State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

EMERGENT RELIEF

OAL DKT. NO. EDS 06482-18

AGENCY DKT. NO. 2018 27955

J.M. ON BEHALF OF E.M.,

Petitioner,

v.

MONROE TOWNSHIP BOARD OF EDUCATION AND GLOUCESTER COUNTY SPECIAL SERVICES SCHOOL DISTRICT,

Respondents.

Zachary J. Marshall, Esq., for petitioner (Broder Law Group, attorneys)

John J. Armano, Esq., for respondent Monroe Township Board of Education (Trimble & Armano, attorneys)

Kim C. Belin, Esq., for respondent Gloucester County Special Services School District (Florio, Perrucci, Steinhardt, & Cappelli, attorneys)

Record Closed: May 14, 2018 Decided: May 15, 2018

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

STATEMENT OF THE CASE

Petitioner, J.M. on behalf of E.M., requests an emergent order seeking the following: continuation of the current homebound instruction services; reinstatement of required related services of speech-language therapy, occupational therapy, and counseling services, and compensatory education and related services for respondents' alleged failure to implement the individualized education plan (IEP) during the 2017-2018 school year. Respondent Monroe Township Board of Education (Board) asserts that emergent relief is not appropriate because Gloucester County Special Services District (GCSSD) is currently providing petitioner with homebound instruction and petitioner has not satisfied any of the criteria necessary to grant emergent relief. GCSSD contends that it is providing homebound instruction with no intention to terminate same and emergent relief is not appropriate.

PROCEDURAL HISTORY

On May 4, 2018, petitioner's request for emergent relief and a due process hearing was filed with the Office of Special Education Programs (OSEP) of the New Jersey Department of Education. On May 7, 2018, the request for emergent relief only was transmitted to the Office of Administrative Law (OAL) for oral argument, that was held on May 14, 2018.

FACTUAL DISCUSSION

E.M. is a thirteen-year-old student with disabilities. He has a diagnosis of Autism Spectrum Disorders, Impulse Control Disorder, and Bipolar Disorder, as well as a diagnosis of Type I Diabetes. He is eligible for special education and related services with an underlying disability of Multiple Disabled.

E.M.'s IEP for 2017-2018[1] required placement at GCSSD's Bankbridge Regional

[1] Petitioner attached the 2016-2017 IEP to the Certification of Counsel for Petitioner in Support of Petitioner's Request for Emergent Relief. The parties agree that the 2017-2018 IEP attached to the Board's Answer as Exhibit A is the current IEP.

School-South (Bankbridge). In November 2017, GCBSSD suspended E.M. from Bankbridge until he completed a partial day treatment program. On January 3, 2018, GCBSSD set up homebound instruction for E.M. but it was not successful because of E.M.'s behavior. On February 26, 2018, William Tyson, a teacher at GCSSD, started working with E.M. in the homebound program. The homebound program is currently being implemented with Mr. Tyson, and the parties agree that it has proven academically successful thus far.

Petitioner desires the continuation of homebound instruction until a proper school placement can be achieved. Respondents agreed to continue the current homebound instruction pending return to an appropriate educational setting.

CONCLUSIONS OF LAW

N.J.A.C. 1:6A-12.1(a) provides that the affected parent(s), guardian, board or public agency may apply in writing for emergency relief. An emergency relief application is required to set forth the specific relief sought and the specific circumstances that the applicant contends justify the relief sought. Each application is required to be supported by an affidavit prepared by an affiant with personal knowledge of the facts contained therein and, if an expert's opinion is included, the affidavit shall specify the expert's qualifications.

Emergent relief shall only be requested for the following issues pursuant to N.J.A.C. 6A:14-2.7(r):

i. Issues involving a break in the delivery of services;

ii. Issues involving disciplinary action, including manifestation determinations and determinations of interim alternate educational settings;

iii. Issues concerning placement pending the outcome of due process proceedings; and

iv. Issues involving graduation or participation in graduation ceremonies.

In this case, petitioner asserts that there is an issue involving a break in the delivery of services because all the related services in the IEP are not being provided during homebound instruction. Respondents contend that E.M. is receiving all the appropriate services under the current homebound instruction.

The standards which must be met by the moving party in an application for emergent relief are embodied in N.J.A.C. 6A:14-2.7(s)1, 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 each of the following factors have been established:

1. The petitioner will suffer irreparable harm if the 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.

Petitioners must satisfy all four prongs of the Crowe test, unless the matter involves the application of stay put. The purpose of "stay put" is to maintain stability and continuity for the student. If there is a dispute, the first preference for interim placement is the one agreed to by the parties. Although, E.M.'s current IEP places him at Bankbridge, it is uncontroverted that E.M. will remain in homebound instruction until an appropriate educational setting is realized.

The standards for emergent relief are set forth in Crowe v. DeGoia, 90 N.J. 126 (1982), and codified at N.J.A.C. 6A:3-1.6. These standards for emergent relief require irreparable harm if the relief is not granted, a settled legal right underlying a petitioner's claim, a likelihood that petitioner will prevail on the merits of the underlying claim, and a

balancing of the equities and interest that petitioner will suffer greater harm than respondent.

Petitioner bears the burden of satisfying all four prongs of this test. Crowe, 90 N.J. at 132–34. Turning to the first requirement for emergent relief, it is well settled that relief should not be granted except "when necessary to prevent irreparable harm." Crowe, 90 N.J. at 132. In this regard, harm is generally considered irreparable if it cannot be adequately redressed by monetary damages. Id. at 132-33. The moving party bears the burden of proving irreparable harm and must demonstrate a clear showing of immediate irreparable injury. Continental Group, Inc. v. Amoco Chemicals Corp., 614 F.2d 351, 359 (D.N.J. 1980).

Petitioner argued that because the services required in the IEP are not being provided to E.M. during his homebound instruction, E.M.'s window of opportunity for progress in those areas is closing. In oral argument, there was much emphasis by petitioner's counsel on a lack of educational services; however, the current homebound program, by everyone's account, appears to be successful. The current success does not diminish petitioner's claim that E.M. was without an educational program for approximately three months. However, petitioner's concerns, for purposes of emergent relief as set forth in her Certification, are that the related services of speech and language, occupational therapy, and counselling are not being provided by homebound instruction. Without these services, petitioner fears that E.M. will regress.

Respondent argued that E.M.'s behaviors interfered with his education while at Bankbridge. Counsel for the Board submitted that the related services provided under the IEP were intended to address behavior problems occurring in the classroom. Counsel argued that petitioner's Certification was deficient because she relied upon an old IEP. Respondent contended that not only was the frequency of the related services reduced in the 2017-2018 IEP, but the services were also designed to be pull-out services to help E.M. function in the classroom. Therefore, counsel maintained that the related services are not analogous to homebound instruction. Respondent submits that homebound instruction is effectively meeting E.M.'s educational needs. Respondent

submitted that E.M.'s educational progress is proof that he is not regressing or suffering irreparable harm.

It is petitioner's burden to show irreparable harm. While acknowledging the success of the current homebound instruction, petitioner expressed her fear that E.M. is regressing, without providing any specifics. Petitioner was unable to specifically articulate the exact nature and frequency of the related services that she claims E.M. is entitled to under the 2017-2018 IEP. Under these circumstances, I **FIND** that the dispute about the nature of the related services required under the 2017-2018 IEP does not rise to a level of grievances enumerated under N.J.A.C. 6A:14-2.7(r). I further **FIND** that petitioner's claims for lost hours of instruction and related services can be adequately addressed at the due process hearing. Therefore, I **FIND** that because E.M. is receiving an appropriate homebound instruction program pending return to an educational setting, I **CONCLUDE** that petitioner has not made a showing of irreparable harm.

Accordingly, I **CONCLUDE** that petitioner has failed to demonstrate a likelihood of success on the merits of the case and has not demonstrated that his legal right to the underlying claim is well-settled.

For the same reasons I **CONCLUDE** that petitioner has failed to demonstrate that E.M. will suffer greater harm than respondent will suffer if the requested relief is not granted.

The fact that there is no evidence beyond an assertion that E.M. may suffer irreparable harm if he does not receive certain related services while in homebound instruction and a failure to demonstrate a likelihood of success on the merits compelling respondents to provide certain disputed services causes me to **CONCLUDE** that the petitioner has not met his burden in this matter. Consequently, the petitioner's request for emergency relief is **DENIED**.

ORDER

For the foregoing reasons, I **ORDER** that the petitioner is not entitled to the requested emergent relief and that the petitioner's request for emergency relief is **DENIED**.

This decision on application for emergency relief shall remain in effect until the issuance of the decision on the merits in this matter. The hearing having been requested by the parents, this matter is hereby returned to the Department of Education for a local resolution session, pursuant to 20 U.S.C.A. § 1415 (f)(1)(B)(i). 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 15, 2018 — Kathleen M. Calemmo

DATE — **KATHLEEN M. CALEMMO**, ALJ

Date Received at Agency

Date Mailed to Parties:

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