



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

ON EMERGENT RELIEF

OAL DKT. NO. EDS 10189-2022

AGENCY DKT. NO. 2023-35157

**BERLIN BOROUGH
BOARD OF EDUCATION,**

Petitioner,

v.

N.R. ON BEHALF OF K.J.,

Respondent.

Brett E.J. Gorman, Esq., for petitioner (Parker McCay, P.A.)

Brie Latini, Parent Advocate, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(7)

Record Closed: November 18, 2022

Decided: November 21, 2022

BEFORE: **WILLIAM T. COOPER III, ALJ:**

STATEMENT OF THE CASE

The Berlin Borough Board of Education ("petitioner") brings an action for emergent relief against N.R. on behalf of K.J. (respondent) seeking an order for home instruction for the student, pending an appropriate interim alternative educational setting for no more than forty-five days.

PROCEDURAL HISTORY

The petitioner filed a request for emergent relief and an underlying expedited due process petition at the Office of Special Education (OSE) on or about November 15, 2022. On November 16, 2022, the matter was transmitted to the Office of Administrative Law as a contested case seeking emergent relief and expedited due process for petitioner. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Oral argument regarding the application for emergent relief was conducted on November 18, 2022.

FACTUAL DISCUSSION

The following facts are not in dispute therefore, I find the following as Fact:

Petitioner

K.J. is a five-year-old, kindergarten student attending Berlin Community School. N.R. is the mother and guardian of K.J. The student resides with his parents in Berlin, New Jersey. The student is currently classified as Emotional Regulation Impairment and is receiving special education and related services.

K.J. is in a self-contained special education setting with other students who also have special education needs, some of whom are non-verbal.

Between September 9, 2022, and September 19, 2022, K.J. has been involved in numerous incidents of aggression towards staff and students. The following incidents occurred:

- On September 9, 2022, K.J. retaliated against a student who, had reported to the teacher that he was playing with a large pair of scissors, by flipping the chair that the student was sitting in, flipping the student's desk onto the student and slapping the student on the arm.

- On September 12, 2022, K.J. climbed onto a table and then onto cubes on the table and shouted “mother f****r” sticking both middle fingers up at the teacher. When the teacher tried to help K.J. down, he attempted to kick her.
- On September 12, 2022, K.J. kicked and slapped his teacher and slapped a classmate.
- On September 13, 2022, K.J. punched his one-to-one support in the nose when she told him he had to go to art class.
- On September 13, 2022, K.J. kicked, slapped, and tried to bite his teacher who was squatting down to talk to him and repeatedly called her a “mother f****r”.
- On September 13, 2022, K.J. hit his teacher repeatedly with a tower he had made out of gear toys when asked to clean up for dismissal. He then slapped the teacher who had knelt to console another child and then walked around disrupting the school supplies placed on counters.
- On September 15, 2022, K.J. eloped from the classroom, gave the teacher the middle finger with both hands, and slapped the teacher when he tried to redirect him.
- Following the events of September 15, 2022, Kristen Braidwood, Supervisor of Special Education, contacted K.J.’s parents and asked them to pick K.J. up and then verbally informed them that K.J. would be placed on home instruction until further notice.¹

¹ Petitioner contacted Division of Child Protection and Permanency (DCP&P) on two occasions to report concerns regarding K.J.’s home environment.

- On September 16, 2022, Kellilyn Mawson, MST, BCBA, Principal of Berlin Community School notifying K.J.'s parents in writing of the following: K.J.'s actions were in violation of the Student Code of Conduct; that K.J. would serve a one-day out of school suspension; and that K.J. would be placed on home instruction until supports could be put in place to facilitate K.J.'s safe return to school.
- On September 19, 2022, K.J. was placed in the Child Study Team office with his case manager. During the one hour that K.J. was with the case manager, he gave the case manager the middle finger sixteen times, used racially charged language six times, and made eight threats of "I am going to kill you" and/or "I am going to kill you with a knife".

On September 19, 2022, Kellilyn Mawson notified K.J.'s parents in writing that based upon the frequency and intensity of the numerous aggressions toward K.J.'s classmates and teachers the petitioner could not provide a safe environment for him. The parents were further advised that K.J. would be required to undergo an evaluation by a licensed clinician, scheduled and paid for by petitioner.

K.J.'s teacher did not feel safe providing home instruction in his home, and the parents requested that home instruction be conducted at the school, so, K.J. was brought to school after hours for the provision of home instruction.

On September 26, 2022, Dr. James L. Hewitt performed a neuropsychiatric assessment on K.J. and diagnosed him with Disruptive Mood Dysregulation Disorder, Attention Deficit Disorder with Executive Function Deficits, Adjustment Disorder with Disturbance of Conduct, and Social Communication Disorder.

On September 27, 2022, during home instruction, K.J. used inappropriate language thirty-five times; inappropriate gestures nine times; damaged school property three times; and hit his teacher three times and himself one time.

On September 28, 2022, during home instruction, K.J. used inappropriate language twelve times, inappropriate gestures once, wrote on the table three times and verbally threatened the teacher once.

On September 30, 2022, the child study team held an emergency Individual Education Program (IEP) meeting to discuss the next best steps to ensure K.J. was receiving continuity of services and K.J. and his classmates and school staff could remain safe while waiting upon necessary revisions to his IEP. During the meeting N.R. stated her disagreement with the option of an out-of-district program.

Dr. Hewitt's report advises that K.J. cannot safely return to school and will require revisions to his IEP that incorporates a suitable out-of-district placement.

On October 3, 2022, Kristin Braidwood forwarded in an email a copy of Dr. Hewitt's report to N.R. and advised her, that the child study team concurred with an out-of-district placement as recommended by Dr. Hewitt. The email also advised N.R. that if she did not agree with the revised plan for an out-of-district placement with ten hours of home instruction per week until a placement could be secured the petitioner would seek judicial intervention.

N.R. did not agree with the proposed revision to K.J.'s IEP and the parties both sought judicial intervention.

On October 21, 2022, Administrative Law Judge Joan M. Burke denied petitioner's request for emergent relief and ordered K.J. returned to Berlin Community School.²

On October 31, 2022, K.J. returned to the Berlin Community School on an abbreviated schedule as agreed to by the petitioner and respondent.

² EDS 09082-2022.

Between October 31, 2022, and November 9, 2022, K.J. was involved in numerous incidents of aggression towards staff and students. The following incidents occurred:

- On October 31, 2022, the class participated in Halloween activities and K.J. used inappropriate language one time and was physically aggressive five times.
- On November 1, 2022, K.J. used inappropriate gestures once, inappropriate social language four times, racially charged language twice, was physically aggressive forty times including kicking, hitting, throwing, and knocking down chairs, engaged in property destruction twenty-eight times and spat three times.
- On November 2, 2022, used inappropriate gestures once.
- On November 3, 2022, K.J. used inappropriate gestures five times, inappropriate social language one time, was physically aggressive twenty-six times including kicking and hitting staff and other students, engaged in property damage seven times, and made one verbal threat.
- On November 7, 2022, K.J. used inappropriate social language seven times, was physically aggressive eight times and engaged in property destruction three times.
- On November 9, 2022, K.J. hit his classmate who he perceived had come too close to him while they were doing free time activity that involved dancing. K.J.'s teacher went over to separate and talk to the students. K.J. punched his teacher with a closed fist in her left eye and then grabbed a dry eraser and struck her again in the left eye. The teacher was left with visible marks. During this event two other students were also struck. Another teacher was hit and K.J. tried to bite her twice. The other students had to

be removed from the classroom until the teachers were able to calm K.J. down.

The Child Study Team previously stated:

- K.J attended a general education preschool setting that was not able to meet K.J.'s emotional and behavioral needs adequately. K.J. requires a small structured therapeutic setting with an increase in individualized instruction and consistent implementation of his individual behavior plan and frequent access to reinforcers. K.J. requires explicit instruction in social, emotional, behavioral competencies with opportunities for skills to scaffolded, modeled, practiced, feedback provided, and with ongoing repetition and reinforcement of these skills. At this time, Berlin Community School staff are recommending seeking an out-of-district placement.

The Child Study Team's recommendation was premised upon the increasing aggressive behavior and the assault on staff and students. The parent rejected the September 30, 2022, IEP and the out-of-district placement.

Petitioner contends that it is substantially likely that injury will occur if K.J. remains at the Berlin Community School.

Respondent

The parents are of the opinion that K.J. is having difficulty transitioning into a new school system, that the proper controls as outlined in the IEP from Collingswood are not being employed properly, and that petitioner was too quick to seek an out-of-district placement. The parent further contends that K.J.'s behavior in the classroom does not meet the criteria for removal due to special circumstances as required by the Individuals with Disabilities Education Act (IDEA) at section 300.530(g), in that he did not bring a weapon to school, possess, or use illegal drugs or cause serious bodily injury.

The parent argues that there is an overall lack of communication from petitioner and that this interferes with their ability to assist K.J. in correcting his behavior. Further, the behavioral interventions called for in his IEP from Collingswood, including “. . . increased attention and staff support, an emotion necklace to help identify and name emotions, a token board and a stamp chart to reinforce positive behavior, visual schedule . . .” are not specially designed strategies that were developed based on the function of K.J.’s behavior. They are merely a list of random strategies with no systematic interventions or structured plan in place and thus, K.J. has ineffective support that could be a possible antecedent for his behavior.

The parents disagree with Dr. Hewitt’s opinion and point out that his “conclusion that K.J. cannot safely return to school seems incongruent with his observations and impressions.” They further question Dr. Hewitt’s impartiality given that he was selected by petitioner, his services were paid for by petitioner, without any input from the parents. The parents are concerned that petitioner is simply giving up on K.J. and pushing him out of the district.

During oral argument the parents complained that petitioner has done a poor job of communicating with them from the start of the school year. They do not deny the frequency of the behaviors but believe that the lack of cooperation from petitioner is hindering their ability to work jointly to control K.J.’s behavior. They feel that petitioner is focusing on just K.J.’s “bad days” and ignoring the days when he does well. Overall, they are concerned that they are being forced into making decisions without the benefit of all of the relevant information.

LEGAL ANALYSIS AND CONCLUSION

N.J.A.C. 1:6A-12.1(a) provides that the affected parent(s), guardian, district, or public agency may apply in writing for emergent relief. An emergent 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.

Here, the petitioner seeks an order to place the student on home instruction pending placement in an appropriate interim alternative educational setting for no more than forty-five days. This issue involves a determination of an interim alternate educational setting.

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

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 petitioner bears the burden of satisfying all four prongs of this test. Crowe v. DeGioia, 90 N.J. at 132-134.

The **first consideration** is whether petitioner will suffer irreparable harm if the requested relief is not granted. “Irreparable harm is shown when money damages cannot adequately compensate plaintiff’s injuries.” Hornstine v. Twp. of Moorestown, 263 F. Supp. 2d 887, 911 (D.N.J. 2003) (citing Sampson v. Murray, 415 U.S. 61, 90 (1974)). “More than a risk of irreparable harm must be demonstrated.” Cont’l Grp., Inc. v Amococ Chemicals Corp., 614 F.2d 351, 359 (3rd Cir. 1980). “The requisite for injunctive relief has been characterized as 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 protected by statute or by common law.” Id. This was further explained by the New Jersey District Court:

“A party seeking a preliminary injunction must make a clear showing of immediate irreparable injury . . . Establishing a risk of irreparable harm is not enough. A plaintiff has the burden of proving a clear showing of immediate irreparable injury . . . Mere speculation as to an injury that will result, in the absence of any facts supporting such a claim, is insufficient to demonstrate irreparable harm.” See Spacemax Int’l LLC v. Core Health & Fitness, LLC, No. CIV.A. 2:13-4015-CCC, 2013 WL 5817168, at 2 (D.N.J. Oct. 28, 2013) (internal citations and quotations omitted).

Here, irreparable harm is established because of the foreseeable risk of injury and danger to, other students and staff at Berlin Community School. The incidents of K.J.’s aggressions and inappropriate behavior are well documented and include hitting, kicking, slapping, spitting, and biting. This behavior cannot be tolerated, especially in a kindergarten classroom. If left unchecked there is little doubt that injury will occur either to K.J., another student, or staff members. I **CONCLUDE** that the petitioner has met its burden of establishing irreparable harm.

The **second consideration** is whether petitioner has shown his claim to be well settled. Petitioner is entitled to seek an order changing the placement when maintaining the current placement of a student is substantially likely to result in injury to the child or others. 20 U.S.C. 1415(k)(3)(A). Additionally, a petitioner 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). Petitioners have met this

burden by the showing of the numerous incidents in which K.J. acted to harm himself or others. Accordingly, I **CONCLUDE** that the petitioners have met their burden of establishing that their claim is well settled that an appropriate placement must be found whether the child presents a threat.

The **third consideration** is whether petitioner has a likelihood of prevailing on the merits. In this matter, a review of the record reveals that petitioner is likely to prevail on the merits.

It is clear from the record that K.J. presents a risk of harm to himself, his fellow students, and to school staff, if he continues to attend classes at the Berlin Community School. Petitioner has made efforts to minimize the risk of harm and maintain a safe environment, unfortunately those efforts have not been successful. It is also clear from the record that K.J.'s educational needs cannot be met in the current setting provided by the Berlin Community School. More importantly, Dr. Hewitt's advised that K.J. cannot safely return to school and will require revisions to his IEP to incorporate a suitable out-of-district placement.

In New Jersey it is well settled that a safe and civil environment in school is necessary for students to learn, and disruptive or violent behaviors are conducts that disrupts a school's ability to educate its students in a safe environment. N.J.S.A. 18A:37-13. K.J.'s continued presence at the Berlin Community School would seriously jeopardize the general right of all students to obtain a proper education and will not serve to benefit him in any way. It is clear from the record that petitioner has made significant efforts to minimize the risk of harm and maintain a safe environment, unfortunately those efforts have not been successful. It is also clear from the record that K.J.'s educational needs cannot be met in the current setting provided by the Berlin Community School. K.J. cannot safely return to school and will require revisions to his IEP to incorporate a suitable out-of-district placement.

Thus, home instruction, while a suitable out-of-district placement is being investigated, appears to be an appropriate solution for the benefit of K.J., his fellow

students and teachers. Consequently, I **CONCLUDE** that petitioner has a likelihood of prevailing on the merits at this point in the proceedings.

The **fourth requirement** for emergent relief entails a balancing of the interests between the parties. Petitioner asserts that if K.J. remains at the Berlin Community School it is substantially likely that an injury will occur. K.J. is only five years old yet the incidents of his aggressions and inappropriate behavior are well documented and include hitting, kicking, slapping, spitting, and biting. The incident of November 9, 2022, caused a minor injury to a teacher but it is an example of the escalation of K.J.'s aggression. It is recognized that keeping him at home while a suitable out-of-district placement is located places the student in a restrictive environment, however his conduct in the school presents a danger to K.J. and to other students, leading to the conclusion that K.J. is best served by in-home instruction until a more appropriate placement becomes available. Therefore, I **CONCLUDE** that the equities weigh in favor of petitioner.

Having considered the parties' arguments and submissions, I **CONCLUDE** that the petitioner has met all four prongs of the standard for the entitlement to emergency relief. For the foregoing reasons, I **CONCLUDE** that the request for emergent relief is granted.

It is **ORDERED** that petitioner's motion for emergent relief is **GRANTED**.

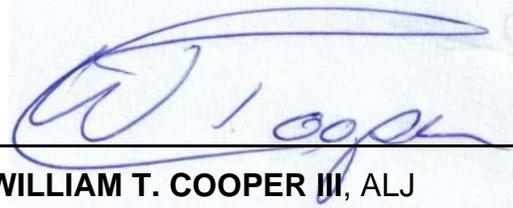
It is further **ORDERED** K.J. be placed on home instruction for no more than forty-five days pending appropriate placement.

It is further **ORDERED** that the expedited due process hearing will be held on **December 7, 2022, at 2:00 p.m.**

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

November 21, 2022

DATE



WILLIAM T. COOPER III, ALJ

Date Received at Agency

Date Mailed to Parties:

WTC/am

APPENDIX

WITNESSES

For petitioner

None

For respondent

None

EXHIBITS

For petitioner

Petition for Emergent Relief and Expedited Relief

For respondent

Response to Berlin Borough