State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING
EMERGENT RELIEF
OAL DKT. NO. EDS 12368-23
AGENCY REF. NO. 2024-36705

M.A. AND N.M. ON BEHALF OF MINOR CHILD, M.A.,
Petitioners,
v.
BERNARDS TOWNSHIP BOARD
OF EDUCATION,
Respondent.

Lori M. Gaines, Esq., for petitioners (Barger & Gaines, attorneys)

Cherie L. Adams, Esq., for respondent (Adams Gutierrez & Lattiboudere, LLC)

BEFORE **JEFFREY N. RABIN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, M.A. and N.M. on behalf of minor student M.A. (petitioners) filed a due process petition seeking to have respondent, the Bernard's Township Board of Education (respondent, or District), place minor student M.A. in a residential educational placement.

Petitioners have now filed the within motion for emergent relief, to have M.A. placed in a residential school as soon as possible.

This motion for emergent relief was filed by petitioner on or about December 14, 2023, with the Office of Administrative Law (OAL). N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. An emergent hearing in this matter took place on December 20, 2023, and the record closed.

FINDINGS OF FACT

Based on petitioners' petition for emergent relief and brief, respondent's brief, and the evidence and testimony offered by the parties' representatives, and solely for the purpose of deciding this emergent appeal, I **FIND** the following to be the undisputed facts:

1. M.A. is an eleven-year old student who attends Bernards Township Public School District. He has been diagnosed with autism, mixed receptive-expressive disorder, attention deficit, overactivity, pica and sensory integration dysfunction. He is non-verbal.
2. In July of 2021, a Functional Behavioral Assessment ("FBA") was completed, and a Behavioral Intervention Plan ("BIP") was developed. The BIP was intended to address M.A.'s behaviors, such as eloping, aggression, non-compliance, self-injurious behavior, non-contextual vocalizations, and mouthing. Respondent began providing home programming and parent training. The behavioralist concluded that M.A.'s maladaptive behaviors affected his learning and the learning of other students.
3. During the 2022-2023 school year, M.A. was placed in the school's self-contained autism program with 1:1 instruction, and received individual and group speech therapy along with occupational therapy, and was eligible to participate in the District's Extended School Year ("ESY") program.
4. M.A. has engaged in property destruction, at home and at school. He damaged furniture and walls, wrote on walls, and broke objects.

5. M.A. was physically assaultive and caused injury to others including family members and District staff. He attacked his younger brother on November 17, 2023, causing injury. He was physically aggressive and assaultive in school.
6. On July 11, 2023, during his home program, M.A. attempted to get on a trampoline. He hit his head on a plastic strap and became agitated. He then hit his younger brother who was already on the trampoline. The instructor got on the trampoline and separated the boys. M.A. grew increasingly agitated and pulled his pants and underwear down and threw himself back and forth on the trampoline.
7. On July 12, 2023, M.A. was working at home with a District instructor. He was crying loudly, running back and forth banging the floor strongly with his foot, in an out of control manner. He slammed a cup on the floor breaking it into pieces. The instructor and M.A.'s mother tried to calm him down, but he kicked his mother and with both hands hit the instructor across the face. On July 13, 2023, respondent stopped sending staff members to M.A.'s home. Respondent provided no home programming to M.A. from July 13, 2023, through October 17, 2023.
8. On October 17, 2023, the respondent contracted with We Care Autism Services (We Care) to provide M.A. with his home-based instruction, eight hours per week of instruction to M.A. and two hours per week of parental training.
9. On November 2, 2023, We Care's behaviorist terminated her session early due to safety concerns; M.A. threw a tantrum, crying loudly, banging his feet on the floor, throwing objectives, jumping on his bed, and attempting to pull recessed lighting out of the ceiling so that he could insert his hand into the gap. We Care then suspended working on any individualized education plan ("IEP") goals in the home.
10. On December 1, 2023, We Care was in M.A.'s home for a parent training session, when he exhibited aggressive behavior. He eloped from the instructional area three times, during which he grabbed glass objects and slammed them violently onto the floor, breaking them.
11. M.A. engaged in self-injurious behaviors in and outside of school. One time M.A. took a paper towel and tightly wrapped it around his own neck, despite working 1:1 with a staff member.

12. Even though petitioners have installed locks on every window and door in their home, M.A. still successfully eloped from the house. On June 1, 2023, M.A. opened and jumped out of a locked window and disappeared. When he was found, he was covered in motor oil. On August 26, 2023, M.A. eloped from his home. Petitioners called the police who found M.A.'s clothes on the side of the river. He was later found naked in a shed at someone's home; he was wet from swimming in their pool. On September 21, 2023, petitioners had to call the police after M.A. ran away from home. The police found him naked and missing his Care Trak bracelet. On September 24, 2023, M.A. ran away from home and was located by police.
13. M.A. also eloped within the school setting. An Elopement Plan was first developed by respondent in 2018 and remains in place for him today. On October 29, 2023, M.A. eloped from the instructional area, and kicked two of his classmates as he ran by.
14. M.A. has pica and both in and out of school has eaten elastic and rubber items, creams, toys, banana peels, grass, and other non-food items, as well as erasers, shaving creams, hand sanitizer and pencil points.
15. Petitioners had M.A. privately evaluated by Dr. Anita Breslin. Her report was not received prior to the IEP meeting of July 25, 2023. Subsequent to that meeting, an incident involving M.A. outside of school was reported to the school and respondent asked for an emergency meeting for September 22, 2023, which was converted to an IEP meeting. The case manager and staff working with M.A. received the Breslin report on Monday, September 18, 2023. An additional IEP meeting was held on October 13, 2023, at which the respondent reviewed Dr. Breslin's findings and her recommendation that M.A. be placed in a residential school for children with severe autism. Due to Dr. Breslin's opinion that M.A. was a danger to himself and other students as well as his parents and siblings, respondent agreed to explore residential placements. There were at least three residential schools being explored as part of the admissions process.

Testimony

For petitioners:

Petitioners' counsel stated that respondent's Director of Special Services, Jean O'Connell, had stated at the IEP meeting of October 13, 2023, that she was in agreement with petitioners that M.A. be placed in a residential school and that this agreement would be added to the new IEP. O'Connell's Certification of December 19, 2023, was not accurate, as there had been no mention at the IEP meeting that respondent's agreement to provide residential placement was subject to financial contributions from PerformCare.

Exhibit P-11 was a Written Notice from the IEP meeting of October 13, 2023, in which respondent confirmed that even though they were opposed to placing M.A. in a residential program, based on Dr. Breslin's recommendations the District would then start exploring residential programs. The Notice, from Jennifer Dempsey, School Psychologist/Case Manager, stated, "Moving forward, the district will work collaboratively with Dr. Breslin to find an appropriate residential placement for [M.A.] that will meet his unique needs." Thereafter, on October 16, 2023, respondent's counsel Cherie Adams wrote to a representative of petitioners and asked, "[W]ill you be withdrawing this petition for mediation in light of the District notice agreeing to a residential placement?"

Respondent approached three schools, but when they discovered the expenses involved, changed their mind about paying for a residential placement, seeking only to pay for educational services.

Respondent's argument about "stay put" was flawed; regulations allow for emergent relief, therefore stay put is not an absolute. Where there is irreparable harm to a student, there is an exception to stay put. This is evidenced by the fact that a school board can have dangerous students removed from their school despite stay put. Petitioners referred to (the uncitationed case of) Collingswood v. A.C., in which an administrative law judge granted emergent relief to a school despite stay put being in place. Further, the IEP process was not being usurped in the within matter, because respondent agreed to residential placement during an IEP meeting.

The New Jersey District Court identified nine factors that played a role in determining whether residential placement was educationally necessary for a student. D.B. ex rel. R.H. v. Ocean Twp. Bd. of Educ., 985 F. Supp. 457, 503 (D.N.J. 1997). This was not a strict test and all nine factors need not be met. Petitioners met all nine factors.

Finding in favor of petitioners here would not circumvent the due process requirements; this would be a temporary order until a due process hearing was completed.

PerformCare does not help or prevent behaviors; it responds after the fact, after an emergency had taken place. The last time M.A. ran away from home he was found more than a mile from home. Also, PerformCare takes a very long time to provide help; they sometimes take years to determine if a child required residential placement, and has many prerequisite hurdles before agreeing to residential placement.

As seen in Exhibit P-16, Ms. O'Connell indicated to one of the schools, Melmark, that respondent only wanted to pay educational, not residential, expenses. Melmark's representative, Ms. Meunch, indicated that they only dealt with districts that pay both educational and residential expenses. Ms. Meunch then asked respondent to advise. Based on this, the District had sabotaged the admissions process with Melmark by indicating they would not pay the residential fee.

For respondent:

Respondent's counsel said stay put applied, which would keep M.A. in school and continue home schooling. The District never agreed to residential placement; they only agreed to consider it. Petitioners failed to exhaust all their remedies; for instance, they refused help from PerformCare, which was in place to help families. PerformCare would be a better option than residential placement, which was the most-restrictive environment for M.A. PerformCare could provide emergency help within an hour of the report of the need for help.

Whether residential placement was necessary was not proper for a petition for emergent relief. The case cited by petitioners was not applicable, because in that case the child had already been in residential placement and the parents sought to have the student moved to a different residential placement.

None of the three schools respondent applied had any openings for M.A. There had not been any discussion about funding.

LEGAL ANALYSIS

The issue is whether petitioners had proven by a preponderance of the evidence that they had met the standard for emergent relief, and that they were entitled to relief.

N.J.S.A. 18A:6-9 authorizes the Commissioner of Education to consider controversies between a parent and a school board. The OAL is the appropriate venue for hearing an appeal of a school board's findings.

N.J.A.C. 6A:14-2.7(r) allows a party to apply in writing for a temporary order of emergent relief as part of a request for a due process hearing or an expedited hearing for disciplinary action. The request needed to be supported by an affidavit or notarized statement specifying the basis for the request for emergency relief. N.J.A.C. 6A:14-2.7(r)(1) lists the cases emergent relief is available for, which includes issues involving (i) a break in the delivery of services; (ii) disciplinary action, including manifestation determinations and determinations of interim alternate educational settings; (iii) placement pending the outcome of due process proceedings; and (iv) issues involving graduation or participation in graduation ceremonies.

The within petitioners seek an order of emergent relief due to issues concerning placement pending the outcome of the due process hearing, in that they argue that student M.A. must be placed in a residential school in order to be appropriately educated pending the outcome of the full due process hearing. I **CONCLUDE** that petitioners comply with N.J.A.C. 6A:14-2.7(r)(1)(iii) and are therefore eligible to seek emergent relief.

Next, pursuant to N.J.A.C. 6A: 3-1.6 and the case of Crowe v. DeGioia, 90 N.J. 126 (1982), a petitioner must show by a preponderance of the credible evidence that the four prongs/prerequisites set forth therein had been met in petitioners' favor in order to be granted emergent relief.

A petitioner bears the burden of proving the four prongs for emergent relief. B.W. ex rel. D.W. v. Lenape Reg'l High Sch. Dist., OAL Dkt. No. EDS 06933-05, Agency Ref. No. 2006-10522E, at 8 (N.J. Adm); see also J.G. ex rel. Q.B. v. Bd. of Educ. of Lakewood, OAL Dkt. No. EDU 10073-03, Agency Ref. No. 466-12/03, at 6 (N.J. Adm); R.D. ex rel. C.D. v. Willingboro Bd. of Educ., 95 N.J.A.R.2d 190, at 2.

Per N.J.A.C. 6A: 3-1.6 and Crowe, emergent relief may be granted if the judge determines from the proofs that the following four prongs have been met:

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.

1. The petitioners will suffer irreparable harm if the requested relief is not granted.

M.A. has severe autism. He is non-verbal. M.A. engages in dangerous behaviors, including setting fires and being physically assaultive towards himself and others. He has eloped from his home and school; on at least two occasions, this resulted in police finding him wet and naked near a river and a swimming pool, and another occasion where he was found covered in motor oil with motor oil in his mouth, requiring the intervention of Poison Control. Both Drs. Breslin and Cargan have certified that M.A. is at risk for further

irreparable harm if the present situation remains in place for additional months pending the completion of a full due process hearing.

Irreparable harm may be shown when there is a "substantial risk of physical injury to the child or others, or when there is a significant interruption or termination of educational services." C.B. ex rel. C.B. v. Jackson Twp. Bd. of Educ., EDS 4153-09. (Exhibit P-26.) Here, based on the briefs, certifications and photographs submitted by petitioners, M.A. has caused himself and others physical harm. He had been physically aggressive towards District staff and outside teaching staff. There was such a risk of harm that respondent has halted sending staff to M.A.'s home.

In July 2021, an FBA was completed, calling for a BIP. The FBA and BIP addressed M.A.'s behaviors, specifically, elopement, aggression, non-compliance, self-injurious behavior, non-contextual vocalizations, and mouthing. The behavioralist concluded that M.A.'s maladaptive behaviors affected his learning and the learning of other students. M.A. has engaged in property destruction, at home and at school. He damaged furniture and walls, wrote on walls, and broke objects. He was physically assaultive and caused injury to others, including family members and District staff. He attacked his younger brother on November 17, 2023, causing injury. He was physically aggressive and assaultive in school.

On July 11, 2023, during his home program, M.A. hit his younger brother while fighting over a trampoline, then grew more agitated and pulled his pants and underwear down and threw himself back and forth on the trampoline.

On July 12, 2023, M.A. was working at home with a District instructor. He was out of control, and slammed a cup on the floor, shattering it. He then kicked his mother and hit the instructor across the face with both hands. As a result, on July 13, 2023, respondent stopped sending staff members to M.A.'s home, and provided no home programming to M.A. from July 13, 2023, through October 17, 2023.

After respondent contracted with We Care to take over home-based instruction for M.A., on November 2, 2023, We Care's behaviorist terminated her session early due to

safety concerns; M.A. threw a tantrum, banging his feet, throwing objectives, jumping on his bed, and attempting to pull recessed lighting out of the ceiling. On December 1, 2023, We Care was in M.A.'s home when M.A. exhibited aggressive behavior, then eloped from the instructional area three times. While attempting to flee his instruction, M.A. grabbed glass objects and slammed them violently onto the floor, breaking them.

M.A. also engaged in self-injurious behaviors. One time in school, M.A. took a paper towel and tightly wrapped it around his own neck, attempting to strangle himself.

Petitioners have had to install locks on every window and door in their home. Yet on June 1, 2023, M.A. opened and jumped out of a locked window and disappeared, only to be found later covered in motor oil. On August 26, 2023, M.A. eloped from his home; the police found M.A.'s clothes on the side of the river, and later found M.A. naked in a shed at someone's home, after apparently swimming in their pool. On September 21, 2023, M.A. ran away from home and the police found him naked and missing his Care Trak bracelet. On October 29, 2023, M.A. eloped from school, during which he kicked two of fellow students.

M.A. has pica, and both in and outside school has eaten elastic items, rubber items, creams, toys, banana peels, grass, and other non-food items, as well as erasers, shaving creams, hand sanitizer and pencil points.

In addition to the various cuts and bruises M.A. has caused to himself, his family, and other students and District staff, M.A. has put himself in situations where greater harm could have resulted. He could have drowned in that stranger's pool, or in the river where he eloped. He could have been electrocuted by playing with recessed wires in his home. He could easily have poisoned himself due to ingesting non-edible substances, such as motor oil. He could have been hit by a car while eloping from home or school. He has already caused physical harm and seems likely to continue doing so. Being non-verbal, M.A. would not even be able to cry or ask for help. Even more concerning is that he has disrupted his own learning process and that of his fellow students. The interventions put in place by respondent have been unsuccessful.

These incidences submitted by petitioners clearly demonstrate a substantial risk of physical injury to M.A. and to others, and have led to a significant interruption or termination of educational services. Respondent feels such harm could have been avoided if petitioners had exhausted the resource of PerformCare, but PerformCare does not help or prevent behaviors; it responds after the fact, after an emergency has taken place.

I **CONCLUDE** that petitioners have proven that the first prong of the Crowe test for emergent relief had been met in favor of the petitioners.

2. The legal right underlying the petitioners' claim is settled.

As a student classified for special education, M.A. is entitled to a free appropriate public education (FAPE) pursuant to the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. §1400; N.J.A.C. 6A:14. "Appropriate" means an IEP must be "reasonably calculated" to enable the child to receive educational benefits. Rowley v. Hendrick Hudson Sch. Dist., 458 U.S. 176, 201–03 (1982). It must be "likely to produce progress, not regression or trivial educational advancement." Polk v. Cent. Susquehanna Sch. Dist., 853 F.2d 171 (3d Cir. 1988) cert. denied 488 U.S. 1030 (1989). It must offer the opportunity for "significant learning" and "meaningful educational benefit." Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238 (3d Cir. 1999).

"Special Education" is defined within the IDEA as "specially designed instruction . . . that is intended to meet the unique needs of a child with a disability." 34 C.F.R. § 300.39(a)(1) (2023). "Specially designed instruction" is defined as "adapting, as appropriate, to the needs of the child, the content, methodology, or delivery of instruction: (i) to address the unique needs of the child that result from the child's disability . . . ." In Endrew F. v. Douglas County School District 137 S.Ct. 998, 991–92 (2017), the Court stated that "the progress contemplated by an IEP must be appropriate in light of the child's circumstances." In Battle v. Commonwealth of Pennsylvania, 629 F.2d 269 (3d Cir. 1980), the court stated, "Where basic self-help and social skills such as toilet training, dressing, feeding, and communication are lacking, formal education begins at that point." Thus, petitioners are correct to argue that one must consider all the needs that a child

presents, including a student's behavioral needs and need for consistency in programming.

Petitioners cited to Kruelle v. New Castle County School District, 642 F.2d 687 (3d Cir. 1981), which ordered the respondent school district to place the petitioner student in a residential school. The court relied on expert testimony that inconsistencies in approach, environment and caretakers had led to self-destructive behavior, and therefore the student belonged in a full-time placement with staff familiar with the programming. In North v. District of Columbia Board of Education, 471 F. Supp. 136 (D.D.C. 1979), the court found that there were certain students whose social and emotional needs were so intertwined with their educational needs that residential placement was an appropriate remedy. Petitioners cited to S.C. ex rel. T.M. v. Bloomfield Board of Education, EDS 3397-04, where the administrative law judge relied on Kruelle to find that the special-needs student required placement in a residential school at the District's expense. This comported with 34 C.F.R. § 300.104, which stated that if placement in a public or private residential program was necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, was to be at no cost to the parents of the child. This also comported with N.J.A.C. 6A:14-7.5(b)(3), which stated that when a school district placed a student with a disability in an approved residential private school in order to provide a FAPE, the placement shall be at no cost to the parent.

Accordingly, it is well-settled that a student is entitled to a FAPE, with a special-needs student's educational programming being based on an IEP that is reasonably calculated to enable the child to receive educational benefits, that is likely to produce progress, not regression or trivial educational advancement, and which offers the opportunity for significant learning and meaningful educational benefit. The IEP must meet the unique needs of the child that result from the child's disability. Behavioral needs must be considered, and residential placement is an acceptable option to fulfill these needs.

I **CONCLUDE** that petitioners have proven that the second prong of the Crowe test for emergent relief had been met in favor of the petitioners.

3. The petitioners have a likelihood of prevailing on the merits of the underlying claim.

While the right to a FAPE is settled law, and residential placement at District expense is a viable option if required to meet the student's educational needs based on his or her unique situation, the moving party still must show a likelihood of prevailing based on the facts in their particular case. Respondent disagrees that petitioners have demonstrated that the merits of petitioners' case create a likelihood of success at a full due process hearing. Respondent argued that a court should not grant residential placement as part of a petition for emergent relief, but rather that a full due process hearing would be required, to give both parties the full opportunity to present credible proofs as to whether the child's educational needs were being met.

The counter-argument would be that if this court were to grant petitioners' prayer for relief, and order that respondent place M.A. in a residential placement, it would only be a temporary order. There would still be a full due process hearing in the near future, where both parties could present all their proofs as to whether the current IEP provided FAPE. If at that time respondent proved that it had provided a FAPE to M.A., the student could then be returned to in-district educational programming. Further, respondent had one week after the filing of the within emergent matter in which to gather its documentation and reporting in order to make an argument that M.A. was making meaningful progress under his current educational programming. Instead, the only reporting submitted by respondent was its Exhibit R-2, reporting from We Care.

However, We Care had only been working with M.A. for two months, since October 2023; this provides only a small sample size from which to draw conclusions as to whether M.A. was making progress under his current IEP. Petitioners calculated that We Care only worked with M.A. 6 percent of any given week. We Care acknowledged that they could not fully deal with M.A.'s IEP goals because of his maladaptive behaviors. We Care dealt only with M.A.'s home schooling, and would not be a good source of information as to M.A.'s progress at school. We Care acknowledged M.A.'s elopement issue. In fact, the entirety of Exhibit R-2 dealt with M.A.'s behavioral issue and did not deal with any

educational progress. Nowhere did We Care indicate that M.A. was learning any new skills at home.

Conversely, petitioners have made several arguments that are persuasive as to their likelihood of success in a full due process hearing. First, although no IEP calling for residential placement had been issued and agreed to, the District had already agreed to place M.A. through his IEP into a residential setting. Director of Special Services Jean O'Connell agreed with petitioners at the October 13, 2023, IEP meeting that, based on Dr. Breslin's report, M.A. needed residential placement. (Exhibit 10, at 29.) Ms. O'Connell later stated that the District would go forward with residential placement. (Exhibit 10 at 30.) She later stated that she was in agreement that an IEP would be created calling for residential placement. (Exhibit 10 at 32.) Petitioners' representative later asked if the IEP would reflect residential placement, and respondent agreed. (Exhibit 10 at 36 and 37.) Respondent's counsel Cherie Adams then wrote to petitioners to confirm whether they would withdraw their due process petition since the District had agreed to residential placement. (Petitioners' Exhibit R.) Finally, on October 13, 2023, Jennifer Dempsey, school psychologist/case manager, wrote to petitioners on behalf of respondent, in response to Dr. Breslin's report, and stated, "Although the district was opposed to placing [M.A.] in a residential program, based on the strong recommendation of Dr. Anita Breslin, the district now agrees to explore residential programs for [M.A.]. Moving forward, the district will work collaboratively with Dr. Breslin to find an appropriate residential placement for [M.A.] that will meet his unique needs." It is clear that respondent reviewed Dr. Breslin's report, agreed with her opinion that M.A. was not making meaningful educational progress under his current IEP, then agreed with her conclusion that M.A. required residential placement.

Second, petitioners argued that the New Jersey District Court in D.B. on behalf of R.H. v. Ocean Township Board of Education, 985 F. Supp. 457, 503 (D.N.J. 1997), had set forth nine factors to assist in determining whether residential placement was educationally necessary for a student. First, one must consider the steps the school district had taken to include the child in a special class within a regular or local community-based school setting. In the within matter, the respondent had included M.A. in its special autism class and also supplemented the in-school instruction with home-based

instruction. But M.A.'s educational and behavioral skills had not improved. In S.C. v. Deptford Towship Board of Education, 248 F. Supp. 2d 368 (D.N.J. 2003), this fact was considered sufficient to order that the student be placed in a residential placement.

The second D.B. factor compared the educational benefits the child would receive in the district program to those to be received in a residential placement. The District has been trying for years to manage M.A.'s behavior at home via home-based instruction. However, his behavioral issues continued. Even with 1:1 instruction in school, his behavioral issues continued, causing harm to both himself and to others around him. At a residential school M.A. would receive constant behavioral intervention and instruction throughout the entire day, such as getting ready for school by helping him with daily living and self-hygiene tasks such as showing and brushing his teeth and helping him with social and leisure activities.

The third factor looked at the effects on other children. M.A. has caused physical harm to other students and has disrupted other students during the school day. In 2021 the District's FBA concluded that M.A.'s maladaptive behaviors of aggression, self-injurious behaviors, non-compliance, tantrum, elopement, non-contextual vocalizations, and mouthing "disrupt learning opportunities in the classroom." (Exhibit P-1.) That behavioralist stated in 2023 that M.A. disrupted the learning of classmates. (Exhibit P-15.)

Factor four examined whether the child had any physical or emotional conditions which interfered with his ability to learn in his school placement. Here, M.A. was severely autistic and non-verbal. His maladaptive behaviors of aggression, elopement, tantrums, self-injurious behaviors, and non-compliance, have impeded his educational progress. (Exhibit P-1.) The respondent had stopped sending staff to M.A.'s home because of his aggressive and assaultive behaviors, and he did not receive any home-based instruction from July 13, 2023, through October 2023, when respondent hired an outside agency to provide instruction there. Respondent has documented that M.A.'s behavior impeded his education progress in its IEPs. (Exhibits P-8, P-15.)

The fifth D.B. factor examined whether a student's physical or emotional condition actually had an effect on the student's learning. Here, the best example was that both the respondent's behavioralist and We Care noted that M.A.'s behavior affected his ability to learn and to focus on IEP goals.

The sixth factor examined whether any health or educational professionals working with the child concluded that he needed residential placement for educational purposes. In the within matter, Dr. Breslin, an expert in the education of autistic students, concluded that M.A. required a residential school for educational purposes. (Petitioners' Exhibit B.) Dr. Cargan, M.A.'s treating pediatric neurologist, reached the same conclusion. (Petitioners' Exhibit C.)

Factor seven was unrealized potential, one that could only be developed in a residential placement. Dr. Breslin determined that M.A. was able to learn when in school and receiving 1:1 instruction. Without 1:1 outside of the classroom, his behaviors interfered with his learning, as well as his safety.

Factor eight examined whether past experience indicated a need for residential placement. Petitioner argued that the fact that M.A. had spent years in respondent's day-school autism class combined with home instruction, yet had not shown improvement in his behavior and general skills, evidenced that continued placement in such a program was inappropriate. They argued that M.A. would benefit from the more intensive programming available in a residential school for students with autism.

The ninth factor asked whether the demand for residential placement was made primarily to address educational needs. Petitioners persuasively argued that their son had much to learn that he had not learned in the school building or through home instruction: communication skills, safety skills, and self-care skills such as personal hygiene. Petitioners could not deny that part of their request for residential placement was because of M.A.'s maladaptive behaviors at home, but enough evidence had been offered to show that the primary reason for their request was because of M.A.'s poor educational skills, poor personal skills, and behavioral issues that impeded his ability to make meaningful educational progress.

These nine factors were issues to be considered, not a strict test where all nine prongs had to be met. Petitioners' arguments that M.A. met all nine factors were persuasive enough to indicate that petitioners had a strong likelihood of success on the merits of the underlying case.

I **CONCLUDE** that petitioners have proven that the third prong of the Crowe test for emergent relief had been met in favor of the petitioners.

4. When the equities and interests of the parties are balanced, the petitioners will suffer greater harm than the respondent will suffer if the requested relief is not granted.

Petitioners have offered sufficient evidence that part of the respondent's concern in altering its agreement to find a residential placement for M.A. was financial. As respondent had agreed in principle to pursue a residential placement for M.A., any argument that it would now suffer a financial setback due to a residential placement is disingenuous. Petitioners were correct to state in their brief that they understand that respondent, as a public entity, should be concerned with its finances, but those concerns do not and cannot be permitted to trump the District's responsibility to appropriately educate M.A. at no cost to petitioners.

The harm to M.A. is that he continues to not receive the comprehensive instructional program he requires in order to address his behaviors and increase his ability to learn. He continues to lack the skills necessary to preclude his own destructive behaviors. He remains a risk of harm to himself, his family, and the students and staff of the school district. Both parties should consider themselves lucky that one of M.A.'s elopements did not result in a fatality. Respondent acknowledged this risk of harm by stopping the sending of its teachers to M.A.'s home. Every day that M.A. is not placed in a residential learning environment is another day when something terrible may befall him. Situations like this are inherently ripe for emergent relief.

Conversely, respondent offered no legitimate claim of harm if petitioners' relief was granted. Respondent argued that it would be harmed by having to apply to several

facilities with no timeline as to when or if M.A. would be accepted, and that if M.A. were not accepted, it would be in violation of this judge's order. But the relief sought by petitioners is for respondent to immediately restart the admissions process; the parties understand that respondent cannot guarantee a residential placement. But it would be imperative for the admissions process to be active so that M.A. can be placed as soon as a spot opens up. Petitioners have shown that the respondent introduced financial issues into the process, which possibly acted to thwart the entire admissions process. School districts are required to provide a free and appropriate public education. In the within matter, a finding in favor of petitioners would make the respondent District responsible for paying for the educational and residential costs of a residential placement until such time that the full underlying due process hearing is complete. The District would not be able to balk at committing to a residential placement simply because it did not wish to spend the money required to effectuate such placement, nor would it be able to add a prerequisite condition that its placement of M.A. be subject to a commitment from an outside funding source. This is no different than any other situation where a school district is responsible to provide a FAPE to a student in its district, and does not create any additional harm to respondent. It is the petitioners who bear the additional risk of harm if M.A. is placed in a residential placement pursuant to an order in this emergent case but then has to be moved pursuant to a different outcome in the underlying due process hearing. Further, this judge would not be putting time constraints on respondent's efforts to identify a residential placement, although the District would be required to immediately restart the admissions process and use its best efforts to find a residential placement for M.A.

I **CONCLUDE** that petitioners have proven that the fourth prong of the Crowe test for emergent relief had been met in favor of the petitioners.

Therefore, I **CONCLUDE** that petitioners have shown by a preponderance of the evidence that they have met all four prongs of the Crowe test for emergent relief. I **CONCLUDE** that petitioners have shown that they are entitled to emergent relief in this matter.

ORDER

Accordingly, I **ORDER** that the petitioners' application for emergent relief be and hereby is **GRANTED**. It is **ORDERED** that respondent immediately restart, with the cooperation of petitioners, the admissions process to identify a residential placement for M.A., and that it use its best efforts to place M.A. into a residential placement as soon as possible. It is **ORDERED** that the cost of the residential and educational portions of such residential placement be borne by respondent. It is **ORDERED** that petitioners cooperate in any attempts by respondent to procure outside funding for such residential placement. This Order shall remain in effect until the conclusion of the underlying due process action.

This order on application for emergency relief shall remain in effect until issuance of the decision in the matter. The parties will be notified of the scheduled hearing dates. 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.

December 21, 2023 _____

DATE **JEFFREY N. RABIN**, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

JNR/jm

APPENDIX

WITNESSES

For petitioners

None

For respondent

None

BRIEFS/EXHIBITS

For petitioners

Exhibit A	Certification of Mr. Mokhles Awadalla, dated December 11, 2023
Exhibit B	Certification of Dr. Anita Breslin, dated December 11, 2023
Exhibit C	Certification of Dr. Abba Cargan, dated December 11, 2023
P-1	District Functional Behavior Assessment, dated August 4, 2021
P-2	Request to Amend an IEP without a Meeting, dated February 8, 2022
P-3	Incident Report, dated July 12, 2023
P-4	Elopement Plan, dated April 6, 2018, edited April 2019
P-5	Investigation Report, dated August 26, 2023
P-6	Investigation Report, dated September 21, 2023
P-7	Investigation Report, dated September 24, 2023
P-8	IEP, dated July 25, 2023
P-9	Dr. Anita Breslin Report of Determinations, dated September 14, 2023
P-10	IEP Meeting Transcript, dated October 13, 2023
P-11	Written Notice from IEP Agreeing to Residential Placement, dated October 10, 2023
P-12	Cherie Adams Email to Lori Aarons, dated October 16, 2023
P-13	Authorization to Exchange Information, dated October 23, 2023
P-14	Emails between Parents and District, October 27, 2023, to November 10, 2023

P-15	IEP (reissued 10/13/2023) dated July 25, 2023
P-16	Parent Emails re: Melmark, November 2, 2023, to November 6, 2023
P-17	Behavioral Treatment of Autism & Other Developmental Disabilities
P-18	Applied Behavior Analysis Treatment of Autism Spectrum Disorder: Practice Guidelines for Healthcare Funders and Managers
P-19	Neurological Consultation – Dr. Abba Cargan, dated August 9, 2022
P-20	Dr. Abba Cargan Office Note, dated November 29, 2022
P-21	Dr. Abba Cargan Office Note, dated March 7, 2023
P-22	Dr. Abba Cargan Office Note, dated November 16, 2023
P-23	Dr. Abba Cargan Office Note, dated November 16, 2023
P-24	Incident Report, dated October 19, 2023
P-25	Incident Report, dated May 5, 2022
P-26	CB v. Jackson Township Board of Education, EDS 04153-09
P-27	Article: Family demands justice after 25 year old man with autism shot by LASD in Cudahy, dated April 3, 2021
P-28	Article: A 13 year old boy with autism was shot by police after his mother called for help managing a mental breakdown, dated September 9, 2020
P-29	Article: Editorial: Deputies shot an autistic man, then the justice system terrorized him. There's a better way.
P-30	Battle v. Commonwealth of Pennsylvania, 551 IDELR 647
P-31	Kruelle v. New Castle County School District, 642 F.2d 687
P-32	S.C. ex rel. T.M. v. Bloomfield Board of Education, EDS 03397-04
P-33	S.C. v. Deptford Township Board of Education, 248 F. Supp. 2d 368 (D.N.J. 2003)
P-34	T.R. and D.R. ex rel. J.R. v. Cherry Hill Township Board of Education, EDS 08862-09
P-35	J.B., a Minor, by his Guardian ad Litem, S.B. v. Manville Board of Education, EDS 04756-97
P-36	Emails between District and parents re: additional hours to home program, dated December 6, 2023

For respondent

Brief in Response to Petition for Emergent Relief dated December 8, 2023

R-1 IEP, dated May 26, 2022

R-2 We Care Autism Services report, dated December 15, 2023

R-3 A.W. and J.W. ex rel. B.W. v. Marlboro Township Board of Education, 2006 N.J. AGEN LEXIS 409

R-4 D.C. and T.C. ex rel. J.C. v. Glen Rock Board of Education, 2008 N.J. AGEN LEXIS 897

R-5 Certification of Jean O'Connell, dated December 19, 2023