

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

**FINAL DECISION – EMERGENT
RELIEF**

OAL DKT. NO. EDS 10816-17

AGENCY DKT. NO. 2017 26591

D.I. and S.I. ON BEHALF OF T.I.,

Petitioner,

v.

**MONROE TOWNSHIP BOARD OF
EDUCATION,**

Respondent.

Beth A. Callahan, Esq., for petitioner (Callahan & Fusco, LLC)

Michael A. Pattanite Esq., for respondent (Lenox, Socey, Formidoni, Giordano,
Cooley, Lang & Casey, attorneys)

BEFORE **JUDE-ANTHONY TISCORNIA, ALJ:**

D.I. and S.I. (“petitioner”) filed a request for emergent relief on behalf of their thirteen year old Daughter, T.I., who is eligible for special education and related services based on the criteria for autistic. Petitioner seeks an order compelling the Monroe Township Board of Education (“respondent”) to place T.I. at the Caldwell University Center for Autism and Applied Behavioral Analysis (“Caldwell”). Respondent opposes petitioner’s request for emergent relief.

PROCEDURAL HISTORY

The request for emergent relief was received by the Office of Special Education Policy and Planning on October 12, 2017, and the matter was transmitted to the Office of Administrative Law (OAL) on the same date for determination as a contested case. A hearing was originally scheduled for October 20, 2017, and adjourned to October 24, 2017, at the request of the parties. An oral argument was conducted on October 24, 2017, at the Office of Administrative Law in Newark, New Jersey.

FACTS

The following facts are undisputed.

T.I. suffers from autism and exhibits self-injurious behaviors. Petitioner unilaterally placed T.I. in an intensive home program on May 12, 2017. Petitioner's attorney sent a letter dated May 12, 2017, to Marietta Ruela, Director of Pupil Personnel Services at the Monroe Township School District, informing the district of the unilateral placement. T.I. has been receiving approximately twenty-five hours of home instruction (ABA) per week. This home instruction is being paid for by petitioner's insurance.

Petitioner asserts that T.I. is severely autistic and as such, is in need of forty plus hours per week of an intensive educational program. Petitioner argues that T.I.'s at home placement constitutes a break in delivery of services under N.J.A.C. 6A:14-2.7(r). Petitioner asserts that the only proper placement at this juncture would be at Caldwell University as a transitional placement in order to address the self-injurious behaviors, then ultimately to Garden Academy located in West Orange, NJ. Petitioner asserts that T.I. is currently without placement which qualifies as an emergent situation under N.J.A.C. 6A: 3-1.6.

ANALYSIS

One applicable regulation is N.J.A.C. 6A:14-2.7(r), which provides in pertinent part as follows:

1. 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.

Here, petitioner argues that T.I. has experienced a break in the delivery of services because she has been in an in-home placement with limited services since May 12, 2017, and is in need of more formal, institutional placement at Caldwell University. It follows that petitioner may request emergent relief in this proceeding.

Petitioner's request for court-ordered out of district placement is a request for equitable relief; and those who seek equity must do equity. The difficulty, then, with petitioner's argument is that it fails to acknowledge the fact that petitioner is the one who unilaterally placed T.I. in an intensive at home placement to begin with. Petitioner cannot now point to T.I.'s at-home placement as cause for emergent relief because petitioner's hand was what unilaterally placed T.I. at home and without proper services.

More generally, emergent relief is available pursuant to N.J.A.C. 1:6A-12.1(e), N.J.A.C. 6A:3-1.6(b) and N.J.A.C. 6A:14-2.7(s), if the application meets the following four requirements:

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.

The first requirement is that T.I. will suffer irreparable harm if the requested relief is not granted. N.J.A.C. 6A:3-1.6(b)1. Harm is considered to be irreparable if it cannot be remedied by money damages. Crowe v. DiGioia, 90 N.J. 126, 132-33 (1982). Moreover, the harm must be substantial and immediate; risk of harm alone is not sufficient.

Here, petitioner unilaterally placed T.I. at home where she has remained for over five months. An underlying due process complaint was filed and will be heard on November 28, 29 and December 18, 19, 2017. Petitioner fails to show how maintaining the status quo up until the date of the plenary hearing would cause some immediate irreparable harm thus prompting the need for emergent court action. Petitioner argues that with each passing day T.I. is at risk of further regression; but this is no more the case today as it was five months ago when T.I. was placed at home. It follows that T.I. will not experience irreparable harm.

The second consideration is whether the legal right underlying petitioner's claim is settled. N.J.A.C. 6A:3-1.6(b)2. In effect, petitioner contends here that T.I. has been denied a free appropriate public education. While respondent argues that the legal right to a placement solely based on the choice of the parents is not a well settled right, the right of a student who is eligible for special education and related services to receive a free appropriate public education is well settled. It follows that petitioner meets this requirement.

The next factor is petitioner's likelihood of prevailing on the merits of the claim. N.J.A.C. 6A:3-1.6(b)3. Petitioner's claim is to place T.I. at Caldwell University for a

period of time not yet determined and then to ultimately place her at the Garden Academy. There is no obligation place T.I. in the Caldwell University program if Respondent can place T.I. in a comparable program. Respondent's ability to place T.I. in a comparable program is an issue to be flushed out at the hearing on November 28, 29 and December 18, 19, 2017. Under the circumstances, petitioner has not demonstrated that she has a likelihood of prevailing on the merits of the claim.

The final requirement relates to equities and interests of the parties. N.J.A.C. 6A:3-1.6(b)4. Here, petitioner has a clear interest in having an educational program in effect for T.I. On the other hand, respondent is obligated by N.J.A.C. 6A:14-4.1(g) only to provide a comparable program for T.I. Respondent claims to have a comparable program available for T.I. at one of two out of district placements closer to Monroe Township. In either case respondent agrees to pay for an out-of-district placement at a private school.

ORDER

In order to prevail on a motion for emergent relief, the movant must meet all four requirements under N.J.A.C. 1:6A-12.1(e), N.J.A.C. 6A:3-1.6(b) and N.J.A.C. 6A:14-2.7(s). Here, petitioner satisfies only one of the four requirements. Therefore, I **CONCLUDE** that petitioner's request for emergent relief does not satisfy the applicable requirements. Accordingly, it is **ORDERED** that petitioner's request for emergent relief be 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 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.

October 25, 2017

DATE

JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency

10/25/17

Date Mailed to Parties:

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