



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**FINAL DECISION**

**ON EMERGENT RELIEF**

OAL DKT. NO. EDS 08405-2021

AGENCY DKT. NO. 2022-33472

**HAMMONTON TOWN BOARD OF EDUCATION,**

Petitioner,

v.

**M.D. ON BEHALF OF L.D.,**

Respondent.

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**Amy Houck Elco**, Esquire, for petitioner (Cooper Levenson, attorneys)

**M.D.**, pro se, respondent

Record Closed: October 18, 2021

Decided: October 19, 2021

BEFORE **ELAINE B. FRICK**, ALJ:

**STATEMENT OF THE CASE**

Petitioner, Hammonton Town Board of Education (the District) seeks an order to immediately place the student, L.D., in an interim alternative placement of home instruction, pending the underlying due process petition, due to the health and safety risk posed if the student remains in “stay put” placement in school. Respondent, M.D., mother of the child, L.D., opposes the emergent relief request and contends that the child should remain in school and should not be on home instruction.

## **PROCEDURAL HISTORY**

On or about October 7, 2021, the District submitted an emergent request and a due process petition to the New Jersey Department of Education, Office of Special Education (DOE). The DOE transmitted the emergent request to the Office of Administrative Law (OAL) where it was filed on October 12, 2021, to be heard as an emergent contested matter. N.J.S.A. 52:14B-1 to 14B-15; N.J.S.A. 52:14F-1 to 14F-13.

The matter was scheduled for oral argument on the emergent matter for October 18, 2021. The proceeding was conducted via zoom audio/video technology, due to the continued suspension of in person proceedings at the OAL because of the COVID-19 pandemic.

Petitioner's application for emergent relief and certification by Sharon DeNafo, Supervisor of Special Services for the District, was submitted and considered for this application. A letter from M.D. to counsel for the District, dated October 14, 2021, was submitted in advance of the proceeding, and considered for this application.

Respondent requested that multiple individuals be permitted to attend the Zoom proceeding as advocates. The District did not object to the request. M.D. participated via zoom connection with the father of the child, L.L., who was seated next to her. M.D.'s sister, E.D. was present, via zoom. Jessica Castiblanco, Family Support Coordinator, and Tasha Lowe, Family Support Partner, from the Atlantic Cape Family Support Organization, were seated next to one another and present via zoom. Heide Shelley, a behavioral therapist from ABC Therapy, who provides private at home after school therapy to L.D., was present via zoom.

## **FACTUAL DISCUSSION AND FINDINGS**

Based upon the submissions of the parties, and argument heard from the parties, I **FIND** as **FACTS** the following:

L.D. is a six-year-old child with the classification of autism. He is enrolled in first grade at the Hammonton Early Childhood Education Center, for the 2021-2022 school year. Pursuant to a prior Individual Educational Program (IEP), he is in a self-contained classroom, which has a total of seven students. There is a special education teacher and L.D. has a 1:1 aide and a behavior plan. He was a virtual student for kindergarten for the 2020-2021 school year.

The child has been engaging in behaviors in the classroom such as screaming, kicking, pulling hair, elopement, plopping himself on the floor, and pulling his pants down. On September 9, 2021, while in class, L.D. had an incident during which he injured his teacher and aide, both of whom had to go to the school nurse. The other children in the classroom had to be escorted out of the room during the incident.

On September 13, 2021, while in class, L.D. had an incident during which he injured his teacher. He slapped the teacher, used the bottom of his hand to push her head, refused to sit down for instruction, turned his desk over, spit in his hands, and pulled his pants down. The teacher had scratches and bruises on her arms from the incident. The other children in the classroom had to be escorted out of the room during the incident.

On September 15, 2021, the Child Study Team (CST) convened, including L.D.'s mother, M.D., to address L.D.'s behaviors. The District does not have an appropriate autistic program for L.D.'s needs. The September 15, 2021, CST recommendation was to place the child in home instruction until an appropriate out-of-district placement could be found for L.D. The mother disagreed with the recommendation for out of district placement. The District offered to tour other programs with M.D. One recommended placement is in a neighboring district, approximately five miles from the Hammonton school.

The District has tried to schedule out of district tours with M.D. It asserts that scheduled tours were cancelled by the mother, and she pursued other district tours at other schools she selected to view. The District confirmed that they have now

coordinated with the mother tours of other district programs, to occur on October 18, and October 25, 2021.

L.D. was suspended for ten days, for injuring his teacher. On September 29, 2021, the District conducted a manifestation determination meeting. M.D. and eight advocates attended the meeting. The District determined that L.D.'s behavior was a manifestation of his disability. The District reiterated to the parents and advocates that it did not have an appropriate program for L.D. and that L.D. needed out of district placement.

As of October 1, 2021, M.D. filed for mediation via the DOE, to invoke "stay put" for L.D. at Hammonton.

On October 6, 2021, L.D. had another incident where he hit his teacher and required support staff for approximately five to ten minutes to calm him down. The other children had to be escorted out of the classroom during the incident.

On October 8, 2021, L.D. was in the classroom and slapped the teacher and kicked his aide. L.D. has been suspended again for ten days. A manifestation determination meeting is scheduled to occur on October 21, 2021. As of this proceeding on October 18, 2021, the child was at home, completing his second ten-day suspension.

### **Arguments of the parties**

The District agrees that the "stay put" placement of the child would be in school. It asserts it is entitled to the emergent relief of interim placement of the child on home instruction, due to the health and safety risks posed to L.D., the other students, and the staff, if L.D. remained in the classroom. The District does not have a program to address the child's needs and is actively working with M.D. to find an appropriate placement. The District does not have the staff, nor the physical room to set up a program to specifically meet L.D.'s needs. It asserts it meets the criteria of Crowe v.

DiGioia, 90 N.J. 126 (1982) to be awarded the emergent relief sought, for the health and safety of all.

Respondent opposes the home instruction placement. M.D. sent a letter response to the District, in which she indicated she agreed with home instruction, to be done by a Special Education teacher, and that L.D.'s related services must continue to be provided during home instruction. During this proceeding, M.D. asserted she no longer took that position and disagreed with the District's requested home instruction placement.

M.D. contends that L.D. loves school. If he is not permitted to return to the classroom, it will be a disruption to his schedule, which is critical to him with his disability. He needs the schedule to continue, which is attending school in the morning and then having certain after school in home services M.D. has arranged. The child does not learn with virtual or remote instruction. Both M.D., and the father, L.L., work full time and cannot be at home to oversee the home instruction of L.D. Most recently, as of approximately October 6, 2021, L.D.'s prescribed medication was increased, which M.D. believes has resulted in better behavior by L.D.

M.D. proposes that L.D.'s at home therapists could go to the school to give suggestions to the Hammonton teachers, aides, and staff as to how to handle L.D.'s behavior and learn how to redirect him when it appears he is going to tantrum or refuses to do a requested task. She asserts that L.D. has not recently exhibited the behaviors the school alleges have occurred in September and October of this year, and that the staff just needs to learn how to redirect L.D.

### **LEGAL ANALYSIS**

The New Jersey Administrative Code provides that parent(s), guardian(s), or the District Board of Education (BOE), or a public agency, may apply in writing for emergency relief. N.J.A.C. 1:6A-12.1(a). An applicant for emergency relief must set forth in their application the specific relief sought and the specific circumstances they contend justify the relief sought. Id.

In special education matters, emergent relief shall only be requested for the following issues:

- 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.

N.J.A.C. 6A:14-2.7(r)1.

The District is seeking an interim alternative educational setting, pending the outcome of the due process proceedings, as per N.J.A.C. 6A:14-2.7(r)1, subsections ii and iii. I thus **CONCLUDE** that the District's request for emergent relief has been appropriately filed with the OAL for consideration herein.

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).

There are two exceptions to the stay put provision. The first is if the parties agree to a different placement, otherwise “the child shall remain in the then-current educational placement of the child.” 20 U.S.C.S. § 1415(j). The second exception arises under the disciplinary provisions of IDEA, 20 U.S.C.S. § 1415(k).

The District here acknowledges that “in school” education and related services is the appropriate stay put placement. It is seeking emergency relief from the stay put placement, due to the asserted health and safety risk posed to the child, the other students, teachers, and staff, if L.D. were to return to the classroom after his most recent suspension, pending the outcome of the underlying due process petition seeking out of district placement to address the student’s needs.

The well settled four prongs to be considered in an assessment of a party’s request for emergent relief, as set forth within Crowe v. DiGioia, 90 N.J. 126 (1982), are codified in the New Jersey Administrative Code. The regulations provide that emergency relief may be granted if the 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.

N.J.A.C. 1:6A-12.1(e) and N.J.A.C. 6A:14-2.7(s)(1).

The District asserts that it will suffer irreparable harm if their requested relief is not granted. The child has had his injurious incidents, within a short period of time, where he has injured teachers and staff. His exhibited behaviors of slapping, spitting, physical defiance by overturning his desk, and pulling down his pants, pose a risk to the other students in the classroom. The District contends it is required to educate all students, and provide a Free Appropriate Public Education (FAPE) pursuant to IDEA, 20 U.S.C. section 1400, et seq., and the New Jersey Administrative Code for Special Education, N.J.A.C. 6A:14, et seq. L.D.’s behaviors have required the school to escort the other students out of the classroom, which encroached on their educational time

and prohibits the District from providing the necessary services to those students. The District does not want to continue to suspend the child from school. It recognizes that the child's behavior on one of the occasions has been determined to have been a manifestation of his disability. The District candidly acknowledges it does not have the staff, nor the physical setting to accommodate L.D.'s needs. I **CONCLUDE** such asserted issues will result in irreparable harm to the District, if the child were to be in the classroom, without appropriately skilled teachers, aides, and staff to address his needs.

The District asserts that there is a settled legal right that it is inappropriate to keep a child in school if harm will result to other children. It relies upon N.J.A.C. 6A:14-4.2, the regulation requiring placement of students with disabilities in the least restrictive environment. The regulation details circumstances each school district must ensure for a least restrictive environment, such as placement of the student as per their IEP, and to the greatest extent possible, educating the child in a classroom with peers who are not disabled. N.J.A.C. 6A:14-4.2. When determining the least restrictive environment, consideration must be given to the "potentially beneficial or harmful effects which a placement may have on the student with disabilities or the other students in the class[.]" N.J.A.C. 6A:14-4.2(a)8iii. The District contends it is well settled that it must consider the harmful effects which may occur to L.D. himself, and to the other students in the classroom, if L.D. remains in the classroom.

The District points to two final decisions issued by Administrative Law Judges (ALJ) from the OAL, where the emergent relief of placing a child on home instruction was granted. In the matter of Sparta Township Board of Education v. R.M. and V.M. obo C.M., OAL Docket Number EDS 01975-2020, (decided February 21, 2020), the ALJ concluded the BOE was entitled to emergent relief, for the student to be on home instruction for a forty-five day period, due to the safety risk posed whereby the student's behavior could not be controlled on at least two occasions, when the high school student had to be restrained by a security guard and the assistant principal. In that situation, the student had 504 Plan accommodations. In the matter of Collingswood Borough Board of Education v A.C. obo D.F., OAL Docket Number EDS 10586-2009 (decided April 1, 2010), the ALJ granted the BOE's emergent relief to place the student in an out of district school setting that was highly structured with behavioral supports.



Within the decision, the ALJ referenced that on an earlier emergent application, the district requested modification of stay put, to place the first-grade student on home instruction due to the student's behavioral difficulties, which constituted a danger to himself and others. That emergent relief request was granted, placing the student on home instruction, pending an appropriate out of district placement.

I **CONCLUDE** that the District has demonstrated that there is settled legal right, whereby a District may request the emergent relief of modification of stay put, to an alternate placement, such as home instruction, in light of behavioral issues of a student, which pose a threat or risk of threat to the healthy and safety of the student or others.

The District asserts it meets the third prong of the Crowe factors, that it has a likelihood of prevailing on the merits of the underlying claim. The District admittedly does not have a program, nor the physical space to create a program in its school, to accommodate L.D.'s needs. In addition, the above referenced final decisions from the OAL demonstrate that similar relief has been granted in similar situations. I **CONCLUDE** there is a likelihood of success on the merits of the underlying petition for out-of-district placement of the student.

The fourth prong the District must satisfy to demonstrate is that it will suffer greater harm than respondent will suffer if the requested relief is not granted. The equities of the interests of the parties shall be balanced, to determine if the District can satisfy this condition. The District asserts it is unable to provide FAPE to other students, due to L.D.'s disruptive behavior. It admittedly does not have appropriate staff to handle L.D., and the District cannot allow potential future additional harm to its teachers, aides, and staff members, nor to L.D. himself. Additionally, it is subject to liability for not protecting or shielding the other students in the classroom and in the school, from potential harm or injury caused by L.D. or as a result of his physical behaviors such as overturning the desk or exposing himself when pulling his pants down.

The parents and the student will suffer harm if L.D. is required to go on home instruction. The parents both work full time and are unable to be home with L.D. If he is home, they will have to adjust their work schedules, or make other accommodations for

someone to care for L.D., which presumably will pose a financial deficit to them. M.D. also asserts that if L.D. cannot return to school it will disrupt his routine, although the child has been home on a second, ten-day imposed suspension, since the beginning of the school year, which has been approximately half of the time from the start of the school year. Respondents asserts that video and remote learning does not work for L.D. The school has indicated that home instruction would be in person, by a special education teacher, and that it can deliver other related services from the student's IEP, in home, in person.

Having considered the equities and interests of the parties, I **CONCLUDE** that the scales are tipped in favor of the District, to demonstrate that it will suffer greater harm than respondent, if L.D. were permitted to remain in school, during the pendency of the underlying due process action. Certainly, this is not making light of the challenges posed to the student by being placed on home instruction and the hardship to the parents in such circumstances.

Based upon the above conclusions that the District has satisfied the requirements to be granted emergent relief, I must **CONCLUDE** that the District shall be granted the emergent relief sought, to alternatively place the student on home instruction, during the pendency of the due process petition. I **CONDCLUDE** the District has demonstrated, by a preponderance of the evidence, that the risk of harm to L.D., the teachers, staff, and other students, is too great to allow L.D. to remain in school at this time.

The school shall be required to provide in person, home instruction, by a Special Education teacher and shall provide L.D.'s related services within person professionals. I **CONCLUDE** that such services shall be arranged, without haste, to address the child's academic needs, pending the outcome of the underlying due process petition.

**ORDER**

It is **ORDERED** that the District's emergent relief request to place L.D. on home instruction during the pendency of the underlying due process petition is **GRANTED**. It is further **ORDERED** that home instruction shall be in person, by a Special Education teacher, and related services shall be in person, by an appropriate professional.

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 Policy and Dispute Resolution.



December 19, 2021  
\_\_\_\_\_  
DATE

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**ELAINE B. FRICK, ALJ**

Date Received at Agency \_\_\_\_\_

Date Mailed to Parties: \_\_\_\_\_

EBF/tat