State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDS 06076-21

AGENCY DKT. NO. 2021- 33021

K.P. on behalf of A.P.,

Petitioner,

v.

MANVILLE BOROUGH BOARD OF EDUCATION, SOMERSET COUNTY,

Respondent.

K.P., on behalf of A.P., petitioner, pro se

David B. Rubin, Esq., for respondent (David Rubin, P.C., attorneys)

BEFORE **MARY ANN BOGAN**, ALJ:

Manville Borough Board of Education, (District) applied for emergent relief on behalf of the District to seek an order authorizing the District to proceed with a functional behavioral analysis (FBA) and directing A.P.'s parents to cooperate in any aspect of the FBA requiring their involvement.

PROCEDURAL HISTORY

On or about June 21, 2021, petitioner filed a complaint for due process with the New Jersey Department of Education, Office of Special Education Policy and Dispute Resolution

challenging the June 14, 2021, individualized education program (IEP) proposed by the child study team. The petition states that petitioner seeks to maintain current program and placement in the general education setting. On or about June 29, 2021, petitioner filed a request for emergent relief seeking an immediate stay-put of the current program and placement in general education. On the same date, the emergent petition was transmitted to the Office of Administrative Law (OAL). The Honorable Susan L. Olgiati conducted oral argument on July 1, 2021, and granted the requested relief in an order issued on July 2, 2021. The Due Process hearing was conducted by the undersigned on October 6, 2021. The record closed on November 15, 2021. Thereafter the respondent filed this request for emergent relief, and it was scheduled for oral argument on November 15, 2021. Although A.P.'s mother was the sole petitioner for the due process petition, A.P.'s father M.P., after being noticed, participated in the oral argument for the current emergent relief application. The record closed on the same day,

FACTUAL DISCUSSION

A.P. is a twelve-year-old seventh grade student who is eligible for special education services under the classification of autistic. He currently attends Alexander Batcho Intermediate School in the District.

The District enclosed a certification of Laura D.'Amato, Director of Special Services, in support of the District's emergent relief application. By way of background, at the due process hearing on October 6, 2021, A.P.'s case manager, Sandra Peckhardt, testified that the District was prepared to conduct an FBA now that A.P. was back into in-person instruction. The District found this additional assessment particularly necessary because A.P.'s family declined to send him to an extended school year programing that the District offered over the past summer, and because he had been attending school on remote instruction since March 2020.

Around the time of the due process hearing, written consent was provided by K.P. for the FBA, and the District's Board-Certified Behavior Analyst (BCBA) began the FBA. Thereafter, A.P.'s father M.P. notified the District on or around October 27, 2021, in what the District determined to be revocation of consent for the FBA. The District

determined that if one parent revokes consent given by the other parent, a District is required to honor that revocation. In that the District was required to honor the father's revocation of K.P.'s prior consent, the Board notified the parents that it believed that an FBA is in A.P.'s best interest; however, until consent was granted by both parents or an appropriate court order was issued resolving the disagreement, the FBA would not be conducted. Sometime thereafter, K.P. sent an email which seemed to reverse her original position consenting to the FBA going forward.

The certification of Laura D'Amato, Director of Special Services, in support of the District's application sets forth that the District "was committed to identifying and addressing any behaviors in the school setting that might impede A.P.'s progress." The District urges that the "parents' refusal to allow our BCBA to conduct an FBA to get to the bottom of A.P.'s behaviors issues is sabotaging our efforts to provide him with an appropriate education." The District points out that A.P. was making progress and "acclimating himself to the school environment" at the time of the hearing. Once the mother's consent was received on October 7th, the BCBA began working on the FBA. Thereafter on October 20, 2021, there was an "abrupt increase" in negative behaviors. Ms. D'Amato's certification states that A.P. appeared "easily agitated", he "flipped over a table and screamed in a high-pitched voice because another class was making too much noise." The school called the father to pick up A.P. When the father arrived, he reported to the case manager and the building principal that he was now living in a hotel with his children due to a change in the home environment. Several incidences followed, for example, when on October 27th, A.P. started yelling at a female autistic student, walking towards her in an aggressive manner "balling" his fists and yelling at her to "shut up." The behavior was so concerning that staff held him back because "they were afraid he was going to be physical with her." A.P. also "slammed the door" of a class playing music. The principal intervened. When he brought A.P. to the office, A.P. took off his mask and spit all over the table. Ms. D'Amato asserts that without the FBA, the District is unable to identify the "triggers" of A.P.'s school-based behaviors to develop a behavior intervention plan.

M.P. contends that the "timing" of the FBA was "skeptical" because it was raised at the time when the due process hearing was over, and "all of a sudden" the District

requests that it perform an FBA. Moreover, M.P. is concerned that the District "suddenly hired a new person" instead of conducting an FBA with a BCBA who has a relationship with A.P. He further asserts that "in my gut" the District does not have good intentions and the District never demonstrated any "respect" by asking him about the FBA. A.P.'s mother, K.P. indicated that she did not have a response to the emergent petition, and she understood why it was necessary to conduct.[1]

The District responded that the FBA must be conducted in the school setting, so it was "timed" to take place after the student returned to in person learning. The FBA was scheduled to take place and a short time after the revocation of consent by M.P., the District filed the emergent petition. The District explained that the regulations provide for parental rights to request an independent evaluation under certain circumstances but only after the District completes its assessment.

LEGAL ARGUMENT AND CONCLUSION

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

1. The [District] will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying the [District's] claim is settled;

3. The [District] [has] a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the [District] will suffer greater harm than the [petitioner] 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.

[1] K.P.'s request to introduce into evidence recordings of IEP meetings held in October 2019, October

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.

Emergent relief may be granted when parents refuse to consent without good cause to assessments that the District may find are necessary. Washington Township Board of Education v. C.L. and A.L. o/b/o N.L., OAL Dkt. No. EDS 06855-17 Agency Dkt. 2017 -26211 (May 22, 2017). In the instant matter, there is a substantial risk of physical injury to the child or others if the FBA is not conducted. A parents' unreasonable refusal to consent to an assessment is grounds for emergent relief. Gloucester City Bd. Of Educ. V. A.H. o/b/o K.S. OAL Dkt. No. EDS. 09165-15, (July 14, 2015). In addition, the failure to conduct necessary evaluations "will also place the student at risk, as any lapse in special services may well cause the child to regress." Id.

Here, the District's assertion that there is an urgent need to conduct the FBA to determine the triggers for A.P.'s outbursts at school so that appropriate measures can be taken to address them, is persuasive. The District set forth compelling evidence that

2020 and June 2021 was denied since the recordings are not relevant.

A.P. has demonstrated a disturbing pattern of behavior and these instances of behavior were not disputed.

Accordingly, I **CONCLUDE** the District's request for emergent relief has established a clear showing of immediate irreparable harm if the requested relief is not granted.

As to the issue of whether the legal right underlying the District's claim is settled, according to N.J.A.C. 6A:14-3. (b), once the child study team determines that an evaluation is warranted, the district must request and obtain parental consent to evaluate. If the parent refuses to provide consent to conduct the evaluation, the district may file for a due process hearing to compel the evaluation. N.J.A.C. 6A:14-3.4(c). I **CONCLUDE** the District has demonstrated that the legal right underlying the District's claim is settled.

Regarding the District's likelihood of prevailing on the merits, there are no material facts in dispute that would alter the District's likelihood of prevailing on the merits. As previously referred to, emergent relief is likely to be granted when a parent(s) refuses to cooperate in the evaluation process. Washington Twp. Board of Education.

Accordingly, I **CONCLUDE** the District has met the third prong of the emergent relief standard as to whether the District has a likelihood of prevailing on the merits of the underlying claim. Here there are no material facts in dispute that oppose District's likelihood of success.

Lastly, the District must show that when the equities and interests of the parties are balanced, the District will suffer greater harm than the parents will suffer if the requested relief is not granted. The District reported undisputed data that A.P.'s acting out behaviors are risky and may likely affect his ability to access his education. Here, the parents have not demonstrated that they would be prejudiced in any manner by the FBA being conducted. Furthermore, the father's concern for an independent FBA may be requested under certain circumstances as set forth.

Under N.J.A.C. 6A:14-2.5(c):

> Upon completion of an initial evaluation or reevaluation, a parent may request an independent evaluation if there is disagreement with the initial evaluation or a reevaluation provided by a district board of education. A parent shall be entitled to only one independent evaluation at public expense each time the district board of education conducts an initial evaluation or reevaluation with which the parent disagrees. The request for an independent evaluation shall specify the assessment(s) the parent is seeking as part of the independent evaluation request.

The school district shall pay for the IEE "unless the school district initiates a due process hearing to show that its evaluation is appropriate and a final determination to that effect is made following the hearing." N.J.A.C. 6A:14-2.5(c) and (c)(1). N.J.A.C. 6A:14-2.5(c)(1)(ii) specifies that "[n]ot later than 20 calendar days after receipt of the parental request for the independent evaluation, the school district shall request the due process hearing." Thus, "[t]he school district shall not delay either providing the independent evaluation or initiating a due process hearing to defend the school district's evaluation." N.J.A.C. 6A:14-2.5(c)(5).

I **CONCLUDE** that when the equities are balanced, the District is suffering and will suffer greater harm than then parents if the Emergent Petition is not granted.

Therefore, I **CONCLUDE** that the District has met the four prongs of the Crowe standards required for emergent relief pursuant to N.J.A.C. 1:6A-12.1 (e) and that the relief shall be **GRANTED.**

ORDER

It is hereby **ORDERED** that the District shall proceed with the functional behavioral assessment and the parents are directed to cooperate in any aspect of the FBA requiring their involvement.

This decision on application for emergency relief resolves all of the issues raised in the emergent relief application therefore, no further proceedings in this matter are necessary. This order on application for emergency relief is final pursuant to 20 U.S.C. § 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. § 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 Policy and Dispute Resolution.

November 17, 2021 _____
DATE

MARY ANN BOGAN, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

MAB/nmn

APPENDIX

EXHIBITS

For petitioner:

Exhibit A Emails dated October 27, 2021

Exhibit B Email from David B. Rubin, Esq. to Mr. and Mrs. P.

Exhibit C Email from Mrs. P. to David B. Rubin, Esq. dated October 27, 2021