



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

EMERGENT RELIEF

OAL DKT. NO. EDS 08012-21

AGENCY DKT. NO. 2022-33419

J.S. ON BEHALF OF T.R.

Petitioner,

v.

NEWARK CITY BOARD OF EDUCATION,

Respondent.

Crystal Rogers, Parent Advocate. for petitioner

Katherine Gilfillan, Esq. for respondent (Newark Board of Education)

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

STATEMENT OF THE CASE

On September 27, 2021, petitioner filed an application for emergent relief seeking the immediate placement of her daughter at the Deron School in Union, New Jersey because the Newark School District was unable to accommodate an Order from a prior Final Decision dated September 3, 2021 placing T.R. at Academy 360. In seeking this relief, among other things, petitioner seeks enforcement of the prior decision.

PROCEDURAL HISTORY

On September 27, 2021, petitioner filed an application for emergent relief, with the Office of Special Education Programs. The Office of Special Education Programs transmitted the application for emergency relief to the Office of Administrative Law for hearing under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the office, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, and the Special Education Program, N.J.A.C. 1:6A-1.1 to -18.4.

Among other things, the application seeks Enforcement of a prior Final Decision dated September 3, 2021 Docket Number EDS 10309-20 which determined that the appropriate placement for T.R. was at Academy 360, an out-of-district placement located in Verona, New Jersey.

After learning that there were no available spots for T.R. for the new 2021-2022 school year, the District communicated this development to petitioner, and again proposed a new placement at Newark Regional Day, which had previously been rejected by petitioner.

Petitioner seeks Enforcement of the prior Final Decision through placement at the Deron School, another out-of-district placement which had accepted T.R. for admission. At the outset of the hearing, the District's new counsel, sought recusal of the undersigned ALJ due to the knowledge and familiarity with the prior case. That application was denied.

On October 1 ,2021, and again on October 5, 2021 I held oral argument on the application for emergency relief, which included limited testimony from the petitioner, and the Newark District director of Special Services. On that date, I denied the application, and the within written Order ensues.

FINDINGS OF FACT

Based on the Certifications of Cristina Penetti, Supervisor of Special Education; Sabrina Styza previous counsel for the District in this case, Ms. Mitchell on behalf of the District, together

with the representations of petitioner, who provided limited sworn testimony during oral argument; and documents related to home instruction and the representations of respondent at the hearing, I **FIND** the following preliminary **FACTS** for purposes of this application only:

T.R. is 12-years-old and is in 7th grade. She is eligible for special education and related services based on her prior diagnosis of the following disabling conditions: Schizencephaly, intellectual disability, poor muscle tone, seizures and significantly impaired communicative abilities. To overcome her communication challenges, she uses an AAC device which makes sounds, words and sentences for her.

On January 27, 2021, the District IEP team met with petitioner present, and the team determined that T.R. required a more restrictive placement than the classroom she was in at the time at the 14th Avenue School. As such, the team recommended a mid-year placement at Newark Regional Day.

After listening to the representations made at the meeting, which included a presentation by the principal at Newark Regional Day, petitioner rejected the proposed IEP and placement, and demanded that T.R. finish the school year at 14th Avenue School.

Petitioner's due process hearing was the subject of several conferences and five days of testimony, which resulted in a Final Decision being issued on September 3, 2021, prior to commencement of the new school year. The Decision ordered the District to place T.R. out of District at Academy 360.

On September 7, 2021, the District was informed that there were no openings at Academy 360 for T.R., and immediately informed petitioner of this development. At the present time, T.R. is not enrolled in any educational setting, and is not receiving home instruction.

CONCLUSIONS OF LAW

Under N.J.A.C. 1:6A-12.1(e), an administrative law judge may order emergency relief pending the decision in the case if the judge determines from the proofs that: (1) petitioner will

suffer irreparable harm if the relief is not granted; (2) the legal right underlying the claim is settled; (3) petitioner has a likelihood of prevailing on the merits of the claim; and (4) when the equities and interests of the parties are balanced, petitioner will suffer greater harm than respondent will suffer if the relief is not granted.

In this case, petitioner establish its burden of establishing it meets all four criteria. With T.R. still not in any educational setting, more than a month after the start of the school year, the District concedes there is evidence of irreparable harm, albeit, the District contends that some of the harm is caused by petitioner refusing to present T.R. at the alternate setting of Newark Regional Day after it was learned that Academy 360 had no spots available for T.R.

But petitioner cannot demonstrate she can satisfy any of the three remaining criteria necessary to be entitled to emergent relief.

Petitioner cannot demonstrate that the legal right underlying her claim is settled. Simply put, there is no legal authority for an Administrative Law Judge to enforce a prior order. Without this authority, the undersigned is limited in what can be done in this situation, where an order was entered as part of a related decision, and the District cannot comply because there is no seat available for the student in the placement at Academy 360.

Next, petitioner has not demonstrated that she has a likelihood of prevailing on the merits of his claim because, as District counsel correctly points out, in order to even consider an alternate placement at petitioner's requested school, (in this case Deron in Union, New Jersey), there would have to be a full plenary hearing, with input from the District professionals and officials at Deron to confirm such a placement in lieu of Academy 360 is appropriate. It is not enough to rely on the testimony of the parent when making such a decision. And in the related case, there was no testimony about Deron.

Finally, when the equities and interests of the parties are balanced, petitioner has not demonstrated that her son will suffer greater harm than respondent will suffer if the relief is not granted. While petitioner has expressed in detail her objection to a placement at Newark Regional Day, the District is again offering such a placement albeit temporarily, while preserving its rights

to appeal the related decision. There is a placement available, even if it is one that petitioner does not prefer.

For these reasons, I **CONCLUDE** that the application for emergency relief must be **DENIED**.

However, while I still have jurisdiction over the parties for this Emergent application, and as I stated at the conclusion of the proceeding, although I am denying the application for the legal and procedural reasons stated herein, I am including two requirements on the District:

- 1) Within seven (7) days hereof, the parties are to meet in person at a mutually convenient time with the newly assigned Case Manager Jack Rifkin and Principal Jennifer Mitchell at Newark Regional Day to discuss implementation of TR's educational needs for the 2021-2022 school year. This will be without prejudice to either side's legal rights.

It is noted here that there has been a lack of communication and trust issues between the parties which still appear to exist, so within the scope of my authority and while I still have the case, I am adding this to my order, together with the additional transportation requirement set forth below.

- 2) The District shall arrange through its Office of Pupil Services, within seven (7) days arrange for appropriate round trip transportation for T.R. that takes into account her communication and other related challenges, including but not limited to the need for a bus aide to prevent or intervene with any situations that may occur while T.R. is transported

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that the application for emergency relief is hereby **DENIED**, with the two requirements set forth above.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2018) 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); 34 C.F.R. § 300.516 (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.

October 7, 2021
DATE


ANDREW M. BARON, ALJ

Date Received at Agency October 7, 2021

Date Mailed to Parties: October 7, 2021
mm

APPENDIX

List of Witnesses

For Petitioners:

J.S.

For Respondent:

Cristina Pennetti

List of Exhibits

For Petitioners:

P-1 Parent letter

P-2 Deron acceptance

P-3 Home instruction papers

For Respondent:

R-1 Styza Certification

R-2 Penetti Certification

R-3 Pennetti Supplemental Certification