

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION ON

EMERGENT RELIEF

OAL DKT. NO. EDS 14744-18

AGENCY DKT. NO. 2019-28903

**HAMILTON TOWNSHIP
BOARD OF EDUCATION,**

Petitioners,

v.

L.E. AND A.E. ON BEHALF OF J.E.,

Respondents.

Michael A. Pattanite, Jr., Esq. for petitioner (Lenox, Socey, Formidoni,
Giordano, Cooley, Lang & Casey, LLC, attorneys)

No appearance by or for respondents

Record Closed: October 18, 2018

Decided: October 22, 2018

BEFORE **ELAINE B. FRICK**, ALJ:

STATEMENT OF THE CASE

The petitioner, Hamilton Township Board of Education (the District), seeks an order to compel the immediate placement of the respondent minor student at the Hamilton Educational Program (HEP), alleging the student poses a danger to himself and others. The respondents previously voiced objection to the placement but have not filed a written objection or request for due process.

PROCEDURAL HISTORY

The District, filed a Verified Petition for Due Process and Request for Emergent Relief with the Office of Special Education Programs of the New Jersey Department of Education (OSEP) on October 10, 2018. The emergent relief sought, as well as the underlying due process claim, is to compel the immediate placement of the minor student pursuant to an Individualized Education Program (IEP) dated September 20, 2018.

The emergent matter was transmitted by OSEP to the Office of Administrative Law, (OAL) where it was filed on October 11, 2018, as a contested case. N.J.S.A. 52:14B-1 to B-15; N.J.S.A. 52:14F-1 to F-13. The parties were notified by the OAL that the emergent request would be heard on October 16, 2018, at 9:30 a.m. at the OAL, 9 Quakerbridge Plaza, Mercerville, New Jersey. Petitioner presented oral argument. The respondents failed to appear. The respondents did not notify OAL within twenty-four hours of the scheduled proceeding as to why they failed to appear. The record closed October 18, 2018.

FACTUAL DISCUSSION

For purposes of deciding this application for emergent relief, the following is a summary of the relevant facts derived from the contents of the petition and oral argument. Therefore, I **FIND** the following as **FACTS**:

J.E. is a minor student, born April 21, 2003, currently fifteen-years-old. He attended Hamilton High School East-Steinert (Steinert) pursuant to an IEP, dated June 18, 2018. (Exhibit A.) The student is classified as “Other Health Impaired” due to a diagnoses of deficit hyperactivity disorder and major depression. (Exhibit A at 4.)

The student began his sophomore year at Steinert for the 2018-2019 school year. On September 11, 2018, five days into the school year, he was involved in a verbal altercation with another student in the cafeteria. He was escorted from the cafeteria by the principal, while the other student was escorted by another staff member. The other student yelled at J.E., who turned back towards that student and

collided with the principal, causing them both to fall to the floor. J.E. was disciplined for open defiance, with a four day out of school suspension (OSS). (Exhibit C.)

The Child Study Team (CST) convened on September 20, 2018, to assess J.E.'s progress and review or revise the June 18, 2018, IEP, due to their concern for his escalating behavioral and discipline issues. (Exhibit D.) The student and his mother were present at the meeting on September 20, 2018.

The CST determined that behavioral interventions needed to be implemented to address J.E.'s behavior to assist him in achieving regular school attendance, earn passing grades, have a good discipline record, and demonstrate self-control when feeling angry or frustrated. (Exhibit D at 7.) The student was attending a mix of pull-out replacement and push-in classes through a resource program at Steinert, as per the June 18, 2018, IEP. (Exhibit A.) The September 20, 2018, IEP recommended a change in placement to the HEP. J.E. would attend special education classes for students with behavioral disabilities at HEP and receive counseling services. (Exhibit D at 9-10, 12.) The HEP program would be a smaller classroom environment with a low student to teacher ratio. This would enable J.E. to receive immediate feedback for emotional and behavioral issues. (Exhibit D at 10.)

J.E.'s mother, L.E., expressed concern for her son attending HEP. She did not believe he would be successful at HEP and did not agree with changing his programs. She advised the District staff that she had an advocate working with her and she intended to file a "disagreement" to the change in program. (Exhibit D at 3.) The staff noted that J.E.'s mother felt there had not been enough time in the 2018-2019 school year to make this decision. The staff explained to her that the decision was based on J.E.'s behavior and discipline from the previous school year and this school year. (Exhibit D at 12.)

The student also disagreed with the change. J.E. did not feel that he would be successful in the HEP program based upon his experience in the middle school. (Exhibit D at 12.)

J.E.'s mother would not sign the September 20, 2018, IEP. The staff gave L.E. a copy of the IEP, which notified her of her rights, and provided her a copy of the Parental Rights in Special Education (PRISE) document.

The next day, September 21, 2018, a staff member was alerted that J.E. was walking in the hallway in a dazed state. The staff member observed J.E. in the hallway where he punched a locker and slammed his head against it, stating that he wanted to kill another student. He was brought to the nurse's office by wheelchair. He was in a panic situation. He stated the words "kill, kill, kill" repeatedly while in the nurse's office. (Exhibit F at 1.) He was heard by the nurse making the statement "kill, kill them in the lunchroom, they are laughing at me." (Exhibit F at 3; Exhibit G.) He was transported to the hospital by ambulance. (Exhibit F.)

J.E.'s mother signed a Crisis Response-Parent Acknowledgement form on September 21, 2018. (Exhibit F.) She confirmed that she knew J.E. must be seen by a licensed and qualified mental health provider for him to return to school. She also acknowledged that upon his return to school, she must provide the district with a note signed by a licensed and qualified mental health provider indicating that J.E. was seen in their office. (Exhibit F.)

The district sent an invitation to J.E.'s parents to attend a manifestation determination. (Exhibit H.) J.E.'s mother attended the meeting on September 28, 2018. She was provided a copy of the "Disciplinary Action Manifestation Determination." (Exhibit I.) It was determined that J.E.'s behavior was not a manifestation of his disability of Attention-Deficit/Hyperactivity Disorder (ADHD) and major depressive disorder. (Exhibit I.) The parent was going to provide to the District additional previously completed assessments and evaluations.

The District staff determined that the disciplinary action to be imposed upon J.E. for the September 21, 2018, incident was OSS for six days. Home instruction was to begin on the fifth-day of the OSS. (Exhibit I.)

It was noted in the manifestation determination that J.E. needs a smaller setting with special education teachers and counseling available to support him emotionally and behaviorally. The staff member also noted that J.E.'s mother did not agree with that conclusion. She believes J.E. needs a behavior plan in place with additional support when something happens. (Exhibit I.) A psychiatric evaluation was recommended to be completed. On September 28, 2018, L.E. signed the consent form for the completion of the psychiatric evaluation. (Exhibit J.)

The respondents have not filed any written objection to the IEP or request for a due process hearing. The student remains on home instruction. He has not reported to HEP, as per the September 20, 2018, IEP, nor has he returned to Steinert. The District filed its petition for due process and emergent relief on October 10, 2018.

Arguments of the parties:

The District seeks to compel the immediate placement of the student in the HEP program, pursuant to the September 20, 2018, IEP. (Exhibit D.) The student and his mother both voiced objection to the change in placement at the IEP meeting and at the manifestation determination meeting. However, the district asserts that the respondents never filed a written objection to the placement and did not request a due process hearing. Thus, the September 20, 2018, IEP would be the governing placement for the student. He should be compelled to attend HEP to ensure that he receives a free and appropriate public education (FAPE) and the services he needs, which are not being provided by home instruction and not available at Steinert. The student poses a danger to himself and others if he were to resume attendance at Steinert.

The respondents vocalized their objection to the change in placement. The mother did consent to J.E. undergoing the recommended psychiatric evaluation. The respondents did not file a written objection or request for a due process hearing. Respondents did not appear for the scheduled emergent oral argument.

LEGAL ANALYSIS AND CONCLUSION

New Jersey Administrative Code 1:6A-12.1(a) provides that the affected parent(s), guardian, board or public agency may apply in writing for emergency relief. An applicant for emergency relief must set forth in their application the specific relief sought and the specific circumstances they contend justify the relief sought. N.J.A.C. 1:6A-12.1(a).

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;
- 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.

The student is currently receiving home instruction, which began during his six-day OSS for a disciplinary issue that arose the day after the IEP meeting. The District asserts this is a break in services since the student has not returned to school where he would receive the recommended services, in addition to appropriate academic instruction. I **CONCLUDE** this matter involves the issue of a break in services, which could require emergent relief, pursuant to N.J.A.C. 6A:14-2.7(r)1.

Emergency relief may be granted pursuant to N.J.A.C. 1:6A-12.1(e) and N.J.A.C. 6A:14-2.7(s)(1), if the judge determines from the proofs that the following conditions have been established:

- i. The petitioner will suffer irreparable harm if the requested relief is not granted;
- ii. The legal right underlying the petitioner's claim is settled;
- iii. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

- 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.

N.J.S.A. 6A:14-2.7(s); Crowe v. DeGioia, 90 N.J. 126 (1982), codified at N.J.A.C. 6A:3-1.6(b).

The petitioner bears the burden of satisfying all four prongs of this test. Crowe, 90 N.J. at 132-34. First, the petitioner must demonstrate irreparable harm will occur if J.E. is not immediately placed at HEP. Harm is irreparable when there can be no adequate after-the-fact remedy in law or in equity; or where monetary damages cannot adequately restore a lost experience. Crowe, 90 N.J. at 132-133; Nabel v Board of Education of Hazlet, EDU 8026-09, Final Decision on Application for Emergent Relief (June 24, 2009).

The student himself is subject to irreparable harm, for remaining on home instruction, because he is not receiving the services he is to be provided, but for basic academic instruction. The District is required to provide a FAPE. 34 CRF § 300.17. The respondents are preventing that from occurring by J.E. remaining on home instruction. J.E. is not receiving counseling and support services and is not receiving an education among his peers. There is no other remedy in law or equity, or monetary damages, to restore this lost experience, for the student, or for the District. I **CONCLUDE** that irreparable harm will occur, to the student and the District, if J.E. is not compelled to attend the HEP program and remains on home instruction.

Second, the District must demonstrate it has a settled legal right to the relief requested. When a district recommends a change in placement, it shall provide written notice to the parent at least fifteen calendar days prior to the implementation of the proposed action, to allow the parent to consider the proposal. N.J.A.C. 6A:14-2.3(h)2. The District provided the IEP with the recommended change on September 20, 2018. Respondents had the legal right to reject that IEP within fifteen days of the notice of the change, which would have been October 5, 2018. N.J.A.C. 6A:14-2.3(h)3ii. The respondents did not submit written objection or otherwise file for a due process hearing.

The District is mandated to implement the proposed action after the opportunity for the parent to contemplate same has expired unless the parent disagrees with the proposed action and the district attempts to resolve the disagreement; or the parent requests mediation or a due process hearing prior to the expiration of the fifteenth calendar day. N.J.A.C. 6A:14-2.3(h)3i. and 14-2.3(h)3ii.

The District candidly acknowledges they were aware of the respondents' disagreement with the change in placement and noted same in the IEP and in the manifestation determination. The District asserts that the regulations require a parent to file a written objection to the IEP. The mother's failure to sign the IEP does not constitute an objection to it. N.J.A.C. 6A:14-2.3(h)3ii. I **CONCLUDE** that parent's vocalized objections were not enough to stall or prevent the implementation of the September 20, 2018, IEP. I thus **CONCLUDE** that the September 20, 2018, IEP is the controlling IEP for placement. The District is mandated to implement the proposed action. N.J.A.C. 6A:14-2.3(h)3ii. Therefore, I **CONCLUDE** the District has a settled legal right to compel the change in placement.

The District argues that they are entitled to enforce "stay put" at HEP if the September 20, 2018, IEP is found to be the "then-current educational placement" for J.E. The "stay put" provision of the Individuals with Disabilities Education Act (IDEA) provides that "during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents agree otherwise, the child shall remain in the then-current educational placement of the child." 20 U.S.C. § 1415(j).

Pursuant to the New Jersey Administrative Code, no changes are to be made to a child's classification, program, or placement unless emergency relief is granted. Specifically, N.J.A.C. 6A:14-2.7(u) provides that:

Pending the outcome of a due process hearing, including an expedited due process hearing, or any administrative or judicial proceeding, no change shall be made to the student's classification, program or placement unless both parties agree, or emergency relief as part of a request for a

due process hearing is granted by the Office of Administrative Law according to (m) above or as provided in 20 U.S.C. § 1415(k)4 as amended and supplemented.

N.J.A.C. 6A:14-2.7(u).

This prohibition of a change in placement, commonly referred to as “stay put”, acts as an automatic preliminary injunction. The overarching purpose is to prevent a school district from unilaterally changing a disabled student’s placement. Drinker by Drinker v Colonial School District, 78 F.3d 859, 864 (3d Cir. 1996). Regarding the standard of review for a “stay put” request, the emergent-relief factors set forth in N.J.A.C. 6A:14-2.7(r)–(s), N.J.A.C. 1:6A-12.1, and Crowe v. DeGioia, 90 N.J. 126, 132–34 (1982), are generally inapplicable. “Congress has already balanced the competing harms as well as the competing equities.” Pardini v. Allegheny Intermediate Unit, 420 F.3d 181, 188 (3d Cir. 2005). In Drinker, the court explained that IDEA “substitutes an absolute rule in favor of the status quo for the court’s discretionary consideration of the factors of irreparable harm and either a likelihood of success on the merits or a . . . balance of hardships.” Drinker, 78 F.3d at 864 (citations omitted.) If the “stay put” provision applies, injunctive relief is available without the traditional showing of irreparable harm. Ringwood Board of Education v. K.H.J. ex rel K.F.J., 469 F. Supp. 2d 267 (D.N.J. 2006). Under such circumstances, it becomes the duty of the court to ascertain and enforce the “then-current educational placement” of the student. Drinker, 78 F.3d at 865.

The purpose of “stay put” is to maintain stability and continuity for the student. The first preference for interim placement is one agreed to by the parties. However, when the parties are unable to agree, the placement in effect when the due process request was made, i.e., the last uncontroverted placement or program, is the status quo. In this matter, the June 2018, IEP which provided for the student to continue his education and services at Steinert, was agreed upon by the parents. The September 20, 2018, IEP came about because of J.E.’s escalating discipline and behavioral issues. The student and parent voiced objection to a change in placement. The mother later consented to the student undergoing a psychiatric evaluation, after J.E.’s incident at the

school on September 21, 2018. The fact remains that the respondents never filed a written objection within fifteen days. Having concluded that the September 20, 2018, IEP is controlling, I further **CONCLUDE** that IEP is the “then-current educational placement” of this student. Therefore, I **CONCLUDE** “stay put” is appropriate injunctive relief, which requires the student’s placement is at HEP.

The third prong of the factors the District must satisfy is whether it has a likelihood of prevailing on the merits of the underlying claim. Although “stay put” is an automatic injunction and further analysis under Crowe is not necessary, the District’s emergent request is to compel placement at HEP, not just on a “stay put” basis. Since I have concluded “stay put” is appropriate at HEP, pursuant to the September 20, 2018, IEP, this results in the District being mandated to implement the placement. Therefore, their request to compel such placement is appropriate and I **CONCLUDE** that the student shall be compelled to attend placement at HEP. Logically, it flows from this conclusion that the District not only has the likelihood of prevailing on the merits of its underlying claim, it has prevailed on its underlying due process claim. Therefore, the third prong for emergent relief is satisfied as I **CONCLUDE** that the District will prevail on the merits of the underlying due process claim, which satisfies its requirement to demonstrate a likelihood of prevailing on the merits.

The final prong of the test the District must satisfy to be entitled to the emergent relief sought is to demonstrate it will suffer greater harm than the respondent student if the relief is not granted. This is shown by a balancing of the equities and interests of the parties. Here, if the District’s requested relief is granted, the respondents are foreclosed from objecting to the change in placement. Yet, the respondents have not come forward to present any evidence or indication that the student will be harmed if compelled to attend the program that provides academic and behavioral services. Rather, the respondents’ insistence that J.E. remain on home instruction is self-inflicted irreparable harm. By remaining on home instruction, the student prevents the District from being able to provide FAPE. Even if the student had sought to return to Steinert, such placement thwarts the District’s ability to provide appropriate academic instruction and services for the health and welfare of J.E. and safeguard the student body population. It is the defiant behavior by the respondents that results in the scales being

tipped to the District suffering greater harm if the student is not compelled to be placed at HEP. I **CONCLUDE** the petitioner has demonstrated it will suffer greater harm than the respondent if the emergent relief is not granted.

The District has demonstrated all four conditions set forth in Crowe and as codified in N.J.A.C. 6A:3-1.6(b). Therefore, I **CONCLUDE** that the petitioner is entitled to the emergent relief to compel the immediate placement of the minor student at HEP.

ORDER

It is **ORDERED** that the emergent relief requested by the District to compel the immediate placement of the minor student at HEP is **GRANTED**.

APPENDIX

EXHIBITS

For Petitioner:

Petition with Exhibits:

Exhibit A: June 18, 2018, IEP

Exhibit B: Disciplinary record J.E.

Exhibit C: Disciplinary record regarding September 11, 2018, incident

Exhibit D: September 20, 2018, IEP

Exhibit E: Disciplinary record regarding September 21, 2018, incident

Exhibit F: Statements regarding September 21, 2018, incident

Exhibit G: Nurse report regarding September 21, 2018, incident

Exhibit H: Invitation to Manifestation Determination

Exhibit I: Disciplinary Action Manifestation Determination September 28,
2018

Exhibit J: Request for additional assessment consent

For Respondent:

none