***State of New Jersey***
OFFICE OF ADMINISTRATIVE LAW

**AMENDED FINAL DECISION ON EMERGENT RELIEF**
OAL DKT. NO. EDS 05106-22
AGENCY DKT. NO. 2022-34548

**C.M. on behalf of J.M.,**
Petitioner,
v.
**RED BANK REGIONAL BOARD OF EDUCATION,**
Respondent.

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**Gabrielle Pettineo,** Esq., for petitioner (Kenny, Gross, Kovats & Parton, attorneys)

**Athina L. Cornell,** Esq., for respondent (Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC, attorneys)

Record Closed: July 18, 2022 Decided: July 20, 2022

BEFORE **SARAH G. CROWLEY**, ALJ:

## STATEMENT OF THE CASE

Petitioner, C.M., on behalf of her son, J.M., filed a petition for emergent relief against the respondent, Red Bank Regional Board of Education, seeking placement of J.M. back in his home school at Red Bank Regional High School (RBR) in the fall of 2022. There is no current individualized education program (IEP) or placement in place for J.M., and he has been receiving home instruction for over six months with no proposed transition back to RBR. J.M. is a sixteen-year-old rising junior. An amended IEP relating to his transition back to RBR expired on June 17, 2022.

## PROCEDURAL HISTORY

Petitioner filed a due-process petition and a petition for emergent relief with the Office of Special Education (OSE) on June 22, 2022. The matter was transmitted to the Office of Administrative Law (OAL) on June 24, 2022, as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and 14F-1 to -13. In response to the emergent application, respondent submitted an answer to the petition on July 6, 2022. The original return date of June 24, 2022 was adjourned by consent of the parties and several conference calls were conducted via Zoom to discuss a potential settlement of the emergent application. After no resolution was reached, oral argument was presented via Zoom on July 18, 2022, and the record closed at that time.

## FACTUAL DISCUSSION

Petitioner is sixteen years old and is a resident of the Red Bank Regional High School District. He was deemed eligible for special-education services under the classification “other health impaired” (OHI). He has been diagnosed with attention deficit hyperactivity disorder, generalized anxiety disorder, major depressive disorder, and oppositional defiant disorder. He is a rising junior in high school and has been out of school since November 2021. He has been receiving home instruction at a rate of ten hours a week. His education has been disrupted due to ongoing mental-health issues, and some substance-abuse issues since he was a freshman. He was enrolled in RBR in his freshman year and began the 2020–2021 school year at RBR. He experienced a

crisis at home and was hospitalized in late September 2020, and again in October 2020. He underwent inpatient treatment out of state from December 7, 2020, to January 20, 2021.

Upon his return from treatment, in January 2021, a meeting was held with the District and a therapeutic placement was recommended for J.M. He received home instruction and attended a therapeutic program at High Focus Center. In March 2021, through mutual agreement of the parties, J.M. was placed in a small therapeutic out-of-district placement at the Oakwood School in Tinton Falls, New Jersey. He continued in this placement without incident through the remainder of his freshman year. He returned to RBR in the fall of 2021. He experienced some difficulties adjusting, and on November 10, 2021, after an incident where he shouted at a staff member, "you don't want to see me angry," he was suspended for five days. Prior to the November 2021 incident, J.M. had never been disciplined in school. The district never conducted a functional behavior assessment and there was no behavior intervention plan, or any other accommodations offered for J.M. upon his return to school in the fall of 2021.

Following the November 10, 2021, suspension, the petitioner sought treatment at Carrier Clinic for J.M. for one week related to medication management. The District proposed home instruction for ten hours a week, and counseling. An IEP meeting was convened on December 15, 2021, at which time the District recommended continuing home instruction, including counseling. The petitioner continued to request reentry to RBR for J.M., but with no resolution he continued with home instruction through May 2022. The district counseling component did not commence until May 2022. On May 27, 2022, an amended IEP was signed which provided for a transition of J.M. back to RBR by attending one class per day, continued therapy, and supplemental home instruction. After six months of home instruction, there was no FBA conducted by the district and no behavior intervention plan in the amended IEP. It is unclear if any of the accommodations requested by J.M.'s psychiatrist were incorporated or implemented.

The District reported that following J.M.'s return to school for one class a day, his teachers reported that J.M. was having difficulty concentrating, leaving class, and failing to complete assignments. None of this was reported prior to an incident that occurred on

June 3, 2022, that resulted in a one-day suspension for cursing at the principal and leaving school grounds. The amended IEP from May 27, 2022, provided for J.M. to attend one class a day at RBR and otherwise continue with home instruction. The District proposes to continue with home instruction as part of a "gradual reentry program," or in the alternative to "explore" out of district placements. It is unclear what the District is proposing, as no amended IEP or program has been provided.

There was a significant amount of discussion about the District's request for a psychiatric evaluation. The District alleges that there was an agreement of the parties for J.M. to undergo a psychiatric evaluation. I see no specific reference to an such an agreement in the amended IEP, nor does it state that any such placement in contingent upon such an evaluation. Moreover, if such an exam was needed to develop an appropriate IEP and get J.M. back to school full time then the district should have filed for due process to compel such an exam. Refusing to propose an appropriate IEP is not the proper recourse. To continue J.M. on home instruction for over six months because they want their own psychiatric examination is not appropriate. The District was provided with a report from J.M.'s psychiatrist and from CHOP and several accommodations were suggested. It is unclear if any of these accommodations when they sent him back to school for one period a day.

## LEGAL ANALYSIS AND CONCLUSION

N.J.A.C. 1:6A-12.1(a) provides that the affected parent(s), guardian, board, or public agency may apply in writing for emergency relief. An emergency-relief application is required to set forth the specific relief sought and the specific circumstances that the applicant contends justify the relief sought. Each application is required to be supported by an affidavit prepared by an affiant with personal knowledge of the facts contained therein and, if an expert's opinion is included, the affidavit shall specify the expert's qualifications.

Emergent relief shall only be requested for the following issues, pursuant to N.J.A.C. 6A:14-2.7(r)(1):

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.

In this case, emergent relief is appropriate because sections i, ii, and iii are all implicated, as is one of the basic tenets of the IDEA of providing a free and appropriate education (FAPE) in the least restrictive environment (LRE). Petitioner seeks to have J.M. placed back at RBR full time in September. J.M. has been receiving home instruction for six months with no transition plan in place. There was an amended IEP providing for a gradual reentering program of one class a day. There was no FBA conducted, nor does it appear that a BIP in place or implemented in connection with the reentry plan. An incident occurred in June that resulted in a one-day suspension, and there has been no progress on a plan since that date. The incident does not appear to the undersigned to be enough to prevent J.M. from returning to school and/or from continuing with a plan to send J.M. back to RBR full time. The District claims that it needs a psychiatric evaluation to prepare an appropriate IEP but failed to file for due process to seek same. There is a report from the Children's Hospital of Philadelphia (CHOP) and a report from J.M.'s treating psychiatrist which indicate that a transition back to school is important to J.M.'s mental health and recovery. The plan to transition J.M. back to school in May without any accommodations or a BIP was destined to fail. Both J.M.'s treating doctor and the report from CHOP indicate that accommodations and a BIP would be appropriate to transition him back to school.

J.M. has been through quite a lot in the past two years and getting him back to normal and school full time is essential emotionally as well as academically. He is on medication to help him with his mental-health issues and is stabilized and continuing with his counseling. The report from his treating doctor indicates this, and there is nothing provided to the contrary. If the district wants a psychiatric evaluation, and there was a

refusal to permit such an examination, then due process should have been filed by the District. To continue with ten hours of home instruction indefinitely is not an acceptable plan for this student and has clearly resulted in a failure to provide FAPE in the LRE. There is no evidence that J.M. has been a danger to himself or others, and the incident that resulted in a one-day suspension in June is not a legitimate basis to continue to deny him a FAPE in the LRE.

The standards for emergent relief are set forth in Crowe v. DeGoia, 90 N.J. 126 (1982), and codified at N.J.A.C. 6A:3-1.6. These standards for emergent relief require irreparable harm to the petitioner if the requested relief is not granted; a settled legal right underlying the petitioner's claim; a likelihood that the petitioner will prevail on the merits of the underlying claim; and, when the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent if the request is not granted.

Petitioner bears the burden of satisfying all four prongs of this test. Crowe, 90 N.J. at 132–34. J.M. has been out of school and receiving home instruction since November 10, 2021, with the exception of one week in May 2022 when he was permitted to come to school for one class a day. The petitioner has established that the harm in not transitioning J.M. back to school will be irreparable. He has been at home and away from any peers for almost a year. Remaining on full-time in-home instruction will result in irreparable harm. Although it is difficult to determine an appropriate placement on an emergent application, the district has proposed no reasonable alternative and made little effort to transition J.M. back to school full time and there is no reason to further delay a return to RBR full time in the fall. The District must come up with an appropriate behavior intention plan and an FBA should be conducted. In addition, the petitioner should submit to a psychiatric examination to help assist the district in coming up with the best plan for J.M. in school. However, neither the FBA or the psychiatric examination shall delay return to school full time in the fall. The greater harm has been demonstrated by the petitioner.

The second prong of the test is if the petitioner has set forth a well-settled legal right. It is well settled that a district is required to provide all special-education students FAPE in the LRE. The District had J.M. on home instruction at a rate of 10 hours a week for six months and is proposing continued home instruction. They have no proposed plan

for J.M. to return to school. Home instruction at a rate of 10 hours a week for six months and continuing has resulted in a denial of FAPE in the LRE. If the District needed an evaluation to develop the appropriate IEP, then it should have filed for due process to get it. If the District wants to propose an out-of-district placement, then put it in the IEP and propose it and litigate it, but to continue home instruction at a rate of ten hours a week is no longer an option and is not appropriate for a student that does not present a danger to himself or others. This home instruction is a result of an incident that occurred six months ago that resulted in a 4-day suspension. Petitioner has demonstrated a legal right that is well settled.

Next, petitioner must demonstrate the likelihood of prevailing on the merits. If the issue is whether J.M. is being denied FAPE in the LRE, then, yes, the petitioner is likely to prevail on the merits. A decision on the appropriate placement is not an issue that is generally decided on an emergent basis. However, leaving J.M. in home instruction is not an option, and if the District needs evaluations to decide where he should be or to come up with a reasonable behavior intervention plan to get him back in school then it should have filled for due process to get the appropriate evaluations. J.M.'s own counselor opined that a "transition with appropriate accommodations" was appropriate. However, the district has failed to do this and J.M. is now entering his junior year of high school. He should be returned to school full time in the fall with appropriate accommodations and a behavior intervention plan in place. The district should accomplish this immediately and the petitioner shall produce J.M. for a psychiatric evaluation. However, such an evaluation and the results of same shall not prevent full return to school in September 2022.

The final Crowe factor requires a balancing of the equities in determining who would sustain the greater harm should emergent relief not be granted. In this case, it is clear that the petitioner would sustain the greater harm if emergent relief were not granted. There has been no demonstration or allegation that J.M. has presented a danger to himself or others. He received a 4-day suspension in November of 2021 and has been out of school since then. He has gone through rehab, counseling and is stable on medication at this time and the district has not proffered any legitimate reason to keep

him out of school any longer. The balancing of equities requires a return of J.M. full time to RBR in the fall.

Therefore, for all of the foregoing reasons, I **CONCLUDE** that petitioner has demonstrated entitlement to emergent relief in the form of a return to RBR full time at the start of the school year in September of 2022. The IEP should be drafted to include a behavior intervention plan and an FBA should be conducted as soon as possible. In addition, the petitioner shall produce J.M. for a psychiatric examination but the examination and the results of same as well as the FBA shall not delay the reentry of the petitioner to school full time in September 2022l.

## ORDER

It is **ORDERED** that the petitioner's application for emergent relief is **GRANTED** as set forth above and J.M. shall return to RBR full time at the start of the school year in September 2022. It is further **ORDERED** that the petitioner shall produce J.M. for a psychiatric examination at the party's earliest convenience.

This decision on application for emergency relief does not resolve all of the issues raised in the due process complaint; therefore, further proceedings in this matter are necessary. However, the foregoing decision of on the application for emergency relief resolves the issue of the placement of J.M. for the fall. This decision 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.

July 20, 2022(amended)
DATE

Sarah G. Crowley
**SARAH G. CROWLEY**, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

SGC:sm