

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING

EMERGENT RELIEF

OAL DKT. NO. EDS 03752-15

AGENCY DKT. NO. 2015-22440

D.C. ON BEHALF OF J.J.,

Petitioners,

v.

ELIZABETH BOARD OF EDUCATION,

Respondent.

D.C., pro se, appearing with **Larry Anderson**, peer support partner, Family Support Organization of Union County

Jessika Kleen, Esq., (Machado Law Group), for respondent

Record Closed: March 26, 2015

Decided: March 27, 2015

BEFORE SANDRA ANN ROBINSON, ALJ:

This matter arises out of an application for emergent relief and due process filed by petitioners D.C. on behalf of her son J.J. The Department of Education Office of Special Education Programs (Department/OSEP) received the above captioned request for emergency relief and a due process hearing. As per the New Jersey Administrative Code N.J.A.C. 1:6A-12.1, the Department transmitted the emergent and due process application to the Office of Administrative Law (OAL) on March 19, 2015. Oral arguments on the emergent relief were heard on March 26, 2015.

EMERGENT RELIEF

N.J.A.C. 1:6A-12.1 provides that at an emergent relief hearing, the judge may allow the affidavits to be supplemented by testimony and/or oral argument. The judge may order emergency relief pending issuance of the decision in the matter or, for those issues specified in N.J.A.C. 1:6A-14.1(a), may order a change in the placement of a student to an interim alternative educational setting for not more than 45 days in accordance with 20 U.S.C. 1415(k) (2), 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.

J.J. will be thirteen years old in September 2015. He is autistic and suffers from chronic asthma. During petitioner's sworn presentation she disclosed that J.J. has had asthma attacks during gym, as was reported to her by his teacher's assistant and the school nurse. During asthma attacks J.J. passes out or faints. J.J. uses an arrow-chamber and is unable to handle the inhaler and take puffs by himself.

J.J. was transported to school on a Medical Transport Mini Van with an emergency medical technician (EMT) onboard during the 2012/2013 school year (SY), the 2013/2014 SY and the 2014/2015 SY up until March 16, 2015. Since the medical transport services stopped on March 16th J.J. has not attended school. Petitioner reports that her son was on a regular school bus for almost one month at the commencement of the 2014/2015 SY from September to October. And, there were two

occasions, when transport phoned to cancel a pick-up without advanced notice. On each of the two occasions of cancellation, petitioner immediately contacted Valerie Dunn, Supervisor of Special Services and the medical transport was dispatched to pick-up J.J.

The emergent relief petitioner seeks is to have the continuation of medical transport and have onboard the van an EMT, other medical professional or qualified person who knows how to operate an inhaler. Petitioner submitted two notes, one certified and the other not certified from J.J.'s doctor that declared J.J. has asthma, which causes him to pass out. She also offered an email, dated February 5, 2015, from school personnel pertaining to the discontinuance of medical transportation. An Asthma Action Plan sheet was also submitted. Petitioner did not present supporting affidavits.

Respondent does not dispute that medical transport services were provided for J.J. from 2012 through March 16, 2015. Respondent was not aware and/or had no record of J.J.'s asthma attacks in school and/or in gym. Respondent explained that during an IEP meeting in December 2014 a decision was made that J.J. did not need a specialized medical transport such as an ambulance, bus or van with specialized equipment along with the presence of an LPN or RN. Medical transport van services was scheduled to stop for J.J. on or about January 7, 2015, around the time petitioner received written notice that the services would be ending for her son. Respondent does not dispute that medical transport did not stop for J.J. in January 2015, but continued to March 16, 2015.

Respondent is willing to provide J.J. with an aide on a regular school bus who will be trained to operate an inhaler and an epi-pen. Respondent did not offer supporting affidavits.

The Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C.A. 1400-1487, requires that all children with educational disabilities have access to a FAPE and related services designed to meet their unique needs, and establishes procedural due

process rights. The federal statute is a grant formula law used to distribute federal funds to the states to provide services for the disabled. State law regarding education for the educationally disabled must be consistent with the IDEA and the federal regulations for the state to receive federal funds.

Having carefully considered the respective arguments during oral presentations and having reviewed the documents submitted during the hearing, petitioner's application for emergent relief and respondent's document of inquiry "Primary Care Provided Correspondence" from J.J.'s doctor, I find that petitioner's argument regarding an emergent need for a medical professional or qualified person who knows how to operate an inhaler to be on the bus or in the van, to be compelling. I find merit in petitioner's argument that respondent's abrupt removal of J.J. from medical transport services near the end of the 2014/2015 SY, after J.J. has received those services for almost three SY's (2012 – 2015), can bring emotion for J.J. who becomes emotional with change because he does not do well with transition. I am convinced that J.J. will more likely than not suffer irreparable harm if he has an asthma attack on the school bus without a medical professional or qualified person to administer an inhaler. I believe that J.J. will suffer greater harm than the respondent will suffer if the requested relief is not granted.

THERAPEUTIC SCHOOL FOR CHILDREN WITH AUTISM

In regard to placement in a therapeutic school for children with autism, N.J.A.C. 6A:14-2.7(o) provides, that pending the outcome of a due process hearing, including an expedited due process hearing, or any administrative or judicial proceeding, no change shall be made to the student's classification, program or placement unless both parties agree, or emergency relief as part of a request for a due process hearing is granted by the OAL or as amended and supplemented according to 34 C.F.R. § 300.526. A child must remain in his then-current educational placement, or "stay put placement," unless both parties agree to change the stay put placement or "emergency relief as part of a request for a due process hearing is granted by the OAL according to [N.J.A.C. 6A:14-2.7(m)] or as provided in 20 U.S.C. 1415(k) (4)." 20 U.S.C. 1415(j); N.J.A.C. 6A:14-

2.7(u); see also Drinker by Drinker v. Colonial Sch. Dist., 78 F. 3d 859, 864 (3d Cir. 1996). The IDEA “substitutes an absolute rule in favor of the status quo for the court's discretionary consideration of the factors of irreparable harm and either a likelihood of success on the merits or a fair ground for litigation and a balance of hardships.” Drinker by Drinker, supra, 78 F.3d at 864 (quoting Zvi D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982)). The dispositive factor in deciding a child's current educational placement should be the IEP actually functioning when the stay put is invoked. Id. at 867 (citations omitted).

New Jersey participates and receives funding in accordance with the IDEA. Lascari v. Ramapo Indian Hills Regional High School District, 116 N.J. 30, 34 (1989). In New Jersey each district board of education is required to have “policies, procedures and programs . . . in effect to ensure . . . [a FAPE] . . . is available to all students with disabilities between the ages of three and 21.” N.J.A.C. 6A:14-1.2(b). Students with disabilities must be educated, to the maximum extent appropriate, in the least restrictive environment. N.J.A.C. 6A:14-1.2(b) (5).

An emergent relief order cannot be issued unless all of the following factors are established by petitioner:

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.

N.J.A.C. 6A:14-2.7(m)1; See N.J.A.C. 1:6A:12.1(e), Crowe v. DeGioia, 96 N.J. 126 (1982).

The issue of J.J.'s placement in a therapeutic school for children with autism will be determined in a full due process hearing.

CONCLUSION

Based on the facts presented, **I CONCLUDE** that emergent relief in the form of having an EMT, medical professional or qualified person, who knows how to operate an inhaler in a van or on a bus, is warranted. **I CONCLUDE** that since respondent is willing that respondent should commence training someone to operate an inhaler and epi-pen for the purpose of providing medical assistance on a school bus.

ORDER

Accordingly, it is **ORDERED** that the petition of D.C. o/b/o J.J., for emergent relief, is **GRANTED** with regard to the immediate need for medical transport services. **I ORDER** that respondent shall immediately continue to provide J.J. with medical minivan transport services with an EMT onboard until June 26, 2015, the end of the 2014/2015 SY, or until a final decision in the due process matter determines an alternate transport service is required. **I ORDER** that J.J. return to school via medical minivan transport services with an EMT, by no later than Monday March 30, 2015.

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 either party feels that this decision is not being fully implemented, this concern should be communicated in writing to the Director, Office of Special Education Programs.

March 27, 2015

DATE

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SANDRA ANN ROBINSON, ALJ

DOCUMENTS REVIEWED

Letter from Kenneth J. Davis, M.D., J.J.'s Primary Care Physician, dated September 16, 2014

Memorandum from Ashleighann Pierre-Morgan Re: J.J.'s Medical Transportation, dated February 5, 2015

Request for Emergent Relief, signed by Petitioner on March 17, 2015

Inquiry Sheet from Elizabeth Public Schools "Determination of Eligibility For Medical Transportation" to J.J.'s Primary Care Physician, dated March 17, 2015

Return to Work or School Slip signed by Kenneth J. Davis, M.D., dated March 26, 2015

Asthma Action Plan