



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

EMERGENT RELIEF

OAL DKT. NO. EDS 2893-18

AGENCY REF. NO. 2018-27583

**HAMILTON TOWNSHIP BOARD
OF EDUCATION,**

Petitioner,

v.

J.S. ON BEHALF OF J.N.,

Respondent.

Patrick F. Carrigg, Esq., appearing for petitioner, Hamilton Township Board of Education (Lenox Law Firm, attorneys)

No appearance by or on behalf of respondent

BEFORE **JEFFREY N. RABIN**, ALJ:

STATEMENT OF THE CASE

Petitioner, the Hamilton Township Board of Education (District), has filed for emergent relief seeking an order for the continued in-district placement of student J.N., a minor student whom the District believes represents a danger to himself and others, through the end of the current school year (2017-18), pending continuing due process to

establish a permanent school placement. In the alternative, petitioner seeks continued interim in-district placement of student J.N. for a second 45-day period.

PROCEDURAL HISTORY

On February 23, 2018, the petitioner filed a petition for due process and moved for emergent relief with the Office of Special Education Policy and Procedure (OSEPP), Department of Education (DOE).

The emergent matter was transmitted to the Office of Administrative Law (OAL), where it was filed on February 26, 2018, to be heard as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14 F-1 to -13. A Hearing was scheduled for March 2, 2018. Due to missing documentation, the Hearing was adjourned and a new Hearing was scheduled for March 7, 2018. The Hearing scheduled for March 7, 2018, did not take place as State Offices were closed due to inclement weather. The Hearing was held on March 12, 2018, and the record closed on that date.¹

FINDINGS OF FACT

Based on the Briefs and testimony at the Hearing, I **FIND** the following to be the undisputed facts:

1. Respondent, J.S., is the mother of student, J.N., a 15-year old student born on July 8, 2002. J.N. is currently a student eligible for special education under the classification of Emotionally Disturbed, based on a determination made on June 30, 2010. J.N. has an existing Behavioral Intervention Plan.

¹ Due to the expedited nature of this matter being filed as a petition for Emergent Relief, both parties were notified of the initial Hearing date of March 2, 2018, and the rescheduled dates of March 7, 2018, and March 12, 2018, by emails dated February 26, March 2, and March 8, 2018 (copies attached hereto as Exhibit J-1, J-2 and J-3.) Additionally, telephone messages were left for respondent J.S. on those same dates, confirming the scheduling information contained in the emails. It is deemed that respondent J.S. had notice of the Hearing date of March 12, 2018. J.S. did not appear at the Hearing on March 12, 2018, was marked as "Failure to Appear," and the Hearing took place with no representative of student J.N.

2. On October 17, 2017, J.N. was discovered to be in possession of three small bags of marijuana while at his school, Nottingham High School (Nottingham). J.N. admitted to Andrew Paden (Educational Assistant) that he had been selling marijuana for money. Principal Ragazzo suspended J.N. pending a disciplinary hearing before the Board of Education.

3. On October 31, 2017, the District's Child Study Team conducted a manifestation determination and determined that the illegal conduct did not arise from J.N.'s disability, and that J.N. was therefore subject to the same disciplinary procedures applicable to students without disabilities.

4. On November 13, 2017, a committee from the District conducted a hearing regarding the charge against J.N. Respondent failed to appear at the hearing. The Committee concluded that J.N. had been in possession of marijuana with intent to distribute. The Committee recommended to the District that J.N. not return to Nottingham, based on their finding that J.N.'s possession with intent to distribute constituted a continuing danger to other students.

5. On November 15, 2017, the full District considered the Committee's recommendation, and voted to accept the Committee's finding that J.N. was guilty of possession with intent to distribute.

6. On November 21, 2017, the Child Study Team conducted an Individualized Education Program (IEP) meeting and found that J.N. had not performed well during the last school year in maintaining his grades and addressing behavioral issues. By way of a new IEP, the Child Study team recommended that J.N. be placed in a smaller, more restrictive environment, one that was available at the Hamilton Educational Program (HEP), in order to better address his grades and behavioral issues. (Exhibit R-5.)

7. HEP has a smaller student body and smaller campus than Nottingham, and has a child study team, counselors and extra supervisors available. It coordinates with CARES (Counsel on Addiction Recovery Services) and New Choices (part of

Catholic Charities), two programs that address students with substance abuse issues.

8. J.S. objected to this recommendation by letter dated November 21, 2017. The District filed a Petition for Emergent Relief, and this matter was heard before the Hon. Mary Ann Bogan on January 2, 2018. At that hearing, the parties reached a settlement agreement in which J.S. agreed to J.N. being placed in HEP for 45 days.

9. J.N. entered HEP on January 9, 2018. The 45-day period expired on February 22, 2018. During that time period, J.N. was absent 8 out of 41 days, and served a two-day suspension due to leaving school grounds and inappropriate behavior.

10. On January 12, 2018, J.N. came to HEP smelling of marijuana. He tested positive for marijuana, and was subsequently entered into the New Choices program. New Choices is an after-school program taking place two days per week, in which a student is drug-tested regularly, and where a student participates in group and individual sessions and after-school activities.

11. At HEP, student J.N. was performing better academically than he was at Nottingham, but was still struggling with his classes. He was distracted in class, resisted participating in academic tasks, and continued to display learning and behavioral issues.

12. The District has asserted that J.N. is not prepared to return to Nottingham and seeks an order placing J.N. at HEP for the remainder of the 2017-28 school year (approximately 70 days), pending continuing due process, or in the alternative, that he remain at HEP for an additional 45 days. J.N. will be scheduled for an annual review of his IEP sometime in May 2018.

LEGAL ANALYSIS

Emergent Relief

N.J.A.C. 6A:14-2.7(r) allows either party to apply in writing for a temporary order of emergent relief as part of a request for a due process hearing or an expedited hearing for disciplinary action. The request shall be supported by an affidavit or notarized statement specifying the basis for the request for emergency relief. N.J.A.C. 6A:14-2.7(r)(1) lists the cases emergent relief is available for, which includes issues involving (i) a break in the delivery of services, (ii) disciplinary action, including manifestation determinations and determinations of interim alternate educational settings, and (iii) placement pending the outcome of due process proceedings.

Petitioner's Petition For Emergent Relief and Expedited Hearing Due to Disciplinary Action and for Continuing Due Process sought to address a possible break in the educational services provided to student J.N. It stemmed from disciplinary proceedings based on J.N.'s admission to drug charges, and also sought continuing due process in adjudicating issues regarding J.N.'s education and permanent school placement. Accordingly, this Petition meets the threshold issues required for the granting of emergent relief.

For emergent relief to be granted, the petitioner must comport with the requirements of N.J.A.C. 6A:3-1.6.²

N.J.A.C. 6A:3-1.6 provides for emergent relief or stay as follows:

- (a) Where the subject matter of the controversy is a particular course of action by a district board of education or any other party subject to the jurisdiction of the Commissioner, the petitioner may include with the petition of appeal, a separate motion for emergent relief or a stay of that action pending the Commissioner's final decision in the contested case.

² As further required by N.J.A.C. 6A:14-2.7(s)(1.)(i through iv.).

(b) A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):

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.

[See also N.J.A.C. 1:1-12.6.]

For emergent relief to be granted, the petitioner must satisfy all four prongs of the Crowe test by clear and convincing evidence, a "particularly heavy" burden. Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 396 (App. Div. 2006) (quoting Punnett v. Carter, 621 F.2d 578, 582 (3d Cir. 1980)); see also Guaman v. Velez, 421 N.J. Super. 239, 247–48 (App. Div. 2011).

Here, the petitioner seeks injunctive relief to continue the interim out-of-district placement at Hamilton Educational Program for minor student, J.N., whom the District believes represents a danger to himself and others. Petitioner argues that placing J.N. in a smaller, more restrictive environment, which is available at the Hamilton Educational Program (HEP), would better address his grades and behavioral issues.

I. The petitioner will suffer irreparable harm if the requested relief is not granted.

As to this first requirement, that the petitioner will suffer irreparable harm if the requested relief is not granted, the petitioner has asserted that harm is generally considered irreparable in equity if it cannot be redressed adequately by money damages.

As a school district, petitioner has sought to carry out its Constitutional duties to provide a thorough and efficient education to respondent and to protect students in its care from continuing danger.

Respondent student J.N. admitted that he had been selling marijuana at Nottingham. Respondent failed to appear at the hearing of November 13, 2017, when the Committee was hearing the charges against J.N. The Committee concluded that J.N. had been in possession of marijuana with intent to distribute. Petitioner would be irreparably harmed in its efforts to maintain a safe school atmosphere if J.N. were permitted to return to Nottingham and continue selling marijuana to students. Petitioner cannot be made whole through monetary relief.

II. The legal right underlying petitioner's claim is settled.

Petitioner's claim is that a public school has the right to discipline students and maintain its schools as part of its responsibility to provide a free and appropriate public education (FAPE) for all students. As to the second requirement of the Crowe test, that the legal right underlying petitioner's claim is settled, petitioner has cited N.J.S.A.18A:37-2(c), which authorizes school districts to suspend and expel a student whose conduct constitutes a continuing danger to the physical well-being of other students. Petitioner also relies on N.J.S.A.18A:37-2(j), which states that knowing possession of a controlled substance on school premises constitutes good cause for suspension and expulsion. Accordingly, petitioner has demonstrated that the law is settled in its favor.

III. The petitioner has a likelihood of prevailing on the merits of the underlying claim.

Student J.N. admitted to possession of marijuana with intent to distribute. Respondent failed to appear at the hearing of November 13, 2017, when the District's Committee was hearing the charges against J.N. The Committee concluded that J.N. had been in possession of marijuana with intent to distribute. Respondent could have also challenged the underlying facts of the charges against J.N. at the hearing on January 2, 2018, but instead opted to accept the factual findings and enter into a Stipulation of

Settlement. Respondent failed to appear at the hearings on March 2 and March 12, 2018, which demonstrated that respondent does not contest that student J.N. presents a continuing danger to other students and should remain suspended from Nottingham. Petitioner's argument is persuasive, and accordingly, petitioner has met this third prong of the Crowe test.

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.

As to the balancing of the equities of the situation and the interests of the parties, it is the petitioner District that would suffer the greater harm if the relief sought was not granted. Petitioner Hamilton Board of Education has a Constitutional obligation to provide a thorough and efficient education to the students of Hamilton Township. To meet that obligation, behavioral supports such as effective discipline must be imposed when necessary. In the within matter, petitioner imposed a one school year suspension of a student who admitted to possessing and selling illegal drugs. As the underlying right of the District to effectuate discipline such as a suspension has been established, petitioner's action in suspending J.N. was justified. Petitioner would be harmed if students legitimately disciplined would be allowed to return to the general education environment. Denying a continued interim alternative placement in this matter would have dire consequences for the District to be able to maintain safe schools.

Student J.N. would suffer little to no harm by continued interim placement at HEP. J.N. has been able to start over at a new school without the reputation of being a drug dealer. In that J.N.'s grades were also suffering towards the end of his time at Nottingham, the small group classes offered at HEP are better suited to meet J.N.'s educational needs. Without respondent's input on this matter, it is difficult to see any harm that would affect J.N. by continuing at the school he has been attending for the last 45 days.

Petitioner not only has a Constitutional responsibility to provide all students in the District with a FAPE, it has a responsibility to provide student J.N. with a FAPE. J.N.'s

grades were suffering at Nottingham. He has shown a slight improvement at HEP. There is reason to believe that the smaller, more restrictive environment offered at HEP will help J.N. continue to improve academically. More importantly, HEP is able to address the drug issues that may be interfering with J.N.'s academics, through the substance abuse programs available there.

Accordingly, when the equities and interests of the parties are balanced, it would be the petitioner which would suffer the greater harm. Therefore, petitioner has met its burden of showing by clear and convincing evidence that emergent relief may be granted to petitioner. As the District, through the most current IEP, continues to provide student J.N. with a free and appropriate public education (FAPE), and J.N. has continued receiving meaningful benefit in the least restrictive environment, J.N. is eligible to remain at HEP for the balance of the 2017-18 school year.

ORDER

The petitioner's motion for emergent relief is **GRANTED**. It is **ORDERED** that J.N. shall continue to attend Hamilton Educational Program (HEP) through the end of the 2017-18 school year, pending an IEP review and continuing due process to establish a permanent placement.

This decision 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 Programs.

March 13, 2018

DATE



JEFFREY N. RABIN, ALJ

Date Received at Agency

Date Mailed to Parties:

JNR/cb

APPENDIX

WITNESSES

For petitioner:

Martin Audino

Phil Tenaglia

For respondent:

None

EXHIBITS

Judicial Exhibits:

J-1 Scheduling E-mail, dated February 26, 2018

J-2 Scheduling E-mail, dated March 2, 2018

J-3 Scheduling E-mail, dated March 8, 2018

For petitioner:

P-1 Board Hearing Packet

P-2 Letter to Audino, dated November 15, 2017

P-3 Letter to J.S., dated November 20, 2017

P-4 Letter to J.S., dated November 21, 2017

P-5 Draft Individualized Education Program (IEP), dated November 21, 2017

P-6 Summary of J.N. Progress 2018

For respondent:

None