



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION

ON EMERGENT RELIEF

OAL DKT. NO. EDS 01237-22

AGENCY DKT. NO. 2022-33900

D.K. ON BEHALF OF J.K.,

Petitioner,

v.

MAINLAND REGIONAL BOARD OF

EDUCATION,

Respondent.

Jamie Epstein, Esq., for petitioner

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

BEFORE **JEFFREY R. WILSON, ALJ:**

STATEMENT OF THE CASE

D.K., the petitioner, brings an action for emergent relief, on behalf of her adult son, J.K., against the Mainland Regional Board of Education (Board/District) seeking an order to return J.K. to the placement and program described in J.K.'s Individualized Education Program (IEP) that was in effect prior to J.K.'s January 3, 2022, removal and to provide J.K. with compensatory education from March 1, 2022, to the date the respondent returns J.K. to the placement and program described in J.K.'s IEP that was in effect prior to J.K.'s January 13, 2022, removal.

PROCEDURAL HISTORY

D.K. is the parent and legal guardian of J.K. who was born August 4, 2003, and is qualified for and receives special education services, categorized as multiply disabled. His current placement and program are Mainland Regional High School.

On January 13, 2022, J.K. was involved in an altercation with other students on school property. On January 21, 2022, a meeting was held with school representatives and members of the IEP team to review the incident. As a result of that review, it was determined J.K.'s behavior in that incident was not a manifestation of his disability. It is alleged he inflicted serious bodily injury upon another person while at school, on school premises or at a school function. Accordingly, notice of an automatic removal from school for forty-five calendar days (January 14, 2022, to March 1, 2022) was issued.

On February 16, 2022, the Office of Special Education (OSE) acknowledged receipt of petitioner's request for an expedited petition for due process, for immediate placement of J.K. back in his current program and placement in school, along with compensatory education. The expedited due process hearing was for the disciplinary matter only.

On February 17, 2022, the expedited due process petition was assigned to Elaine. B. Frick, ALJ, and scheduled for a prehearing conference on February 18, 2022. Due to a scheduling conflict, the prehearing conference was adjourned to February 28, 2022. In the meantime, this matter was reassigned to the undersigned ALJ who rescheduled the prehearing conference, to be conducted telephonically, on March 3, 2022.

During the March 3, 2022, prehearing conference, it was confirmed J.K. was returned to his current placement and program at the Mainland Regional High School, on March 1, 2022. Accordingly, it was concluded that the basis for hearing this matter on an expedited basis was now moot and that the matter be converted to a regular due process petition.

On March 4, 2022, an order was entered that this matter be converted to a regular due process petition, under the same OAL Docket Number EDS 01237-22 and Agency Docket Number 2022-33900. The remaining issues involving compensatory education and all other special education issues shall be adjudicated through a regular due process petition.

It was also ordered that this matter be referred to another ALJ solely for the purpose of conducting a settlement conference. Any issues not resolved at the settlement conference shall be returned to the undersigned ALJ as the hearing officer. Furthermore, it was ordered that the parties participate in a telephone conference with the undersigned ALJ on March 9, 2022, to select a mutually convenient date and time for their settlement conference. During the March 9, 2022, conference, the parties selected March 16, 2022, at 1:00 p.m. as the mutually convenient date and time. On March 15, 2022, the petitioner filed the within application for emergent relief

On March 16, 2022, the parties participated in a settlement conference before Barry Moskowitz, ALJ. The conference was unsuccessful. That evening, the petitioner sent a letter to the undersigned ALJ seeking a date to be heard on the within application for emergent relief. On March 17, 2022, the parties were emailed formal notice that oral argument on petitioner's emergent application would be heard on March 22, 2022, at 11:00 a.m., utilizing the Zoom platform.

On March 18, 2022, the petitioner sent another letter to the undersigned ALJ requesting a management conference regarding the initial petition. The parties were informed, via email, that a management conference would be scheduled after oral argument on the within application for emergent relief, during the Zoom session on March 22, 2022.

The counsel for the parties presented oral argument on the emergent relief application on March 22, 2022, utilizing the Zoom platform. D.K. and his parents were present, and the record closed.

FACTUAL DISCUSSION

Based upon the oral arguments of counsel and examination of the documentary evidence, I **FIND** the following **FACTS** are undisputed:

J.K. is currently a twelfth-grade student eligible for special education services through the District. He is classified as emotionally disturbed and other health impaired, due to his Attention Deficit Hyperactivity Disorder (“ADHD”). As such, J.K.’s 2021-2022 IEP provides that he shall receive all his academic courses, as well as Physical Education (“PE”) in a Special Class Emotional Regulation Impairment setting. Most of these courses are provided through the Transition Academic Program (“TAP”). The IEP also specifies that the length of J.K.’s school day will be shortened per the TAP schedule and he will be accompanied to and from school by a bus attendant. As such, J.K. arrives at school by 8:20 a.m. each morning and leaves by 1:40 p.m. each afternoon.

Students in the TAP program may not leave the TAP classroom unless accompanied by a paraprofessional, including to attend non-TAP electives or use the restroom. However, there is a restroom located within the TAP classroom that the students are free to use at any time. Pursuant to the behavioral interventions section of his most recent IEP, J.K. participates in the TAP Behavioral Support Program to reward positive behavior. This program allows students to earn “TAP Dollars” in exchange for positive behavior, which can then be redeemed to privileges such as lunch outside of the TAP classroom as well as gift cards or items from the District store.

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 return J.K. to the placement and program described in J.K.'s IEP that was in effect prior to J.K.'s January 13, 2022, removal and to provide J.K. with compensatory education¹ from March 1, 2022, to the date the respondent returns J.K. to the placement and program described in J.K.'s IEP that was in effect prior to J.K.'s January 13, 2022, removal.

The petitioner seeks relief under the third prong arguing that the District modified J.K.'s educational program in violation of the "stay put" provision of the Individuals with Disabilities in Education Act ("IDEA"). 20 U.S.C. 1415(j). While usually a party requesting emergent relief must establish the factors set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), there is an exception to these proof requirements where a parent alleges that the district violated the "stay put" provision. *Id.* Instead, in order to be entitled to emergent relief, the parent must demonstrate that the district implemented or proposed a fundamental change to the student's then-current educational placement. G.R. o/b/o M.B. v. Irvingtown Twp. Bd. of Educ., EDS 00986-15, 2015 WL 3962537, *1 (N.J. Adm. Feb. 5, 2015).

¹ The issue of compensatory education will not be addressed on an emergent basis.

It is undisputed that J.K.'s "then-current educational placement" refers to his 2021-2022 IEP, that details his placement category as follows:

In the presence of general education students between 40% and 79% of the school day (2021-2022)

In the present matter, the petitioner argues that the District violated the stay put provision by segregating J.K. from being in the presence of his non-disabled peers. Specifically, the petitioner alleges that (1) J.K. is prohibited from leaving the TAP classroom for PE or lunch; (2) J.K. is required to arrive at school after the other students and leave before the other students; and (3) J.K. is only permitted to leave the TAP classroom with an escort. The District argues that the petitioner has failed to demonstrate that the District has made any change or modification to J.K.'s educational program, let alone a fundamental change.

The petitioner concedes J.K. has participated in the TAP program since the beginning of the 2021-2022 school year. Although the petitioner argues that J.K.'s IEP is inappropriate, the petitioner concedes J.K.'s stay put, as detailed in his current IEP, has remain unchanged since it was developed.

Based upon the foregoing, I **CONCLUDE** there has been no change or modification to J.K.'s current IEP. His stay put remains as detailed in his IEP. Accordingly, I **CONCLUDE** that the petitioner has failed to establish his burden of proof required for emergent relief.

ORDER

Having concluded that the petitioner has failed to establish his burden of proof, the petitioner's request for emergent relief is **DENIED**.

It is hereby **ORDERED** that the parties shall participate in a telephone management conference with the undersigned ALJ on **April 4, 2022, at 11:00 a.m.** Formal notice for this conference will be sent under separate cover.

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.



March 22, 2022
DATE

JEFFREY R. WILSON, ALJ

Date Received at Agency

Date Mailed to Parties:

JRW/tat