



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

EMERGENT RELIEF

OAL DKT. NO. EDS 14348-23

AGENCY DKT. NO. 2024-36884

N.M. ON BEHALF OF J.M.,

Petitioner,

v.

NEWARK CITY BOARD OF EDUCATION,

Respondent.

Vaness Roper, Parent Advocate, for petitioner pursuant to N.J.A.C. 1:1-5.4(a)7

Christine Martinez, Esq., for respondent (Machado Law Group, attorneys

Record Closed: January 16, 2024

Decided: January 17, 2024

BEFORE **MARGARET M. MONACO**, ALJ:

On December 28, 2023, petitioner N.M. on behalf of her son J.M. filed a Request for Due Process Hearing and a Request for Emergent Relief with the Department of Education, Office of Special Education. The Office of Special Education transmitted petitioner's Request for Emergent Relief to the Office of Administrative Law, where it was scheduled for oral argument on January 3, 2024. Petitioner's Request for Emergent Relief seeks home instruction, with 1:1 BCBA assigned, pending an out-of-district placement at an ABA school. Oral argument on petitioner's motion for emergent relief was adjourned at the parties'

request and rescheduled for January 12, 2024. On January 5, 2024, Mr. Roper filed a brief and additional documentation in support of petitioner's motion. On January 9, 2024, the District filed a brief and certifications of Special Education Supervisors Dr. Shirley Fonseca (Fonseca Cert.) and Cristina Pennetti (Pennetti Cert.) in opposition to the motion. On January 9 and January 11, 2024, Mr. Roper submitted additional documentation with respect to petitioner's motion. Oral argument was entertained on January 12, 2024, after which Mr. Roper submitted additional documentation. On January 16, 2024, the District filed a supplemental brief, and the record was closed.

FACTUAL DISCUSSION

For purposes of the within motion, I **FIND** the following **FACTS**:

J.M. is four years old. J.M. has been diagnosed with autism spectrum disorder and is non-verbal. (See Fonseca Cert. at ¶ 4; letter from Dr. Chung.)

In or around May/June 2023, petitioner began J.M.'s transfer to the District from New York. (Fonseca Cert. at ¶ 5.) Petitioner provided to the District a copy of an IEP for J.M. from New York. (Id. at ¶ 6; see Id. at Exhibit A.)

Upon enrollment, J.M. was matched to Community Hills Early Learning Center via NewarkEnrolls in order to have J.M. attend the District's Extended School Year (ESY) program at Oliver Street School. (Fonseca Cert. at ¶ 7.) According to the District's Report of Accident to Pupil, on July 10, 2023, during ESY, J.M. was touched on the shoulder by another student and, as J.M. does not like to be touched, he ran away, tripped, fell, and bumped his head. (Id. at ¶ 8; see Id. at Exhibit B.) J.M. was taken to the school nurse for evaluation and his parent was notified. (Ibid.) Petitioner did not return J.M. to the District's ESY program after this incident. (Id. at ¶ 9.)

On July 14, 2023, the parent took J.M. to the emergency room. According to the hospital records, the "[a]ssociated [d]iagnoses" regarding that visit were head injury and traumatic hematoma of the forehead. (See Saint Barnabas records.)

On July 24, 2023, an evaluation planning meeting was held. The District's Child Study Team proposed additional assessments, including a social assessment, a speech/language assessment, and an occupational therapy assessment. (Fonseca Cert. at ¶ 10; see Id. at Exhibit C.) Petitioner consented to the proposed assessments and later consented to a psychological assessment on August 4, 2023. (Id. at ¶¶ 10, 11; see Id. at Exhibits D and E.)

In August 2023, the District conducted J.M.'s evaluations. (Fonseca Cert. at ¶ 12.) J.M. underwent an August 3, 2023 occupational therapy evaluation; an August 12, 2023 speech/language evaluation; an August 15, 2023 social history assessment; and an August 20, 2023 psychological evaluation. (Ibid.)

Beginning with the 2023–2024 school year, J.M. was registered for, matched with, and attended the District's Early Childhood Center – North Elementary School (ECC). (Fonseca Cert. at ¶ 13.)

The District scheduled an IEP eligibility meeting for September 14, 2023, which petitioner canceled on September 14, 2023. (Fonseca Cert. at ¶ 14.) The IEP eligibility meeting was rescheduled for October 5, 2023, and the IEP team developed an IEP for J.M. based on the classification of Preschool Child with a Disability. (Id. at ¶ 15; see Id. at Exhibit F.) The October 5, 2023 IEP provides J.M. a special education program and related services, including placement in the District's Preschool Disability program; individual occupational therapy twice per week for 30 minutes; and individual speech and language therapy twice per week for 30 minutes. The IEP also provides J.M. with a shared aide for 360 minutes daily, and ESY services. (Id. at ¶ 16; see Id. at Exhibit F.)

According to the District's Nurse's Log, on October 16, 2023, J.M. arrived at school with a bump on his head; J.M. was sent to the nurse for assessment; and his parent was notified. (Fonseca Cert. at ¶ 17; see Id. at Exhibit G.)

According to the District's Nurse's Log and the Reports to Parent of Clinic Visit, on October 16, 2023, J.M. was also assessed twice by the nurse as J.M. had come to school with a reddened eye and, with concerns of conjunctivitis (i.e., pink eye), the nurse contacted

petitioner and recommended that J.M. be seen by urgent care. (Fonseca Cert. at ¶ 18; see Id. at Exhibit G and Reports to Parent of Clinic Visit.)

The parent took J.M. to the emergency room on October 16, 2023. According to the hospital records, a CT of J.M.'s head was taken, and he was diagnosed with a forehead contusion. (See Saint Barnabas records.)

According to the District's records, including the Report of Accident to Pupil, the Nurse's Log, and the Report to Parent of Clinic Visit, on December 12, 2023, J.M. was rolling around on his cot in the classroom during naptime; J.M. rolled off the cot and bumped his head on the floor; J.M. was sent to the nurse for assessment; and his parent was notified. (Fonseca Cert. at ¶ 19; see Id. at Exhibit G and H and Report to Parent of Clinic Visit.) On December 13, 2023, petitioner stopped sending J.M. to school. (Id. at ¶ 20.)

On December 15, 2023, the parent took J.M. to CityMD where, according to the facility's records, J.M. was diagnosed with an unspecified injury of the head. (See CityMD records.) It appears that the parent also took J.M. to the emergency room. (See CBMC records.)

Based on J.M.'s behaviors, and petitioner's refusal to send J.M. to school, the District met with petitioner on December 19, 2023, to discuss placement in the District's ABA program at South Street School (South Street). (Fonseca Cert. at ¶ 21.) South Street is currently a collaboration between the District and Douglass Developmental Disabilities Center (DDDC) of Rutgers, The State University of New Jersey. (Pennetti Cert. at ¶ 3; see Id. at Exhibit A.) At South Street, a qualified behavior analyst (BCBA) directly oversees the program, and the BCBA also trains both the teachers and the paraprofessionals at South Street on applied behavior analysis. (Id. at ¶ 4.) Currently, there are four other students in the South Street classroom proposed for J.M. (Id. at ¶ 5.) A teacher and an aide are assigned to the classroom on a full-time basis. (Ibid.) Additionally, the BCBA visits the classroom four times per week to take data and ensure that the program is meeting the needs of each student. (Ibid.) Students in the South Street ABA program also have structured opportunities to engage with non-disabled

peers in the least restrictive environment. (Id. at ¶ 6.) According to Special Education Supervisor Pennetti, while at South Street, there will continue to be clear communication between the District and petitioner including, but not limited to, a communication book that is shared between the District and petitioner. (Id. at ¶ 7.) J.M.'s progress will also be reported to the parents twice per week on a written form, and in quarterly narratives, and J.M. will be provided with a Picture Exchange Communication System. (Id. at ¶¶ 8, 9.)

According to Special Education Supervisor Fonseca, the District has repeatedly advised petitioner that, at this time, there is no data supporting the need for a 1:1 aide for J.M. (Fonseca Cert. at ¶ 22.) Instead, the District recommended collecting data for thirty days, and then reassessing the need for a 1:1 aide. (Id.)

On December 20, 2023, petitioner advised the District that she wanted to visit South Street prior to consenting to J.M.'s placement, and that she would reconvene after the holidays. (Fonseca Cert. at ¶ 23; see Id. at Exhibit I.) Petitioner's visit to South Street was scheduled for January 4, 2024 at 9:30 a.m. (Pennetti Cert. at ¶ 10; see Id. at Exhibit B.) Before visiting the proposed South Street program, petitioner filed the instant emergent application and the underlying due process petition on December 28, 2023. (Fonseca Cert. at ¶ 24.) Petitioner visited South Street to observe the program on January 4, 2024. (Pennetti Cert. at ¶ 11.)

In connection with her motion, petitioner asserts, among other claims, that J.M. sustained three injuries in less than six months (i.e., a head injury on July 10, 2023, an eye/head injury in October 2023, and a head injury on December 12, 2023), which "demonstrates Newark's public schools as an unsafe environment"; J.M. regressed developmentally while attending the District's school; and the "South [S]treet [ABA] program is not an appropriate ABA school for [J.M.]" based on a variety of listed reasons. Petitioner submitted a letter by a nurse practitioner dated December 19, 2023, which states that J.M. is under the nurse practitioner's care and, "[i]n light of his two recent head injuries (7/2023 and 12/2023), please consider him for home instruction to avert further problems." Petitioner also submitted a letter by Dr. Chung with Mount Sinai, Developmental and Behavior Pediatrics, which states that "[m]other concerned about

[J.M.'s] safety—she states that he was injured in school three times in the past few months” and, “[a]s such, I support her decision to find an alternate school placement that is more appropriate for him as soon as possible, and continuing home instruction in the meantime with appropriate therapies[.]”

LEGAL DISCUSSION AND CONCLUSIONS

An application for emergent relief may only be requested if it concerns issues involving a break in the delivery of services, disciplinary action, placement pending the outcome of due process proceedings, or graduation or participation in graduation ceremonies. N.J.A.C. 6A:14-2.7(r)(1). N.J.A.C. 6A:14-2.7(s) sets forth the standards governing motions for emergent relief and instructs in pertinent part:

Emergent relief may be granted if the administrative law judge determines from the proofs that:

- 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.

See also N.J.A.C. 1:6A-12.1(e); Crowe v. De Gioia, 90 N.J. 126 (1982). “Each of these factors must be clearly and convincingly demonstrated” by the moving party. Waste Mgmt. of N.J. v. Union County. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

Turning to the first criteria, “[i]t is axiomatic that injunctive relief ‘should not be entered except when necessary to prevent substantial, immediate and irreparable harm.’” Garden State Equal. v. Dow, 433 N.J. Super. 347, 351 (Law Div. 2013) (quoting Subcarrier Commc’ns, Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997)); see

Crowe, 90 N.J. at 132. Harm is generally considered irreparable if it cannot be adequately redressed by monetary damages. Id. at 132-33. Petitioner bears the burden of proving that J.M. will suffer irreparable harm unless the requested relief is granted. More than a risk of irreparable harm must be demonstrated. Continental Group, Inc. v. Amoco Chemicals Corp., 614 F.2d 351, 359 (D.N.J. 1980). The requisite for injunctive relief requires 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. (Citations omitted.)

Having considered the parties’ submissions and arguments, I **CONCLUDE** that petitioner has failed to clearly and convincingly demonstrate that J.M. will suffer irreparable harm unless the requested relief seeking home instruction is granted.

Succinctly stated, the record is bereft of any documentation, medical or otherwise, that establishes that J.M. cannot attend school in the District and requires the requested relief to address his special education needs. Further lacking is a clear showing of any cognizable harm to J.M. if he returns to in-person schooling. Although the documentation reveals that J.M. bumped his head on July 10, 2023, while attending ESY at the Oliver Street School, and bumped his head on December 12, 2023, while in school at ECC, the District has offered placement in a totally different program, the District’s South Street ABA program. J.M.’s proposed classroom at South Street currently has only four other children with a teacher and an aide assigned on a full-time basis. The BCBA also visits the classroom four times per week. J.M. has never attended the South Street program, and petitioner has failed to offer any evidence to support the claim that continuing J.M.’s education in the District’s program will constitute irreparable harm. To the extent that petitioner is alleging that J.M. is in danger in school, more than a risk of irreparable harm must be demonstrated and the mere possibility of future harm is insufficient. Similarly, petitioner’s disagreement with J.M.’s programming or placement at ECC and/or South Street does not equate to irreparable harm. The certifications of Special Education Supervisors Fonseca and Pennetti make clear that the District remains willing, able, and ready to provide in-person programming to J.M. And any harm or regression that J.M. may sustain from the lack of instruction or services is attributable to the parent keeping him

home from school since December 13, 2023. In sum, the totality of the evidence falls short of establishing a substantial and immediate danger of irreparable harm to J.M. if home instruction is not granted, and the possibility of a remote future harm or speculation regarding harm that could occur is insufficient to satisfy petitioner's burden.

Petitioner must also make a preliminary showing of a reasonable probability of ultimate success on the merits of her underlying claim and demonstrate that the legal right underlying her claim is settled to prevail on an application for an emergent relief. Crowe, 90 N.J. at 133. I **CONCLUDE** that petitioner has failed to shoulder her burden of proving both standards.

In this regard, “[e]ach public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.” 34 CFR 300.115(a). In general, this continuum ranges from the least restrictive to the most restrictive environment, i.e., “instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.” 34 CFR 300.115(b)(1); see N.J.A.C. 6A:14-4.3(b). Pursuant to N.J.A.C. 6A:14-4.8(a), a student with a disability shall have his or her IEP implemented through one-to-one instruction at home only when it can be documented that all other less restrictive program options have been considered and have been determined inappropriate. In this matter, the IEP team has made no such determination, and the evidence fails to demonstrate that home instruction is the only appropriate program option for J.M.

A district may also provide home instruction when a “student is confined to the home or another out-of-school setting due to a temporary or chronic health condition or a need for treatment that precludes participation in their usual education setting[.]” N.J.A.C. 6A:16-10.1(a). In short, there is no indication in the letters by the nurse practitioner or the doctor, or any other evidence, that J.M. is suffering or recovering from any medical condition resulting from the prior bumps to his head or another health condition that requires his confinement to the home. Any request for home instruction due to a temporary or chronic health condition must also comply with the procedures set forth in N.J.A.C. 6A:16-10.1(a), including the parent's submission of “a written determination from

the student's physician documenting the projected need for confinement at the student's residence or other treatment setting for more than 10 consecutive school days or 20 cumulative school days during the school year," and the school physician's verification of the need for home instruction.

Finally, a determination regarding the appropriateness of the District's program and placement, and whether J.M. requires an out-of-district placement to address his special education needs, are plainly fact-sensitive in nature and the likelihood of petitioner's success on her underlying due process claims cannot be decided on the current record. There are obvious disputes between the parties regarding petitioner's claims, the resolution of which requires hearing from experts and the District's professionals and examining a host of documentation regarding J.M. and the actions taken by the District. In other words, the resolution of whether the District denied J.M. a FAPE and whether J.M. requires an out-of-district placement as alleged by petitioner requires consideration of fact and opinion evidence in a plenary proceeding.

In view of the foregoing, it is unnecessary to address whether, when the equities and interests of the parties are balanced, petitioner will suffer greater harm than the District if the requested relief is not granted.

Based upon the foregoing, I **CONCLUDE** that petitioner has failed to meet the requirements warranting emergent relief.

ORDER

It is **ORDERED** that petitioner's Request for Emergent Relief be and hereby is **DENIED**.

This decision on application for emergency relief shall remain in effect until the issuance of the decision on the merits in this matter. The hearing having been requested by the parents, this matter is hereby returned to the Department of Education for a local resolution session, pursuant to 20 U.S.C.A. § 1415 (f)(1)(B)(i). 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.

January 17, 2024
DATE


MARGARET M. MONACO, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

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