



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION ON

EMERGENT RELIEF

OAL DKT. NO. EDS 01330-22

AGY REF NO. 2022/33913

ELIZABETH CITY BOARD OF EDUCATION,

Petitioner,

v.

D.F. ON BEHALF OF M.F.,

Respondent

Richard P. Flaum, Esq., for Petitioner (DiFrancesco, Bateman, Coley, Yospin,
Kunzman, Davis, Lehrer & Flaum, attorneys)

D.F., parent of **M.F.**, Respondent, pro se

Record Closed: February 24, 2022

Decided: February 24, 2022

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner filed a due process petition and motion for emergent relief with the Office of Special Education (OSE) in the New Jersey Department of Education (DOE).

The contested matter was transferred to the Office of Administrative Law (OAL), pursuant to N.J.A.C. 1:6A-12.1, where it was filed on February 18, 2022.

The motion for emergent relief seeks an order placing the student on home instruction pending re-evaluations for appropriate placement as the student poses a danger to staff and other students. The request for emergent relief was heard on February 24, 2022.

FACTUAL BACKGROUND

D.F. is the parent of N.F. N.F. attends the William F. Halloran #22 School in the Elizabeth Public School District. N.F. is eligible for special education and related services under the classification of Autism. N.F. has been due for a triennial re-evaluation for approximately one year. No re-evaluation has taken place to date.

N.F. exhibited self-injurious behaviors while in school on January 21, 2022. Staff were required to use physical restraint and therapeutic hold techniques. The School Nurse checked out N.F. after the incident. D.F. was notified by letter from the Principal, Ms. Alfaro.

A one-day suspension was imposed on N.F. on January 24, 2022 for “hitting, punching and kicking staff members.” D.F. was again notified by letter from Principal Alfaro. He was advised that he must accompany N.F. to school and attend a conference. N.F. returned to school on January 25, 2022 with D.F.

A three-day suspension followed on February 1, 2022 for “physical aggression against the teacher and aide and classroom elopement.” N.F. strangled the special education teacher and stated “I want to kill you and slit your throat.” He also stated “I want to skip this thing called life.” Again, D.F. was notified of the above via letter, this time from Vice Principal, Linda Trebino. N.F. was required to see a licensed mental health professional before returning to school. N.F. returned to school with D.F. on

February 7, 2022 after seeing a licensed mental health professional, and after D.F. met with Principal Alfaro and other District staff.

An email from N.F.'s case manager, Susan Luskie, was sent to D.F. to request an IEP meeting. Several dates were proposed, either in person or virtually. D.F. responded he was unavailable on the suggested dates and would provide alternative dates.

Also on February 7, 2022, the Director of Special Services, Diana Pinto-Gomez, followed up to request dates D.F. was available. The response from D.F. was to inquire about the District's denial of his request for independent evaluations. He refused to attend an IEP meeting until he retained an advocate of counsel. He also asked for a meeting to discuss N.F.'s suspensions.

Director Pinto-Gomez emailed D.F. on February 8, 2022 to follow up as to dates for an IEP meeting. There were further email exchanges which did not result in a date for an IEP meeting.

Director Pinto-Gomez replied via email, on February 9, 2022, to D.F. advising of the need for an IEP meeting. N.F. was given another one-day suspension on this date for "physical aggression against a teacher, aide and security guard and classroom elopement." Vice Principal Trebino notified D.F. via letter and advised that he must accompany N.F. to school for a conference on November 11, 2022.

D.F. sent an email to Principal Alfaro on February 9, 2022 regarding the attendance issues with N.F. and accusing the District of falsifying records, stating "the bias and malicious manipulation, revision and recording of student attendance by staff has a pattern." He further advised that he received a telephone call from Vice Principal Trebino about the suspension and that N.F. contradicted the events that led to his suspension.

Another email from D.F., on February 10, 2022, addressed the need for a meeting with the CST and the falsification of reports.

D.F. brought N.F. to school on February 11, 2022 after his suspension. D.F. would not speak with anyone regarding placement and left. After D.F. left N.F. was again physically restrained and therapeutic hold techniques employed due to aggression towards staff and school property destruction. At this time N.F. was placed on home instruction. D.F. was notified by letter dated February 11, 2022. D.F. responded via email that he opposed home instruction.

There has been no IEP meeting and no re-evaluations. D.F. has refused to meet with the IEP team and has refused to consent to any re-evaluations.

N.F. has been on home instruction since February 18, 2022, consisting of two hours per day, five days per week.

LEGAL ANALYSIS AND CONCLUSION

Initially, it must be determined if petitioner is entitled to request emergent relief.

A party may only request emergent relief for the following reasons, in accordance with N.J.A.C. 6A:14-2.7(r)1:

- i. Issues involving a break in the delivery of services;
- ii. Issues involving disciplinary action, including manifestation determinations and determinations of interim alternate education settings;
- iii. Issues concerning placement pending outcome of due process proceedings; and
- iv. Issues involving graduation or participation in graduation ceremonies.

As the present matter concerns the issues of a break in services, discipline and placement pending the outcome of due process proceedings, Petitioner is certainly entitled to seek emergent relief.

The New Jersey Supreme Court has set forth a four-prong test for determining whether an applicant is entitled to emergent relief. Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982) (enumerating the factors later codified at N.J.A.C. 6A:14.2-7(s)1.)

The four factors (“the Factors”), include:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. 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.

The moving party bears the burden of proving each of the Crowe elements “clearly and convincingly.” Waste Mgmt. of N.J. v. Union County Util. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

A review of the four factors is in order.

Factor One. The petitioner will suffer irreparable harm if the requested relief is not granted. Staff are also at risk. N.F. is also at risk, as he has exhibited self-injurious behavior. His continued behaviors need to be addressed, and an IEP developed to address them. Petitioner is required to maintain the safety of its students and staff, and to ensure an atmosphere conducive to learning for its students. N.F.’s continued attendance at William F. Halloran #22 School will greatly diminish Petitioner’s ability to provide the same.

Factor Two. The legal right underlying petitioner's claim is settled. Petitioner is responsible for maintaining a safe school for its students and staff. N.J.A.C. 6A:14-2.8(f) authorizes the removal of a student when the student caused a serious bodily injury under 20 U.S.C. §1415(k). N.J.S.A. 18A:37-13 states in pertinent part "...a safe and civil environment in school is necessary for students to learn and achieve high academic standards; harassment, intimidation or bullying, like other disruptive or violent behaviors, is conduct that disrupts both a student's ability to learn and a school's ability to educate its students in a safe environment...".

Factor Three. Petitioner has a likelihood of prevailing on the merits of the underlying claim. Petitioner must address N.F.'s behavior and his disability in developing an appropriate IEP. The only avenue available is to re-evaluate N.F. and determine an appropriate placement. In this regard, Petitioner is likely to prevail on the merits.

Factor Four. 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 will not be granted. Both Petitioner and Respondent will suffer irreparable harm if the requested relief is not granted. If granted, N.F. will continue to receive an education via home instruction pending re-evaluation. This is not the least restrictive environment. He needs to have re-evaluations done and a proper placement made according to his needs. The Petitioner, if not granted, will be unable to ensure the safety of its students and staff, and the ability of its students, particularly the classmates of N.F., from receiving an appropriate education in a safe and civil environment.

It should be noted that D.F. stated that he believes any evaluations done by the District will be biased. This is why he requested independent evaluations. That request for independent evaluations is the subject of another due process petition currently before the OAL with a different ALJ. This belief is speculative.

N.F. is one year past due for his triennial re-evaluation. See N.J.A.C. 6A:14-3.8(), which states in pertinent part: Within three years of the previous classification, a

multi-disciplinary reevaluation shall be completed to determine whether the student continues to be a student with a disability.

The OAL has previously granted emergent relief in similar circumstances. See Gloucester City Bd. of Educ., OAL DKT. NO. EDS 09165-15 (2015), Wayne Twp. Bd. of Educ. v. G.G. and S.W. ex.rel. G.G., OAL DKT. NO. EDS 05519-17 (2017), and Washington Twp. Bd. of Educ. v. H.M. ex.rel., OAL DKT NO. EDS 08328-19 (2019).

Based upon the foregoing, I **CONCLUDE** that petitioner's request for emergent relief be **GRANTED**.

ORDER

It is hereby **ORDERED** that petitioner's request for emergent relief is **GRANTED**, as follows:

1. J.L. is to continue on home instruction. D.F. shall cooperate with the implementation of home instruction;
2. Petitioner is to commence the triennial re-evaluation process as soon as is practicable, but in no event later than forty-five days from the date hereof;
3. Evaluations done by the District shall consist of a Psychological Evaluation, an Educational and Social Evaluation, and a Psychiatric Evaluation;
4. Respondent is to fully cooperate with Petitioner concerning the triennial re-evaluations; and,
5. All re-evaluations are to be completed no later than ninety days from the date hereof.

This decision on application for emergency relief shall remain in effect until the issuance of the decision on the merits in this 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.



February 24, 2022

DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

db

APPENDIX

List of Moving Papers

For Petitioner:

Due Process Petition

Brief in Support of Application for Emergent Relief

Certification of Chihui Seo-Alfano with Exhibits A through I

For Respondent:

None