

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION ON EMERGENT RELIEF

OAL DKT. NO. EDS 15438-16

AGENCY DKT.NO. 2017 25271E

S.D. ON BEHALF OF L.D.,

Petitioner,

v.

NEWARK BOARD OF EDUCATION,

Respondent.

Elizabeth Athos, Esq. appearing on behalf of petitioner (Education Law Clinic)

Aresn Zartarian, Esq. for respondent (Newark Public Schools, attorneys)

Record Closed: October 24, 2016

Decided: October 24, 2016

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

Petitioner, S.D., brings this action seeking an order to compel Newark Board of Education (Newark) to implement L.D.'s IEP specifically provide him with feeding therapy and 1:1 nursing support. Newark filed a cross motion requesting L.D. be immediately be placed in the Belmont Runyon School.

On October 11, 2016, the Office of Special Education Programs transmitted the matter to the Office of Administrative Law (OAL) under Docket No. EDS 15438-16. Oral arguments were held on October 24, 2016, on which date the record closed.

FACTUAL DISCUSSION

After carefully considering the documentary evidence presented, and having had the opportunity to hear oral arguments, I **FIND** the following **FACTS**:

S.D is the parent of L.D. L.D. is eligible to receive special education and related services under the category of disabling condition of traumatic brain injury. Petitioners lived in Orange, New Jersey until June 30, 2016. While living in Orange, L.D. received special education services from the Orange Board of Education (Orange). Orange placed L.D. in an out of district placement at Horizon School for the 2015-2016 school year in accordance with the IEP. L.D. cannot speak, eat by mouth or walk. While he was at Horizon L.D. received intensive educational support, feeding therapy, individual and group therapy, cognitive rehabilitation based therapy, occupational therapy and the support of a 1:1 nurse. The nurse monitored seizure activity and aspiration during feeding as well as provided suction whenever necessary. Petitioner met with Newark before the commencement of the 2016-2017 school year. Newark upon review of L.D.'s Orange student file determined that the multiple disabled medically involved (MDMI) program at Belmont Runyon School was a comparable placement to that outlined in the Orange IEP. Newark determined that L.D.'s nursing needs could be met through access to the Belmont Runyon's nursing coverage, a personal aide to provide supervision, toileting and assistance with activities of daily living (ADL) and feedings in the nurse's office. Dr. Howard Britt, a doctor for L.D. recommended that she have a 1:1 nurse assist her at school to follow seizure medical precautions, monitor L.S. for aspiration during feeding and administer medication through a G-Tube.

Petitioner refused to send L.D. to school without Newark providing 1:1 nursing. It appears that L.D. is not in any school at this time. Petitioner has not attended an IEP meeting with Newark regarding L.D.

LEGAL ANALYSIS 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 this case, after hearing the arguments of petitioner and respondent and considering the 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).

Petitioner has not shown that L.D. would suffer irreparable harm if her motion is not granted. Petitioner has not shown that the program offered by Newark is not comparable to the program offered at Horizon. The Newark program would provide that L.D.'s feeding is done in the nurse's office and he would have access to Belmont Runyon's nursing coverage and a personal aide to provide assistance with his ADL's. Petitioner's doctor recommended that L.S. have 1:1 nursing but did not Order it and did not comment on the program offered by Newark.

Petitioner has not shown that she has a likelihood of success on the merits of her underlying claim or that the legal right underlying her claim is settled. Petitioner voluntarily moved L.D. from Orange to Newark. Petitioner has not proved that The Newark Placement is not comparable to the Horizon placement.

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, whether L.D. will suffer irreparable harm if the requested relief is not granted because there was no showing of irreparable harm and the legal right underlying petitioner's claim is settled and the petitioner has a likelihood of prevailing on the merits of the underlying claim.

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

N.J.S.A. 18A:38-25 provides:

Every parent, guardian or other person having custody and control of a child between the ages of six and 16 years shall cause such child regularly to attend the public schools of the district or a day school in which there is given instruction equivalent to that provided in the public schools for children of similar grades and attainments or to receive equivalent instruction elsewhere than at school.

Petitioner has refused to enroll L.D. in school in Newark.

I **CONCLUDE** that petitioner must enroll L.D. in school.

After hearing argument of petitioner and considering all the affidavits, certifications and documents submitted, it is **ORDERED** that petitioner's motion for emergent relief is therefore **DENIED**.

IT IS FURTHER **ORDERED** that petitioner enroll L.D. in school.

This decision on application for emergency relief resolves all of the issues raised in the due process complaint; therefore, no further proceedings in this matter are

necessary. This decision on application for emergency relief is final pursuant to 20 U.S.C.A. § 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.A. § 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.

October 24, 2016

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency

October 24, 2016_____

Date Mailed to Parties:

October 24, 2016_____