State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION GRANTING EMERGENT RELIEF

OAL DKT. NO. EDS 04765-19

AGENCY DKT. NO. 2019 29680

PEMBERTON TOWNSHIP BOARD OF EDUCATION

Petitioner,

v.

C.M. and J.M. o/b/o B.M.,

Respondents.

William C. Morlok, Esq., for petitioner (Parker McKay, P.A., attorneys)

C.M. and J.M., respondents, pro se

Record Closed: April 10, 2019 Decided: April 11, 2019

BEFORE **DAVID M. FRITCH, ALJ**:

STATEMENT OF THE CASE

The Pemberton Township Board of Education (District) seeks emergent relief pursuant to N.J.A.C. 6A:14-2.7 to allow it to conduct evaluations (psychiatric, psychological, and social) to assist the District in determining whether B.M. is eligible for special education and related services and to provide him with a free appropriate public education (FAPE). B.M.'s mother, C.M., has withdrawn consent to the District to

conduct an evaluation of B.M. and has stated her desire to have independent evaluations by individuals of her choice be the only evaluations performed on B.M., requiring the District to rely only on evaluations she independently obtains in developing an IEP for B.M.

PROCEDURAL HISTORY

On April 5, 2019, the petitioner filed an Emergent Due Process Petition and Request for Emergent Relief with the Office of Special Education Programs (OSEP). The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on April 8, 2019. N.J.S.A. 52:14F-5(e), (f), and (g) and N.J.A.C. 1:6A-1 through 18.5. Oral argument on the motion was held on April 10, 2019, and the record was closed.

FACTUAL DISCUSSION

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

1. B.M. is an eight-year-old student, who resides with his mother, C.M., in Pemberton, New Jersey.

2. B.M. currently attends school at the Emmons School, where he is in the second grade. B.M. has been at the Emmons School since the beginning of the 2018/2019 school year.

3. B.M. has been diagnosed on the autism spectrum (P-1 at PEM0033) and has had a 504 Accommodation Plan to provide him certain accommodations in the educational environment since January 2018. (Id. at PEM0041.)

4. The District reported a number of disciplinary incidents involving B.M., including reports of disruptive behavior during school including pushing desks towards teachers, throwing pencils in class, slamming doors, kicking desks and walls, kicking and hitting the principal, and hitting other students. (See Id. at PEM0106-109.)

5. Following an incident in November 2018, where the District reported that B.M.'s conduct had escalated in the classroom and he had hit counselors and teachers, B.M. was referred to the District's child study team on November 28, 2018.

6. After this incident, C.M. kept B.M. out of school. On December 7, 2018, C.M. wrote to the District, informing them that she "never agreed/signed mental evaluation to return [B.M.] to school & he will not return if it is required." (Id. at PEM0024.) The stated reason for C.M.'s concern regarding an evaluation of C.M. was that "I had problems in the past with guidance cohearsing [sic]/questioning my son about rumors and slander . . . I have had CPS/Family Services at my home & cases closed immediately." (Id.)

7. As a result of his extended absence, the District made a truancy referral in December 2018. B.M. was returned to school in February 2019.

8. For the 137 days so far in the 2018/2019 school year, B.M. has been absent from school for 64 days.

    a. When in school, B.M. has been removed from the classroom setting approximately three to five times per week due to behavioral issues

9. On January 3, 2019, an Initial Identification Plan meeting was held. (Id. at PEM00031-40.) That plan recommended a psychological evaluation, social history, and psychiatric testing for B.M. (Id. at PEM00038.)

    a. The proposed action from this meeting described B.M. as an intelligent child "with significant behavior problems hav[ing] been documented in the form of interventions, detentions and or suspensions" which are adversely affecting his academic performance. (Id. at PEM00033.)

10. B.M.'s parents refused to give consent for the recommended testing, and even refused to sign the attendance sheet to document their presence at the meeting. (See Id. at PEM0067.)

11. B.M.'s mother, C.M., provided an undated letter to the District purporting to be from Kevin Costello, Esq. (Id. at PEM00001.) This letter requested that the

District "immediately meet with me to determine what cognitive, processing, and behavioral evaluations must be conducted to implement an individualized education plan (IEP) for [B.M.]." (Id.) This letter was not submitted by Mr. Costello, but rather by C.M., and Mr. Costello did not represent C.M. or ask that the letter be sent on his behalf or under his name.

12. This typed letter also contained handwritten correspondence by C.M. on the second page, stating that:

> Testing will be null/void if any personal/private information of family is gathered. I do not consent to anyone questioning [B.M.] about our personal/private life due to past experiences with counselors (making/questioning him slanderous remarks/hearsay). School calling CPS/family services. I will provide my son w/ all counseling/emotional/psychological testing if necessary. Private doctors/out of my pocket.
>
> [(Id. (emphasis in original).)]

13. On January 18, 2019, C.M. sent a letter to the District, stating that:

> Due to slanderous remarks, errors, mistakes, false allegations I will not consent to anyone questioning, counseling any of my children . . . in regard to our personal, private life. Anything I may have signed I rescind . . . I will not allow an IEP to move forward unless/until the team acknowledges his sensory issues cause his meltdowns (sound, taste, tough, smell, sight) and are not consistent day to day. One or more can effect him at different times. I do not consent to anyone from CPS/Department of Children Families. No state/government agencies to question/counsel my children.
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> [(Id. at PEM00051-52 (emphasis in original).)]

14. B.M. was again referred for Child Study Team evaluations on February 26, 2019, due to the District's concerns for B.M.'s "overall school performance including social/emotional, behavioral, and academic functioning." (Id. at PEM00054.)

15. On March 11, 2019, an Initial Identification Plan meeting was held with B.M.'s parents in attendance. (Id. at PEM00055-56.) At this meeting, B.M.'s parents consented to a proposed psychological and social history evaluation (Id. at

PEM00072), however, they indicated that they wished to seek a private psychiatric evaluation and refused to consent to the District conducting a psychiatric evaluation of B.M. (Id.)

16. The day after the March 11, 2019 meeting, C.M. emailed Christine Hale, Assistant Director of Special Services for the Pemberton Township Board of Education. (Id. at Certification of Christine Hale at ¶ 21.) In this email, C.M. stated:

> I would like to revoke consent for psychological evaluations for the school to evaluate my son B.M. I have my own doctors reports and I am following all recommendations and referrals through my doctors. I would like to notify everyone that any oral and written consent has been revoked for psychologists or psychiatrists to collect information on my child since I am separated from [J.M.] a N.J. State school employee. The contract is null/void "under duress" for misrepresentation, non disclosure, I have to make this decision based on lies and a one-sided custody battle I feel may be going on without my knowledge or without being notified.
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> [(Id. at Certification of Christine Hale at ¶ 21. Id. at PEM0078.)]

17. Ms. Hale has continued to try to secure consent from B.M.'s parents since the March 12, 2019, email from C.M., but she remains concerned that B.M.'s parents may again pull B.M. from school causing further school absences. (Id. at ¶ 21.)

18. Ms. Hale described B.M. as "a highly intelligent student whose recent increased behaviors are impeding his ability to succeed." (Id. at ¶ 27.)

LEGAL DISCUSSION

N.J.A.C. 1:6A-12.1 provides that the affected parent(s), guardian, board or public agency may apply in writing for emergent relief. An emergency relief application is required to set forth the specific relief sought and the specific circumstances the applicant contends justify the relief sought. N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief:

> A motion for 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):
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> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
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> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has the 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.

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

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

The moving party bears the burden of proving irreparable harm. More than a risk of irreparable harm must be demonstrated. Continental Group v. Amoco Chemicals Corp., 614 F.2d 351, 359 (D.N.J. 1980). Here, the District asserts that there are issues involving a break in services due to the school time that B.M. has missed due to behavioral outbursts, as well as the actions of his mother keeping him home from school during the school year. Additionally, both the District and B.M. face the potential

of irreparable harm by the continued delay in allowing the District to meet its obligations to B.M. to provide him with a FAPE due to the respondents withholding of consent to conduct the necessary testing. Without a proper evaluation to support B.M.'s educational plan, the District's efforts to provide B.M. with a FAPE continue to be impaired. The continued refusal by the respondents to allow the necessary testing to produce an IEP for B.M. can only exacerbate a break in his educational services. This is irreparable harm. Franklin Township Board of Education v. N.K. o/b/o M.M., EDS 07818-16, Final Decision, (June 6, 2016) http://lawlibrary.rutgers.edu/oal/search.html. See also Gloucester City Board of Education v. A.H. o/b/o K.S., EDS 09165-15, Final Decision, (July 14, 2015) http://lawlibrary.rutgers.edu/oal/search.html (finding failure to comply with IDEA regulations puts student at risk because "any lapse in special services may well cause the child to regress"); Haddonfield Borough Board of Education v. S.J.B. o/b/o J.B., EDS 02441-04, Final Decision, (May 20, 2004) http://lawlibrary.rutgers.edu/oal/search.html (finding irreparable harm to student and school district where there is a delay in the District's continued ability to provide a FAPE due to parents withholding consent to IEP assessments).

This impasse also places the District in the untenable place of being prevented from meeting its clear obligations under State and Federal laws to provide B.M. with a FAPE. The District must ensure that it is providing a healthy and safe environment for all its students, including B.M. and it would seem imprudent to continue to have B.M. in the school environment with a documented history of disruptive behavioral outbursts without an appropriate evaluation—to do otherwise may also cause the District to suffer irreparable harm. Therefore, I **CONCLUDE** that the petitioner has met their burden of establishing a clear showing of immediate irreparable injury unless the requested relief is granted.

Secondly, the petitioner must also demonstrate that the legal right underlying their claim is settled and they must make a preliminary showing of a reasonable probability of success on the merits. Crowe, 90 N.J. at 133. It is well-settled that the Individuals with Disabilities Education Act (IDEA) requires a school district to provide a FAPE to all children with disabilities and determined to be eligible for special education.

20 U.S.C. § 1412(a)(1)(A). According to N.J.A.C. 6A:14-3.3(a), a district board of education has an obligation to locate, refer, and identify students who may have disabilities due to physical, sensory, emotional, cognitive, or social difficulties. This obligation is often referred to as a school district's "child find" obligation. Thereafter, a student may be referred to a child study team for evaluation to determine eligibility for special education programs and services. N.J.A.C. 6A:14-3.3(e). If a child study team determines that an evaluation is warranted, the district must request and obtain consent to evaluate the student. N.J.A.C. 6A:14-3.4(b). If the parent refuses to provide consent to conduct the initial evaluation, the district may file for a due process hearing to compel consent for the evaluation. N.J.A.C. 6A:14-3.4(c).

Here, the District was presented with a child with an autism diagnosis who had demonstrable behavioral deficiencies which indicate a possible need for additional special education services. The District appropriately reached out to the respondents to request testing. The respondents have repeatedly denied the District's request, and B.M. continues to attend school within the District without an established IEP to determine what services and resources are needed to appropriately provide him with a FAPE. The District has a well-settled right to complete an evaluation plan, which may include, among other things, a psychiatric and psychological evaluation to assess whether B.M. is eligible for special education services and placement. While C.M. wishes to limit the District to reliance on her own independent evaluations by a doctor of her choice in compiling an IEP for B.M., the District cannot be forced to rely on just an independent evaluation and must be allowed to evaluate the student itself. Andress v. Cleveland Independent School District, 64 F. 3d 176, 178 (5th Cir. 1995), cert. denied, 519 U.S. 812 (1996). Accordingly, I **CONCLUDE** that the District has met the second prong of the emergent relief standard in that the legal right underlying their claim is settled.

In evaluating the petitioner's likelihood of prevailing on the merits of their underlying claim, there are no material facts in dispute in this matter which oppose the petitioner's likelihood of success. There is significant precedent to support the granting of requests by school districts for emergent relief to compel parental cooperation in the

IEP evaluation process. See, e.g., Millville Board of Education v. S.L. o/b/o Z.B., EDS 15556-18, Final Decision, (November 5, 2018) http://lawlibrary.rutgers.edu/oal/search.html; Washington Township Board of Education v. C.L. and A.L. o/b/o N.L., EDS 06855-17, Final Decision, (May 22, 2017) http://lawlibrary.rutgers.edu/oal/search.html; Edison Township Board of Education v. M.B. and P.B. o/b/o M.B, EDS 2319-07, Final Decision, (April 11, 2007) http://lawlibrary.rutgers.edu/oal/search.html; Lawrence Township Board of Education v. D.F. o/b/o D.F., EDS 12056-06, Final Decision, (January 5, 2007) http://lawlibrary.rutgers.edu/oal/search.html; Trenton Board of Education v. S.P. o/b/o B.P, Final Decision, EDS 874-01, (March 23, 2001) http://lawlibrary.rutgers.edu/oal/search.html. As applied here, I **CONCLUDE** that the petitioner has demonstrated a likelihood of prevailing on the merits. Clearly, the District is unable to comply with its legal obligations because of the respondents' lack of cooperation, and this impedes the District from assisting B.M, one of its students, whom the District reasonably believes requires special education services and programs.

Finally, in balancing the relative equities of the parties' respective positions, the District will suffer greater harm than the respondents if relief is not granted. The District recognizes that B.M. suffers from a disability which may require special education and related services and, as a result, the District must be permitted to investigate those concerns further by way of the recommended evaluations. B.M. is further suffering great harm from his lapses in school attendance, and these interests outweigh the stated interests of the respondents in withholding their consent to perform the requested testing. I **CONCLUDE** that, when the equities and interests of the respective parties are balanced, the petitioner will suffer greater harm than the respondents if the requested relief is not granted.

Based upon the foregoing, I **CONCLUDE** that the petitioner has met the requirements set forth in N.J.A.C. 6A:3-1.6(b) warranting emergent relief in this matter to compel the respondents' consent and cooperation with evaluations and development of an IEP for B.M.

In addition to seeking an order to compel consent to evaluate B.M., the petitioner also seeks additional remedies including attorneys' fees and costs of suit, an order finding and declaring that the District has fully complied with the provisions of IDEA and all other applicable statutes and/or regulations, and an order declaring that, if B.M.'s parents do not cooperate with the IEP evaluation process, the District is to be released and held harmless against all claims under IDEA and other similar causes of action. (See Pet. Br. at 3.) With respect to the District's claim for attorneys' fees, the general rule is that each party bears his or her own attorneys' fees and costs in the absence of express authorization by statute, court rule or contract. Balsley v. North Hunterdon Bd. of Educ., 117 N.J. 434, 443 (1990); In re Thomas, 278 N.J. Super. 580, 284-85 (App. Div. 1995). See also N.J.A.C. 1:1-1.3(a) and R. 4:42-9(a). Absent specific statutory authority to grant such a request, I **CONCLUDE** that the District's claim for attorneys' fees in this matter is without merit.

With regards to the petitioner's claim seeking "an Order finding and declaring that the Board has, at all times relevant hereto, complied with the Individuals with Disabilities Education Act" and all other relevant regulations, the record in this emergent matter does not contain adequate information to make such a determination, nor would such a determination be appropriate or necessary for an emergent application. Accordingly, I **CONCLUDE** that the District's claim seeking such an order is without merit. Further, should B.M.'s parents not comply with the IEP process or refuse to provide consent for the implementation of an IEP developed for their child, N.J.A.C. 6A:14-2.3(a)(c) provides specific statutory provisions to protect the District against claims that it has denied the student a FAPE under the applicable provisions. I **CONCLUDE** that those clearly enumerated statutory protections need not be reiterated in an order on an emergent basis to cover the contingent possibility that B.M.'s parents continue their pattern of non-cooperation with the District in the development and implementation of B.M.'s IEP, and the District's request for an order releasing and holding them harmless from further obligations under IDEA if B.M.'s parents continue their non-compliance with the IEP testing is inappropriate here.

ORDER

Accordingly, the petitioner's application for emergent relief to compel consent to perform psychological, social history, and psychiatric evaluations on B.M. and to do all other things necessary to cooperate in the evaluation and/or IEP process is **GRANTED**. Accordingly, it is **ORDERED** that the District initiate and conduct a psychiatric, psychological, and social evaluation of B.M. It is also **ORDERED** that the respondents cooperate fully and positively in that effort. The petitioner's applications for additional remedies of attorneys' fees and costs, for an order finding and declaring that the District has fully complied with the provisions of IDEA and all other statutes and/or regulations, and an order declaring that, should B.M.'s parents continue to not cooperate in the evaluations and development of an IEP for B.M. that they be released and held harmless under the provisions of IDEA and other relevant statutes are **DENIED**.

This decision on application for emergency relief resolves all of the issues raised in the due process complaint; therefore, no further proceedings in this matter are necessary. This decision on application for emergency relief is final pursuant to 20 U.S.C.A. §1415(i)(1)(A) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C.A. §1415(i)(2). 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 11, 2019
DATE

DAVID M. FRITCH, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/dw

APPENDIX

WITNESSES

For petitioner:

Christine Hale, Assistant Director of Special Services for the Pemberton Township Board of Education

For respondents:

C.M.

J.M.

EXHIBITS

For petitioner:

P-1 Emergent Due Process Petition and Request for Emergent Relief

For respondent:

None