



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

ON EMERGENT RELIEF

OAL DKT. NO. EDS 14176-23

AGENCY DKT.NO. 2024-36742

D.K. & J.K. ON BEHALF OF M.K.,

Petitioner,

v.

BERKELEY HEIGHTS TOWNSHIP

BOARD OF EDUCATION.,

Respondent.

Charolyn R. Chaundry, Esq. for Berkeley Heights Township Board of Education
(Chaundry Law, attorneys)

Joseph D Castellucci, Esq. for D.K. and J.K. on behalf of M.K.

Record Closed: February 2, 2024

Decided: February 2, 2024

BEFORE **KIMBERLY A. MOSS**, ALJ:

D.K. and J.K (Parents) on behalf of their minor child M.K. brings this emergent action seeking for M.K. to be returned to Governor Livingston High School. The parents also seek to have the two petitions consolidated and be allowed to amend their petition.

On November 13, 2023, the Office of Special Education Programs transmitted Parents matter to the Office of Administrative Law (OAL) for emergent disposition. On

November 14, 2023, the Office of Special Education Programs transmitted the District's matter to the OAL for emergent disposition, it was also incorrectly listed for a due process hearing. The district filed opposition to the motion of Parents on November 15, 2023, under OAL Docket Number EDS 12601-23. Oral arguments were held on November 16, 2023. I ruled in favor of the District at that time.

On December 21, 2023, parents filed a due process petition. On or about January 26, 2024, the parents again filed a motion for emergency relief for M.K. to be returned to Governor Livingston High School. The District filed opposition to the motion on January 30, 2024. Oral arguments were held on February 2, 2024. Hearing dates are scheduled for March 13, 2024 and April 19, 2024.

FACTUAL DISCUSSION

After carefully considering the documentary evidence presented, and having had the opportunity to hear oral arguments, I **FIND** the following **FACTS**:

M.K. was a student at Governor Livingston High School in Berkeley Heights. She receives special education services. In January 2022, M.K. had a psychiatric evaluation completed by Dr. Richard Kleinmann, who recommended consideration of whether M.K. would benefit from participation in a partial day program such as High Focus centers or Gen Psych.

An IEP meeting was held on January 2, 2023. It was determined that a therapeutic day school should be considered for M.K. The parents rejected this and it was agreed that a partial school day schedule would be used. M.K. would come to school for one class per day, which would increase to four classes per day. She would have home instruction for her other classes. M.K. was unable to attend those classes. The school psychologist could not deescalate M.K. when dysregulated.

An IEP meeting was held on January 31, 2023, where the IEP team recommended home instruction pending an alternative placement at a therapeutic day

school. The parents agreed to this. When the out-of-the-district schools offered intakes for M.K., the parents changed their mind and contested going to the intakes.

M.K. had a psychiatric evaluation in February 2023 by Dr. Jacob Jacoby who recommended M.K. be in a more comprehensive academic environment that could offer her counseling such as Rutgers Behavioral Health.

An emergent relief motion was heard in March 2023. The result of that was the stay-put which was a continuation of the partial day schedule with an increase in attendance if possible.

The parties subsequently entered into a settlement where the parents agreed to visit three of the district placements and the District would pay for an independent neuropsychological evaluation. The independent evaluator, Dr Jonathan Mack recommended that M.K. enter a partial hospitalization program and then attend Princeton House. Dr. Mack diagnosed M.K. with Disruptive Mood Dysregulation Disorder, Other Specific Neurodevelopmental Disorder with executive function and to some degree working memory and processing speed deficits, Developmental Coordination Disorder, Generalized Anxiety Disorder, Other Specified Personality Disorder with nascent borderline and narcissistic features, Specific Learning Disorder with impairment in reading: word reading accuracy, reading rate or fluency, reading comprehension, mild to moderate, rule-out autism spectrum disorder and rule out attention-deficit/hyperactivity disorder combined presentation. Dr. Mack believes that M.K. should be treated by a board-certified child and an adolescent psychiatrist. The parents did not follow Dr. Mack's recommendation.

The District contracted with ESS to provide tier three services to M.K. for the 2023-2024 school year. This is the highest level of services provided to districts. M.K. was to have group therapy twice a week, individual therapy once a week, family therapy twice a month and monthly parent support groups. M.K. refused to attend the group therapy. She did not attend scheduled individual therapy sessions but seeks out ad hoc sessions and occasionally therapeutic check-ins.

On October 4, 2023, the IEP team wanted M.K. to have a higher level of care, an evaluation of M.K. and an intensive therapy program. The parents resisted this recommendation. The Parents' advocate requested four weeks for further information and to determine if M.K.'s attendance, participation and engagement in class would improve. The District agreed but noted if this failed that M.K. would be placed on home instruction pending an out of district therapeutic placement. The IEP lists M.K.'s placement as home instruction.

On October 11, 2023, M.K. in an ESS session, became agitated and stated that she wanted to kill herself. M.K. was unable to communicate a plan for her safety. She was engaging in self-harm by scratching herself and pulling her hair. The District recommended that M.K. have immediate follow-up with a psychiatrist or be taken to the emergency room. A risk assessment was done. Rafael Contreas, an advanced practice psychiatric mental health nurse practitioner met with parents and M.K. He completed a school re-admittance for M.K. on October 16, 2023.

On October 24, 2023, M.K. went to ESS to report a classroom trigger. She became aggressive and was unable to deescalate. She engaged in self-harm and stated, "You are going to make me kill myself." A risk assessment was done at that time. The District attempted to follow up with the parents who refused to take the risk assessment paperwork.

On October 30, 2023, the District spoke with Contreras who stated that he sees M.K. briefly each month for medication modification and monitoring. He agreed that M.K. would benefit from a placement where she can receive a higher level of care. A note from Contreras dated November 3, 2023, states that his recommendation is that M.K. engage in an Intensive Therapy Program (IOP) and once the higher-level treatment is completed, then she should be able to return to school. ESS recommended that M.K. receive a higher level of care.

M.K. displays explosive behaviors and inappropriate language toward peers and staff and resistance to using de-escalation techniques. She is inconsistent in her attendance at school. In her history class as of October 4, 2023, M.K. attended class thirty-two percent of the time and was absent sixty-eight percent of the time. In English class for that time M.K. was present fifty-three percent of the time and absent forty-seven percent of the time.

One teacher stated that M.K. makes disparaging and accusatory comments about other students in class. These students become hesitant or afraid to participate. M.K. has negatively impacted the students in the ALL room, which is a place where students can work and get academic assistance. M.K. has come into the room yelling, cursing and throwing papers of work that she has to complete. When she did this, a student became visually disturbed and unable to communicate during M.K.'s presence. M.K.'s screaming and slamming of objects, her cursing and threatening while in the ESS room can be heard outside of the room. This made the students in the class near the ESS room uncomfortable, the students had to make edits to its film project to eliminate M.K.'s loud cursing. M.K.'s outbursts from the ESS room can be heard in the library. When M.K. is dysregulated, she engages in self-harm.

On November 13, 2023, Gen Psych provided a letter stating that while M.K. was in their care, she denied homicidal and suicidal thoughts and does not present a danger to herself or others and is cleared to attend school.

M.K. is currently receiving her classes by home instruction. The District's position is that it cannot provide FAPE to M.K. at the Governor Livingston High School.

On November 17, 2023, I Ordered M.K. to be placed on home instruction for forty-five days and complete IOP program, GenPsych, and follow the recommendation of the IOP program while the District seeks out a therapeutic placement for M.K.

The GenPsych discharge summary for M.K. reported that she has social anxiety related to school and bullying, does not feel that she has friends and reports students

were spreading rumors about her after a bad panic attack. She also reported difficulty focusing and thinking about going home when she is in school.

M.K. completed the GenPsych program on December 11, 2023. Under additional services /further needs, GenPsych lists that, “client should gain a better school schedule and return to school in person.” It did not list any strategies or techniques used to assist M.K when she becomes dysregulated. GenPsych listed that M.K. would have continued therapy with Jennifer Barber. This did not occur.

Nurse Contreras, who has been treating M.K. at Immediate Care Psychiatric Center also recommended that M.K. return to public school with accommodations for mental health due to completing the IOP program and continued compliance with her medication management if M.K. has displayed improved symptoms. He does not state which mental health accommodation M.K. would need in returning to school.

On January 9, 2024, during home instruction, due to M.K.’s behavior during the math and science sessions, the tutor became uncomfortable working with M.K., another tutor had to be assigned to M.K. On January 25, 2024, during home instruction, M.K. almost panicked about the work stating that the projects are too long. She kept flicking off the screen and moving to another section. She was crying and what appeared to be hyperventilating about there was too much work and if she was in school, she could ask her classmates. She repeatedly said I can’t do this. She then started to scream at her mother. She did one page of work then became completely overwhelmed. When the tutor began to go over the math work, M.K. became upset and insistent that she could not do the work.

LEGAL ANALYSIS AND CONCLUSION

The standards for the granting of emergent relief are set forth in N.J.A.C. 6A:3-1.6(b). Emergent relief may be granted if the judge determines from the proofs that:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying the petitioner’s claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. 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 parents did not show that M.K. would suffer irreparable harm if she was not allowed to return to Governor Livingston school. Twice in January 2024, M.K. had difficulty with home instruction. On January 25, 2024 during home instruction, she was crying, hyperventilating and screaming. Nurse Contreares states that M.K. should return to school if she completed the IOP program and has displayed improved symptoms. M.K. has not displayed improved symptoms as shown by the two incidents in January 2024. In addition, two doctors and ESS state that she needs a higher level of care that cannot be given at Governor Livingston high school.

Petitioner also does not meet the likelihood of prevailing on the merits criteria. The District has stated that it cannot provide FAPE to M.K. at the Governor Livingston school.

For emergent relief to be granted all four of the criteria must be met.

I **CONCLUDE** that parents have not met all four of the criteria for emergent relief specifically irreparable harm and likelihood of prevailing on the merits. The parents' request to consolidate both cases is not opposed.

The parents requested to be allowed to file an amended petition.

N.J.A.C. 1:1-6.2(a) provides:

(a) Unless precluded by law or constitutional principle, pleadings may be freely amended when, in the judge's discretion, an amendment would be in the interest of efficiency, expediency and the avoidance of over-technical pleading requirements and would not create undue prejudice.

I **CONCLUDE** if parents can file an amended petition.

ORDER

Based on the foregoing, it is **ORDERED** that the petition for emergent relief in this matter be and is hereby **DENIED**. It is further **ORDERED** that M.K. remain on home instruction for forty-five days.

It is further **ORDERED** that the two petitions be and are hereby consolidated.

This order on application for emergency relief shall remain in effect until issuance of the decision in the matter. The parties will be notified of the scheduled hearing dates. 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.

February 2, 2024



DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency

February 2, 2024_____

Date Mailed to Parties:

February 2, 2024_____

ljb