



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

**FINAL DECISION – EMERGENT  
RELIEF**

OAL DKT. NO. EDS 02233-23

AGENCY DKT. NO. 2023-35566

**D.K. and J.K. ON BEHALF OF M.K.,**

Petitioner,

v.

**BERKELEY HEIGHTS TOWNSHIP**

**BOARD OF EDUCATION,**

Respondent.

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**D.K. and J.K. on behalf of M.K.** petitioners pro se

**Carolyn R. Chaudry, Esq.,** (Chaudry Law, Attorneys) for respondent

Record Closed<sup>1</sup>: March 21, 2023

Decided: March 22, 2023

BEFORE **JUDE-ANTHONY TISCORNIA, ALJ:**

**STATEMENT OF THE CASE**

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<sup>1</sup> This matter is final with record closed only as to the Application for Emergent Relief. As set forth below, only the Emergent petition was transmitted to the OAL at the time of the hearing.

D.K. and J.K. o/b/o M.K. (petitioners) were presented with an IEP on January 2, 2023. This IEP required M.K. received hybrid instruction. A subsequent IEP was presented on January 31, 2023. This IEP requires at-home instruction. The district asserts the January 31, 2023, IEP is the “stay put”. Petitioners argue the last agreed upon IEP was the January 2, 2023, IEP, and thus, they seek an order requiring hybrid instruction until the underlying due process is resolved.

### **PROCEDURAL HISTORY**

Petitioners filed a request for emergent relief seeking an order that the IEP for purposes of “stay put” remains the January 2, 2023, IEP, which requires hybrid instruction until the underlying due process petition is resolved. The matter was transmitted to the OAL on March 13, 2023, and assigned to the undersigned for an emergent hearing. The hearing was conducted on March 21, 2023, at which point the record was closed.

The underlying due process petition seeks to dispute a proposed out-of-district placement. This due process petition is set for mediation on Tuesday, March 28, 2023, and is not before this tribunal.

### **FACTS**

The following **FACTS** are undisputed.

M.K. is a minor student enrolled in the district, and the district is responsible for providing a free and appropriate education for M.K. On January 2, 2022, petitioners attended an IEP meeting, were presented with an IEP resulting from that meeting, and agreed to same. This IEP (the Jan. 2 IEP) called for a hybrid plan of instruction wherein M.K. would receive some of her instruction at home and some of her instruction at school.

On January 31, 2023, petitioners attended an IEP meeting, after which they were presented with an IEP (Jan. 31 IEP). See Exhibit B. This document is entitled “DRAFT-INDIVIDUALIZED EDUCATION PROGRAM” See exhibit B, first page. Also located on

the front page of this IEP is a box entitled “Summary – Special Education Programs and Related Services”. Within this box is a handwritten note which states “HI (arrow) pending therapeutic”. Petitioner, D.K., signed a form entitled “Consent to Implement Revised IEP Prior to 15 Days” at the conclusion of the January 31, 2023, IEP meeting. See Exhibit C. This form indicated on its face that the signatory agreed to the terms of the IEP, so that said IEP may be implemented immediately.

On February 2, 2023, petitioner received a “Type Written Copy” of the Jan.31 IEP. See Exhibit J. This document did not include “DRAFT” in it’s title, and in the box on the front page entitled “Summary – Special Education Programs and Related Services” there appears the following typed verbiage:

Home instruction: Academic                      01/31/2023-12/05/2023 1x weekly 600 min  
School related Counseling: Individual 01/31/2023-12/05/2023 1x weekly 30 min.

### **Disputed Facts**

The district asserts that since D.K. signed the form, she agreed to the January. 31 IEP, and thus, said IEP took effect immediately. D.K. testified that, while she did sign the form (Exhibit C). She does not agree with at home instruction for her M.K., and thus, did not agree to the implementation of the January 31 IEP. D.K. testified that since the IEP had the word “DRAFT” on it, she understood this to mean the conversation was ongoing and a formalized IEP would follow at some later date, and that she could, then, decide to agree to it or dispute it. In the interim, she assented to documents being sent to potential out of district placements and was under the impression that her daughter would be allowed back in school on a hybrid basis while an out of district placement was obtained.

M.K. has been receiving special education services at home for over two months, and she remains “at home”.

### **Findings of Fact**

I, hereby find the following to be pertinent facts of the case:

D.K. signed the form referred to here as Exhibit C, though she did not intend for her daughter to be put on fulltime at-home instruction. The verbiage in the box entitled “Summary – Special Education Programs and Related Services” differs between the “Draft” IEP (Exhibit B) and the Typed IEP (Exhibit J). Based on the forging, I **CONCLUDE** that D.K. was misinformed when she signed Exhibit C, and she did intend to be bound by any home-schooling placement by signing the form. This is supported by the fact that the ‘draft’ version (Exhibit B) is does not clearly indicate that a full-time home school program is to be immediately implemented. It is further supported by the fact that, when D.K. received the “typed written” version of the IEP on February 2, 2023, she immediately disputed same because of the at home instruction piece. I, further, **CONCLUDE** that D.K. did not knowingly agree to the implementation of the January 31, 2023, IEP, and thus, said IEP was not mutually agreed upon by the parties.

### **LEGAL ANALYSIS AND CONCLUSIONS**

One applicable regulation is N.J.A.C. 6A:14-2.7(r), which provides in pertinent part as follows:

1. Emergent relief shall only be requested for the following issues:
  - 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, petitioner seeks immediate return of M.K. to hybrid instruction, which she was receiving under the January 2, 2023, IEP. This placement is only temporary, as an out of district placement is being sought, through the specifics of said proposed placement are disputed, with a pending underlying Due process petition. Thus, I **CONCLUDE** that the petition for emergent relief satisfies (i) and (iii) above.

More generally, emergent relief is available pursuant to N.J.A.C. 1:6A-12.1(e), N.J.A.C. 6A:3-1.6(b) and N.J.A.C. 6A:14-2.7(s), if the application meets the following four requirements:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying the 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.

Regarding the first prong, above, the seminal case of Crowe v DeGioia, *supra*, 90 N.J. at 132-33 defines irreparable harm as harm “that cannot be redressed adequately by monetary damages”. As the issue here is a loss of in-school education services, which contribute to the social development of a child, I **CONCLUDE** this prong is met.

Regarding the second prong, as I have already found petitioner did not agree to the January 31, 2023, IEP, then the stay put IEP would be the January 2, 2023, IEP. As it is well settled that the “stay put” placement is what is implemented pending the outcome of a challenge to an IEP, it is, thus, well settled that the “stay put” be enforced here. See N.J.A.C. 6A:14-2.6(d). See also 20 U.S.C. 1415(j). Thus, I **CONCLUDE** this prong is met.

Regarding the third prong, the underlying claim here is a dispute regarding out of district placement. While petitioner does not dispute out of district placement generally, she disputed the three schools proposed by the district. This is so, because 1) one of the three schools declined to accept M.K. 2) the second school is over an hour away; and 3) the third school has not yet been visited. Thus, petitioner is likely to prevail on the merits as she is not opposed to her child being put in an out of district placement; she is simply opposed to three choices presented thus far. She noted on the record that she would consider the third school after a visit could be arranged. Thus, I **CONCLUDE** this prong is met.

Regarding the fourth prong, I **CONCLUDE** that in home instruction is, in this case, the most restrictive environment M.K. may receive an education in. I further **CONCLUDE** that the “stay put” IEP requires hybrid instruction, and continued at-home instruction will, likely, result in irreparable harm to a student due to the sheer nature of limited social interaction with peers and face to face interaction with teachers and staff. Also, petitioner is only asking for a limited amount of in-school instruction until an out of district placement can be obtained. Thus, when the equities and interests of the parties are balanced, it appears the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted. Thus, I **CONCLUDE** petitioner has met this final prong.

Based on the foregoing, I **CONCLUDE** that petitioner has met the four-pronged requirements to succeed on an emergent action as cited above, and is, therefore, entitled to injunctive relief pending the outcome of the underlying due process petition. The foregoing emergent petition is, therefore, be **GRANTED**.

### **ORDER**

It is, hereby, **ORDERED** that petitioner’s request for emergent relief be **GRANTED**, and M.K. be brought back into the district on a limited basis so as to facilitate a hybrid placement as per the January 2, 2023, IEP. It is further **ORDERED** that said placement initially be no more than one day per week, with incremental increases if certain goals are met as determined by the district.

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.

A handwritten signature in black ink, appearing to read "J. O. L.", is located at the bottom right of the page.

March 22, 2023

DATE \_\_\_\_\_

**JUDE-ANTHONY TISCORNIA, ALJ**

Date Received at Agency

3/22/23

Date Mailed to Parties:

3/22/23

id

**APPENDIX**

**LIST OF WITNESSES**

For Petitioner

D.K

For Respondent

M. Gardner, Special education Director

**LIST OF EXHIBITS IN EVIDENCE**

For Petitioner

None

For Respondent

- A Berkeley Heights Public Schools Meeting Attendance Sign-in Sheet – Assess Progress and Review or Revise IEP dated 1/31/23
- B IEP dated 1/31/23 with handwritten notes by former case manager Jeannette Gates
- C Consent to Implement Revised IEP Prior to 15 Days Form – Signed and dated by Dominique Klausner on 1/31/23
- D Authorizations For The Release of Records/Information to out of district schools signed by D. Klausner on 1/31/23
- E Request for Additional Assessment – Proposed Action-Additional Assessment – Psychiatric Evaluation dated 1/31/23 and Consent for Additional Assessment signed by D. Klausner on 1/31/23
- F Authorization For The Release of Records/Information to Psychiatrists – Signed by D. Klausner on 1/31/23
- G Berkeley Heights Department of Special Services Document Verification Form Signed and dated by D. Klausner on 1/31/23

- H Atlantic Health System – Report To Schools of Assessment For Psychiatric Hospitalization signed by D. Klausner on 12/13/22
- I Cover Letter from M. Gardner to Parent regarding new IEP dated 2/2/23
- J Type Written Copy of IEP dated 1/31/23 and sent to Parents on 2/2/23
- K Emails between M. Gardner and Parents regarding intakes dated 2/22/23
- L Emails between M. Gardner and Parents regarding Frontline notifications and Frontline report dated March 6, 2023-March 7, 2023
- M Email between M. Gardner and Parents forwarding information from Frontline regarding delivery of messages dated March 14, 2023
- N Psychiatric Evaluation by Richard Kleinmann, M.D. dated February 6, 2022
- O Mediation Request dated February 23, 2023 and received by the District and filed with the Office of Special Education on March 1, 2023
- P Emails and notes re. Intakes from Case Manager James Weaver