



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 09192-21

AGENCY DKT. NO. 2022-33475

B.K. AND S.K. ON BEHALF OF W.K.,

Petitioners,

v.

ROSELLE BOROUGH BOARD

OF EDUCATION,

Respondents.

B.K. and S.K., o/b/o W.K. pro se petitioners

Jaclyn S. D'Arminio, Special Education Counsel for respondent (Inglesino,
Webster, Wyciskala Taylor, attorneys)

Record Closed: May 2, 2022

Decided: May 24, 2022

BEFORE **ERNEST M. BONGIOVANNI**, ALJ:

STATEMENT OF THE CASE

Petitioner B.K. and S.K., on behalf of W.K. seek a 1:1 aid to ensure their 13-year-old classified child has proper medical attention through an aide, nurse or appropriate paraprofessional, to and from, and while at instruction, because of the child's seizure history.

PROCEDURAL HISTORY

This matter arises out of the Individuals With Disabilities Act (IDEA) 20 U.S.C.A. §§ 1401 TO 1484. It was transmitted to the Office of Administrative Law for a hearing on November 9, 2021. Respondents move by April 13, 2022 letter brief, with Certifications and exhibits, for an Order of Dismissal for petitioner's failure to provide Discovery, failure to appear, and failure to respond under OAL rules governing motion practice.

On December 9, 2021, a telephonic prehearing conference took place. As a result of the conference, it was agreed that all Discovery documents and other evidence such as witnesses' lists were to be exchanged, except for final expert witness reports, and documents and evidence that might have to be obtained by interrogatories by February 9, 2022. A status conference was to take place on February 9 at 3:30 p.m.

Respondent made documents demand of petitioners on January 26, 2022. Among other things it specifically requested the signing of a Health Insurance Portability and Accountability Act ("HIPPA") Release, so that respondents to seek to find the medical basis for a doctor's note supplied by the parents from one Dr. Leonis Topper MD. (Paragraph 9, April 13, 2022 Certification of Jacyln S. D'Arminio, and respondent's Letter Brief, Exhibit F). Respondent also provided initial document Discovery to petitioners on January 28, 2021 (Id. at ¶10. and Exhibit G). On February 7, 2022, records sought by respondent from petitioner's Doctor Topper were denied because no signed HIPPA form had been supplied from or on behalf of petitioners. On February 11, 2022, respondents made demand upon petitioners to sign the aforesaid HIPPA form and a medical information release form. (Id. at ¶11, 12, Exhibits H and I).

On February 9, 2022, at 3:30 p.m., the undersigned attempted to convene the scheduled status conference, via phone, but was unable to do so because the petitioners did not call in. After notifying petitioners they failed to attend the February 9, 2022 conference, the status conference was held on February 16, this time with petitioners' participating. During the status conference the petitioners agreed to and were ordered to provide the signed HIPPA form to respondent's counsel by no later than February 22.

Further, certain dates were established as follows (all for 2022) Discovery Deadline April 1, motion deadline of April 15, a status conference to be held May 24, an Exhibits binder due May 27, 2022, and a hearing date of June 1, 2022 via Zoom starting at 9 a.m.

Petitioner advised the court by letter March 23, 2022, that despite numerous attempts, they were unable to get any compliance with documents and other discovery demands, including the long sought signed HIPPA. Respondent also provided further Discovery (though none was specifically sought) to petitioners on April 1, 2022 (D Arminio Id. at ¶¶16, 17 , Exhibits L and M.)

Respondents filed this motion on April 13, 2022. On April 26, 2022, the undersigned's Judicial Assistant advised petitioners via email that their written response was due by April 25, 2022 but that they were being given an extra one week to respond to respondent's motion, that is to May 2, 2022. However, petitioners were also advised they could move to expand the date for a written reply still further by supplying a Certification seeking more time for good cause.

Petitioners have made no reply whatsoever to the Court, as of today's date.

I **FIND** the aforesaid procedural history to be the undisputed relevant **FACTS** governing this motion.

LEGAL ANALYSIS AND CONCLUSIONS

The certification notes that no explanation for the failure of petitioners to provide Discovery was given. Further petitioner had still not complied with the N.J.A.C 1:1-10.4 (a) and the specific directives given to them at the status conference on February 16, 2021. In fact, there has been no response to them at all. There has been no communication by petitioners, at all, apparently with respondents since the status conference of February 16, 2022, and no communication by them with the court since that time.

Also, as of this date, petitioner has failed to file with the OAL any responsive pleading to the motion.

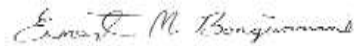
An Administrative Law Judge may dismiss a petition for a party's failure to comply with procedural requirements under N.J.A.C. 1:1-10.4(a)(1). J.G. V Paramus Bd. Of Educ., 2008 U.S. Dist. LEXIS, 30030 *9 (D.N.J. April 11, 2008). While dismissal should be imposed sparingly in the case of discovery violations, it is appropriate when a party's ability to defend his case is seriously impaired Zaccardi v. Becker, 88 N.J. 245, 253 (1982). Petitioners here claim a denial of FAPE because respondents refuse to, or are unable to provide a one for one paraprofessional for the 13-year-old special needs child, because they claim a nurse or aid or one with enough medical expertise should be solely dedicated throughout the school day, including transportation to and from school, because of the child's alleged seizure condition. The only evidence given for such a need was provided in a doctor's note written by Dr. Topper, who in turn denied any request for information sought by respondent without a signed HIPPA. Petitioners have known with certainty for at least three months that the signed HIPPA is essential and have outright ignored this requirement; nor have they given any other information, medical or otherwise requested by discovery to the respondent. Further they have given no explanation for their failure. Finally, they have ignored the instant motion which seeks the dismissal of the petition.

Accordingly, owing to the prejudice to respondent's defense caused by the unwarranted noncompliance with Discovery, I **CONCLUDE** the petition should be and is hereby **DISMISSED WITH PREJUDICE**. I also **CONCLUDE**, petitioner's having been duly notified of the motion which warns of dismissal of their petition if unanswered have effectively abandoned this matter, N.J.A.C. 1:1-14.4(a), justifying dismissal with prejudice of any of their claims.

ORDER

Based on the foregoing Roselle Borough Board of Education motion is granted and the petitioner's petition is **DISMISSED WITH PREJUDICE**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2019) 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 (2019). 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 24, 2022
DATE

ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency:

May 24, 2022

Date Mailed to Parties:
id

May 24, 2022