



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

ON EMERGENT RELIEF

OAL DKT. NO. EDS 05335-2021

AGENCY DKT. NO. 2021-32864

A.C. ON BEHALF OF Z.P.,

Petitioner,

v.

WEST WINDSOR-PLAINSBORO

REGIONAL BOARD OF EDUCATION,

Respondent.

Denise Lanchantin Dwyer, Esq., for petitioner (Law Office of Denise Lanchantin Dwyer, LLC, attorneys)

Marc G. Mucciolo, Esq., for respondent (Methfessel & Werbel, attorneys)

BEFORE **SARAH G. CROWLEY**, ALJ:

STATEMENT OF THE CASE

Petitioner A.C. (A.C. or mother), on behalf of her minor son Z.P. (Z.P. or student), filed a Motion for Emergent Relief against the West Windsor-Plainsboro Regional Board of Education (District) demanding that the District provide an aide, or a bus driver trained in the administration of an epinephrin pen (epi-pen) and albuterol. Z.P. is a five-year-old male student diagnosed with Autism Spectrum Disorder (ASD), Mixed Expressive/Receptive Language Disorder and Childhood Behavior Insomnia. In addition, Z.P. suffers from severe allergies. The District asserts that the bus driver is trained to

administer the epinephrine, and the need for someone trained to administer the albuterol inhaler has not been demonstrated.

PROCEDURAL HISTORY

On September 2, 2021, petitioner filed a Motion for Emergent Relief. The respondent filed opposition to the Motion of September 13, 2021. Oral argument was heard via zoom on September 15, 2021. There is a pending due process proceeding between the parties on this and other issues related to Z.P.

FACTUAL BACKGROUND

In support of the petition, A.C. has provided a letter from Z.P.'s doctor, Dr. Rahul Datta, M.D. from Children's Hospital of Philadelphia (CHOP). The letter advised that due to severe allergies to foods, an Epinephrine auto-injector and an albuterol inhaler should be available to Z.P. on the bus, and someone trained to administer same with him at all times. The school had been notified of these issues and they have been discussed at length by and between the parties. These same issues were discussed last year in connection with a prior due process proceeding, but remained unresolved due to remote learning for Z.P. The District has provided a bus with a driver trained in the administration of an epi-pen. However, the issue of someone trained in the administration of the albuterol remains.

The District disputes the claims of Dr. Datta and argues that the risks are speculative and do not meet the requirements for emergent relief. The District argues that their doctor had a discussion with Dr. Datta which calls into question whether the albuterol treatment is essential. However, no testimony was taken during the emergent proceeding and the prior decision from Judge Buck in March 2021 did not address this

issue. The March decision directed that parties discuss and revisit this issue of transportation safeguards for the child, since they were moot during remote learning.

LEGAL ANALYSIS AND CONCLUSION

N.J.A.C. 1:6A-12.1(a) provides that the affected parent(s), guardian, district, or public agency may apply in writing for emergent relief. An emergent 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.

Here, the petitioner seeks an order that requires the District to provide a bus driver who is trained in the administration of an epi-pen as well as an albuterol inhaler due to the child's severe allergies. In the alternative, an aide trained in same should be on the bus with Z.P. 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 1.) that the party seeking emergent relief will suffer irreparable harm if the requested relief is not granted; 2.) the existence of a settled legal right underlying the petitioner's claim; 3.) that

the party seeking emergent relief has a likelihood of prevailing on the merits of the underlying claim; and 4.) a balancing of the equities and interests that the party seeking emergent relief will suffer greater harm than the respondent. The petitioner bears the burden of satisfying all four prongs of this test. Crowe, 90 N.J. at 132-34. Arguably, the standard is a high threshold to meet, and I will address each prong separately.

Irreparable Harm

Here, there has been a showing of irreparable harm to Z.P. The petitioner has provided documentation from Z.P.'s doctor that the failure to administer an epi-pen or albuterol should the child have a reaction would be life threatening. The District alleges that the doctor only wrote that the albuterol was necessary to satisfy the petitioner, but I have no sworn testimony or documentation to dispositively dispute this statement by Z.P.'s doctor. Accordingly, **I FIND** as fact that there is actual risk or potential risk of serious harm to Z.P. That risk cannot be overlooked on an emergent motion without testimony from the medical professionals about what is necessary for this child.

In light of the aforementioned, **I CONCLUDE** that petitioner has met the burden of establishing irreparable harm.

The Legal Right Is Settled

There is sufficient statutory and case law that supports the District's obligation to provide health services to its students. The District's own policies address this issue in detail. There does not seem to be a dispute on this issue with respect to the epi- pen, but some disagreement on the plan to be put in place and if the petitioner had established that there is a need for someone trained in the administration of albuterol inhaler. Again, these are issues that need to be addressed at a hearing with appropriate documentation and medical testimony. However, there can be no dispute that if such a need is established, the District has a legal obligation to provide the appropriate health plan for this child. Moreover, the letter from Z.P.'s doctor demonstrates the necessity of same at all times for Z.P.

Thus, **I CONCLUDE** petitioner has met the second prong of the emergent relief standard in that a legal right underlying the claim is settled.

Likelihood of Prevailing on the Merits

Regarding whether the petitioner has a likelihood of prevailing on the merits of the underlying claim, the material facts in this case are in dispute—does Z.P. have a life-threatening condition that requires someone trained in the administration of an epi- pen and albuterol inhaler. The District has argued that it is a speculative assertion by petitioner. However, the assertion by Z.P.'s doctor that he should have someone trained in administration of both epi-pen and albuterol at all times is not an unsupported speculation, and a decision on the credibility of such a statement cannot be determined on an emergent motion. Absent something to the contrary or a full hearing on this issue, it is not unsupported speculation.

Therefore, **I CONCLUDE** petitioner does meet the third prong of the emergent relief standard.

Z.P. Will Suffer Greater Harm Than the Respondent

The next prong of the above test to be addressed is whether the equities and interest of the parties weigh in favor of granting the requested relief. The potential harm to Z.P is life-threatening. Thus, **I CONCLUDE** that the Z.P. would suffer greater harm if the requested relief was granted and therefore petitioner has met the final prong of the analysis.

ORDER


Having concluded that the petitioner has satisfied the four requirements for emergent relief, the petitioner's request for emergent relief is **GRANTED**.

I **ORDER** that the District's proposed plan that provides for the bus driver to be trained on signs and symptoms of an anaphylactic episode and how to administer the epi-pen is sufficient. However, it should be modified to address the issues relating to the albuterol administration, which can be accomplished by training of the driver or providing an aide on the bus.

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. 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 Policy and Dispute Resolution.

September 16, 2021 _____

DATE



SARAH G. CROWLEY, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

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