

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 07818-16

AGY REF NO. 2016/24522

**FRANKLIN TOWNSHIP BOARD OF
EDUCATION**

Petitioner,

v.

N.K. ON BEHALF OF M.M.,

Respondent

Cameron R. Morgan, Esq., for Petitioner (Parker McCay, P.A., attorneys)

N.K., Respondent, pro se

Record Closed: June 6, 2016

Decided: June 6, 2016

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner filed an Emergent Due Process Petition and Request for Emergency Relief with the Office of Special Education Programs in the New Jersey Department of Education (DOE) on May 23, 2016. In support of the Request for Emergent Relief petitioner also filed the Certification of Ryan Green, supervisor of special services for petitioner, and a brief in support of thereof. The Request for Emergency Relief shall hereafter be referred as a motion.

Said motion seeks an order, among other things, as follows:

- A. That petitioner has complied with the Individuals with Disabilities Education Act, 20 U.S.C.A. § 1400 et seq., N.J.S.A. 18A:46-1 et seq.;
- B. That M.M.'s student records be immediately released to NuView Academy, CPC Behavioral Healthcare – High Point Center, Honor Ridge Academy, and Mercer Elementary School, and any other out-of-district placement potentially appropriate to meet M.M.'s needs;
- C. That M.M.'s mother, N.K., cooperate fully with any and all required intake procedures in order to permit an admissions determination by the above placements, or any other out-of-district placement potentially appropriate to meet M.M.'s needs.

FACTUAL BACKGROUND

M.M. is classified to receive special education and related services under the Individuals with Disabilities Education Act (IDEA), under the classification category of "Other Health Impaired". M.M. transferred into the Franklin Township School District (District) in or about October 2014.

M.M.'s individualized education program (IEP) provides for him to be placed in an out of district placement with a therapeutic and/or behavioral disabilities program capable of meeting his needs. The District does not provide such a program.

M.M. was placed at Rutgers Child Therapeutic Day School (Rutgers) after transferring into the District. Rutgers, at an IEP meeting on April 13, 2015, informed the District that M.M.'s placement would be terminated as Rutgers felt it could no longer meet M.M.'s needs. The termination would be effective May 5, 2015.

The District, since that time, has attempted to find an alternate placement for M.M. that would meet his needs. The District has made repeated attempts to secure parental permission from N.K. for the release of M.M.'s records at other out of district locations. N.K. has withheld her consent. As a result the District cannot place M.M. in a program suitable for his needs.

N.K. has indicated she will only agree to placement at a public school. The District has attempted to place M.M. at a program within a public school. M.M. has not been accepted into such programs.

M.M. receives home instruction provided by the District at the Road to Success Alternative Program at Franklin Middle School. Said home instruction continues to date.

LEGAL ANALYSIS AND CONCLUSION

Initially, it must be determined if petitioners are entitled to emergent relief.

A party may only request emergent relief for the following reasons, in accordance with 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 education settings;
- iii. Issues concerning placement pending outcome of due process proceedings;
and
- iv. Issues involving graduation or participation in graduation ceremonies.

As the present matter concerns a break in the delivery of services pursuant to N.J.A.C. 6A:14-2.7(r)1.

The New Jersey Supreme Court has set forth a four-prong test for determining whether an applicant is entitled to emergent relief. Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982) (enumerating the factors later codified at N.J.A.C. 6A:14.2-7(s)1).

The four factors (“the Factors”), include:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying 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 moving party bears the burden of proving each of the Crowe elements “clearly and convincingly.” Waste Mgmt of N.J. v. Union County Util. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

A review of the four factors is in order.

Factor One. The District is prevented from fulfilling its legal obligation to provide a Free and Appropriate Public Education (FAPE) by the parent’s refusal to consent or cooperate with the District. See K.P v. Maple Shade Twp. Bd. Of Educ., EDS 8871-09, 2009 N.J. AGEN LEXIS 593 (September 8, 2009); Highlands Bd. of Educ. V. M.F. o/b/o K.F., 39 I.D.E.L.R. 224, 2003 N.J. Agen, Decision) (June 28, 2003); see also, River Edge Bd. Of Educ. V. E.F. o/b/o V.F., 2009 N.J. Agen. LEXIS 313,) OAL Dkt. No. EDS 5680-09, Agen. Ref. No. 2009-14747 (Final Decision) (June 1, 2009).

In River Edge, Judge Strauss wrote:

“A break in the services provided to V.F. has already occurred. Without ... the opportunity to explore various placement opportunities, the Districts’ efforts to provide FAPE will be impaired. E.F.’ refusal to consent to the course proposed by the District can only exacerbate a break in services. This is irreparable harm.”

Factor Two. The legal right underlying petitioner’s claim is settled. N.J.A.C. 6A:14.2-7(a) provides that either party may request a due process hearing. Further, N.J.A.C. 6A:14.2-7(b) provides that a district board of education is permitted to file for

due process “when it is unable to obtain required consent to ... release student records.”

It is clear that ALJs have ordered emergent relief under the same facts set forth herein regarding a parent’s refusal to release student records. See Maple Shade, supra.

Factor Three. Petitioner has a likelihood of prevailing on the merits of the underlying claim. There is little doubt that petitioner will succeed on the merits. See Hanover Park Regional High School Bd. of Educ. v. F.S. o/b/o S.S., 2014 N.J. Agen. LEXIS, OAL Dkt. No. EDS 9804-14, Agen. Ref. No. 2015-21546 (August 12, 2014). See also Maple Shade, supra.

Factor Four. 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 will not be granted. The District will be unable to provide M.M. with an educational program designed to address his needs. The parent will not suffer any harm. See Hanover and Maple Shade, supra.

I **CONCLUDE** that petitioner’s request for emergent relief be granted.

I further **CONCLUDE** that this decision is dispositive of all issues raised in the due process petition and is therefore a FINAL DECISION.

ORDER

It is hereby **ORDERED** that petitioner is authorized to immediately release the records of M.M. to NuView Academy, CPC Behavioral Healthcare – High Point Center, Honor Ridge Academy, and Mercer Elementary School, and any other out-of-district placement potentially appropriate to meet M.M.’s needs; and

It is further **ORDERED** that M.M.'s mother, N.K., cooperate fully with any and all required intake procedures in order to permit an admissions determination by the above placements, or any other out-of-district placement potentially appropriate to meet M.M.'s needs.

This decision on application for emergency relief resolves all of the issues raised in the due process complaint; therefore, no further proceedings in this matter are necessary. This decision on application for emergency relief is final pursuant to 20 U.S.C.A. § 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.A. § 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.

June 6, 2016

DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency

Date Mailed to Parties:

db

APPENDIX

List of Moving Papers

For Petitioner:

Due Process Petition

Motion for Emergent Relief

Certification of Ryan Green

Brief in support of motion with Exhibits A through F

For Respondent:

None