



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION ON
SUMMARY DECISION

OAL DKT. NO. EDS 03832-22

AGENCY DKT. NO. 2022-34285

**BERKELEY TOWNSHIP BOARD OF
EDUCATION,**

Petitioner,

v.

J.H. ON BEHALF OF B.M.,

Respondent.

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

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

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

Record Closed: August 8, 2022

Decided: August 17, 2022

STATEMENT OF THE CASE

Petitioner, Berkeley Township Board of Education (the District), seeks an Order granting summary decision in its favor. The District also seeks an Order compelling

consent/authorizing the District to send the student records of B.M. to potential out-of-district placements, and continuing B.M.'s Interim Alternative Placement of home instruction until he is placed in an appropriate program out-of-district. Respondent J.H., the mother of B.M., filed no response to the motion.

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

On or about May 12, 2022, the District filed a request for emergent relief and Due Process Petition (Petition) with the New Jersey Department of Education, Office of Special Education (OSE). The OSE transmitted the request for emergent relief to the Office of Administrative Law (OAL), where it was filed on May 12, 2022, to be heard as an emergent contested matter.

Following a May 19, 2022, hearing on the emergent application, the undersigned issued an Order dated May 20, 2022, granting the District's request for emergent relief and placing B.M. in an Interim Alternative Placement of home instruction, due to his behaviors which presented a danger to himself and others, pending outcome of the underlying Petition.

Hearing on the District's Petition was scheduled to begin on July 7, 2022. On the morning of July 7, 2022, J.H. sent an email to the OAL advising that B.M. was ill and unable to participate in the in-person hearing.¹ The District's counsel and its representative appeared for the in-person hearing as scheduled. As there was no plan for respondent's virtual participation in the hearing, and as the hearing room was not equipped for same, I advised that parties that I would conduct a telephone conference to discuss procedural issues including respondent's recent filing of a Due Process Petition which had not yet been transmitted to the OAL. Additionally, we clarified that the only remaining issue of the District's underlying Petition was the release of student records to explore potential out-of-district placements. During the July 7, 2022, conference, respondent continued to refuse to consent to the release of student records to any potential out-of-district placements suggested by the District. The District

¹ The hearing was scheduled as an in-person proceeding at J.H.'s request.

however agreed to send student records to out-of-district placements requested by J.H. During the conference, the District also advised of its intent to file the present motion for summary decision as the petitioner failed to produce any evidence in opposition to the Petition.

Later that same day, J.H. sent an email to the District with copy to the OAL advising that she consented to the release of the student records to Toms River School District, Central Regional School District, Lacy Township School District, and Brick School District. She continued to refuse to consent to the release of student records to any potential out-of-district placements recommended by the District.

On or about July 18, 2022, the District filed the present motion for summary decision. Respondent filed no opposition to the motion.

FINDINGS OF FACT

Based the District's unopposed motion, as well as the findings from my May 20, 2022, Order on emergent relief, I **FIND** the following as **FACT**:

B.M.'s current educational placement is the Interim Alternative Placement of home instruction.

During the May 19, 2022, hearing on the District's request for emergent relief, S.H. advised that she was not seeking "stay put" for B.M., as she originally requested because she no longer believed that placement in the District is appropriate for B.M. She further argued that home instruction was also not appropriate for him.

On or about May 27, 2022, J.H. signed a release of records form, but crossed out the two potential placements listed by the District—Coastal Learning Academy and Ocean Academy, and instead wrote in "other public districts w/self contained placements w/6-10 kids that is not a behavioral program."

The June 20, 2022 Pre Hearing Order in this matter set a discovery end date of June 27, 2022, and directed that by July 1, 2022, the parties exchange all exhibits intended to be introduced at the hearing and identify all witnesses anticipated to testify at hearing.

The respondent submitted no documentary evidence and identified no witnesses for the hearing by the July 1, 2022, Pre Hearing Order deadline, or by the July 7, 2022 hearing date.

LEGAL ANALYSIS

Summary decision may be rendered in an administrative proceeding if the pleadings, discovery and affidavits “show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” N.J.A.C. 1:1-12.5(b). The standard to be applied in deciding a motion pursuant to N.J.A.C. 1:1-12.5(b) is essentially the same as that governing a motion under R. 4:46-2 for summary judgment in civil litigation. Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 121, (App. Div. 1995), certif. denied, 145 N.J. 372 (1996).

A court should grant summary judgment when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-529 (1995). The Supreme Court of New Jersey has adopted a standard that requires judges to “engage in an analytical process to decide whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” Id. at 533.

I **CONCLUDE** that this matter is ripe for summary decision.

The District argues that to provide FAPE to students requiring services that are not contained within the local education agency, districts may, with consent, seek a

placement in an appropriate out-of-district environment dictated by the student's individualized needs. It argued that the New Jersey Administrative Code allows a District to Petition for Due Process when a parent refuses consent to send the student's records to a prospective out-of-district placement. N.J.A.C. 6A:14-2.3(c); N.J.A.C. 6A:14-2.3(a)(4). The District seeks consent to release B.M.'s student records to out-of-district placements including Ocean Academy, and Manchester Township School District operating Regional Day School at Jackson. The District further continues to argue that it cannot meet B.M.'s needs therefore, the Interim Alternative Placement of home instruction cannot be permitted to lapse.

Here, the District determined that an out-of-district placement was necessary for B.M. because it could not meet his needs in any placement provided by the District. The District argues that without evidence to the contrary, it has met its burden to demonstrate why release of the student records is necessary. It further argues that actual placement of B.M. cannot be secured or advocated for by the District until a potential placement receives B.M.'s student records and accepts him as a student. Finally, the District notes that it will have to reapply for Due Process to compel placement if respondent continues to disagree with placement.

Respondent failed to produce any evidence to defend against the District's request for an Order compelling consent/authorizing release of student records to potential appropriate out-of-district placements and filed no opposition to the present motion. Thus, there is no material issue of fact for a hearing to resolve. Moreover, my May 20, 2022, Order on emergent relief addressed the issue of dangerousness that B.M. posed to himself and others, and concluded that B.M.'s Interim Alternative Placement would be home instruction. B.M.'s student records must be released to potential out-of-district placements so an appropriate program and placement can be identified for the 2022-2023 school year. In the absence of an appropriate out-of-district placement, B.M.'s placement must remain the Interim Alternative Placement of home instruction.

Accordingly, I **CONCLUDE** that District’s Motion for Summary Decision should be **GRANTED** in its favor, and that the motion fully resolves the remaining issue of the District’s Petition.

ORDER

For the reasons set forth herein, I hereby **ORDER** that Summary Decision is **GRANTED** in favor of the District. I further **ORDER** that the District is authorized to release B.M.’s student records to out-of-district placements including Ocean Academy, Manchester Township School District operating Regional Day School at Jackson, and any other surrounding State approved private and public schools. Finally, I **ORDER** that B.M. shall continue in the Interim Alternative Placement of home instruction until he is placed in an appropriate out-of-district program.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2022) 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); 34 C.F.R. § 300.516 (2022). 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.



August 17, 2022

DATE

SUSAN L. OLGIATI, ALJ

Date Received at Agency

Date Mailed to Parties:

SLO/as