



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON
EMERGENT RELIEF

OAL DKT. NO. EDS 08779-22

AGENCY DKT. NO. 2023-34970

**BERKELEY TOWNSHIP BOARD OF
EDUCATION,**

Petitioner,

v.

J.H. ON BEHALF OF B.M.,

Respondent.

Michael A. Pattanite, Jr., Esq., for petitioner (Leneck, Socey, Formidoni,
Giordano, Cooley, Lang and Casey, LLC, attorneys)

J.H., respondent, pro se

Record Closed: October 25, 2022

Decided: October 26, 2022

BEFORE **CATHERINE A. TUOHY, ALJ:**

STATEMENT OF THE CASE

Respondent, J.H., on behalf of her son, B.M., filed a Request for Emergent Relief against the petitioner, Berkeley Township Board of Education, seeking B.M.'s return to an in-district placement at the Berkeley Township Elementary School in the Least Restrictive Environment.

PROCEDURAL HISTORY

Petitioner, Berkeley Township Board of Education filed a due process petition with the Office of Special Education (OSE) on September 19, 2022, for an order to compel parent and student to attend an intake for placement in an out-of-district setting (Ocean Academy). The matter was transmitted to the Office of Administrative Law (OAL) on October 5, 2022, and filed as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13.

Respondent, J.H., filed a due process petition and request for emergent relief dated October 18, 2022, directly with the OAL and not with the OSE, following an unsuccessful settlement conference in this case on October 19, 2022. Both the petition and request for emergent relief seeks B.M.'s return to an in-district placement at the Berkeley Township Elementary School.

Petitioner district previously obtained an Order on Emergent Relief in Berkeley Township Board of Education v. J.H. on behalf of B.M., EDS 03832-2022, on May 20, 2022, from the Hon. Susan L. Olgiati, ALJ granting the district's request for emergent relief to place B.M. in an interim alternative placement of home instruction, pending the outcome of that underlying due process petition. By Final Decision on Summary Decision, dated August 17, 2022, Judge Olgiati granted summary decision in favor of the district and ordered that the district was authorized to release B.M.'s student records to out-of-district placements including Ocean Academy, Manchester Township School District operating Regional Day School at Jackson, and any other surrounding State approved private and public schools. Judge Olgiati ordered that B.M. shall continue in the Interim Alternative Placement of home instruction until he is placed in an appropriate out-of-district program.

Oral argument on respondent's request for emergent relief was conducted on October 25, 2022, via Zoom audio and video technology, due to the continued suspension of in-person hearings at the OAL due to the COVID pandemic.

Following oral argument, petitioner submitted the OAL case file in OAL DKT. NO. EDS 03832-2022; the Final Decision on Summary Decision in EDS 03832-2022, dated August 17, 2022; and the Neuropsychological Examination dated September 19, 2022. Respondent, J.H. also submitted a copy of the Neuropsychological Examination dated September 19, 2022. Respondent also submitted copies of a note from North Jersey Therapeutic Services as well as a September 7, 2022, letter to respondent from the OSE Complaint Investigation Unit acknowledging receipt of a complaint alleging that the Berkeley Township School District is noncompliant with state and/or federal special education law.

The record closed on October 25, 2022, following receipt of those submissions.

FACTUAL DISCUSSIONS

For respondent, J.H.

J.H. filed for emergent relief since her son has been out of school since April 28, 2022. B.M. was a transfer student from Texas to Berkeley Township in February 2022, and B.M. was placed in the general education setting with resource pull out services, which was the last IEP that was prepared for B.M. in May by his last school, but which had not yet been implemented because he lost his charter placement. J.H. advised the district of this, but they decided to start with it since it was deemed appropriate by his last district, and they would start with this IEP and could add services and more restrictions if necessary. B.M. was there a week and was suspended. The district advised that they were following the IEP. B.M. had a Behavioral Intervention Plan (BIP) that was specific and required that he have a safe place to go when he was upset, either the gym or a counsellor's office, but he could not run the hallways at his previous school. The district did not provide B.M. with a safe place to go when he was upset. His prior school used various positive de-escalation techniques which were effective. The district's response was to force B.M. to comply, rather than to prevent the behavior from happening by determining what caused the behavior to occur. The district's reactions caused B.M.'s behavior to escalate. J.H. believes this was the driving issue. B.M. kept leaving the classroom. She suspects it was a combination of the district not having the proper

supports in place for him and that he was getting grade level work when he was not at grade level, which she advised the district of in March. This caused B.M. to become frustrated and leave the class.

B.M. kept leaving the classroom and was restrained. Nothing was done by the district to determine why he was leaving the classroom or positive efforts and supports implemented to keep him in the classroom. Once he was restrained, he fought back, kicked, and punched and did things he was not supposed to do. B.M. was supposed to be given personal space to de-escalate. By restraining him, the district escalated his behaviors. He was suspended and no Functional Behavioral Assessment (FBA) was done for B.M. He only attended three weeks of school at Berkeley all together since February. Rather than provide B.M. with positive reinforcement and de-escalation techniques, the district's response was to force compliance. The district should have prevented these things from happening and previous strategies that had been in his IEP were removed.

During the last incident for which he was suspended, B.M. was not on his medication because there was a lapse of insurance coverage when they transferred from Texas. She explained this to the district. Home instruction was not provided until the middle to end of May. He was only in school three weeks cumulatively since he started in February. He missed two months of home instruction. Home instruction was from 4:00 p.m.–5:00 p.m. when she was home from work. The main issue she feels is that her son has not been given a fair chance at Berkeley. No evaluations were done to see what he required and what would be a suitable placement. Those strategies contained in his previous IEP that worked for B.M. were removed from the IEP. He has been removed from school without an FBA and has been restrained excessively. They have not documented what happens before the restraints. The district should have provided proper evaluations. He has been socially and academically deprived of an education and has not been in school in nine months.

J.H. wants her son to be placed back in Berkeley, the least restrictive environment with the necessary supports included in his IEP. He has been without an education since they came to the district.

J.H. was on her cell phone in her car in the parking lot at Ocean Academy during this Zoom oral argument. She had been there since 8:00 a.m. this morning when she dropped off B.M. for his first day of school there. Although she had viewed the school previously, she had never been there when the students were present. This placement is not appropriate for her son as the students there are more severely disabled. The school is located at the back of a drug rehabilitation center. Her son has issues including anger management and impulse control. She has privately arranged for him to receive counselling and support services which have been very effective, but the district refuses to look at these records.

A September 19, 2022, neuropsychological evaluation was done which supports her son going back in-district with pull out supports and a behavioral modification plan. The evaluation lists various approaches to assist B.M. return to an academic setting.

For petitioner, Berkeley Township School District

The district believed that the matter was settled as of counsel's discussions with J.H. on Friday which is why they did not submit any documents before oral argument. The district relies on and incorporates by reference the facts set forth in the two previous court orders in the prior case that the district filed for both emergent relief and the final decision on summary decision.

There are a lot of factual disputes with what J.H. has presented, including the level of issues B.M. presented with while in district. The district does not have the ability to provide the services that B.M. needs. He was in-district in the Behavioral Disabilities (BD) program placement when the last incident occurred. It was very clear from witnessing that interaction as was found by the emergent relief judge as well as the summary decision judge that the district does not have the services and ability to provide the level of services B.M. requires in-district. There is a due process petition currently pending by the district to place the student. The district has been met with resistance by mom to place the child which is why the district has filed this due process petition to determine the appropriate placement for B.M.

For purposes of emergent relief, J.H. must prove by clear and convincing evidence that she meets the factors set forth in Crowe v. DeGoia. The parent, J.H., cannot meet any of the factors. The first element cannot be met in that B.M. will not suffer irreparable harm if the relief is not granted. There is a due process petition pending by the district on these issues to try and place the student because the district has been met with resistance by the parent the entire time to try and place the student. Second, the parent does not have a settled recognized claim or reasonable likelihood of success on the merits. Looking back at the summary decision opinion, certainly nothing was presented then, and this petition is the natural follow up to that because the district could not get a placement without first sending the student's records. The district had to proceed in two parts. The district first had to get the student's records to send to the other placements. The length the district has gone to place the student in an appropriate out-of-district placement while on homebound instruction is documented in both the district's emergent relief application filed in May as well as the summary decision in the district's favor. The district will suffer greater harm being compelled to take B.M. back in a program they know they cannot maintain him in. This is documented in both the previous emergent application filed by the district and the summary decision in the district's favor. In balancing these equities, they weigh in favor of the district.

The student was not successful in the district's BD program. The district has filed for due process to decide an appropriate placement for B.M. The district does not go to these great lengths to place a student if they do not have to. For these reasons, the parent's application for emergent relief must be denied.

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):

- 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, J.H. asserts that she is entitled to emergency relief because the contested matter involves issues involving a break in the delivery of services; issues involving disciplinary action, including manifestation determinations and determinations of interim alternate educational settings; and issues concerning placement pending the outcome of the due process proceedings. Although J.H. sets forth appropriate requests for emergent relief, she is not entitled to this relief as these issues have previously been decided.

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 if the relief is not granted; a settled legal right underlying the claim; a likelihood of success on the merits of the underlying claim; and a balancing of the equities and interests that J.H. will suffer greater harm than the district. J.H. bears the burden of satisfying all four prongs of this test. Crowe, 90 N.J. at 132–34.

The district previously obtained an Order on Emergent Relief in Berkeley Township Board of Education v. J.H. on behalf of B.M., EDS 03832-2022 on May 20, 2022, from the Hon. Susan L. Olgiati, ALJ granting the district's request for emergent relief to place

B.M. in an interim alternative placement of home instruction, pending the outcome of that underlying due process petition. By Final Decision on Summary Decision, dated August 17, 2022, Judge Olgiati granted summary decision in favor of the district and ordered that the district was authorized to release B.M.'s student records to out-of-district placements including Ocean Academy, Manchester Township School District operating Regional Day School at Jackson, and any other surrounding State approved private and public schools. Judge Olgiati ordered that B.M. shall continue in the Interim Alternative Placement of home instruction until he is placed in an appropriate out-of-district program.

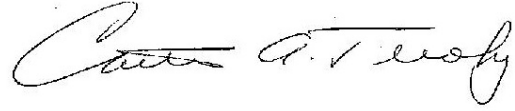
Judge Olgiati's decision was final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2022) and was appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a District Court of the United States. 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.516 (2022). J.H. did not appeal this final decision and it is the law of this case.

Since the Final Decision dated August 17, 2022, Judge Olgiati previously ordered that B.M. shall continue in the Interim Alternative Placement of home instruction until he is placed in an appropriate out-of-district program, I **CONCLUDE** that J.H. on behalf of B.M. is not entitled to the emergent relief sought, that is, a return to an in-district placement at Berkeley Township Elementary School.

ORDER

It is **ORDERED** that the J.H.'s application for emergent relief is **DENIED**.

This order on application for emergency relief shall remain in effect until issuance of the final decision in the matter. 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.



October 26, 2022

DATE

CATHERINE A. TUOHY, ALJ

Date Received at Agency

emailed October 26, 2022

Date Mailed to Parties:

CAT/gd

APPENDIX

EXHIBITS

For petitioner

- OAL case file in OAL DKT. NO. EDS 03832-2022
- Order on Emergent Relief in EDS 03832-2022, dated May 20, 2022
- Final Decision on Summary Decision in EDS 03832-2022, dated August 17, 2022
- Neuropsychological Examination, dated September 19, 2022

For respondent

- Neuropsychological Examination, dated September 19, 2022
- Note from North Jersey Therapeutic Services
- Letter to respondent from the OSE Complaint Investigation Unit acknowledging receipt of a complaint alleging that the Berkeley Township School District is noncompliant with state and/or federal special education law, dated September 7, 2022