



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

**FINAL DECISION ON**

**EMERGENT RELIEF**

OAL DKT. NO. EDS 10038-21

AGENCY DKT. NO. 2022-33643

**C.T. ON BEHALF OF J.T.,**

Petitioner,

v.

**EGG HARBOR TOWNSHIP BOARD**

**OF EDUCATION,**

Respondent.

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**Robert C. Thurston**, Esq. for petitioner (Thurston Law Offices, LLC, attorney)

**Kasi M. Gifford**, Esq. and **Amy Houck Elco**, Esq. for respondent (Cooper Levenson, P.A., attorneys)

Record Closed: December 15, 2021

Decided: December 16, 2021

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

**STATEMENT OF THE CASE**

Petitioner, C.T. on behalf of her son, J.T., filed an application for emergent relief against the respondent, Egg Harbor Township Board of Education, alleging a break in services and seeking 'stay put', pending the due process proceeding, pursuant to the May 17, 2021, Individualized Education Program (IEP). Respondent opposes this application and agrees that the May 17, 2021, IEP is the 'stay put' IEP and submits that

is the IEP they have been following in providing services to J.T. and there has been no break in services by respondent.

### **PROCEDURAL HISTORY**

Petitioner filed both a due process petition and application for emergent relief with the Office of Special Education Policy and Procedure (OSEP) on December 10, 2021. The application for emergent relief alleges a break in services and seeks 'stay put' pending the outcome of the due process hearing. The due process petition seeks implementation of the last agreed upon IEP, compensatory education, and reimbursement of fees. The emergent application was transmitted to the Office of Administrative Law (OAL) on December 10, 2021, as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The underlying due process petition remained at OSEP. The parties presented oral argument on the emergent relief application via Zoom, on December 15, 2021, and the record closed.

### **FACTUAL DISCUSSION**

#### **For Petitioner**

J.T., eleven years old, is autistic and in the sixth grade at the Alder Avenue Middle School. He has been diagnosed with hypogammaglobinemia and suffers from chronic asthma. He also has GE reflux, a very sensitive stomach and gag reflex. He is eligible for special education and related services under the classification of autism. His IEP is dated May 17, 2021, for the 2021-2022 school year. J.T. is in the special multiple disabilities class and has a 1:1 individual paraprofessional assigned to him from September 8, 2021, through June 21, 2022, daily for 360 minutes, which is six hours per day. There are six and a half hours in the school day. There has been no IEP meeting since the May 17, 2021, and it is the operative IEP. Petitioner wants the IEP followed as written.

J.T. was absent from school at the beginning of the year due to COVID and returned to school September 20, 2021. There were a series of incidents which petitioner tried to resolve with respondent without litigation. They were able to work out

issues petitioner had with the first aide and the District assigned a new aide to J.T. On November 29, 2021, J.T. returned to school and was assigned a new paraprofessional. Petitioner alleges that the assigned paraprofessional was at lunch and an aide was not sitting with J.T. when an incident occurred during a rock painting project and that the classroom teacher berated and humiliated J.T. Petitioner alleges that J.T. was traumatized and did not want to return to school. Petitioner again pulled J.T. out of school and filed this emergent application. Petitioner argues that the failure of the paraprofessional to be sitting with J.T. during this incident with the classroom teacher constitutes a break in services. A 1:1 aide should be sitting next to the child assisting him with his needs for six hours and should not be anywhere else in the classroom. The aide who was in the classroom, covering for J.T.'s aide while she was at lunch, was not sitting next to J.T. when this incident occurred.

Petitioner points out that the IEP addresses J.T.'s various needs, including social skills, as well as multiple references that J.T. requires prompting and specific directions repeated due to a processing delay. The IEP provides that each teacher that works with J.T. will be informed of the accommodations and modifications in his IEP. The social/emotional/behavioral section of the Present Levels of Academic Achievement and Functional Performance (PLAAFP) at page 9, of the IEP states that it is beneficial for J.T. to participate in a positive reinforcement program for demonstrating the appropriate social-emotional skill. It also states that J.T. responds well to positive and specific staff attention and states:

J.T. may become worried or anxious over student dynamics and/or task completion/concepts. This can often impede his daily academic progress. When he becomes overwhelmed, providing J.T. with the opportunity to speak with a supportive staff member, practice relaxation techniques, and encourage him to use his words have helped him to manage his emotions more appropriately.

The IEP at page 10, indicates that, "J.T. is eager to please his teachers, but struggles to participate in classroom activities, even ones he is familiar with, without prompting". In addition, when a student asks him a question or speaks to him, he will

often ignore them. He follows classroom routine with minimal prompting but often needs extra time to complete tasks, as he has a processing delay and can be distracted by his peers. “J.T. experiences anxiety and may be reluctant to participate in group activities or when he is unsure of his abilities.” (IEP, page 10.) The IEP at page 12, indicates that J.T. needs a “paraprofessional to implement individualized plan, maintain attention and help reduce worry.” The “modifications” section of the IEP at page 17, includes items such as: J.T. will be monitored for overload, excess stimuli; tasks will be broken down into manageable units; J.T. will be provided a highly structured, predictable learning environment; directions will be repeated, clarified or reworded; and that J.T. will be allowed wait time for processing before calling on student for response.

Petitioner submits that all the above are reasons that J.T. requires a 1:1 paraprofessional. On November 29, 2021, J.T. did not have an aide sitting next to him to assist him in understanding the rock painting assignment when it is alleged the teacher had an adverse response to what he was doing. Although there is a factual dispute as to what transpired between J.T. and the teacher, petitioner argues that J.T. did not have a 1:1 paraprofessional sitting with him at the time, and this constituted a break in service.

The emergent petition at paragraph nine and ten alleges that respondent’s personnel have told C.T. that the School District proposes to change J.T.’s placement to another self-contained classroom or to homebound services and that they are “phasing out” the 1:1 aide program.

#### For Respondent

Respondent relies on the certifications it supplied with its answer and brief in opposition to petitioner’s request for emergent relief. Respondent supplied certifications from Jennifer Biddick, Supervisor of Special Education for respondent; Carole Severage, J.T.’s paraprofessional; Rebecca Hendrix, Special Education Teacher for respondent; and Raymond Dorso, Director of Special Education for respondent.

The District has proposed no changes to the IEP. They are following the IEP as written. All the staff are familiar with the IEP and are implementing it. J.T.'s 1:1 aide is with him at lunchtime providing him with support since he has a sensitivity to watching others eat and may gag.

The certifications indicate that the District is following the May 17, 2021, IEP. There have been no changes to the IEP. Petitioner pulled J.T. out of school from October 29, 2021, to November 29, 2021, without a medical note. There were discussions regarding offering homebound instruction due to J.T.'s failure to attend school, but petitioner did not agree. There have also been discussions regarding future evaluations and the future need to discuss appropriate placement depending on the evaluations. There have also been discussions regarding paraprofessional rotations so all staff would be familiar with each student. However, no changes to J.T.'s IEP have been made. There have been no proposed changes to his program or services.

The District asserts that it has repeatedly attempted to work collaboratively with the petitioner and her counsel and has attempted to address all of petitioner's concerns. All of petitioner's complaints have been investigated by the District. There is a factual dispute as to what transpired during the November 29, 2021, painting incident as Ms. Hendrix certification disputes petitioner's version of events. She was following the IEP and directly working with J.T. and modeling the activity to make sure J.T. could participate. The certifications indicate that J.T.'s 1:1 paraprofessional was at lunch during the incident, but another paraprofessional covered in her absence. The IEP calls for J.T. to have a 1:1 paraprofessional for six hours and that is what the District is providing during the course of a six and a half-hour school day.

The District wants to work with petitioner. They want J.T. to come to school and learn. The District did not try to change anything without an IEP. They offered home instruction to assist J.T. after missing so much school. It is difficult to implement an IEP when the student does not come to school. All along, the District has been trying to work with petitioner and they are unsure why an emergent application had to be brought when they are following the IEP.

There is no basis for emergent relief and petitioner's application should be denied. The District disputes petitioner's version of what transpired between the teacher and J.T. on November 29, 2021. However, there was no break in the delivery of services to J.T. J.T.'s IEP calls for a 1:1 aide to be with him for six hours every day. The school day is six and a half hours. The aide accompanies J.T. to lunch to provide support because J.T. has GE reflux and a very sensitive stomach and gag reflex. Therefore, the aide cannot take her lunch when J.T. takes his lunch since she is there to support him, so she takes lunch during another thirty-minute period of the day. On November 29, 2021, the 1:1 aide took her lunch from 12:31 p.m. to 1:04 p.m. and the painting activity took place without J.T.'s 1:1 aide in the classroom, but another aide remained in the classroom for J.T. (See certifications of Gifford, Dorso, Hendrix and Severage.)

The District has not proposed any changes to the May 17, 2021, IEP and they agree that it is the 'stay put' IEP. The District is following the May 17, 2021, IEP and providing all the services set forth therein. The teachers and aides are following this IEP. There has been no break in services as far as the District is concerned, aside from the break in services occasioned by petitioner's failure to send J.T. to school.

### **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 a break in the delivery of services and an issue concerning placement pending the outcome of the due process proceedings entitling them to emergent relief.

The last agreed upon placement for J.T. was in the multiple disabilities special class with a 1:1 paraprofessional, six hours per day, as set forth in the IEP of May 17, 2021. That is his 'stay put' placement and there is no dispute that is his 'stay put' placement. 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 remains 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). There was never a dispute as to what the 'stay put' IEP was. Respondent is in agreement that the May 17, 2021, IEP is J.T.'s 'stay put' IEP and is the IEP by which they are delivering special education and related services to J.T.

Petitioner's application for emergency relief seeking 'stay put' when the respondent has been following the May 17, 2021, IEP and agrees that it is the 'stay put' IEP renders that part of the application moot. An action is moot when it no longer presents a justiciable controversy because the issues raised have become academic. For reasons of judicial economy and restraint it is appropriate to refrain from decision-

making when an issue presented is hypothetical, judgment cannot grant effective relief, or the parties do not have a concrete adversity of interest. Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976); J.L. and K.D. o/b/o J.L. v. Harrison Twp. Bd. of Educ., EDS 13858-13, Final Decision (January 28, 2014). <<http://lawlibrary.rutgers.edu/oal/search.html>>.

Petitioner's argument that there was a break in services occasioned by the assigned 1:1 paraprofessional's absence from the classroom during her lunchbreak on November 29, 2021, when the alleged 'painting incident' occurred, has no merit. The IEP called for J.T. to have a 1:1 paraprofessional for six hours each school day. The school day is six and a half hours. The 1:1 paraprofessional is required to be with J.T. during his lunch so she took her lunch during other class time when another paraprofessional would cover J.T. There is no evidence before me that J.T. received less than his six hours of 1:1 paraprofessional support as was required in his IEP.

It would appear petitioner is arguing that J.T. should have a 1:1 paraprofessional assigned to him for six and a half hours, that is, the entire school day, but that is not what the IEP requires.

Therefore, for all of the foregoing reasons, I **CONCLUDE** that petitioner has not demonstrated entitlement to the emergent relief requested as there has not been a showing of a break in the delivery of services to J.T. and the respondent is following the May 17, 2021, IEP and agrees it is the 'stay put' IEP pending the underlying due process proceedings.



**ORDER**

It is **ORDERED** that petitioner's application for emergent relief is **DENIED**.

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 Policy and Dispute Resolution.



December 16, 2021  
DATE

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**CATHERINE A. TUOHY, ALJ**

Date Received at Agency

\_\_\_\_\_

Date Mailed to Parties:

\_\_\_\_\_

CAT/tat

**APPENDIX**

**Petitioner's Submissions**

Emergent relief petition addendum, dated December 9, 2021  
Certification of C.T., dated December 9, 2021  
Request for due process hearing addendum, dated December 9, 2021  
May 17, 2021, IEP  
Correspondence from Robert Thurston, Esq., dated December 14, 2021

**Respondent's Submissions**

Answer to emergent petition, dated December 14, 2021  
Respondent's brief in opposition to request for emergent relief  
Certification of Kasi M. Gifford, Esq. with attached Exhibits A through N  
Certifications of Carole Severage, Jennifer Biddick, Rebecca Hendrix, and  
Raymond Dorso, with attached Exhibit O, dated December 14, 2021  
Correspondence from Amy Houck Elco, Esq., December 14, 2021