

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

**FINAL DECISION – EMERGENT  
RELIEF**

OAL DKT. NO. EDS 14911-17

AGENCY DKT. NO. 2018 27021

**L.H. ON BEHALF OF E.T.,**

Petitioner,

v.

**NORTH BRUNSWICK TOWNSHIP**

**BOARD OF EDUCATION,**

Respondent.

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**L.H., pro se**

**Paul C. Kalac**, Esq., for respondent (Schwartz Simon Edelstein & Celso,  
attorneys)

Record Closed: October 16, 2017

Decided: October 18, 2017

BEFORE **RICHARD McGILL**, ALJ:

L.H. (“petitioner”) filed a request for emergent relief on behalf of her twenty-one year old son, E.T., who is eligible for special education and related services based on the criteria for autistic. Petitioner seeks an order compelling the North Brunswick Township Board of Education (“respondent”) to maintain E.T.’s placement at the New Road School at Somerset and to provide compensatory education for a gap in his educational program. Respondent opposes petitioner’s request for emergent relief.

**PROCEDURAL HISTORY**

The request for emergent relief was received by the Office of Special Education Policy and Planning on October 10, 2017, and the matter was transmitted to the Office of Administrative Law on the same date for determination as a contested case. An oral argument was conducted on October 16, 2017, at the Office of Administrative Law in Newark, New Jersey.

### **FACTS**

Prior to October 2017, petitioner lived in Franklin Township, where the school district placed E.T. in New Road School at Somerset, which is an out-of-district private school. On September 30, 2017, petitioner moved to North Brunswick, and on October 2, 2017, she began the process to enroll E.T. in respondent's school district.

On October 6, 2017, Director of Special Services Christopher Harry telephoned petitioner and informed her that E.T. would not be attending New Road School at Somerset because respondent had a comparable program for E.T. Director Harry stated that E.T. could begin immediately in the in-district Mild/Moderate Learning or Language Disabilities program. Petitioner responded that E.T. was in the last year of his program, that he had job placements already set up and that it would be burdensome for him to change at that point. As of October 16, 2017, E.T. did not have an educational program in effect.

### **ANALYSIS**

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, E.T. has experienced a break in the delivery of services in that he has not had an educational program for more than two weeks. In addition, there is an issue concerning placement pending the outcome of due process proceedings. It follows that petitioner may request emergent relief in this proceeding.

Petitioner's request for emergent relief is based on two legal theories. The first legal theory is based on N.J.A.C. 6A:14-2.7(u), which provides as follows: "Pending the outcome of a due process hearing, . . . 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 . . . ." Based on this regulation, petitioner contends that E.T. should "stay put" in his placement at New Road School at Somerset.

The difficulty with petitioner's argument is that there is a specific regulation, N.J.A.C. 6A:14-4.1(g), which addresses the situation where a student transfers from one New Jersey school district to another New Jersey school district. This regulation provides in pertinent part as follows:

(g) When a student with a disability transfers from one New Jersey school district to another or from an out-of-State school district to a New Jersey school district, the child study team of the district into which the student has transferred shall conduct an immediate review of the evaluation information and the IEP and, without delay, in consultation with the student's parents, provide a program comparable to that set forth in the student's current IEP until a new IEP is implemented as follows:

1. For a student who transfers from one New Jersey school district to another New Jersey school district, if the parents and the district agree, the IEP shall be implemented as written. If the appropriate school district staff do not agree to implement the current IEP, the district shall conduct all necessary assessments and, within 30 days of the date the student enrolls in the district, develop and implement a new IEP for the student.

The stay-put provision yields to the procedures related specifically to intrastate transfers. J.F. v. Byram Township Bd. of Educ., 629 F. App'x 235 (3d Cir. 2015). It follows that respondent is obligated in this case to provide a program that is comparable to the one set forth in E.T.'s current IEP, until respondent develops a new IEP for E.T. Under the circumstances, emergent relief is not available to petitioner based upon the stay-put provision in N.J.A.C. 6A:14-2.7(u).

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.

The first requirement is that E.T. will suffer irreparable harm if the requested relief is not granted. N.J.A.C. 6A:3-1.6(b)1. Harm is considered to be irreparable if it cannot be remedied by money damages. Crowe v. DiGioia, 90 N.J. 126, 132-33 (1982). Moreover, the harm must be substantial and immediate; risk of harm alone is not sufficient.

Here, respondent offered a program to petitioner for immediate implementation. Additionally, under N.J.A.C. 6A:14-4.1(g)1, if the school district staff does not agree to implement the current IEP, the district has thirty days from the date the student enrolls in the district to develop and implement a new IEP for the student. It follows that E.T. will not experience irreparable harm.

The second consideration is whether the legal right underlying petitioner's claim is settled. N.J.A.C. 6A:3-1.6(b)2. In effect, petitioner contends that E.T. has been denied a free appropriate public education. The right of a student who is eligible for special education and related services to receive a free appropriate public education is well settled. It follows that petitioner meets this requirement.

The next factor is petitioner's likelihood of prevailing on the merits of the claim. N.J.A.C. 6A:3-1.6(b)3. Petitioner's claim is to maintain E.T.'s placement at New Road School at Somerset. Respondent has established that its obligation for the first thirty days is to provide a comparable program. There is no obligation to keep E.T. in the same program. Respondent has submitted Director Harry's certification, which states that respondent has a comparable program. Petitioner did not submit an opposing certification. The parties have submitted no proofs in regard to the meritoriousness of the new IEP to be developed by respondent. Under the circumstances, petitioner has not demonstrated that she has a likelihood of prevailing on the merits of the claim.

The final requirement relates to equities and interests of the parties. N.J.A.C. 6A:3-1.6(b)4. Here, L.H. has a clear interest in having an educational program in effect for E.T. On the other hand, respondent is obligated by N.J.A.C. 6A:14-4.1(g) only to provide a comparable program for E.T. Respondent claims to have a comparable program available for E.T. Under the circumstances, it would be unreasonable to expect respondent to pay for an out-of-district placement at a private school.

In order to prevail on a motion for emergent relief, the movant must meet all four requirements under 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). Here, petitioner satisfies only one of the four requirements. Therefore, I **CONCLUDE** that petitioner's request for emergent relief does not satisfy the applicable requirements. Accordingly, it is **ORDERED** that petitioner's request for emergent relief be denied.

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 parent, 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.

October 18, 2017

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DATE

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**RICHARD McGILL, ALJ**

Date Received at Agency

October 18, 2017\_\_\_\_\_

Date Mailed to Parties:

October 18, 2017\_\_\_\_\_

ljb