State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION DENYING EMERGENT RELIEF
OAL DKT. NO. EDS 09280-2024
AGENCY DKT. NO. 2024-37845

S.L. ON BEHALF OF P.W.,
Petitioner,
v.
EWING TOWNSHIP BOARD OF EDUCATION AND MERCER COUNTY SPECIAL SERVICES SCHOOL DISTRICT, MERCER COUNTY,
Respondents.

Hillary D. Freeman, Esq. and **Sharyn Gallatin,** Esq., for petitioner (Freeman Law Offices, attorneys)

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

R. Taylor Ruilova, Esq., for respondent Mercer Special Services School District (Comegno Law Group, P.C., attorneys)

Record Closed: July 15, 2024 Decided: July 16, 2024

BEFORE **CARL V. BUCK III,** ALJ:

STATEMENT OF THE CASE

In a request for emergent relief, petitioner, S.L. on behalf of P.W., seek a "stay put" in program placement at the Joseph F. Cappello School (Cappello or School) pending the resolution of a due process action referenced to in this filing - but not yet filed by petitioner. Petitioner seeks reinstatement of P.W.'s placement in the Cappello school in accordance with; (1) the McKinney-Vento Act, and (2) the "stay put" provision of the IDEIA and N.J.A.C. 6A:14-1.1, et seq.

Respondents Ewing Township Board of Education, Mercer County (Ewing or BOE or District) and Mercer County Special Services School District (Mercer or MCSSSD) oppose this request on the grounds that:

1. petitioners have not satisfied the requirements for obtaining emergent relief; and

2. the "stay put" request of petitioner would result in continuation of the IEP of April 22, 2024 – not the IEP of October 2023.

PROCEDURAL HISTORY

Petitioner, on behalf of her minor child, P.W., seek an Order Granting Emergent Relief, pursuant to N.J.A.C. 1:6A-12.1(a), N.J.A.C. 6A:14-2.7(l) and 20 U.S.C. § 1415(k)(2) applying the doctrine of stay put and ordering the respondents, Mercer and Ewing to reinstate provision of full and complete educational services for P.W. at Cappello school (pending the resolution of a due process action) which services were modified through acceptance of an April 2024 IEP by P.W.'s father. This April 2024 IEP modified P.W.'s IEP to provide home instruction for P.W.

Respondents Mercer and Ewing filed opposition to the motion stating that petitioner has failed to establish the elements necessary to carry the burden of proof necessary for emergent relief to be granted.

The parent's petition was received by the State of New Jersey, Office of Special Education (OSEP) on June 28, 2024. OSEP forwarded the petition to the Office of

Administrative Law (OAL), where it was filed on or about July 2, 2024, as a contested case under OAL Docket No. EDS 09280-24. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The matter was assigned to me on July 11, 2024.

A hearing was conducted via the Zoom Video Communication platform on July 15, 2024, during which the parties made brief statements on the record while relying on their written submissions. The record closed on that date.

FACTUAL DISCUSSION AND FINDINGS

The following facts arise from testimony and submissions and form the basis for the below decision. Accordingly, I **FIND** the following as **FACTS:**

P.W. was born on September 20, 2017, and is classified as eligible for special education and related services under the category of Autism. He attended first grade in the 2023-2024 school year. On September 13, 2023, P.W. started attending Cappello in a special class for students with autism operated under the auspices of MCSSSD. An IEP was prepared to reflect this placement for P.W. on or about October 25, 2023. (P-A.) P.W.'s last day of attendance at Cappello was January 19, 2024. Cappello terminated P.W.'s placement by letter, dated March 9, 2024. (MCSSSD Exhibit 2.)

On January 22, 2024, the case manager at MCSSSD received an email from the parent stating there was a family emergency that required travel to Mississippi, and she was unsure when they would return. The email was not sent to Ewing and did not mention housing insecurity.

The District reached out to MCSSSD on January 29, 2024, and February 8, 2024, to see if P.W. had attended school. After being told both times that P.W. remained absent, P.W.'s case manager, Rachel Capuano (Capuano), reached out to petitioner and left a voicemail. The next day, Capuano was informed that petitioner had called MCSSSD to advise P.W. would be out of school another two weeks. Capuano again reached out to petitioner with no luck, leaving another voicemail for her.

On February 14, 2024, Ms. Capuano tried to reach both parents to discuss P.W.'s return date to the District and removal from the rolls. Neither parent answered or called back, nor did they respond to the follow-up email sent about this. Registration in Ewing also tried to reach the parents on February 15, 21 and 28, 2024, and left messages.

P.W. was absent from Cappello for over five consecutive weeks. According to petitioner, P.W. was with her in Mississippi at that time. On February 29, 2024, petitioner sent an email saying she had returned to Ewing and wanted to reenroll P.W. in school. On March 5, 2024, petitioner provided a letter from a landlord affirming that she resided in Ewing. (Ewing Exhibit 3.) The meeting was scheduled for March 7, 2024, but P.W.'s father advised he was unavailable that day, so the meeting was re-scheduled for March 8, 2024.

On March 8, 2024, a meeting was held with MCSSSD. The parties discussed the possibility of P.W. returning to Cappello once a new aide and classroom were assigned. Petitioner was asked to provide a copy of the restraining order she had obtained against P.W.'s father. MCSSSD informed petitioner that the full restraining order must be provided, however, petitioner did not do so. On March 9, 2024, MCSSSD sent Ewing a letter of termination for P.W.'s placement. (Ewing Exhibit 2.)

MCSSSD asked petitioner to provide a copy of the restraining order she had obtained against P.W.'s father and advised petitioner that the full restraining order must be provided. On March 19, 2024, petitioner reportedly provided a redacted temporary restraining order that said the father was not allowed at the residence in Ewing.

On March 27, 2024, Capuano and petitioner were informed again that Cappello lacked appropriate behavioral supports to meet P.W.'s needs and he would not be able to return. The next day, Ms. Capuano unsuccessfully tried to call petitioner. Ms. Capuano then notified petitioner by email that another placement needed to be located for P.W. and in the meantime home instruction would be provided to him.

Following spring break, on April 8, 2024, Ms. Capuano reached out to petitioner by phone again twice, as she had received no return call. On April 9, 2024, Capuano spoke with P.W.'s father. That same day, petitioner emailed Capuano to state she was housing

insecure and would be moving to another shelter that day. (Ewing Exhibit 4.) Petitioner further claimed that Ewing could not speak with P.W.'s father. Id. Petitioner provided a redacted temporary restraining order dated April 12, 2024, an incident that occurred on March 27, 2024. (Ewing Exhibit 5.) That order barred P.W.'s father from petitioner's residence, place of employment and from the children's schools, but it did not bar communication between the school and the father, nor did it terminate the father's rights. Rather, though the order granted petitioner temporary physical custody of the children, P.W.'s father was given parenting time weekly from Thursday at 7:00 p.m. to Sunday at 9:30 a.m. The order stated that petitioner was "temporarily relinquishing her right to the marital residence." Id.

P.W.'s father signed the amendment to P.W.'s IEP to provide for his placement to be changed to home instruction. The IEP was amended without a meeting on April 22, 2024, to memorialize the change in placement to home instruction for P.W. (Ewing Exhibit 1.) The father signed a release of records form allowing the District to pursue placement of P.W. at Burlington County Special Services School District.

On April 19, 2024, Capuano informed petitioner that home instruction could be conducted at the library or virtually, if she were concerned about revealing the location of her shelter for instructors to come to her to educate P.W. (Ewing Exhibit 6.)

Petitioner's position is that the change in placement under the April 2024 IEP required the signature of both parents. It was her intention not to sign the amendment thereby ignoring the change. Petitioner was unaware that P.W.'s father signed the modification for a period until P.W. became aware of the change while visiting his father. The law and regulations provide that a modification may be made to an IEP upon the signature of one parent. Therefore, I **FIND** that the placement described in the April 2024 IEP is the last agreed-upon placement for the purposes of stay-put.

LEGAL ANALYSIS AND CONCLUSIONS

N.J.A.C. 1:6A-12.1(a) provides that the affected parent may apply in writing for emergent relief. An emergent 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. Emergent relief shall only be requested for specific issues, including a break in the delivery of services and/or placement pending the outcome of due process proceedings. N.J.A.C. 6A:14-2.7(r). Here, petitioner has initiated due process proceedings to invoke "stay put" placement at the Cappello school per the October 2023 IEP and have requested emergent relief to obtain this "stay put" placement pending the outcome of those proceedings. Therefore, I **CONCLUDE** that petitioner has established that the issue in this matter concerns placement of P.W. pending the outcome of due process proceedings.

The standards for emergent relief are set forth in Crowe v. DeGoia, 90 N.J. 126 (1982), and are codified at N.J.A.C. 6A:3-1.6. The petitioner bears the burden of proving:

> 1. that the party seeking emergent relief will suffer irreparable harm if the requested relief is not granted;
>
> 2. the existence of a settled legal right underlying the petitioner's claim;
>
> 3. that the party seeking emergent relief has a likelihood of prevailing on the merits of the underlying claim; and
>
> 4. when the equities and the interests of the parties are balanced, the party seeking emergent relief will suffer greater harm than the respondent.
>
> [Crowe, 90 N.J. at 132-34.]

Irreparable Harm

To obtain emergent relief, petitioner must demonstrate more than a risk of irreparable harm to P.W. Petitioner must make a "clear showing of immediate irreparable injury," or a "presently existing actual threat; (an injunction) may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by common law." Cont'l. Group, Inc. v. Amoco Chems. Corp., 614 F. 2d 351, 359 (D.N.J. 1980).

Petitioner contends that irreparable harm is established because P.W. is not placed at the Cappello school where he has shown progress. Petitioner contends that the requested "stay put" will place him back at the Capello school for the 2023-2024 academic year.

The harm that petitioner describes is moot on at least two levels:

1. The 2023-2024 academic year is over. P.W. was not assigned an Extended School Year (ESY) program, therefore the academic year for him would have ended;

2. The claim that a "stay-put" would place P.W. back at Cappello is in error due to the existence of the April 2024 IEP.

Should petitioner prevail in the due process proceeding and prove that the requested "stay put" request is valid, appropriate relief, including compensatory education and a change in placement, will be available.

In light of the above, I **CONCLUDE** that the petitioner has not met the burden of establishing that P.W. will experience irreparable harm.

The Legal Right Is Settled

The second consideration is whether the legal right underlying petitioners' claim is settled. N.J.A.C. 6A:3-1.6(b)(2). Even though petitioner claims that P.W. has no current placement and no current IEP through the alleged disenrollment of March 8, 2024, he - in fact - has both. The stay-put provision in the federal Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1515(j), and its counterpart in the New Jersey Administrative Code, N.J.A.C. 6A:14-2.7(u), provide that no change shall be made to a student's educational placement "pending the outcome of a due process hearing," and function as an automatic preliminary injunction. Drinker v. Colonial Sch. Dist., 78 F.2d 859, 864 (3d Cir. 1996).

The District is obligated to educate P.W. in the LRE with a program that is individually tailored to his unique educational needs. Endrew F. v. Douglas County School Dist. RE-1,

137 S.Ct. 968, 999 (2017). The last agreed-upon placement for P.W. – whether or not mother acknowledges the veracity of the IEP - is that found in the April 2024 IEP, using at home instruction. To change this placement to one selected by the parent, on an emergent basis pending a full hearing on the adequacy of the placement to meet P.W.'s educational needs, runs counter to the purpose of stay-put.

Therefore, I **CONCLUDE** that petitioner does not have the legal right to change P.W.'s placement on an emergent basis.

Likelihood of Prevailing on the Merits

Petitioner claims that the April 2024 IEP is not effective as it was not agreed to by mother. Further, petitioner asserts that the IEL fails to provide P.W. with FAPE, and he must therefore be placed in an appropriate setting, that being at the Cappello school. Respondents contend that issues pertaining to staffing and support must be resolved to determine if Cappello has the ability to accommodate P.W.'s needs or, in the alternative, to plan for the 2024-2025 academic year.

The local district satisfies the requirement that a child with disabilities receive FAPE by providing personalized instruction with sufficient support services to permit that child to benefit educationally from instruction. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 203, 102 S. Ct. 3034, 3049, 73 L. Ed. 2d 690, 710 (1982). The IDEA does not require that the District maximize P.W.'s potential or provide him the best education possible. Rather, the IDEA requires a school district to provide a basic floor of opportunity. Carlisle Area Sch. v. Scott P., 62 F.3d 520, 533-34 (3rd Cir. 1995).

As described above, there are material facts in dispute and the petitioners have yet to submit educational expert support for an out-of-district placement. Prior to a full hearing, petitioners have not yet demonstrated a likelihood of prevailing on the merits of their claim.

Therefore, I **CONCLUDE** petitioners do not meet the third prong of the emergent relief standard.

The Petitioner Will Suffer Greater Harm Than the Respondent

The final prong of the above test is whether the equities and interests of the parties weigh in favor of granting the requested relief to P.W. Petitioner argues that P.W. will suffer greater harm if emergent relief is not granted, such harm being his inability to attend the Cappello school where he has made progress.

Although mother's point is well taken, the overriding factor is that the existing IEP to which "stay put" would inure, is the April 2022 IEP that calls for home instruction.

I **CONCLUDE** that the District would suffer greater harm if the requested relief was granted. Petitioner has not satisfied the four requirements for emergent relief.

Petitioner also challenges the disenrollment of P.W. as apposite to the dictates of the McKinney-Vento Act alleging that improperly disenrolling P.W. from his program at the Cappello school, "despite his homeless status and without adhering to the required procedures, have unjustly forced him into home instruction while awaiting placement in an alternative setting." The issue is moot and does not bear discussion as P.W. is **not disenrolled** in the District. He does not currently have placement at the Cappello school due to a variety of issues including, but not limited to:

1. Being absent in the spring semester for an undetermined period between five and six weeks;

2. Inefficiencies in submission of documents on P.W.'s return to the District;
3. Disregard of the March 8, 2024, notice of disenrollment by the District;

4. Determination of staffing and support levels at Cappello.

I **CONCLUDE** that the District and/or Mercer has not violated the McKinney-Vento Act and petitioner has not satisfied proof necessary for this requirement.

Further, an IEP meeting is scheduled for July 23, 2024, between petitioner and District that will hopefully address concerns of both parties.

ORDER

I **CONCLUDE** that petitioner's request for emergent relief does not satisfy the applicable requirements. For the reasons stated above, I hereby **ORDER** that petitioner's application for emergent relief for P.W. to utilize "stay put" and to be placed in in program placement at the Cappello school pursuant to the October 2023 IEP pending the resolution of a due process action referenced to in this filing while the due process proceeding is pending is hereby **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. § 1415(f)(1)(B)(i). If the parent 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.

July 16, 2024
DATE

CARL V. BUCK III, ALJ

Date Received at Agency:

Date Mailed to Parties:

CVB/tat

APPENDIX

EXHIBITS

Petitioner's Application for Emergent Relief

P-A – IEP, dated October 25, 2023

Respondent Ewing's Brief in Opposition to Petitioner's Request for Emergent Relief

1. IEP for P.W., dated April 22, 2024
2. Letter from MCSSSD, dated March 9, 2024
3. Letter from Kriegman & Smith, dated February 29, 2024
4. E-mail correspondence between petitioner and Ms. Capuano, dated April 9, 2024
5. Temporary Restraining Order, dated April 12, 2024
6. E-mail correspondence from Ms. Capuano to petitioner, dated April 19, 2024

Respondent Mercer's Brief in Opposition to Petitioner's Request for Emergent Relief

A. January 22, 2024, email from petitioner to MCSSSD re: unexpected travel due to family emergency
B. February 8, 2024, email from MCSSSD to petitioner and Ewing re: update on when P.W. would be returning to school
C. February 14, 2024, email from Ewing CST to petitioner re: potential truancy issues and disenrollment
D. February 29, 2024, email from petitioner to Ewing and MCSSSD re: returning and reenrolling P.W.
E. March 4, 2024, email from P.W.'s father to MCSSD and Ewing re: scheduling of March 8, 2024, meeting

F. February 29, 2024, email from Ewing to petitioner re: required proofs of residency
G. March 4, 2024, email from petitioner to Ewing and MCSSD re: proofs of residency
H. Partial temporary restraining order given by petitioner to MCSSSD
I. March 26, 2024, email from petitioner to MCSSD and Ewing re: following up on reenrollment
J. April 8, 2024, email from Ewing to MCSSD re: parent contact information
K. April 2024 Ewing Home Instruction IEP
L. May 3, 3024, email from petitioner to MCSSD, Ewing and other officials re: request to immediately enroll autistic child