



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

EMERGENT RELIEF

OAL DKT. NO. EDS 14733-19

AGENCY DKT. NO. 2020/30771

M.G. ON BEHALF OF E.K.,

Petitioners,

v.

ELIZABETH CITY BOARD OF EDUCATION,

Respondent.

Phillip T. Taylor, Esq., petitioners (P. Taylor Legal, PLLC, attorneys)

Richard P. Flaum, Esq., for respondent (DiFrancesco, Bateman, Coley, Yospin,
Kunzman, Davis & Lehrer, PC, attorneys)

Record Closed: October 24, 2019

Decided: October 24, 2019

BEFORE **JULIO C. MOREJON**, ALJ:

STATEMENT OF THE CASE

Petitioner, M.G. on behalf of E.K. (Student), filed this emergent relief-only seeking an order compelling the Elizabeth Board of Education, (District), to grant the Student home instruction (including Applied Behavioral Analysis therapy (ABA)), pending the outcome of the pending petition for due process filed by M.G. M.G.'s application for emergent relief also seeks relief for : 1) medical exemption to the District's attendance

policy and an adjustment to E.K.'s schedule, and 2) injunctive relief against the District from filing truancy proceedings, pending the outcome of the petition for due process.

PROCEDURAL HISTORY

On October 1, 2019, M.G. on behalf of the Student, filed a Petition for Due Process (Petition) against the District seeking eligibility for special education and related services; compensatory education, an appropriate program in an out-of-school district placement; along with a modified school schedule, and behavior intervention plan designed to address the Students school avoidance, and home instruction, pending the identification of an appropriate out-of-district placement. The Petition was filed under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §§1400 to 1482.

On October 22, 2019, the District filed a cross-Petition for Due Process, in response to the petitioner's request for independent evaluations of the Student.

OSEP transferred this matter to the Office of Administrative Law (OAL), where it was filed on October 17, 2019.

Oral argument was heard on the emergent application on October 23, 2019. The record closed on October 24, 2019, after the District submitted a legible copy of the psychiatric report of Dr. Jennifer Platt.

FACTUAL SUMMARY

A summary of the pertinent evidence presented is as follows, and I **FIND** the following **FACTS**:

The Student is a fifteen-year-old biological female, who identifies as a male and has been registered in the District since kindergarten. The Student is currently in the ninth-grade and enrolled at Thomas Jefferson Arts Academy (Jefferson Arts). The

Student has been diagnosed by his health-care providers¹ with Autism, mixed anxiety disorder, obsessive compulsive disorder, disruptive mood disorder, depressive disorder, hypothyroidism, gender dysphoria, sleep apnea and circadian dysregulation.

The District approved an initial Section 504 accommodations plan (initial 504 Plan) on April 16, 2018, that noted Student's diagnoses for Autism and Anxiety disorder, and provided accommodations, among which are the following:

- Additional time to complete tasks/long-term projects with adjusted due dates, and classroom tests/quizzes
- Provide short breaks when refocusing and in between core academic classes
- Modification of assignments
- Adjust attendance policy, if needed

The Initial 504 Plan was modified on October 29, 2018, (the 2018 Section 504 Plan), which provided the following additional accommodations:

- Meet with school counselor, YES program and/or nurse as needed
- Leave class four-minutes early prior to school bell, and use of school elevator as needed
- Physical education self-paced with modified exercise and adjust attendance

Between February 2018 through June 2018, M.G. and representatives of the District have had several initial identification and evaluation planning meetings. On February 20, 2018, the District denied classifying the Student as special needs, however, the District's psychologist did find that the Student has a medical diagnosis of "Autism and Anxiety Disorder, which affects her ability to attend school." Following this meeting the District authorized the Initial 504 Plan, which was issued on April 2018. As recently as May 2019, the District has denied M.G.'s request that the Student be classified special needs.

¹ Neurodevelopmental evaluation of Dr. Lavinia Stoiecescu dated July 13, 2019, Certification of M.G., exhibit P-2; neurophysiology evaluation of Dr. Meeta Bhatt, dated May 9, 2019, Certification of M.G., exhibit P-3.

Simultaneously with denying the Student's special needs classification on May 2019, the District authorized a psychiatric evaluation of the Student. The same was performed by Jennifer Platt, D.O., (Dr. Platt) on June and July 2019, and a psychiatric evaluation was submitted to the District on September 17, 2019. However, Dr. Platt's psychiatric evaluation was provided to M.G.'s counsel on October 22, 2019, which is after the date the within emergent application was filed. The psychiatric evaluation was included as Exhibit P-19 to petitioner's pleadings at oral argument.

Dr. Platt's psychiatric evaluation confirms the Student's diagnosis of Autism Spectrum Disorder and Generalized Anxiety Disorder, and a possible diagnosis of sensory sensitivities. The psychiatric evaluation also recommends home instruction on a "short-term basis while the academic program is being reevaluated".²

Between February 27, 2018 through December 3, 2018, M.G. through the assistance of Dr. Bernal, had requested home instruction from the District, which requests were denied. On December 19, 2019, following a meeting with the Child Study Team (CST), the District approved home instruction for the Student through June 2019, "while on a modified school schedule pending CST evaluation."

Despite the District approving the Student's home instruction for December 2018 through June 2019, and the two 504 accommodation plans that provided that the District would "Adjust [Student's] attendance policy, if needed", the District has filed summonses with the Municipal Court on November 2018 and April 2019, charging M.G. with violating the truancy law.³

M.G. testified that the District had initially approved home instruction for the Student at the beginning of the 2018-2019 school year. The same was later rescinded by the District after two-weeks because the home instructor conducted the home instruction at the Student's home, which the District had not authorized. M.G. also testified

² Dr. Platt's recommendation for home-instruction does not address if the same is to provide for Applied Behavioral Analysis therapy.

³ N.J.S.A. 18A: 38-25.

that after the District had approved the home instruction in December 2018, the Student did not respond positively to a male instructor and M.G. requested a female instructor. A female instructor, “Ms. Berry” was provided for the last two weeks of school, and M.G. stated that the Student responded positively to her.

The District does not dispute the results of the psychiatric evaluation of Dr. Platt and recognizes that the Student’s current placement is not consistent with the recommendations of Dr. Platt’s psychiatric evaluation. The District does not dispute M.G.’s request for interim home instruction for the Student pending the proper placement of the Student, which is the subject the underlying Petition filed by M.G.

LEGAL ANALYSIS AND CONCLUSION

New Jersey Administrative Code 1:6A-12.1(a) provides that the affected parent(s), guardian, board or public agency may apply in writing for emergency relief. An applicant for emergency relief must set forth in their application the specific relief sought and the specific circumstances they contend justify the relief sought. N.J.A.C. 1:6A-12.1(a).

Emergent relief shall only be requested for the following issues pursuant to N.J.A.C. 6A:14-2.7(r)1:

- 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.

I **CONCLUDE** that it has been established that there exist issues involving a break in the delivery of services to the Student which warrant a request for emergent relief. Specifically, I **CONCLUDE** that this matter involves a break in services to the Student as

the District has failed to provide home instruction during the 2019-2020 school year consistent with the same home instruction services previously provided to the Student during the 2018-2019 school year.

I further **CONCLUDE** that the underlying matter concerns issues of placement of the Student pending the outcome of the due process proceedings. To wit, the Student's interim placement on home instruction and a modified school schedule pending resolution of the due process proceeding.

Emergency relief may be granted pursuant to N.J.A.C. 1:6A-12.1(e) and N.J.A.C. 6A:14-2.7(s)(1), if the judge determines from the proofs that the following conditions have been established:

- i. The petitioner will suffer irreparable harm if the requested relief is not granted;
- ii. The legal right underlying the petitioner's claim is settled;
- iii. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
- iv. 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.S.A. 6A:14-2.7(s); Crowe v. DeGioia, 90 N.J. 126 (1982), codified at N.J.A.C. 6A:3-1.6(b).

M.G. has the burden of establishing all of the above requirements in order to warrant relief in their favor. D.I. and S.I. on behalf of T.I. v. Monroe Township Board of Education, 2017 N.J.Agen LEXIS 814, 7 (OAL Docket No. EDS 10816-17, October 25, 2017). The moving party bears the burden of proving each of the Crowe elements "clearly and convincingly." Waste Mgmt. of N.J. v. Union Cnty. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

Beginning with the first requirement, it is well-settled that relief should not be granted except “when necessary to prevent irreparable harm.” Crowe, 90 N.J. at 132-33. In this regard, harm is generally considered irreparable if it cannot be adequately redressed by monetary damages. Id. at 132-33. In other words, it has been described as “substantial injury to a material degree coupled with the inadequacy of money damages.” Judice’s Sunshine Pontiac v. General Motors Corp., 418 F.Supp. 1212, 1218 (D.N.J. 1976) (citation omitted).

M.G. argues that the District’s failure to provide an adequate placement and interim home instruction has and will continue to have an irreparable detrimental effect upon the Student and continuing to try and force Student to attend school without a modified schedule will cause the Student irreparable damage. M.G. argues further that the District’s failure to provide the Student with interim home instruction, will result in the Student receiving no educational programming until an appropriate placement may be found, putting the Student even further behind educationally. M.G. concludes that the failure to modify the attendance policy with respect to the Student will likely result in continued truancy proceedings filed against the Student which will only serve to further alienate the Student from his continued studies. I agree.

M.G.’s argument is supported by Dr. Platt’s psychiatric evaluation that home instruction on an interim basis is beneficial to the Student until such time that the District and M.G. agree to a proper placement for the Student.

I **CONCLUDE** that M.G. has presented competent proofs that the petitioner will suffer irreparable harm if the requested relief is not granted.

Secondly, M.G. must also demonstrate that the legal right underlying her claim is settled and she must make a preliminary showing of a reasonable probability of success on the merits. Crowe, 90 N.J. at 133. It is well-settled that the Individuals with Disabilities Education Act (IDEA) requires a school district to provide a FAPE to all children with disabilities and determined to be eligible for special education. 20 U.S.C. § 1412(a)(1)(A). Student is likely to prevail on the merits of the underlying claim.

Here, the District originally determined that the Student's evaluation and diagnosis did not satisfy the disabilities defined in N.J.A.C. 6A:14-3.5 or 3.6, or the Student's disabilities do not adversely affect the Student's education performance, and therefore, the Student is not in need of special education and related services. Despite its determination, the District authorized a psychiatric evaluation by Dr. Platt, which validated M.G.'s request that the Student be classified for special education and related services, and that pending proper placement of the Student, he receive home instruction on an interim basis. The District, now possessed with the Dr. Platt's psychiatric evaluation, does not dispute the need for home instruction and acknowledges that the Student's placement should be consistent with Dr. Platt's conclusions. A student's right to home instruction under circumstances similar to those presented here has been previously upheld. See, In B.V. o/b/o D.V. v. Pennsauken Bd. of Educ., 2012 N.J. AGEN LEXIS 265, at *13 (OAL Dkt. NO. EDS 7217-12 Jun. 5, 2012).

I **CONCLUDE** therefore that M.G. has met the second prong of the emergent relief standard in that the legal right underlying her claim is settled and the third requirement of Crowe, that the petitioner has a likelihood of prevailing on the merits of the underlying claim.

Finally, in balancing the relative equities of the parties' respective positions, the Student will suffer greater harm than the District if relief is not granted. The District recognizes that the Student will require special education and related services and, as a result, the District recognizes that the Student will further suffer harm from his lapses in school attendance, and these interests are in sync with M.G.'s request for interim home instruction until such time that there is a proper placement for the Student.

I **CONCLUDE** that, when the equities and interests of the respective parties are balanced, the petitioner will suffer greater harm than the respondents if the requested relief is not granted.

In addition to seeking an order requiring the District to: (1) provide the Student with home instruction, including ABA therapy, pending an appropriate educational placement; (2) provide a medical exemption to the attendance policy and a modified schedule; and

(3) enjoin the District from pursuing truancy proceedings against M.G. and the Student, pending an appropriate educational placement for the Student, petitioner also seeks additional remedies including attorneys' fees and costs of suit,

With respect petitioner's claim for attorneys' fees and costs, the general rule is that each party bears his or her own attorneys' fees and costs in the absence of express authorization by statute, court rule or contract. Balsley v. North Hunterdon Bd. of Educ., 117 N.J. 434, 443 (1990); In re Thomas, 278 N.J. Super. 580, 284-85 (App. Div. 1995). See also N.J.A.C. 1:1-1.3(a) and R. 4:42-9(a). Absent specific statutory authority to grant such a request, I **CONCLUDE** that the M.G.'s claim for attorneys' fees in this matter is denied.

With respect to petitioner's request that the District provide the Student a medical exemption to the attendance policy and a modified schedule, and to enjoin the District from pursuing truancy proceedings against M.G. and the Student, pending an appropriate educational placement for the Student, I **CONCLUDE** that the Section 504 Accommodation Plans for school year 2018-2019, and 2019-2020, provide that the District agrees to make adjustment to the attendance policy, "if needed", and therefore I **CONCLUDE** that the proofs presented herein evidence a need for the District to make adjustments to the attendance policy so that the Student can continue with his home instruction studies, at his home if necessary, without the threat of a truancy charge for not physically attending classes at his school.

ORDER

Accordingly, petitioner's application for emergent relief requiring the District to provide the Student with home instruction, and a modified school schedule, pending resolution of the due process proceeding is **GRANTED**.

In addition, petitioner's request in the application for emergent relief that the District is to provide a medical exemption to the attendance policy and a modified schedule; and to enjoin the District from pursuing truancy proceedings against Parent and Student pending an appropriate educational placement for the Student is **GRANTED**, inasmuch

as the Section 504 Accommodation plans state that the District is to adjust the attendance policy for the Student to reflect that the Student will be in an interim home instruction program, pending an appropriate educational placement for the Student, and therefore will not be attending regular classes at Jefferson Arts.

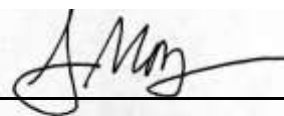
With respect to petitioner's claim for attorneys' fees and costs in filing the within application for emergent relief, the same is **DENIED**.

Accordingly, it is **ORDERED** that the District initiate a home instruction plan for the Student as recommended in Dr. Platt's psychiatric evaluation, and that M.G. and the Student cooperate with the District in the home instruction program.

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.

October 24, 2019

DATE



JULIO C. MOREJON, ALJ

Date Received at Agency

October 24, 2019

Date Mailed to Parties:

October 24, 2019

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