

DECISION

DENYING EMERGENT RELIEF

OAL DKT. NO. EDS 13087-15

AGENCY DKT. NO. 2016 23370

L.B. ON BEHALF OF G.B.,

Petitioner,

v.

MAPLE SHADE TOWNSHIP

BOARD OF EDUCATION and

LARC SCHOOL,

Respondents.

Roger A. Barbour, Esq., for petitioner

Patrick Madden, Esq., for respondent Maple Shade Township Board of Education (Madden and Madden, PA, attorneys)

Aileen F. Droughton, Esq., for respondent LARC School (Traub, Lieberman, Straus & Shrewsberry, LLP, attorneys)

Record Closed: September 14, 2015

Decided: September 15, 2015

BEFORE **JOHN S. KENNEDY**, ALJ:

STATEMENT OF THE CASE

Petitioner L.B. requests an emergent order authorizing her to administer prescribed medical Marijuana to G.B., a student at the school. Respondents Maple Shade Township Board of Education (Board) and LARC School (LARC) oppose this

request, contending that they do not have the legal authority to permit the administration of medical marijuana on school property.

PROCEDURAL HISTORY

On or about December 9, 2014, petitioner filed a Petition for Emergent Relief and Due Process with the New Jersey Department of Education, Office of Special Education Programs. Petitioner sought the entry of an order compelling LARC School to “immediately administer G.L.B.’s [medical marijuana] to her at school, and other relief.”

Petitioner’s application for emergent relief was denied on January 9, 2015 (Respondent’s Exhibit 1, L.B. on behalf of G.B. v. The Maple Shade Township Board of Education and LARC School, 2015 N.J. AGEN LEXIS 19 (N.J. AGEN 2015)).

Litigation of the petition for due process filed by petitioner in connection with her application for emergent relief continued and all parties ultimately moved for summary decision on the due process petition. On August 10, 2015, the Court issued its decision granting respondents’ motion for summary decision and denying petitioner’s motion for summary decision (Respondent’s Exhibit 2, L.B. on behalf of G.B. v. The Maple Shade Township Board of Education and LARC School, OAL Dkt. No. EDS 00879-15, Agency Docket No. 2015 22132).

On August 24, 2015, petitioner filed a request for a due process hearing with the Office of Special Education of the New Jersey Department of Education seeking an order that respondents develop an appropriate school policy to permit L.B. to administer prescribed medical marijuana to G.B. during school hours. The Board responded, and seeks continued implementation of the most recent IEP.

On August 24, 2015, petitioner filed a request for emergency relief seeking an order requiring respondents to permit L.B. to administer prescribed medical marijuana to G.B. during school hours. The emergent matter was transmitted to the Office of Administrative Law as a contested case and filed on August 27, 2015. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

Oral argument was heard on September 14, 2015.

FACTUAL DISCUSSION

G.B. is a fifteen-year-old student diagnosed under the disability category of multiply disabled (MD). She has been placed by the Board at LARC, which all parties agree is the appropriate placement for her unique needs. The parties agree that G.B. is making meaningful educational progress at LARC.

In 2010 the New Jersey Legislature passed the Compassionate Use Medical Marijuana Act (CUMMA). G.B. was prescribed medical marijuana in September 2014 to combat her uncontrollable epileptic-seizure disorder. In November 2014, the Board met with the petitioner to discuss, among other things, that providing medical marijuana to G.B. in school be placed in her IEP. The Board denied this request, and the provision of medical marijuana is not currently part of G.B.'s IEP.

The medical marijuana prescribed to G.B. is in oil form and can be administered either in juice or through a syringe injected directly into her mouth. It is not smoked or required to be lit. The medication was prescribed by G.B.'s attending physician, Dr. James Kwak, for a monthly prescription of one-half ounce of medical marijuana (Petitioner's Exhibit M). Dr. Kwak prescribed the medication to be taken four times per day, with one dose to be taken at lunch time (Petitioner's Exhibit N). The federal government has classified marijuana as a controlled dangerous substance (CDS). The medical marijuana prescribed to G.B. has not yet been approved by the Food and Drug Administration; however, the passage of the most recent federal spending bill prohibits the use of federal dollars to enforce any federal law contrary to a state's medical marijuana regulations. Petitioner has satisfied the requirements of New Jersey's Medical Marijuana Act regarding the administration of medical marijuana and both she, as caregiver, and G.B., as a patient, have been appropriately licensed under the Act (Petitioner's Exhibit O).

Petitioner contends that there is a potential for increased epileptic episodes as a result of the Board's refusal to administer the medication to G.B. at lunchtime as prescribed. As a result of respondents' denial of the administration of the medication on school grounds, petitioner has been taking G.B. out of school at lunchtime each day since April 21, 2015. Petitioner administers the lunchtime medication and keeps G.B. home for the remainder of the day.

As a reasonable accommodation, respondents proposed that petitioner pick up G.B. each day at lunchtime, take her off campus to administer her medication, and bring her back after lunch. This accommodation would require petitioner to stay at least 1,000 feet from school property in order for the Board to be assured that there would be no violation of the State-mandated drug-free-school-zone law. Petitioner has not been willing to comply with this procedure because G.B. has difficulty transitioning from one event or environment to another. It also creates a safety issue because G.B. would be required to walk off campus and at least 1,000 feet away from school on a busy roadway on a daily basis. Petitioner has requested to be permitted to come to school each day and administer the lunchtime dose of medication to G.B. Respondents have refused this request contending that this would be disruptive and in violation of the Federal and State-mandated drug-free-school-zone law.

LEGAL ANALYSIS AND CONCLUSION

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.

In this case, it is clear that there is no issue involving disciplinary action or graduation. Further, petitioner is not requesting a different placement pending the outcome of due process proceedings. Petitioner is satisfied with G.B.'s placement at LARC. It must next be determined if the matter involves a break in the delivery of services. Petitioner asserts that because of respondent's refusal to administer G.B.'s lunchtime medication she has missed approximately two and one-half hours of instruction each day since April 21, 2015. This has resulted in a break in the delivery of services and respondents have refused to provide compensatory education. Respondents assert that petitioner has unilaterally decided to take G.B. out of school at lunchtime without detailing an increase of seizures or some other basis for the decision to remove her. It is clear, however, that a break in the delivery of services is present in this case. Whether it be a result of respondents' actions or due to petitioner's unilateral decision to take G.B. home at lunchtime each day and not return her, she has missed two and one-half hours each day since April 21, 2015. Therefore, I **CONCLUDE** it has been established that there exists a break in services.

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 irreparable harm if the relief is not granted, a settled legal right underlying a petitioner's claim, a likelihood that petitioner will prevail on the merits of the underlying claim and a balancing of the equities and interest that petitioner will suffer greater harm than respondent.

Petitioner bears the burden of satisfying all four prongs of this test. Crowe, supra, 90 N.J. at 132–34. First, there has been no showing of irreparable harm. There are no doctor's reports from G.B.'s treating physician that would establish that her lunchtime dose of marijuana is medically necessary. Further, it would appear that petitioner's demand for a lunchtime dose of medical marijuana should be supported by expert opinion. "The need for expert testimony exists when the subject matter of the testimony is 'so esoteric that jurors of common judgment and experience cannot form a valid judgment' as to the fact in issue without testimony." Martinez v. Police and Firemen's Ret. Sys., TYP 8383-12, Initial Decision (March 21, 2014), <<http://njlaw.rutgers.edu/collections/oal/>>. Further, a review of the notes provided by G.B.'s treating physician appear to increase the dosage from two times per day up to as much as five times per day at the request of petitioner (Respondents' Exhibit 5). Specifically, Dr. Kwak's office note of January 8, 2015 states that G.B. is "currently using one half ounce a month but mom feels that she needs more" (Id. at 2). As such, I **CONCLUDE** petitioner has been unable to meet the burden of establishing irreparable harm to G.B.

The next prong of the above test to be addressed is whether there is a settled legal right underlying petitioner's claim. The issue of administration of medical marijuana in school is not well-settled. The New Jersey Compassionate Use Medical Marijuana Act (NJCUMMA) governs the permissible distribution, possession and use of medical marijuana in the State of New Jersey. N.J.S.A. 24:61-1 (as amended by P.L. 2013, c. 130). The statute is intended to decriminalize the possession and use of medical marijuana for those individuals properly licensed under the Act. Another major legal discrepancy for the respondents is that they are mandated to comply with the Drug Free School Zone Act, N.J.S.A. 2C:35-7. This law sets forth a strict prohibition on drugs within a 1,000 feet perimeter or zone around the school. Penalties for drug-related crimes within that zone or perimeter are significantly enhanced. Ibid. The Drug Free School Zone Act is in direct conflict with the NJCUMMA. There also exists a potential conflict between state and federal law. Federal law maintains marijuana as a controlled dangerous substance under the Controlled Substances Act, 21 U.S.C.A. 802. While the passage of the most recent federal spending bill prohibits the use of federal dollars to

enforce any federal law contrary to a state's medical marijuana regulations, the balance of legal requirements on both a federal and state level has not been well-settled.

The next prong of the emergent relief analysis is whether there is a likelihood of success on the merits of petitioner's claim. As set forth above, the law regarding use and possession of medical marijuana in schools is not well-settled. In fact, there has been no case reported in any state that specifically addresses the use and possession of medical marijuana in schools. As a result, petitioner has not established a likelihood of success on the merits to overcome the test for emergent relief to be granted.

As petitioner has also failed to meet the four-prong test for injunctive relief, the application for emergent relief is **DENIED**.

CONCLUSION AND ORDER

For the foregoing reasons, I **CONCLUDE** that petitioner is not entitled to an order that LARC School permit her to administer prescribed medical marijuana at school during school hours. I **ORDER** that petitioner's Motion for Emergent Relief is **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 parents, 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.

September 15, 2015

DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency

Date Mailed to Parties:

cmo

WITNESSES

For Petitioner:

None

For Respondents:

None

EXHIBITS

For Petitioner:

- P-A Affidavit of petitioner L.B.
- P-B Copy of current IEP with copy of current Behavior Plan
- P-C Copy of Stephanie O'Brien, BCaBA's December 2, 2014 Letter Report
- P-D Copy of initial FBA and Behavior Improvement Plan for G.B.
- P-E Copy of Director of CST for MSTBOE Dawn Monacella's April 23, 2014 letter refusing request to administer MMJ on campus
- P-F New jersey CUMMA (N.J.S.A. 24:61-1, et seq.)
- P-G Copy of pertinent portions of Attorney General's Enforcement Guidelines for Police regarding the use of edible medical marijuana on school grounds
- P-H March 29, 2012 and May 14, 2013 letters from C.H.O.P.
- P-I October 22, 2012 letter from G.B.'s neurologist, Dr. Lawrence Brown, MD
- P-J April 12, 2013 New Medication List from CHOP
- P-K Copy of petitioner G.B.'s Attendance Records from 2013 while she was prescribed narcotics to help stop her daily seizures, and her 2014 Attendance Records to date while GLB is prescribed medical marijuana Instead
- P-L G.B.'s Seizure Protocol
- P-M Prescription for medical marijuana from G.B.'s attending New Jersey

physician

- P-N Copy of attending physician's (Dr. Kwak) further instruction as to the dispensing and administering of marijuana doses to G.B., and copy of attending physician statement, New Jersey Department of Health, prescribing one-half ounce of marijuana to G.B. per month, which is to be dispensed and administered pursuant to the attending physician's further instruction
- P-O Copies of L.B. and G.B. medical marijuana licenses
- P-P Copy of the LARC School's policy on the administration of medication
- P-Q Color Photographs of G.B.'s injuries caused by her new self-injurious behaviors

Petitioner's Reply Brief Exhibits:

- P-A Affidavit of G.B.'s attending New Jersey physician Dr. James A. Kwak, M.D.
- P-B Prescription and Dosing/Administration Instructions from G.B.'s attending New Jersey Physician Dr. James A. Kwak, M.D., on LARC School's form for the administration of prescription medicine at school
- P-C LARC and MSTBOE counsel letters of August 13, 2015 vehemently objecting to L.B.'s right to come to school and administer G.B.'s MMJ under the currently existing NJ CUMMA
- P-D New Jersey Attorney General pertinent portion for Guidelines for Police Enforcement and the consumption of edible MMJ while on school grounds
- P-E New Jersey Compassionate Use Medical Marijuana Act (CUMMA) pertinent portions of statute relative to petitioner and L.B.'s right to administer G.B.'s MMJ while on school grounds
- P-F Copies of LARC School's Daily Log Book Communication Reports from February 27, 2015 through March 26, 2015 detailing twelve days that LARC used the Rifkin Restraint Chair to control G.B.'s afternoon maladaptive behaviors
- P-G Affidavit of petitioner L.B.

For Respondents:

- R-1 January 9, 2015 Decision Denying Emergent Relief
- R-2 August 10, 2015 Final Decision Granting Respondent's Motion for Summary Decision and Denying Petitioner's Motion for Summary Decision
- R-3 November 18, 2014 Individualized Education Program
- R-4 Medical Records obtained from Children's Hospital of Philadelphia
- R-5 Medical Records obtained from Kwak Family Medicine, P.C.