State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
ON EMERGENT RELIEF
OAL DKT. NO. EDS 08565-19
AGENCY DKT. NO. 2019-30204

D.W. ON BEHALF OF C.V.,
Petitioners,
v.
TRENTON PUBLIC SCHOOL DISTRICT BOARD OF EDUCATION,
Respondent.

D.W., petitioner, pro se

Audra Pondish, Esq., for respondents (Adams, Guitierrez and Lattiboudere, LLC, attorneys)

Record Closed: July 1, 2019 Decided: July 1, 2019

BEFORE **PATRICIA M. KERINS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

By a request for emergent relief petitioner D.W. seeks to have C.V. attend an Extended School Year (ESY) program at the Lewis School with respondent Board of Education of the City of Trenton (Trenton) bearing the expense of the program and

transportation. Trenton opposes this request and asserts that its proposed in-district ESY program is appropriate for C.V.

This matter was transmitted to the Office of Administrative Law (OAL) on June 25, 2019, for an emergent relief hearing and a final determination in accordance with 20 U.S.C.A. §1415 and 34 C.F.R. §§300.500 to 300.587, and the Director of the Office of Administrative Law assigned me to hear the case pursuant to N.J.S.A. 52:14F-5. The emergent relief hearing was scheduled for oral argument on June 28, 2019 and rescheduled to July 1, 2019 at request of petitioner. A hearing was held and argument made by both the petitioner and the respondent and the record closed.

FACTUAL DISCUSSION

C.V. is a nine year old child who will be entering fourth grade in the 2019-20 school year. She is classified as Multiply Disabled (MD) with a Specific Learning Disability (SLD) and Other Health Impaired (OHI) classification, and receives special education services from Trenton. Her most recent IEP of February 26, 2019, was amended on May 1, 2019. According to that amendment C.V. was to be provided with a one to one aide and a Behavior Intervention Plan (BIP). The IEP goes on to state that C.V. would also receive an ESY program as compensatory education due to Trenton's failure to provide a one to one aide at a time not specified in the IEP amendment.

In her request for emergent relief petitioner states that Trenton has failed to provide a meaningful education and related services to C.V. She further alleges that C.V. was physically assaulted by other students and, that with the assaults and Trenton's failure to provide a proper program and services, she has regressed and lost classroom learning hours. Although Trenton has agreed to provide an ESY program in-distict, D.W. requests that Trenton place C.V. at the summer program at the Lewis School, a private school.

The most recent IEP prepared for C.V. by Trenton describes her as functioning academically at a Kindergarten/First Grade level, unable to work independently. She is described as a danger to herself, with head banging and elopement behaviors. Additionally, she has vision problems. The ESY offered by Trenton in that same IEP is a

five week, twenty hours per week program at a special education classroom in Trenton with a one on one aide and transportation.

D.W. represented C.V. at the hearing and appeared pro se, testifying in support of her emergent request. She asserted that C.V. had regressed over the past school year, during which she had up to six different teachers, and periods of time when Trenton had not staffed the classroom with certified special education teachers. She described several physical assaults upon C.V., including one in which she may have sustained head injuries. Over the 2018-19 school year D.W. stated that she noticed regression in certain areas by C.V., including the ability to compose a paragraph and identify letters. According to D.W., the teacher in the classroom in October 2018 brought the regression to her attention. C.V. also experienced some loss of vision over the year and requires glasses. She began to bang her head around October and did not want to go to school.

As she feels C.V. has regressed, petitioner did not feel the ESY program proposed by Trenton would address C.V.'s needs, particularly her difficulties with reading. She seeks the ESY program at the Lewis School as an alternative, frankly stating that she had lost faith in Trenton to provide C.V. with the instruction that would allow her to make progress in a safe environment.

Trenton, on the other hand, argued that its proposed ESY program in-district was appropriate for C.V.'s needs. The program, as set forth in the May 1, 2019, IEP would provide instruction in literacy and math, along with a one to one aide for C.V. Trenton also agreed that an Occupational Therapy (OT) evaluation would be performed during the program. It presented the testimony of its Supervisor of Special Services, Dr. Mowatt, who described the proposed ESY program and who differed with D.W. on the extent of any regression experienced by C.V. over the past year. Trenton further argued that its ESY program would allow for the implementation of the BIP recently put in place for C.V. in order to deal with her behavioral issues which included head banging, elopement, and anxiety.

LEGAL DISCUSSION

The standards to be met by the moving party in an application for emergent relief in a matter concerning a special needs child are set forth in N.J.A.C. 1:6A-12.1(e) and N.J.A.C. 6A-14-2.7(m)1. See also Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982). They provide that a judge may order emergency relief 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 matter D.W. has raised significant issues regarding C.V.'s education in the Trenton district. Many of those issues will be part of the underlying due process petition. The only issue before me in this emergent application is whether the ESY program at the Lewis School should replace the ESY in-district program proposed by Trenton in the May 1, 2019 IEP. Applying the above four prong analysis required in an emergent application to this matter leads to a conclusion that petitioner has not met her burden for emergent relief.

Addressing the first prong of the test, petitioner has not shown that irreparable harm will result to C.V. if she does not attend the Lewis ESY program. While it is apparent that C.V. is in need of a program which addresses her reading and learning difficulties, it is also apparent that she is in need of behavioral supports to deal with her behaviors in a school environment. There is no indication that Lewis will be implementing the types of

supports set forth in the BIP which is part of her IEP. Additionally, petitioner did not present the nexus between C.V.'s specific needs and Lewis' program sufficient to outweigh the program proposed by Trenton.

As to the second prong, while C.V.'s right to an ESY program is set forth in her IEP, her right to an ESY program at Lewis is not settled. As noted previously, petitioner has not yet made a showing that the Lewis program meets C.V.'s specific needs in a way that the Trenton program does not. While D.W. may yet be able to do so in the underlying due process matter, she has not done so within the four corners of this emergent application.

The third prong of the test for emergent relief requires that petitioner has a likelihood of success on the merits. It may well be that as the facts in this matter are developed petitioner may show that C.V.'s needs were best met by the Lewis program. However, the facts presented to date do not definitively show that such is the case and petitioner has not met the third prong of the test.

The final requirement for relief entails a balancing of the interests between the parties. In this matter, C.V. is not being denied an ESY by Trenton, the dispute is over where that ESY will take place. Petitioner proposes an out-of-district program with an emphasis on reading while Trenton proposes an in-district program with literacy and behavioral components. Petitioner has not yet shown that on balance C.V. will suffer the greater harm in this case.

While petitioner has made a colorable argument that a program such as that at Lewis may be more appropriate for C.V. than an in-district program at Trenton, she has not done so within the demanding confines of a request for emergent relief. As such her request for emergent relief is **DENIED**. Such denial however is without prejudice to any claim regarding the ESY program or compensatory education she may have in the underlying due process matter.

DECISION AND ORDER

For the reasons stated above, I hereby **ORDER** that petitioners' application for emergent relief is **DENIED**.

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

Patricia M. Kerins

July 1, 2019
DATE

PATRICIA M. KERINS, ALJ

Date Received at Agency: July 1, 2019 (emailed)

Date Mailed to Parties:

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APPENDIX

WITNESSES

For Petitioners:

D.W.

For Respondent:

Dr. Mowatt