



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON THE EMERGENT RELIEF

OAL DKT. NO. EDS 04260-18

AGENCY DKT. NO. 2018 27563

B.R. ON BEHALF OF V.R.,

Petitioners,

v.

EDISON TOWNSHIP BOARD OF EDUCATION,

Respondent.

B.R., petitioner, pro se

Douglas Silvestro, Esq., for respondent (Busch Law Group LLC, attorneys)

BEFORE **CATHERINE A. TUOHY**, ALJ:

STATEMENT OF THE CASE

Petitioner B.R., on behalf of her daughter, V.R., filed an application for Emergent Relief against the respondent, Edison Township Board of Education, seeking a one to one aide for her visually impaired daughter following surgery for a detached retina. Respondent opposes this request as unnecessary and not supported by sufficient medical documentation as well as not being appropriate for emergent relief.

PROCEDURAL HISTORY

Petitioner filed a due process petition with the Office of Special Education Policy and Procedure (OSEP) on February 20, 2018, seeking home instruction for V.R. until she was able to return to school, and upon return to school, a one to one aide, visual modifications, a bus aide and time for snacks. The matter was transmitted to the Office of Administrative Law (OAL) on March 22, 2018 as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13.

An initial telephone prehearing was conducted on April 13, 2018, and the matter was scheduled for a hearing on July 3 and 9, 2018. Thereafter, on April 18, 2018, petitioner filed an application for Emergent Relief with the OAL seeking an immediate one to one aide to assist V.R. from the bus to school, to all of her classes, and back to the bus; large print for the PARCC testing; and compensatory education for the hours not provided during home instruction. The parties presented oral argument on the emergent relief application on April 20, 2018, and the record closed.

FACTUAL DISCUSSION

V.R. is fourteen years old and is legally blind. She is a ninth-grade student at J.P. Stevens High School and is eligible for special education and related services under the classification category of “visually impaired”. Her current Individualized Education Program (IEP) calls for an in-district placement at J.P. Stevens High School. Respondent has made various accommodations for V.R. such as providing educational materials in large print and allowing V.R. to leave her classes a little early so that she can more easily traverse the hallways without the crowd of other students. However, the school’s safety plan requires that all classroom doors be locked during class time, so V.R. is among all the student’s waiting to enter the classroom and has to stand against the wall so to avoid being knocked down or bumped into by the other students who are all waiting to enter the classroom. She has also been given an elevator key so that she does not have to go up and down the stairs. Petitioner also explained that the school windows open inwards and her daughter has to remember and be reminded to walk on one side of the hallway so she does not walk into the open windows.

On January 25, 2018, V.R. suffered a detached retina of her right eye and underwent emergency surgery the same day to reattach her retina. It was significant surgery and V.R. had to spend several weeks sleeping on her left side. V.R. could not bend her head forward or lift anything heavy afterwards. The surgery was performed on an emergency basis because if a detached retina were not repaired immediately, the chances of regaining whatever vision V.R. had would decrease.

V.R. goes for follow-up visits to check on her status. V.R. has had high pressure in both of her eyes and has experienced seeing bright lights and floaters in her left eye as well, which is a precursor to a detached retina. Her ophthalmologists are closely monitoring V.R. to see that she does not suffer a detached left retina. Petitioner, B.R., is also visually impaired and she is very concerned that her daughter's condition could deteriorate and she will become totally blind.

V.R. was required to receive home instruction following her surgery. Petitioner claims that there were various problems with the home instruction and V.R. did not receive all of the instruction she was entitled to receive and consequently fell behind in her school work. Petitioner states that V.R. obtained clearance to go to school earlier than she should have because she feared she was falling behind in her studies. Petitioner's due process was filed February 20, 2018 and sought on behalf of her daughter, V.R., home instruction until able to return to school and, upon return to school, a one to one aide, visual modifications, a bus aide and time for snacks. On March 19, 2018, V.R. returned to school after her doctor provided a note clearing her to return with restrictions which stated:

"To Whom it May Concern: Patient had right retinal reattachment repair. – Limited physical exertion – limit weight resistance training – if patient experiences pain or fatigue of eyes please allow rest. Patient will re-start school 3/19/18. Any questions. Thank you, Specialty M.D." (P-2).

On March 19, 2019 V.R. returned to school. Petitioner states that V.R. can only see light out of her right eye and the retina surgeon, Dr. Zarban at UMDNJ, advised that it is a slow process and may take approximately six months before she regains some vision in her right eye. The District did not provide V.R. with a one to one aide on her

return to school because it was not provided for in the doctor's March 12, 2018, note. Petitioner states that her daughter needs the aide to prevent further injury. Any fall, bang or trauma to V.R. either by banging into other students or an object or a fall could cause V.R. further injury to her eyes as well as general injuries to herself since she is visually impaired.

On or about April 7, 2018 petitioner provided the District with a note from Specialty Eye M.D.'s (Atul K. Agarwala, M.D.) which stated:

"To Whom it May Concern. V.R. has poor vision. Need ambulation accompany in school. Not able to maneuver. CBVI." (P-1)

Although the District admitted that this note would suggest an aide be assigned to V.R., the District required an authorization and general medical release to speak with the doctor as to the medical necessity for an aide. Petitioner would not execute a general release because she claimed that the District has not protected their privacy rights in the past and she does not trust them to protect them in the future. Petitioner also explained that her daughter's medical files are linked to other family members medical files as four family members are all involved in a study regarding hereditary vision problems. Petitioners submit that the April 7, 2018, doctor's note is sufficient and the district is well aware of V.R.'s medical history and that her difficulties are real.

Although petitioner requested emergency relief regarding accommodations for the PARRC testing on April 19 and April 20, 2018, and oral argument was on April 20, 2018 the parties agreed that since V.R. did receive the accommodations, this issue was moot. As far as compensatory education for the home instruction hours, the parties agreed that the District would submit a formal proposal for petitioners' approval. If the parents did not agree with the District's proposal and they could not come to a compromise, the compensatory education claim would be heard at the due process hearing.

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, petitioner asserts that there is an issue involving a break in the delivery of services as well as an issue concerning placement pending the outcome of the due process proceedings. Respondents contend that V.R. is receiving all the appropriate services pursuant to her IEP and that she is currently back in school and has been since March 19, 2018, without the assistance of a one to one aide.

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. These standards for emergent relief require 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 as far as the claim that there has been a break in services. V.R. took the PARCC testing on April 19th and 20th and had the appropriate accommodations. The District has acknowledged that V.R. is entitled to any lost hours of home instruction that she did not receive. Although the parties dispute the amounts of hours and how the instruction is to be accomplished, the issue of compensatory education will be decided at the due process hearing if not resolved by the parties before then. Therefore, since there has been no showing of irreparable harm on the issue of compensatory education, I **CONCLUDE** that there is no entitlement to emergent relief on this issue.

Petitioner is legally blind and her condition has worsened with the most recent surgical intervention for the detached retina of her right eye and the symptoms now presenting in her left eye. Petitioner has requested a 1:1 aide on an emergent basis because of V.R.'s recent surgery. V.R.'s medical condition cannot be considered a temporary medical condition or transitory as respondent would seek to argue. V.R.'s visual impairment is not going to improve even if her retina surgery is successful. Petitioner will suffer irreparable harm if she is not afforded an aide to assist her in safely traversing the school hallways. If V.R. falls, is bumped, pushed or walks into a person or object she can sustain further damage to her eyes resulting in total blindness and/or suffer serious personal injuries as a result of an accident due to her visual impairment. Respondent's argument that she has been in school since March 29, 2018 without incident is without merit. V.R. has been fortunate no harm has come to her so far.

Respondent acknowledges that students with disabilities have the right to a free and appropriate education in the least restrictive environment (FAPE). The IDEA and Section 504 requires school districts to provide accommodations for individuals with disabilities; it is undisputed that V.R. is an individual with disabilities and is entitled to an accommodation of a 1:1 aide. The legal right underlying petitioner's claim is well settled and petitioner is likely to prevail on the merits.

The last prong of balancing the equities also requires that petitioner be granted the emergent relief of a 1:1 aide. The District argues that it will suffer greater harm than V.R. The harm to respondent is the cost of the aide, which cannot be compared to the health and safety of the student who may become blind if her disability is not accommodated.

Therefore, for all of the foregoing reasons, I **CONCLUDE** that petitioner has demonstrated entitlement to the emergent relief of the assignment of a 1:1 aide for the remainder of the school year. Petitioner's emergent application is **GRANTED** in this regard.

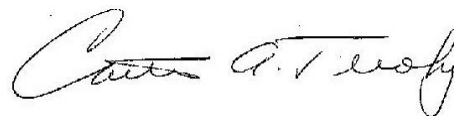
ORDER

It is **ORDERED** that respondent assign a 1:1 aide to assist V.R. throughout her school day as well as assisting her off the bus in the morning and getting her back on the bus in the afternoon request for the compensatory education is denied pending further agreement of the parties. If not resolved, this issue will be determined at the due process hearing.

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 on July 3rd and 9th, 2018. 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.

April 23, 2018

DATE



CATHERINE A. TUOHY, ALJ

Date Received at Agency

April 23, 2018 (emailed)

Date Mailed to Parties:

CAT/mel

APPENDIX

WITNESSES

For Petitioners:

None

For Respondent:

None

EXHIBITS

For Petitioners:

- P-1 Doctor's note dated April 7, 2018
- P-2 Doctor's Note dates June 27, 2003
- P-3 Letter from Department of Human Services to B.R. dated March 23, 2018
- P-4 New Jersey Department of Education – List of State-Imposed Special Education Rules, Regulations, or Policies in Accordance with 20 U.S.C. §1407(a)

For Respondent:

- R-1 Brief in Opposition to the Request for Emergent Relief filed by Petitioner dated April 19, 2018