



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDS 02691-23

AGENCY REF. NO. 2023-35639

MIDDLETOWN TOWNSHIP

BOARD OF EDUCATION,

Petitioner,

v.

I.H. ON BEHALF OF N.J.,

Respondent.

Jared S. Schure, Esq., for petitioner (Methfessel & Werbel, attorneys)

I.H., respondent, pro se

30BEFORE **DEAN J. BUONO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner filed a due process petition and motion for emergent relief with the Office of Special Education (OSE) in the New Jersey Department of Education (DOE). The contested matter was transferred to the Office of Administrative Law (OAL), pursuant to N.J.A.C. 1:6A-12.1, where it was filed on March 28, 2023.

The motion for emergent relief seeks an order that would place the student with a disability in an interim alternative placement on home instruction for not more than forty-five calendar days because it is dangerous for the student to be in his current placement, as the student poses a danger to himself and others. The Board and the parent did not agree to the placement therefore the request for emergent relief was heard on March 29, 2023. At the hearing, none of the respondents appeared. Only the petitioner gave argument.

FACTUAL BACKGROUND

Petitioner

I.H. is the parent of N.J. who is a fourteen-year-old eighth-grader who resides within the District and has been eligible and receiving special education and related services. He is presently eligible under the classification category of Specific Learning Disability. N.J. moved into the District from Ohio and enrolled in the District's Thorne Middle School, on November 17, 2021, as a general education student.

He began being cited for discipline issues as soon as November 19, 2021. Due to academic concerns and behavior concerns, he was referred to Thorne's Child Study Team ("CST") on March 11, 2022. The CST evaluated him and found that he was eligible for special education and related services under the classification category of Specific Learning Disability in the areas of math calculation, math problem solving, and written expression.

An Individualized Education Plan (IEP) was proposed at an IEP meeting held on June 20, 2022; I.H. consented to its implementation. At the meeting, N.J.'s case manager stated that the District wanted its psychiatrist to evaluate N.J. due to the emotional and anger issues he had been displaying in school. The District scheduled two appointments with the psychiatrist, and I.H. and N.J. skipped both of them without informing the District in advance. N.J. finished the 2021–2022 school year having failed all four of his major academic subjects, and having accrued forty-two absences, thirty-four tardies, and twenty-two incidents for infractions including substance abuse, class

disruption, and inappropriate behavior. This is set forth in the March 21, 2023, case summary by case manager Frees, LDT-C, EXHIBIT A.

N.J. currently attends the District's Thorne Middle School, where he is placed in pull-out resource replacement courses for all major academic subjects and receives both group and individual counseling. See February 23, 2023, IEP, EXHIBIT B.

N.J. finished the third marking period with a grade of 0 in American Sign Language, a grade of 25 in Language Arts, a grade of 66 in Pre-Algebra, a grade of 72 in Science, a grade of 71 in Social Studies, and a grade of 0 in Coding/Robotics. See progress report, third marking period, EXHIBIT C. During the first half of the 2022–2023 school year, N.J. accrued twenty-seven absences and fourteen tardies. See second marking period attendance report and report card, EXHIBIT D. N.J.'s poor academic performance and attendance are of a piece with his behavioral problems, which are so severe at this point that they necessitated the instant Petition for Due Process.

Specifically, on September 20, 2022, N.J. took another student's water bottle, sprayed the other student with it, sprayed the other student's pants with it, followed the other student out of class and sprayed his backpack with it, then followed the other student into the boy's locker room, which N.J. did not have permission to enter, and dumped the water from the other student's water bottle on the other student, and threw the other student's water bottle at the other student. See discipline log, EXHIBIT E.

On September 28, 2022, one of N.J.'s teachers instructed him to go to the main office because he was being disruptive in class. In response, N.J. continuously repeated the words, "these nuts, these nuts, these nuts" in front of the entire class. Later that day, N.J. shoved another student into his locker from behind, causing that student to fall into another student, and causing one of those students to have to go home due to an injured ear.

On October 24, 2022, N.J. insulted and made inappropriate comments towards several students in his advisory class. On November 4, 2022, N.J. arrived late to his sign language class. When he arrived, the other students had already begun taking a

quiz. N.J. acted in a disruptive manner during the administration of the quiz. When the teacher took his quiz away, he began jumping on the classroom's radiator and tried to remove the metal grates from the top. He began screaming that he was a "parkour champion." When his teacher told him to go to the main office he responded, "I'm not going, there is only 3 minutes left of class." He then told his teacher, "I don't f***ing need ASL in my life. This class f***ing sucks!" He then left the classroom, but never went to the main office as directed. That same day, N.J. splashed water on a female peer as they were leaving the cafeteria.

On November 17, 2022, N.J. repeatedly entered a class he did not belong to and disturbed the students in it. On November 29, 2022, N.J. asked to leave his class and then never returned. He later admitted to cutting the class. On December 7, 2022, N.J. would not stop talking to his peers while the teacher was trying to teach. When one of his peers told him to be quiet, he responded to her by saying, "You shut up. You are annoying with your ugly yellow f***ing teeth."

On December 16, 2022, N.J. chased after two students while threatening to put water on them, despite being repeatedly asked to stop. He was also cited for "constantly using inappropriate language towards his peers, around teachers." On January 3, 2023, N.J. disrupted his class by refusing to put his Chromebook away and, when asked to do so, raising the volume on a video he was watching. He insulted a female peer when she walked into the class from the bathroom. He used foul language like "s****" and "f****" in class, then threatened that he would "roast" his teacher, at which point N.J. had to be removed from the classroom.

On January 6, 2023, N.J. slapped two peers in the crotch. When a staff member told him to report to the main office he responded, "F*** you, b****." He also told a peer, "F*** you, you sound like a nasally b****" several times. On January 24, 2023, N.J. threw a piece of bread in the cafeteria, and it hit a teacher in the head.

On February 1, 2023, N.J. sat in the back of his classroom tapping a pencil. When the teacher offered to help him with his assignment, he responded that he would not do his assignment and that he didn't "give a s***." When the teacher asked if he

wanted to go to the main office, he responded by saying, “F*** this,” and proceeded to throw a book across the room, tip over a desk, and knock over a chair. On February 10, 2023, N.J. was running in a hallway. When a teacher told him to stop, N.J. responded, “Shut up.” Later, N.J. approached a male peer and pretended that he was going to shake his hand, and then proceeded to hit the peer in the groin. On February 22, 2023, N.J. was cited for disruptive behavior, ignoring reprimands, “totally inappropriate behavior” towards a teacher, “constant comments,” and “disruptive noises.” On February 23, 2023, N.J. refused to close his Chromebook despite having been directed multiple times by his teacher to do so. While on his Chromebook, N.J. accessed Instagram and five additional sites that he was not permitted to use. Id.

On March 10, 2023, N.J. began screaming at a female peer, telling her that she was “f***ing annoying” and that she could “go f*** herself.” He then stormed out of class. That same day, N.J. grabbed a peer’s neck with his two hands. At this time, it is the judgement of the school-based members of Thorne Middle School’s IEP team that the District is presently unable to handle N.J.’s significant behavioral needs in his current placement. On March 13, 2023, an IEP meeting was held during which the school-based members of the IEP team recommended to I.H. that N.J. be placed on home instruction via an IEP for up to forty-five days while the parties explore an appropriate out-of-district placement. IEP, EXHIBIT F.

Despite N.J.’s manifest dangerousness and the risks he poses to the Thorne Middle School community, I.H. refused to consent to the implementation of the proposed IEP. I.H. also refused to consent to the release of N.J.’s student records to potential out-of-district placements. To protect its students and staff, the District had no recourse but to seek this Court’s intervention.

Respondent

Neither I.H. nor N.J. appeared for the hearing.

LEGAL ANALYSIS AND CONCLUSION

Due to the nature of this proceeding, it must be determined if petitioner is entitled to the request emergent relief. In as much, a party may only request emergent relief for the following reasons, in accordance with N.J.A.C. 6A:14-2.7(r)1:

- i. Issues involving a break in the delivery of services;
- ii. Issues involving disciplinary action, including manifestation determinations and determinations of interim alternate education settings;
- iii. Issues concerning placement pending outcome of due process proceedings; and
- iv. Issues involving graduation or participation in graduation ceremonies.

As the present matter concerns the issues of a break in services, discipline and placement pending the outcome of due process proceedings, petitioner is certainly entitled to seek emergent relief.

The New Jersey Supreme Court has set forth a four-prong test for determining whether an applicant is entitled to emergent relief. Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982) (enumerating the factors later codified at N.J.A.C. 6A:14.2-7(s)1).

The four factors (“the Factors”), include:

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.

The moving party bears the burden of proving each of the Crowe elements “clearly and convincingly.” Waste Mgmt. of N.J. v. Union County Util. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

A review of the four factors is in order.

Factor One. The petitioner will suffer irreparable harm if the requested relief is not granted. The staff, students and N.J. are all at risk as N.J. continues to exhibit injurious behavior. The continued behaviors need to be addressed, and an IEP developed to address them. Petitioner is required to maintain the safety of its students and staff, and to ensure an atmosphere conducive to learning for its students. N.J.’s continued attendance in school will greatly diminish petitioner’s ability to provide an appropriate educational setting.

Factor Two. The legal right underlying petitioner’s claim is settled. Petitioner is responsible for maintaining a safe school for its students and staff. N.J.A.C. 6A:14-2.8(f) authorizes the removal of a student when the student caused a serious bodily injury. N.J.A.C. 18A:37-13 states in pertinent part “. . . a safe and civil environment in school is necessary for students to learn and achieve high academic standards; harassment, intimidation or bullying, like other disruptive or violent behaviors, is conduct that disrupts both a student’s ability to learn and a school’s ability to educate its students in a safe environment . . .” This is certainly relevant and applicable here.

Factor Three. Petitioner has a likelihood of prevailing on the merits of the underlying claim. Petitioner, as a matter of law, must address N.J.’s behavior and his disability in developing an appropriate IEP. The only avenue available is to evaluate N.J. and determine an appropriate placement. The safest alternative at the moment is home instruction. In this regard, petitioner is likely to prevail on the merits.

Factor Four. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondents will suffer if the requested relief will not be granted. Here, both the petitioner and respondent will suffer irreparable harm

if the requested relief is not granted because, if granted, N.J. will continue to receive an education via home instruction pending evaluation. This is the least restrictive environment. He needs to have evaluations done and a proper placement made according to his needs. The petitioner, if not granted, will be unable to ensure the safety of its students and staff, and the ability of its students, particularly the classmates of N.J., from receiving an appropriate education in a safe and civil environment.

N.J.A.C. § 6A:14-2.7(n) provides: “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 shall request an expedited hearing. 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 45 calendar days [. . .]” The OAL has previously granted emergent relief in similar circumstances. See Gloucester City Bd. of Educ., OAL DKT. NO. EDS 09165-15 (2015), Wayne Twp. Bd. of Educ. v. G.G. and S.W. ex.rel. G.G., OAL DKT. NO. EDS 05519-17 (2017), and Washington Twp. Bd. of Educ. v. H.M. ex.rel., OAL DKT NO. EDS 08328-19 (2019).

Based upon the foregoing, **I CONCLUDE** that petitioner’s request for emergent relief be **GRANTED**.

ORDER

It is hereby **ORDERED** that petitioner’s request for emergent relief is **GRANTED**. **IT IS FURTHER ORDERED** that N.J. be placed in the appropriate interim alternative education setting (IAES) of home instruction for forty-five calendar days because N.J.’s current placement is substantially likely to result in injury to N.J. or others. **IT IS FURTHER ORDERED** that the respondent is compelled to enable the District to obtain, releases, and/or exchange N.J.’s student records.

This decision on application for emergency relief shall remain in effect until the issuance of the decision on the merits in this 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 30, 2023

Date



DEAN J. BUONO, ALJ

Date Received at Agency

Date Mailed to Parties:

DJB/cb

APPENDIX

LIST OF MOVING PAPERS AND EXHIBITS

For petitioner

- Due Process Petition
- Brief in Support of Application for Emergent Relief
- Certification of Dr. Michele Tiedemann
- Exhibits A through F

For respondents

None