



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**FINAL DECISION**

**EMERGENT RELIEF**

OAL DKT. NO. EDS 10933-20

AGENCY DKT. NO. 2021-32247

**M.S. ON BEHALF OF L.S.,**

Petitioner,

v.

**UNION CITY BOARD OF EDUCATION,**

Respondent.

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**Frances Nicotra.,** for Petitioner M.S.

**Susanne Lavelle,** Esq., for Respondent

**Lori Gaines,** Esq., for Respondent/ Intervenor M.H.

Record Closed: December 23,2020

Decided: December 29, 2020

BEFORE **ANDREW M. BARON,** ALJ:

**STATEMENT OF THE CASE**

On December 21, 2020, Respondent M.H. filed a request for emergent relief with the Office of Administrative Law, seeking to Intervene and be recognized as a party to the within matter for the purpose of seeking an out-of-district placement for the parties' daughter L.S.

Prior thereto, on October 5, 2020, the Union City School District, (hereinafter referred to as the District, filed a Mediation Request with the Department of Education, in an effort to resolve differences between L.S.'s parents concerning her placement in an appropriate out-of-district school. The mediation failed, L.S.'s father, M.S. filed a due process petition, and the District withdrew its own filing to avoid having two matters pending with the Office of Administrative Law.

With no agreement between L.S.'s parents about an appropriate placement for L.S., her mother, M.H. retained counsel, and filed the within Motion to Intervene/Request for Emergent Relief.

Oral argument was held during the afternoon of December 23, 2020. Limited sworn testimony was also heard during the course of the proceeding from M.S., M.H. and Dr. Delia Menendez, the Director of Special Services for the district.

At the outset of the proceeding, counsel for M.S. gave consent for M.H. to Intervene in the matter, so that relief is **GRANTED**, and there was no need for further discussion on this issue.

### **FACTS**

Most of the underlying facts concerning L.S.'s learning challenges and educational history are undisputed.

What is disputed is the best course of action for an appropriate educational setting moving forward, that will offer L.S. the best opportunity to overcome her challenges and thrive in an alternative educational setting.

It is important to note here, before addressing the details of the situation, that neither parent can be faulted for advocating what they believe to be in the best interests of L.S.

Based on the relevant documents submitted, limited testimony and evidence I

**FIND:**

L.S., age 8, is a student with multiple learning challenges including but not limited to autism, anxiety and inability to control certain types of behavior, as well as other diagnoses.

She received early intervention from the District at age 3, which led to a decision to have her repeat pre-school.

Due to her struggles which evidenced themselves early on, she has also received speech therapy, physical therapy and occupational therapy.

Over, time also diagnosed were: Attention Hyperactivity Disorder, Global Developmental Delay, Coffin-Siris Syndrome 4, (a genetic condition), and signs of cognitive impairment.

According to the records and M.H., she starts each school year with enthusiasm, but by January of each year, she effectively “shuts down.” This seems to be an indication of someone who wants to learn and is willing to may need a different environment in order to overcome a number of significant learning challenges.

Showing signs of increased anxiety, in January 2019, she started to refuse speech therapy sessions, and essentially “shut down” for the remainder of the school year.

With the beginning of the new school year in September 2019, at the recommendation of the district, M.H. arranged for a behaviorist to work with L.S. at home. However, L.S. continued to regress at school.

Not wanting to give up on potential opportunities to enhance L.S.’s ability to learn, M.H. met with district officials in February 2020 before school and other things shut down due to the onset of Covid. At that time, the District Child Study team proposed for the first time an out-of-district placement for L.S.

At that time, L.S.'s father M.S., was unwilling to agree to such a placement, as he believed that it was more the behavioral component that was interfering with L.S.'s ability of learn.

(M.S. and M.H. were divorced in April 2015, under a Superior Court Order of shared custody, so it is understandable why out of love for L.S., they may have had differences about how to help her to overcome these growing challenges.) Unfortunately, at the time it was prepared and filed, the Order itself, included here as **(EXHIBIT A)**, only expresses in general terms that "when significant issues arise concerning L.S., the parties should confer with each other." While the Order itself acknowledges L.S.'s special needs, it is lacking on how to resolve disputes over how best to address these needs when disagreements arise.

To his credit, over time, M.S. while still not agreeing on the specific program, M.S. did change his position somewhat following the receipt of a report from pediatric neurologist Dr. John Ferrara, concerning his medical opinion as to a diagnosis and recommendations on how to proceed. So, while still believing that North Hudson was the best option, M.S. did agree that an out-of- district placement was necessary in order to enhance L.S.'s ability to learn. He had also investigated other options such as the Mustard School, which is a Christian based learning institution, but that school is not recognized or approved by the New Jersey Department of Education, thus limiting the District's ability to secure approval from its Board of Education.

Further advocating his position that North Hudson was the best choice for L.S., M.S. noted it was much closer to home, and did not require busing to get there. He also felt that the emphasis on behavioral training there would benefit L.S.

But as noted during the hearing, a significant drawback to North Hudson, was the fact that its autism program ends at age 8, and L.S. would age out of that program in June 2021, requiring yet another school placement to meet those needs.

While not ignoring the behavioral component to L.S.'s profile, **I FIND** that for the time being, continued home based **ABA therapy**, which seems to be recommended by most of the professionals, is the better course of action.

Unable to take action due to the disagreement at the time between the parents, the District filed for mediation in October 2020. The outcome of this was unsuccessful, and it led M.S., who was advocating for what he believed to be in L.S.'s best interests, to file his own due process petition.

Simultaneous with these ongoing legal proceedings, District officials, who recognized they could not provide FAPE to L.S. in her present setting, continued to secure reports from medical and educational professionals, including Dr. Eileen Dolan, a Developmental Behavioral Pediatrician, associated with Institute for child Development at Hackensack-Meridian Hospital (**EXHIBITS E and F**), as well as a previously prepared report dated February 28, 2020, from Antonella Kuskin, the head of the Child Study Team, (**EXHIBIT B**).

Dr. Dolan, a pediatric neurologist, who had been treating L.S. for some time, also offered the opinion that a suitable out-of-district placement was appropriate in order to increase the likelihood of L.S.'s learning capabilities.

Simultaneous with the reports of Dr. Dolan, M.H. also provided a report from Ann Martino, a speech pathologist who had been working with L.S. since March 2020. (**EXHIBIT G**). Among other things, Ms. Martino found that L.S.'s expressive and receptive language skills were interfering with her ability to learn and function in school, and also interfered with L.S.'s ability to develop meaningful social interactions and relationships with her peers.

By way of example, challenges in phonological awareness, complex expressive language and pragmatic language skills, all of which impact reading and writing skills at an age appropriate level, were lacking. Therefore, a school with small class sizes, and certified instructors with training in these areas is warranted.

As discussed above, to his credit, even though he still disagreed with the placements sought by M.H. and the District, M.S. started to reconsider his position, and in late November 2020, he retained Dr. John Ferrera, a child neuropsychologist to evaluate L.S. and her multiple needs. **(EXHIBITS H & I)**.

Similar to the other professionals outlined above, Dr. Ferrera noted the relationship between L.S.'s behavioral issues and her performance in school. Although he does not normally opine on a particular school, Dr. Ferrera noted the small class sizes and one-to-one learning opportunities at **Banyan**, and while he considered the options at North Hudson and ECLC, and he spent time contacting all three schools, he felt that **Banyan** was a better option. Among other things, he noted the multi-sensory curriculum offered at **Banyan**, including but not limited to one-on-one tutoring and trained and certified instructors in certain areas would give L.S. the best opportunity to succeed.

Both Dr. Ferrera and M.H. confirmed that **Banyan** offers five periods a day of language literacy, (an area where it is undisputed L.S. needs to maximize her ability to improve), as well as a Wilson Reading System taught by certified teachers/instructors. All classes, including math, science and social studies are taught by special education certified teachers, and while unlike North Hudson that has a greater emphasis on behavioral issues, **Banyan has a BCBA** on staff, as well as social workers when needed to work with students like L.S. who also have behavioral issues.

Finally, the Certification and testimony of Dr. Delia Menendez was also considered. Dr. Menendez, who serves as Director of Special Services for the District, was very familiar with L.S.'s case. To her credit as well, several months earlier, she too recognized, given her training and experience in the field, that the District could not fulfill its obligations under IDEA, FAPE and Section 504 of the Rehabilitation Act to L.S. That is part of the application seeking Emergent relief.

While Dr. Menendez considered North Hudson as requested by M.S. because she is familiar with the program and curriculum at that school, she ruled it out due to the type of constituency it serves, which she did not believe was in L.S.'s best interests. And while Dr. Menendez expressed a preference for ECLC, due in part because Banyan is virtual

until January 15<sup>th</sup>, she did not strongly oppose a placement at Banyan to meet and address Banyan's future educational needs. (More often than not, in contested cases like these the District is defending what it is offering and opposing an out-of-district placement, so again here, it is important to acknowledge that the District wants to see L.S. be exposed to a better educational learning experience for now, with, of course, the ultimate goal being re-unification within the District at some time in the future). **I FIND**, that the District and its personnel should be commended for taking this position in order to meet its legal obligations to L.S.

I also FIND, that the Parties should also be commended for conducting themselves in a civil manner throughout the course of the hearing. Being the parent of a child with special needs can cause emotional reactions to certain situations. As she progresses, there will, no doubt, be future disagreements about which course of action to pursue for L.S. Since the Custody Agreement did not provide a mechanism for resolving these differences, it is hoped that expensive and protracted litigation can be avoided by adopting the same approach that both sides presented during this hearing.

### **LEGAL DISCUSSION AND CONCLUSIONS**

The Individuals with Disabilities Education Act, (IDEA), 20 U.S.C. Sect. 1400-1482, ensures that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet the unique needs and prepare them for further education, employment and independent living, and ensures that the rights of children with disabilities and parents of such children are protected. See also: N.J.A.C. 6A;14-1.1 et seq.

States qualifying for federal funds under the IDEA must assure all children with disabilities receive the right to a "free appropriate public education." Hendrick Hudson Cent. Sch. District Bd. of Educ. v. Rowley, 458 U.S. 176 (1982). Subject to certain limitations, FAPE is available to all children with disabilities residing in the State between the ages of three and twenty-one, inclusive. 20 U.S.C. Sect. 1412 (a1A,B).

In order to facilitate the implementation of FAPE for eligible students, an Individualized Education Program, (IEP) is prepared, developed and reviewed for each child that is eligible to receive special services. 20 U.S.C. Sect. 1412,1414 respectively. The IEP establishes the rationale for the student's educational placement and serves as a basis for the implementation of certain programs to meet that student's unique educational and sometimes behavioral special needs. N.J.A.C. 6A: 14-1.3-3.7. Annually or more often if necessary. The IEP team shall meet to review and revise the IEP to determine an appropriate placement for the student.

The standards that must be met by the moving party in an application for emergent relief are embodied in N.J.A.C. 6A:14-2.7(r)–(s), N.J.A.C. 1:6A-12.1, and Crowe v. DeGioia, 90 N.J. 126, 132–34 (1982). Emergency relief may be granted if the judge determines:

- i. The petitioner will suffer irreparable harm if the requested relief is not granted;
- ii. The legal right underlying petitioner's claim is settled;
- iii. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
- iv. 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.

[N.J.A.C. 6A:14-2.7(s)(1).]

“Each of these factors must be clearly and convincingly demonstrated” by the moving party. Waste Mgmt. of N.J. v. Union County. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

Considering the above factors for emergent relief, I **CONCLUDE** that M.H. has satisfied the four criteria. Specifically, given the opinions of Dr. Dolan, Dr. Ferrara, Ms. Kuskin, Dr. Menendez and the accompanying documents presented by both sides, M.H. **does satisfy the first prong required for relief because she did clearly and convincingly demonstrate L.S.** will suffer irreparable harm, unless an out-of-district placement to **Banyan** is facilitated effective January 4, 2021.



As to the other criteria, the legal rights of L.S. are elaborated above under **IDEA and FAPE**, M.H. on behalf of L.S. is **likely to prevail on the merits**, and having considered all the documents and limited testimony presented, **after balancing the equities**, it is more likely that M.H. on behalf of L.S. will be prejudiced, unless the requested relief seeking an out-of-district placement at **Banyan** is granted.

Additionally, M.H. has met the criteria of demonstrating a likelihood of success on the merits of the underlying claim. M.H., the District and even M.S. have presented expert opinions and conclusive data to show that the plan currently in place fails to offer a free appropriate public education. While M.S. presented valid reasons to consider other alternatives such as North Hudson and the Mustard Seed School that he had researched on behalf of L.S., having considered all of the facts and evidence presented, the most appropriate placement sought for L.S. at the present time is the **Banyan School**, as the District itself says the programs available in-district are insufficient to meet L.S.'s needs.

Under the facts and circumstances presented, M.H. has met all four criteria required for emergent relief.

Therefore, I **CONCLUDE** that petitioner has proven that L.S. will be irreparably harmed if emergent relief is not granted; and further **CONCLUDE** that M.H. has demonstrated a likelihood of prevailing on the merits.

Accordingly, I **CONCLUDE** that M.H. has established the necessary criteria to be successful for emergent relief, and therefore, the relief sought in this emergent application, which essentially seeks an Order confirming the need for an out-of-district placement at the **Banyan School**, located in Fairfield, New Jersey, is **GRANTED**.

### **ORDER**

M.H.'s application to **INTERVENE** in this part of the case, as well as for future proceedings is **GRANTED BY CONSENT**.

M.H.'s request for Emergent relief is **GRANTED**. Accordingly, it is hereby **ORDERED** that the petition for emergent relief to place L.S. at the **Banyan School** when schools return from the holiday break on or about January 4, 2021 is hereby **GRANTED**. (It is understood that the administrative process to enroll, and set up a class schedule for L.S. may take a few days when Banyan and Union City re-open on January 4, 2021, and that L.S. may have to start her new learning experience with Banyan as a virtual student, until the projected date set forth below.)

It is further **ORDERED**, that the District shall begin to take the steps necessary to ensure the safe transportation of L.S. to **Banyan**, when it re-opens for in school classes on or about January 15, 2021, including but not limited to the use of an area **JOINTURE** arrangement, or in the event such an arrangement is not available, an emergency bid for a contract with a local school bus company. Any such means of transportation **SHALL** include the use of a **Bus Aide**, at least for the remaining balance of this school year to ensure an orderly and safe transition for L.S.

This decision on application for emergency relief resolves all of the issues raised for this proceeding only. There is a future proceeding in this matter currently scheduled for January 7, 2021, during which any remaining issues not covered by this decision can be addressed. 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.

December 29, 2020

DATE



Andrew M. Baron

**ANDREW M. BARON, ALJ**

Date Received at Agency:

December 29, 2020

Date Mailed to Parties:

December 29, 2020

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## **APPENDIX**

### **Witnesses**

#### **Petitioners**

M.S.

Intervenor/Petitioner  
M.H.

Dr. Delia Menendez

### **Exhibits**

#### **Petitioner**

- i- North Hudson profile
- ii- Mustard Seed Profile
- iii- Dr. Ferrara email and report

#### **Intervenor/Petitioner**

- i- Certification of M.H.
- ii- Certification of Antonella Kuskin
- iii- Certification of Dr. Delia Menendez
- A- Custody order, dated April 5, 2015
- B- Dist. Ed. Eval., dated February 28, 2020
- C- Mediation Request, dated October 5, 2020
- D- Withdrawal letter, dated November 2, 2020
- E- Dr. Eileen Dolan report, dated November 4, 2020
- F- Dr. Dolan Supplemental report, dated November 20, 2020
- G- Ann martino Speech language report, November 20,2020
- H- Dr. Ferrara email, dated December 9, 2020
- I- Dr. Ferrara Neuropsychiatric report