State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

DECISION

DENYING EMERGENT RELIEF

OAL DKT. NO. EDS 16939-14

AGENCY DKT. NO. 2015 22132

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

Tracey L. Schneider, Esq., for respondent Maple Shade Township Board of Education

Aileen F. Droughton, Esq., for respondent LARC School

Record Closed: January 8, 2015 Decided: January 9, 2015

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

STATEMENT OF THE CASE

Petitioner L.B. requests an emergent order that LARC School administer prescribed medical Marijuana to G.B., a student at the school. Respondents Maple Shade Township Board of Education (Board) and The LARC School (LARC) oppose this request, contending that they do not have the legal authority or ability to administer medical marijuana on school property.

PROCEDURAL HISTORY

On December 15, 2014, 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 administer prescribed medical marijuana to G.B. during school hours. The Board responded, and seeks continued implementation of the most recent IEP.

On December 24, 2014, petitioner filed a request for emergency relief seeking an order requiring respondents 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 December 24, 2014. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

Oral argument was heard on January 8, 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.

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 in 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, James Kwak, for a monthly prescription of one-half ounce of medical marijuana (Petitioner's Exhibit "J"). Petitioner submitted specific instructions regarding dosage and storage of the medication to the Board on a form prepared pursuant to LARC School policy on the administration of medicine at school (Petitioner's Exhibit "K"). 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 FDA, 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 "R").

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. No medical documentation was submitted with the application for emergent relief to support this contention. Petitioner references G.B.'s attendance records to show that since being prescribed medical marijuana in September 2014 her attendance has greatly improved. During the 2013-2014 school year, G.B. was either absent or late as a result of her seizure disorder forty-one percent of the school year. G.B. has been absent only six times from September 2014 to date (Petitioner's Exhibit "H"). Since being prescribed medical marijuana G.B.'s daily seizures have decreased by approximately fifty percent in frequency (¶22 of petitioner's affidavit).

As a reasonable accommodation, respondent proposed that petitioner pick up G.B. each day at lunch time, 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 submits correspondence from G.B.'s behavior consultant, Stephanie O'Brien, M.S., BCaBA, to support the notion that G.B.'s school day would consistently be interrupted not only because of the removal from her school program, but also because of the behaviors which would likely follow when she is returned to school (Petitioner's Exhibit "L").

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 without the medication, there is a greater potential that G.B. will have seizures after the time she should have received her lunchtime dose of medical marijuana. This would likely result in a break in the delivery of services. G.B. has only missed six days of school since the start of the school year. All have been single, sporadic days with no apparent connection to the refusal to administer the medical marijuana. These absences are de minimus especially in light of the higher number of absences experienced during the prior school year, all of which have been attributable to her seizure disorder. Therefore, I **CONCLUDE** it has not been established that there exists a break in services or that a break in services is imminent.

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 has failed to establish that her claims fall within the emergent relief categories of N.J.A.C. 6A:14-2.7(r).

However, even if the four factors set forth above were applied, it is clear that petitioner has not met the burden set forth in Crowe. Petitioner bears the burden of satisfying all four prongs of this test. Crowe, 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 irreparable harm if the respondents continued to refuse to administer the medical marijuana in school. Further, Petitioner asserts that G.B. is doing notably better. Her absences have been drastically reduced from the 2013-2014 school year to the current school year since the petitioner began administering the medical marijuana to her. During this time, LARC has not been administering medical marijuana in school. As such, 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. It is unclear what impact this Act will have on the respondents or their employees who have not been licensed or classified as G.B.'s primary caregiver. 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. Id. 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. 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. Petitioner asserts that G.B.'s seizures will increase as a result of the Board's refusal to administer the medication at lunchtime, but has not presented any medical documentation to support this assertion. As a result, petitioner has not established a likelihood of success on the merits to overcome the test for emergent relief to be granted.

The final standard to be addressed is whether upon balancing the equities and interests, the petitioner will suffer greater harm than respondents. In this matter, petitioner asserts that G.B. will suffer greater harm in the form of an increase in the frequency of seizures as a result of the refusal to administer the lunchtime dose of medication. However, if petitioner's relief were granted, the respondents would be in a

position of requiring the administration of a controlled dangerous substance on school grounds by an individual who is not a registered care provider under the NJCUMMA. It is not at all certain that G.B. will suffer an increase in the frequency of seizures. Thus, petitioner has not met her burden that balancing the equities and interests, G.B. will suffer greater harm than respondents.

As petitioner has also failed to meet the four-pronged 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 administer prescribed medical marijuana at school. 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 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.

January 9, 2015
DATE

JOHN S. KENNEDY, ALJ

Date Mailed to Parties: January 9, 2015

cmo

WITNESSES

For Petitioner:

None

For Respondent:

None

EXHIBITS

For Petitioner:

P-1 Petition, December 9, 2014

For respondent:

R-1 Brief, January 5, 2015