

**M.H.,**  
Petitioner,  
v.  
**EAST WINDSOR REGIONAL**  
**SCHOOL DISTRICT,**  
Respondent.

Decided: October 1, 1986

Approved for Publication by the Division of Special Education:  
December 8, 1986

**SYNOPSIS**

A 16 year old student, who had been classified as perceptually impaired, filed an application to return to his previously established course of study during the pendency of a dispute over his proper classification and placement.

The administrative law judge assigned to the case found that the student had been involved in a lunch room fight with an assistant principal. Subsequently, the student was re-evaluated as emotionally disturbed and his placement changed from mainstreamed classes with resource room instruction to a half-day, out-of-district school coupled with a half-day of vocational school.

The judge noted that *N.J.A.C. 1:6A-3.1(e)* establishes a "three-prong" test for the granting of emergency relief pending a decision. Under that test, a petitioner must show that: (1) the application has a reasonable probability of ultimately prevailing on the merits; (2) serious harm will result to the student, or the student's educational program will be seriously harmed if the relief is not granted; and, (3) the relief requested is narrowly defined and will not cause unreasonable expense or substantial inconvenience. The judge observed that while the first prong of the test, the "likelihood of success" element, might be the standard test for emergency relief, the "stay put" provision of special education law took precedence over it. Thus, if the grant of emergency relief would restore the status quo, it should be granted regardless of the outcome of the "likelihood of success" test.

Accordingly, the judge concluded that he need only determine if the "stay put" provision should be overridden because of legitimate concerns that restoring the student to his prior placement might result in a threat to safety.

Finding that the incident was an isolated one and one that was likely to occur with any student, the judge concluded that the Board's evidence was insufficient to permit a finding of possible danger. Thus, the student was returned to mainstream placement with resource room assistance pending the outcome of the matter.

---

**John Beranbaum**, Assistant Deputy Public Advocate, for petitioner (Alfred A. Slocum, Public Advocate, attorney)  
**David H. Coates, Esq.**, for respondent (Turp, Coates, Essl & Driggers, attorneys)

---

**MASIN, ALJ:**

M.H., a 16-year old student in the East Windsor Regional School District, represented by his parent E.H., filed an application for emergency relief with the Division of Special Education of the Department of Education on September 23, 1986, seeking an order directing that M. be permitted to return to his normal course of instruction at the Hightstown High School in the regular, mainstreamed classes supplemented by resource room instruction. Petitioner seeks this relief during the pendency of a dispute between the parties regarding the proper classification and placement of M. The matter was transmitted to the Office of Administrative Law for an emergency hearing and was received by the Office of Administrative Law on September 25, 1986. An emergency hearing was held on September 26, 1986, at the Office of Administrative Law.

The evidence presented by the parties establishes, without dispute, that M. had been attending Hightstown High School as an eleventh grade student during and up to May 14, 1986. He was classified at that time as Perceptually Impaired ("PI") and was attending regular, mainstreamed classes supplemented by resource room instruction.

The record further reflects that on May 14, 1986, M. was involved in a fight with Assistant Principal Robert Scott. The fight occurred in and around the lunch room area. At this point it is sufficient to note that as a result of the fight M., his older brother, and a third student, were suspended pending an expulsion hearing. The hearing was held on June 3, 1986 and the local board of education determined not to expel any of the students. M. was placed on Home Instruction for the remainder of the school year and was referred to the child

study team for an evaluation and a determination regarding his program and placement for the 1986-87 school year.<sup>1</sup>

On September 2, 1986, the child study team issued a report which changed M.'s classification to that of Emotionally Disturbed ("ED"). His placement was changed to a half-day, out-of-district school for ED students and a half-day vocational school program, the latter having been agreed upon by the Board, the H.'s, and the vocational school during the previous school year.

E.H. expressed her opposition to the proposed change in classification and placement at the September 2, 1986 child study team conference. The child study team took the position that M. would not be permitted to return to his regular school placement during the pendency of any proceedings concerning the classification and placement. Ms. H. then filed for a due process hearing to contest the change in classification and placement. M. has remained at home, receiving home instruction and attending vocational school, as previously arranged, for half a day.

#### *DISCUSSION*

In this emergency decision, it is not necessary to detail in any great degree the testimony received with respect to the fight which occurred on May 14, 1985 and which precipitated the chain of events leading to this emergency proceeding. It is sufficient to indicate that the fight began when Mr. Scott approached M. to determine what was the cause of a "problem" on the serving line. While the parties differ as to the exact details of what followed, it is clear from both versions that the incident degenerated into a situation where Scott made certain requests of M., who was less than prompt or cooperative in response to those requests, partly, according to M., because of the manner of expression which Scott purportedly displayed. Suffice it to say that physical contact eventually occurred. Mr. Scott agrees that he initiated physical contact when he reached out his arm towards M., who was walking away despite numerous requests to come back to Scott and discuss the matter (and some inappropriate language) and placed his fingers on the student's upper arm. At this point, according to Scott, M. turned and grabbed him with both hands on Scott's neck and began shaking him back and forth while pressing on the neck. According to the student, Scott initiated the physical

---

<sup>1</sup>Mr. Scott requested a transfer to another school for the 1986-87 school year and is not currently at the High School.

conduct when M. refused to sit down as directed by Scott because he believed that Scott was ordering him "like an animal" and was asking him in an inappropriate fashion. The touching, as described by the student, involved a grabbing at the collar of a jacket and an attempt to force the student down and then a pinning against the wall.

It is not necessary to dissect the incident as described by the parties.<sup>2</sup> Having examined their testimony, I found that each sincerely expressed his view of the incident and that in the case of M. he recognized that he had not acted in the most appropriate manner and that the situation could have been handled differently on his part in order to have avoided a confrontation.

It is the position of the petitioner that he is entitled to relief on an emergency basis in order to restore him to the status in which he was prior to his suspension, the status which was the last agreed upon educational placement, because of the "stay put" provisions of the Education of the Handicapped Act, 20 *U.S.C.S.* 1415(e)(3) and the New Jersey Administrative Code, *N.J.A.C.* 1:6A-5.4 and 6:28-2.1(h). The Federal statute, 20 *U.S.C.* 1415(e)(3) reads:

During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child . . . until all such proceedings have been completed.

It is the petitioner's position that until the question of his proper classification, that is the dispute concerning whether he has properly been reclassified as ED from PI, is resolved, the school board has no alternative but to maintain him in the previously agreed upon Individualized Educational Program ("IEP").

The school board argues that (1) given the serious nature of the May 14, 1986 incident, as well as another incident involving "in-subordination" which will be described below, the student's return to the regular school setting poses a serious danger of physical harm to students, faculty and to M. himself; and (2) that the petitioner's chances of succeeding in the ultimate dispute concerning placement are not sufficient to permit the grant of emergency relief under the normal provisions which govern when such relief may be obtained, the so called "three-pronged test" for emergency relief set forth in *N.J.A.C.* 1:6A-3.1(e).

---

<sup>2</sup>The incident grew to involve at least several other students. Scott was pushed to the floor and received bruises. No one was seriously injured.

The respondent does not dispute that in a case where the evidence establishes a serious risk of physical harm the “stay put” provision of the Federal and State statutes may be overridden and the child may be maintained in a temporary placement in order to protect those who may be subject to danger. However, the respondent argues that in this case the evidence does not support a finding that M. poses such a danger. In addition, with respect to the “three-pronged test,” while such may be the general test for emergency relief, the existence of the extremely strong policy mandated by the “stayput” provision overrides the general “reasonable probability of success” test and therefore, the likelihood of success on the merits is not an appropriate test as to whether the “stay put” provision should be enforced or not.

It is first appropriate to resolve the question concerning the relationship of the “stay put” provision and the “reasonable probability of success” prong of the standard emergency relief test. Generally it is necessary when considering a grant of emergency relief to consider whether there is any reasonable likelihood that the applicant for emergency relief has a chance of succeeding on the merits of his claim, so that emergency relief is not granted to effectuate something which will be likely undone at the time of plenary consideration. While this is the general rule, in the area of special education, I **FIND** that the Federal and State mandates, as expressed in the Education of the Handicapped Act and the New Jersey Administrative Code, demonstrate a specific direction in favor of the *status quo*; that is, the last agreed upon individualized educational program, which so to speak “tips the scale” in favor of granting emergency relief which will restore the *status quo*, regardless of whether the applicant seeking such a restoration is likely to be successful on the merits of his ultimate claim. The specific mandate of the “stay put” provision is, as the United States Supreme Court noted in *Burlington School Committee v. Massachusetts Department of Education*, 471 U.S. 359; 105 S.Ct. 1996, 2004 (1985), “located in a section detailing procedural safeguards which are largely for the benefit of the parents and the child.” Thus, in the determination for an application for emergency relief in the special education area, the Congress, the Legislature, and the administrative agency in carrying out the legislative mandate, have chosen to strongly favor one position, that is *status quo*, over the other proposed new classification/placement, and by doing so have in effect directed that the “likelihood of success” test not serve as the guide

post for determining if emergency relief should be granted. This direction has both procedural and substantive effects.<sup>3</sup>

I **CONCLUDE** that it would be inappropriate in the context of this emergency application to consider the likelihood of the petitioner succeeding in his challenge to the proposed ED classification and the proposed placement following therefrom. Thus, the determination of whether emergency relief should be granted must be limited to a consideration of whether the State provision should be overridden because of legitimate concerns that restoring M. to the high school may serve as a threat to the safety of students, faculty and M. himself.

Having considered the evidence concerning M.'s past school history, which I **FIND** contains no hint of violence toward teachers, students, or anyone else throughout his first two and three-quarter years in the high school, I **FIND** that the school board has failed to demonstrate any substantial evidence that M. poses a likely, or a probable, threat to the physical safety of anyone. While one cannot in any way condone M.'s conduct in his confrontation with Mr. Scott, and accepting, for the purposes of this proceeding, Mr. Scott's general version of the incident (although not discrediting M.'s version in all its particulars) I **FIND** that that one incident, isolated as it was, is an insufficient basis upon which to conclude that M. should be excluded from his normal and agreed upon placement on a continuing and indefinite basis pending the outcome of the current dispute concerning his reclassification. While the May 14 incident was, in and of itself, serious and could have lead to significant physical injury, there is no evidence from which one can find that that incident was other than an aberrational incident unlikely, at least on the evidence presented, to recur. Further, having listened to the testimony of M. and considered his past record, I **FIND** that M. has learned some lesson from the incident and that while one can never be certain, there

---

<sup>3</sup>Contrary to respondent's position *Burlington School Committee* does not support its contention that the "stay put" provision allows consideration of the "likelihood of success." The case deals with the right of parents to reimbursement for tuition in a private placement effectuated against Board wishes before a hearing but later found appropriate. The issue before the Court was an after-the-fact financial determination, not a before hearing right-to-maintain the *status quo*, emergency relief issue. There is no indication in the court's opinion as to whether the Board had sought such relief in the case, and Justice Rehnquist's opinion notes that such relief, against parents, might not have been available. 85 *L. Ed.* 2d 397.

appears little likelihood that he would let himself become so involved again.

As noted above, the school board presented evidence of an incident of "insubordination" which occurred in February or March 1986. This incident involved a dispute between a teacher and M. which occurred prior to a social studies field trip. As the buses were preparing to leave, the teacher requested that M. give her a whistle which he had been blowing. He would not give the whistle to her and she objected to the manner in which he was refusing. The teacher directed M. to go to the office of Assistant Principal Tilson Sills. Once he arrived there he spoke with Dr. Sills and called his mother at Sills' direction. He was returned to his classes as the field trip had left. According to Dr. Sills, there was no further problem that day.<sup>4</sup>

Having considered this incident, I **FIND** that it is the type of incident which is likely to occur with any student and that while it was unfortunate, it does not support the school board's position that the child poses a threat of physical harm. The incident was not of such a nature as to bolster the board's conclusion that the May 14 incident demonstrated that type of threat. The "whistle" incident did not involve any threat of physical violence or intimation of such activity.

Finally, it is important to note that although the school board was not permitted to present evidence to demonstrate that M. was unlikely to succeed on the merits with respect to the question of the propriety of his classification as ED, the board could have presented evidence from its expert witnesses, be they members of the child study team or not, in support of a contention that the child's alleged emotionally disturbed state rendered him a danger. The board presented no such evidence, relying only on the testimony of Mr. Scott and Dr. Sills to support its conclusion that such danger existed.

Having given careful consideration to the evidence presented, and to the serious concern of the school board for the safety of its students, employees and of M. himself, I **CONCLUDE** that the board's evidence is insufficient to permit a finding that the possibility of physical danger exists to such a point as to override the clear, direct and strong mandate of the Education of the Handicapped Act and

---

<sup>4</sup>Sills had no record of any other problems or incidents of violence or physically improper action on M.'s part. M.H. did acknowledge several detentions in high school for unrelated, non-violent conduct such as tardiness, failure to provide excuse notes, etc.

---

M.H. v. East Windsor School District

Cite as 9 *N.J.A.R.* 159

---

the State statute and regulations that the child “remain in the then current educational placement.”

For the reasons expressed, it is **ORDERED** that M. H. be forthwith permitted to attend classes at the Hightstown High School in accordance with such schedule as would be appropriate for one being educated as a mainstream student with resource room.

This decision is final, pursuant to 20 *U.S.C.S.* 1415(e) and 34 *C.F.R.* 300.509 and is appealable by filing a complaint and bringing a civil action either in the Superior Court of New Jersey or in a District Court of the United States. If either party feels that the decision is not being fully implemented, they should communicate their written concerns to the Director, Division of Special Education.

**You must check the New Jersey Citation Tracker in the companion loose-leaf volume to determine the history of this case in the New Jersey courts.**