



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING

EMERGENT RELIEF

OAL DKT. NO. EDS 4251-18

AGENCY REF. NO. 2018-27699

**MANVILLE BOROUGH BOARD OF
EDUCATION,**

Petitioner,

v.

D.K. AND R.K. ON BEHALF OF M.K.,

Respondent.

David B. Rubin, Esq., appearing for petitioner

No appearance by or on behalf of respondents

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

STATEMENT OF THE CASE

Petitioner, the Manville Borough Board of Education (the Board), has filed for emergent relief pursuant to N.J.A.C. 1:6A-12.1(e), to conduct educational and speech/language evaluations of respondents' child, M.K., a minor, special needs student, to assist the Board in determining whether M.K. continues to be eligible for special education and related services. This is an effort for the Board to provide M.K. with a free appropriate public education (FAPE).

PROCEDURAL HISTORY

On March 20, 2018, the petitioner filed a petition for due process and moved for emergent relief with the Department of Education (DOE), Office of Special Education Policy and Procedure (OSEP).

The emergent matter was transmitted to the Office of Administrative Law (OAL), where it was filed on March 22, 2018, to be heard as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The petitioner filed a brief in support of its petition on March 20, 2018. A Hearing on the emergent issue was held on March 28, 2018.¹

FINDINGS OF FACT²

The pertinent facts are as follows:

1. The child, M.K., is a student residing within the Manville Borough School District, who is fourteen years old. He has been eligible for special education services under the classification "Communication Impaired" since 2012, and has been receiving special education and related services since then.
2. Respondent R.K. attended M.K.'s annual review meetings from 2012 through 2015, but neither D.K. nor R.K. has attended annual review meetings since then. M.K.'s mother waived his triennial evaluation in 2015, and M.K. has not been formally reevaluated in six years.
3. M.K.'s speech therapist has reported that M.K. no longer requires speech services. M.K.'s case manager has attempted to obtain respondent's consent to updating M.K.'s educational and speech/language assessments to determine what

¹ Respondents were notified of this Emergent Hearing by regular mail on March 22, 2018, emails dated March 23, 2018, and by telephone messages left for them on March 26 and March 28, 2018.

² These facts were taken from petitioner's petition and brief, as no testimony was taken on the date of the Emergent Hearing.

his current needs are, but the respondents have refused their consent without offering any explanation.

LEGAL ANALYSIS

Emergent Relief

N.J.A.C. 6A:3-1.6 provides for emergent relief or stay as follows:

(a) Where the subject matter of the controversy is a particular course of action by a district board of education or any other party subject to the jurisdiction of the Commissioner, the petitioner may include with the petition of appeal, a separate motion for emergent relief or a stay of that action pending the Commissioner's final decision in the contested case.

(b) A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying 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.

[See also N.J.A.C. 1:1-12.6.]

For emergent relief to be granted, the petitioner must satisfy all four prongs of the Crowe test by clear and convincing evidence, a "particularly heavy" burden. Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 396 (App. Div. 2006) (quoting Punnett v. Carter, 621

F.2d 578, 582 (3d Cir. 1980)); see also Guaman v. Velez, 421 N.J. Super. 239, 247–48 (App. Div. 2011).

The petitioner seeks injunctive relief compelling the respondents to make M.K. available for updated educational and speech/language assessments/reevaluations.

I. The petitioner will suffer irreparable harm if the requested relief is not granted.

As to this first requirement, that the petitioner will suffer irreparable harm if the requested relief is not granted, petitioner has correctly asserted that a school district's inability to comply with evaluation timelines set by state and federal regulations due to lack of cooperation by the parents amounts to irreparable harm. In Gloucester City Board of Education v. A.H. o/b/o K.S., OAL Dkt. No. EDS 09165-15, Agency Dkt. No. 2015-23030 (July 14, 2015), it was held that a Board of Education must conduct a reevaluation of any student pursuant to the timelines set forth in N.J.A.C. 6A:14 et seq. Failure of the Board to comply with such regulatory guidelines would expose them to the imposition of sanctions by the New Jersey Department of Education and the federal government. It was also found that a "failure to comply will also place the student at risk, as any lapse in special services may well cause the child to regress, erasing all the gains achieved during the school year." Gloucester City Board of Education v. A.H. o/b/o K.S. Such reevaluations are particularly important, as they would help determine whether or not the student would continue to be defined as a student with a disability and, if so, would determine that student's reclassification according to N.J.A.C. 6A:14 et seq.

Further, petitioner asserted that a school district is irreparably harmed when it is prevented from meeting its obligation to provide a free appropriate public education (FAPE) because a child's placement might be inappropriate. Haddonfield Borough Board of Education v. S.J.B. o/b/o J.B., OAL Dkt. No. EDS 2441-04, Agency Dkt. No. 2004-8817 (May 20, 2004). Because respondents D.K. and R.K. waived reevaluation of student M.K. in 2015, M.K. has not been formally evaluated since 2012. M.K.'s speech therapist has reported that he no longer needs speech therapy; a reevaluation of M.K. is required in order to confirm this. Without a reevaluation, the Board cannot be assured that it is

meeting its responsibility to provide a free appropriate public education because M.K.'s placement might be inappropriate.

Therefore, I **CONCLUDE** that petitioner has met the first prong of the emergent relief standard in that petitioner would suffer irreparable harm if the requested relief is not granted.

II. The legal right underlying petitioner's claim is settled.

As to the second requirement, that the legal right underlying petitioner's claim is settled, N.J.A.C. 6A:14-3.4(b) indicates that if a child study team determines that an evaluation is warranted, the school district must request and obtain consent to evaluate. If the parents refuse to provide consent, the district may file for a due process hearing to compel the evaluation. N.J.A.C. 6A:14-3.4(c).

Thus, it is a settled legal right that the Board may conduct the requested evaluations in order to assess whether M.K. remains eligible for special education, and I **CONCLUDE** that petitioner has met the second prong of the emergent relief standard.

III. The petitioner has a likelihood of prevailing on the merits of the underlying claim.

As confirmed in Washington Township Board of Education, the Office of Administrative Law has a long history of granting a school district's request for emergent relief to compel parental cooperation in the evaluation process. See also Trenton Bd. of Educ. v. S.P. o/b/o B.P., OAL Dkt. No. EDS 874-01, Agency Dkt. No. 2001-4968 (March 23, 2001); Dumont Bd. of Educ. v. G.C., OAL Dkt. No. EDS 1575-95, Agency Dkt. No. 1995-6617E (February 15, 1995); Gloucester City Board of Education v. A.H. o/b/o K.S. Specifically, in Trenton Board of Education v. S.P. o/b/o B.P., the Honorable John R. Futey granted the school district's application for emergent relief to compel parental consent and cooperation for an initial evaluation of an eighth-grade student when the parents were uncooperative.

In Gloucester City Board of Education v. A.H. o/b/o K.S., the Honorable Sarah G. Crowley granted the school district's request for emergent relief to compel the parent and student to cooperate in the reevaluation of the student by scheduling the reevaluations, ensuring that the student will appear for the scheduled sessions, and participating in the reevaluation process. Judge Crowley appropriately reasoned that the reevaluation process is necessary to determine whether the student continues to be a student with a disability eligible for special education, and that the school district's failure to comply with the requirements pertaining to students with disabilities would expose the district to sanctions by the New Jersey Department of Education and federal government.

Therefore, I **CONCLUDE** that petitioner has met the third prong of the emergent relief standard in that petitioner has a likelihood of prevailing on the merits of the underlying claim.

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.

As to the balancing of the equities of the situation and the interests of the parties, it is the petitioner Board that would suffer the greater harm if the relief sought was not granted. A Board of Education is required to conduct student reevaluations. Failing to do so would expose them to sanctions by the federal government and the New Jersey Department of Education. Further, if relief is not granted petitioner would be prevented from meeting its statutory obligation to provide a free appropriate public education to M.K., because his placement might be inappropriate.

Petitioner persuasively asserted that respondents would not be prejudiced by these reevaluations being conducted. Aside from the law requiring that such reevaluations be conducted, these new assessments would add to the information available to M.K.'s parents and the school board in making future decisions about what constitutes an appropriate education for M.K.

Therefore, I **CONCLUDE** that petitioner has met the fourth prong of the emergent relief standard in that when the equities and interests of the parties are balanced, it is petitioner who will suffer greater harm than the respondents.

CONCLUSION

The petitioner has demonstrated that it has met the four factors enumerated in Crowe v. DeGioia, 90 N.J. 126. Accordingly, the relief sought in the emergent application is granted.

ORDER

Petitioner's request for emergent relief is **GRANTED**. It is **ORDERED** that the respondents must cooperate with the Board in the reevaluation process by assisting in the scheduling of the educational and speech/language reevaluations, ensuring that M.K. appears for scheduled sessions, participating in parent interviews, and accompanying M.K. to outside appointments.

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 Programs.

March 29, 2018 _____

DATE



JEFFREY N. RABIN, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

JNR/cb

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

None

EXHIBITS

For petitioner:

Petition and Letter Brief

For respondent:

None