

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

EMERGENT RELIEF

OAL DKT. NO. EDS 12808-17

AGENCY DKT. NO. 2018/26874

M.M. ON BEHALF OF K. M.,

Petitioner,

v.

PATERSON BOARD OF EDUCATION,

Respondent.

David R. Giles, Esq. for petitioner (Law Offices of David R. Giles)

Frances E. Barto, Esq., for respondent (Barto & Barto, attorneys)

Record Closed: September 25, 2017

Decided: October 31, 2017

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, M.M. on behalf of K.M. (M.M.), seeks an order by way of emergent relief to have the respondent, Paterson Board of Education, (District) place her son K.M. in 9th grade and vacate the District's decision to retain M.M. in 8th grade due to absences related to M.M.'s diagnosed disability, and that the District provide K.M. with the support and services he needs to succeed in school.¹

¹ M.M. filed the Request for Emergent Relief on August 30, 2017, *pro se*. Thereafter, M.M. was represented by counsel at the emergent hearing conducted on September 8, 2017. This matter was originally received as an emergent application to place K.M. in 9th grade and vacate the District's decision to retain him in 8th grade due to absences, and that the District provide K.M. with "the support and services he needs to succeed in school". It was this last statement contained in the Request for

On August 30, 2017, petitioner filed a petition with the Office of Special Education Policy and Procedure (OSEPP), seeking emergent relief and due process hearing, pursuant to N.J.A.C. 6A-12.1 and N.J.A.C. 6A:14-2.7(r). The matter was transferred to the Office of Administrative Law (OAL) and received at the OAL on August 31, 2017, as an emergent and contested matter, and request for a due process hearing was retained by OSEPP. The emergent matter was heard on September 8, 2017, at the Newark, New Jersey offices of the OAL. The hearing was adjourned to September 12, 2017, to allow the District to produce a witness to testify concerning the entries contained in a parent contact log. By letter dated September 12, 2017, counsel for the District informed the undersigned that the District would not produce a witness and therefore the parent contact log would not be submitted in evidence. The parties were then given until September 22, 2017 to submit their written summations.

Written summations were filed with the OAL on September 25, 2017, at which time the record was closed.

ISSUES

1. Has M.M. met all of the elements necessary to request emergent relief pursuant to N.J.A.C. 6A: 14-2.7(r).
2. Has M.M. met all of the elements necessary for the undersigned to grant M.M.'s request pursuant to N.J.A.C. 6A:14-2.7(s) that the District be compelled to place K.M. in the 9th grade, and provide K.M. with the support and services he needs to succeed in school, in granting Home Instruction.

Emergent Relief examined in the context of M.M.'s testimony in the emergent hearing seeking to have the District reinstate the Home Instruction program that resulted in the decision below.

DISCUSSION and CONCLUSION

M.M., brings this case on behalf of her son, K.M., a fifteen-year-old, enrolled in the 8th grade at the NRC Middle School for the 2016-2017 school year, for an Emergent Relief to (1) have the District advance K.M. to the 9th grade, and (2) and provide K.M. with the support and services he needs to succeed in school, in granting Home Instruction as previously provided by the District.

The District has decided to retain K.M. in the 8th grade for the 2017-2018 school year due to his excessive absences (114 school days) for the prior school year. K.M. was classified with a specific learning disability at the age of eight and has an Individualized Educational Plan (IEP).

Sometime in January 2016, K.M. refused to go to school, and exhibited quiet and withdrawn behavior, which led to the District placing him in a Home Instruction program for the remainder of the 2015-2016 school year. However, the district did not renew K.M.'s Home Instruction program for the 2016-2017 school year, leading to K.M.'s increase in attendance problems. (R-2)

M.M. testified that during the 2016-2017 school year, she pleaded with K.M.'s Case Manager to have him placed back on the Home Instruction program and the District instructed her to have K.M. evaluated by a mental health professional. As a result of K.M. not attending classes during the 2016-2017 school year, M.M. was charged with violating N.J.S.A. 18A: 38-25, concerning mandatory schooling for children up to the age of 16 (truancy). M.M. appeared in the local Municipal Court regarding the truancy charges and the summonses were dismissed by the court after M.M. explained that K.M. was not attending school because of his mental health issues.

Sometime during the 2016-2017 school year, the District contacted the New Jersey Division of Child Protection & Permanency (DCF) on two occasions to investigate whether M.M. was neglectful in not sending K.M. to school. M.M. testified that DCF closed their file and the charges were found to be unsubstantiated.

In January 2017, M.M. took K.M. to be evaluated by Dr. Bindu Khanna, (Dr. Khanna) a Child and Adolescent Psychiatrist at St. Joseph's Regional Medical Center. (R-1). Dr. Khanna's diagnosed K.M. with "major depressive disorder, single, without psychotic features, moderate to severe; dysthymic disorder; provisional of generalized anxiety disorder." (R-1 at page 3). Dr. Khanna suggested M.M. "consider inpatient hospitalization for evaluation, medication management, or partial hospital program to provide intensive therapy to the client", as she did not feel outpatient therapy alone at this time would be sufficient." (R-1 at page 3). M.M. declined the higher level of care, and believed that K.M. was safe in the home and preferred to start with medication management. Dr. Khanna prescribed Zoloft 25 mg 1 tablet daily was for depression (R-1 at page 3).

Dr. Khanna then completed a Request for Home Instruction for K.M. dated January 13, 2017, and the same was provided to the District (P-1). In the Request for Home Instruction form, Dr. Khanna diagnosed K.M. with "major depressive disorder...severe social phobia-client should be considered for placement in a therapeutic school." Dr. Khanna then recommended that K.M. be provided with "60 days of Home Instruction until placement in therapeutic school." (P-1). ²

After Dr. Khanna's psychiatric evaluation, the District placed K.M. in D.B. Middle School, in April 2017. However, K.M.'s school attendance problems continued despite being placed in D.B. Middle School. After the 2016-2017 school year, the District notified M.M. that K.M. would not advance to 9th grade due to his excessive absences.

M.M. testified that while K.M. was initially placed on medication (Zoloft 25 mgs), K.M. stopped taking the same sometime after seeing Dr. Khanna and at the time of the hearing K.M. was not taking any medication. M.M. also testified that K.M. had received some counseling in the prior school year of 2016-2017 with PerformCare in October

² Although Dr. Khanna determined that therapeutic school instruction was preferred, M.M.'s testimony in the emergent hearing was limited to the District placing K.M. in a Home Instruction plan.

2016.³ However, the counseling was canceled sometime in December 2016, because K.M. was not responding to treatment.

M.M. also testified that she could not get K.M. to go to school and that he would stay in bed most if not all of the day. M.M. testified that if K.M. could advance to the 9th grade his attendance would improve because he would be with children his own age. M.M. was of the opinion that K.M.'s physical size (he is over six-feet) in comparison to the other children in the 8th grade would result in stigmatizing him and cause him to not attend school, and that is one of the reasons she cites for advancing K.M. to the 9th grade. M.M. I asked M.M. how K.M.'s mental health would improve by simply advancing him to the 9th grade and she acknowledged that she did not know.

The District did not provide a witness, certification or affidavit from the District in response to M.M.'s statements contained in her certification and testimony for Request for Emergent Relief. The parties did stipulate to joint exhibits concerning the District's School Attendance Policy No. 5200 (J-1); the District's Promotion and Retention policy No. 5410 (J-2), and the District's policy for Promotion from the Eighth Grade No. 5411 (J-3). On cross-examination M.M. was asked why she did not meet with the District concerning K.M.'s IEP and why she did not have K.M. attend school, as required by statute and the District's regulations. M.M. disputed the District's assertions that she did not cooperate with the District concerning the IEP requirements, and for K.M.'s absences, she testified that K.M. did not want to go to school because he was depressed and shy.

N.J.A.C. 6A:14-2.7(r) provides that emergent relief may only be requested for the following reasons:

- 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

³ M.M. testified that she tried giving K.M. medication but he would reject the same.

- iv. Issues involving graduation or participation in graduation ceremonies.

Here, M.M. has satisfied the requirements of N.J.A.C. 6A:14-2.7(r), in that there is an issue of placement of K.M., in the 9th grade pending the outcome of a due process proceeding.

N.J.A.C. 6A:14-2.7(s) provides that emergent relief may be granted if an administrative law judge determines from the proofs that: The petitioner will suffer irreparable harm if the requested relief is not granted; the legal right underlying the petitioner's claim is settled; the petitioner has a likelihood of prevailing on the merits of the underlying claim; and, 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.

M.M. acknowledges that K.M. has not attended school 114 days for the 2016-2017 school year, and that the same is in violation of the District's school attendance requirements (J-1). M.M. explains K.M.'s absences as related to his depression, which Dr. Khanna has confirmed in her medical report (R-1) and requests that K.M. be placed in a Home Instruction program, which the District had previously implemented for the 2015-2016 school year.

M.M. has not provided adequate proof that advancing K.M. to the 9th grade will result in his complying with the District's school attendance policy, and address his mental health diagnosis. M.M. has failed to have K.M. take his prescribed depression medication and she has not had K.M. committed to an inpatient psychiatric facility, as recommended by Dr. Khanna; alternatives to simply advancing K.M. to the 9th grade in order to address the school absences.

My determination is controlled by N.J.A.C. 6A:3-1.6(b), which provides that a judge may order emergency relief pending issuance of the final decision in a special education matter if it appears from the proofs that:

1. The petitioner will suffer irreparable harm if the requested 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.

See also: N.J.A.C. 1:1-12.6, and Crowe v. DeGioia, 90 N.J. 126 (1982), which echoes the regulatory standard for this extraordinary relief. It is well established that a moving party must satisfy all four prongs of the regulatory standard to establish an entitlement to emergent relief. 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, Inc. v. General Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976).

Advancing K.M. to the 9th Grade

I am satisfied that M.M. has not satisfied the first prong of N.J.A.C. 6A:3-1.6(b), and the requirements of Crowe v. DeGioia, in establishing that K.M. will be irreparably harmed by attending the 8th grade during the pendency of the underlying matter. M.M. recognized that K.M. must attend school, but she has failed or is unable to convince K.M. to attend school on a regular basis. Advancing K.M. to the 9th grade will not resolve his underlying mental health issue of depression.

Consequently, M.M. does not have a likelihood of prevailing on the merits of the underlying claim, as M.M. acknowledges that K.M. was not in compliance with the District's school attendance policy by missing 114 days of school during the 2016-2017 school year.

As to the balancing hardships, there is no hardship for K.M. to remain in the 8th grade, without Home Instruction, when he has not satisfied the District's attendance policy by missing 114 school days.

Providing Home Instruction

I am satisfied that M.M. has not satisfied the first prong of N.J.A.C. 6A:3-1.6(b), and the requirements of Crowe v. DeGioia, in establishing that K.M. will be irreparably harmed if the District does not place K.M. in Home Instruction program. K.M. ceased attending school because of his depression, anxiety and school phobia. However, after Dr. Khanna psychiatric evaluation M.M. did not adhere to Dr. Khanna's recommendations and place K.M. in an inpatient facility and discontinued his depression medication.

Now, M.M. asks that emergent relief be granted in the form of Home Instruction plan, where Dr. Khanna has diagnosed K.M. with "major depressive disorder", and suggested M.M. "consider inpatient hospitalization for evaluation, medication management, or partial hospital program to provide intensive therapy to the client" and M.M. has not adhered to the same (R-1). M.M. cannot now establish that K.M. will be irreparably harmed if he is not placed in Home Instruction alone, when she Dr. Khanna's first form of treatment is in an inpatient facility due to K.M.'s severe depression.

Since M.M. cannot satisfy all four prongs of the N.J.A.C. 6A:3-1.6(b), and the requirements of Crowe v. DeGioia, in establishing that K.M. will be irreparably, the remaining requirements for emergent relief are moot.

M.M.'s request for emergent relief to have K.M. placed in the 9th grade and to vacate the District's decision to retain K.M. in the 8th grade is **DENIED**.

M.M.'s request for emergent relief to have the District assign K.M. Home Instruction is **DENIED**.

ORDER

It is hereby **ORDERED** that M.M.'s request for emergent relief to have K.M. placed in the 9th grade and to vacate the District's decision to retain K.M. in the 8th grade be **DENIED**.

It is hereby **ORDERED** that M.M.'s request for emergent relief to have the District assign K.M. Home Instruction 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.

October 31, 2017

DATE

JULIO C. MOREJON, ALJ

Date Received at Agency

October 31, 2017

Date Mailed to Parties:

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