



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

**ORDER**  
**EMERGENT RELIEF**

OAL DKT. NO. EDS 05855-2022

AGENCY DKT. NO. 34617

**J.M. ON BEHALF OF J.M.,**

Petitioner,

v.

**EWING TOWNSHIP BOARD**

**OF EDUCATION,**

Respondent.

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**Lacia Japp**, Esq., for petitioner (Disability Rights of New Jersey, attorneys)

**Robin S. Ballard**, Esq., for respondent (Schenck Price, Smith & King, LLP,  
attorneys)

BEFORE **SARAH G. CROWLEY**, ALJ:

**STATEMENT OF THE CASE**

Petitioner J.M., (mother of J.M.), on behalf of her daughter J.M. (J.M. or student), filed a due process petition on June 29, 2022, to invoke stay put in the current program and placement at Ewing High School pursuant to the last agreed upon Individual Education Plan (IEP) for J.M. The due process petition also challenges the new proposed IEP. The respondent filed a motion for emergent relief on August 25, 2022, seeking to compel an out of district placement for the petitioner.

## **PROCEDURAL HISTORY**

Respondent filed an application for emergent on August 25, 2022. The petitioner filed opposition on August 29, 2022, and oral argument was conducted via ZOOM on August 30, 2022.

## **FACTUAL DISCUSSION**

J.M. is a classified student eligible for special education services, classified as having a specific learning disability. She transferred into the Ewing Public School system at the beginning of her freshman year (2021.) Due to the pandemic, school was virtual and then hybrid for that school year. Students returned to in person learning for the 2021-2022 school year. The last agreed upon IEP for J.M. was executed on February 24, 2022. The IEP provides for supports and counseling as well as a limited Behavior Intervention Plan (BIP). The petitioner received a ten-day suspension for behavior issues related to an incident that occurred on March 23, 2022. She received home instruction, which continued for the remainder of the school year. There is no documentation or agreement supporting the continued home instruction. It is the undersigned's understanding that the parties were in discussions about evaluations, a revised behavior intervention plan and an amended IEP which were never agreed to, which resulted in J.M. remaining on home instruction for the remainder of the school year. The due process was filed as a result of the inability to reach any resolution and in order to invoke stay put placement in person at Ewing High School.

The respondent has filed an emergent motion seeking an interim out of district placement alleging that the petitioner is dangerous and disruptive. In support of this argument, the respondent outlines some of the issues that arose last year which led to J.M.'s 10 day suspension and home instruction. They submit the incident reports in support of these allegations, but concede that it was the incident of March 23, 2022 only that led to the 10 day suspension. J.M. was involved in an altercation with another student in March of 2022 where she hit another student and berated a teacher. There was no police involvement and no injury reported. This is the only incident which involved any

physical altercation. There are no other allegations of harm or a threat of harm to her or anyone else. The other incidents involve behavior infractions during class. There was an incident which occurred on October 28, 2021, where it is alleged that J.M. was planning to fight another student. However, there was never any altercation or specific threat of harm to anyone. In January of 2022, J.M. allegedly recorded an altercation between other students on her phone. She was not involved in the incident and no discipline was issued. There were other minor infractions during the school year where she fell asleep in class, was wearing her headphones, was caught using her cell phone in class and was wearing a hoodie. There are no incidents involving any physical altercations or a threat of physical harm involving J.M. during that school year, yet she is remaining on home instruction for the entire year. Moreover, the allegations which are on their face insufficient to sustain this action are not supported by any documentation or affidavits.

### **LEGAL ANALYSIS AND CONCLUSION**

The district asserts that N.J.A.C. 6A:14-2.7(n) permits an ALJ to order a change in placement of a student with a disability to an appropriate alternative placement when school personnel maintain that it is dangerous for the student to be in the current placement and the parent does not agree to the change. This alternative interim placement may be ordered for not more than forty-five days pursuant to 20 U.S.C. § 1415(k). 20 U.S.C. § 1415(k)(1)(G) provides that for the alternative interim placement to occur, one of the following must occur:

1. carrying or possessing a weapon in school or on school premises;
2. knowingly possessing or using illegal drugs or soliciting sale of a controlled substance while at school or on school premises; or
3. inflicting serious bodily injury upon another while at school or on school premises.

Serious bodily injury has been defined as:

1. substantial risk of death;

2. extreme physical pain;
3. protracted and obvious disfigurement; or
4. protracted loss or impairment of the function of a bodily member, organ or mental faculty. See, 34 CFR § 300.530(i)(3); 18 U.S.C. § 1365(h)(3)

In this case, it has not been established that anyone has been inflicted with serious bodily injury as a result of the March 23, 2022 incident or any other incident. The district asserts that the allegations are sufficient to warrant an alternative interim placement citing Lawrence Township BOE v. D.F. OAL Dkt. No. EDS 12056-06. It should be noted, however that there has been no evidence to support that J.M. has demonstrated violent or aggressive behaviors. Further, there has been no evidence to indicate any serious injuries sustained by another student or a teaching staff member. In Lawrence, evidence revealed that D.F. physically beat another student on at least two occasions while on school premises. N.J.A.C. 6A:14-2.8(b) requires school district personnel, on a case-by-case basis, to consider any unique circumstances when determining whether or not to impose a disciplinary sanction or order a change of placement for a student with a disability who violates a school code of conduct.

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. The board has submitted a certification from the director of Special Services advising that he "reviewed the brief and the facts contained therein are correct." There is no support for the allegations of any physical threat of harm or actual harm to anyone. Moreover, other than the allegations surrounding the March 23, 2022, incident which did not involve serious bodily injury, even assuming the allegations to be true, there is nothing justifying an interim out of district placement.

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, the district asserts that the past disciplinary actions, for which J.M. received a ten-day suspension and home instruction for several months that requires an alternative placement pending the outcome of the due process proceedings. Petitioner contends that J.M. is not a danger and the appropriate placement is in the general education setting pursuant to her current IEP.

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, one of the Department's regulations governing special education. These standards for emergent relief include: 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 interest that petitioner will suffer greater harm than respondent.

The moving party bears the burden of satisfying all four prongs of this test. Crowe, 90 N.J. at 132–34. First, there has been no showing of irreparable harm. While the district asserts that J.M. is “dangerous and disruptive”, there has been no indication that J.M. has in any way harmed or injured anyone with the exception of a fight which occurred in March of 2022, for which she served a ten-day suspension and there is no one was injured. There is no basis for an interim alternate placement due to a student being disruptive. This student has been out of school for several months and there is not basis for the district to file a motion one week before school is to commence to keep her out of school any longer. As such, I **CONCLUDE** the district has been unable to meet the burden of establishing irreparable harm.

The next prong of the above test to be addressed is whether there is a settled legal right underlying petitioner's claim, and they are likely to prevail on the merits of such a claim. It is well-settled law that N.J.A.C. 6A:14-2.7(n) permits an ALJ to order a change in placement of a student with a disability to an appropriate alternative placement when school personnel maintain that it is dangerous for the student to be in the current placement and the parent does not agree to the change. However, this legal right must be supported by facts and there are no such fact found in this case, namely that J.M. is a danger to herself or others pursuant to 20 U.S.C. section 1415(k)(1)(G). Thus, I **CONCLUDE** that the district has not established a settled legal right for the relief requested or that there is a likelihood of success on the merits of this claim.

The "stay put" provision of the Individuals with Disabilities Education Act (IDEA) provides in pertinent part:

[D]uring the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents agree otherwise, the child shall remain in the then-current educational placement of the child.

[20 U.S.C.A. § 1415(j).]

Furthermore, pursuant to the New Jersey Administrative Code, no changes are to be made to a child's classification, program or placement unless emergency relief is granted. N.J.A.C. 6A:14-2.7(u) specifically provides:

Pending the outcome of a due process hearing, including an expedited due process hearing, or any administrative or judicial proceeding, no change shall be made to the student's classification, program or placement unless both parties agree, or emergency relief as part of a request for a due process hearing is granted by the Office of Administrative Law according to (m) above or as provided in 20 U.S.C. § 1415(k)4 as amended and supplemented.

The "stay put" provision acts as an automatic preliminary injunction, the overarching purpose of which is to prevent a school district from unilaterally changing a disabled student's placement. See *Drinker*, 78 F.3d at 864. In terms of the applicable

standard of review, the emergent-relief factors set forth in N.J.A.C. 6A:14-2.7(r)–(s), N.J.A.C. 1:6A-12.1, and Crowe v. DeGioia, 90 N.J. 126, 132–34 (1982), are generally inapplicable to enforce the “stay-put” provision. As stated in Pardini v. Allegheny Intermediate Unit, 420 F.3d 181, 188 (3d Cir. 2005), “Congress has already balanced the competing harms as well as the competing equities.”

In Drinker, the court explained:

“[T]he [IDEA] substitutes an absolute rule in favor of the status quo for the court’s discretionary consideration of the factors of irreparable harm and either a likelihood of success on the merits or a . . . balance of hardships.”

[Drinker, 78 F.3d at 864 (citations omitted).]

In other words, if the “stay put” provision applies, injunctive relief is available without the traditional showing of irreparable harm. Ringwood Bd. of Educ. v. K.H.J. ex rel K.F.J., 469 F. Supp. 2d 267 (D.N.J. 2006). Under those circumstances, it becomes the duty of the court to ascertain and enforce the “then-current educational placement” of the handicapped student. Drinker, 78 F.3d at 865.

The purpose of “stay put” is to maintain stability and continuity for the student. The first preference for interim placement is one agreed to by the parties. However, when the parties are unable to agree, the placement in effect when the due process request was made, i.e., the last uncontroverted placement or program, is the status quo. In this matter, J.M.’s current IEP places her at the Ewing High School with the supports as set forth in the February 23, 2022, IEP. Therefore, I **CONCLUDE** that the IDEA’s “stay put” provision requires J.M. to remain in that placement pending the outcome of the underlying due process petition. See, e.g., E.S. o/b/o J.S. v. Union Twp. Bd. of Educ., EDS 11355-07, Final Decision (Nov. 1, 2007) <http://njlaw.rutgers.edu/collections/oal/> (finding that stay put required the child to remain in her stay put placement despite allegations that the child had not made any academic or social progress and had become extremely uncomfortable with some teachers and students at the school and that the child was refusing to attend the stay put placement.)

For the foregoing reasons, the respondent district has not demonstrated entitlement to emergent relief. The relief sought is therefore **DENIED**.

**ORDER**

Having concluded that the respondent has not satisfied the requirements for emergent relief, the petitioner's request for emergent relief is **DENIED**.

I **FURTHER ORDER** that J.M. be returned to her stay put placement in Ewing High School next week pending the outcome of the underlying due process petition.

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.



August 31, 2022

DATE

SARAH G. CROWLEY, ALJ

SGC/tat

cc: Clerk – OAL/Trenton  
courtesy copy to Agency EDS



**APPENDIX**

**EXHIBITS**

**For Petitioner:**

Brief and Exhibits in Opposition to Motion for Emergent Relief, dated August 29, 2022.

**For Respondent:**

Petition for Emergent Relief, dated August 25, 2022