



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

EMERGENT RELIEF

OAL DKT. NO. EDS 03228-19

AGENCY DKT. NO. 2019 29513

S.E. ON BEHALF OF J.E.,

Petitioner,

v.

HUNTERDON CENTRAL REGIONAL

BOARD OF EDUCATION,

Respondent.

S.E., petitioner, pro se

John Comegno, Esq., for respondent, Hunterdon Central Regional Board of Education (Comegno Law Group, attorneys)

Record Closed: March 13, 2019

Decided: March 14, 2019

BEFORE **MARY ANN BOGAN**, ALJ:

On March 7, 2019, petitioner S.E., on behalf of his son, J.E., applied for emergent relief asserting that J.E. is not currently receiving educational services after the respondent Board denied petitioner's request to extend home instruction. Petitioners seek an order for continued home bound instruction, to excuse J.E.'s absences due to illness, to receive resources from the school to help him complete any

assignments needed to receive credit, and support for a modified learning environment that allows J.E. to successfully complete high school. Along with the request for emergent relief, petitioners also filed a due process hearing with the Department of Education, Office of Special Education (OSE).

The respondent, Board, maintains that petitioner's challenge to the Board's medical determination that J.E. no longer requires home instruction, and that any emotional factors affecting his functioning do not present a safety issue to himself or others, should be dismissed as it is without merit. The District contends that the real issue for petitioner is making sure J.E. has enough credits to graduate high school. Moreover, petitioner's request for school credits and excused absences are not ripe for disposition by way of application for emergent relief. J.E.'s last individualized educational program (IEP) on record, dated September 12, 2018, places J.E. at Hunterdon Central Regional High School (HCRHS) in Project Trust, a comprehensive supported program to address his behavioral needs in-district. (Exhibit 1.)

OSE transmitted the matter to the Office of Administrative Law, where it was filed on March 7, 2019 and scheduled for oral argument on March 13, 2019 at 9:30 a.m. Oral argument was conducted on that date and the record closed.

FACTUAL DISCUSSION

J.E. is age eighteen and is eligible for special education services under the classification Emotionally Disturbed pursuant to a diagnosis of Bi-polar Disorder.

On November 15, 2018, petitioner notified the Board that J.E. would remain absent from school until further notice. On November 18, 2018, petitioner made an initial request for home instruction. The request contained a letter from Dr. Sayyaparaju, J.E.'s psychiatrist, dated November 19, 2018, indicating that J.E. would benefit from home instruction "until greater mood and anxiety stability can be achieved." Dr. Sayyaparaju indicated that J.E. may be ready to return to school in 30 days "if he displays adequate anxiety and mood control." (Exhibit 2.)

On December 3, 2018, the Board temporarily approved home instruction. All parties agree that petitioner did not receive education in all subject areas while on home instruction. The District contends that home instruction failed because J.E. refused to be taught by the math and science home instruction teachers. The petitioner asserts that J.E. experienced many successful home instruction sessions, especially with the Spanish teacher, but their request for a different math and science teacher went unanswered by the district. (P-5.)

On December 19, 2018, petitioner made an additional request to extend home instruction. The request was again accompanied by a letter from Dr. Sayyaparaju dated December 19, 2019, requesting an additional 30 days to allow for greater mood and anxiety control. (Exhibit 3.) On January 4, 2019, the Board notified petitioner that the request for continued home instruction was denied by school physician, Dr. John Kripsak. (Exhibit 4.¹) On January 25, 2019, petitioner informed the Board that J.E. would not return to HCRHS, requesting instead a home-based online instruction program.

Dr. Webb, Director of Special Education certified that Dr. Kripsak spoke with Dr. Sayyaparaju, J.E.'s treating psychiatrist "in order to gain additional information relevant to said determination and J.E.'s present condition." Dr. Webb also certified that she spoke to J.E.'s treating psychologist, Dr. Susan Blackwell-Nehlig, who advised that J.E. "was stable and ready to return to HCRHS." (R-2 - Certification of Dr. Carol Webb, referred to as "Webb Cert. paragraphs 13-14.)

Dr. Sayyaparaju, in her report, acknowledged the conversation with Dr. Kripsak and set forth clinical details of J.E.'s visit on January 17, 2019:

J.E. presented with a neutral affect and reports experiencing ongoing ups and down in his mood. He finds the Wellbutrin has been a positive addition to his regimen and feels his overall motivation has improved. He continues to become

¹ The notification was in the form of an email to S.E. from Judy Singer, Registrar and Home Instruction Coordinator stating that home instruction has been denied by our school physician.

easily despondent, hopeless and passively suicidal when he thinks about returning to school. J.E. is aware he will resume the Project Trust program next week. Primarily, he worries about whether or not he will successfully be able to attend on a daily basis. The anxiety related to returning to school has caused his obsessive-compulsive tendencies to flare up and he has engaged in repetitive checking and re-checking at home.

Dr. Sayyaparaju concludes with the following recommendations: excuse J.E.'s school absences and reinstate home instruction or provide an alternative option to complete high school credit requirement such as an online school. (P-2.)

Further, Dr. Webb certifies that Dr. Susan Blackwell-Nehlig, J.E.'s psychologist since December 2016, concluded that J.E. "was stable and ready to return to school." (R-2 - Webb Cert. para.14.)

Yet, Dr. Blackwell-Nehlig in her report dated March 13, 2019, states:

This psychologist [] participated in meeting (by phone) with Mr. S.E. and the District. This psychologist explained that it was not her recommendation (or Dr. Sayyaparaju's) that J.D. be placed in a partial or intensive outpatient program. Nevertheless, the absence of this recommendation should not have implied that J.E. was stable. Lastly, this psychologist supports Dr. Sayyaparaju's recommendations to excuse J.E.'s absences and either reinstate his home instruction or offer an appropriate alternative option for J.E. to earn his diploma, such as an online school, especially as J.E. is in the process of re-evaluation by the District.

Dr. Blackwell-Nehlig also observes that J.E. has become suicidal in response to pressure to attend school. (P-3.)

The District contends that home instruction is too restrictive for J.E. and that he should return to school as the District has made ongoing efforts to conduct appropriate assessments/evaluations to determine continued eligibility for J.E. and/or to develop an appropriate IEP. The District also contends that J.E.'s school related phobia and feeling of being overwhelmed can be resolved by a gradual introduction to school and summarily dismisses the recommendations by J.E.'s treating psychiatrist and

psychologist because there is no mention of a crisis center being contacted to respond to suicidal thoughts or proof that J.E. participates in intensive outpatient therapy. After petitioner provided consent for J.E. to undergo further evaluations in the Reevaluation Planning Notice, dated February 7, 2019, Bryan Fennelly, M.D. conducted a psychiatric evaluation of J.E. and issued two reports. (Exhibit 7.) His preliminary recommendation of March 7, 2019 specifically state “J.E. is [in] no acute danger to himself or others. He is cleared to return to school. Emotional factors affecting his functioning do not present a safety issue.” (Exhibit 8.) Dr. Fennelly comprehensive report dated March 12, 2019 recommends:

1. The present of a thought disorder *must* be addressed with psychiatric treatment, specifically medication. I would strongly advise that J.E. restart an antipsychotic. Untreated psychotic thinking carries a very poor prognosis.
2. J.E. would benefit from an extended residential program for mood disorders before attempting to develop a definitive educational plan. He has demonstrated an inability to consistently move forward due to his psychiatric condition.
3. I strongly recommend parental counseling and family therapy to address important limits that must be set to help J.E. adhere to treatment and educational recommendations.
4. Ultimately S.E. may have to accept that J.E. living at home untreated is harmful to him.
5. Given my strong recommendations requiring acute psychiatric treatment, it would be beyond reason to consider an IEP which allows Home Instruction without intense treatment.
6. I feel that the best way to minimize J.E.’s risk of suicide is to assure that he receives adequate treatment. I would encourage S.E. to investigate the limits and responsibility of [the] Power of Attorney as it pertains to assuring J.E.’s best interests.

[R-1.]

In addition to submitting the reports of J.E.’s psychiatrist and psychologist reports that indicate J.E. is not ready to return to school, petitioner contends that he would love

for J.E. to be successful at Project Trust but he has the responsibility to ensure J.E.'s best interest. Petitioner contends that J.E.'s five-year history of mental illness and recommendations from J.E.'s treating doctors provide sufficient evidence to demonstrate J.E.'s inability to return to school at this time. (P-1.) He believes as his caretaker he knows what is in his son's best interest, and he and his family have been actively engaged in providing support to J.E. (P-4.)

LEGAL ARGUMENT AND CONCLUSION

N.J.A.C. 6A:14-2.7(r), provides in pertinent part that a party may apply in writing for a temporary order of emergent relief as part of a request for a due process hearing under very limited circumstance.

1. 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;
- iii. Issues concerning placement pending the outcome of due process proceedings;
- iv. Issues involving graduation and participation in graduation ceremonies.

Although not specifically pled, pro-se petitioner contends that emergent relief may be requested in this situation pursuant to N.J.A.C. 6A:14-2.7(r)(1)(iii) because there are issues concerning placement pending the outcome of due process proceedings. Here, petitioner disputes the placement of J.E. at the District school for the 2018-2019 school year, and seeks continued in-home placement pending the due process proceedings. Accordingly, I **CONCLUDE** the petitioner's request for emergent relief shall be reviewed in this manner.

Notwithstanding the conclusion above, the petitioner also asserts that there are issues involving a request to have J.E.'s school absences excused due to illness, and to ensure school credits. Petitioner may not seek emergent relief under N.J.A.C. 6A:14-2.7(r), because the issue regarding class credits and absences do not meet the protected categories for emergent relief.

As set forth in N.J.A.C. 1:6A-12.1(e), N.J.A.C. 6A:3-1.6(b) and N.J.A.C. 6A:14-2.7(s), an application for emergent relief will be granted only if it meets the following four requirements:

1. The petitioners will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying the petitioners' claim is settled;
3. The petitioners have a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioners 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, 102 N.J. 50 (1986), 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. See also Crowe at 132-35.

Turning to the emergent criteria, it is well settled that relief should not be granted except "when necessary to prevent irreparable harm." Crowe 90 N.J. at 132. In this regard, harm is generally considered irreparable if it cannot be adequately redressed by monetary damages. Id. at 132-33. Moreover, the harm must be substantial and immediate. Judice's Sunshine Pontiac, Inc. v. Gen. Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976) (citation omitted). More than a risk of irreparable harm must be demonstrated. Continental Group, Inc. v. Amoco Chems. Corp., 614 F.2d 351, 359 (D.N.J. 1980). The requisite for injunctive relief is a "clear showing of immediate

irreparable injury,” or a “presently existing actual threat; (an injunction) may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by common law.” Ibid. (citation omitted.) Irreparable harm in special education classes has been demonstrated when there is a substantial risk of physical injury to the child, or others, or when there is a significant interruption or termination of educational services. M.H. o/b/o N.H. v. Milltown Board of Education, 2003 WL 21721069, OAL Dkt. No. EDS 4166-03.

In the instant matter, there is an insufficient showing of a “substantial risk of physical injury” to J.E. nor has there been a “significant interruption or termination of his educational services.” The Board is ready and willing to educate J.E. in accordance with the in-district placement (HCRHS) in Project Trust, a comprehensive supported program to address his behavioral needs program set forth in the September 12, 2018, IEP.

However, there remains an unresolved ability to agree upon J.E.’s appropriate placement, especially because the medical evaluations from J.E.’s treating doctors submitted by the petitioner, and the District’s psychological evaluation prepared by Dr. Fennelly, that was submitted by the District at the hearing, all equivocate on the appropriate remedy. The school physician, Dr. Kripsak, did contact J.E.’s treating doctors to secure additional information, and although it is clear that the extensive medical recommendations from all providers include recommendations for continued services for J.E., the record is not clear as to the type of services J.E. should receive. Furthermore, contrary to the District’s assertions that all medical evaluations recommend that J.E. is stable and ready to return to school, only Dr. Webb’s certified responses are consistent with that conclusion made by the District.

While the District’s expert, Dr. Fennelly states that home instruction without intense treatment is not recommended, he does not clearly address J.E.’s school placement. Instead, Dr. Fennelly provides several recommendations including steps to take before a plan is put in place to educate J.E.:

J.E. would benefit from an extended residential program for mood disorders before attempting to develop a definitive educational plan. He has demonstrated an inability to consistently move forward due to his psychiatric condition.

While irrevocable harm may ensue unless an issue of placement can be resolved quickly, under the facts of this unique case, I **CONCLUDE** that petitioner has not demonstrated a clear showing of immediate irreparable harm to J.E. if the requested relief is not granted.

Since all four standards for emergent relief must be met, the three remaining prongs of the standards for emergent relief will not be addressed.

The record is clear that given the extensive medical reports and the district's psychiatric evaluation conducted recently by Dr. Fennelly, J.E. should be receiving services and assessments as to whether or not the current IEP is appropriate or if another placement is warranted. However, the medical evaluations present unclear recommendations as to J.E.'s placement. Given the ongoing reevaluation process and the District's own uncertainty, set forth in Dr. Fennelly's report, as to whether or not J.E. can return to school, I **CONCLUDE** that an IEP meeting shall be convened within the next five (5) business days to review and consider all of J.E.'s medical reports and evaluations and determine if a change in placement or continuing home instruction is warranted.

Therefore, I **CONCLUDE** that petitioner's request for emergent relief be **DENIED WITHOUT PREJUDICE** to the parent's filing of an emergent relief application on the basis of home services.

ORDER

It is hereby **ORDERED** that petitioners' request for emergent relief in the form of an order directing J.E.'s continued home instruction is **DENIED WITHOUT PREJUDICE** to the parent's filing of an emergent relief application on the basis of home services. I hereby further **ORDER** that an IEP meeting shall be convened within the next five (5)

business days to review and consider all of J.E.'s medical reports and evaluations and determine if a change in placement or continuing home instruction is warranted.

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.

March 14, 2019 _____

DATE



MARY ANN BOGAN, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

MAB/cb

APPENDIX

EXHIBITS

For petitioners:

- P-1 J.E. history over the last five years
- P-2 Report by Dr. Sayyaparaju re: J.E. dated March 12, 2019
- P-3 Report by Dr. Blackwell-Nehlig re: J.E. dated March 12, 2019
- P-4 Emails
- P-5 Home Instruction Issue

For respondent:

- Exh. 1 IEP dated September 12, 2018
- Exh. 2 Letter from Dr. Sayyaparaju dated November 19, 2018
- Exh. 3 Letter from Dr. Sayyaparaju dated December 19, 2018
- Exh. 4 Email from Judy Singer, Registrar and Home Instruction Coordinator to S.E. dated January 4, 2019
- Exh. 5 Due Process Petition dated February 25, 2019
- Exh. 6 Emergent Relief Petition
- Exh. 7 Reevaluation Planning-Proposed Action dated February 7, 2019
- Exh. 8 Letter from Dr. Fennelly re: J.E. dated March 7, 2019
- R-1 Psychiatric Evaluation from Dr. Fennelly to Suzanne Taylor, MSS, LCSW dated March 12, 2019
- R-2 Certification of Director of Special Services, Carol Webb, Ed.D