluded that the petitioner has not satisfied any of the four requirements for emergent relief, the petitioner's request for emergent relief is **DENIED**. A telephone conference call is scheduled for **Thursday, October 15, 2020, at 3:30 p.m.** in order to set a hearing date on the due process petition.

This order on application for emergency relief shall remain in effect until issuance of the decision in the matter. The parties will be notified of the scheduled hearing dates. 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.



October 14, 2020

DATE

DEAN J. BUONO, ALJ

Date Received at Agency

Date Mailed to Parties:

mph

APPENDIX

EXHIBITS

For petitioner:

Affidavits

For respondent:

Affidavits