



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**FINAL DECISION**

**ON EMERGENCY RELIEF**

OAL DKT. NO. EDS 13029-18

AGENCY DKT. NO. 2019-28770

**M.J. ON BEHALF OF N.J.,**

Petitioner,

v.

**TRENTON BOARD OF EDUCATION,**

Respondent.

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**M.J.**, petitioner, pro se

**Audra A. Pondish**, Esq., for respondent, Trenton Board of Education (Adams, Gutierrez and Lattiboudere, attorneys)

Record closed: September 12, 2018

Decided: September 13, 2018

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

**STATEMENT OF THE CASE**

Petitioner has filed for emergent relief seeking immediate alternative school placement of student, N.J., pending continuing due process to establish a permanent school placement.

## **PROCEDURAL HISTORY**

On September 7, 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 September 10, 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. The hearing was held on September 12, 2018, and the record closed on that date.

## **FINDINGS OF FACT**

Based on the testimony at the hearing, and the brief submitted by respondent Trenton Board of Education (“BOE” or “District”), I **FIND** the following to be the undisputed facts:

1. Petitioner M.J. is father to N.J., a seventeen-year-old, twelfth grade student. N.J. is currently eligible for special education under the classification of “Intellectually Disabled—Cognitive Mild.” N.J. has an existing Individualized Education Program (“IEP”) from December 14, 2017, in effect through December 13, 2018.
2. While living with his father, N.J. attended a high school in Mercer County, NJ.<sup>1</sup> At some time in 2017, N.J. moved to New York City to live with his mother, where he was enrolled in a public high school. After Thanksgiving break in 2017, N.J. moved back to New Jersey to live with M.J. in Trenton, and was enrolled in his current school, Daylight Twilight High School (“Twilight”). Respondent District accepted the school reports from New York, and on December 14, 2017, developed an IEP for student N.J. Petitioner M.J. did not

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<sup>1</sup> Neither party was able to identify the name of the high school in Mercer County, although petitioner believed it shared a campus with Mercer County Community College.

attend the IEP meeting on December 14, 2017. M.J. was not familiar with the IEP or what educational services were to be provided by the respondent to N.J.

3. Neither M.J. nor N.J. ever filed any written reports or notices to Twilight or respondent District regarding any harassment or other incidences involving N.J. Petitioner never submitted any reports or notices to respondent indicating that N.J. had issues with the IEP or classes or N.J.'s educational program at Twilight. Despite many absences in the 2017-18 school year, N.J. passed all his classes with grades of B's and C's.
4. N.J. has refused to return to Twilight for the 2018-19 school year.

## **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 types of cases for which emergent relief is available, which include 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 Request for Emergent Relief ("Request") stated, "My son [N.J.] is not receiving services that he needs..." Although this might be interpreted as a claim for a break in services, petitioner did not specify in his Request that there was a "break in the delivery of services." Further, petitioner failed to state what services his son was scheduled to receive pursuant to any educational plan or IEP, and failed to enumerate which services N.J. was no longer receiving. Petitioner acknowledged that he was not familiar with the IEP or the services to be provided thereunder. Petitioner testified that N.J. has chosen not to return to Twilight, which was the cause of N.J. not receiving any

educational services in the 2018-19 school year. Accordingly, I **FIND** that petitioner's statement in his Request did not meet the threshold issue of a "break in the delivery of services."

Regarding other grounds for emergent relief, petitioner did not make any claim as to "disciplinary actions." Although petitioner also filed for a full due process hearing, his Request did not specifically assert a claim for "placement pending the outcome of due process proceedings." Student N.J. is, in fact, already enrolled in a school, and therefore has already been placed, pending the outcome of due process proceedings. When completing the question in the Request form for how this problem could be resolved, petitioner wrote, "We want a different school!" This statement clearly pertains to a permanent placement and not a placement pending the outcome of legal proceedings.

N.J.A.C.1:6A-12.1(a) requires that an application for emergent relief set forth the specific relief sought and the specific circumstances justifying relief. Again, petitioner's request failed to state what services his son was scheduled to receive pursuant to any educational plan or IEP, and failed to enumerate which services N.J. was no longer receiving. Petitioner failed to identify available alternatives and was not clear on whether there was any school or alternative program available that could better address N.J.'s needs. Petitioner stated that N.J. wanted to be enrolled in a vocational program, but respondent's IEP included transitional programs which would include vocational educational opportunities. Petitioner also made claims of problems experienced by N.J. at Twilight without providing specific information of said incidences, such as when or where they occurred and what immediate actions petitioner or respondent District took to address such problems or incidences. Neither M.J. nor N.J. ever filed written reports or submitted any notices to Twilight or the District indicating that N.J. was having problems either inside or outside the classroom.

Accordingly, I **FIND** that petitioner failed to address the threshold prerequisites for emergent relief set out in N.J.A.C. 6A:14-2.7(r).

Additionally, for emergent relief to be granted, the petitioner must comport with the requirements of N.J.A.C. 6A:3-1.6.<sup>2</sup>

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.

(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).

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

Petitioner failed to submit a letter memorandum or brief addressing the four prongs required pursuant to Crowe, as required by N.J.A.C. 6A:3-1.6(b). Further, petitioner failed to address the four Crowe prongs in his Request, and did not address these issues at the hearing. Without formally addressing irreparable harm, the legal right underlying petitioner's claim, petitioner's likelihood of prevailing on the merits of the underlying claim, and the equities and interests of the parties, there can be no emergent relief.

Despite petitioner's failure to provide any formal proofs or letter memorandum or brief addressing the four required Crowe prongs, respondent has sufficiently shown in its brief of September 11, 2018, that petitioner would not have met those four prongs.

First, respondent has asserted that at the IEP meeting of December 14, 2017, the team determined that N.J.'s needs could be met in the District's self-contained program at Twilight. The District's program was to provide speech-language therapy on a weekly basis and a Statement of Transition Services Coordinated Activities/Strategies beginning in December 2017. Thus, respondent has deflected any claim of irreparable harm by having in place an IEP designed to ensure that N.J. would receive an appropriate education program during the time frame leading up to the due process hearing.

Second, petitioner failed to prove that the underlying legal right was settled in his favor. Respondent has, in fact, asserted that the underlying legal right is established in favor of the District, because it met its legal obligations by developing an IEP designed to provide a free, appropriate public education in the least restrictive environment.

Third, with an IEP in place and a school placement that contained transition services, and with an IEP meeting to be held in December 2018, to further address N.J.'s needs, respondent has made a strong argument that petitioner does not have a likelihood of success on the merits of his underlying claim. Petitioner offered no testimony or documentation which indicated a likelihood of success on the merits of his due process claim.

Finally, petitioner did not address a balancing of the equities and interests of the parties in this case. Respondent, however, made a convincing argument that the balancing of harms would come out in its favor. If petitioner's request for emergent relief were to be granted, the respondent District would have to pay for additional educational services without the possibility of reimbursement if petitioner's due process claim was ultimately denied. Conversely, respondent argued that petitioner would suffer no harm if emergent relief is denied, because petitioner would still be moving forward with a due process hearing to decide his underlying claim, all while N.J. was enrolled in a program tailored to meet his specific educational needs.

In conclusion, petitioner failed to: set forth the specific relief sought and the specific circumstances justifying relief; demonstrate that he met the threshold prerequisites for emergent relief set out in N.J.A.C. 6A:14-2.7(r); submit a letter memorandum or brief addressing the four prongs for emergent relief required pursuant to Crowe, as required by N.J.A.C. 6A:3-1.6(b); address the four Crowe prongs in his Request, and; meet his burden of proving that petitioner satisfied all four prongs of the Crowe test by clear and convincing evidence. Therefore, I **CONCLUDE** that petitioner's request for emergent relief must be **DENIED**.

**ORDER**

The petitioner's motion for emergent relief is **DENIED**. It is **ORDERED** that student N.J. shall continue to attend his current school, 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 the issuance of the decision on the merits in this matter. The hearing having been requested by the parents, 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 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.

September 13, 2018  
DATE

  
\_\_\_\_\_  
**JEFFREY N. RABIN, ALJ**

Date Received at Agency \_\_\_\_\_

Date Mailed to Parties: \_\_\_\_\_

JNR/dw



**APPENDIX**

**WITNESSES**

**For petitioner:**

None

**For respondent:**

Nola Occhipinti-Derita, Superintendent of Special Education, Trenton BOE

**EXHIBITS**

**For petitioner:**

Request for Emergent Relief, dated September 7, 2018

**For respondent:**

Brief, dated September 11, 2018