

FINAL DECISION GRANTING
RESPONDENTS' MOTION FOR
SUMMARY DECISION AND DENYING
PETITIONER'S MOTION FOR
SUMMARY DECISION

OAL DKT. NO. EDS 00879-15

AGENCY DKT. NO. 2015 22132

L.B. ON BEHALF OF G.B.,

Petitioner,

v.

MAPLE SHADE TOWNSHIP
BOARD OF EDUCATION and,
LARC SCHOOL,

Respondents.

Roger A. Barbour, Esq., for petitioner

Patrick Madden, Esq., for respondent Maple Shade Township Board of Education (Madden and Madden, PA, attorneys)

Aileen F. Droughton, Esq., for respondent LARC School (Traub, Lieberman, Straus & Shrewsbury, LLP, attorneys)

Record Closed: June 25, 2015

Decided: August 10, 2015

BEFORE **JOHN S. KENNEDY**, ALJ:

STATEMENT OF THE CASE

Petitioner L.B. requests an order that the LARC School administer prescribed medical marijuana to G.B., a student at the school. Respondents Maple Shade Township Board of Education (Board) and the LARC School (LARC) oppose this

request, contending that they do not have the legal authority or ability to administer medical marijuana on school property.

PROCEDURAL HISTORY

On December 15, 2014, petitioner filed a request for a due-process hearing with the Office of Special Education of the New Jersey Department of Education seeking an order that respondents administer prescribed medical marijuana to G.B. during school hours. The Board responded, and seeks continued implementation of the most recent IEP.

The matter was transmitted to the Office of Administrative Law as a contested case and filed on January 20, 2015. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

Petitioner filed a Motion for Summary Decision on April 1, 2015. Respondent filed a Cross-Motion for Summary Decision on May 6, 2015. Oral argument was heard on June 25, 2015. At issue is whether respondents should be required to administer the prescribed medical marijuana.

FACTUAL DISCUSSION

G.B. is a fifteen-year-old student diagnosed under the disability category of multiply disabled (MD). She has been placed by the Board at LARC, which all parties agree is the appropriate placement for her unique needs. The parties agree that G.B. is making meaningful educational progress at LARC.

In 2010 the New Jersey Legislature passed the Compassionate Use Medical Marijuana Act (CUMMA). G.B. was prescribed medical marijuana in September 2014 to combat her uncontrollable epileptic-seizure disorder. In November 2014, the Board met with the petitioner to discuss, among other things, that providing medical marijuana to G.B. in school be placed in her IEP. The Board denied this request, and the provision of medical marijuana is not currently part of G.B.'s IEP.

The medical marijuana prescribed to G.B. is in oil form and can be administered either in juice or through a syringe injected directly into her mouth. It is not smoked or required to be lit. The medication was prescribed by G.B.'s attending physician, Dr. James Kwak, for a monthly prescription of one-half ounce of medical marijuana (Petitioner's Exhibit "D"). Dr. Kwak prescribed the medication to be taken four times per day, with one dose to be taken at lunch time (Petitioner's Exhibit "E"). Petitioner submitted specific instructions regarding dosage and storage of the medication to the Board on a form prepared pursuant to LARC School policy on the administration of medicine at school (Petitioner's Exhibit "K"). The federal government has classified marijuana as a controlled dangerous substance (CDS). The medical marijuana prescribed to G.B. has not yet been approved by the Food and Drug Administration; however, the passage of the most recent federal spending bill prohibits the use of federal dollars to enforce any federal law contrary to a state's medical marijuana regulations. Petitioner has satisfied the requirements of New Jersey's Medical Marijuana Act regarding the administration of medical marijuana and both she, as caregiver, and G.B., as a patient, have been appropriately licensed under the Act (Petitioner's Exhibit "I").

Petitioner contends that there is a potential for increased epileptic episodes as a result of the Board's refusal to administer the medication to G.B. at lunchtime as prescribed. As a result of respondents' denial of the administration of the medication on school grounds, petitioner has been taking G.B. out of school at lunchtime each day. Petitioner administers the lunchtime medication and keeps G.B. home for the remainder of the day.

As a reasonable accommodation, respondents proposed that petitioner pick up G.B. each day at lunchtime, take her off campus to administer her medication, and bring her back after lunch. This accommodation would require petitioner to stay at least 1,000 feet from school property in order for the Board to be assured that there would be no violation of the State-mandated drug-free-school-zone law. Petitioner has not been willing to comply with this procedure because G.B. has difficulty transitioning from one event or environment to another. It also creates a safety issue because G.B. would be

required to walk off campus and at least 1,000 feet away from school on a busy roadway on a daily basis.

LEGAL ANALYSIS AND CONCLUSION

N.J.A.C. 1:1-12.5, governing motions for summary decision, permits early disposition of a case before the case is heard if, based on the papers and discovery which have been filed, it can be decided “that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” N.J.A.C. 1:1-12.5(b). The provisions of N.J.A.C. 1:1-12.5 mirror the language of R. 4:46-2 of the New Jersey Court Rules governing motions for summary judgment. To survive summary decision, the opposing party must show that “there is a genuine issue which can only be determined in an evidentiary proceeding.” Ibid. Failure to do so entitles the moving party to summary decision. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995).

Moreover, even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is “so one-sided that [the moving party] must prevail as a matter of law.” Id. at 536. This tribunal is required to do “the same type of evaluation, analysis or sifting of evidential materials as required by Rule 4:37-2(b) in light of the burden of persuasion that applies if the matter goes to trial.” Id. at 539–40. Like the New Jersey Supreme Court’s standard for summary judgment, summary decision is designed to “liberalize the standards so as to permit summary [decision] in a larger number of cases,” due to the perception that we live in “a time of great increase in litigation and one in which many meritless cases are filed.” Id. at 539 (citation omitted).

There is no genuine issue as to any material fact in this matter in relation to the fact that respondents have denied the administration of G.B.’s prescribed medical marijuana during lunchtime. The material facts are as follows:

1. G.B. has been prescribed medical marijuana to be taken four times per day, with one dose to be taken at lunchtime.

2. Petitioner has satisfied the requirements of the CUMMA regarding the administration of medical marijuana and both she, as caregiver, and G.B., as a patient, have been appropriately licensed under the Act.
3. The school nurse that would be required to administer the medication is not licensed to administer the medication under the CUMMA.
4. The federal government has classified marijuana as a Schedule I narcotic and has prohibited its use.
5. Respondents have denied the administration of medical marijuana to G.B. on school property during lunchtime.
6. G.B. leaves school each day at lunch to receive her medication and does not return in the afternoon, causing her to miss a half day of instruction each school day.

The New Jersey Legislature has passed the CUMMA in an attempt to protect from arrest and criminal and other penalties patients who use marijuana to alleviate suffering from debilitating medical conditions. N.J.S.A. 24:6I-1 to -16. The legislation also protects a patient's physician, primary caregiver and those who are authorized to produce medical marijuana. Ibid. The CUMMA permits the possession and/or use of medical marijuana by a certain set of individuals and entities. N.J.S.A. 24:6I-6. They are:

Qualifying patients

Primary caregivers

Medical Marijuana alternative treatment centers

A qualifying patient's physician, or

Any other person acting in accordance with the provisions of the act

The first four sets of individuals or entities are defined in the CUMMA. A “qualifying patient” is defined as a resident of the State of New Jersey who has been provided with a certification by a physician pursuant to a bona fide physician-patient relationship. N.J.S.A. 24:6I-3. A “primary caregiver” must be a resident of the State of New Jersey, at least eighteen years old, has agreed to assist with a registered qualifying patient’s medical use of marijuana, is not currently serving for another qualifying patient, and is not the qualifying patient’s physician. A primary caregiver must also never have been convicted of possession or sale of a controlled dangerous substance, be registered with the Department of Health and satisfy a criminal background check, and be designated as primary caregiver on the qualifying patient’s application for a registry identification card. Ibid.

A “physician” means a person licensed to practice medicine in New Jersey with whom the patient has a bona fide physician-patient relationship and who is the primary care physician, hospice physician, or physician responsible for the ongoing treatment of a patient’s debilitating medical condition, provided, however, that such ongoing treatment shall not be limited to the provision of authorization for a patient to use medical marijuana or consultation solely for that purpose. Ibid. A “medical marijuana alternative treatment center” is defined as an organization approved by the Department of Health to perform activities necessary to provide registered qualifying patients with usable marijuana and related paraphernalia in accordance with the provisions of the act. Ibid.

It is clear that respondents cannot be considered qualifying patients, primary caregivers, a qualifying patient’s physician or a medical marijuana alternative treatment center under the definitions found in the CUMMA. Petitioner argues that respondents, and more particularly, the school nurses employed by the respondents, fall into the last set of individuals permitted to possess medical marijuana under the CUMMA, namely, any other person acting in accordance with the provisions of the act. There is no way, however, that any individual employed by respondent can act in accordance with the CUMMA unless they comply with the extensive registration process and subject themselves to those requirements. There has been no evidence presented in this case that respondents or any of its employees have registered with the Department of Health.

Petitioner asserts that respondents are authorized to administer medical marijuana to G.B. as a result of the doctrine of in loco parentis. Black's Law Dictionary (6th Ed.) defines in loco parentis as "in the place of a parent; instead of a parent; charged, factitiously, with a parent's rights, duties and responsibilities." "Loco parentis' exists when person undertakes care and control of another in absence of such supervision by latter's natural parents and in absence of formal legal approval, and is temporary in character and is not to be likened to an adoption which is permanent." Black's Law Dictionary 787 (6th ed. 1990). New Jersey Recognizes this doctrine beginning with New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733 (U.S.N.J. 1985). When discussing the Fourth Amendment's guarantee against unreasonable searches and seizures, the Court acknowledged this doctrine stating: Teachers and school administrators, it is said, act in loco parentis in their dealing with students: their authority is that of the parent, not the State, and is therefore not subject to the limits of the Fourth Amendment.

I **CONCLUDE** that respondents' obligations to act in loco parentis over G.B. does not authorize them or any of respondents' employees to administer medical marijuana to her under the CUMMA requirements. While it is true that L.B. is G.B.'s mother and has been registered to administer the medication to G.B. as her primary caregiver, respondents' duty to take reasonable measures to safeguard G.B. does not authorize them to take action that is protected under the CUMMA without following the extensive registration process of the act. The Attorney General Medical Marijuana Enforcement Guidelines for Police, issued December 6, 2012, outline procedures available to police officers to verify CUMMA registry status. (R-1 at 7.) A police officer will be able to verify a person's status as a bona fide registered qualifying patient, primary caregiver, or employee of an alternate treatment center by contacting the State Police Regional Operations Intelligence Center (ROIC). The ROIC will have secure access to information from the database maintained by the Department of Health Medicinal Marijuana Program. Ibid. As respondents' employees are not registered with the Department of Health Medicinal Marijuana Program, they will not be protected by the CUMMA.

Respondents are mandated to comply with the Drug Free School Zone Act, N.J.S.A. 2C:35-7. This law sets forth a strict prohibition on drugs within a 1,000 feet

perimeter or zone around the school. Penalties for drug-related crimes within that zone or perimeter are significantly enhanced. Ibid. The Drug Free School Zone Act is in direct conflict with the NJCUMMA. There also exists a potential conflict between state and federal law. Federal law maintains marijuana as a controlled dangerous substance under the Controlled Substances Act, 21 U.S.C.A. 802. While the passage of the most recent federal-spending bill prohibits the use of federal dollars to enforce any federal law contrary to a state's medical-marijuana regulations, the balance of legal requirements on both a federal and state level has not been well-settled. While this conflict creates problems for respondents and their employees if they were to possess and administer the medication, the same should not be said of L.B. as a registered primary caregiver under the CUMMA. L.B. has the ability to assert an affirmative defense against charges of possession or distribution of medical marijuana to G.B. even on school grounds. This issue, however, is not before this tribunal, since the petition seeks a determination as to whether respondents should be required to administer medical marijuana to G.B. under the provisions of the CUMMA.

For the reasons stated above, I **CONCLUDE** that the CUMMA does not authorize respondents or individuals employed by respondents to possess and/or administer medical marijuana to G.B. In further support of this conclusion is that the New Jersey State Legislature has proposed amendments to the CUMMA which would authorize the administration of medical marijuana on public school grounds. The bill, A 4587, would authorize parents, guardians or primary caregivers to administer medical marijuana on school grounds, on a school bus, or at a school-sponsored activity, provided it is administered in a non-smokable form in a location designated by the school.

Specifically, the bill would require boards of education, chief school administrators of non-public schools, and chief administrators of facilities providing services to persons with developmental disabilities to adopt a policy authorizing parents, guardians, and primary caregivers to administer medical marijuana to qualifying patients under certain circumstances.

In the case of a public or non-public school, parents, guardians, and primary caregivers would be authorized to administer medical marijuana to a student in a non-

smokable form while the student is on school grounds, aboard a school bus, or attending a school-sponsored event, provided the administration is consistent with a school policy that:

- 1) requires the student to be authorized to engage in the medical use of marijuana pursuant to the “Compassionate Use Medical Marijuana Act” and the parent, guardian, or primary caregiver to be authorized to assist the student with the medical use of medical marijuana;
- 2) establishes protocols for verifying the registration status and ongoing authorization concerning the medical use of marijuana for the student and the parent, guardian, or primary caregiver;
- 3) expressly authorizes parents, guardians, and primary caregivers to administer medical marijuana to the student while the student is on school grounds, aboard a school bus, or attending a school-sponsored event;
- 4) identifies locations on school grounds where medical marijuana may be administered; and
- 5) prohibits the administration of medical marijuana by smoking or other form of inhalation.

The proposed bill, like the CUMMA itself, falls short of authorizing a school nurse or any other employee of a school district to assist the student with the medical use of medical marijuana.

ORDER

Accordingly, it is **ORDERED** that:

1. Respondents’ cross-motion for summary decision is **GRANTED**;
2. Petitioner’s motion is **DENIED**; and
3. The petition in this matter is **DISMISSED**.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2014) 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); 34 C.F.R. § 300.516 (2014). If the parent or adult student feels that this order 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.

August 10, 2015
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

cmo

WITNESSES

For Petitioner:

None

For Respondents:

None

EXHIBITS

For Petitioner:

- A. Copy of Petitioner L.B and G.B.'s Petition for Emergent Relief and Due Process
- B. Copy of Honorable John S. Kennedy, ALJ's Decision Denying Emergent Relief
- C. Copy of Petitioner L.B.'s Affidavit
- D. Copy of Prescription for G.B.'s medical marijuana from her attending physician, Dr. James A. Kwak, M.D., approved medical marijuana doctor pursuant to the New Jersey CUMMA and Implementing Regulations
- E. Copy of dosing instructions for G.B.'s medical marijuana from her attending physician, Dr. James A. Kwak, M.D., approved medical marijuana doctor pursuant to the New Jersey CUMMA and Implementing Regulations
- F. Copy of New Jersey Administrative Code Provisions for School Nurses
- G. Copy of LARC School's 2013-2015 Attendance and Tardy Reports for G.B.
- H. Copy of Bus Protocol in the event that G.B. has a seizure on the school bus
- I. Copy of medical marijuana licenses for Petitioners L.B. and G.B.

- J. Copy of Affidavit of G.B.'s attending physician, Dr. James A. Kwak, M.D., regarding G.B.'s medical marijuana prescription
- K. Copy of the LARC School's Policy on the Administration of Medication to a Pupil at School
- L. Copy of U.S. House and Senate Bills to Remove Marijuana from Schedule (I) Narcotic classification to approve medical marijuana in states with medical marijuana acts and to tax the sale of marijuana
- M. Copy of New Jersey Assembly Resolution No. 224 regarding revisions to the Administrative Code, which are presently inconsistent with the Legislative Intent of the NJ Compassionate Use Medical Marijuana Act (NJCUMMA)
- N. Copy of Reuters Press Release pertaining to Federal Court Judge Kimberly Meuller's Statement that she is considering declaring the Schedule (I) Narcotic designation of marijuana as unconstitutional
- O. Copy of pertinent portions of the NJCUMMA regarding the New Jersey Legislature's Declared Legislative Intent of the CUMMA.
- P. Copy of Reports documenting that forty states that will have some form of marijuana legislation (medical or recreation) on their books by 2017
- Q. Copy of Wall Street Journal article on group of New Jersey prosecutors and Civil Rights activists who are forming a coalition to end the prohibition on marijuana
- R. U.S. Congress and U.S. Senate legislation introduced to legalize and tax marijuana, and to approve existing medical marijuana laws currently enacted in the States
- S. Copies of G.B.'s Daily Communication Log Book entries from February 27, 2015 through March 15, 2015 while G.B. has been denied her medical marijuana at school causing her to have increased behavioral problems and seizures
- T. Copies of photographs of G.B. praying with the Sisters of St. Clare
- U. Copy of December 12, 2014 report from G.B.'s BCaBA, Stephanie M. O'Brien, M.S., BCaBA, detailing G.B.'s maladaptive behaviors upon transitioning

- V. Copy of L.B.'s scratched face resulting from a disruption to G.B.'s typical daily routine
- W. Copy of the LARC School's March 9, 2015 Accident Report/Unusual Event Report detailing G.B.'s chipped front adult tooth which occurred as a result of her confinement to a Rifkin (restraint) chair
- X. March 29, 2013 and May 14, 2013 Reports from Children Hospital of Philadelphia (CHOP) detailing G.B.'s medications to date
- Y. October 22, 2013 Medical Statement from G.B.'s treating neurologist at CHOP
- Z. Color copies of G.B.'s 2011-2012 LARC school picture (on heavy antiepileptic drugs) vs. her 2014-2015 LARC school picture (while prescribed medical marijuana)
- AA. Copy of Pages 80-81 from "100 Questions & Answers About Epilepsy" detailing increased depression, anxiety and mood disorders for epileptics
- BB. Epilepsy Foundation Statement as to the beneficial effects of medical marijuana in controlling seizures and need for access and research
- CC. Copy of March 10, 2015 letter from G.B.'s attending neurologist, Dr. Lawrence Brown, M.D., Associate Professor of Neurology, CHOP, detailing the ineffectiveness of all of G.B.'s prior medications
- DD. Affidavit of G.B.'s attending neurologist, Dr. Lawrence Brown, M.D., Associate Professor of Neurology, CHOP
- EE. Affidavit of Kenneth Wolski, RN, MPA, Executive Director of the New Jersey Coalition for Medical Marijuana
- FF. Copy of "Medical Marijuana" news report detailing how medical marijuana is the only medicine that works for some people
- GG. Copy of Federal DEA Drug Schedules pursuant to Controlled Substances Act, and State of New Jersey Drug Schedules pursuant to Controlled Dangerous Substances Act
- HH. Copy of March 26, 2015 letter from Philip M. Gattone, M.Ed., President and CEO of the Epilepsy Foundation, written in support of G.B.'s request to take her medicine at school during the school day
- II. Copy of American Nurses Association (ANA) December 12, 2008 position statement: "In Support of Patients' Safe Access to Therapeutic Marijuana"

Petitioner's Reply Brief Exhibits:

- A. Copy of Applicable Sections of the New Jersey Compassionate Use Medical Marijuana Act
- B. Copy of May 3, 2015 Sunday edition of the Star-Ledger reporting on G.B.'s story and wherein the investigating reporter interviewed New Jersey State Senator Nicholas Scutari (D-Union) with regard to his position as a sponsor of the NJCUMMA
- C. Copy of LARC's "Present Levels of Academic Achievement and Functional Performance," with LARC staff achievement reports for all of G.B.'s academic classes, to wit, Math, May 8, 2015; Language Arts, May 8, 2015; Science, May 8, 2015; Social Studies, May 8, 2015; Visual and Performing Arts, May 8, 2015; Health and PE, May 8, 2015; Technology, May 8, 2015; Career Education, May 8, 2015; Speech and Language, April 30, 2015; Occupational Therapy, May 1, 2015; Physical Therapy, May 3, 2015; and Behavior, Personal/Social Development (not dated) – commonly referred to as PLAAFP's – Present Levels of Academic Achievement and Functional Performance (AND) Copy of Speech and Language progress report from Educational Services Unit, Burlington County Special Services School District, Homebound Speech Provider
- D. Copy of April 21, 2015 letter from respondent Maple Shade's Child Study Team Director Dawn Monacella confirming that the District will not offer a reasonable accommodation for the administration of G.B.'s noon dose of MMJ
- E. Copy of April 2015 request for an attorney general advisory opinion from counsel for respondent Maple Shade Patrick J. Madden, Esq.
- F. New Jersey Attorney General Medical Marijuana Enforcement Guidelines for police, dated December 6, 2012
- G. List of other statutory enactments which recognize the in loco parentis relationship
- H. Copy of May 20, 2013 report of G.B.'s BCaBA, Stephanie M. O'Brien, M.S., BCaBA, detailing that G.B. did not have any serious maladaptive behaviors at that time

- I. Copy of LARC School's daily log book communications to the parents for March 2015, detailing G.B.'s maladaptive behaviors during the afternoons
- J. Copy of December 2, 2014 report of G.B.'s BCaBA, Stephanie M. O'Brien, M.S., BCaBA, detailing G.B.'s maladaptive behaviors during transitioning requirements
- K. Copy of the LARC School's policies on the administration of medication during school hours
- L. Copy of Dr. James A. Kwak's prescription for G.B.'s MMJ and for the administration and dosing of MMJ for G.B. at school
- M. Copy of the Epilepsy Health Center's article on "Taking Your Medicines Properly"
- N. Copy of parental reporting on oral cannabis extracts and the treatment of refractory epilepsy
- O. Copy of March 26, 2015 letter from Philip Gattone, M.Ed., President and CEO of the Epilepsy Foundation
- P. Copy of Epilepsy Foundation's report on sudden unexplained death in epilepsy (SUDEP) and documentation as to the SUDEP harm that can result from tonic-clonic (grand mal) seizures resulting in approximately 45,000 such deaths per year
- Q. List of more than twenty medical organizations and associations that support and recommend the use of medical marijuana for the treatment of otherwise uncontrollable epileptic seizures
- R. Decision of the Honorable John S. Kennedy, ALJ, denying petitioners' emergent relief petition

Petitioner's Sur Reply Brief Exhibits:

- A. Copies of LARC School's Daily Communication Log Book
- B. May 3, 2015 Star Ledger Article
- C. May 14, 2015 LARC School Behavior Plan

For Respondents:

- R-1 Attorney General Medical Marijuana Enforcement Guidelines For Police
- R-2 Individualized Education Program for G.B. dated November 17, 2013
- R-3 Transcript of CMMNJ TV Interview of L.B. and R.B.
- R-4 Medical Records of G.B. as of March 19, 2015
- R-5 Additional Medical Records