

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

**FINAL DECISION DENYING**

**EMERGENT RELIEF**

OAL DKT. NO. EDS 09751-18

AGENCY DKT. NO. 2019-28463

**D.M. ON BEHALF OF J.O.,**

Petitioner,

v.

**LAKESWOOD TOWNSHIP BOARD  
OF EDUCATION, OCEAN COUNTY,**

Respondent.

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**D.M.**, on behalf of **J.O.**, petitioner, pro se

**Michael I. Inzelbuch**, Esq., for respondent

Record Closed: July 17, 2018

Decided: July 18, 2018

BEFORE **TRICIA M. CALIGUIRE**, ALJ:

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

By a request for emergent relief, petitioner D.M. seeks to have her minor daughter, J.O., enrolled in the Oak Street Elementary School, Lakewood, New Jersey, for the Extended School Year (ESY) this summer. Respondent Lakewood Township Board of Education,

Ocean County (Lakewood or District) opposes this request and argues that J.O. is not eligible for ESY as she does not have an Individualized Education Program (IEP).<sup>1</sup>

This matter was transmitted to the Office of Administrative Law on July 10, 2018, for an emergent relief hearing and a final determination in accordance with 20 U.S.C.A. § 1415 and 34 C.F.R. §§ 300.500 to 300.587. Oral argument on emergent relief was held on July 17, 2018, and, following the submission of exhibits the day of the hearing, the record closed.

### **FACTUAL DISCUSSION AND FINDINGS**

The following facts are not in dispute and form the basis for the below decision. Accordingly, I **FIND** the following as **FACTS**:

J.O. is a nine-year-old child residing within the Lakewood Township School District. She attends the Oak Street Elementary School, where she is a rising fourth grade student. In the report card issued to J.O. at the end of the third marking period of the 2017-18 school year, she earned all passing grades (A's and B's other than in Spanish) and showed improvement in classroom work. (R-1C.) J.O. does not have, and has never had, an IEP, and has not been classified under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §§ 1400 to 1419.

Pursuant to Section 504 of the Federal Rehabilitation Act of 1973, as amended by the Americans with Disabilities Act Amendments Act of 2008, effective January 1, 2009, which amended the Americans with Disabilities Act of 1990 (Section 504), J.O. has been classified

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<sup>1</sup> In its brief filed prior to oral argument, respondent notes that D.M. certified that this matter involves “[i]ssues involving disciplinary action, including manifestation determinations and determinations of interim alternate educational settings,” and that no such issues are involved in this matter. Letter Br. of Resp’t. (July 17, 2018), p. 2. Although this matter was not discussed at hearing, it appears that D.M. should have checked the line on the certification form for “[i]ssues involving a break in services.”

as disabled since she was in kindergarten. This classification is based on diagnoses of Autism Spectrum Disorder (ASD) and Attention Deficit and Hyperactivity Disorder (ADHD). Her 504 Plan, which provides certain accommodations and modifications within the classroom, was most recently modified in December 2017. (R-1A.) According to D.M., J.O. takes medication daily to regulate her behavior.

In May 2014, January 2015, and July 2015, J.O. was referred to the Lakewood Child Study Team (CST), but the CST determined in each instance that an evaluation of J.O. for Special Education Services was not warranted. (R-1F.) In June and July 2016, J.O. was again evaluated by the CST and found not eligible for Special Education and Related Services and, therefore, an IEP was not developed for her. (R-1A.)

On April 25, 2018, D.M. participated in a meeting of the CST during which D.M. requested that J.O. participate in ESY. D.M. made this request on the advice of J.O.'s neurologist, who stated that J.O. would benefit from spending time through the summer months in an academic environment. (R-1D.) The CST informed D.M. that J.O. would first have to be evaluated, as only children with IEPs are eligible for ESY. Further, D.M. learned that the CST review period would extend through the summer and not be completed in time for J.O. to participate in ESY. (R-1F.) In the April 25, 2018, meeting, J.O. stated that she did not want J.O. evaluated or classified for special education.<sup>2</sup> The CST determined that J.O. would not be assessed. (R-1B.)

In her request for emergent relief, D.M. stated that "children that have a Section 504 in place also [qualify] for special programs given by the state." D.M.'s post-hearing submission included an online document from the federal Office for Civil Rights titled "Protecting Students with Disabilities, Frequently Asked Questions About Section 504 and the Education of Students with Disabilities."<sup>3</sup> Although she did not identify the specific section

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<sup>2</sup> At hearing, D.M. stated that she is concerned about the social ramifications of in-class support should J.O. be classified. It is not clear if D.M. provided this explanation to the CST.

<sup>3</sup> <https://www.2.ed.gov/about/offices/list/ocr/504faq.html>

of this document on which she relies, the following question and response appears to most closely track D.M.'s above statement:

**What services are available for students with disabilities under Section 504?**

Section 504 requires recipients [of federal financial assistance from the US Department of Education] to provide to students with disabilities appropriate educational services designed to meet the individual needs of such students to the same extent as the needs of students without disabilities are met . . . [which] could consist of education in regular classrooms, education in regular classes with supplementary services, and/or special education and related services.

[<https://www.2.ed.gov/about/offices/list/ocr/504faq.html>, p. 3.]

D.M. provided no further basis to support her argument that Lakewood is obligated to provide J.O. with ESY because she has a Section 504 Plan.

**LEGAL ANALYSIS AND CONCLUSIONS**

N.J.A.C. 1:6A-12.1(a) provides that the affected parent may apply in writing for emergent relief. An emergent relief application is required to set forth the specific relief sought and the specific circumstances that the applicant contends justify the relief sought. Each application is required to be supported by an affidavit prepared by an affiant with personal knowledge of the facts contained therein.<sup>4</sup>

Emergent relief shall only be requested for the following issues pursuant to N.J.A.C. 6A:14-2.7(r):

- i. Issues involving a break in the delivery of services;

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<sup>4</sup> Although D.M. made reference in her oral argument to statements of J.O.'s doctors, she did not include an expert affidavit with her application for emergent relief.

- 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.

As discussed above, D.M. arguably seeks an order to place J.O. in ESY to avoid a break in the delivery of educational services to J.O., as D.M. believes J.O. will regress over the summer. Therefore, analyzing the application in the most favorable light to the movant, I **CONCLUDE** it has been established the issue concerns a break in the delivery of services.

The standards for emergent relief are set forth in Crowe v. DeGoia, 90 N.J. 126 (1982), and codified at N.J.A.C. 6A:3-1.6. The petitioner bears the burden of proving:

1. that the party seeking emergent relief will suffer irreparable harm if the requested relief is not granted;
2. the existence of a settled legal right underlying the petitioner's claim;
3. that the party seeking emergent relief has a likelihood of prevailing on the merits of the underlying claim; and
4. when the equities and the interests of the parties are balanced, the party seeking emergent relief will suffer greater harm than the respondent.

[Crowe, 90 N.J. at 132-34.]

### **Irreparable Harm**

Here, there has been no showing of irreparable harm to J.O. While D.M. appears to argue that irreparable harm is established because J.O. will regress over the summer without continued academic instruction, she presented no evidence that J.O. will not be able to catch up when the new school year begins. In fact, respondent provided documents showing that J.O. is reading at or slightly above grade level, is being taught at grade level in all subjects and has been performing well academically. Letter Br. of Resp't., p. 3, citing R-1F. While J.O.'s third-grade report card showed lower grades in the first marking period than in the next two, that does not establish that J.O. is unable to make up any academic regression once she returns to school every day (and it is noteworthy that D.M. made no reference to J.O.'s academic achievement records).

To obtain emergent relief, D.M. must demonstrate more than a risk of irreparable harm; she must make a "clear showing of immediate irreparable injury," or a "presently existing actual threat; (an injunction) may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by common law." Continental Group, Inc. v. Amoco Chemicals Corp., 614 F. 2d 351, 359 (D.N.J. 1980).

In light of the above, I **CONCLUDE** that the petitioner has not met her burden of establishing irreparable harm.

### **The Legal Right Is Settled**

The petitioner has not demonstrated that the law favors her. D.M. conceded that her daughter has had a Section 504 Plan in place for several years, that J.O. does receive accommodations due to her disability pursuant to the Section 504 Plan, and that D.M. did not want J.O. to be evaluated for a Special Education classification earlier this year. Even if we accept that the online information provided by D.M. states that federal law requires school

districts to provide ESY to disabled students on the same basis as those children who are not disabled, D.M. did not show that any students are accepted in ESY without IEPs.

Legal support for the District's policy that only children with IEPs are eligible for ESY is found in the Department of Education regulations:

The IEP team shall make an individual determination regarding the need for an extended school year program. An extended school year program provides for the extension of special education and related services beyond the regular school year. An extended school year program is provided in accordance with the student's IEP when an interruption in educational programming causes the student's performance to revert to a lower level of functioning and recoupment cannot be expected in a reasonable length of time. The IEP team shall consider all relevant factors in determining the need for an extended school year program.

[N.J.A.C. 6A:14-4.3(c) (emphasis added).]

Thus, I **CONCLUDE** petitioner has failed to meet the second prong of the emergent relief standard in that a legal right underlying her claim is not settled.

### **Likelihood of Prevailing on The Merits**

The undisputed facts are that J.O. does not have an IEP, has never had an IEP, and when the Lakewood CST most recently prepared to evaluate J.O.—a necessary predicate to the development of an IEP—D.M. stated that she does not want J.O. classified. Without an IEP, or proof that she is eligible for an IEP, D.M. has no chance of prevailing on the merits of her claim for ESY.

Therefore, I **CONCLUDE** petitioner does meet the third prong of the emergent relief standard.

**The Petitioner Will Suffer Greater Harm Than the Respondent**

The final prong of the above test is whether the equities and interests of the parties weigh in favor of granting the requested relief to D.M. The petitioner argues that J.O. will suffer greater harm if emergent relief is not granted, such harm being a regression in academic performance that could not be made up within a reasonable amount of time when the new school year begins. This argument is speculative and D.M. offered no evidence of its merit.

On balance, it appears that should J.O. be admitted into ESY without an IEP, respondent would be setting a precedent that may then require the District to expand their ESY program significantly at considerable cost. It is worth noting that the District does provide free summer programming to its school-age residents and J.O. is currently participating at one of the District schools.<sup>5</sup> Further, the District has not determined that J.O. would not be eligible for an IEP and then ESY; their decision not to evaluate J.O. was supported by D.M. and could be re-visited at her request.

I **CONCLUDE** that the District would suffer greater harm if the requested relief was granted.

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<sup>5</sup> D.M. described this program as recreational, not academic.



**ORDER**

Having concluded that the petitioner has not satisfied any of the four requirements for emergent relief, the petitioner’s request for emergent relief is **DENIED**.

For the reasons stated above, I hereby **ORDER** that petitioner’s application for emergent relief for J.O. to be placed in the Oak Street Elementary School for Extended School Year programming is hereby **DENIED**.

No further issues remain upon resolution of this emergent matter; therefore, no further proceedings in this matter are necessary. This decision on application for emergency relief is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. § 1415(i)(2). 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.

July 18, 2018

DATE

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**TRICIA M. CALIGUIRE, ALJ**

Date Received at Agency:

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Date Mailed to Parties:

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**LIST OF EXHIBITS**

**For Petitioner:**

- P-1 “Protecting Students with Disabilities, Frequently Asked Questions About Section 504 and the Education of Students with Disabilities,” <https://www.2.ed.gov/about/offices/list/ocr/504faq.html>

**For Respondent:**

- R-1 Counsel for Respondent, Michael I. Inzelbuch, Esq., Letter Brief
- A. Letter and Supporting Documents from Michael I. Inzelbuch, Esq., to D.M., Concerning ESY and “Bridge” Program, dated June 8, 2018
  - B. Letter from Devorie Stareshfsky, Supervisor, Special Education Department, Lakewood Board of Education, to D.M., Concerning CST Meeting and 504 Plan, dated June 6, 2018
  - C. J.O.’s Third Marking Period Report Card, Lakewood Public Schools, 2017-2018 School Year
  - D. Email from osegui@lakewoodpiners.org to D.M. Concerning J.O.’s 504 Plan, dated April 10, 2018
  - E. Letter from Peter Stern, Case Manager, Oak Street School, Child Study Team, to the Parents of J.O., Concerning Referral for an Initial Child Study Team Evaluation, dated April 17, 2018
  - F. Initial Evaluation Plan, Lakewood Public School District, dated April 25, 2018
  - G. Comprehensive Psychological Evaluation, Lakewood Public Schools, Preschool Child Study Team, dated April 22, 2016
  - H. Social Assessment, Lakewood Public Schools, dated June 13, 2017
  - I. Educational Evaluation, Lakewood Public Schools, Child Study Team, dated June 6, 2016
  - J. Thomas Rugino, M.D., ND/Neuro DC Instructions SCR, Children’s Specialized Hospital, dated March 28, 2018

- K. Annual Review – 504, Lakewood Public School District, Current Grade: 03, Projected Grade: 04
- L. Email Thread between D.M. and [osegui@lakewoodpiners.org](mailto:osegui@lakewoodpiners.org), Concerning D.M.'s Inquiry on Lakewood Township Summer 2018 Activities/Programs, dated June 8, 2018