



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

EMERGENT RELIEF

OAL DKT. NO. EDS 02258-23

AGENCY DKT. NO. 2023-35578

H.M. AND C.M. ON BEHALF OF C.M.,

Petitioners,

v.

**PISCATAWAY TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

Michael Flom, Parent Advocate, for petitioners, pursuant to N.J.A.C. 1:1-5.4(a)(7)

David B. Rubin, Esq., for respondent (Busch Law Group, LLC, attorneys)

Record Closed: March 21, 2023

Decided: March 22, 2023

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

STATEMENT OF THE CASE

Petitioners, H.M. and A.M., on behalf of their son, C.M., filed a petition for emergent relief against the respondent, Piscataway Township Board of Education seeking an order immediately returning the student to the general education classroom as the stay put placement pending the due process hearing. Respondent opposes this application and

argues that the stay put placement is home instruction and petitioners have not demonstrated they are entitled to emergent relief.

PROCEDURAL HISTORY

Petitioners filed both a due process petition and a petition for emergent relief with the Office of Special Education (OSE) on March 7, 2023. The emergent petition seeks an order immediately returning the student to the general education classroom with support, services, and accommodations as stay put, with an individual aide pending the due process request. The due process petition seeks independent educational evaluations with classroom observation, occupational therapy, services of a neuropsychologist, speech language evaluations, revisions to the IEP including eligibility category, in-class resources (ICR) for ELA and Math, individual counselling sessions, other changes to the program to address social and pragmatic language and reimbursement. The emergent petition alone was transmitted to the Office of Administrative Law (OAL) on March 15, 2023, as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13, while the underlying due process petition remained at OSE.

The parties presented oral argument on the emergent relief application on March 21, 2023, via Zoom audio and video technology, and the record closed.

Petitioners' Request for Emergent Relief dated March 13, 2023, with annexed table of contents of Combined Exhibits 1 through 44 for Emergent Relief and Due Process Petition were submitted and considered for this application.

Respondent's March 18, 2023, Letter Brief of David B. Rubin, Esq., in opposition to petitioners' application for emergent relief, with attached (Harassment, Intimidation and Bullying (HIB) Investigation Report dated November 9, 2022; Certification of Deidre Ortiz, with attached Psychological Assessment Report, Psychiatric Evaluation, Educational Evaluation, and draft of a proposed IEP dated February 21, 2023; and Certification of Colleen Pongratz with attached Exhibits A through E, were also considered in this application.

FACTUAL DISCUSSIONS

For petitioners

C.M. is an eight-year-old boy with a 504 plan who has been diagnosed with combined ADHD, autism, anxiety, depression, and social skills deficits. He has been physically isolated from his peers for a variety of circumstances for all but a month and a half of the last three years. He was in school in March 2020 when COVID started and went on remote instruction and did not return to school until September 2022 and then was removed from school on October 20, 2022. He spent a lot of time isolated from his peers which exacerbated his social skill deficits. On September 6, 2022, when he returned to school he was repeatedly verbally harassed, physically assaulted, and bullied. On October 20, 2022, when he sought help regarding the bullying five months ago and went to report it as he was instructed to do, he was removed from school illegally. The school failed to protect him. He was forced to endure a traumatic emergency psychiatric in-patient evaluation ordered by the District, denied due process and is continuing to be denied access to any in-person instruction including social skills instruction which the District agrees he needs as it is in his 504 plan. The District argues that the parent signed a home instruction plan that changed his placement. Petitioners argue that the parent signed the home instruction plan under considerable duress and threats from the District of refusing to provide any instruction including home instruction, academic, emotional counselling, or any social skills instruction. The District refused to schedule the Child Study Team (CST) evaluation and threatened them with the imposition of a long-term suspension without advising them of their due process rights. It is important to note that the conditions imposed by the District in the home instruction plan have actually already been satisfied for over a month. Home instruction was to last, per the administration, pending completion of the CST evaluations. The CST evaluations were completed as of February 10, 2023. The eligibility meeting was held on February 21, 2022. The District has no legal basis for keeping him out of school. Petitioners are seeking an order returning C.M. to the general education classroom with the services and accommodations recommended in the latest version of his 504 plan which has specific services and accommodations to handle the situation plus petitioners are also requesting an additional

item recommended by both C.M.'s psychologist and therapist which is an aide to prevent C.M. from being bullied and also to prevent C.M. from responding inappropriately to his peers because of his disability including impulsivity and social skills issues.

Another parent option petitioners wish considered which is not part of this emergent relief application would be to move C.M. to another public school outside of the District to prevent the District administration's continued intimidation, discrimination and harassment of C.M.

The District's argument that C.M. be removed for dangerousness is not supported and is manufactured. There are five mental health professionals including the mental health screener and the psychiatrist the District insisted petitioners take the student to who all found that C.M. is not a danger to himself or others. What is happening is that the student has an immature response to stress. He was last in school in kindergarten and has kindergarten responses to conflicts, resulting in him making disturbing remarks and can be interpreted as a threat but nobody believes he is making a threat as the comments were over the top. The attendance clerk on October 20, 2022, was not threatened. The District has no psychiatric evidence that C.M. is a danger. The only certification submitted alleging dangerous behavior is that of Colleen Pongratz (Pongratz), who is not a psychiatrist, psychologist or mental health professional and misrepresented the facts. It took petitioner's two months and six requests to get documentation as to what happened in this case. The District's psychiatric evaluation does not say he is a threat to himself or others. Petitioners believe the risk threat assessment was altered from a low-risk threat assessment to a medium-risk assessment triggering the District's referral for a psychiatric evaluation. C.M. was released and cleared to return to school at 2:00 a.m. and the District still did not allow C.M. back in school.

The District failed to convene a 504 meeting when parents initially requested one and one was not done until December 20, 2022. The 504 plan contained all the accommodations requested except the District refused to provide a social skills class because that would require C.M. being with other students. The social skills class is in the 504 plan. The District also unilaterally predetermined C.M.'s placement as out-of-

district placement and did not interview the parents. Nobody but Pongratz has said the student is a danger to himself or others. His doctors said he can return to class with minimal supports which they have asked for. The District is creating the danger to the student's psychological well-being.

Petitioners understand that districts are concerned about students bringing in a weapon to school. This is not the case. C.M. was bullied repeatedly and their response was to blame C.M. rather than preventing the bullying. C.M.'s comments on October 20, 2022, was the result of his boiling over. He went to get help from the school counsellor opposite his classroom, then went to the principal's office who was not there and then he was interviewed by the attendance clerk. He made a complaint and exercised his first amendment rights and he was betrayed and punished by what is now a five-month removal from school. C.M. wants to go back to school but the parents are concerned about how to protect him. Petitioners believe the District has it in for C.M. and made a predetermination in October that they do not want to deal with C.M. and want him out of the District in an emotionally disturbed placement without dealing with other potential options.

C.M. is eligible for protection and under Drinker it remains the law in the third circuit that the determination of the child's current educational placement when due process was filed controls, and the status quo should be maintained pending due process. The consent form for home instruction was signed without waiving petitioners' rights to stay put and the District accepted the form.

Petitioners submit that the reason it took so long to file this application was it took a long time to get the records from the District. C.M. is not a threat to himself or others and has impulse control and social skills deficits. The 504 plan the District offered and agreed to in December indicated that C.M. would receive counselling rather than discipline. The 504 case manager, who is a Board Certified Behavior Analyst (BCBA) indicated C.M. is impulsive and uses alarming remarks but has taken no action on any of his threats.

C.M. is now on medication for ADHD and has been for months. His treating doctor indicated that his medication cannot be managed unless he is put back in the classroom to see how he is interacting with the other students. Petitioners submit that C.M. is not dangerous, the District is dangerous to the mental health of this eight-year-old third grader.

For respondent

Petitioners were not coerced when they signed the consent for home instruction and had their advocate involved in the process. If petitioners were suffering irreparable harm these past four months on home instruction, this emergent application should have been brought four months ago. The premise of the parents' arguments was that the child was bullied, and his behavior was the result of being bullied. The parents raised this concern with the District and an HIB investigation was conducted which was found to not be HIB, but rather a conflict between the two students. The parents had the right to appeal this determination to the Board and then if they were not satisfied to the Commissioner of Education, but did not do so. There is a dispute regarding whether bullying was going on, clearly there is a dispute that the District coerced or retaliated against the parents for complaining about the bullying and putting the child on home instruction. The District disputes that the parents were deceived in any way or retaliated against. The child is being educated and was placed on home instruction with the parents' consent and that is the current functioning educational placement at the moment and is the stay put placement. There is no irreparable harm. There has been delay on the parents' part. The facts in this case are hotly disputed. Balancing the equities, the District does not know what is going on in this child's head and whether he intended to make threatening comments to others or not. What happens if the next threatening comment he makes, whether intended or not, is made to the wrong student or classmate and then what happens when the District is limited in its ability to protect C.M.

Respondent submits that the application for emergent relief be denied as petitioners' have not satisfied the standards for granting same. The child has been determined eligible for special education, but the parties have been quibbling about the category. They all agree that the child should be in school, but there is a dispute as to

which is the right one. The District did not make any predetermination as to placement. It is routine for districts to prepare draft IEPs for discussion in advance of the IEP meeting which is what happened in this case. The draft IEP was the CST's preliminary proposal and was not a predetermination.

Discussion

A review of the certification of Colleen Pongratz indicates that C.M. began attending kindergarten in the District in September 2019 at the Knollwood Elementary School. During the COVID-19 state of emergency, he attended school remotely from March 2020 through June 2021 when he completed first grade. Petitioners withdrew C.M. from the District for his entire second grade school year, 2021–2022, but re-enrolled him in August 2022. The petitioners emailed the District regarding their concerns about C.M. returning to school and the Principal, Brian Voigt, communicated with the petitioners throughout the summer and discussed the possibility of putting supports in place for C.M.'s return to school in-person and to plan his initial 504 meeting. On September 6, 2022, petitioners emailed Dr. Aboudara, the school psychologist, sharing their concerns related to C.M.'s executive functioning and emotional regulation. On September 9, 2022, C.M.'s parents shared an email from his homeschool teacher that stated in part that C.M. "needs support to deescalate anger outbursts, they are somewhat frequent and becomes overwhelmed with strong emotions." On September 13, 2022, the District convened an initial Section 504 meeting to discuss accommodations for C.M.'s disability, as he had a diagnosis of ADHD. The District put in place several interventions to address C.M.'s behaviors including frequent breaks, frequent student-initiated visits to the school counselor, assistant principal or principal, regular phone check-ins between C.M. and his father, participation in a "lunch bunch" counselling group and the use of a fidget spinner.

On September 15, 2022, C.M. was reported to have been fighting with another student in the boy's bathroom. On September 22, 2022, C.M. put his hands around the neck of a kindergarten student. On September 28, 2022, C.M. told a table of classmates "You're going to die." On October 7, 2022, C.M. told the principal and Dr. Aboudara about using kitchen knives to murder a classmate if the "darkest vaults" in his head ever got

open. On October 12, 2022, C.M. told a classmate he would “cut off your head and stick it to my wall.”

On October 20, 2022, a “Student Conduct Referral Form” was reported by the attendance clerk regarding an incident with C.M. C.M. had gone to the office looking to speak to the principal, Mr. Voigt who was not there at the time. The attendance clerk thought the C.M. looked angry and asked him if anything was wrong and if she could help. C.M. stated that he had a list of “students that need to be expelled and teachers that need to be fired” and if it didn’t happen there would be “bloodshed.” The clerk asked C.M. what he meant and he told her he would bring a knife to school. When the clerk told him he would get in trouble for doing that, C.M. told her that he would hide it so on one would know, but he wouldn’t do that because his mom and dad would be mad. (Exhibit A, Certification of Colleen Pongratz.)

As a result of this incident, C.M. was sent for a psychiatric screening by Acute Psychiatric Services on October 20, 2022, the day of the incident. C.M. was determined not to be an imminent danger to himself or others.

On October 21, 2022, C.M.’s parents requested the District to conduct an HIB investigation concerning a student they believed was bullying C.M. The parents also requested that C.M. be referred to the CST to be evaluated for eligibility for special education and related services.

Ms. Pongratz indicates in her certification that she understood that C.M. could not be excluded from school for more than ten school days without either parental consent or an application to an ALJ for emergent relief. She had conversations with the parents basically stating that the District did not feel it safe to return C.M. to school in person until they had a clear understanding of his mental and emotional condition. Ms. Pongratz told the parents the District would have no choice but to file for emergent relief unless the parents consented to home instruction while the CST conducted the necessary evaluations. The parents consented to home instruction pending CST evaluations.

On November 2, 2022, the parents and the District signed the Home Instruction Request form indicating that C.M. was placed on home instruction pending CST evaluations. (Exhibit E, Certification of Colleen Pongratz.)

The certification of Deidre Ortiz, Director of Pupil Services, indicates that C.M. was referred to the District's CST on October 27, 2022. An initial planning meeting was scheduled for November 14, 2022, and rescheduled for November 22, 2022, at petitioners' request and conducted via Zoom. The CST proposed an evaluation plan to conduct educational, psychological and psychiatric evaluations, for which petitioners gave written consent on December 2, 2022. The completed evaluations were emailed to petitioners on February 10, 2023, along with a draft of a proposed IEP. Based on the evaluations, the CST's preliminary recommendation was for an out-of-district placement. An eligibility and IEP meeting was conducted via Zoom on February 21, 2023. The draft IEP found C.M. eligible for special education and related services under the disability category of Emotional Regulation Impairment (ERI) and recommended an out-of-district placement. (See proposed IEP dated February 21, 2023, annexed to certification of Ms. Ortiz.)

C.M. remains on home instruction despite the CST evaluations being completed on February 10, 2023.

The CST's Psychological Assessment evaluation dated January 10, 2023, (also annexed to Ms. Ortiz's certification) references a number of reports including the following:

Neuropsychologist, Dr. Christine Ghilain who found C.M. had deficits in attentional control and behavioral regulation which reflect dysfunction of frontal systems, and behaviors observed are consistent with a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD), Combined Type. Trouble using appropriate methods to share his feeling and react appropriately to less preferred activities was also evident. Dr. Ghilain opined that children with executive deficits and trouble tolerating frustration can interfere with peer relationships and cause increased interpersonal difficulties as they mature.

The Acute Psychiatric Services hospitalization screening done on October 21, 2022, by Dr. Elton Smith indicated that C.M. was assessed and discharged to the safety of his parents as he was determined not to be a danger to himself or others.

C.M.'s treating psychologist, Doris E. Schueler, PhD. submitted a letter dated November 14, 2022, indicating that C.M. is not a physical threat to his peers or to faculty at the school. Dr. Schueler recommended that C.M. return to school with the provision of an aide, to help him should he be "approached by others at recess or in class until he masters social skills." She also recommended a peer social skills group along with daily counselor check-ins.

Hasan Memom, M.D., a board-certified psychiatrist and neurologist submitted a letter dated November 21, 2022, indicating that C.M. was seen in his clinic on November 13, 2022. Dr. Memom indicated that C.M. had a diagnosis of ADHD Combined Type, Major Depressive Disorder, Performance Anxiety and Disruptive Mood Regulation Disorder. He was also being evaluated for an Autism Spectrum Disorder (ASD). Dr. Memom requested that C.M. be returned to school to help with his medication adjustment in a "real time environment." Dr. Memom further concluded that C.M. is not a danger to self or others and can safely return to school.

The December 12, 2022, Section 504 Accommodation Plan indicates that C.M. has been diagnosed with ADHD Combined Type, anxiety, depression and ASD. The major life activity affected by this physical or mental impairment is learning, concentrating and social interactions with peers. This impairment substantially limits a major life activity in that due to his diagnoses, C.M. struggles with work completion, maintaining his attention and remaining on-task. Additionally, he struggles with executive functioning tasks such as organization of materials and planning. Furthermore, C.M. struggles with regulating his emotions and tolerating frustration. Lastly, due to current behavioral concerns associated with his diagnoses he is on home instruction pending a full CST evaluation. Various accommodations are listed including C.M. will receive a five-to-ten-minute reflection period if consequences are needed for inappropriate behavior. Also C.M. will participate in a peer social skills group two times weekly for twenty-five minutes.

This will begin when C.M. resumes in-person instruction. Groups will include both social skills and executive functioning strategies. (Petitioners Exhibit 2.)

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, petitioners assert that there is an issue concerning placement pending the outcome of the due process proceedings and therefore, this is an appropriate application for emergent relief. Petitioners contend that C.M. should be immediately returned to the general education classroom at Knollwood Elementary School with his most recent 504 plan from December 2022 in place with the addition of a one-on-one aide being assigned to C.M. The District argues that parents consented to home instruction and that is his stay put placement pending the due process proceeding as well as arguing that they do not meet the standards for emergent relief.

The “stay-put” provision under the Individuals with Disabilities Education Act (IDEA) provides an automatic preliminary injunction, preventing a school district from making a change in placement from the last agreed upon IEP, during the pendency of a petition challenging a proposed IEP. 20 U.S.C.S. § 1400, et seq, Drinker v. Colonial School District, 78 F.3d 859, 864 (3d Cir. 1996, and Zvi D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982). The purpose of “stay put” is to maintain the status quo for the child while the dispute over the IEP remains unresolved. Ringwood Bd. of Educ. v. K.H.J., 469 F.Supp.2d 267, 270–71. (D.N.J. 2006.)

Although the parents consented to home instruction, the home instruction form clearly states that the home instruction was to be in effect pending CST evaluations. The CST evaluations were completed on February 10, 2023, and C.M. should have been returned to school at that time. Ms. Pongratz was aware that C.M. had certain rights as a student with a disability and that is why she requested the parents sign the consent for home instruction, otherwise the District would be forced to bring an action to remove him for dangerousness. Even if the District had brought such an action and were successful, they could only keep him removed for forty-five days before returning him to school.

The stay-put provision provides in relevant part that during the pendency of any proceedings conducted pursuant to this section, unless the state or local educational agency and the parents otherwise agree, the child remain in the then-current educational placement of the child. 20 U.S.C.A. § 1415(j). The relevant IDEA regulation and its counterpart in the New Jersey Administrative Code reinforce that a child remain in his or her current educational placement “during the pendency of any administrative or judicial proceeding regarding a due process complaint.” 34 C.F.R. § 300.518(a) (2016); N.J.A.C. 6A:14-2.7(u). Since the time period provided for the home instruction consent form expired on February 10, 2023, once the CST evaluations were completed, C.M. should have been returned to his general education classroom with his December 2022, 504 plan in place. That would be his stay put placement.

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 a petitioner's claim; a likelihood that petitioner will prevail on the merits of the underlying claim; and a balancing of the equities and interests that petitioner will suffer greater harm than respondent. Petitioners bear the burden of satisfying all four prongs of this test. Crowe, 90 N.J. at 132–34.

As far as the first factor set forth in Crowe, petitioner will suffer irreparable harm if the relief is not granted. He has been removed from his classroom and peers for too long and is in need of social skills due to his disability. He has not been found by any of the treating mental health providers to be a danger to himself or others. The District should assign C.M. an individual one-on-one aide to assist him as recommended by C.M.'s physician in order to prevent and/or minimize the likelihood of C.M. engaging in maladaptive behaviors or reacting inappropriately in his peer interactions.

The District has an obligation to provide C.M. with FAPE in the least restrictive environment. The IDEA's mainstreaming requirement requiring education in the "least restrictive environment" at 20 U.S.C.A. § 1412(a)(5) mandates that:

[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

The least restrictive environment in this case is for C.M. to be educated in his home district, Knollwood Elementary School. The District has an obligation to provide appropriate behavioral supports to C.M. and cannot demonstrate, at this stage, that it used supplementary aids and services such as assigning him an aide to demonstrate that reasonable steps were taken to educate C.M. in the least restrictive environment.

Therefore, as far as the second and third factors set forth in Crowe, petitioners have a settled legal right and a likelihood of success on the merits. C.M. has the right to

be educated in the least restrictive environment. His removal from the regular education environment can only occur when the nature or severity of his disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. The District has the burden of proof on this issue at the due process hearing.

The fourth factor set forth in Crowe requires a balancing of the equities and whether the petitioners will suffer greater harm than the respondent if the relief requested is not granted. I **CONCLUDE** that in balancing the equities, petitioners would suffer greater harm than the respondent. C.M. is an eight-year-old disabled child who requires social skills and peer interactions after a long period of deprivation. There has been no indication that C.M. is a harm to himself or others or that he should be removed for dangerousness. The District should provide C.M. with an individual one-on-one aide in order to manage C.M.'s behaviors and keep C.M. as well as all school individuals safe pending the due process hearing.

Therefore, for all of the foregoing reasons, I **CONCLUDE** that petitioners have demonstrated entitlement to the emergent relief requested, since they have satisfied all four prongs of the test and that the stay put placement for C.M. pending the due process hearing shall be the general education class at Knollwood Elementary School pursuant to the December 2022, 504 plan with the addition of a one-on-one aide, unless the parties both agree to a change in placement.

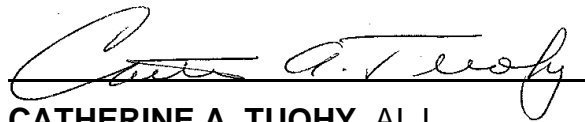
ORDER

It is **ORDERED** that the petitioners' application for emergent relief is **GRANTED**. It is further **ORDERED** that the IEP team shall meet within five days of the date of this Decision to develop an appropriate IEP for C.M.'s return to school.

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.

March 22, 2023 _____

DATE



CATHERINE A. TUOHY, ALJ

Date Received at Agency:

Date Mailed to Parties:

CAT/gd

APPENDIX

WITNESSES

For petitioners

None

For respondent

None

EXHIBITS

For petitioner

- Petitioners' Request for Emergent Relief dated March 13, 2023 (181 pages) with annexed table of contents of Combined Exhibits 1 through 41 for Emergent Relief and Due Process Petition included as pages 182-183
- Additional Exhibits 42 through 44 emailed and received on March 16, 2023

For respondent

- Letter Brief from David B. Rubin, Esq., dated March 16, 2023, in Opposition to Petitioners' Application for Emergent Relief, with attached HIB Investigation Report dated November 9, 2022
- Certification of Deidre Ortiz, with attached Psychological Assessment Report, Psychiatric Evaluation, Educational Evaluation, and draft of proposed IEP dated February 21, 2023
- Certification of Colleen Pongratz with attached Exhibits A through E