



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

GRANTING EMERGENT RELIEF

OAL DKT. NO. EDS 12974-23

AGENCY DKT. NO. 2024-36639

G.R. ON BEHALF OF H.M.,

Petitioner,

v.

**LAKESWOOD TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

G.R., petitioner, pro se¹

Michael I. Inzelbuch, Esq., for respondent Lakewood Township Board of
Education

Record Closed: January 24, 2024

Decided: January 26, 2024

BEFORE **TRICIA M. CALIGUIRE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This case arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1401 to 1484(a), and 34 C.F.R. §§ 300.500 et seq. (2022). By a request for

¹ G.R. is H.M.'s legal guardian.

emergent relief and petition for due process, petitioner G.R. seeks an order requiring the immediate enrollment of H.M. in Lakewood Township High School (LHS) and a program consistent with the individualized education program adopted for H.M. as of March 29, 2023 (IEP), by which H.M. was placed at the Alpha School, an out-of-district placement which petitioner alleges can no longer meet H.M.'s specialized needs and is unable to provide the program developed for H.M. and memorialized in the IEP.

On October 11, 2023, petitioner filed a request for due process with the Department of Education, Office of Special Education (OSE), which, following mediation, was transmitted to the Office of Administrative Law (OAL) on November 21, 2023, for hearing as a contested case. On November 28, 2023, the parties appeared before the Honorable Mary Ann Bogan, ALJ, for a settlement conference, but the matter did not settle and was assigned to me for hearing.

On December 5 and 12, 2023, the parties participated in telephone hearings, during which the parties agreed to an independent evaluation of the programs and placements at both the Alpha School and LHS, the report of which was issued on January 4, 2024. Attempts to resolve the matter via identification of an alternate out-of-district placement were unsuccessful, and on or about January 12, 2024, petitioner filed a request for emergent relief. Oral argument on emergent relief was held on January 24, 2024, and the record closed.

FACTUAL DISCUSSION AND FINDINGS

The following facts are not in dispute and form the basis for the below decision. Accordingly, I **FIND** as **FACTS**:

1. H.M. is a sixteen-year-old female who is eligible for special education (SE) and related services in the Multiply Disabled (MD) classification category. Her disabilities include autism, moderate intellectual disability, communication

- impairment, and emotional regulation impairment. H.M. also suffers from post-traumatic stress disorder (PTSD)² and Crohn's disease.
2. At all relevant times, H.M. has resided with G.R. in Lakewood Township, the local school district required under the IDEA and New Jersey law to provide her with a free appropriate public education (FAPE).
 3. Since 2018, H.M. has attended Alpha, then the School for Children with Hidden Intelligence, and for medical reasons, was provided home instruction before returning to Alpha in January 2022.
 4. H.M.'s current IEP, adopted for implementation on March 29, 2023, continues her placement at Alpha with a one-to-one aide, related services, transportation, and extended school year.
 5. Petitioner admits to being initially satisfied with the SE and related services provided to H.M. at Alpha but, prior to the beginning of the 2023–2024 school year, expressed concerns to the District child study team (CST) that Alpha was no longer an appropriate placement.
 6. On or about August 2023, the CST sent H.M.'s records to three out-of-district schools; two of the schools did not accept H.M., and G.R. rejected the third.
 7. There is no evidence that the CST sent H.M.'s records to other potential placements prior to October 11, 2023, when G.R. filed for due process.
 8. Between March 2023, and November 2023, the District performed the following evaluations of H.M.: educational, functional behavioral assessment (FBA), occupational therapy (OT), physical therapy (PT), psychological, and speech

² As described in numerous reports of professional evaluations of H.M., including by District staff, H.M. was subject to physical, emotional and sexual abuse at a very early age.

and language. The reports of these evaluations included the following statements, in pertinent part:

[A]lthough [G.R.] is grateful to . . . Alpha for helping [H.M.] over the years, [she] does not feel that Alpha is able to meet [H.M.'s] educational needs anymore.

[H.M.] is functioning significantly below grade level and would benefit from a small educational placement that offers strong behavioral and [OT] supports along with a functional academic curriculum that is supplemented by pre-vocational and life skills training.

[H.M.] would not benefit from transferring into the [LHS] self-contained MD program. The other students are functioning at a higher level than her and she would lose social opportunities to interact with her peers, because she requires a specially designed educational program that is more restrictive than the current students need. [H.M.] would be isolated from the rest of the class most of the time, which could have a negative impact on her social and emotional progress.

[FBA, Vivian Attanasio, M.S., BCBA, LBA (November 5, 2023), at 4, 11.)

[H.M.] presents with severe deficits in her receptive and expressive language skills, limited attention and engagement. [S]he requires significant support in order to remain engaged and calm and can easily become dysregulated and unsafe. Individual [speech and language] sessions are necessary due to the severity of the delays with which [H.M.] presents in addition to her unsafe behaviors.

[Speech and Language Evaluation, Malky Shonbrun, MS, CCC-SLP (April 19, 2023), at 11.]

9. On January 4, 2024, Lisa Spano, Psy.D., BCBA-D, who was retained by the District, issued a report on the program evaluation she conducted. Dr. Spano observed the relevant programs at Alpha and LHS; interviewed G.R., staff at

both schools, and H.M.'s private therapist; and reviewed H.M.'s records. Dr. Spano concluded, in pertinent part:

Alpha School is not an appropriate placement for [H.M.] at this time as it does not meet her highly individualized needs. **[H.M.] requires a school that specializes in the treatment of individuals with [autism spectrum disorder] (ASD) utilizing the principles and methodologies of Applied Behavior Analysis (ABA).**

[H.M.] needs daily access to a Board-Certified Behavior Analyst (BCBA)[.]

[H.M.] requires access to highly trained and experienced ABA professionals that have expertise in ASD and the treatment of problem behaviors.

The two observed [MD classes at LHS] were not appropriate for [H.M.] as the instructional level and skill level of the students were too high.

While some of the life, vocational, and community-based activities that [H.M.] would be exposed to at [LHS] would be appropriate, the format and methodology in which these activities are currently taught at the high school would not meet her individualized needs.

[G.R.] agrees that [H.M.] would likely not make academic progress at [LHS]. However, she stated that her interest in the district's program would be for [H.M.] to access [OT] and the life and vocational skills program[.]

While [H.M.] would be *exposed* to life and vocational skills concepts, [LHS] does not specialize in the utilization of ABA principles and techniques that [H.M.] needs to make meaningful progress toward these goals. Furthermore, adding a BCBA to the District's program would be an ineffective attempt to piecemeal a program to meet [H.M.'s] needs; rather, **[H.M.] needs an out-of-district placement with established ABA systems.**

[Program Evaluation, Dr. Spano (January 4, 2024), at 21-22 (emphases in original).]

10. G.R. contends that at Alpha, H.M. is not being educated properly. She has insufficient OT, and "she is being restricted in manners that are not acceptable

for her condition,” including being held by aides, having her hands held, being belted to her seat during group instruction, and being moved without communication to her. Ltr. Br. of Petitioner (January 24, 2024), at 2.

11. Dr. Spano reported that H.M.’s SE teacher at Alpha, Jessica Duda, stated that during whole group instruction, Duda “fastens a belt buckle” to “stabilize” H.M. (Program Evaluation at 5-6.) Dr. Spano did not report observing the use of restraints.

12. The District concedes that Alpha is an inappropriate placement for H.M. and contends that LHS is also inappropriate. Further, counsel represented that the District continues to look for an appropriate, state-approved, out-of-district placement, including those recommended by G.R.

13. G.R. has provided written consent to a neuropsychological evaluation of H.M. to be conducted by Dr. Samuel D. Mandelman. Further, G.R. agreed to share with the District the results of a private psychiatric evaluation, to be conducted on January 29, 2024.

LEGAL ANALYSIS, CONCLUSIONS AND ORDER

N.J.A.C. 1:6A-12.1(a) provides that the affected parent (or guardian) may apply in writing for emergent relief. An emergent 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.

Emergent relief shall only be requested for specific issues, including placement pending the outcome of the due process proceeding. N.J.A.C. 6A:14-2.7(r)(1)(iii). Here, petitioner has filed a due process petition and requested emergent relief to remove H.M. from her current placement and to immediately enroll her at LHS in a program and placement where she may obtain the SE and related services described in the IEP.

Therefore, I **CONCLUDE** that petitioner has established that the issue in this matter concerns placement pending the outcome of the due process proceeding.

The standards for emergent relief are set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), and are codified at N.J.A.C. 6A:3-1.6. The petitioner bears the burden of proving:

1. that the party seeking emergent relief will suffer irreparable harm if the requested relief is not granted;
2. the existence of a settled legal right underlying the petitioner's claim;
3. that the party seeking emergent relief has a likelihood of prevailing on the merits of the underlying claim; and
4. when the equities and the interests of the parties are balanced, the party seeking emergent relief will suffer greater harm than the respondent.

[Crowe, 90 N.J. at 132-34.]

Irreparable Harm

To obtain emergent relief, petitioner must demonstrate more than a risk of irreparable harm to H.M. Petitioner must make 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." Cont'l. Group, Inc. v. Amoco Chems. Corp., 614 F. 2d 351, 359 (D.N.J. 1980).

In Crowe, the Supreme Court found that irreparable harm is that which "cannot be redressed adequately by monetary damages." 90 N.J. at 132-33. In education cases, money damages are not available; "the analysis to be used is that if compensatory education, provided at a later date, cannot remedy the situation, then the harm is irreparable." M.P. and N.P. o/b/o D.P. v. Roxbury Tsp. Bd. of Educ., 2022 NJ AGEN LEXIS 665, OAL Dkt. No. 4671-22. However, irreparable harm in SE cases has also 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 (District's refusal to amend child's IEP to increase pre-school sessions or to reimburse parents did not present risk of irreparable harm).

Here, petitioner contends that irreparable harm is established because H.M. is not being educated properly; she has regressed, as evidenced by being assigned IEP goals she had previously "mastered"; and is being restrained in an unacceptable manner. While the risk of physical injury to H.M. appears low, given that a one-to-one aide is with her during the school day, the risk of emotional injury from improper restraints appears high, especially given H.M.'s mental health history, which is replete with abuse leading to PTSD. See A.G. o/b/o S.P. v. East Windsor Reg. Bd. of Educ., 2009 NJ LEXIS AGEN 279 (irreparable harm found in loss of psychiatric services for student at risk of suicide); Hamiton Tsp. Bd. of Educ. v. L.E. and A.E. o/b/o J.E., 2018 NJ LEXIS AGEN 550, at *10-11 (student removed from district for behavioral reasons "is subject to irreparable harm, for remaining on home instruction, because he is not receiving the services he is to be provided").

With respect to the availability of compensatory education to "make up" at a later date the education and related services H.M. is currently not receiving, H.M. is sixteen years old and already far behind her same-age peers in her academic and functional development. The District has credibly explained its difficulty in identifying related service providers to work with H.M. outside of school; offering H.M. compensatory education at a later date is not, for now, a solution.

I **CONCLUDE** that the petitioner has met the burden of establishing that H.M. will experience irreparable harm if she remains in her current placement at Alpha.

The Legal Right Is Settled and the Likelihood of Prevailing on the Merits

The second and third considerations are whether the legal right underlying petitioner's claim is settled and, if so, whether she is likely to prevail at a hearing on the merits. N.J.A.C. 6A:3-1.6(b)(2), (3). The District is obligated to educate H.M. in the least

restrictive environment (LRE) with a program that is individually tailored to her unique educational needs. Endrew F. v. Douglas County School Dist. RE-1, 580 U.S. 386 (2017). The local district satisfies the requirement that a child with disabilities receive FAPE by providing personalized instruction with sufficient support services to permit that child to benefit educationally from instruction. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 203, (1982). The IDEA does not require that the District maximize H.M.'s potential or provide her with the best education possible. Rather, the IDEA requires a school district to provide a basic floor of opportunity. Carlisle Area Sch. v. Scott P., 62 F.3d 520, 533-34 (3rd Cir. 1995).

The law describes a continuum of placement options, ranging from mainstreaming in a regular public school as least restrictive to enrollment in a non-approved residential private school as most restrictive. 34 C.F.R. § 300.115 (2012); N.J.A.C. 6A:14-4.3. Further, New Jersey law requires that “students with disabilities shall be educated in the [LRE].” N.J.A.C. 6A:14-4.2(a).

There is no question that the March 2023 IEP, placing H.M. at Alpha, is not adequate to meet her educational needs. While respondent claims that LHS is also inadequate, the District cannot avoid its legal obligation to provide H.M. with a FAPE in the LRE because a better alternative has yet to be identified. Simply put, an MD class at LHS that is not ideally suited to H.M.'s many challenges is a better alternative than Alpha, where both parties agree H.M. is not thriving, and her individual needs are not being met. There are no material facts in dispute, and Dr. Spano provided expert support to change H.M.'s placement (though I recognize that she does not recommend LHS).

I **CONCLUDE** that petitioner has shown that H.M. has the legal right to be educated at LHS, and petitioner has demonstrated a likelihood of prevailing on the merits of her claim.

The Petitioner Will Suffer Greater Harm Than the Respondent

The final prong of the above test is whether the equities and interests of the parties weigh in favor of granting the requested relief to H.M. Petitioner argues that H.M. will

suffer greater harm if emergent relief is not granted, such harm being “continued suffering in a program that does not understand her, that does not treat her with the right care and respect and is not educating her” as provided in her IEP. Petitioner’s Br., ¶ 4. Respondent counters that “placement in an inappropriate program [at LHS] may cause greater harm” than remaining at Alpha. Br. of Respondent (January 22, 2024), at 3.

Here, it is worthy of note that petitioner’s concerns regarding H.M.’s continuing placement at Alpha were communicated to the CST before the current school year began, and, to its credit, the District responded by sending H.M.’s records to three out-of-district schools which specialize in educating students with similar challenges. But then, that outreach stopped until after petitioner filed for due process (in October 2023).

Placing H.M. at LHS will not be enough; the parties must complete the evaluation process, which I ordered earlier this month, so that potential placements can adequately evaluate whether they can provide H.M. “personalized instruction with sufficient support services to permit [her] to benefit educationally[.]” Rowley, 458 U.S. at 203. The parties have considered whether home instruction with OT services at LHS (under specific conditions after school hours) would be a satisfactory alternative while the search for a permanent placement continues. I encourage continuation of such discussions but cannot allow them to prevent immediate action by respondent to provide H.M. with the SE and services outlined in her IEP.

I **CONCLUDE** that H.M. would suffer greater harm if the requested relief was not granted. Petitioner has satisfied the four requirements for emergent relief.

ORDER

Based on the foregoing, together with the record as a whole, I **ORDER** that the emergent petition of G.R. on behalf of H.M. seeking H.M.’s enrollment at LHS, pending her acceptance and placement at an out-of-district school acceptable to both parties, is **GRANTED**. I **ORDER** the District CST to immediately meet with petitioner to determine

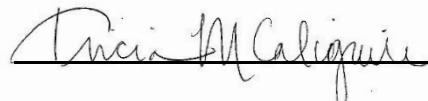
the schedule of attendance at LHS appropriate for H.M. given her medical conditions, if any such accommodations in school hours and/or transportation are necessary.³

Further, I **ORDER** petitioner to immediately consent to a full set of educational and behavioral evaluations as have been or will be identified as necessary by respondent to determine an appropriate program and placement for H.M., and to consent to the release of records, whether educational or medical, regarding H.M. as requested by the professionals retained to evaluate H.M. and/or as requested by those out-of-district schools which may consider H.M. for enrollment in the 2023–2024 and/or 2024–2025 school years.

This decision on the application for emergency relief resolves all of the issues raised in the emergent and due process applications; therefore, no further proceedings in this matter are necessary. 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, guardian 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.

January 26, 2024 _____

DATE



TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

TMC/cb

³ For example, the record includes discussion of H.M. arriving at school after regular school hours have begun due to complications of Crohn’s disease.