



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON
EMERGENT RELIEF

OAL DKT. NO. EDS 03372-22

AGENCY DKT. NO. 2022-34219

**HADDONFIELD BOROUGH BOARD
OF EDUCATION, CAMDEN COUNTY,**

Petitioner,

v.

M.L. and T.N. on behalf of J.N.,

Respondents.

Robert A. Muccilli, Esq., for petitioner Haddonfield Borough Board of Education
(Capehart & Scatchard, P.A., attorneys)

Jamie Epstein, Esq., for respondents M.L. and T.N. on behalf of J.N.

BEFORE **TRICIA M. CALIGUIRE, ALJ:**

STATEMENT OF THE CASE

This case arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1401 to 1484(a) and C.F.R. §§300.500. By a request for emergent relief, petitioner Haddonfield Borough Board of Education (Board) seeks (1) the immediate removal of J.N. from Haddonfield Middle School (HMS), Haddonfield Borough School District (District) and his immediate placement on home instruction pending an out-of-district alternative interim placement for the remainder of the 2021-2022 school year; and

(2) authorization to disclose J.N.'s student records to the Garfield Park Academy (Garfield) and/or the Hampton School (Hampton) in connection with the consideration by Garfield and/or Hampton of J.N. for admission. The basis for the Board's request is that by his behavior, J.N. presents a danger to himself and to others. Respondents M.L. and T.N. oppose this request on the grounds that the Board has not satisfied the requirements for obtaining emergent relief and by cross-petition, request that J.N. be immediately returned to his placement at HMS under the doctrine of stay-put.

PROCEDURAL HISTORY

On April 27, 2022, the Board filed a complaint for an expedited due process hearing and emergent relief with the New Jersey Department of Education (DOE), Office of Special Education Programs. On April 28, 2022, the request for an expedited hearing was not granted, but was transmitted for a due process hearing to the Office of Administrative Law (OAL). At the same time, the emergent petition was transmitted to the OAL for an emergent relief hearing.

On April 29, 2022, M.L. and T.N. on behalf of J.N. filed a cross-petition for emergent relief with the OAL, seeking the immediate return of J.N. to HMS under the doctrine of stay-put. Oral argument on emergent relief was held on May 2, 2022; following a May 2, 2022, submission by counsel for M.L. and T.N., who had made his appearance shortly before the emergent hearing, the record on emergent relief closed and the cross motions are ripe for review.

Following the emergent hearing, it was determined that the original filing of the Board satisfied the requirements of a request for an expedited hearing in N.J.A.C. 1:6A-14.2(a)(1), and for an emergent hearing in N.J.A.C. 1:6A-12.1(e). Accordingly, the parties were notified that an expedited hearing would be held on May 12, 2022, within twenty days of the original hearing request, pursuant to N.J.A.C. 1:6A-14.2(c).

FACTUAL DISCUSSION AND FINDINGS

Based on the filings, including certifications and exhibits, of both parties, I **FIND** the following statements as **FACTS**:

J.N. is a twelve-year-old male who is eligible for special education and related services in the Autistic classification category.

For the 2021-2022 school year, J.N. was placed in a seventh-grade general education classroom in HMS. He receives in-class support for math, language arts, social studies, and science; supplementary instruction in study skills; speech therapy; occupational therapy; individual counseling; behavioral intervention counseling; a behavioral intervention plan; and parent counseling and training. Brief in Support of Board's Request for Expedited Due Process Hearing and Emergent Relief (April 27, 2022) (Board Brief), Exhibit B. J.N. spends more than 80 percent of the school day in the presence of general education students.

The Board makes the request for emergent relief because of incidents during the school day in which J.N. acted in a violent, aggressive, and disruptive manner toward staff and other students, as a result of which staff responded by restraining J.N. and removing other students from his vicinity. The Board submitted Behavioral Incident Forms detailing the following four specific incidents¹:

1. On December 16, 2021, in the HMS lunchroom, J.N. responded to a statement of another student in an aggressive manner. He refused to comply with directions of the clinical assistant (CA) assigned to him, screamed, used profanity, and attempted to hit the CA with his closed fists and bookbag. The CA restrained J.N. several times; other students were removed from the

¹ In her certification, HMS Principal Tracy Matozzo described additional incidents in which she alleges that by his behavior, J.N. has "caused substantial disruption of the educational environment and has created a safety risk." Board Brief, Ex. J.

- lunchroom. When J.N. appeared to calm down, the CA released him and J.N. then threw a chair in the direction of the CA and the principal. At this point, the principal involved law enforcement, who assisted in de-escalation efforts. J.N.'s father was contacted; he arrived and took J.N. home. Id., Ex. C.²
2. On April 6, 2022, J.N. responded to his CA's attempt to de-escalate J.N.'s disruptive behavior by running from the school into traffic on Chestnut Street. Two staff members attempted to de-escalate the situation and keep J.N. safe; J.N. responded with profanity, racial insults, and non-compliance. Id., Ex. D.
 3. On April 8, 2022, in a structured study hall, the teacher gave a verbal prompt to all students. The CA assigned to J.N. repeated the teacher's direction and J.N. responded with profanity ("leave me the fuck alone") and began to use his phone in violation of school policy. The CA gave J.N. the option of using his phone after beginning an assignment. J.N. attempted to leave the classroom, pushed the door and pushed against the CA. J.N. then took a call from his mother and used profanity with her. His mother asked staff to permit J.N. to leave; staff escorted J.N. to his father's car and J.N. continued to use profanity. Id., Ex. E.
 4. On April 13, 2022, J.N. was asked by his CA to put his name on a written assignment on which he had been working. J.N. refused, ripped up the paper and threw it at the teacher. J.N. began weaving between desks, trying to get away from staff, cursing at staff. He then bumped into his CA, swung at him and kicked him twice. Staff cleared the room of other students, but J.N.'s continued use of profanity ("fuck you, fuck both of you") could be heard by other students and staff in the hall. J.N. called a parent and used profanity on the call. He made a profane gesture toward staff. Id., Exs. F and G.

² The four Behavioral Incident Forms attached to the Petition as exhibits provide greater detail regarding J.N.'s behavior and the responses of HMS staff.

In December 2021, after the first incident described above, the CST conducted a manifestation determination meeting and concluded that J.N.'s behavior was a manifestation of his disability, and he was not disciplined. His return to school, however, was conditioned on the written recommendation of his treating psychiatrist, Dr. Marco Mircetic. By written report dated January 20, 2022, Dr. Mircetic stated that it was "appropriate and safe for J.N. to return to a normal school environment" with the supports outlined in his prior IEPs. Board Brief, Ex. O.

On January 11, 2022, J.N.'s child study team (CST) met to assess his progress and review and/or revise his Individual Education Program (IEP). Petition and Brief of M.L. and T.N. on behalf of J.N. Seeking Emergent Relief (April 29, 2022) (Parent Petition), Appendix, p. 3. The concerns of the parents are documented in the IEP, including their request that all staff be trained on J.N.'s behavioral intervention plan (BIP), a request that was agreed to by the District. The parents also made requests that were not approved, including that the parents be contacted prior to the District involving emergency services and/or the police to address a crisis situation with J.N.; daily Board-certified behavior analyst (BCBA) services for a short term; the use of two paraprofessionals to support J.N. (2:1 rather than 1:1 support); identification and training of a substitute for the 1:1 paraprofessional, if needed; specific training for all District staff that "could possibly interface" with J.N. "for any reason"; Applied Behavior Analysis (ABA) services during school breaks and/or vacations.

The January 11, 2022, IEP further states that J.N.'s "behavior impedes his learning or that of others." Strategies and supports to address specific targeted behaviors, including a BIP and a crisis intervention plan, are detailed in the IEP. The BIP includes the following:

In the event J.N. engages in unsafe behaviors or inappropriate behaviors (e.g., verbal threat, cursing, aggression, or physical disruptions) and does not comply with leaving the immediate environment with verbal prompts for more than 5 minutes; or behaviors persist/increase in intensity or frequency . . . the students in the classroom should be

removed . . . and the Principal or Assistant Principal should be notified.

If behavioral stabilization cannot be met and J.N. is not following the Code of Conduct once administration is involved [the] discussion should be had if J.N. needs to be removed from the building for the day and parents be notified of the situation.

In the event that J.N. engages in unsafe behaviors toward himself or others around him (adults and peers), after attempts to utilize non-physical interventions and strategies, staff will utilize approved crisis management techniques to maintain safety of J.N. and others.

[Parent Petition, App. 3, at 20-21.]

On April 13, 2022, J.N.'s IEP team convened an annual review meeting during which the District proposed a change in J.N.'s placement for the remainder of the 2021-2022 school year and for the 2022-2023 school year for the following reasons:

J.N. requires a highly structured clinical/behavioral education program that is specifically designed to meet his social and emotional needs [and] provides the conditions for more intensive behavioral interventions and a setting in which variables can be manipulated in a way that is not possible in [HMS]. As a result of significant and disruptive behavioral incidents, J.N. is increasingly spending less time in the classroom which leads to less exposure to the curriculum. With the increase of dysregulated behaviors, there is a concern for J.N.'s safety as he has put himself in a harmful situation (e.g., leaving the school building unsupervised). There is also a concern for the safety of others (staff and peers) when J.N. becomes dysregulated.

[Board Brief, at 9-10.]

The parents object to the proposed change in placement as a violation of J.N.'s rights under the doctrine of stay-put as HMS is the last-agreed upon placement.

The parents contend generally that J.N.'s behavior in each of the above-described incidents was in response to action taken by the CA assigned to him or was caused by

the failure of the CA to properly implement J.N.'s BIP. With respect to the proposed change in placement, the parents stated:

J.N. does not require a "highly structured clinical/behavioral" placement. Dr. Mercetic attested to the need for J.N. to be educated in the [least restrictive environment] with non-disabled peers, in J.N.'s current placement. J.N. had a highly successful 6th grade year at [HMS]. J.N. had minimal difficulties [this year], the only difficulties reported by the district all directly stem from untrained staff, who are not certified or properly credentialed to implement J.N.'s IEP or [BIP] successfully. If the district provided a [registered behavior technician] and full time BCBA who are properly trained, experienced and qualified to develop/implement an innovative behavior plan successfully, there would be no need for any further discussions or actions by the district.

LEGAL ANALYSIS AND CONCLUSIONS

The Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482 (IDEA), is designed to assure that disabled children may access a free appropriate public education (FAPE) that is tailored to their specific needs. 20 U.S.C. § 1400(c). Under IDEA and its implementing regulations, a school district "may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child" possesses a weapon, possesses, uses, or sells illegal drugs, or inflicts serious bodily injury on another person while on school property. 20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g).

Although the Board does not allege that J.N. brought drugs or a weapon to school, and there is no evidence that he caused serious bodily injury to a third-person, the Board seeks an order authorizing a change in placement to an interim alternate educational setting for no more than forty-five days and home instruction pending that placement, on the grounds that it is substantially likely that an injury will occur, to J.N., to another student, or to staff, should he remain at HMS. 20 U.S.C. § 1415(k)(3), (k)(4)(B); 34 C.F.R. § 300.532(a) and (c); see also N.J.A.C. 6A:14-2.7(n); N.J.A.C. 1:6A-14.2(a). As provided

in the regulations, the Board requested an expedited due process hearing. 20 U.S.C. §1415(k)(3); 34 C.F.R. §§ 300.532(a) and (c). Therefore, J.N. shall remain in the interim alternative educational setting pending a decision in the expedited due process hearing “or until the expiration of the forty-five-day removal period, whichever occurs first.” 20 U.S.C. § 1415(k)(4)(A); 34 C.F.R. § 300.533.

While the parents do not agree with the basis for the Board’s action (as described above), at the hearing they argued simply that the Board acted unilaterally to change J.N.’s placement and that emergent relief in the form of an order approving that unilateral change is not available to the Board here due to application of “stay-put.” The parents are correct that the IDEA contains procedural safeguards intended to guarantee that they are entitled to an “impartial due process hearing” before a local educational agency if they object to the decisions of the local school regarding the education of their disabled child. 20 U.S.C. § 1415(c)(2). The Act provides, “[D]uring the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child.” 20 U.S.C. § 1415(j); N.J.A.C. 6A:14-2.7(u); Drinker v. Colonial School District, 78 F.3d 859, 864 (3d Cir. 1996) (“Once a court ascertains the student’s current educational placement, the movants are entitled to an order without satisfaction of the usual prerequisites to injunctive relief.”).

There are, however, exceptions to the stay-put provision, including in a case such as this one, involving an emergency raised by the student’s behavior. “Stay put does not stand for the proposition that a special education student’s placement cannot be impacted by proper disciplinary action.” K.T. on behalf of B.T. v. Washington Twp. Bd. of Educ., OAL Dkt. No. EDS 16366-17, Final Decision (November 28, 2017).

With the request for an expedited hearing, or afterward, N.J.A.C. 1:6A-12.1(a) provides that the board of education may apply in writing for emergent relief by describing the specific relief sought and the specific circumstances that justify the relief sought. See also N.J.A.C. 6A:14-2.7(r). When, as here, the Board of Education has sought an

expedited hearing on the grounds that it is dangerous for the child to remain in his placement, the judge may order a change in the placement of the student to an interim alternative educational setting for not more than forty-five days if the Board meets the standards for obtaining emergent relief (described below). N.J.A.C. 1:6A-12.1(e).

Emergent relief shall only be requested for specific issues, including a break in the delivery of services and/or placement pending the outcome of due process proceedings. N.J.A.C. 6A:14-2.7(r). Here, the Board has initiated due process proceedings to obtain an appropriate program for J.N. in an out-of-district placement and have requested emergent relief barring his return to HMS, approving home instruction pending his out-of-district placement, and ordering the release of J.N.'s records to potential placements. Therefore, I **CONCLUDE** that the Board has established that the issue in this matter concerns placement of J.N. pending the outcome of due process proceedings.

The standards for emergent relief are set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), and are codified at N.J.A.C. 6A:3-1.6. The petitioners bear the burden of proving:

1. that the party seeking emergent relief will suffer irreparable harm if the requested relief is not granted;
2. the existence of a settled legal right underlying the petitioner's claim;
3. that the party seeking emergent relief has a likelihood of prevailing on the merits of the underlying claim; and
4. when the equities and the interests of the parties are balanced, the party seeking emergent relief will suffer greater harm than the respondent.

[Crowe, 90 N.J. at 132-34.]

Irreparable Harm

To obtain emergent relief, the Board must demonstrate more than a risk of irreparable harm should J.N. remain at HMS. The Board must make a “clear showing of immediate irreparable injury,” or a “presently existing actual threat; (an injunction) may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by common law.” Cont’l. Group, Inc. v. Amoco Chems. Corp., 614 F. 2d 351, 359 (D.N.J. 1980). In an educational setting, “irreparable harm may be shown when there is a substantial risk of physical injury to the child or others, or when there is a significant interruption or termination of educational services.” Ocean Twp. Bd. of Educ. v. J.E. and T.B. obo J.E., OAL Dkt. No. EDS 00592-04, 2004 NJ AGEN LEXIS 115, at *8 (February 23, 2004) (irreparable harm found where an eight-year-old’s “physical aggressiveness and disruptive behaviors [posed] a safety concern to himself and others, and the district’s behavior modification techniques [were] no longer effective”); Sparta Twp. Bd. of Educ. v. R.M. and V.M. obo C.M., OAL Dkt. No. 01975-20, 2020 NJ AGEN LEXIS, at *14 (February 21, 2020) (inappropriate interactions with other students and breaking a desk deemed “sufficient evidence of the risk of harm to [student], school staff, teachers and students that if [student] remained in school at this time, other incidents could occur involving the health, safety and welfare of any of these individuals”).

The Board contends that irreparable harm is established by the “tremendous and foreseeable risk of injury to J.N.” and to others based on the undisputed behavior described above. Board Brief, at 15. Running into traffic, throwing furniture, and attempting to hit staff could certainly result in injury to someone. Of equal concern is the unpredictability of J.N.’s aggression, the rapid escalation, and the inability of staff to de-escalate using the strategies agreed to by the CST on January 11, 2022. Irreparable harm is also shown by the disruption J.N.’s behavior poses to his own education and to that of his peers. His profanity-laced outbursts are disruptive and his frequent need to leave school early has caused “him to lose meaningful instruction time.” Id. at 16.

Although the parents did not respond to these arguments at the emergent hearing, in their brief in opposition to the request for emergent relief they generally blame J.N.'s paraprofessionals for their alleged failure to follow J.N.'s BIP and/or their affirmative incitement of J.N., and the failure of the District to provide the appropriate supports for J.N., including appropriate training of staff. Further, the parents disagree that J.N.'s behavior has posed a threat to his own safety or to the safety of other students and staff.

I **CONCLUDE** that there is sufficient evidence that J.N.'s behavior presents a substantial risk of injury to J.N., other students and staff and the Board has met the burden of establishing that irreparable harm may result if J.N. is returned to HMS.

The Legal Right is Settled and Likelihood of Prevailing on the Merits

The second consideration is whether the legal right underlying the Board's claim is settled, N.J.A.C. 6A:3-1.6(b)(2), and then third, the Board must make a preliminary showing of a reasonable probability of success on the merits. Crowe, 90 N.J. at 133. It is well-settled that the IDEA and federal and New Jersey regulations permit a board of education to change the placement of a disabled student on an interim basis when the school district determines the current placement presents a safety risk and the parents and district cannot agree on an alternative. 20 U.S.C. §1415(k)(4)(A); N.J.A.C. 6A:14-2.7(n).

With respect to the Board's underlying expedited due process claim, it has shown a likelihood of obtaining the relief sought due to the substantial risk J.N.'s behavior presents to himself and to others, that relief being an interim alternative placement for the remainder of the 2021-2022 school year, home instruction pending J.N.'s placement in an alternative setting, and the release of J.N.'s records to Garfield and Hampton for the purpose of the schools' evaluation of J.N. for admission.³ While the parents dispute the version the Board presented of the four incidents giving rise to the Board's removal of

³ In their emergent petition, the parents detailed the reasons they believe neither Garfield nor Hampton are acceptable placements for J.N. Nothing in this order precludes the parties, prior to the expedited hearing, from investigating other placements that may be acceptable to both.

J.N. from HMS, the parents appear to rely primarily on the explanations given them by J.N., not by any third-party observers.⁴ Yet, even text messages from J.N.'s mother show that he has acted in a physically and verbally aggressive and unsafe manner toward her. Board Brief, Ex. P.

The Board is also likely to succeed on the merits of its claim that placement of J.N. at HMS is not appropriate as it does not provide him with the highly structured support system that is needed to address his social, emotional and behavioral issues. A review of the correspondence, including text messages, provided by the parents shows that (1) the parents are not satisfied with the supports provided by HMS; and (2) the parents object to the paraprofessionals retained by the District and to the outside agency with which the District contracts for such paraprofessionals, lending support to the Board's claim that it cannot provide a FAPE to J.N. in the least restrictive environment at HMS.

For the above reasons, I **CONCLUDE** that the Board meets the second and third prongs of the emergent relief standard.

Balance of Equities and Interests

The final prong of the above test is whether the equities and interests of the parties weigh in favor of granting the requested relief to the Board. The Board states that it is obligated to provide a safe educational environment to J.N. and to his peers and, at present, J.N.'s documented behavior creates a significant risk of injury to J.N., his peers, and the staff of HMS.

The Board has agreed to meet its obligation to continue J.N.'s education through home instruction pending identification of an appropriate interim alternative educational placement, which should occur before the end of the current school year. On balance, it appears unreasonable to risk harm to J.N., or to his classmates, or to the staff assigned

⁴ Both parties contend a video of the December 16, 2021, incident in the lunchroom supports their position; the Board has offered to submit the video for review at or prior to the expedited hearing, pending the entry of a protective order as it depicts other minor children.

to him in the meantime. I **CONCLUDE** that the Board would suffer greater harm if the requested relief was not granted.

I **CONCLUDE** the petitioner Board's request for emergent relief satisfies the applicable requirements.

ORDER

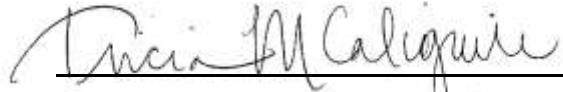
For the reasons stated above, I hereby **ORDER** that the application for emergent relief of the Haddonfield Township Board of Education seeking the removal of J.N. from his placement at HMS pending a decision in the expedited due process proceeding is hereby **GRANTED**. I further **ORDER** that J.N.'s records may be released to Garfield Park Academy and the Hampton School and to any other out-of-district school deemed appropriate by either or both parties for the purposes of evaluating J.N. for admission.

This order on application for emergency relief shall remain in effect until the issuance of the decision in this matter. The expedited hearing requested by the Board of Education shall take place on May 12, 2022, at 9:30 a.m., by Zoom.

If the parents 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 Programs.

May 4, 2022

DATE



TRICIA M. CALIGUIRE, ALJ

Date Received at Agency:

Date Mailed to Parties:

TMC/nmn