



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

ON EMERGENT RELIEF

OAL DKT. NO. EDS 01320-23

AGENCY DKT.NO. 2023-35360

D.V. ON BEHALF OF J.V.,

Petitioner,

v.

**FAIR LAWN PUBLIC SCHOOLS BOARD OF
EDUCATION,**

Respondent.

Bradley Flynn, Esq. for petitioner

Nathanya Simon, Esq. for respondent (Scarinci & Hollenbeck LLC attorneys)

Record Closed: March 31, 2023

Decided: March 31, 2023

BEFORE **KIMBERLY A. MOSS**, ALJ:

Petitioner, D.V. on behalf of her minor child J.V., brings this action seeking J.V. either returned to Academy 360 or be placed in Capstone Center during the pendency of the due process petition.

On February 13, 2023, the Office of Special Education Programs transmitted the matter to the Office of Administrative Law (OAL) for emergent relief and due process.

The initial emergent relief petition was withdrawn. A second motion on emergent relief was filed by petitioner on March 24, 2023. Opposition to the motion was filed on March 29, 2023. Oral arguments were held on March 31, 2023. The hearing is scheduled for June 26, 2023 and July 11, 2023.

FACTUAL DISCUSSION

After carefully considering the documentary evidence presented, and having had the opportunity to hear oral arguments, I **FIND** the following **FACTS**:

J.V. is a seventeen year old resident of Fair Lawn. He is eligible for special education services under the category of autism. J.V has been in an out of district placement at Spectrum360/Academy 360 (Academy 360) since October 2017.

In September 2021 J.V. began demonstrating OCD behaviors. These behaviors primarily occurred while he was transitioning from one situation to another.

Since December 2022 J.V.'s behavior at school has worsened. Beginning on January 5, 2023, J.V. would be removed from class and moved to an alternative location and given one-to-one instruction when he becomes aggressive, if this occurs in the morning J.V. was given an opportunity to rejoin the class in the afternoon. This occurred several times.

On March 7, 2023, Academy 360 suspended J.V. for one day due to his physical aggressive behavior which led to injuries. Academy 360 again suspended J.V. for one day on March 10, 2023. On March 13, 2013, J.V. began virtual instruction. Academy 360 spoke to the petitioner stating that J.V. was too dangerous to come back but would be given virtual instruction at home which he continues to receive. There was no manifest determination done.

Dr Jeffrey Daly, an Adult and Child psychiatrist provided outpatient care for J.V. since November 2022. He diagnosed J.V. with Autism Spectrum Disorder and Obsessive-Compulsive Disorder. Dr Daly states that J.V. requires a specialized

education program and that the home virtual instruction is causing J.V. social, emotional, and behavioral regression. D.V., the mother of J.V., agrees with this assessment.

Academy 360's tuition contract with Fair Lawn Public Schools Board of Education provides:

If the parents or guardians exercise their rights to disapprove the termination of the student at the approved private school by requesting mediation or a due process hearing, then the terms and conditions of the contract shall remain in full force and effect unless the parties otherwise agree or the matter is resolved.

The District is re-considering the placement of J.V. at Academy 360. It believes that he requires a more intensive placement. The District is prepared to make a placement of J.V. into another out of district placement that is appropriate for J.V. The District did not address J.V.'s removal from Academy 360 in its opposition.

Petitioner filed for emergency relief and due process on February 10, 2023.

LEGAL ANALYSIS AND CONCLUSION

The "stay-put" provision acts as "an automatic preliminary injunction," barring schools from making changes to a disabled student's education without parental consent. *Drinker*, 78 F.3d at 864. The fact that IDEA applies this injunction automatically, and does not consider "the usual prerequisites of injunctive relief" such as "whether [the parent's] case is meritorious or not," demonstrates the high priority that Congress intended to give to the continuity of student services under IDEA. *Id.* (quoting *Woods v. New Jersey Dep't of Educ.*, No. 93-5123, 20 *Indiv. Disabilities Educ. L. Rep.* 439, 440 (3d Cir. Sept. 17, 1993)). The Supreme Court has noted that this protection is "unequivocal" with the purpose of "strip[ping] schools of the [*13] unilateral authority they had traditionally employed to exclude disabled students . . . from school." *Drinker*, 78 F.3d 859, 864 (3d Cir. 1996) (emphasis in original) (quoting *Honig v. Doe*, 484 U.S. 305, 323, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)). *Cinnaminson Township Board of Education v. K.L. o/b/o/ R.L.* 2016 U.S. Dist. LEXIS 104706.

In this matter the placement that J.V. was in when the initial emergent relief motion and the due process petition was filed was in class at Academy 360.

N.J.S.A. 6A:14-2.8 provides:

(a) For disciplinary reasons, district board of education officials may order the removal of a student with a disability from his or her current educational placement to an interim alternative educational setting, another setting, or a suspension for up to 10 consecutive or cumulative school days in a school year. Such suspensions are subject to the same district board of education procedures as the procedures for nondisabled students. However, at the time of removal, the principal shall forward written notification and a description of the reasons for such action to the case manager and the student's parent(s).

1. Notwithstanding (a) above, preschool students with disabilities shall not be suspended, long-term or short-term, and shall not be expelled.

2. The district board of education is not required by 20 U.S.C. §§ 1400. et seq., or this chapter to provide, during periods of removal, services to a student with a disability who has been removed from his or her current placement for 10 school days or less in a school year, provided that if services are provided to general education students for removals of 10 or fewer days duration, students with disabilities shall be provided services in the same manner as students without disabilities during such time periods for removals of 10 or fewer days.

(b) District board of education personnel may consider, on a case-by-case basis, any unique circumstances when determining whether or not to impose a disciplinary sanction or order a change of placement for a student with a disability who violates a district board of education code of conduct.

(c) Removals of a student with a disability from the student's current educational placement for disciplinary reasons constitutes a change of placement if:

1. The removal is for more than 10 consecutive school days; or

2. The student is subjected to a series of short-term removals that constitute a pattern because they cumulate to more than 10 school days in a school year and because of factors such as the length of each removal, the total amount of time the student is removed, and the proximity of the removals to one another.

i. District board of education officials, in consultation with the student's case manager, shall determine whether a series of short-term removals constitutes a pattern that creates a change of placement.

(d) Disciplinary action initiated by a district board of education that involves removal to an interim alternative educational setting, suspension

for more than 10 school days in a school year, or expulsion of a student with a disability shall be in accordance with 20 U.S.C. § 1415.(k). (See N.J.A.C. 6A:14 Appendix A.) However, removal to an interim alternative educational setting of a student with a disability in accordance with 20 U.S.C. § 1415.(k) shall be for a period of no more than 45 calendar days.

(e) In the case of a student with a disability who has been removed from his or her current placement for more than 10 cumulative or consecutive school days in the school year, the district board of education shall provide services to the extent necessary to enable the student to progress appropriately in the general education curriculum and advance appropriately toward achieving the goals set out in the student's IEP.

1. When it is determined that a series of short-term removals is not a change of placement, district board of education officials, in consultation with the student's special education teacher and case manager, shall determine the extent to which services are necessary to enable the student to progress appropriately in the general curriculum and advance appropriately toward achieving the goals set out in the student's IEP.

2. When a removal constitutes a change of placement, and it is determined that the behavior is not a manifestation of the student's disability, the student's IEP team shall determine the extent to which services are necessary to enable the student to progress appropriately in the general curriculum and advance appropriately toward achieving the goals set out in the student's IEP.

(f) In the case of a removal for drug or weapons offenses, or because the student caused a serious bodily injury in accordance with 20 U.S.C. § 1415.(k) and its implementing regulations at 34 CFR Part 300, or a removal by an administrative law judge for dangerousness consistent with 20 U.S.C. § 1415.(k) and its implementing regulations at 34 CFR Part 300, the district board of education shall provide services to the student with a disability consistent with 20 U.S.C. § 1415.(k) and its implementing regulations at 34 CFR Part 300, incorporated herein by reference. However, removal to an interim alternative educational setting of a student with a disability in accordance with 20 U.S.C. § 1415.(k) shall be for a period of no more than 45 calendar days.

In this matter, J.V. was not removed from Academy 360 for drugs, weapons, or serious bodily injury.

The standards for the granting of emergent relief are set forth in N.J.A.C. 6A:3-1.6(b). Emergent relief may be granted if the judge determines from the proofs that:

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.

In this matter, the petitioner has shown that J.V. will suffer irreparable harm if he continues home instruction. His doctor stated that he needs a specialized educational program and that the virtual home instruction has caused significant social, behavioral and emotional regression.

The rights underlying the stay put claim and the likelihood of petitioner prevailing on the merits of the stay put claim is clear. J.V. was at Academy 360 in class when the due process petition was filed. That is the stay put placement.

The petitioner will suffer greater harm than the respondent when all interests are balanced as stated above.

In this case, after hearing the arguments of petitioner and respondent and considering the documentation submitted, I **CONCLUDE** that petitioner has the requirement of N.J.A.C. 6A:3-1.6(b) regarding stay put placement.

ORDER

Accordingly, It is **ORDERED** that the petition for emergent relief is hereby **GRANTED**.

It is **FURTHER ORDERED** that J.V. be returned to in person instruction at Academy 360 pending the resolution of the due process petition.

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 Programs.

March 31, 2023



DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency

March 31, 2023

Date Mailed to Parties:

March 31, 2023