



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION GRANTING

EMERGENT RELIEF

OAL DKT. NO. EDS 13771-23

AGENCY DKT. NO. 2024-36797

J.M. ON BEHALF OF J.M.,

Petitioner,

v.

EWING TOWNSHIP BOARD

OF EDUCATION,

Respondent.

Ruby Kish, Esq., for petitioner (Disability Rights of New Jersey, attorneys)

Robin S. Ballard, Esq., for respondent (Schenck, Price, Smith & King, LLP,
attorneys)

Record Closed: December 18, 2023

Decided: December 19, 2023

BEFORE **NICOLE T. MINUTOLI**, ALJ:

STATEMENT OF THE CASE

Petitioner, on behalf of J.M.,¹ seeks an emergent order against the Ewing Board of Education (Ewing BOE) returning J.M. to her general educational program at Ewing High School (Ewing HS), Ewing Township School District (District), pending the outcome of her due process hearing. Respondent Ewing BOE opposes this request claiming that petitioner is not entitled to the requested relief or, in the alternative, petitioner failed to meet the requirements for emergent relief. Respondent also contends that the request is procedurally deficient because petitioner failed to submit a supporting affidavit in accordance with N.J.A.C. 1:6A-12.1.

PROCEDURAL HISTORY

On November 28, 2023, petitioner filed a complaint for a due process hearing with the New Jersey Department of Education, Office of Special Education (OSE). On December 6, 2023, petitioner filed a request for emergent relief with the OSE. On December 12, 2023, the OSE transmitted the emergent request to the Office of Administrative Law (OAL), as an emergent, contested matter. N.J.S.A. 52:14B-1 to B-15; N.J.S.A. 52:14F-1 to F-23. Oral argument on the emergent request was held on December 18, 2023, and 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** as **FACTS**:

J.M. is a sixteen-year-old female who is eligible for special education (SE) and related services pursuant to the eligibility category of Emotional Regulation Impaired. She transferred into the District from the Trenton Public School District in 2020. During the school year 2020-2021, J.M. attended ninth grade virtually and in a hybrid manner due to COVID-19. During the school years 2021-2022 and 2022-2023, J.M. attended Ewing HS in person.

¹Because the petitioner's initials and the student's initials are the same, the petitioner, J.M., will be referred to as "petitioner" or "the petitioner," and the student will be referred to as J.M.

Pursuant to her September 28, 2023, individualized education program (IEP), J.M. received instruction in a general education (GE) class at Ewing HS. According to petitioner, J.M. benefitted from emotional and behavioral counseling as well as academic support offered at the school.

While at Ewing HS, during the 2021-2022 and 2022-2023 school years, J.M. committed numerous infractions for which discipline was imposed, including suspensions ranging from one day to ten days.

On October 13, 2023, J.M. was involved in a fight near Ewing HS after school hours. After the fight, she returned to Ewing HS and punched two outdoor light fixtures on the building, breaking them. The police were called to the scene but J.M. was not taken into custody and went home with petitioner.

Due to her actions on October 13, 2023, J.M. was suspended from school for four days starting Monday, October 16, 2023, through Thursday, October 19, 2023, and thereafter received home instruction pending an administrative hearing with the Superintendent of Schools.

On October 26, 2023, the CST conducted a manifestation determination review (MDR) with petitioner in attendance. Following review, the CST determined the incident on October 13, 2023, was not a manifestation of J.M.'s disability. Petitioner did not challenge the determination.

On October 30, 2023, the Ewing BOE convened for J.M.'s disciplinary hearing. J.M. was accused of inappropriate behavior and endangering the safety of both staff and students stemming from the October 13, 2023, incident. Both petitioner and J.M. were in attendance. The Ewing BOE reviewed statements made by petitioner, J.M., the Ewing HS principal, and the Superintendent, and examined J.M.'s prior behavior and disciplinary record while at Ewing HS. The Ewing BOE determined that J.M. committed the alleged actions on October 13, 2023, and as a result, extended her suspension to forty-five days, with home instruction continuing during that period. At the conclusion of forty-five days,

J.M. was to return to the Ewing BOE's alternative learning program (ALP) for the duration of the marking period.

The ALP program is an alternative to the GE program and only meets in the afternoon and evening hours at Ewing HS. It provides limited services, little social interaction, and separates J.M. from her peers.

On November 15, 2023, an IEP meeting was held. The IEP team recommended that home instruction continue through January 14, 2024, or until an appropriate out-of-school-district-placement could be secured for J.M., whichever came first. Petitioner did not agree with the IEP team's recommendation and filed for a due process hearing on November 28, 2023.

On December 4, 2023, J.M. began attending the ALP at Ewing HS.

LEGAL ANALYSIS AND CONCLUSION

N.J.A.C. 1:6A-12.1(a) provides that the affected parent(s), guardian, board, or public agency may apply in writing for emergency relief. An emergency 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 and, if an expert's opinion is included, the affidavit shall specify the expert's qualifications.

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.

Petitioner seeks relief under the third prong, arguing that the Ewing BOE modified J.M.'s IEP in violation of the "stay-put" provision of the Individuals with Disabilities in Education Act (IDEA). 20 U.S.C. 1415(j). Specifically, petitioner alleges that the Ewing BOE did not have the authority to place J.M. in the ALP after she completed her forty-five-day suspension on November 30, 2023, instead of returning J.M. to the GE classroom with her peers.

While usually a party requesting emergent relief must establish the factors set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), there is an exception: where a parent alleges that the district violated the "stay-put" provision. Ibid. To obtain emergent relief in that instance, the petitioner must demonstrate that the district implemented or proposed a fundamental change to the student's then-current educational placement. G.R. o/b/o M.B. v. Irvingtown Twp. Bd. of Educ., EDS 00986-15, 2015 WL 3962537, *1 (N.J. Adm. Feb. 5, 2015).

The relevant IDEA regulation and its counterpart in the New Jersey Administrative Code underscore that a child remains in his or her current educational placement "during the pendency of any administrative or judicial proceeding regarding a due process complaint." 34 C.F.R. § 300.518(a) (2016); N.J.A.C. 6A:14-2.7(u). The stay-put provision functions as an automatic preliminary injunction, one which dispenses with the customary need for a court to weigh the factors for emergent relief such as irreparable harm and likelihood of success on the merits. Drinker v. Colonial Sch. Dist., 78 F.3d 859,859 (3d Cir.1996). Stay-put maintains the status quo for the child while the dispute over the IEP remains unresolved. Ringwood Bd. of Educ. v. K.H.J., 469 F.Supp.2d 267, 270–71 (D.N.J. 2006).

In the present matter, as part of the Ewing BOE's imposed discipline, after the forty-five-day suspension, J.M. was transferred to the school's ALP, which is an interim alternative educational setting (IAES). While this IAES is located at Ewing HS, it is not part of the GE program. This transfer was a unilateral change in placement which

specifically violates the stay-put provision of the IDEA. Petitioner did not request nor accede to Ewing BOE's one-sided action. Because of this, I **CONCLUDE** that petitioner is entitled to an "automatic injunction" pursuant to 20 U.S.C. 1415(j).

Next, petitioner contends that the Ewing BOE did not have the authority to continue J.M's removal from Ewing HS for more than forty-five days. Petitioner argues that both the IDEA and New Jersey Administrative Code prohibit the removal of a student with disabilities from their placement for more than forty-five days and that any attempt to do so is a unilateral change in placement by the Ewing BOE.

For disciplinary reasons, school officials may remove a student with a disability from a current placement to an IAES, another setting, or suspension for up to ten consecutive or cumulative, school days in a school year. N.J.A.C. 6A:14-2.8(a). Such a suspension is subject to the same district board of education procedures as applicable to nondisabled students, unless the removal is for more than ten consecutive or ten cumulative school days. N.J.A.C. 6A:14-2.8(c)(1). Further, disciplinary action of a student with a disability must be consistent with the requirements of 20 U.S.C. § 1415(k): "[R]emoval 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." N.J.A.C. 6A:14-2.8(d).

The regulations are clear. When a student with a disability is removed from a current placement for more than ten cumulative or consecutive school days in any one school year, the board of education is required to provide services to the extent necessary to enable the student to progress appropriately in a GE curriculum and achieve her or his IEP goals. N.J.A.C. 6A:14-2.8(e). Further, when a removal constitutes a change of placement and it is determined that the behavior in question 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 a general curriculum and towards achieving the goals set out in the IEP. N.J.A.C. 6A:14-2.8(e).

In the present matter, there are two violations of the IDEA and New Jersey Administrative Code which must be considered separately. First, the Ewing BOE did not

have the authority to extend J.M.'s discipline past the forty-five-day suspension period which ended on November 30, 2023. Second, J.M.'s unilateral placement in ALP was also impermissible as a violation of the stay-put provision. As to the first, I **CONCLUDE** that J.M.'s discipline is limited to her forty-five-day suspension and that the Ewing BOE improperly and arbitrarily extended J.M.'s discipline. As to the second, I **CONCLUDE** that J.M.'s placement in ALP, which flowed from the Ewing BOE's improper extension of J.M.'s discipline, be terminated and that J.M. must be returned to Ewing HS's GE classroom pending the outcome of the due process hearing.²

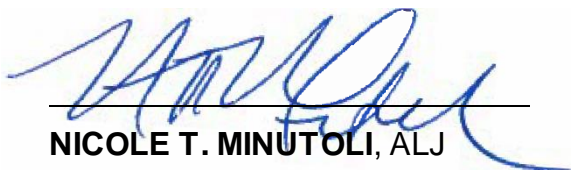
ORDER

For the above reasons, I hereby **ORDER** that the request of petitioner J.M. on behalf of minor child J.M. for emergent relief is **GRANTED** and I **ORDER** respondent Ewing BOE to return J.M. back to her program and placement at Ewing HS.

² Respondent incorrectly argues that emergent relief should be denied due to a procedural defect pursuant to N.J.A.C. 1:6A-12.1, for failing to submit a supporting affidavit. In her brief, petitioner states that all allegations and facts in support of her due process petition are incorporated herein and that portion of the file was not transmitted to me. The regulations anticipate the ability of a party to supplement its pleadings during the emergent relief hearing. N.J.A.C. 1:6A-12.1 (e). Therefore, considering petitioner's ability to supplement during the hearing, I find that there is no need to reject her emergent application.

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.

December 19, 2023
DATE



NICOLE T. MINUTOLI, ALJ

Date Received at Agency: December 19, 2023

Date Mailed to Parties: December 19, 2023

NTM/dw/mph