



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

EMERGENCY RELIEF

OAL DKT. NO. EDS 01093-23

AGENCY DKT. NO. 2023-35441

C.C. AND L.K. ON BEHALF OF C.C.

Petitioners,

v.

KINNELON BORO BOARD

OF EDUCATION,

Respondent.

Matthew C. Moench, Esq., for petitioners (King, Moench & Collins, attorneys)

Kyle J. Trent, Esq. for respondent (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: February 9, 2023

Decided: February 10, 2023

BEFORE **KELLY J. KIRK**, ALJ:

This matter arises under the Individuals with Disabilities Education Act, 20 U.S.C.A. §§1400 to 1482. On February 3, 2023, petitioners filed, inter alia¹, a Request

¹ The parties advised that a request for emergent relief relative to the disciplinary action was filed by the petitioners. However, said request was not included with the transmittal of the request for emergent relief relative to the educational placement.

for Due Process Hearing, a Request for Expedited Due Process Hearing and a Request for Emergent Relief against respondent, Kinnelon Board of Education (District). The Request for Emergent Relief alleges that the parents “received notice from Kinnelon Public Schools on January 31, 2023, that their son was being recommended for an out of district placement and that in the interim period between now and a new school being chosen he would receive at-home instruction.” The Office of Special Education of the Department of Education (Department) transmitted the Request for Emergent Relief to the Office of Administrative Law (OAL), where it was filed on February 6, 2023.

On February 7, 2023, the District filed opposition to the petitioners’ Request for Emergent Relief, consisting of a letter brief and certification with three exhibits (Respondent Exhibits). On February 8, 2023, petitioners filed a letter brief and certification with ten exhibits (Petitioners Exhibits) in support of their Request for Emergent Relief. Oral argument was held on February 9, 2023.

Exhibits

An email from petitioners dated June 16, 2022, at 9:43 a.m. states:

I am just following up to see how he’s been since your last update. His therapy is going excellent and he has been very good at home.

[Petitioners Exhibit 1.]

An Individualized Education Program (IEP), dated November 8, 2022, reflects, inter alia, the following: an IEP meeting was held on November 8, 2022; C.C.’s classification is emotional regulation impairment; C.C.’s program includes a behavior intervention plan, modifications, supports for school personnel, and testing accommodations; C.C.’s special education program and related services were pull-out resource replacement for reading/language arts and math, pull-out supplementary instruction for social skills, an individual personal aide, and an individual behavioral intervention consultation. (Petitioners Exhibit 4.)

An email from petitioners dated November 9, 2022, at 1:34 p.m. states:

We want him to remain at Stoneybrook [sic]. I really don't wish to discuss it any further and I thought I made that abundantly clear.

The schools recommended are nothing more than glorified, overpriced day care centers. This will be detrimental to his development and education. The vast majority of the kids seen at the schools have extremely severe emotional and/or other issues which are far in excess of [redacted]. There are low paid, uneducated staff sitting with kids having breakdowns screaming and crying. The level of care and resources at the public schools in Kinnelon are far in excess and superior to these institutions.

The small group setting works for [redacted] with a reasonable success rate. We have confirmed this already. Moving him to a smaller math group is what we suggested time and again. It is now only being implemented. Please provide the details; ie teacher and number of students and other pertinent information.

We have actively assisted and continue to work with [redacted] to ensure he gets a proper education. Please ensure to email me with anything you would like the therapist to work on weekly. Please send it Thursday night for the preceding week.

[Petitioners Exhibit 2.]

An email from Melissa Cook, MB, BCBA, dated December 1, 2022, at 3:14 p.m. states, in part, the following:

I wanted to give an update about [redacted] this week—all good news.

I was in Mrs. Dilenno's class the first day he was there for math. He came in and did such a great job. He chose his seat, did his work, answered questions, worked in a group, and transitioned appropriately. He even stopped a worksheet and put it where he was asked to before he had finished it when Mrs. Dilenno moved on to the next activity.

I saw him today for social skills and we were talking about the new math class and he said he really liked it. I told him I was proud of him for how well he did.

Then he told me that he got a really good score on a test- and originally was not given a point for one of the questions. In the past this may have caused an issue, but [redacted] correctly reported that he used his words and said, "I think I'm right" and explained it to his teacher calmly. We talked about what growth that is for him, and I encouraged him to keep up the great work.

[Petitioners Exhibit 3.]

An email from Dawn Uttel, Principal, dated January 30, 2023, at 10:23 a.m. states:

After speaking to the staff members involved in the incident which occurred at the close of class on Friday afternoon, we have deemed it necessary to conduct the assessment. During Library/Media class on Friday afternoon, [redacted] was provided with leniency in sitting close to a classmate. Mr. Nunez was standing directly behind him. The student was the same student that was mentioned in the initial email that you received from Mrs. Foster earlier in the day. After a period of time, the classmate expressed that he no longer wanted to remain in the space near [redacted] when he proceeded to move his seat away from [redacted], [redacted] attempted to follow the student. It was at this time that Mr. Nunez repeated to [redacted] that the other student was allowed to move his seat. [Redacted] continued to be upset by this. It was at this time that [redacted] took his pencil and attempted to make a stabbing motion at Mr. Nunez.

After this occurred for the safety of [redacted] and the other students, Mr. Nunez did place [redacted] in a mild hold. [Redacted] was seen by the school nurse, as is policy, and picked up my Mrs. [redacted].

After speaking to Mrs. [redacted] this morning, she has requested a paraprofessional change. In order for this to occur, we are asking for an in-person meeting this week. Please know that this can occur over Zoom.

As per the Code of Conduct, District Policy #5600, [redacted] will have a 20-minute lunch detention in the main office for the behavior.

If you are refusing the risk assessment at this time, I ask that you please inform us in writing.

[Petitioners Exhibit 5, emphasis added.]

A letter from Hillary Beirne, Director of Special Services, and Uttel, dated January 31, 2023, states:

We are reaching out to discuss our concerns and steps going forward for your son, [redacted]. As you know, since transitioning to Stonybrook School in 3rd grade, [redacted] has been struggling to maintain his behaviors and we continued to be highly concerned, not only for his safety, but also for the safety of other students and staff members. At this time, we would like to proceed, as we have previously discussed in prior meetings, with looking for an out of district placement for him that would be more beneficial and where a highly therapeutic program will be available to him.

As stated in our November 8, 2022 meeting the Child Study Team continues to recommend an out of district placement for [redacted]. I want to assure you that **it is our hope that [redacted] will be able to return to the Kinnelon School District in the future.** At this time we feel that his social and emotional needs can be better met in a therapeutic setting. In September, the plan is to offer a behavioral/therapeutic class here in the Kinnelon Public School District. We feel that **upon his return this would be the most appropriate placement for him.**

To review, [redacted] has had incidents this school year, which include putting his hands on other students, becoming highly fixated on individual students, as well as other issues, including:

- Headbutting another student, resulting in them both being sent to the nurse (11/1/22)
- Risk assessment completed on 12/7/22, as he indicated violence toward his mother
- A situation where he implied that he had access to a blow torch, and wanted to set something on fire (11/21/22)
- Kicked another student because he was frustrated during a game during homeroom (1/12/23)
- [Redacted] became upset in Library/Media class on 1/27/23 where he took his pencil and attempted to make a stabbing motion at his paraprofessional.

The last issue which occurred on 1/27/23, further indicates that [redacted] behaviors continued to be inconsistent and unpredictable. **Therefore, we do not have a program here in Kinnelon district that can properly support [redacted] needs at this time.**

While we take the time to explore the out of district school options, [redacted] will be placed on home instruction, starting Wednesday 2/1/23. We will arrange the home instruction as soon as possible, and will make arrangements for any time that he misses waiting for it to begin. Two of the school that we would like to explore are Chapel Hill & the Shepherd School. We are open to any schools that you might have an interest in seeing as well.

While we know this is an unfortunate situation, we feel strongly that this is what is best for [redacted] based on what we can offer him here. We look forward to collaborating with you, and would like to schedule a meeting as soon as possible to discuss the steps going forward.

[Petitioners Exhibit 6/District Exhibit 1, emphasis added.]

A letter from petitioners' attorney, dated January 31, 2023, reflecting delivery via UPS and email to Beirne with carbon copies via email to David Mango (Superintendent), Lori Foster (School Psychologist), Uttel and Kyle Trent, Esq., states, in part, as follows:

We have reviewed the notice you sent to [redacted] Jr.'s parents on the afternoon of January 31, 2023, informing them of Kinnelon Public School's (hereinafter "the District") unilateral decision to place [redacted] Jr. in home instruction beginning on February 1, 2023. We vehemently disagree with the District's action and demand that the District reverse its position, pending a hearing before the Office of Administrative Law within the Department of Education.

We are in the process of preparing an application for emergent relief with the Office of Administrative Law, which will include a request for an expedited due process hearing and mediation pursuant to New Jersey regulations. N.J.A.C. 6A:14-2.7. As stated above, [redacted] Jr.'s parents demand that that District immediately reinstate [redacted] Jr. for in-school instruction while awaiting the resolution decided by the Office of Administrative Law.

We would also like to take the opportunity to note several deficiencies in the notice you sent to [redacted] Jr.'s parents that are in direct violation of Federal guidelines. . . .

We also take issue with the timing of this notice, which was sent late in the afternoon of the day before in-home instruction is supposed to start, meaning [redacted] Jr.'s parents, two working adults, received less than one day's notice for a monumental change in how their child is to be educated. It is our sincere hope that this was an oversight on the part of the District, as any explanation to the contrary would be unreasonable on its facts.

We firmly believe that the District's action is without merit, and it will result in irreparable harm to [redacted] Jr. while needlessly interfering with his absolute right to a free appropriate public education. . .

[Petitioners Exhibit 7.]

A letter from Uttel and Melissa Coleman, Assistant Principal, dated February 1, 2023, indicating it was via certified mail and email, states in bold type "**Notice of 10 Day Suspension**" and further states:

As you are aware, your son [C.C.] was involved in an incident at the Stonybrook School on Friday, January 27, 2023. During that incident [C.C.] attempted to stab his assigned paraprofessional with his pencil. As a result, please accept this correspondence as official notice that [C.C.] has been suspended from school for ten (10) school days pursuant to Board Policy and Regulation 5610. As a result, [C.C.] will not be permitted on school grounds between February 1 and 14, 2023.

The incident underlying this action occurred on or about January 27, 2023. During that school day, [C.C.] became upset while in his Library/Media class after fixating on a particular student earlier in the day who was not interested in socializing with [C.C.]. When he became upset, [C.C.] attempted to stab his paraprofessional with a pencil. The paraprofessional was forced to restrain [C.C.] for approximately one minute to avoid being stabbed with the pencil or other violence from occurring. Witnesses including the paraprofessional and [C.C.] confirmed what occurred. [C.C.] admitted to the conduct when given an opportunity to present his side of the story. He minimized his behavior,

however, by suggesting that he only tried to stab the paraprofessional with the eraser side of the pencil.

Based on the foregoing, it appears that [C.C.] has violated, at a minimum, the District's Code of Conduct as set forth in Board Policy and Regulation 5600. [C.C.] put himself and others at risk of harm and created an unsafe environment for those around him. He specifically attempted to cause bodily harm to his paraprofessional. As also stated within the Policy, conduct that constitutes good cause for suspension which [C.C.] did exhibit were continued and willful disobedience towards his paraprofessional and open defiance of authority of the teacher or person, having authority over the student. [C.C.'s] due process rights with respect to this short term suspension are set forth at N.J.A.C. 6A:16-7.1(c)(3) and -7.2. An appeal of this decision may be made to the Commissioner of Education in accordance with N.J.A.C. 6A:3-1.3 through 1.17. As a student with a disability, [C.C.] also remains entitled to rights and procedural protections set forth a N.J.A.C. 6A:14 and the IDEA, 20 U.S.C. §§ 1400 et seq. As [C.C.] has not been suspended previously during this school year, however, the present suspension is specifically authorized by N.J.A.C. 6A:14-2.8(a).

District staff will contact you separately to arrange for home instruction for [C.C.] consistent with District policy and procedures. Further, it is my understanding that the District will also be scheduling an IEP meeting to address any needed modifications to [C.C.'s] IEP via separate cover.

If you have any questions or require any additional information or clarification, please feel free to contact my office. In the event you retain legal counsel, he or she should contact the Board's legal counsel, Kyle J. Trent, Esq. . . . with any questions.

[Petitioners Exhibit 8/ District Exhibit 2.]

A letter from petitioners' attorney, dated February 2, 2023, reflecting delivery via UPS and email to Mango, with carbon copies via email to Beirne, Foster, and Uttel, states, in part, as follows:

As you are aware multiple applications for emergent relief and due process are pending before the New Jersey Department of Education and Office of Administrative Law due to the District's actions concerning [redacted].

We would like to take the opportunity to note several defects in the January 31, 2023 and February 1, 2023 correspondence sent to [redacted] parents by the District. . . .

Next, the District's February 1, 2023 correspondence suspending [redacted] for a ten day period is also contrary to New Jersey state law and the District's own policies and regulations. . . .

Next, it is extremely concerning to this office that the District has suspended [redacted] for an incident that occurred with his paraprofessional (Mr. Nunez) on or about January 27, 2023 where it is alleged that [redacted] attempted to stab Mr. Nunez with a pencil and that Mr. Nunez had to physically restrain [redacted]. The February 1, 2023 correspondence noting [redacted] attempt to stab Mr. Nunez is directly contradicted by Ms. Uttel's email correspondence dated January 30, 2023 which states "[redacted] took his pencil and attempted to make a stabbing motion at Mr. Nunez." . . .

Based on the foregoing, we demand that [redacted] suspension be reversed and expunged from his student records. We additionally request that [redacted] be placed back into in-person instruction pending the outcome of the emergent and due process applications filed in the Office of Administrative Law within the Department of Education. . .

[Petitioners Exhibit 9.]

An email dated February 2, 2023, at 10:06 a.m. from Foster states: Attached please find the meeting notice for the scheduled IEP meeting on February 9, 2023, at 10:45 a.m. at Stonybrook School. (District Exhibit 3.) The Invitation to Assess Progress and Review or Revise IEP reflects that the purpose is to "assess the student's progress and to review and possibly revise the student's Individualized Education Program (IEP)." (District Exhibit 3.)

Legal Analysis and Conclusion

The Request for Emergent Relief states:

The parents of [redacted] received notice from Kinnelon Public Schools on January 31, 2023, that their son was being

recommended for an out of district placement and that in the interim period between now and a new school being chosen he would receive at-home instruction. The at-home instruction was scheduled to begin on February 1, 2023 giving [redacted] parents virtually no notice to seismic shift in the way their son was to be educated. Additionally, as [redacted] parents both work full-time they are subject to additional hardship to make sure that their son receives the free and appropriate public education that he is entitled to. The District's unilateral decision was presented with no opportunity for [redacted] parents to present a counter-argument, ensuring [redacted] due process rights were violated. It is also of our belief that this plan is a drastic shift from [redacted] IEP, potentially even violating it.

The Request for Emergent Relief further states that the problem could be resolved by “allowing [redacted] to remain at his school while awaiting the results of this application, or until a reasonable compromise plan can be agreed to by both parties.”

Petitioners argued that after an incident on January 27, 2023, the District advised them via an email that C.C. would receive a 20-minute lunch detention, but the following day advised them via a letter that C.C. would immediately be removed and placed on home instruction pending an out-of-district placement. Petitioners also argued that the District thereafter advised the parents that C.C. would receive 10-day suspension, but the suspension letter does not rescind or revoke the January 31, 2023, letter, or even reference the January 31, 2023, letter. Petitioners further argued that based upon the January 31, 2023, letter, C.C. was placed on home instruction without an IEP meeting or due process, and that C.C. should be allowed to return to school upon the completion of the suspension.

The District argued that C.C. is allowed to return to school upon the completion of the suspension and that the January 31, 2023 letter must be read in conjunction with February 1, 2023 letter, which supersedes the January 31, 2023 letter. The District also argued that there is no change in placement or justiciable issue before the OAL unless C.C. attempts to return after the suspension but is not allowed to do so. The District further argued that the request for emergent relief is premature and that until February 15, 2023, there can be no change in placement because C.C. is suspended. The District

concedes that an IEP meeting is required for a change in placement, and intends for such meeting occur within the time period of the suspension. The District also argued that the parents cannot meet the emergent relief criteria. Specifically, the District argued that there is no irreparable harm because C.C. is not being improperly excluded from school—he is suspended—and argued that unless he is excluded at the conclusion of the suspension, there is no basis for emergent relief. The District further argued discipline relative to other emergent relief factors.

The disciplinary issue was not transmitted to the OAL. Accordingly, the only issue is C.C.'s removal from school for home instruction pending an out-of-district placement. Parental consent must be obtained whenever an IEP is amended without a meeting pursuant to N.J.A.C. 6A:14-3.7(d). N.J.A.C. 6A:14-2.3(a)(8). An IEP may be amended without a meeting of the IEP team in several ways, including if the district board of education provides the parent a written proposal to amend a provision(s) of the IEP and, within 15 days from the date the written proposal is provided to the parent, the parent consents in writing to the proposed amendment. N.J.A.C. 6A:14-3.7(d)(2). Any such amendment must be incorporated in an amended IEP or an addendum to the IEP, and a copy of the amended IEP or addendum must be provided to the parent within 15 days of receipt of parental consent by the district board of education. N.J.A.C. 6A:14-3.7(d)(3). No such amendment occurred and pursuant to 34 C.F.R. § 300.518(a), except as provided in 34 C.F.R. § 300.533, during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under 34 C.F.R. § 300.507, unless the district board of education and parents agree otherwise, the child must remain in his or her current educational placement. In this regard, the court in Ringwood Bd. of Educ. v. K.H.J., 469 F. Supp. 2d 267, 269 (D.N.J. 2006) noted:

The IDEA, 20 U.S.C. §§ 1400- 85, gives parents of handicapped children the right to both an impartial due process hearing on complaints involving the educational placement of their child and to state or federal judicial review of the final administrative decisions. . . . Throughout the administrative and judicial proceedings, § 1415(e)(3), which is also known as the "stay put" provision, applies to the child's educational status. . . . The stay put rule addresses a

child's educational status during the pendency of disputes surrounding the child's program or placement. . . . Section 1415(e)(3) functions as an automatic preliminary injunction and may be substituted as an absolute rule in favor of the status quo for a court's "discretionary consideration of the factors of irreparable harm and either a likelihood of success on the merits or a fair ground for litigation and a balance of hardships." . . . If the stay put provision applies, "injunctive relief is available without the traditional showing of irreparable harm." . . . After a court ascertains the student's current educational placement, movants are entitled to an order without having to satisfy the unusual prerequisites to injunctive relief. (Citations omitted.)

Pursuant to N.J.A.C. 6A:14-2.7(s)(1), emergent relief may be requested according to N.J.A.C. 1:6A-12.1 and may be granted if the administrative law judge determines from the proofs that: (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 success on the merits of the underlying claim; and (iv) when the equities and interest of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted. See also, Crowe v. De Gioia, 90 N.J. 126 (1982). In order to prevail on an application for emergent relief, the applicant must meet all four prongs.

Inasmuch as there are procedural safeguards to prevent the same, unilateral removal of C.C. from his current educational program and placement is improper. Although the District argued discipline in relation to the emergent relief criteria, there is no dispute that this request for emergent relief relates solely to the District notifying the parents that C.C. was being removed from his in-District program and placed on home instruction effective February 1, 2023 pending an out-of-district placement. In this regard, the parents need not demonstrate a likelihood of success on the merits because stay put unequivocally provides that the District cannot unilaterally remove C.C. and place him on home instruction. I am not persuaded by the District's arguments that the January 31, 2023 letter must be read in conjunction with the February 1, 2023 letter. The February 1, 2023 letter does not reflect that it clarifies or rescinds the January 31, 2023 letter, and C.C. had already missed school on February 1, 2023, as a result of the January 31, 2023 letter—not as a result of any purported suspension. Likewise, the

District's arguments that C.C. is allowed to return to in-person instruction at school at the conclusion of his suspension are unavailing. The discipline and the removal from school for at-home instruction pending an out-of-district placement are two distinct issues, and while I do not doubt the District's representations through its attorney—after receipt of letters from petitioners' attorney alleging violations of due process rights—that C.C. will be allowed to return to school at the conclusion of the suspension, no letter was ever issued to the parents from the District to clarify or rescind its January 31, 2023 letter. Moreover, although the District also argued discipline in relation to the remaining emergent relief criteria, the request for emergent relief on the discipline is not before me and the District's arguments that when the equities and interests of the parties are balanced the District—for safety reasons—will suffer the greater harm if C.C. is returned to school are nevertheless not persuasive. The fact that the District has now expressed that C.C. will return to school upon the conclusion of the suspension effectively negates any such safety considerations. Additionally, I reject the District's argument that the request for emergent relief is not justiciable at this time because the student is on suspension and there can be no emergency unless/until he is excluded from school upon the conclusion of the suspension. This requires one to accept the District's argument that—despite what its January 31, 2023 letter very clearly states—C.C. was not actually placed on home instruction, but instead is merely suspended for ten days. To say that parents notified of a district board of education's intent to remove their child from his current program and placement—even if not until two weeks in the future—cannot request emergent relief until such time as the student is actually excluded is wholly without merit. Again, while I do not doubt the representations of the District's attorney that C.C. will now be allowed to return to school at the conclusion of the suspension—especially since state and federal law requires it—the parents were within their rights to file a request for emergent relief as there are no exhibits from the District filed with its letter brief evidencing that C.C. was in fact not being placed on home-instruction pending an out-of-district placement.

In view of the foregoing, is it hereby **ORDERED** that petitioner's request for emergent relief is **GRANTED**. Under the present circumstances, C.C. shall remain in his IEP-dictated placement pending a decision on the merits of the due process requests or other agreement by both parties.

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.



February 10, 2023

DATE

KELLY J. KIRK, ALJ

Date Received at Agency

Date Mailed to Parties:

db