



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON EMERGENT RELIEF

OAL DKT. NO. EDS 03832-22

AGENCY DKT. NO. 2022-34285

BERKELEY TOWNSHIP BOARD OF EDUCATION,

Petitioner,

v.

S.H. on behalf of B.M.,

Respondent.

Michael A. Pattanite, Jr., for petitioner (Lenox, Socey, Formidoni, Giordano,
Cooley, Lang, & Casey, LLC, attorneys)

S.H. on behalf of B.M., respondent, pro se

BEFORE **SUSAN L. OLGATI**, ALJ:

STATEMENT OF THE CASE

Petitioner, Berkeley Township Board of Education (the district), seeks an order placing student B.M. in an interim alternative placement of home instruction, due to dangerousness, pending outcome of the underlying due process petition. The district also seeks an order compelling consent to the release of student records to out-of-district educational institutions for consideration of potential placement.¹ Respondent,

¹ This request relates to the underlying due process petition and therefore is not addressed in this emergent order.

S.H., mother of B.M., opposes the interim alternative placement of home instruction and contends that B.M. needs to be in school.

PROCEDURAL HISTORY

On or about May 12, 2022, the district submitted an emergent request and a due process petition to the New Jersey Department of Education, Office of Special Education (OSE). The OSE transmitted the emergent request to the Office of Administrative Law (OAL), where it was filed on May 12, 2022, to be heard as an emergent contested matter.²

Oral argument on the emergent matter was scheduled for May 16, 2022. The proceeding was scheduled via Zoom remote video platform due to ongoing restrictions relating to the COVID pandemic. At the start of the proceeding, S.H. requested an adjournment to consult with/retain legal counsel. As a result, the matter was rescheduled for May 19, 2022. On May 19, 2022, petitioner advised that she was unable to obtain counsel on short notice. Oral argument was held on this date despite S.H.'s lack of representation.

FACTUAL DISCUSSION AND FINDINGS

The following was not disputed and/or, based upon the written submission of the district and video of the April 28, 2022, incident, found by me as **FACT**:

Respondent S.H. is the mother and guardian of B.M.

B.M. is currently ten years old. He was born in August 2011. He is in the fourth grade and resides with his mother in Bayville, New Jersey.

² The district captioned its filing as a "Petition for Emergent Relief, Expedited Hearing, and Due Process." The due process petition was transmitted to the OAL for hearing along with the request for emergent relief. However, the due process petition was not transmitted as an expedited matter.

B.M. came to the district in February 2022. Prior to this, B.M. attended school in Texas. Based on a 2020 Texas individualized education program (IEP), B.M. was deemed eligible to receive special education and related services in the disability category of “emotional disturbance.” See Exhibit B, Texas IEP, at 3.

On March 3, 2022, the district’s child study team (team) held an evaluation planning meeting. B.M. was deemed eligible for special education and related services under the classification of “emotional regulation impairment.” He was placed in general education classes at Clara B. Worth Elementary School with pull-out instruction in reading and math. See Exhibit C, evaluation planning documents; Exhibit D, April 11, 2022, IEP.

On March 24, 2022, B.M. was suspended from school for assaulting a school staff member. See Exhibit E, Administrative Hearing Documents and Incident Reports, at March 31, 2022, letter. Witness statements and the incident report reflect that on this date, B.M., among other things, hit, kicked, and spat in the face of principal Kevin Waldron. He also attempted to punch Principal Waldron in the leg and groin multiple times. See Exhibit E.

Thereafter, B.M.’s IEP was revised to change his placement to a self-contained emotional-regulation-impairment class in Berkeley Township Elementary School due to a pattern of behaviors that were unsafe to himself and others. See Exhibit D.

On April 28, 2022, B.M. was involved in another incident involving an assault on district staff. See Exhibit F, April 28, 2022, Incident Report including witness statements and photographs; Exhibit I, school surveillance video of April 28, 2022.

The video of the April 28, 2022, incident contains no sound but shows B.M. running behind a female staff member and swatting at and slapping/hitting her on the head. Principal Daniel Prima and another male staff member responded to the situation. B.M. continued to swat at, strike, and attempt to strike the staff members. Principal Prima physically restrained B.M., in what appears to be an attempt to prevent B.M. from harming himself and the staff, and brought him down to the ground. The

male staff member assisted with the restraint of B.M. while he was on the ground. The female staff member remained next to B.M. and attempted to calm him. The restraint took approximately twenty-five minutes to deescalate. See Exhibit F; Exhibit I. During the incident, B.M. continued to hit and attempt to hit staff members. He also repeatedly kicked, head butted, and bit Principal Prima. Ibid. As a result of this incident, B.M. was suspended effective April 28, 2022, through May 6, 2022. Exhibit F.

On May 6, 2022, the team held a manifestation determination meeting. See Exhibit G. The team determined that B.M.'s actions on April 28, 2022, were a manifestation of his disability, but were not caused by the district's failure to follow the student's current IEP. The team further determined that B.M.'s IEP needed to be amended to allow for an out-of-district placement in an appropriate supportive placement. Ibid.; see also Exhibit A.

S.H. did not consent to the proposed out-of-district placement and did not consent to the release of records for consideration of a possible out-of-district placement. See Exhibit F.

The district specifically sought consent to release B.M.'s student records to Coastal Learning Center in Howell, N.J., and Ocean Academy in Lakewood, N.J. See Exhibit H.

During the period of suspension resulting from the April 28, 2022, incident, home instruction was offered to B.M. by the district at school, during after-school hours. B.M. attended only one session of home instruction because S.H. contended that the offered instruction conflicted with her work schedule.

Arguments of the Parties

The district argues that it will suffer immediate and irreparable harm if B.M. is returned to school in the district, as he has engaged in repeated physical assaults on staff. It contends that it cannot appropriately address B.M.'s behaviors and that he presents a danger to himself, other students, staff, and the educational environment.

Respondent opposes the interim placement of home instruction. S.H. contends that one to two hours of daily home instruction is not appropriate for B.M. and that he has already missed many days of school. In early May S.H. sent an email to the district advising that she intended to invoke to her right to “stay put.” However, at oral argument on May 19, 2022, S.H. advised that she no longer wished to invoke stay put because she no longer believes that placement in the district is appropriate for B.M. She does not agree with the district’s recommendation for placement in a behavioral program. She further argues that the district failed to properly implement B.M.’s IEP and behavioral intervention plan.

LEGAL ANALYSIS

In special education matters, 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; and
- iv. Issues involving graduation or participation in graduation ceremonies.

[N.J.A.C. 6A:14-2.7(r)(1).]

Here, the district seeks emergent relief relating to issues concerning placement, including interim alternative educational settings, pending the outcome of the due process proceedings. Accordingly, I **CONCLUDE** that the district’s request for emergent relief is consistent with N.J.A.C. 6A:14-2.7(r)(1)(ii) and (iii) and is therefore appropriate for consideration herein.

Under Crowe v. De Gioia, 90 N.J. 126, 132–35 (1982), and N.J.A.C. 1:6A-12.1(e), emergency relief may be granted if the judge determines from the proofs that each of the following elements 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.

The moving party must satisfy all four prongs of this standard to establish an entitlement to emergent relief.

As to the first prong of the standard for emergent relief, the district asserts that it will suffer irreparable harm if its requested relief is not granted. Here, B.M. has been involved in at least two incidents since his February 2022 transfer to the district that resulted in his suspension from school due to acts of physical aggression/assault of district staff. His behaviors during these incidents included, but were not limited to, slapping, hitting, punching, kicking, biting, and spitting. These behaviors not only harmed staff members but continue to pose a risk to the other students, to teachers, and to B.M. himself. The district contends that it is unable to appropriately address B.M.'s behaviors.

Accordingly, I **CONCLUDE** that the district has demonstrated irreparable harm to its staff, to its students, to the educational environment, and to B.M. himself if he were to return to school in the district rather than the interim alternative placement of home instruction.

As to the second and third prongs of the standard for emergent relief, the district asserts that its right to educate a student in the least restrictive environment is well

settled and that B.M. must be educated in an out-of-district placement that can support his behavioral needs while providing him with an appropriate education. Additionally, the district contends that based on the record in this matter, there is a reasonable probability of its success on the merits.

The district is required to educate all students, and provide a free appropriate public education pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et seq., and the New Jersey Administrative Code for Special Education, N.J.A.C. 6A:14, et seq. When determining the least restrictive environment, consideration must be given to the “potentially beneficial or harmful effects which a placement may have on the student with disabilities or the other students in the class.” N.J.A.C. 6A:14-4.2(a)(8)(iii).

Additionally, N.J.A.C. 6A:14-2.7(n) provides a mechanism to remove a student with a disability when district board of education personnel maintain that it is dangerous for the student to be in the current placement and the district and the parent cannot agree on an appropriate placement. In these situations, an administrative law judge may order a change in placement for not more than forty-five calendar days according to the provisions of 20 U.S.C. § 1415(k) and its implementing regulations.

Accordingly, I **CONCLUDE** that the district has demonstrated that the legal right underlying its due process claim is settled, and that there is a likelihood of prevailing on the merits of the underlying claim for an out-of-district placement.

As to the fourth prong of the standard for emergent relief, the district argues that a balancing of the hardships to the parties demonstrates that it must be granted the interim alternative placement because B.M.’s behaviors present a danger to himself, other students, staff, and the educational environment.

S.H. argues that home instruction is not appropriate for B.M. and that he needs to be in school. She gave somewhat conflicting testimony regarding being unable to bring B.M. to home instruction because it conflicted with her work schedule, and having missed work due to being at home with B.M. during his suspension. She initially

contended that due to work she was unable to be home during the day when home instruction was offered, and that she could not bring B.M. to home instruction offered at school during after-school hours until after 4:00 p.m. At oral argument on May 19, 2022, the district confirmed that it could provide home instruction to B.M. at his home at/after 4:00 p.m.

Having considered the equities and interests of the parties, I **CONCLUDE** that the district has demonstrated that it, and indeed B.M., will suffer greater harm if he is not placed in the interim alternative placement of home instruction pending the outcome of the underlying due process action. S.H. now agrees that B.M.'s current placement is not appropriate and that he requires an out-of-district placement. However, S.H. disagrees with the potential placements recommended by the district and has not consented to the release of B.M.'s records to explore possible out-of-district placement. B.M. has been suspended since April 28, 2022, and has attended only one session of home instruction offered by the district. He needs to begin receiving instruction.

Based on the above, I further **CONCLUDE** that the district has satisfied all four prongs of the standard for emergent relief and that its request to place B.M. in the interim alternative placement of home instruction pending the outcome of the due process petition should be granted.

ORDER

It is **ORDERED** that the district's request for emergent relief to place B.M. in an interim alternative placement of home instruction, pending outcome of the underlying due process petition, is **GRANTED**. Consistent with my oral ruling placed on the record on May 19, 2022, the district shall provide B.M. with home instruction beginning on May 23, 2022, starting at 4:45 p.m., as agreed by the parties. The home instruction shall occur in B.M.'s home and be provided by a teacher along with a behaviorist. Home instruction shall be provided for one to two hours, Monday through Friday, as B.M. is able to tolerate. The dates and times of the ordered home instruction may be modified by the mutual written agreement of the parties, or if the district demonstrates that it is unsafe to continue with same in B.M.'s home.

This order on application for emergency relief shall remain in effect until issuance of the final decision in the matter. A conference call is scheduled for **May 26, 2022, at 4:00 p.m., or, alternatively, June 1, 2022, at 4:00 p.m.**, to schedule hearing dates and establish a pre-hearing order for the due process petition.³ 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.

May 20, 2022

DATE

SUSAN L. OLGATI, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

SLO/as

³ Alternate dates were provided to the parties because S.H. advised that she was meeting with counsel on Monday May 23, 2022, for possible retention. S.H. was advised to have counsel retained by her, if any, to file a letter of representation with the OAL.