



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

EMERGENT RELIEF

OAL DKT. NO. EDS 04650-24

AGENCY DKT. NO. 2024-37322

M.P.,

Petitioner,

v.

ESSEX COUNTY YOUTH DETENTION

CENTER, JUVENILE JUSTICE

COMMISSION, AND ESSEX REGIONAL

EDUCATIONAL SERVICES COMMISSION,

Respondents.

Ruby Kish, Esq. and **Regina Ann Smith**, Esq., for petitioner (Disability Rights
New Jersey, attorneys)

Gary J. Cucchiara, Assistant County Counsel, for respondent Essex County
Youth Detention Center (Jerome M. St. John, County Counsel, attorney)

Kevin J. Dronson, Deputy Attorney General, for respondent Juvenile Justice
Commission (Matthew J. Platkin, Attorney General of New Jersey,
attorney)

Lawrence M. Teijido, Esq., for respondent Essex Regional Educational Services
Commission (Antonelli Kantor Rivera, attorneys)

BEFORE **KELLY J. KIRK**, ALJ:

This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 to 1482. On April 8, 2024, petitioner, M.P. filed a due process petition and an application for emergent relief, consisting of a letter brief and certification of M.P., against respondents, Essex County Youth Detention Center (ECYDC), Juvenile Justice Commission (JJC), and Essex Regional Educational Services Commission (ERESC).

The Office of Special Education of the New Jersey Department of Education (Department) transmitted the application for emergent relief to the Office of Administrative Law (OAL), where it was filed on April 9, 2024. The transmittal reflects “Emergency Relief: Petitioner maintains that there is a break in services and seeks an order for immediate implementation of IEP and provision of 4 hours of instruction, five days a week at Sojourn High School.” Oral argument was scheduled for April 16, 2024.

On April 15, 2024, respondents submitted opposition to petitioner’s application for emergent relief as follows: ECYDC submitted a letter brief and certification of Todd Barcliff with two exhibits; JJC submitted a letter brief and certification of Christina Broderick, Esq.; and ERESO submitted a letter brief and certification of counsel with one exhibit. Petitioner’s IEP was submitted on April 16, 2024. Oral argument was held on April 16, 2024. Given the nature and extent of the behavior history reflected in the warden’s certification and that counsel indicated during oral argument that there may be documentation relative to M.P.’s removal from Sojourn High School (Sojourn) and placement on home instruction not yet identified due to the expedited proceeding, respondents were permitted to submit any such documentation or to confirm in writing that no such documentation exists no later than April 19, 2024 at noon.

On April 19, 2024, ERESO submitted two Sojourn incident reports and an email stating, inter alia, that ERESO did not have any documentation specifically addressing M.P.’s removal from Sojourn and placement on home instruction. On April 19, 2024, ECYDC submitted an email stating that, per the warden, petitioner has engaged in disruptive behavior in his own classes and those of other residents, but there is no

documentation relative to the placement on home instruction. No supplemental documentation was received from JJC.

For background and context petitioner's Due Process Petition¹ alleges, inter alia, the following:

1. M.P., a classified student, was born on January 13, 2004, and is eligible to receive special educational services through the Essex County Youth Detention Center.
2. For judicial efficiency, Petitioner joins all three public agencies involved with the education of children with disabilities in the state's juvenile detention facilities. The Individuals with Disabilities Education Act ("IDEA") and its implementing regulations apply to all public agencies educating classified youth under twenty-one regardless of whether that agency is receiving funds under the IDEA. 34 CFR 300.2(b)(2).
3. Respondent, Essex County Youth Detention Center ("Essex YDC") located at 80 Duryea St, Newark, New Jersey 07103, provides housing, medical, recreation, education, holistic, and social services to detained youth ages nine to seventeen.
4. Essex YDC is a public agency within the state of New Jersey responsible for in [sic] the education of children with disabilities. Therefore, Essex YDC is bound by the IDEA and implementing regulations. 34 C.F.R. 300.2(b)(1)(iv).
5. The Essex YDC must ensure all youth, including youth with disabilities, receive educational services at a minimum of four hours per day, five days per week, two hundred and twenty days per year. N.J.A.C. 13:92-9.3(b)(1).
6. Respondent, Essex Regional Educational Services Commission ("ERESC"), located at 333 Fairfield Rd, Fairfield, New Jersey 07004, operates Sojourn High School, an alternative school located in the Essex YDC to provide educational services to detained middle and high school aged youth.
7. ERESC is an educational services agency responsible in part for the education of children with disabilities. Therefore, ERESC is bound by the IDEA and its implementing regulations. 34 C.F.R. 300.2(b)(1)(ii).
8. For classified students, ERESC, as the receiving school, must implement the educational program and services documented in the student's Individualized Education Program ("IEP"). N.J.A.C. 6A:14-7.1(a).

¹ Only the application for emergent relief was transmitted to the Office of Administrative Law. However, petitioner's letter brief on the application for emergent relief reflects that "The statement of facts from the underlying Due Process petition dated April 5, 2024, is incorporated herein."

9. Respondent, New Jersey's Juvenile Justice Commission ("JJC"), located at 1001 Spruce St., Suite 202. Trenton, New Jersey 08638, is responsible for the oversight of all New Jersey Youth Detention Centers.

10. The JJC is a political subdivision of the State of New Jersey responsible in part for the education of children with disabilities and, therefore, bound by the IDEA and its implementing regulations. 34 C.F.R. 300.2(b)(1)(i).

11. The JJC must ensure detention centers abide by regulations for state facilities found within N.J.A.C. 6A:14-8 and N.J.A.C. 6A:17-3.

12. M.P. is a student with a disability as defined by the Individuals with Disabilities Education Act 20 U.S.C. §1400 et seq. ("IDEA"); the Rehabilitation Act of 1973, 20 U.S.C. § 794, et seq. ("Section 504"); 34 C.F.R. § 104, et seq.; the Americans with Disabilities Act, 42 U.S.C. § 12101 ("ADA"); and N.J.A.C. 6A:14-3.5.

13. M.P. is entitled to receive special education programs and services under the classification "Other Health Impaired."

M.P.'s Educational Background

14. M.P. was first identified as a student with a disability in 2019 when he was a ninth grader attending People's Prep Charter School ("People's Prep").

15. The psychological evaluation conducted by People's Prep indicated that M.P. had significant behavioral and emotional issues that impacted his learning including challenges with executive functioning and impulsivity.

16. People's Prep developed an IEP to provide M.P. with the special education supports and services he required to navigate the behavioral issues that impeded his learning.

17. Between 2019 and 2022 M.P. received education at various out of district educational placements.

M.P.'s Education at Essex YDC

18. M.P. was placed in the Essex County Youth Detention Center in May 2022.

19. Upon belief and information from M.P.'s school records, his operable IEP at the time he was placed at the Essex YDC was a JJC IEP dated May 5, 2021.

20. From May 2022 through July 2023, the Essex YDC escorted M.P. from the residential floor to the school floor, where Sojourn High School is located, on a fairly consistent basis.

21. From July through October of 2023 Respondents denied M.P. all educational services.

22. On or about November 2, 2023, Essex YDC moved M.P. to a different unit where he began attending school

- sporadically, certainly a far cry from the four hours per day, five days a week required by his IEP.
23. On the days that he remained on the unit, he did not receive any instruction.
24. When on the school floor M.P. attended different classes, though he was unsure if he was receiving all classes necessary to meet state graduation requirements.
25. Sometime towards the end December 2023, the Essex YDC informed M.P. that he would no longer be permitted to attend school due to a verbal altercation with an officer in the classroom.
26. M.P. has not attended school at Sojourn High School since December 2023.
27. M.P.'s current educational program consists of limited and sporadic access to a computer website, BrainPop, that offers short animated movies for students in grades K–8.
28. On the days where Respondents allow M.P. to access Brain Pop, he does so under the supervision of a staff member who monitors him while he completes educational games and quizzes.
29. It is unclear whether these BrainPop assignments align with the required curriculum or allow M.P. to earn credits towards graduation.
30. M.P. is a twelfth-grade student who was on track to graduate before the beginning of the 2023/2024 school year.
31. To date, Respondents continue to deny M.P. an appropriate educational program.
32. Since first entering the Essex YDC in May, 2022, M.P. has only had one annual review meeting to update the IEP.
33. Despite knowing that M.P.'s IEP was dated May 5, 2021, Respondents did not hold an IEP until January 24, 2023, two-hundred and sixty four days in violation of N.J.A.C. 6A:14-3.7(e)(17)(i).
34. This was the last time Respondents held an IEP meeting, an additional violation of N.J.A.C. 6A:14-3.7(e)(17)(i).
35. At the time of the January 2023 IEP meeting, M.P. had not been evaluated in over three years. There is nothing in the records that indicate M.P. signed a waiver of the triennial evaluations.
36. The IEP requires M.P. to receive thirty minutes of individual counseling, one time per month.
37. The Present Levels of Academic Achievement and Functional Performance in the January 2023 IEP state M.P. is easily distracted and requires frequent redirection.
38. The IEP includes a behavior intervention plan with a target behavior of increasing M.P.'s ability to stay on task and complete coursework.
39. The behavior intervention plan requires M.P.'s teachers to collect data through a data collection management system.

40. There is no documentation of data collection in M.P.'s records.
41. The January 2023 IEP requires M.P. attend school a "minimum of 4 hours, 5x per week."
42. JJC failed to hold and [sic] annual review meeting to revise M.P.'s IEP on or before January 24, 2024; thus the January 2023 remains his current, operable IEP.
43. On December 6, 2023, Counsel for M.P. began to contact several administrators from ERESO to schedule an IEP meeting.
44. On February 15, 2024, counsel received an email from the ERESO attorney stating that ERESO was not responsible for convening IEP meetings for youth with disabilities attending Sojourn High School.
45. Despite being on notice that M.P. required an IEP meeting, none of the Respondents have scheduled a meeting to develop an IEP leaving the January 24, 2023 IEP as the last operable IEP.
46. Respondent's failure to hold an annual IEP meeting to revise and revise the January 24, 2023 IEP has denied M.P. a FAPE.

The Certification of Todd Barcliff states, inter alia, the following: he is the warden of ECYDC, a division and facility of the County of Essex, a body politic and corporate of the State of New Jersey; the County entered into an agreement with ERESO, which operates Sojourn, an alternative school at ECYDC, in January 2024; under the agreement, Sojourn provides classroom educational services to the residents at ECYDC, including teachers, administrators, materials, special needs instruction, and counseling, that will enable students to obtain elementary and high school credits that will be recognized by their resident districts; his office has obtained attendance records for M.P. from ERESO "which include home instruction, or "one-to-one" instruction," from December 2023 through April 12, 2024; those records indicate that M.P.'s attendance during that period has generally been good; in accordance with the County's contractual relationship with ERESO, it has been ECYDC's intention and purpose to provide residents at the facility with the FAPE that they deserve, including those with special needs; he is aware that M.P. is classified as a student with special needs; it is not ECYDC's responsibility to prepare and issue IEPs, as such information is supplied to ECYDC from other sources; ECYDC is dedicated to providing residents and special needs students with the full educational services that they have a right to and deserve, including instruction five days per week and four hours per day, through its arrangement with Sojourn, but unfortunately that is not always possible or

practical under the circumstances; M.P. has had a “severe difficult and troubled” past before coming to ECYDC in 2022, that included affiliations with gangs; M.P.’s troubling behavior has continued; and as shown in his behavioral history M.P.’s misconduct has been egregious, including numerous assaults on other residents and officers at the facility, fighting, destruction of property, possession of contraband, terroristic threats, refusal of direct orders, and disruptive behavior.

The Certification of Christina Broderick, Esq. states, inter alia, the following: county detention centers, including ECYDC, are not JJC facilities and the JJC plays no role in the day-to-day functions of ECYDC; the JJC does not have a direct role in providing educational services to incarcerated individuals at the ECYDC; the JJC’s role is largely limited only to monitoring the county detention centers; although the JJC has cited ECYDC in the past in connection with its educational programs, the JJC does not have the ability to provide education services to any individual student at the facility, or even the authority to compel ECYDC to do so.

A January 24, 2023, Juvenile Justice Commission Essex County Juvenile Detention Center Individualized Education Program (IEP) reflects the local educational agency (LEA) as Lindenwold Borough, his classification as “other health impaired,” his placement category as “Regular Education with 100% Modification,” and his related services as “Counseling, 30 minutes, pullout, once monthly.” The IEP also states:

[P.M.] is an 18 year old male who entered the Essex County Juvenile Detention Center on 5/30/2022 and currently is receiving educational and residential programming through the Essex County Juvenile Detention Center. Prior to his admission he was enrolled in schooling through the Juvenile Justice Commission at Costello Prep. His most recent IEP is from the Juvenile Justice Commission.

Petitioner’s application for emergent relief seeks a finding that respondents’ actions violated N.J.A.C. 13:92-9.3(b)(1) and an order requiring that M.P. be immediately provided with no less than four hours of education per day, five days per week at Sojourn in the ECYDC. The arguments of the parties are as follows:

- Petitioner: ECYDC, JJC, and ERESA have an affirmative responsibility to educate students placed at the ECYDC, and by failing to meet the minimum educational standards pursuant to N.J.A.C. 13:96-9.3, respondents have violated M.P.'s right to a FAPE under the IDEA; that students with disabilities are entitled to equal access to education and cannot be denied the benefits of, or excluded from, participation in educational services; and that to prevent irreparable harm, respondents must immediately provide M.P. with educational services in accordance with his IEP and regulations mandating minimum instruction standards for youth detention centers.
- ECYDC: Petitioner does not satisfy the four requirements for emergent relief; it appears from M.P.'s attendance records that his recent attendance has been generally good; although he may not have received all of the hours of educational services to which students are ordinarily entitled, it is apparent that his own misconduct has contributed to such a deficiency in a significant way; he has not been able to participate in regular classroom activities due to his disruptive and violent behavior; the petition lacks specificity with respect to the manner in which such services were not provided; he has not demonstrated that the underlying claim of entitlement to specific hours and nature of educational services under the factual circumstances presented is settled; his own violent and disruptive behavior has resulted in any inability of educational authorities to provide him with services he should otherwise deserve; that ECYDC and Sojourn cannot ignore the rights and interests of the other students entitled to educational benefits; and removal of M.P. from classrooms or the provision of one-to-one services which might result in the inability to meet technical regulations as to hours of educational services under the circumstances of this case would enable him to benefit from his own wrongs.
- ERESA: The petition does not detail any specific days or instances when M.P. allegedly did not receive instruction; the petition does not provide any indication that compensatory education, which was requested as relief in the petition, would be inadequate should petitioner ultimately prevail; N.J.A.C.

13:92-9.3 is not applicable to ERES and there is no legal basis to order its compliance with the same; ERES is not the entity responsible for providing Petitioner with FAPE and is not a proper party to this action.

- o JJC: County detention centers, including ECYDC, are not JJC facilities and the JJC plays no role in the day-to-day functions of ECYDC; the JJC does not have a direct role in providing educational services to incarcerated individuals at the ECYDC; the JJC's role is largely limited only to monitoring the county detention centers; although the JJC has cited ECYDC in the past in connection with its educational programs, the JJC does not have the ability to provide education services to any individual student at the facility, or even the authority to compel ECYDC to do so; and because JJC has no role in providing the educational services M.P. receives at Essex YDC or Sojourn and, as a corollary, can take no steps to directly remediate any deficiencies, the claims brought against the JJC in the instant application fail.

A party may apply, in writing, for a temporary order of emergent relief as a part of a request for a due process hearing or an expedited hearing for disciplinary action, or at any time after a due process or expedited hearing is requested pending a settlement or decision on the matter. N.J.A.C. 6A:14-2.7(r). The request must be supported by an affidavit or notarized statement specifying the basis for the request for emergency relief. Ibid. However, emergent relief may be requested only for the following: (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. N.J.A.C. 6A:14-2.7(r)(1).

Pursuant to N.J.A.C. 6A:14-2.7(s)(1), emergent relief may be requested according to N.J.A.C. 1:6A-12.1 and may be granted if the administrative law 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 success on the merits of the underlying claim; and
- iv. When the equities and interest of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

To prevail on an application for emergent relief, the petitioner must meet all four prongs as set forth above. Harm is generally considered irreparable if it cannot be redressed adequately by monetary damages. Crowe v. De Gioia, 90 N.J. 126, 132-133 (1982).

A free appropriate public education (FAPE) is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school. 20 U.S.C. § 1412(a)(1)(A). The obligation to make a FAPE available to all children with disabilities does not apply with respect to children (i) aged 3 through 5 and 18 through 21 in a State to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to children in those age ranges; and (ii) aged 18 through 21 to the extent that State law does not require that special education and related services under 20 USCS §§ 1411 et seq. be provided to children with disabilities who, in the educational placement prior to their incarceration in an adult correctional facility (I) were not actually identified as being a child with a disability under 20 U.S.C. § 1401; or (II) did not have an individualized education program under this 20 U.S.C. §§ 1411 et seq. 20 U.S.C. § 1412(a)(1)(B).

As authorized by 20 U.S.C. § 1412, 34 C.F.R. § 300.2 applies to each State that receives payments under Part B of the IDEA, as defined in 34 C.F.R. § 300.4 and its provisions apply to all political subdivisions of the State that are involved in the education of children with disabilities, including: (i) the State educational agency (SEA); (ii) local educational agencies (LEAs), educational service agencies (ESAs), and public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA; (iii) other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for children with deafness or children with blindness); (iv) State and local juvenile and adult correctional facilities. 34 C.F.R. § 300.2(b)(1). Moreover, its provisions are binding on each public agency in the State

that provides special education and related services to children with disabilities, regardless of whether that agency is receiving funds under Part B of the IDEA. 34 C.F.R. § 300.2(b)(2). Each public agency in the State is responsible for ensuring that the rights and protections under Part B of the IDEA are given to children with disabilities (1) referred to or placed in private schools and facilities by that public agency; or (2) placed in private schools by their parents under the provisions of § 300.148. 34 CFR § 300.2(c).

In New Jersey, a detention facility shall provide an educational program which meets the needs of each juvenile based on his or her age, level of ability, previous educational experience, and interest. N.J.A.C. 13:92-9.3(a). All residents of county juvenile detention facilities shall participate in an educational program suited to meet his or her needs. Ibid. The educational programs shall be operated on a twelve-month basis and provide for the juvenile's cognitive and affective development that includes:

1. A program consisting of a minimum of four hours per day five days per week and 220 days per calendar year;
2. Physical education provided by a certified physical education teacher. Physical education shall be a part of the four-hour minimum required school day. At least 150 minutes of physical education shall be provided per week which may include classes in health and family life. Physical education shall not constitute more than one hour of the daily education program. All other recreational activities shall not be considered in determining the four-hour minimum required for the educational program;
3. A program consisting of basic academic instruction as appropriate to the individual program plan (IPP) or individualized education plan (IEP), as applicable; and
4. A New Jersey State Attendance Register entry for all students at the facility, and a written schedule for the educational program.

[N.J.A.C. 13:92-9.3(b).]

The facility shall not schedule non-educational activities for the juvenile population during school hours. N.J.A.C. 13:92-9.3(c). Each county juvenile detention facility shall establish and implement policies and procedures for educational services for juveniles. N.J.A.C. 13:92-9.3(d). The policies shall include provisions for continuing the delivery of educational services to disruptive pupils. Ibid. Each county juvenile

detention facility shall establish a written attendance policy that defines legitimate absences to include sickness, injury, religious observance, required court appearance or other compelling personal circumstance. N.J.A.C. 13:92-9.3(d). The educational program delivery system shall provide remedial and special education. N.J.A.C. 13:92-9.3(f).

Within forty-eight hours of admission to the facility, exclusive of weekends, holidays and non-pupil contact days, an educational assessment of each juvenile shall be initiated. N.J.A.C. 13:92-9.3(g). Standardized achievement and/or placement tests shall be administered to each juvenile. Ibid. Within thirty days of admission to the facility, exclusive of weekends, holidays and non-pupil contact days, an individual program plan (IPP) shall be developed for each juvenile to ensure a continuum of program offerings for those students who were enrolled in an educational program that includes: (1) input from the juvenile's home school district or other applicable educational program, whenever possible; (2) individualized educational goals and objectives; and (3) individualized programs which allow high school credit to be awarded through alternative learning experiences in accordance with program completion authorized at N.J.A.C. 6A:8-5.1(a)1ii. N.J.A.C. 13:92-9.3(h). An individualized education plan (IEP) shall be provided for every juvenile who has been classified as eligible for special education, in accordance with N.J.A.C. 6A:14. N.J.A.C. 13:92-9.3(i). The detention facility's educational program shall utilize the existing IEP, as developed by the home school district or applicable educational program. Ibid. If it is determined that the most recent IEP is outdated, the home district shall be advised. Ibid.

The basic curriculum shall consist of subjects which incorporate the New Jersey Core Curriculum Content Standards, each of which shall be provided to students at their individual level of functioning. These subjects may include: (1) Language Arts Literacy; (2) Social Studies; (3) Science; (4) Mathematics; (5) Comprehensive Health and Physical Education; (6) Life Skills; (7) Vocational Training; (8) Law-Related Education; (9) World Languages; (10) Visual and Performing Arts; (11) Technological Literacy; and (12) Career Education. N.J.A.C. 13:92-9.3(j). All educational programs shall be fully staffed to include substitute coverage when needed with the following ratios: (1) single

class population shall not exceed 12 students; and (2) the teacher-to-student classroom ratio shall be one teacher to 12 students. N.J.A.C. 13:92-9.3(l). Classes shall be conducted separate from sleeping areas. N.J.A.C. 13:92-9.3(m). Either independently or through contractual agreements, the juvenile detention facility shall employ the educational personnel required to ensure the provision of programs and services pursuant to N.J.A.C. 6A:17. N.J.A.C. 13:92-9.3(n). All educational personnel shall possess the appropriate certification endorsement issued by the State Board of Examiners. N.J.A.C. 13:92-9.3(n)(1). All teachers and educational services personnel shall participate in the required professional development activities consistent with the requirements at N.J.A.C. 6A:17-3.5(d). N.J.A.C. 13:92-9.3(n)(2). Each facility shall provide, or make available, a Site Education Supervisor to oversee the facility's education program. N.J.A.C. 13:92-9.3(o).

Appropriate records on each juvenile's work and progress shall be maintained in the facility to ensure proper credit is given for assignments and course work completed. N.J.A.C. 13:92-9.3(t). Contact with the juvenile's home district shall be maintained and educational records furnished to the home district to ensure that proper credit is given for assignments and course work completed at the marking period intervals established on the facility's school calendar as approved by the Commission's Office of Education. N.J.A.C. 13:92-9.3(u). The progress report, in the form of a report card and/or transcript, shall include a designated contact person and the following information which is necessary to formulate an appropriate educational program and to ensure that credit for work completed is granted: (1) statewide assessment and diagnostic findings; (2) credits earned toward high school graduation requirements; (3) grade level equivalent; (4) vocational training experiences; and (5) IPP or IEP. N.J.A.C. 13:92-9.3(w).

Petitioner alleges that from July through October of 2023, he was denied all educational services, that from November 2023 he sporadically attended Sojourn, and that since December 2023, he has not attended Sojourn and his current educational program consists of limited and sporadic access to a computer website, BrainPop, that offers short, animated movies for students in grades K–8. Inasmuch as this is an application for emergent relief, time constraints do not allow for complete discovery. Attendance records from Sojourn were submitted with ERESC's certification of counsel,

and while they do reflect that M.P. was largely “Present,” it is not clear how many hours of instruction or physical education petitioner has been receiving daily or by what method. Further, there is no dispute amongst the parties that M.P. has not attended Sojourn in person since he was placed on home instruction on December 20, 2023.

Any SEA, State agency, or LEA that receives assistance under 20 USCS §§ 1411 et seq. must establish and maintain procedures to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a FAPE by such agencies. 20 U.S.C. § 1415(a). Except as provided at 20 U.S.C. § 1415 (k)(4), during the pendency of any proceedings, unless the State or LEA and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed. 20 U.S.C. § 1415(j).

There is no dispute that petitioner was classified as eligible for special education and has an IEP. Per the most recent IEP, M.P.’s educational placement is “regular education with 100% modification,” which would be Sojourn, not home instruction. Although it appears to be a result of petitioner’s behavior, no documentation submitted reflects the rationale for or procedure by which M.P.’s educational placement was changed from Sojourn to home instruction or any duration of time.

Generally, school personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct. 20 U.S.C. § 1415(k)(1)(A). School personnel may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than ten school days (to the extent such alternatives are applied to children without disabilities). 20 U.S.C. § 1415(k)(1)(B). If school personnel seek to order a change in placement that would exceed ten school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child’s disability pursuant to 20 U.S.C. § 1415(k)(1)(E), the relevant disciplinary procedures applicable to children without disabilities may be

applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities, except as provided 20 U.S.C. § 1412(a)(1), although it may be provided in an interim alternative educational setting. 20 U.S.C. § 1415(k)(1)(C). A child with a disability who is removed from the child's current placement under 20 U.S.C. § 1415(k)(1)(G) (irrespective of whether the behavior is determined to be a manifestation of the child's disability) or 20 U.S.C. § 1415(k)(1)(C) shall (i) continue to receive educational services, as provided at 20 U.S.C. § 1412(a)(1), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and (ii) receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur. 20 U.S.C. § 1415(k)(1)(D).

Except as provided 20 U.S.C. § 1415(k)(1)(B), within ten school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the IEP Team (as determined by the parent and the LEA) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine (I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (II) if the conduct in question was the direct result of the LEA's failure to implement the IEP. 20 U.S.C. § 1415(k)(1)(E)(i). If the LEA, the parent, and relevant members of the IEP team determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability. 20 U.S.C. § 1415(k)(1)(E)(ii). If the LEA, the parent, and relevant members of the IEP team make the determination that the conduct was a manifestation of the child's disability, the IEP team shall (i) conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the LEA had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement described in 20 U.S.C. § 1415(k)(1)(C) or (G); (ii) in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior; and (iii) except as provided in 20 U.S.C. §

1415(k)(1)(G), return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan. 20 U.S.C. § 1415(k)(1)(F). The interim alternative educational setting shall be determined by the IEP team. 20 U.S.C. § 1415(k)(2).

Pursuant to N.J.A.C. 13:92-9.3(o), the detention facility must have in place policies that include provisions for continuing the delivery of educational services to disruptive pupils. However, the removal has far exceeded ten days and there is no evidence that any type of disciplinary procedures or manifestation determination were initiated to effectuate petitioner's removal—which appears at this point to be indefinite—from his placement at Sojourn.

School personnel may remove a student to an interim alternative educational setting for not more than forty-five school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child (i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or LEA; (ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or LEA; or (iii) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or LEA. 20 U.S.C. § 1415(k)(1)(G). Not later than the date on which the decision to take disciplinary action is made, the LEA shall notify the parents of that decision, and of all procedural safeguards accorded under 20 U.S.C. § 1415(k)(1)(H). Thus, although school personnel may remove a student to an interim alternative educational setting for inflicting serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or LEA, the removal cannot exceed forty-five days and notice of the decision is required, as are all procedural safeguards.

As reflected in the records from the warden, M.P. has an extensive history of violence and disruption at the ECYDC, including gang assault, inciting a riot, indecent

exposure, refusing direct orders, threatening an officer, fights/rioting, and repeated instances group assaults, assaults, fights, terroristic threats, assault on an officer, disruptive behavior, contraband, and destruction of county property. To remove a student with a disability when district board of education personnel maintain that it is dangerous for the student to be in the current placement and the parent and district board of education cannot agree to an appropriate placement, the district board of education must request an expedited hearing. N.J.A.C. 6A:14-2.7(n). 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 forty-five calendar days according to 20 U.S.C. § 1415(k) and its implementing regulations. Ibid. The procedure at 20 U.S.C. § 1415(k) may be repeated as necessary. N.J.A.C. 6A:14-2.7(n)(1). However, there is no evidence that an expedited hearing was ever sought to remove M.P.

It is also noted that a juvenile who has reached the age of eighteen may be transferred from the JJC to the Department of Corrections, only when the Superintendent, Secure Care Administrator, and Executive Director have approved a determination of the Juvenile Reception Classification Committee (JRCC) that the threshold criteria set forth in N.J.A.C. 13:91-2.1(b) have been satisfied and: (1) the juvenile voluntarily requests a transfer to the Department by signing the Voluntary Transfer Request Form, Form 103; or (2) with respect to a proposed involuntary transfer, the determination has been upheld after a hearing before a hearing officer under the provisions of N.J.A.C. 13:91-3. N.J.A.C. 13:91-2.1(a). The threshold criteria for transfer of a juvenile to the Department are:

- 1.** The juvenile demonstrates disruptive behavior, and that his or her continued presence in the juvenile facility threatens:
 - i.** The safety of the public, juvenile facility staff, or other juveniles; or
 - ii.** The ability of the Commission to operate the juvenile facility in a stable, safe, and orderly manner;
- 2.** The juvenile's maturity level and criminal sophistication makes the juvenile inappropriate for the available Commission programs; or
- 3.** The juvenile's continued presence in the juvenile facility impedes the effective delivery of the programs, services, and

sanctions developed and implemented by the Commission to meet the special needs of the juvenile-aged offenders committed to the care, custody, and control of the Commission.

[N.J.A.C. 13:91-2.1(b)].

As set forth above, New Jersey has specific laws regarding educational programs in a detention facility, and for a student with a disability there are procedures that must be followed for a change in placement or interruption of services. Certainly, petitioner's extensive history of violence and disruption is of significant concern. However, it does not appear from any records submitted that any of the above-referenced disciplinary, manifestation determination, or removal to an interim alternative educational setting procedures were effectuated. Likewise, it does not appear from any records submitted that there was any procedural action taken to remove M.P. or transfer M.P. to the Department of Corrections if it is dangerous for him to be at Sojourn. As such, based upon the most recent IEP and the apparent failure of any entity to take any formal action, M.P.'s current placement should be at Sojourn and not on home instruction.

With regard to the emergent relief criteria, petitioner has a likelihood of success on the merits of his claim that he is entitled to return Sojourn pending a due process hearing on the merits, because his legal right to an education while in the detention facility is settled and summarily removing him from Sojourn indefinitely without complying with any procedures established by law to have done so will result in irreparable harm. Further, although M.P.'s behavior is of significant concern, in balancing the equities and interests, petitioner will suffer the greater harm if not returned to Sojourn because his removal from Sojourn and placement on home instruction was not consistent with applicable law, and the respondents retain their rights to immediately act to properly remove him if there is basis to do so.

In view of the foregoing, I **CONCLUDE** that petitioner is entitled to emergent relief, and it is hereby **ORDERED** that petitioner be returned to Sojourn pending a decision on the merits of the due process petition. However, this order does not preclude or limit in any way the respondents or any other appropriate entity from taking any action authorized

by law to properly, procedurally remove M.P. from Sojourn during the pendency of the due process petition for any reason, including, but not limited to, any violent and disruptive behavior.

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



April 22, 2024

DATE

KELLY J. KIRK, ALJ

Date Received at Agency

Date Mailed to Parties:
