State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

DECISION ON

EMERGENT RELIEF

OAL DKT. NO. EDS 04068-2019

AGENCY DKT. NO. 2019-29592

R.H. and M.H. ON BEHALF OF M.H.,

Petitioners,

v.

BARNEGAT TOWNSHIP

BOARD OF EDUCATION,

Respondent.

Diana R. Sever, Esq. for petitioner (Posternock Apell PC, attorneys)

Patrick J. Madden, Esq. for respondent (Madden & Madden, PA attorneys)

Record Closed: April 16, 2019 Decided: April 17, 2019

BEFORE **JUDITH LIEBERMAN**, ALJ:

STATEMENT OF THE CASE

Petitioners, parents of minor student M.H., seek immediate placement of M.H. in a residential, therapeutic setting by respondent Barnegat Township Board of Education (District). M.H. was placed in an out-of-district residential, therapeutic setting ("Lake House") by way of a mediated agreement with the District. The placement was

intended to address M.H.'s special education needs, which included psychiatric treatment. After approximately six months, Lake House advised it could not provide the level of care required by M.H. Petitioners now seek placement at a new facility they identified, which they assert will provide M.H. necessary special education and psychiatric and therapeutic supervision.

PROCEDURAL HISTORY

Petitioners filed a Request for a Due Process Hearing and Request for Emergent Relief with the Office of Special Education Programs of the New Jersey Department of Education, (OSEP). The Request for Emergent Relief, which seeks an Order directing the District to immediately place M.H. in an intensive, daily therapeutic program pending a final decision on the underlying issues in dispute, was transmitted by OSEP to the Office of Administrative Law, (OAL) where it was filed on March 25, 2018, as a contested case. N.J.S.A. 52:14B-1 to B-15; N.J.S.A. 52:14F-1 to F-13. A hearing was scheduled for April 2, 2019. The parties met that day and discussed possible resolution of the emergent petition. The hearing was adjourned to permit further discussion by the parties. On April 12, 2019, counsel for the petitioner advised that the parties were unable to resolve the matter. The parties presented oral argument on April 16, 2019, at the OAL offices in Mercerville, New Jersey, and the record closed that day.

FACTUAL DISCUSSION

The underlying facts, derived from the contents of the petitions and briefs are largely uncontroverted:

M.H. is currently sixteen years old. She has been classified as a student with Emotional Disturbance. Beginning in or about 2011, when she was eight years old, she began to demonstrate difficulties with physical contact, emotional connection and proper consumption of food and liquids. Her condition worsened, as she continued to display oppositional defiant behaviors, at home and at elementary and middle school. During the 2016-2017 school year, she demonstrated an increased unwillingness to attend school and aggressive behavior while at school and at home. In or about September

2017, petitioners requested homebound instruction for M.H., which the District approved.

M.H. received multiple forms of care, including admission to outpatient programs and inpatient psychiatric hospitalization on more than one occasion. Also, she was seen by multiple counselors and medical professionals who provided counseling and prescribed medication, and a mobile crisis team was enlisted over a period of months.

In December 2017, a Child Study Team was convened. A February 13, 2018, psychiatric assessment, which was conducted by Alexander Iofin, M.D., in response to the District's referral, concluded M.H. suffered from "severe psychiatric conditions" with "principal diagnoses" of "bipolar disorder type 2, most recent episode hypomanic with anxious distress with a presence of atypical features; unspecified eating disorder which includes a history of significant limits in consumption of liquids and development of dehydration." (R-1 at 12.) Dr. Iofin noted that, when M.H. "is older, in her late teens and early or mid-twenties, there could be further clinical manifestations that might include a presence of psychotic symptomatology which is not part of the current clinical picture[.]" Ibid.

The assessment recommended:

> [U]tulization of mental health resources on the higher end of such utilization in the year of 2018. It is reasonable to consider wrap-around services for this child to be continued, including involvement of [a case management organization]. It is reasonable to consider attendance of long-term partial care program for this child. It is reasonable to consider a treatment plan that will include utilization of both psychotherapeutic and psychopharmacological treatment modalities utilized together and integrated in the maser treatment plan.
> (Id. at 12-13).

On February 26, 2018, M.H.'s treating psychiatrist advised that she was diagnosed with Major Depressive Disorder, Generalized Anxiety Disorder and ADHD, for which she was prescribed medications. The psychiatrist wrote M.H. is "unable to

regulate emptions at the level needed to successfully navigate through the school day. [She] will require psychiatric and therapeutic supervision during times of academic instruction in efforts to assist [her] with emotional regulation." (P-A.)

In or about March 2018, the District determined M.H. was eligible for special education and related services due to her classification as Emotionally Disturbed. An initial IEP proposed home instruction for the remainder of the 2017-2018 school year and twenty minutes of school counseling, totaling eight sessions during the school year. M.H. was hospitalized in March and April 2018, and received no home instruction during those months.

On April 13, 2018, M.H.'s treating counselor, Leanne Hershkowitz, LPC, opined M.H.'s "true diagnosis" was Developmental Trauma Disorder, which was not a DSM diagnosis at that time.[1] (P-B.) She concluded that Reactive Attachment Disorder (RAD) was "the most appropriate diagnosis for [M.H.] but does not adequately encompass all facets of her distress[.]" Ibid. She recommended a "small supportive school environment" because "adolescents with RAD are often only compliant with long-term, compassionate relationships with teachers and administrators who are both flexible and adaptable to their varying needs" Ibid.

In early June 2018, the petitioners advised the District of their intent to move M.H. to Lake House, a residential facility in North Carolina. They moved M.H. to Lake House in June 2018.[2] The parties engaged in mediation concerning the placement. The District agreed to the placement and agreed to pay the educational portion of the tuition costs for the 2018-2019 school year "or until student's completion of program, whichever date is first." (P-C.) Pursuant to the agreement, the District was to schedule a team meeting on or before April 30, 2019, to review M.H.'s progress and the District would be the stay put placement. Ibid.

[1] R.H. testified that Hershkowitz began seeing M.H. in April 2018.

[2] The petitioners arranged for M.H.'s transportation to Lake House.

M.H. resided and attended school at Lake House from June 27, 2018, through January 12, 2019. On January 12, 2019, she was hospitalized due to her demonstration of self-injurious behaviors and suicidal ideations. On January 22, 2019, Lake House's academic director wrote that M.H. became more engaged over time, after initially refusing to participate in school. She grew to trust the teaching staff and the facility "in general", and demonstrated improved academic achievement. (P-D.) Lake House discharged M.H. because she required a "higher level of care" than it could provide. It recommended a program that specializes in students who have experienced trauma and further recommended M.H. not return home and not "step down to a lower level of care." Ibid. The prognosis for M.H. was, "If parents . . . find a program that will be able to both meet [M.H.'s] needs therapeutically as well as keep her safe, prognosis is increased." Ibid.

The discharge summary included a January 14, 2019, report by Jordan Siegel, B R, MSW, LCSW. He wrote that, upon M.H.'s arrival at Lake House, she refused to participate in school or appropriately respond to staff. She "struggled with accepting nurture and engagement from staff and therapist. . . . [She] struggled to stay within a classroom setting and was resistant to challenge in general." (P-D.) Siegel wrote that M.H.'s abilities and participation in school evolved in a positive way. "By the time [M.H.] was discharged . . . she was more frequently opening up to staff and her therapist. She was attending school almost consistently as well as attending her classes almost consistently." Ibid. She "became better at following directions [and] . . . was able to remain in groups more frequently and follow the structure set by staff." Ibid. However, she "did not accomplish any of her Master Treatment Plan goals in this area." Ibid.

M.H. returned to the petitioner's home on January 18, 2019.[3] She was not provided an education program through February 24, 2019. An IEP meeting was conducted February 12, 2019. A revised IEP provided for temporary home instruction and no behavioral counseling or therapy. The petitioner's signed the revised IEP. (R-4.) The IEP was amended to include counseling once per week, sixty minutes per session, with the goal of returning M.H. to her school. The IEP noted the petitioners

[3] R.H. drove M.H. to New Jersey from Lake House.

were exploring placement at a second facility, Wellspring, a residential facility in Connecticut, that is approved by the New Jersey Department of Education. (R-6.)

The petitioners did not agree with the District's plan for homebound instruction and now seek placement at Wellspring. They assert it is equipped to provide an intensive, daily therapeutic program that will address M.H.'s behavior and mental health problems and enable her to participate in academic programs. Petitioners assert Wellspring is prepared to accept M.H.[4]

Testimony

R.H., M.H.'s mother, testified that she and her husband determined that Lake House was necessary because M.H. was not attending school or receiving home instruction and was no longer "participating in her life." They tried to work with the District to get her help. They could not compel M.H. to attend intake meetings at potential out of district placement sites. They ultimately determined a residential placement was necessary to address her attachment issues. They unilaterally moved M.H. to Lake House because they were "losing time," as M.H. was not participating in school.

Before M.H. went to Lake House, she was to receive homebound instruction from four teachers who shared instruction duties. They were to instruct M.H. in her home or meet her at a library or the high school. M.H. met with none of the teachers. After she returned home from Lake House, M.H. was to meet with instructors, access online instruction, and meet with her case manager, Licensed Clinical Social Worker Robert Klaslo, at home once per week. To date, M.H. met with a homebound instructor once and never met with Klaslo. M.H. refuses instruction and counseling. She will not exit her bedroom when the instructor or Klaslo report to the home. The petitioners cannot compel her to exit her room. R.H. routinely leaves Klaslo's contact information for M.H.

[4] Petitioners' counsel referred to the website for the Arch Bridge School at Wellspring. The site references the school's history "serving children with emotional, psychological and learning vulnerabilities and issues . . . to facilitate each student's transfer back to their communities and local schools." http://wellspring.og/arch-bridge-school/

so she could contact him directly; M.H. has not done so. M.H. has also not accessed the online instruction program since she returned home in January 2019.

Since returning home, M.H. typically sleeps late and avoids interaction with her parents before they leave for work. Her parents work from approximately 9:00 a.m. to 5:00 p.m. each day. M.H. spends most days inside the house, exiting only to take the family's dog outside. She has not left the confines of the property, with three exceptions: she went to dinner with friends once; attended a wedding; and shopped for clothes for the wedding. She has not otherwise left the house since she returned from Lake House. M.H. refuses to eat dinner with her family and spends much of her time playing computer games by herself. The petitioners cannot compel M.H. to behave differently. Petitioners believe that, because M.H. has RAD, which is an attachment and not a behavioral disorder, behavioral modification, such as punishment for refusing to cooperate, would not be productive.

Petitioner submitted a March 2019, letter from Leanne Hershkowitz, who wrote that she reviewed Lake House's discharge report and agreed with its treatment recommendations. She "strongly" recommended that M.H. not return home and that a "step down program" not be utilized. She advised, "[a] higher level of care placement will directly and positively impact M.H's ability to return to the classroom as well as live at home. At Lake House, M.H. was on the path to becoming an engaged student and productive member of their community. Her emotional well being is paramount to her educational abilities and engagement and therefore must be addressed in order for her to succeed academically." (P-E.)

R.H. testified that Hershkowitz has not seen M.H. since June 2018. The petitioners consulted with Hershkowitz and determined, given their belief M.H. had RAD, that she should not form an attachment that would soon end. This was based upon their hope and expectation that M.H. would move to a new residential facility in the near future. The petitioners have, however, regularly communicated with Hershkowitz.

When R.H. advised the District that M.H. was not able to remain at Lake House, Klaslo told her to search for a new placement and advise the District of her findings.

R.H. pursed facilities listed on a document provided by the District, all of which were residential with academic components. Wellspring was the only facility that provisionally accepted M.H. It was aware of M.H.'s history, including the reason for her discharge from Lake House. It also had records from the hospital where M.H. was admitted immediately after leaving Lake House.

R.H. noted that M.H. had engaged in self-injurious behavior before she moved to Lake House. Although she engaged in such behavior while at Lake House, she was building attachments there. M.H. has expressed interest in visiting Wellspring and has expressed frustration that she has not yet done so.

Arguments of the parties:

Petitioners assert M.H will suffer irreparable harm if she is not placed at Wellspring because she has been and continues to be denied a free appropriate public education (FAPE.) Further, her capacity to transition back to successful school participation will be further impaired by the continued denial of a daily, therapeutic educational program. The petitioners refer to Lake House's discharge report, which noted that M.H.'s participation in classes slowly increased over a period of months. Petitioners also assert that their legal right is settled, as Individuals with Disabilities Education Act (IDEA) provides, "If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child." 34 C.F.R. 300.104. Petitioners contend the harm M.H. would suffer outweighs any harm the District would suffer, as the District would experience only financial consequences.

The District asserts emergent relief should be denied because the petitioners have not demonstrated that M.H. will suffer irreparable harm. While M.H. "presents some rather extreme difficulties[,]" she was unsuccessful at the first residential placement and, thus, "it is illogical to expect M.H.'s outcome at [Wellspring] will be any different than her outcome at [Lake House.]" (Brief at 15-16.) The District further asserts M.H.'s legal right is not settled as the District's plan involves the least restrictive

setting while the petitioner's proposal involves the "most restrictive environment." (Brief at 16.) The District argues that the law favors the least restrictive environment and education of disabled students in their home district or as close to the home district as possible. The District further argues that there is no evidence in the record demonstrating that Wellspring is appropriate for M.H. It adds, "given the deleterious effect of the prior out of district placement upon M.H., it is more likely than not that this [second] placement could cause a further regression." Finally, the District argues that, because the first placement "ultimately led to self-injurious behaviors[,]" M.H. would likely suffer harm if the emergent relief were granted. (Brief at 17). The District would suffer greater harm than the petitioners because it would be required to address the damage done to M.H. by the second residential placement. (Brief at 17.)

The District also contends that the petitioners' approach to their daughter's care is based on an unsupported diagnosis of RAD. Hershkowitz's letter constitutes a net opinion that includes neither a proper foundation for her opinion nor her relevant expertise. Moreover, the petitioners have tailored their treatment of M.H. in response to the RAD diagnosis. Even if RAD were the correct diagnosis, there is nothing in the record concerning the appropriate treatment methodologies. The District clearly cannot require Klaslo to force M.H. to exit her bedroom and participate in counseling. Thus, the petitioners' assistance is essential to developing an appropriate methodology that will encourage M.H. to engage. As such, the District believes it should have an opportunity to meet with the petitioners and Hershkowitz to develop strategies, including, possibly, positive reinforcement, that would encourage M.H.'s participation.

The District also contends that Lake House was never the proper placement. It agreed to the placement, after mediation, in response to petitioners' Due Process petition. There has been no showing of M.H.'s success at Lake House; neither an attendance record nor data has been presented to document M.H.'s progress. The District further argues that the petitioners are using this opportunity to renegotiate their prior agreement, which was unsuccessful.

Finally, the District requests that, if it is ordered to send M.H. to Wellspring, it should not be required to transport her to the facility. Given M.H.'s uncontested history

of sabotage and false claims of abuse by Lake House staff[5], the District believes it ought not be required to engage with M.H. in this manner.

LEGAL ANALYSIS AND CONCLUSION

N.J.A.C. 1:6A-12.1(a) provides that a parent, guardian, board or public agency may apply in writing for emergency relief. An applicant for emergency relief must set forth in the application the specific relief sought and the specific circumstances they contend justify the relief sought. Emergent relief shall only be requested for the following issues:

> 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;
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> iii. Issues concerning placement pending the outcome of due process proceedings; and
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> iv. Issues involving graduation or participation in graduation ceremonies.
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> N.J.A.C. 6A:14-2.7(r)1

The petitioners seek placement of M.H., pending the outcome of the due process proceeding. They also assert M.H. has not received educational service while she has resided at home, notwithstanding the plan for home-based education and counseling. I, thus, **CONCLUDE** this matter involves issues that could require emergent relief, pursuant to N.J.A.C. 6A:14-2.7(r)1.

[5] The petitioners agree that M.H.'s claim of abuse by Lake House staff was unfounded.

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.

See also Crowe v. DeGioia, 90 N.J. 126 (1982), codified at N.J.A.C. 6A:3-1.6(b).

The petitioner bears the burden of satisfying all four prongs of this test. Crowe, 90 N.J. at 132-34. Harm is irreparable when there can be no adequate after-the-fact remedy in law or in equity; or where monetary damages cannot adequately restore a lost experience. Crowe, 90 N.J. at 132-133; Nabel v Board of Education of Hazlet, EDU 8026-09, Final Decision on Application for Emergent Relief (June 24, 2009).

IDEA requires that a state receiving federal education funding provide a FAPE to disabled children. 20 U.S.C. § 1412(a)(1). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan ("IEP"). 20 U.S.C. § 1414(d). The IEP "must be 'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" Shore Reg'l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir. 1988)).

The IDEA thus does not require that the District maximize M.H.'s potential or provide her the best education possible. Instead, the IDEA requires a school district to provide a basic floor of opportunity. Carlisle Area Sch. v. Scott P., 62 F.3d 520, 533-34 (3d Cir. 1995). The District will have satisfied the requirements of law by providing M.H.

with personalized instruction and sufficient support services "as are necessary to permit [her] 'to benefit' from the instruction." G.B. v. Bridgewater-Raritan Reg'l Bd. of Educ., 2009 U.S. Dist. LEXIS 15671, *5 (D.N.J. Feb. 27, 2009) (citing Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 189 (1982)).

The IDEA expressly contemplates education programs outside the school setting accompanied by additional services.[6] Any plan must involve the least restrictive environment. 20 U.S.C. § 1412(a)(5); N.J.A.C. 6A:14-4.2(a). Home instruction is permitted "when it can be documented that all other less restrictive program options have been considered and have been determined inappropriate." N.J.A.C. 6A:14-4.8(a). A plan for such instruction shall be effective for sixty calendar days and subject to periods of renewal of up to sixty days. N.J.A.C. 6A:14-4.8(a)2. Such "[i]nstruction shall be provided for no fewer than 10 hours per week. The 10 hours of instruction per week shall be accomplished in no fewer than three visits by a certified teacher or teachers on at least three separate days." N.J.A.C. 6A:14-4.8(a)4.

Residential placement can be appropriate "[i]f placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child." Kruelle v. New Castle County School Dist., 642 F.2d 687, 691-692 (3d Cir. 1981)(citing 45 CFR sec.121a.302). A court must "assess the link between the supportive service or educational placement and the child's learning needs." Kruelle, supra, 642 F.2d at 694. "The relevant question . . . is whether residential placement is part and parcel of a specially designed instruction to meet the unique needs of a handicapped child in conformity with § 1401." Ibid. (citation omitted).

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[6] "Special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions. 20 U.S.C. § 1401. "Related services" means transportation, and such developmental corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children. 20 U.S.C. § 1401(17).

If residential placement is the only realistic option for learning improvement, the "question of 'least restrictive environment' is also resolved. Only when alternatives exist must the court reach the issue of which is the least restrictive." Kruelle, 642 F.2d at 695 (citation omitted). See also D.B. v. ocean Top. Bd of Educ., 985 F.Supp. 457, 491 (D.N.J. 1997).

Here, it is uncontroverted that M.H. should not be in an ordinary school setting. It is also uncontroverted that the District agreed to a residential placement after attempting home instruction. There is no evidence in the record that residential placement is now inappropriate.[7] Nonetheless, the District argues that M.H. would be unsuccessful in a residential placement at this time because she did not "succeed" at the first placement. The District also argues that there is no evidence that M.H. progressed in any meaningful way while at Lake House. Lake House's discharge report, however, documented improvement in M.H.'s capacity to participate in educational activities over approximately six months. Lake House acknowledged that her Master Treatment Plan goals had not yet been accomplished. However, the mediated agreement contemplated M.H. would remain at Lake House through the end of the 2018-2019 school year, if necessary. There is no evidence in the record that M.H.'s failure to meet Plan goals by January meant that she failed the entire program. The District agreed to a residential placement and there is no evidence demonstrating that a residential placement is now inappropriate.[8] Accordingly, I **CONCLUDE** petitioners have established that their legal right is settled.

A determination that a child needs residential placement requires a careful analysis of where the child's educational and non-education needs begin and end, see e.g., Kruelle, and, thus, ordinarily requires a plenary hearing. However, here, the District previously agreed to residential placement, given M.H.'s combined educational and mental health limitations. It is uncontested that the current education plan is not

[7] The petitioners provided letters from professionals who opined that M.H. needs immediate placement at a residential facility that offers more services than Lake House, not less. The District objected to the letter provided by Hershkowitz, as it is hearsay. It is bolstered by the Lake House Discharge Report, to which the District did not object. Regardless, there is no evidence in the record that a residential placement is no longer appropriate.

[8] This conclusion does not rely upon a finding that RAD is the proper diagnosis. I note, however, the District agreed to the Lake House placement after Hershkowitz's April 13,2018, letter concerning the diagnosis.

working. M.H. has not been in school and has not received educational or counseling services from the District since she returned home January 18, 2019. While a new IEP was prepared after M.H.'s return to New Jersey, it offers no meaningful new provisions beyond those in the IEP that was in place prior to her first residential placement. Nothing new is proposed at this time, other than continued homebound education, which has proven to be futile and does not meet the minimum regulatory requirements. The District merely offered speculation about next steps that could possibly be considered. However, for the foreseeable future, the only plan now available to M.H. involves continuation of a failing homebound instruction program.

As noted above, had M.H. not "engaged in self-harm behaviors and expressed an intent to commit suicide" in January 2019, she would still be at Lake House. There is no evidence suggesting that the unfortunate episode in January 2019, was caused by her placement at Lake House. Rather, the evidence in the record suggests, and it is reasonable to conclude, she needs more services than that provided by Lake House. The District asserts, without support, that M.H. will not succeed at any future residential placement, given her prior "failure." As noted, this is speculative and ignores the gravity of M.H.'s condition. It is also an insufficient justification for the failure to provide a meaningful education program. Accordingly, I **CONCLUDE** the petitioners have demonstrated that M.H. will suffer irreparable harm if she is not returned to a residential facility at this time.

With respect to petitioners' likelihood of success on the merits, the District previously agreed that residential placement was appropriate. M.H. would still be at the first residential placement but for the incident involving self-harm. Months have passed since then and nothing has been offered other than the same instruction program that predated M.H.'s residential placement. M.H. is entitled to an education plan that can be implemented, even if the most restrictive setting is required. I therefore **CONCLUDE** that the petitioners have demonstrated a likelihood of success on the merits.

Finally, I must consider a balance of the equities in making a determination whether to grant the relief sought. I recognize the District would be required to shoulder the financial burden of continued residential placement. However, it previously agreed

to pay such costs through the end of the 2018-2019 school year and it presumably has not been required to pay tuition for a residential placement since January 2019. The District also contends it will be burdened if M.H. does not fare well at Wellspring and her conditions worsens. This speculative outcome is outweighed by the uncontroverted fact that M.H. suffers from an extreme condition, has received no education since January 2019, and there is not currently a meaningful plan in place that would successfully provide her an education. Accordingly, the equities compel me to **CONCLUDE** that the petitioners will suffer greater harm than the District if the relief they seek is not granted.

Accordingly, I **ORDER** that the request for emergent relief be **GRANTED**. Pending a plenary hearing, M.H. is to be placed at Wellspring at the District's expense. I will recommend that the plenary hearing be expedited, to the extent possible, given the cost to be borne by the District.

With respect to the District's request that it not be required to transport M.H. to Wellspring, given M.H.'s uncontested history of sabotage and false claims of abuse by Lake House staff, the federal regulations define transportation as a related service when that transportation is required to assist a child with a disability to benefit from special education. 34 C.F.R. 300.16(b)(14). "Transportation" includes (i) travel to and from school and between schools; (ii) travel in and around school buildings; and (iii) specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability. Ibid.

The provision of transportation under the Act and its implementing regulations has also been interpreted by the Office of Special Education of the United States Department of Education, which determined:

> First, if a school district provides transportation to the general school population to and from school, it is responsible for providing transportation for handicapped children to any special education program in which it has placed the child. Second, if a school district does not provide transportation to the general school population, the issue of transportation for handicapped children must be decided on a case-by-case basis. If a handicapped child

> needs transportation to benefit from special education, then it must be provided as a related service.
> [*Dubois,* 211:267 (OSEP Policy Letter 1981).]

The District is, thus, obligated to provide transportation as a related service. However, given the District's expressed concern about the potential difficulty associated with transporting M.H., and R.H.'s testimony that she was able to successfully arrange for transport to Lake House and that she transported M.H. home from Lake House by herself, I **CONCLUDE** the petitioners shall make the arrangements for M.H.'s travel to Wellspring. The District shall reimburse the petitioners for the cost associated with such travel. The District Court has noted that IDEA mileage reimbursement has been calculated using the IRS standard business mileage rate at the time the expense was incurred. A.S. v. Harrison Township Board of Education, et. al., 67 IDELR 207 (D.N.J. 2016)(citations omitted). The parties may, of course, agree upon a method of transportation that is billed differently. The method and cost of such transportation must be agreed upon in advance by both parties.

Accordingly, I **ORDER** that the petitioners shall make arrangements for M.H.'s transport to Wellspring. I further **ORDER** the District shall reimburse the petitioners for the cost of transportation, using the IRS standard business mileage rate at the time the transportation expense was incurred. If the parties agree, prior to the transport of M.H. to Wellspring, to a method of transportation that is billed differently, and both parties agree to the cost of that service, the District shall reimburse the petitioners for that expense.

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.

April 17, 2019

DATE

JUDITH LIEBERMAN, ALJ

Date Received at Agency

Date Mailed to Parties:

vj

APPENDIX

WITNESSES

For petitioner:

R.H.

For respondent:

None

EXHIBITS

For petitioner:

P-A February 26, 2018, letter from Dr. Victor Grosu

P-B April 13, 2018, letter from Leanne Hershkowitz, LPC

P-C July 31, 2018, Notice of Agreement

P-D Lake House Academy Academic Summary

P-E Undated letter from Hershkowitz

For respondent:

R-1 February 13, 2018, report by Dr. Alexander Iofin

R-2 June 16, 2018, mediation request

R-3 July 31, 2018, Notice of Agreement

R-4 February 12, 2019 IEP

R-5 March 4, 2019, IEP

R-6 March 19, 2019, cover letter transmitting amended IEP