

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION GRANTING

EMERGENT RELIEF

OAL DKT. NO. EDS 06855-17

AGENCY DKT. NO. 2017 26211

**WASHINGTON TOWNSHIP BOARD
OF EDUCATION,**

Petitioner,

v.

C.L. and A.L. o/b/o N.L.,

Respondent.

Sanmathi Dev, Esq., appearing for petitioner, (Capehart and Scatchard, attorneys)

No appearance by respondents

Record Closed: May 19, 2017

Decided: May 22, 2017

BEFORE **DEAN J. BUONO**, ALJ:

STATEMENT OF THE CASE

Petitioner, Washington Township Board of Education, (District or petitioner) seeks emergent relief pursuant to N.J.A.C. 6A:14-2.7(r), N.J.A.C. 6A:14-2.7(s) and N.J.A.C. 1:6A-12.1(e), to conduct evaluations of N.L. (learning, psychological, social, and psychiatric) and speak to her outside providers to assist the Board in determining whether N.L. is eligible for special education and related services. This is an effort for

them to provide N.L. with a free appropriate public education (FAPE). Respondents indicate that the minor child receives home instruction due to “anxiety” and the evaluations will not be in the best interest of the child.

PROCEDURAL HISTORY

On May 12, 2017, petitioner filed a complaint for due process with the Office of Special Education Programs (OSEP). The Complaint was filed under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §§1400 to 1482. Petitioner sought an order to conduct evaluations and release of records for the minor child in an effort to provide her with a FAPE.

Petitioner filed an emergent relief application with the Office of Special Education Policy and Procedure on May 15, 2017. The application alleges that C.L. and A.L., on behalf of N.L. failed to provide authorization for release of records and allow evaluations of the minor child so the District could determine placement and provide FAPE. On May 18, 2017, the undersigned held a telephone conference with the parties in an effort to resolve any issues. Respondent C.L., indicated that she was not represented by counsel and she would not be appearing at the hearing. Oral argument was heard on May 19, 2017, at the Office of Administrative Law and the record closed at that time.

FACTUAL DISCUSSION

N.L. is currently a ten-year-old general education, fourth grade student who is enrolled in Wedgewood Elementary School in the Washington Township School District (“District”), but is homeschooled for the 2016-2017 school year. (Petitioner Exhibit “A”). C.L. is N.L.’s mother. A.L. is N.L.’s father. N.L. currently resides with them in Sewell, New Jersey, which is within the District. Id.

On December 14, 2016, respondents requested homebound instruction for N.L. due to a temporary or chronic illness, namely for vertigo like symptoms, anxiety and possible migraines. (Petitioner Exhibit “A” “B”). N.L.’s anticipated return was January

23, 2017, and the District approved respondents' request for continued homebound instruction. Id.

Thereafter, respondents submitted letters, dated February 14, 2017, March 14, 2017, and March 27, 2017, from Cooper Pediatrics requesting an extension of homebound instruction to April 20, 2017. (Petitioner Exhibit "C"). The letters indicated that N.L. had a "stress related anxiety thought to be due to school precipitated events" "as reported by mother." The District approved respondents' second request for homebound instruction. (Petitioner Exhibit "A"). The letters from Cooper Pediatrics also indicated that N.L.'s mother alleged N.L. was having difficulty at school and complained of being bullied. (Petitioner Exhibit "C"). The District denied that N.L. was subjected to harassment, intimidation, or bullying. (Petitioner Exhibit "A").

On April 27, 2017, the District received a further request to extend homebound instruction from the respondents. The District again approved respondents' request for homebound instruction. (Petitioner Exhibit "D"). Based on the request, it was unlikely that N.L. was to return to school before the end of the current school year. (Petitioner Exhibit "A").

Due to her home instruction exceeding sixty calendar days, pursuant to N.J.A.C. 6A:16-10.1(c)(5), N.L. was referred to the Child Study Team ("CST"). (Petitioner Exhibit "A"). On May 1, 2017, the CST convened an Identification and Evaluation Plan Conference in an effort to determine whether evaluations were warranted to determine whether N.L. was eligible for special education and related services. (Petitioner Exhibit "E"). The CST also discussed that N.L. has not been in school beginning in early December 2017.

At the meeting, respondents reported that it was their belief N.L. was subjected to bullying and harassment at school and wanted her to attend another school. Id. The District denied that N.L. was bullied. Id. Also, respondents reported that N.L. was being seen by an outside therapist and Cooper Pediatrics for anxiety. Id. The CST requested to evaluate N.L. to further investigate a possible emotional disability due to

respondents' report of anxiety and the impact on N.L.'s ability to attend school. Id. The CST requested the following evaluations: learning, psychological, social, and psychiatric. Id. The CST also requested a release of records to obtain additional information and speak to N.L.'s outside providers. Id.

At the May 1, 2017, meeting, respondents did not inform the District whether they consented to the proposed evaluations. (Petitioner Exhibit "A"). Instead, on May 5, 2017, respondents informed the District of their refusal to permit the District from evaluating N.L. (Petitioner Exhibit "E"). At the time of the Emergent Application, N.L. had been out of school for approximately five months.

The District filed this Request for Emergent Relief seeking an order to conduct evaluations of N.L. (learning, psychological, social, and psychiatric) and speak to her outside providers to assist the District in determining whether she is eligible for special education and related services. (Petitioner Exhibit "A"). They argue that the District must be permitted to evaluate N.L. to determine whether she qualifies for special education and related services in order to comply with its child find obligations under state and federal regulations to ensure that she is provided with a FAPE. The child has not attended school or been evaluated and FAPE is a significant concern. During the telephone conference, respondent C.L. indicated that the minor child receives home instruction due to "anxiety" and the evaluations will not be in the best interest of the child. I disagree.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

Petitioner seeks to conduct evaluations of N.L. (learning, psychological, social, and psychiatric) and speak to her outside providers to assist the District in determining whether N.L. is eligible for special education and related services. They clearly argue that the only reason for the application is to provide FAPE. Pursuant to N.J.A.C. 1:6A-12.1(e) and Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982), emergency relief may only be granted 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.

It is important to note that petitioner has the burden to establish that all four prongs are satisfied. Arguably, the standard is a high threshold to meet and I will address each prong separately.

Irreparable Harm

In support of their application, petitioner argues that the irreparable harm is that N.L. is currently being homebound educated and she will regress if not properly evaluated to ascertain if services are needed. C.L. and A.L. have not cooperated with the District in providing medical documentation of her "anxiety".

Clearly, a school district's inability to comply with evaluation timelines set by state and federal regulations due to a lack of cooperation by the parents amount to irreparable harm. Gloucester City Bd. of Educ. v. A.H. o/b/o K.S., 2015 N.J. AGEN LEXIS 570, OAL Dkt. No. EDS 09165-15, Agency Dkt. No. 2015-23030, July 14, 2015. Moreover, a "failure to comply [with the regulations] will also place the student at risk, as any lapse in special services may well cause the child to regress." Id. A school district also shows irreparable harm by demonstrating that it is prevented from meeting its obligation to provide a free appropriate public education because a child's placement is inappropriate. Haddonfield Borough Bd. of Educ. v. S.J.B. o/b/o J.B., 2004 N.J.

AGEN LEXIS 645, OAL Dkt. No. EDS 2441-04, Agency Dkt. No. 2004 8817, May 20, 2004.

Here, petitioners argue that irreparable harm will occur if the District is prevented from meeting its obligations under New Jersey and federal regulations to provide FAPE to N.L. Remember, N.L. is a student who, according to the parents¹, has an educational or emotional disability that has impacted her education. Given the history of N.L. as articulated by the parents, it is essential for her to complete the recommended evaluations and for the District to obtain information from her outside providers in order for the District to determine whether she is eligible for special education. The evaluations will assist the District in developing a transition plan for N.L. to return to school and prevent any irreparable harm.

I agree and **CONCLUDE** that petitioner has established that the District will suffer irreparable harm if the requested relief is not granted.

The Legal Right Is Settled

According to N.J.A.C. 6A:14-3.3(a), a district board of education has an obligation to locate, refer, and identify students who may have disabilities due to physical, sensory, emotional, communication, cognitive, or social difficulties. Thereafter, a student may be referred to the child study team for an evaluation to determine eligibility for special education programs and services. N.J.A.C. 6A:14-3.3(e). If the child study team determines that an evaluation is warranted, the district must request and obtain consent to evaluate. N.J.A.C. 6A:14-3.4(b). If the parent refuses to provide consent to conduct the initial evaluation, the district may file for a due process hearing to compel the evaluation. N.J.A.C. 6A:14-3.4(c).

It was C.L. and A.L. who informed the District that N.L. has an educational or emotional disability that qualifies for special education and related services. The

¹ C.L. and A.L. allege to Cooper University Physicians that N.L. suffers from “anxiety and stress” that was “exacerbated by school events” (Exhibit “B”). Also, C.L. alleges in a May 5, 2017, handwritten note, that N.L. has had “an extensive amount of Dr. Appointments and 2 ER visits for her headaches, dizziness and panic attacks.” “She has been diagnosed with anxiety disorder and a 504 plan has been requested by her doctor.”

District has a settled legal right to complete the evaluation plan, which includes a learning, psychological, learning, and psychiatric evaluation, in an effort to assess whether she is eligible for special education. The District also has a settled legal right to obtain a release to obtain necessary information from N.L.'s outside providers to assess eligibility for special education.

Thus, I **CONCLUDE** petitioner has met the second prong of the emergent relief standard in that a legal right underlying their 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, there are no material facts in dispute that oppose petitioner's likelihood of success. It is well settled that the Individuals with Disabilities Act ("IDEA") requires a school district to provide a free appropriate public education ("FAPE") to all children with disabilities and determined eligible for special education. 20 U.S.C.A. 1412(a)(1)(A). A district board of education is required to locate, refer, and identify any student who may have a disability due to physical, sensory, emotional, communication, cognitive, or social difficulties. N.J.A.C. 6A:14-3.3(a). This obligation is often referred to a school district's "child find" obligation.

As stated, a student may be referred to the child study team for an initial evaluation to determine eligibility for special education programs and services. N.J.A.C. 6A:14-3.3(e). If the child study team determines that an initial evaluation is warranted, the district must request and obtain consent to evaluate. N.J.A.C. 6A:14-3.4(b). If the parent refuses to provide consent, the district may file for a due process hearing to compel consent to evaluate. N.J.A.C. 6A:14-3.4(c). After parental consent for an initial evaluation is obtained, the evaluation, determination of eligibility for services, and the development and implementation of the IEP for the student must be completed within ninety (90) calendar days.

This office has a long history of granting a school district's request for emergent relief to compel parental cooperation in the evaluation process. See Trenton Bd. of Educ. v. S.P. o/b/o B.P., 2001 N.J. AGEN LEXIS 225, OAL Dkt. No. EDS 874-01, Agency Dkt. No. 01-4968, Mar. 23, 2001; Dumont Bd. of Educ. v. G.C., 1995 N.J. AGEN LEXIS 137, OAL Dkt. No. EDS 1575-95, Agency Dkt. No. 95-6617E, Feb. 15, 1995; Gloucester City Bd. of Educ. v. A.H. o/b/o K.S., 2015 N.J. AGEN LEXIS 570, OAL Dkt No. EDS 09165-15, Agency Dkt. No. 2015-23030, July 14, 2015; Edison Twp. Bd. of Educ. v. M.B. and P.B. o/b/o M.B., 2007 N.J. AGEN LEXIS 181, OAL Dkt. No. EDS 2319-07, Agency Dkt. No. 2009-12114, Apr. 11, 2007; and Lawrence Twp. Bd. of Educ. v. D.F. o/b/o D.F., 2007 N.J. AGEN LEXIS 26, OAL Dkt. No. EDS 12056-06, Agency Dkt. No. 2007-11904, Jan. 9, 2007. Specifically, in Trenton Board of Education v. S.P. o/b/o B.P., Administrative Law Judge John R. Futey granted the school district's application for emergent relief to compel parental consent and cooperation for an initial evaluation of an eighth grade student when the parents were uncooperative. Trenton Bd. of Educ. v. S.P. o/b/o B.P., 2001 N.J. AGEN LEXIS 225, OAL Dkt. No. EDS 874-01, Agency Dkt. No. 01-4968, Mar. 23, 2001. Furthermore, a school district's request for emergent relief must be granted when a parent has consented to specific evaluations and then fails to cooperate with the school district in producing the student for the evaluation. Dumont Bd. of Educ. v. G.C., 1995 N.J. AGEN LEXIS 137, OAL Dkt. No. EDS 1575-95, Agency Dkt. No. 95-6617E, Feb. 15, 1995.

Similarly, in Gloucester City Board of Education v. A.H. o/b/o K.S., Administrative Law Judge Sarah G. Crowley granted the school district's request for emergent relief to compel the parent and student to cooperate in the reevaluation of the student by scheduling the reevaluations, ensuring that the student appears for the scheduled sessions, and participating in the reevaluation process. Judge Crowley appropriately reasoned that the reevaluation process is necessary to determine whether the student continues to be a student with a disability eligible for special education and the school district's failure to comply with the requirements pertaining to students with disabilities would expose the district to sanctions by the New Jersey Department of Education and federal government. Gloucester City Bd. of Educ. v. A.H. o/b/o K.S., 2015 N.J. AGEN LEXIS 570, OAL Dkt No. EDS 09165-15, Agency Dkt. No. 2015-23030, July 14, 2015.

Moreover, Judge Crowley determined that a “failure to comply [with the regulations] will also place the student at risk, as any lapse in special services may well cause the child to regress.” Id.

As applied here, the District has demonstrated a likelihood of prevailing on the merits. The District is likewise entitled to a release of N.L.’s records and to speak to her outside providers. Clearly, the District is unable to comply with its legal obligations and the District is at risk for sanctions resulting from noncompliance with established regulations. Petitioners lack of cooperation impedes the District from assisting N.L., a student whose parents have reported that she has exhibited signs of a disability.

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

The Petitioner Will Suffer Greater Harm Than The Respondent

Lastly, petitioner must show that when the equities and interests of the parties are balanced, the District will suffer greater harm than the respondent will suffer if the requested relief is not granted. The District recognizes that C.L. and A.L. informed them that N.L. suffers from a disability which may require special education and related services due to her diagnosis of anxiety and lack of attendance in school. As a result, the District must be permitted to investigate these concerns further by way of the recommended evaluations. N.L. is suffering great harm by not attending school but the District’s harm is greater in having knowledge of the disability, as reported by the parents, and not being permitted to investigate. I **CONCLUDE** that when the equities are balanced, the District is suffering and will suffer greater harm than respondent if the Emergent Petition is not granted.

Based on the foregoing, I **CONCLUDE** that petitioner has met the four prongs of the Crowe standards required for emergent relief pursuant to N.J.A.C. 1:6A-12.1(e).

DECISION AND ORDER

Based on my conclusion that petitioner has established that they are entitled to emergency relief, their request for emergency relief is **GRANTED**. I **ORDER** that petitioner is permitted to conduct evaluations of N.L. (learning, psychological, social, and psychiatric). I **FURTHER ORDER** that the District be permitted speak to N.L.'s outside providers to assist in determining whether she is eligible for special education and related services.

This decision on application for emergency relief resolves all of the issues raised in the due process complaint; therefore, no further proceedings in this matter are necessary. 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 Programs.

May 22, 2017

DATE

DEAN J. BUONO, ALJ

Date Received at Agency

Date Mailed to Parties:

vj