

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION – EMERGENT

RELIEF

OAL DKT. NO. EDS 18458-17

AGENCY DKT. NO. 2018-27170

K.K. ON BEHALF OF A.W.,

Petitioner,

v.

GLOUCESTER CITY

BOARD OF EDUCATION,

Respondent.

AND

OAL DKT. NO. EDS 18460-17

AGENCY DKT. NO. 2018-27171

K.K. ON BEHALF OF R.M.,

Petitioner,

v.

GLOUCESTER CITY

BOARD OF EDUCATION,

Respondent.

Robert C. Thurston, Esq., for petitioner (Thurston Law Offices, LLC, attorneys)

Kayleen Egan, Esq., for respondent (Parker, McKay, P.A., attorneys)

Record Closed: December 22, 2017

Decided: December 22, 2017

BEFORE **LAURA SANDERS**, ACTING CHIEF ALJ:

STATEMENT OF THE CASE

Counsel for K.K.¹ filed a petition for emergent relief seeking continued placement at Gloucester City Junior-Senior High School for the foreseeable future pending the resolution of due process petitions for each child. A.W. is currently in tenth grade, R.M. in ninth. Although the due process petition for each seeks a revised Individualized Education Plan, reevaluation of the student, transportation services, compensatory education, and reimbursement, the emergent portion of the petitions are limited to the seeking of an order for stay-put in the Gloucester City school.

K.K.-M. contends that under the relevant portion of the federal Individual with Disabilities Education Act, 20 U.S.C. §§ et seq. the children are entitled to an order that the last approved Individualized Education Plan must be delivered at the Gloucester School. Respondent contends that petitioner cannot meet the standards for the granting of emergent relief on two grounds – lack of an emergency and inability to show a likelihood of winning on the merits because the IDEA stay-put provisions do not apply to physical locations, only programs.

PROCEDURAL HISTORY

By letter dated December 19, 2017, the Office of Special Education Policy and Procedure acknowledged receipt of the request for emergency relief and a due process hearing. The letter states that the request for due process hearing will follow the usual procedure, which requires participation in a resolution session; or, alternatively, the parties may agree to mediation or to waive the resolution session. The emergent

¹ The transmittal from Office of Special Education Policy and Procedure (OSEPP) identifies petitioner as K.K.; however, the judgment for Kinship Legal Guardianship identifies her as K.K.-M., as does the filing her counsel. Therefore, she is referred to throughout the order as K.K.-M.

request was transmitted to the Office of Administrative Law, where it was filed on December 19, 2017. It was heard on December 22, 2017, and the record closed.

FACTUAL DISCUSSION

Pursuant to a judgment dated May 16, 2017 from the Superior Court of New Jersey, K.K.-M. became the Kinship Legal Guardian for both children. (Pet. Petitioner.) The parties agree that she is employed by the Gloucester City Board of Education but personally resides in Laurel Springs, which is within the Blackhorse Pike Regional School District. By letter dated December 13, 2017, the Superintendent of Gloucester City Public Schools sent a preliminary notice of ineligibility to K.K.-M., directing that she withdraw the children from the district no later than December 22, 2017. She has requested a hearing on that determination, which is currently scheduled before the Gloucester City Board of Education on January 9, 2018. The children currently remain enrolled in the Gloucester City Board of Education schools.

Respondent points to the lengthy process to disenroll a student as evidence that there is no emergency. Specifically, it notes that after a hearing, the full Board must vote on the matter, and a written decision reflecting the Board's determination must be prepared. There is then a twenty-one day period in which the parent can appeal the determination to the Commissioner of the Department of Education. In general, rather than hear them directly, the Commissioner transmits contested cases to the OAL, where they are scheduled for a full de novo hearing. Following the hearing, the Administrative Law Judge is generally obliged to provide a full, written initial decision within forty-five days. In the event that ALJ cannot complete the decision within the initial period, the ALJ can seek one or more forty-five day extensions in which to produce the Initial Decision. The Commissioner then has forty-five days to adopt, modify, or reject the decision, and maybe seek a forty-five day extension if he or she cannot complete the final decision within the initial forty-five days. Pursuant to N.J.S.A. 18A:38-1(b)(2), the student cannot be disenrolled until a final determination by the Commissioner is released to the parties. Thus, respondent contends, that as a factual matter, there is no emergency because the children will remain in Gloucester schools

throughout that entire process, which will take a minimum of five months (one month before arriving at the OAL, a month to get to a hearing, a month and a half to produce an initial decision, plus another month and a half for the Commissioner to rule), which would be the end of May – a month before the end of the school year. It could take longer if the OAL has difficulty finding mutually agreeable hearing dates with the parties, and if either the OAL or the Commissioner needs an extension. Thus, the respondent contends, and I **FIND** as **FACT** based on the process for determining contested residency, that the children are likely to remain in the Gloucester City public schools until at least May, and possibly through the end of the current school year.

LEGAL ANALYSIS

Pursuant to N.J.A.C. 1:6A-12.1(e) and Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982), emergency relief may only 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.

Petitioner has the burden to establish that all four prongs are satisfied.

With regard to the first prong, petitioner argues that the New Jersey residency case is irrelevant because the children have a separate right to remain in the current

school under the IDEA. I **CONCLUDE** that it is not irrelevant because the effect of the residency case is to maintain the children in the present school for most, if not all, the remainder of the school year. Thus, there is no harm to denying the current relief, because the children are not under a present removal threat. Moreover, until a determination with regard to residency is made, it is not possible to know if they will ever, in actuality, face an order to transfer from school district to school district. As the first prong has not been satisfied, the rest have not been addressed.

ORDER

Because there is no current threat of imminent movement and therefore, no means of showing any harm to the children at all, the petition for emergent relief 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 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.

December 22, 2017

DATE

LAURA SANDERS, Acting Chief ALJ

Date Received at Agency

Date Mailed to Parties:

/cb