State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION ON EMERGENT RELIEF

OAL DKT. NO. EDS 02286-18

AGENCY DKT. NO. 2018 27521

R.C. and N.C. o/b/o M.C.,

Petitioners,

v.

COMMERCIAL TOWNSHIP BOARD OF EDUCATION,

Respondent.

Nina C. Peckman, Esq., for petitioners

Pamela Sachs, Assistant Deputy Public Defender, Law Guardian for petitioners (Joseph E. Krakora, attorney)

Jay D. Branderbit, Esq., for respondent (Kent/McBride, attorneys)

Tarabeth LeFurge, Deputy Attorney General, for Department of Children and Family, Division of Child Protection and Permanency (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: February 23, 2018 Decided: February 27, 2018

BEFORE **JOHN S. KENNEDY**, ALJ:

STATEMENT OF THE CASE

In this matter R.C. and N.C. (petitioners) bring an action for Emergent Relief against the Commercial Township Board of Education (respondent) on behalf of M.C., a resource child under the supervision of the Department of Children and Family's (DCF) Division of Child Protection and Permanency (CP&P), asserting that respondent has discontinued key therapies and petitioner is at risk medically. Respondent opposes the relief requested and asserts that the Petition asserts both Procedural and Substantive Due Process violations.

PROCEDURAL HISTORY

Petitioner filed a Verified Petition at the state Office of Special Education Programs (OSEP) on February 12, 2018. OSEP transmitted the matter to the Office of Administrative Law (OAL) on that date as a contested case seeking emergent relief for M.C. M.C. is currently being educated under an IEP, dated December 14, 2017, classified as Intellectually Disabled – Severe Intellectual Disability. The parties presented oral argument on the emergent relief on February 20, 2018, at the OAL offices in Atlantic City. The record was held open until February 23, 2018 to allow the parties to supplement the record.

FACTUAL DISCUSSION

Petitioner asserts that her foster son, M.C., who was born on October 21, 2009, was subjected to non-accidental brain trauma which resulted in traumatic brain damage and cortical damage. M.C. has been diagnosed with traumatic brain injury, seizure disorder, spastic quadriplegia, dysphagia status post gastrostomy tube, global developmental delay, status post bilateral pelvic osteotomy was performed in 2014, obstructive sleep apnea, status post tonsillectomy, adenoidectomy, and placement of tympanostomy tubes in October 2015.

M.C. has been a ward of the State through DCF residing much of his life at DCF's Regional School, Union Campus with intermittent stays at Children's Specialized

Hospital from the age of two months until November 2, 2017, when he was placed in the home of R.C. and N.C. as his resource parents. R.C. and N.C. were determined qualified by CP&P to receive M.C. into their home after approximately forty hours of training on the proper handling of M.C.

On November 17, 2017, respondent placed M.C. in a third grade self-contained multiple-disabled classroom within the Haleyville-Mauricetown Elementary School (HMS). M.C. attends HMS with personal 1:1 nursing staff provided by a Licensed Practical Nurse (LPN). An Individual Health Plan (IHP) was developed for M.C. on November 30, 2017, which included a seizure action plan and an asthma action plan. An IEP meeting was appropriately noticed for December 14, 2017, at which R.C. participated by telephone. R.C. dropped off the call after a disagreement with the discussion and did not participate in the remainder of the IEP. Respondent sent R.C. a notice, dated December 15, 2017, that that the IEP would take effect unless R.C. initiated a Resolution Session, Mediation or Due Process within fifteen days (Exhibit C attached to Certification of Jennifer Machinsky). R.C. sent an email to respondent requesting information as to how to initiate Due Process regarding the IEP on December 21, 2017 (Exhibit D attached to Certification of Jennifer Machinsky). On the same day, respondent sent an email back to R.C. referring her to the previously provided PRISE notice (Exhibit D attached to Certification of Jennifer Machinsky). On January 2, 2018 respondent received another email from R.C. advising that the foster parents were seeking counsel and were seeking an information session to discuss the IEP (Exhibit E attached to Certification of Jennifer Machinsky). Respondent sent a reply email the same day with an invitation to meet and discuss the IEP (Exhibit E attached to Certification of Jennifer Machinsky).

On January 8, 2018, R.C. contacted respondent by letter requesting Mediation (Exhibit F attached to Certification of Jennifer Machinsky). By letter dated January 17, 2018, respondent advised that they are not authorized to arrange mediation and again referred R.C. to the previously provided PRISE notice. In the January 17, 2018 correspondence, respondent invited R.C. to meet with the IEP team to discuss their concerns (Exhibit G attached to Certification of Jennifer Machinsky).

Petitioners assert that M.C. will suffer irreparable harm in his current placement because M.C.'s physical safety is at daily risk. One of his assigned LPNs contends that M.C. is not safe in the self-contained classroom as the other students are aggressive and have thrown furniture in the classroom and he has not received a modified physical education thus exposing M.C. to physical injury (Certification of Melissa Tamburro, LPN). Petitioners seek an out of district placement in order for M.C. to receive comparable services to those he had been receiving at his prior placement and pursuant to his previous IEP, dated August 22, 2017. These include coordination with medical staff, adequately trained staff, appropriate facilities and equipment and a placement with peers that do not pose a risk of physical injury.

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.

In this case, petitioners assert that there is an issue involving a break in the delivery of services. Respondents contend that M.C. is receiving all the appropriate services pursuant to the December 14, 2017 IEP. There is also an issue concerning placement pending the outcome of due process proceedings as the petition for due process seeks an out of district placement. Therefore, I **CONCLUDE** it has been established there exists an issue concerning placement 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 codified at N.J.A.C. 6A:3-1.6, one of the Department's regulations governing special education. These standards for emergent relief include irreparable harm if the relief is not granted, a settled legal right underlying a petitioner's claim, a likelihood that petitioner will prevail on the merits of the underlying claim and a balancing of the equities and interest that petitioner will suffer greater harm than respondent.

Petitioner bears the burden of satisfying all four prongs of this test. Crowe, supra, 90 N.J. at 132–34. First, there has been no showing of irreparable harm. While R.C. asserts that M.C. is in physical danger on a daily basis in his current placement, there has been no indication that M.C. has in any way been harmed or injured since his enrollment at HMS on November 17, 2017. In her certification, M.C.'s case manager confirms that there are no known heath issues and that M.C. is either progressing and/or not regressing as to the stated IEP goals in the current placement. As such, I **CONCLUDE** petitioner has been unable to meet the burden of establishing irreparable harm to M.C.

The next prong of the above test to be addressed is whether there is a settled legal right underlying petitioner's claim. It is well-settled law that a parent's failure to object to a proposed IEP within fifteen days of written notice of same results in the implementation of the proposed IEP by the District. See T.P. and P.P. ex rel. J.P. v. Bernards Twp. Bd. of Educ., EDS 6476-03, Final Decision (March 12, 2004), <http://njlaw.rutgers.edu/collections/oal/> (if petitioners were unclear or dissatisfied with some detail in the proposed IEP, they were obliged to express that and demand

modifications). Specifically, in Carlisle Area School v. Scott P. By and Through Bess P., 62 F.3d 520, 583, n.8 (3d Cir. 1995), the court held that:

> At the threshold, we note that this argument may have been waived. The parents apparently did not contest the appropriateness of the 1991–92 IEP at the time it was offered. . . . Because appropriateness is judged prospectively, we have declined the parents' invitation to play "Monday morning quarterback" by judging the 1991–92 IEP in hindsight. Although we do not construe the parents' failure to press their objections to the IEP when it was offered as a waiver, it casts significant doubt on their contention that the IEP was legally appropriate . . . .
>
> [Citation omitted.]

Similarly, in Fuhrmann ex rel. Fuhrmann v. East Hanover Board of Education, 993 F.2d 1031, 1040 (3d Cir. 1993), the Third Circuit explicitly held that "the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date."

Here, petitioners had legal right to reject the December 14, 2017, IEP within fifteen days of the meeting. See N.J.A.C. 6A:14-2.3(h)(3)(ii) (proposed IEP will be implemented after fifteen days unless the parent requests mediation or a due process hearing). Petitioners took no action to reject any aspect of the IEP within fifteen days. Although R.C. emailed respondent requesting information as to how to initiate Due Process regarding the IEP on December 21, 2017, respondent did not request mediation until January 8, 2018. Setting aside the argument that this request was procedurally deficient as it was sent to respondent and not to OSEP, the request for mediation was not made within fifteen days of the December 14, 2017 IEP. Thus, I **CONCLUDE** that petitioner has not established a settled legal right for the relief requested.

The next prong of the emergent relief analysis is whether there is a likelihood of success on the merits of petitioner's claim. As set forth above, the law regarding challenges to an IEP is clear that such challenges are to be made within fifteen days of written notice of the proposed IEP. Furthermore, it is disputed that M.C. is in physical

danger in his current placement. As a result, petitioner has not established a likelihood of success on the merits to overcome the test for emergent relief to be granted.

In a matter involving the application of stay put, petitioner is not required to meet the above test. Rather, the stay put acts as an automatic statutory injunction against any attempt to change a student's placement from that which is in effect at the time the parents invoke the dispute-resolution procedures embodied in state and federal law. Drinker by Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 (3d Cir. 1996).

The "stay put" provision of the Individuals with Disabilities Education Act (IDEA) provides in pertinent part:

> [D]uring the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents agree otherwise, the child shall remain in the then-current educational placement of the child.
>
> [20 U.S.C.A. § 1415(j).]

Furthermore, pursuant to the New Jersey Administrative Code, no changes are to be made to a child's classification, program or placement unless emergency relief is granted. N.J.A.C. 6A:14-2.7(u) specifically provides:

> Pending the outcome of a due process hearing, including an expedited due process hearing, or any administrative or judicial proceeding, no change shall be made to the student's classification, program or placement unless both parties agree, or emergency relief as part of a request for a due process hearing is granted by the Office of Administrative Law according to (m) above or as provided in 20 U.S.C. § 1415(k)4 as amended and supplemented.

The "stay put" provision acts as an automatic preliminary injunction, the overarching purpose of which is to prevent a school district from unilaterally changing a disabled student's placement. See Drinker, supra, 78 F.3d at 864. In terms of the applicable standard of review, the emergent-relief factors set forth in N.J.A.C. 6A:14-2.7(r)–(s), N.J.A.C. 1:6A-12.1, and Crowe v. DeGioia, 90 N.J. 126, 132–34 (1982), are

generally inapplicable to enforce the "stay-put" provision. As stated in Pardini v. Allegheny Intermediate Unit, 420 F.3d 181, 188 (3d Cir. 2005), "Congress has already balanced the competing harms as well as the competing equities."

In Drinker, the court explained:

> "[T]he [IDEA] substitutes an absolute rule in favor of the status quo for the court's discretionary consideration of the factors of irreparable harm and either a likelihood of success on the merits or a . . . balance of hardships."
>
> [Drinker, supra, 78 F.3d at 864 (citations omitted).]

In other words, if the "stay put" provision applies, injunctive relief is available without the traditional showing of irreparable harm. Ringwood Bd. of Educ. v. K.H.J. ex rel K.F.J., 469 F. Supp. 2d 267 (D.N.J. 2006). Under those circumstances, it becomes the duty of the court to ascertain and enforce the "then-current educational placement" of the handicapped student. Drinker, supra, 78 F.3d at 865.

The purpose of "stay put" is to maintain stability and continuity for the student. The first preference for interim placement is one agreed to by the parties. However, when the parties are unable to agree, the placement in effect when the due process request was made, i.e., the last uncontroverted placement or program, is the status quo. In this matter, M.C.'s current IEP places him the self-contained third grade multiple-disabled classroom within HMS. Petitioners argue that as a result of their objection to the December 14, 2017 IEP, M.C.'s current educational placement is that which is comparable to that articulated in the August 22, 2017 IEP. However, it is uncontroverted petitioner did not challenge the December 14, 2017 IEP within fifteen days. Therefore, I **CONCLUDE** that M.C.'s "current educational placement" is defined by the program outlined in his December 14, 2017 IEP. Having determined that M.C.'s "current educational placement" is defined by the program outlined in his December 14, 2017 IEP, I **CONCLUDE** that the IDEA's stay put provision requires M.C. to remain in that placement pending the outcome of the underlying due process petition. See, e.g., E.S. o/b/o J.S. v. Union Twp. Bd. of Educ., EDS 11355-07, Final Decision (Nov. 1, 2007) <http://njlaw.rutgers.edu/collections/oal/> (finding that stay put required the child

to remain in her stay put placement despite allegations that the child had not made any academic or social progress and had become extremely uncomfortable with some teachers and students at the school and that the child was refusing to attend the stay put placement.)

For the foregoing reasons, the petitioner has not demonstrated entitlement to emergent relief. The relief sought is therefore **DENIED**.

ORDER

Having concluded that the petitioner has not satisfied three of the four requirements for emergent relief, the petitioner's request for emergent relief is **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.

February 27, 2018
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: _____

Date Sent to Parties: _____

JSK/lam

APPENDIX

EXHIBITS

For Petitioner:

Brief, dated February 19, 2018 from Pamela Sachs, Esq.

Brief dated February 21, 2018 from Nina Peckman, Esq.

Certification of R.C., dated February 16, 2018

Certification of Melissa Tamburro, LPN, dated February 16, 2018

Correspondence from Marykatharine Nutini, DO, dated February 21, 2018

For Respondent:

Brief and exhibits, dated February 15, 2018

Supplemental letter brief and exhibits, dated February 19, 2018

Supplemental letter brief, dated February 21, 2018