State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION DENYING
EMERGENT RELIEF
OAL DKT. NO. EDS 10791-19
AGENCY DKT. NO. 2020-30500

S.M. and B.M. ON BEHALF OF J.M.,
Petitioners,
v.
GLOUCESTER TOWNSHIP
BOARD OF EDUCATION,
Respondent.

Seth Broder, Esq.**,** for petitioner (Broder Law Group, P.C., attorneys)

Daniel H. Long, Esq., for respondent (Wade, Long, Wood, & Long, LLC, attorneys)

Record Closed: August 13, 2019 Decided: August 14, 2019

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

STATEMENT OF THE CASE

The petitioners, S.M. and B.M., on behalf of their son J.M., petitioned the Office of Special Education Policy and Dispute Resolution in the New Jersey Department of

Education, pursuant to N.J.A.C. 6A:3-1.6 et seq., for an order for emergent relief seeking that J.M. remain in his current educational placement and program with the Gloucester Township Public Schools (District) at Loring-Flemming Elementary School, as well as seeking compensatory education for any education hours J.M. may have been deprived of, and attorneys' fees.

PROCEDURAL HISTORY

On August 7, 2019, the petitioners filed a Request for Emergent Relief with the Office of Special Education Policy and Dispute Resolution pursuant to N.J.A.C. 6A:3-1.6 et seq. The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on August 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 was held on August 13, 2019, and the record was closed on that date.

FACTUAL DISCUSSION

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

1. J.M. is a student who will be starting the fifth grade in the 2019/2020 school year.
2. J.M. is a resident of Gloucester Township in Camden County, New Jersey.
3. J.M. attended the Loring-Flemming Elementary School (LF) in the District since the first grade.
4. J.M. has been diagnosed with a severe allergy to flax seeds, pistachio nuts, and sesame seeds. Direct contact with these foods may result in J.M. having difficulty breathing and swallowing, abnormal heart rate, loss of consciousness, vomiting, pain, and localized rashes.
    a. Should J.M. experience these symptomologies, prompt emergency Epinephrine must be administered, and further medical intervention must be taken.

5. Since October 6, 2015, J.M. has had an Individual Health Care Plan (IHCP) with the District based on his food allergies.

    a. J.M. does not currently have a Section 504 Accommodation Plan with the District.

6. On or about April 1, 2019, the petitioners contacted Superintendent Bilodeau, to inform him that J.M.'s father, B.M., (who has shared custody of J.M.) was moving to a new residence within the Gloucester Township School District. (Pet. Br. at Ex. C.) B.M. was moving from his current residence in the LR school zone to live with his girlfriend in a larger residence which is located in the Chews Elementary (Chews) school zone within the District.

    a. B.M. acknowledges that, when he moved in May 2019, he was aware that his new residence was in the Chews school zone before moving there and that the school zones have not been changed or modified by the District.

    b. Acknowledging that the residence move would normally require J.M. to attend Chews for the 2019/20 school year, the letter requested that J.M. be permitted to remain at LF for the fifth grade, his final year in elementary school. (Id.)

    c. Bilodeau denied this request on or about April 17, 2019. (See Id. (email dated April 17, 2019).) Although he denied the request for J.M. to attend Chews Elementary for the 2019/20 school year, Bilodeau authorized J.M. to finish the 2018/19 school year at LF. (Resp. Br. at ¶ 17; Pet. Br. at Ex. B.)

    d. The petitioners filed the present request for emergent relief on August 7, 2019.

    e. The 2019/20 school year for the District begins on September 5, 2019.

7. The petitioners aver that J.M. is experiencing "anxiety and panic attacks relating to his medically diagnosed life-threatening food allergies" and his anxiety is increased "when in unfamiliar places, with unfamiliar people, or when in the presence of unknown/unfamiliar/unsafe food." (Pet. Br. at 4.)

a. The petitioners seek to have J.M. remain at LF to "remain in a familiar setting for his education in order to support [his] progress while receiving out-patient therapy for his anxiety." (Id.)

b. The petitioners also claim that moving J.M. to a new school will be "disruptive to his learning experience and medically unsafe" because studies have shown that students with food allergies "are at significantly higher risk of teasing, harassment, and bullying at the hands of both classmates and school staff members than their typical peers." (Id. at 5.)

c. The petitioners presented a letter from Lisa Rosenberg, MSW, who stated that the pending move to a new school leaves J.M. "occupied with excessive anxiety that his new peers don't and won't 'get it'" and that when J.M. is not with "his 'safe' friends, he often becomes worried and panics, which causes 'a lot' of emotional distress." (Pet. Br. at Ex. G.)

d. The petitioners presented a letter from J.M.'s allergist, Trong Le, M.D., expressing concern that moving J.M. to a new school "for one year where he knows not one child, he will lose his safe environment, which will adversely affect [J.M.] mentally, medically, and academically." (Pet. Br. at Ex. E.)

8. The District has a policy, Policy 5120, which governs the assignment of pupils within the District. (Resp. Br. at Ex. B.)

a. This policy requires students to "generally attend the school located in the attendance area of their residence" and permits the Superintendent to assign a pupil to a school other than that designated by the attendance area "when such an exception is justified by circumstances and/or is in the best interest of the pupil." (Id.)

b. J.M.'s current residence is within the Chews attendance area. (See Resp. Br. at Ex. A, Bilodeau Cert. at ¶ 13.)

c. The purpose of this policy is to ensure that students "in the vast majority of circumstances, attend the school of their attendance area within the district and to ensure the equitable and even distribution of pupils at

different schools within the district." (Resp. Br. at Ex. A, Bilodeau Cert. at ¶ 8.)

9. District-wide, the District has 393 currently enrolled students with food allergies, with 236 of them having nut allergies. (Id. at ¶ 15.)

    a. LF has 690 students currently enrolled there. (Id. at ¶ 16.) Of those students, 42 have food allergies and 23 have nut allergies. (Id.)

    b. Chews currently has 668 students enrolled there. (Id. at ¶ 14.) Of those students, 45 have food allergies and 13 have nut allergies. (Id.)

10. All schools within the District, including Chews, have a number of internal protocols in place to handle food allergies, including training protocols for administration of Epinephrine and guidelines to manage life-threatening food allergies in schools. (Id. at ¶ 17. See also Resp. Br. at Ex. C; Id. at Ex. D; Id. at Ex. E.)

11. The school nurse, who has worked at Chews for the past eleven years, developed the model action plan which is now used throughout the District for use of Anaphylaxis (Epi-Pens). (Resp. Br. at Ex. A, Bilodeau Cert. at ¶ 13. See also Resp. Br. at Ex. F.)

12. Prior to denying the petitioners' request to allow J.M. to remain at LF for the upcoming school year, Superintendent Bilodeau consulted with the District's physician, Dr. David Koerner and forwarded all of the medical records to him for his review. (Resp. Br. at Ex. A, Bilodeau Cert. at ¶ 22.)

    a. In a letter submitted by the respondent, Dr. Koerner opined that "[a]fter a thorough review of the policies, standing orders and nursing backgrounds of our schools, I feel that the new school will provide all of the same medical care that any other school in our district will offer." (Resp. Br. at Ex. G.)

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
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> 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 petitioners have 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, Inc. v. Amoco Chemicals Corp., 614 F.2d 351, 359 (3d Cir. 1980) (injunctive relief may not be issued "merely to allay the fears and apprehensions or to sooth the anxieties of the parties") (citing Standard Brands, Inc. v. Zumpe, 264 F.Supp. 254, 267-68 (E.D.La. 1967)). The harm claimed by the petitioners in this matter, however, consists of speculation and fear of the unknown consequences of moving J.M. to a new school where he will be attending without the comfort of being around friends he has known for years. While the petitioners conceded at hearing that the District is able to medically accommodate students like J.M., who suffer from food allergies across the District's schools (including Chews), their concern lies primarily with J.M.'s anxiety of being moved to a new environment surrounded by unfamiliar teachers and peers while continuing to manage his life-threatening allergies. The petitioners allege that J.M. "will suffer irreparable harm should he be forced to transfer into a new unfamiliar school environment" (Pet. Br. at 7) because J.M. needs the comfort of having friends who know him and are familiar with his "normal" state to reassure him that if he does suffer from an allergic reaction at school, his friends will be there and able to quickly identify any abnormal reaction he may be having and get him help.

The petitioners submitted letters from J.M.'s doctors. One of those letters cites to medical studies of students with food allergies being "at significantly higher risk of teasing harassment and bullying" and forcing J.M. to a new environment "where he knows not one child" will cause him to "lose his safe environment." (Id.) Another letter from a social worker opined that when J.M. is not around his "'safe' friends, he often becomes worried and panics" and he needs friends around him who understand his food allergies and without those "safe" friends, J.M. suffers "'a lot' of emotional distress." (Pet. Br. at Ex. G.) A letter from J.M.'s allergist noted that J.M. was experiencing increased anxiety over the prospect of moving to a new school where he

fears "his new peers don't and won't get it." (Id. at Ex. I.) That doctor opined that, taking J.M. out of this safe environment "will adversely affect [J.M.] mentally, medically, and academically, [and] the negative effect could be irreparable." (Id.) The irreparable harm put forth by the petitioners, however, is based on speculation of what may or may not happen after J.M. is placed at Chews where he will be attending without the benefit of his familiar network of friends and teachers who support him at his present school. It is unknown at this time and on this record whether J.M. will be able to make new "safe friends" to help him adjust in this new environment, or what impact J.M.'s increased anxiety over the school move may or may not have on his future academic performance. Given that the petitioners' basis for the irreparable harm is grounded in J.M.'s fear of the unknown and speculation regarding what may happen to J.M. in the new school environment, the petitioners have failed to meet their burden to show immediate irreparable injury that will necessarily follow J.M.'s move to a new school environment. Continental Group, Inc., 614 F.2d at 359. Accordingly, I **CONCLUDE** that the petitioners have failed to meet their burden to establish a clear showing of immediate irreparable injury unless the requested relief is granted.

Secondly, the petitioners must also demonstrate that the legal right underlying their claim is settled and petitioners must make a preliminary showing of a reasonable probability of success on the merits. Crowe, 90 N.J. at 133. The law on this point is well-settled in favor of the respondent, who has broad discretion to take the actions needed to effectively operate its public schools and to protect the health, welfare, and safety of its students. C.D. o/b/o S.C., EDS 08459-17. The District is vested with the authority to establish and change geographic boundaries for pupil placement with the goal of evenly distributing pupils at different schools within the District and doing so is a reasonable exercise of their authority. Fullen v. Middletown Twp. Board of Educ., 1986 S.L.D. 582, adopted Comm'r. 1986 S.L.D. 603. See also C.F. and E.F. o/b/o G.F. v. Board of Education of the Township of Pequannock, Morris County, EDU-08309-18, Final Decision, (November 2, 2018) http://lawlibrary.rutgers.edu/oal/search.html.

District policies and actions within their authority are entitled to a presumption of lawfulness and good faith, and where they are challenged, the challenger bears the

burden of proving that the actions are unlawful, arbitrary, capricious, or unreasonable. Schuster v. Bd. of Educ. Montgomery Twp., 96 N.J.A.R. 2d (EDU) 670, 676 (citing Schnick v. Westwood Bd. of Educ., 60 N.J.Super. 448 (App.Div. 1960) and Quinlan v. Bd. of Educ. of North Bergen Twp., 73 N.J.Super. 40 (App.Div. 1962)). See also Thomas v. Morris Twp. Bd. of Educ., 89 N.J.Super. 327, 332 (App.Div. 1965), aff'd, 46 N.J. 581 (1966); Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960).

In other words, while the District cannot be arbitrary and capricious in its actions, it does have the authority to establish and enforce rules with regard to the distribution of pupils between schools within the District. The arbitrary, capricious, and unreasonable standard of review imposes a heavy burden on challengers of the District's actions. This standard has been defined by New Jersey courts as follows:

> In the law, "arbitrary" and "capricious" means having no rational basis. Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is no room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached . . . Moreover, the court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling.
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> [Piccoli v. Ed. of Educ. of Ramapo Indian Hills Regional School District, EDU 1839-98, Initial Decision, (January 22, 1999) http://lawlibrary.rutgers.edu/oal/search.html (citing Bayshore Sewage Co. v. Dent. of Envir. Protection, 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), aff'd 131 N.J. Super. 37 (App. Div. 1974)).]

The petitioner's legal right to challenge the District's decision is well-established; therefore, I **CONCLUDE** that the petitioners have met their burden to show a well-settled legal right underpins their claim. While their right to appeal is well-established, the applicable "arbitrary and capricious" legal standard makes their probability of success on the merits dubious. I **CONCLUDE**, therefore, that the petitioners have not

shown a likelihood of prevailing on the merits of the underlying claim given the applicable "arbitrary and capricious" standard which applies.

Having concluded that the petitioners have not met two of the first three requisite standards for emergent relief, I need not go to the fourth standard. However, in order to give a full review of the petition, I will discuss the equities. If the requested relief is not granted, petitioners will be harmed in that their son will have to adjust to a new school starting with the upcoming school year. A child starting at a new school with new teachers and peers is an inherently anxiety-inducing event and this anxiety is worsened by J.M.'s need to also manage his medical condition and his fear of doing so without the support of friends who he feels safe with around him. The change in school environment, which is the root cause of J.M.'s increased anxiety, however, was not the result of a unilateral action of the District, but rather the unilateral action of J.M.'s father who changed residences knowing that his new residence would place his son in an attendance zone where, unless an exception was granted, J.M. would be required to attend a new school.

Further diminishing the weight of the petitioners' interests in this matter is the governing law which clearly holds that, while students have a constitutional right to receive a thorough and efficient program of education, there is no corollary right to receive that education in a specific school within the District. See C.F. and E.F. o/b/o G.F, EDU-08039-18; Fullen, 1986 S.L.D. 582. Although I appreciate the desire of J.M.'s parents to keep him at the school that he has become accustomed to with the friends he is familiar and comfortable with and their efforts to minimize the impact of B.M.'s recent relocation on their child's education, the petitioners have not established that they have the right to choose the school of their choice within the District for J.M.'s continued education and for this reason the petitioners cannot demonstrate a harm weighty enough to tip the balance in their favor to justify a grant of the extraordinary relief they are seeking. Balancing the equities does not yield a favorable result for the petitioners and I **CONCLUDE** that the equities in this matter balance in favor of the respondent.

As all four of the Crowe v. De Gioia standards as codified in N.J.A.C. 6A:3-1.6 must be met in order for emergent relief to be granted, I **CONCLUDE** that the petitioners have not met all four standards and their petition for emergent relief therefore must be **DENIED**.

ORDER

Having concluded that the petitioners have not met the four requirements for emergent relief, the petitioners' request for emergent relief is **DENIED**.

This decision on application for emergency relief shall remain in effect until the issuance of a decision on the merits of the matter. The hearing having been requested by the parents, the matter is hereby returned to the Department of Education for a local resolution session, pursuant to 20 U.S.C. 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.

August 14, 2019
DATE

DAVID M. FRITCH, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/dw

APPENDIX

WITNESSES

For petitioners:

S.M. and B.M., parents of J.M.

For respondent:

None

EXHIBITS

For petitioners:

Documents submitted with the petitioner's petition:

Exhibit A	J.M. Food Allergy Action Plan, March 11, 2019
Exhibit B	Letter from John Bilodeau to S.M., April 11, 2019
Exhibit C	Communications between J.M.'s parents and the District, April 1, 2019 – May 23, 2019
Exhibit D	Letter from Mahbod Mohazzebi, M.D., April 16, 2019
Exhibit E	Letter from Trong Le, M.D., April 26, 2019
Exhibit F	Gloucester Township Board of Education, Policy 5120, Assignment of Pupils, September 23, 2013
Exhibit G	Letter from Lisa Rosenberg, M.Ed., MSW, LSW, CSSW, July 12, 2019
Exhibit H	Letter from Mahbod Mohazzebi, M.D., July 29, 2019
Exhibit I	Letter from Trong Le, M.D., August 1, 2019
Exhibit J	Policy Proposal, Gloucester Township Board of Education, Policy 5120

For respondent:

Documents submitted with the respondent's response to petitioners' petition:

Exhibit A Certification of John Bilodeau, Superintendent of the Gloucester Township Public School District, August 12, 2019

Exhibit B Gloucester Township Board of Education, Policy 5120, Assignment of Pupils, September 23, 2013

Exhibit C Gloucester Township Board of Education, Policy 5331, Management of Life-Threatening Allergies in Schools, March 30, 2009

Exhibit D New Jersey Department of Education, Training Protocols for the Emergency Administration of Epinepherine, September 2008

Exhibit E New Jersey Department of Education, Guidelines for the Management of Life-Threatening Food Allergies in Schools, September 2008

Exhibit F Chews Elementary School, Anaphylaxis (Epi-Pen) Action Plan

Exhibit G Letter from David M. Koerner, D.O., School Physician, Gloucester Township Public Schools, August 12, 2019