



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

**FINAL DECISION ON**

**EMERGENT RELIEF**

OAL DKT. NO. EDS 05162-22

AGENCY DKT. NO. 2022-34566

**K.P. ON BEHALF OF G.P.,**

Petitioner,

v.

**STRATFORD BOROUGH BOARD**

**OF EDUCATION,**

Respondent.

---

**K.P.**, on behalf of G.P., petitioner, pro se

**Daniel H. Long**, Esq., for respondent (Wade, Long, Wood & Kennedy, LLC,  
attorneys)

Record Closed: June 28, 2022

Decided: June 29, 2022

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

**STATEMENT OF THE CASE**

Petitioner, K.P., on behalf of her son, G.P., filed a petition for emergent relief against the respondent, Stratford Borough Board of Education seeking immediate provision of an extended school year program in an out-of-district placement, with transportation.

### **PROCEDURAL HISTORY**

Petitioner filed both a due process petition and a petition for emergent relief with the Office of Special Education (OSE) on June 24, 2022. Both petitions seek immediate provision of an extended school year program in an out-of-district placement, with transportation. Both petitions were transmitted simultaneously to the Office of Administrative Law (OAL) on June 24, 2022, as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13.

In response to the emergent application, respondent submitted an answer to the petition for emergent relief dated June 27, 2022, with attached Exhibits A through F, all of which were considered with this emergent application. On June 28, 2022, petitioner submitted various emails between herself and District personnel regarding her concerns dated November 23, 2021, March 14, 2022, March 15, 2022, March 21, 2022, March 22, 2022, March 23, 2022, March 24, 2022, March 25, 2022, March 28, 2022, May 10, 2022, May 11, 2022, and May 14, 2022.

Petitioner also submitted an email dated June 27, 2022, objecting to Mr. Long's representation of respondent in this matter stating that he had represented another school board in a case where K.P. was involved and advocated on behalf of her daughter. Petitioner felt that Mr. Long had a conflict because he was familiar with petitioner's family. Mr. Long submitted that there was no conflict as he has never represented petitioner in any case, and he does represent numerous boards. There is no basis under the Rules of Professional Conduct for requiring Mr. Long's disqualification from representing respondent in this case.

The parties presented oral argument on the emergent relief application on June 28, 2022, via Zoom audio/video technology, due to the continued suspension of in-person proceedings at the OAL due to the COVID-19 pandemic. The record closed on June 28,

2022, following receipt of the IEP dated March 21, 2022 and the proposed May 31, 2022 annual review IEP.

## **FACTUAL DISCUSSIONS**

### **For Petitioner**

Petitioner transferred to Strathmere in September. Petitioner's son G.P. is eight years old and qualifies for special education under the classification communication impairment. G.P. also suffers from severe allergies requiring an EpiPen, asthma, and a severe sensory processing disorder. He attended second grade at the Parkview Elementary School in the Language Learning Disabilities (LLD) class. The only services he receives are in school, including speech. K.P. states that the school nurse has repeatedly sent her son home from school due to a known medical condition and forced him to stay home for twenty-four hours thereafter. G.B. has a constant cough due to his allergies and has a mask exemption due to his sensory issues, however the nurse required him to wear a mask, which was inappropriate. Petitioner's husband had COVID, and the family is very cautious. Both her daughters also had COVID and G.P. missed time from school due to being quarantined.

The nurse also made G.P. stay home on days he needed nebulizer treatments stating she could not give the nebulizer treatment in school due to COVID. Also, the nurse would not do a nebulizer treatment for G.P. but only used G.P.'s rescue inhaler. Petitioner had a doctor's note requiring that nebulizer treatments be given G.P. However, the nurse has never administered a nebulizer treatment to G.P. in school. In March petitioner met with the administration. The nurse repeatedly sending G.P. home has interfered with G.P.'s IEP speech/reading programs and other educational services and has resulted in a denial of G.P.'s right to a Free and Appropriate Public Education (FAPE.) There were no remote sessions in place when G.P. was sent home.

G.P. had his tonsils removed in late May and petitioner provided a letter from Dr. Bresalier to the District requesting G.P. be put on home instruction. K.P. stated that the district called Dr. Bresalier to ask if he understood the cost of homebound instruction,

which was completely inappropriate. It took the district ten days to find a tutor for G.P. The tutor, Mrs. Coffey provided homebound instruction, but most times could only provide an hour of instruction a day and only several times was she able to provide two hours of instruction. However, she was not qualified to do G.P.'s speech therapy. G.P. has had no services since early May. Although G.P. was cleared to return to school June 7, 2022, it was agreed that he would continue on homebound instruction for the remainder of the school year.

Petitioner wants G.P. to attend an in-person Extended School Year (ESY) program out-of-district so he can move towards fulfilling his IEP goals without being subject to bias and not being sent home excessively. Petitioner has requested an out-of-district ESY placement due to the amount of times the nurse has sent G.P. home for a known medical condition all year long. G.P. and petitioner are not comfortable with him attending Parkview.

The annual May 31, 2022, IEP review meeting was held, and it was discussed that G.P. would need ESY. By email, dated June 17, 2022, Ms. Shaeffer asked petitioner if G.P. would be participating in SPIRE, a reading program offered by the District. K.P. was offered two programs, a remote program with a District employee and the in-district ESY program. ESY was always the plan because of the amount of time G.P. missed. Petitioner was not sure if it was the teacher sending her son to the nurse or the nurse sending him home was the problem. They were worried that the in-person ESY program in the district in the summer would also have the same nurse who would continue to send G.P. home. She does not trust the district with her son. G.P. finished the year on homebound instruction

Petitioner has not consented to the May 31, 2022, proposed IEP.

Petitioner wants an out-of-district ESY placement not connected with the district or the administration.

Petitioner has toured and registered G.P. for a private Catholic School in Strathmere for September.

For Respondent

The district followed the New Jersey Department of Health (NJDOH) “Interim COVID-19 guidance for PPE use for school nurses” which stated that during the COVID-19 pandemic, asthma treatments using inhalers with spacers (with or without face mask) was preferred over nebulizer treatments whenever possible. Nebulizer treatments at school should be reserved for students who cannot use or do not have access to an inhaler (with or without spacer or facemask.) The district followed this guidance until they received petitioner’s doctor’s note on March 17, 2022, to use the nebulizer.

Respondent submits that the school nurse has only sent G.P. home from school on five occasions and only on two occasions requested him to stay home the following day. (Respondent’s answer, Exhibit B.) On October 18, 2021, G.P. was sent home by the school nurse at 1:45 p.m. for vomiting and was asked to remain out the following day. On November 23, 2021, G.P. was sent home by the school nurse at 11:45 a.m. for vomiting and asked to remain out the following day. On February 25, 2022, G.P. was sent home by the school nurse at 10:50 a.m. after complaining of headache and tiredness and returned the next day. On April 12, 2022, G.P. was sent home by the school nurse at 11:29 a.m. for not feeling well and returned to school the next day. On May 2, 2022, G.P. was sent home by the school nurse for vomiting on the hallway floor after eating lunch.

G.P.’s doctor, Dr. Bresalier sent a note indicating that it would be beneficial for G.P. to do remote learning from May 3, 2022, until his tonsillitis surgery on May 23, 2022, and then be excused from school from May 23, 2022, to June 3, 2022. Dr. Bresalier sent a note dated May 10, 2020, advising G.P. was having his tonsils removed in the near future due to the fact that he has been sent home for sore throats on such a regular basis he has missed a tremendous amount of school. The doctor requested that G.P. complete his classes online so that he does not get sent home on such a regular basis. (Respondent’s answer, Exhibit C.)

The Center for Disease Control and Prevention (CDC) lists sore throat, nausea, vomiting, fatigue and headache as main symptoms of COVID-19 (Respondent's answer, Exhibit D.) The school follows the New Jersey Department of Education (NJDOE) and NJDOH issued Health and Safety Guidance for the 2021-2022 school year. The guidance states that children and staff with COVID-19 symptoms should be separated away from others until they can be sent home and that individuals should be sent home and referred to a healthcare provider. (Respondent's answer, Exhibit E.) The district erred on the side of caution to keep everyone safe during the pandemic.

The draft IEP dated March 21, 2022, indicates that eligibility for ESY was "Deferred Pending Review".

On June 17, 2022, Devon Shafer, the District's director of special services sent K.P. an email inquiring whether G.P. would be participating in SPIRE, a reading program offered by the District. K.P. was offered two programs, a remote program with a District employee and the in-district ESY program. On June 22, 2022, petitioner for the first time requested an out-of-district ESY placement.

The district contends that an out-of-district ESY program would be difficult if not impossible for the district to coordinate at this late time as most ESY programs are set to start July 5, 2022. The district would be forced to find an appropriate program and coordinate transportation. Also, there is no guarantee that the out-of-district placement would accept G.P. or have space available at this late date. (Respondent's answer, Exhibit F.)

Respondent submits that the factors of Crowe are not met. There is no irreparable harm. The district has offered the SPIRE reading program remote and the in-district ESY program. There has been no showing of a denial of FAPE. The attendance log kept by Mr. Blumenstein indicates that G.P. was sent home five times. Petitioner's claim is not based on settled law and it is unlikely petitioner will succeed on the merits. The school adopted the CDC guidelines and those of the NJDOH and NJDOE. Part of the schools reopening plan adopted the CDC guidelines and erred on the side of caution to keep all students safe from illness from COVID during the pandemic. G.P. is being offered ESY

services either remotely or in-person in the least restrictive environment, his home district. Balancing the hardships, the district will suffer a greater hardship in trying to provide an out-of-district placement since ESY starts on July 5, 2020. Petitioner's request for an out-of-district ESY program was made on June 17, 2022, and the emergent application filed on June 24, 2022, and received by the District on June 25, 2022.

### **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, petitioner asserts that she is entitled to emergency relief because the contested matter involves issues involving a break in the delivery of services; and issues concerning placement pending the outcome of the due process proceedings. Petitioner contends in both her emergent application and due process petition that G.P. is entitled to emergent relief placing him in an out-of-district ESY program.

A review of the March 21, 2022, IEP states that ESY was “Deferred Pending Review”. A review of the proposed annual review May 31, 2022, IEP, which has not been consented to by petitioner, provides for ESY at Parkview Elementary School in the Special Class Mild/Moderate Learning or Language Disabilities class in the special education classroom daily for 240 minutes from July 5, 2022, to August 4, 2022. Extended related services for speech services is offered weekly for twenty-five minutes from July 5, 2022, to August 4, 2022. (May 31, 2022, IEP, page 13.)

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.

Petitioner bears the burden of satisfying all four prongs of this test. Crowe, 90 N.J. at 132–34. Petitioner cannot establish that irreparable harm will be sustained if the relief requested is not granted. The district has offered G.P. both a reading and ESY program in-district. Petitioner does not have a right to an out-of-district ESY placement.

Petitioner essentially argues that the nurse has wrongfully and excessively sent G.P. home from school such as to interfere with his right to receive FAPE. The district argues that it has provided G.P. with FAPE and its actions in sending G.P. home from school were justified and appropriate. Nevertheless, these issues regarding whether the district provided FAPE and the allowance of compensatory damages for a failure to provide same, require a plenary hearing and cannot be decided on an application for emergent relief. Petitioner cannot demonstrate that her legal right to relief is well settled. Petitioner does not have the right to an out-of-district ESY placement. Petitioner does not have the right to decide placement issues. The district has to prove they offered FAPE to petitioner, and it is only after it is determined that FAPE has not been provided following a due process hearing, would the appropriateness of a unilateral placement by petitioner be considered or an award of compensatory education be granted. Petitioner cannot



demonstrate a likelihood of prevailing on the merits since they do not have the right to decide placement. The issue of whether the district failed to offer FAPE can only be made following a plenary due process hearing with fact and expert witness testimony.

The final Crowe factor requires a balancing of the equities in determining who would sustain the greater harm should emergent relief be granted. In this case, it is clear the district would sustain the greater harm if emergent relief were granted and it was forced to arrange and pay for a unilateral out-of-district ESY placement, without the benefit of a due process hearing at this late date. The district has offered petitioner an in-district reading and ESY program.


By denying emergent relief to petitioner, petitioner still has the opportunity to file a subsequent due process petition for a plenary hearing on all the facts to determine if G.P. was provided with FAPE. If following a full hearing, it is determined that G.P. was not provided with FAPE, he would be entitled to an award of compensatory education to make up for any deprivation suffered.

Therefore, for all of the foregoing reasons, I **CONCLUDE** that petitioner has not demonstrated entitlement to the emergent relief requested, since she has not satisfied all four prongs of the test.

**ORDER**

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

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. § 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. § 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 29, 2022  
DATE

\_\_\_\_\_  
**CATHERINE A. TUOHY, ALJ**

Date Received at Agency

\_\_\_\_\_

Date Mailed to Parties:

\_\_\_\_\_

CAT/gd

**APPENDIX**

**EXHIBITS**

**For petitioner:**

Petitioner's request for emergent relief and due process received by OSE June 24, 2022, seeking immediate provision of an extended school year program in an out of district placement with transportation

On June 28, 2022, petitioner submitted various emails between herself and District personnel regarding her concerns dated November 23, 2021, March 14, 2022, March 15, 2022, March 21, 2022, March 22, 2022, March 23, 2022, March 24, 2022, March 25, 2022, March 28, 2022, May 10, 2022, May 11, 2022, and May 14, 2022.

Petitioner's email dated June 27, 2022, objecting to Mr. Long's representation of respondent

Draft of May 31, 2022, annual review IEP

**For respondent:**

June 27, 2022, answer to the petition for emergent relief, with attached exhibits A through F, all of which were considered with this emergent application.

Draft of March 21, 2022, IEP