



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING

EMERGENT RELIEF

OAL DKT. NO. EDS 00268-2022

AGENCY DKT. NO. 2022-33767

**FRANKLIN TOWNSHIP BOARD OF
EDUCATION,**

Petitioner,

v.

V.A. AND C.H. ON BEHALF OF A.H.,

Respondents.

Sanmathi Dev, Esq., for petitioner, (Capehart Scatchard, attorneys)

V.A. and C.H., on behalf of A.H., respondents, pro se

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

STATEMENT OF THE CASE

Petitioner, Franklin Township Board of Education (the District) seeks an immediate order of dangerousness to remove the student, A.H., to an interim alternative educational placement of home instruction for forty-five days pending identification of an appropriate program. Respondents, V.A. and C.H., parents of the child, oppose the emergent relief requested and contend that the child should remain in school and should not be on home instruction.

PROCEDURAL HISTORY

Petitioner, the District, filed both an expedited due process petition and a motion for emergent relief with the Office of Special Education Policy and Procedure (OSEP) on January 12, 2022. Both the emergent application and due process petition seek an order of dangerousness to remove the student, A.H., to an interim alternative educational placement of home instruction for forty-five days pending identification of an appropriate out-of-district program. Both petitions were simultaneously transmitted to the Office of Administrative Law (OAL) on January 12, 2022, as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The parties presented oral argument on the emergent relief application on January 18, 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 January 18, 2022.

Petitioner's request for an expedited due process hearing to remove student to an alternative interim placement due to dangerousness and brief in support of Board's request for expedited due process hearing and emergent relief with attached Exhibits A – L were submitted and considered for this application. Respondents' Exhibits A – E; the Oct 27, 2021, IEP for A.H.; Franklin Township Police Department incident reports; and emails between V.A. and Mr. Green were also considered for this application.

FACTUAL DISCUSSION

For Petitioner

A.H. is a 14- year-old male student with the classification of Other Health Impaired (OHI) based on a diagnosis of attention deficit hyperactivity disorder (ADHD). A.H. is a new student to the district and is currently enrolled in eighth grade at the Sampson G. Smith School for the 2021-2022 school year. A.H. has no prior history with the District and his IEP from his previous district was implemented when he enrolled in petitioner's district. (Petitioner's brief, Exhibit C.) Since enrolling, A.H.'s behavior has escalated. He has been disruptive in class, makes inappropriate comments and does not complete assignments. He does not respond consistently to directions and will often sit on top of his desk with his headphones on and will use his cell phone during class. In addition to

this classroom behavior, A.H. has been involved in other behavioral incidents that are more severe in nature. (Petitioner's brief, Exhibit D.)

On November 18, 2021, A.H. punched another student in the face in the hallway and was suspended November 19, 2021, and November 22, 2021, for this infraction. Two weeks later, on December 6, 2021, A.H. posted threatening statements on an assignment in Google Classroom. They were reading the short story of "The Monkey's Paw" and the writing prompt requested "If you were given three wishes, what would you want?" In response to this prompt, A.H. wrote "1. To get away with killing people; 2. Known for killing people; and 3. Can't die". (Petitioner's brief, Exhibit E.) In addition to this written statement posted on google classroom, A.H. posted a disturbing and graphic video of a person firing a gun and shooting another person. (Petitioner's brief, Exhibit F, My Movie.) These were made the same day as the google classroom posting. Due to the violent and threatening nature of the video and post, the Franklin Township Police were contacted. A.H. posted on social media a text that "Police came to my apartment/6 cops while I was walking home." Then the violent video of one person gunning down another is shown and then the text "BOOM BOOM PAPI" appears. (Petitioner's brief, Exhibit F, My Movie.) Then there is a series of texts between A.H. and his mother. His mother says in the text "They are coming to our house today at 8:30 p.m." A.H. asks "Who?" His mother continues, "Make sure your room is spotless and living room clean. The psychiatrist peol People". In response, A.H. asks "Can I throw i taco at them?" and V.A. responds "Sure if you don't want to go to army." A.H. responds with the text again "BOOM BOOM PAPI" (Petitioner's brief, Exhibit F, My Movie.)

On December 10, 2021, through the Google Classroom platform A.H. sent a message to his teacher and said his foot hurt and he posted a picture of a grandmother with a gun as his icon. (Petitioner's brief, Exhibit F.)

A referral was also made to the Psychiatric Emergency Screening Service (PESS) to assess A.H.'s psychiatric needs. A.H. was suspended for the December 6, 2021, incident for three school days, December 8, 9 and 10, 2021. On December 10, 2021, while on home suspension, A.H. posted a video of himself holding a gun in his home and

“dry firing”. (Petitioner’s brief, Exhibit F. RP Replay.) The Franklin Township Police were again notified and determined that the gun was real and that A.H. had access to a firearm.

On December 10, 2021, it was recommended to V.A. that A.H.’s mental health needs be evaluated by a medical professional. V.A. was advised that A.H. could be brought to Acute Psychiatric Services in Piscataway over the weekend or be screened Monday, December 13, 2021, at the Board offices by staff from Rutgers Behavioral Health. V.A. initially declined both options but later gave her written consent on December 20, 2021. (Petitioner’s Brief, Exhibit I.)

As a result of A.H.’s threatening videos on social media, the school environment was severely negatively impacted. Parents came to school to pick up their children and also called the school in a panic as A.H.’s videos circulated. There was alarm, anxiety and fear among students, parents, teachers and staff. (Petitioner’s brief, Exhibits A and B.)

During a manifestation determination hearing on December 16, 2021, the Child Study Team (CST) determined that the behaviors exhibited on December 6, 2021, and December 10, 2021, were not a manifestation of A.H.’s disability. (Petitioner’s brief, Exhibit G.) Also, during the December 16, 2021, meeting, the CST proposed an IEP placing A.H. on homebound instruction pending the results of the psychiatric examination so that an appropriate out-of-district can be identified. (Petitioner’s Brief, Exhibit H.)

The CST, in the December 16, 2021, IEP, determined that an out-of-district placement is warranted in order to address A.H.’s behavioral and social/emotional needs and that behavioral interventions are warranted, since A.H.’s behavior impedes his own learning and the learning of others and that he needs a structured behavioral support system implemented. (Petitioner’s brief, Exhibit H.)

On December 27, 2021, V.A. filed for due process, challenging the December 16, 2021, proposed IEP and requesting A.H. remain in his placement at Sampson G. Smith School.

A discipline hearing is scheduled for A.H. before the full Board for January 27, 2022. (Petitioner's brief, Exhibit K.)

Petitioner submits that the District's administration, staff and students are extremely concerned about their own safety as well as A.H.'s safety and emotional well-being given A.H.'s threatening behavior, disturbing videos and firearm access. A.H. requires a higher level of support at an out-of-district placement.

Petitioner has a legal right to emergent relief to change a student's placement due to dangerousness. The danger of irreparable harm is clear should A.H. shoot or injure himself, another student or staff member. This is especially true based on the current climate of recent mass/school shootings and media encouragement of students to take violence against their school communities. A.H.'s actions are disruptive to his own education due to his suspensions and to other students and staff due to the alarm and panic being caused by his behavior. The District wants to be able to educate A.H. and has proposed home instruction until a suitable placement can be found that can support his needs.

The number of police reports that have been generated confirms the seriousness of the situation.

For Respondents

V.A., respondent's mother submitted that A.H. is a good, charismatic kid that sometimes acts goofy. The school and the parents cannot agree on a proper placement for A.H. and he has been out of school for six weeks. Although she admits that there are some behavioral concerns, she has a different perspective than the District. Regarding the google chrome assignment, she explained that her son answered the way he did, that is, that he wanted to kill people, he wanted to be known for his kills and not die because he wants to be an army sniper. A.H. was sent to the principals' office following this incident. V.A. was not notified of this incident. He was sent home on the bus. V.A. submits if the District believed A.H. was homicidal, he would not have been sent home on the school bus. He would have been searched for weapons. She found out about this incident

because the police came to their home. Detective Fernandez came to the home and said he was dispatched to do a welfare check on her son. The school later called her and advised her of the writing incident and that he was to be evaluated by PESS before he could return to school.

A.H. was screened by PESS on December 7, 2021, and was found not to be exhibiting symptoms of mental illness that would cause a danger to self or others at the present time. (Respondent's Exhibit A.) V.A. was again contacted by the police department regarding a video that A.H. posted. A.H. was suspended because the video violated the school code of conduct.

When the Franklin Police Department came to V.A.'s home, she consented to a search of her premises. (Respondent's Exhibit D.) She admitted that the video of A.H. dry firing the gun was A.H. but it was not on December 6, 2021. The video was made on November 28, 2021, after V.A., her partner and A.H. had returned home from the shooting range. V.A. said they enjoy going to the firing range and it is not against the law. Her partner has guns at his house which are kept locked up in a safe. A.H. sent the video to a friend on November 28, 2021, but did not post it to social media on December 6, 2021. Someone else may have reposted the video.

There was another student in school named Daniel who kept spreading rumors about A.H. and how he was afraid of A.H. in that he has a gun and is going to bring it to school. (Respondent's Exhibit B.) V.A. reported this to Principal Rutledge about Daniel spreading these rumors and she believes the school should have done an investigation regarding the rumors that were affecting her son.

The police were again contacted following A.H.'s message sent to his teacher saying his toe hurt on google chrome, with the icon of an elderly woman holding a gun. V.A. says the icon was set up by the school when A.H. got his chrome book. V.A. also indicated that the message was not bad in that the text read "Grandma grabs gun, gives home invading goons a run for their lives . . ." (Respondents' Exhibit E.) A.H. was suspended for another week.

The annual review and manifestation meeting was attended by both C.H. and V.A. The District said because of A.H.'s behavior he would have to go out-of-district. V.A. disagreed with the proposed IEP. They cannot come to an agreement because the District believes A.H. is dangerous and there is no proof of this. V.A. has no weapons in her home. A.H.'s prior IEP contained no behavior plan. The disruptions the District is seeing are a result of his ADHD. V.A. did give A.H. the option of going off his medication this year. She did receive a complaint from the math teacher that his behavior was disruptive. If she had known there was a problem, she would have taken him back to the doctor and put back on medication. A.H. on medication is a different child and that is how he got to eighth grade. There has been no psychiatric evaluation and the District wants to kick A.H. out of the district. She is not making excuses; she is advocating for her child which is her right. She tried to take him back to school because he has stay put rights which are being infringed upon. The irreparable damages are to A.H. not to the District. She has two other children in the school. She feels that the school over-investigated these incidents. They have offered home instruction but that is not the least restrictive environment. A.H. needs to be in classroom eighty-percent of the time as required by his IEP. The tik-tok challenge was not the fault of A.H. and that the Districts' allegation that he might "shoot up" the school is irresponsible.

He had no prior behavior problems in school aside from the one incident where he punched the student in the face on November 18, 2021. The District should not be allowed to remove A.H. from school without proof that he is dangerous. They have not received a psychiatric report supporting a change in placement.

C.H., A.H.'s father, believes V.A. covered their arguments very well. Petitioner's allegations that they were afraid A.H. would shoot up the school is especially troubling. There were never any threats made against the school by A.H.

LEGAL ANALYSIS

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. Petitioner has submitted certifications from Dr. Brenda Sofield, Director of Pupil Personnel Services at the Franklin Township School District (Petitioner's brief, Exhibit A) and Evelyn Rutledge, principal of the Sampson G. Smith School (Petitioner's brief, Exhibit B), both of whom are familiar with the facts of this case.

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.

The District is seeking a determination of an interim alternative educational setting and placement pending the outcome of an expedited due process proceeding pursuant to N.J.A.C. 6A:14-2.7(r)(ii) and (iii). I thus **CONCLUDE** that the District's request for emergent relief has been appropriately filed with the OAL for consideration herein.

Pursuant to N.J.A.C. 6A:14-2.7(n):

To remove a student with a disability when school personnel maintain that it is dangerous for the student to be in the current placement and the parent and district cannot agree to an appropriate placement, the district board of education shall request an expedited hearing. The administrative law judge may order a change in the placement of the student with a

disability to an appropriate interim alternative placement for not more than 45 calendar days.

The stay put provision under the Individuals with Disabilities Education Act (IDEA) provides an automatic preliminary injunction, preventing a school district from making a change in placement from the last agreed upon IEP, during the pendency of a petition challenging a proposed IEP. 20 U.S.C.S. § 1400, et seq, Drinker v Colonial School District, 78 F.3d 859, 864 (3d Cir. 1996, and Zvi D. v Ambach, 694 F.2d 904, 906 (2d Cir. 1982). The purpose of stay put is to maintain the status quo for the child while the dispute over the IEP remains unresolved. Ringwood Bd. of Educ. v. K.H.J., 469 F.Supp.2d 267, 270–71. (D.N.J. 2006.)

There are two exceptions to the stay put provision. The first is if the parties agree to a different placement, otherwise “the child shall remain in the then-current educational placement of the child.” 20 U.S.C.S. § 1415(j). The second exception arises under the disciplinary provisions of IDEA, 20 U.S.C.S. § 1415(k).

Petitioner is seeking emergency relief from the stay put placement, due to the asserted safety risk posed to the child, the other students, teachers, and staff, if A.H. were to return to the classroom, pending the outcome of the underlying due process petition seeking an out-of-district placement to address the student’s needs.

The well settled four prongs to be considered in an assessment of a party’s request for emergent relief, as set forth within Crowe v. DiGioia, 90 N.J. 126 (1982), are codified in the New Jersey Administrative Code. The regulations provide that emergency relief may be granted if the judge determines from the proofs that:

- i. The petitioner will suffer irreparable harm if the requested relief is not granted;
- ii. The legal right underlying the petitioner’s claim is settled;

- iii. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
- iv. 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.

N.J.A.C. 1:6A-12.1(e) and N.J.A.C. 6A:14-2.7(s)(1).

The District asserts that it will suffer irreparable harm if their requested relief is not granted. First and foremost, the District argues that irreparable harm is established because of the tremendous and foreseeable risk of injury and danger to others due to: A.H.'s assault on the student in the hallway on November 18, 2021; his subsequent posting to google classroom of his wish to kill people and be known for killing people and not to die; his violent video posting of a person being gunned down by another; and the video of A.H. holding a gun in his home and 'dry firing' it. The seriousness of A.H.'s conduct and the threat he poses cannot be understated especially in light of continued school shootings and threats across the nation in recent years, as well as general mass shootings.

Irreparable harm is also established because A.H.'s behavior is significantly disrupting his own education as well as the education of other students. The District is required to educate all students, and provide a Free Appropriate Public Education (FAPE) pursuant to IDEA, 20 U.S.C. section 1400, et seq., and the New Jersey Administrative Code for Special Education, N.J.A.C. 6A:14, et seq. A.H.'s alarming behaviors have caused anxiety, stress and fear among the student population. Irreparable harm is also established because the Board is being prevented from meeting its legal obligation to A.H. A.H. is losing significant instructional time due to his behaviors because the Sampson G. Smith School is not the appropriate placement to address and support his behavioral, social and emotional needs. A.H. needs to be placed in the interim on homebound instruction and then in an appropriate out-of-district placement which can appropriately address his behavioral, therapeutic and academic needs following a

complete psychiatric evaluation. I **CONCLUDE** that the petitioner has established that it will sustain irreparable harm if the emergent relief requested is not granted.

The second prong of Crowe requires that the District demonstrate that there is settled legal right to change A.H.'s placement to an alternate interim placement, such as home instruction due to dangerousness, pending an appropriate out-of-district placement. The District asserts that it is entitled to a change of placement of a student with a disability to an interim alternate placement when school personnel maintain that it is dangerous for the student to be in the current placement and the parent and district cannot agree to an appropriate placement. N.J.A.C. 6A:14-2.7(n); N.J.A.C. 6A:14-2.8(f). In addition, a board of education is entitled to a change of placement when maintaining the current placement of a student is substantially likely to result in injury to the child or to others. 20 U.S.C. 1415(k). Furthermore, a board of education may apply for emergent relief pursuant to N.J.A.C. 1:6A-12.1(e); N.J.A.C. 6A:14-2.7(r).

In the matter of Sparta Township Board of Education v. R.M. and V.M. obo C.M., OAL Docket Number EDS 01975-2020, (decided February 21, 2020), the ALJ concluded the BOE was entitled to emergent relief, for the student to be on home instruction for a forty-five day period, due to the safety risk posed whereby the student's behavior could not be controlled on at least two occasions, when the high school student had to be restrained by a security guard and the assistant principal. In that situation, the student had 504 Plan accommodations. In the matter of Collingswood Borough Board of Education v A.C. obo D.F., OAL Docket Number EDS 10586-2009 (decided April 1, 2010), the ALJ granted the BOE's emergent relief to place the student in an out-of-district school setting that was highly structured with behavioral supports. Within the decision, the ALJ referenced that on an earlier emergent application, the district requested modification of stay put, to place the first-grade student on home instruction due to the student's behavioral difficulties, which constituted a danger to himself and others. That emergent relief request was granted, placing the student on home instruction, pending an appropriate out-of-district placement.

I **CONCLUDE** that the District has demonstrated that there is settled legal right to change A.H.'s placement to an alternate interim placement, such as home instruction due to dangerousness, pending an appropriate out-of-district placement.

The District asserts it meets the third prong of the Crowe factors, that it has a likelihood of prevailing on the merits of the underlying claim that A.H.'s placement must be changed to an interim alternative placement of home instruction pending an out-of-district placement due to the substantial risk of danger to others; A.H.'s disruption to the education of the other students and to his own education; and the District's inability to deliver FAPE to A.H. I **CONCLUDE** that there is a likelihood of success on the merits of the underlying petition and that the District has met the third prong of Crowe,

The fourth prong of Crowe the District must satisfy is to demonstrate that it will suffer greater harm than respondent will suffer if the requested relief is not granted. The equities of the interests of the parties shall be balanced, to determine if the District can satisfy this condition. A.H.'s parents wish him to continue in school in the least restrictive environment pursuant to his last agreed upon IEP. The District has offered to provide A.H. with interim home instruction pending an alternative appropriate placement following a psychiatric evaluation. A.H.'s educational needs will continue to be met while awaiting an appropriate placement that will address his behavioral and therapeutic needs. The District has an obligation to take A.H.'s threats and actions seriously in order to ensure a safe educational environment for its students and employees.

Having considered the equities and interests of the parties, I **CONCLUDE** that the equities and interests of the parties weigh in favor of granting the District's emergent relief as the Board will suffer greater harm than the respondent if A.H. were permitted to remain in school, during the pendency of the underlying due process action.

Based upon the foregoing, I **CONCLUDE** that the District has satisfied all of the requirements to be granted emergent relief.

ORDER

It is **ORDERED** that the District's emergent relief request to place A.H. on home instruction during the pendency of the underlying expedited due process petition is **GRANTED**.

This order on application for emergency relief shall remain in effect until issuance of the decision in the matter. A telephone prehearing conference is scheduled in this matter on February 3, 2022 via telephone dial-in at 3:00 p.m. Notices will be sent to the parties under separate cover. 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 Programs.



January 19, 2022
DATE

CATHERINE A. TUOHY, ALJ

Date Received at Agency

Date Mailed to Parties:

CAT/tat

APPENDIX

EXHIBITS

For Petitioner

Petitioner's request for an expedited due process hearing to remove student to an alternative interim placement due to dangerousness and brief in support of Board's request for expedited due process hearing and emergent relief with attached Exhibits A – L

For Respondents:

Respondents' Exhibits A – E; the October 27, 2021, IEP for A.H.; Franklin Township Police Department incident reports; and emails between V.A. and Mr. Green