



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

EMERGENT RELIEF

T. R. ON BEHALF OF L.A.,

Petitioner,

v.

**SALEM CITY BOARD OF EDUCATION
AND CAMDEN CITY BOARD OF
EDUCATION,**

Respondents.

OAL DKT. NO. EDS 16571-19

AGENCY DKT. NO. 2020-30944

T.R., petitioner, pro se

Michael A. Pattanite, Jr., Esq., for respondent, Salem City Board of Education
(Lenox, Socey, Formidoni, Giordano, Cooley, Lange & Casey, LLC,
attorneys)

Samantha L. Price, Esq., for respondent, Camden City Board of Education

Record Closed: December 2, 2019

Decided: December 3, 2019

BEFORE **SARAH G. CROWLEY**, ALJ:

STATEMENT OF THE CASE

Petitioner T.R., on behalf of minor child, L.A., seeks return of child to out-of-district placement, with transportation and compensatory education, by the Salem City Board of Education. The District responded that the child is no longer a resident of Salem City and is therefore not entitled to a free and appropriate education (FAPE) in the Salem City School District (Salem). The petitioner claims to have been evicted and currently homeless and residing temporarily with her sister in Camden City. Camden City Board of Education (Camden) maintains that until the child is enrolled in Camden City, they have no obligation to provide any services. The petitioner seeks an order for emergent relief requiring Salem to provide transportation to the last agreed upon IEP, which places L.A. at Creative Achievement Academy (Creative).

PROCEDURAL HISTORY

On November 25, 2019, petitioner filed an emergent pro se due process petition with the Office of Controversies and Disputes of the New Jersey Department of Education (Department). On November 25, 2019, the emergent matter was transmitted to the Office of Administrative Law (OAL). Opposition was filed by Camden and Salem on November 29, 2019. Oral argument was held on December 2, 2019. The attorneys for Camden and Salem were present and the petitioner appeared by telephone. The motion for emergent relief is now ripe for consideration. The record closed following the oral argument on December 2, 2019.

FACTUAL DISCUSSION

Most of the pertinent facts in this case are not in dispute. T.R. and her minor child L.A. lived within the Salem City District at the beginning of the 2019-2020 school year. The IEP dated April 25, 2019, placed L.A. at the Creative Achievement Academy in Vineland, New Jersey for the 2019-2020 school year. Sometime in the fall of 2019,

T.R. was evicted from their home in Salem City, and moved temporarily to a family/friend in Camden City, New Jersey.

The District terminated the student's placement at Creative due to non-attendance. The District maintains that they tried to reach out to T.R. and T.R. likewise claims to have made numerous calls to the district about her eviction and transportation of L.V. to Creative. During this time, the District prepared a new IEP with in-district services. However, it was never provided to, or agreed to by the parent. The District did concede that they were on notice that the family was no longer residing in Salem, as their truancy officer had gone to the home several times and there was mail piled up and no one living there.

Based on a review of the pleadings and the arguments presented by the parties, I **FIND** the following as **FACT**:

1. L.A. and his family were residing in Salem City prior to being evicted from their home on October 3, 2019.
2. The last agreed upon IEP for L.A. placed him at an out-of-district placement at Creative in Vineland, New Jersey.
3. Salem provided busing to and from the out-of-district placement.
4. The family is temporary residing with a family member in Camden City, New Jersey.
5. L.A. has not had any school services and has not been to school in over two months.

LEGAL ANALYSIS AND CONCLUSIONS

The regulations governing controversies and disputes before the Commissioner of Education provide that “[w]here the subject matter of the controversy is a particular course of action by a district board of education . . . the petitioner may include with the petition of appeal, a separate motion for emergent relief or a stay of that action pending the Commissioner's final decision in the contested case.” N.J.A.C. 6A:3-1.6(a). The regulations further provide that the Commissioner may “[t]ransmit the motion to the OAL for immediate hearing on the motion.” N.J.A.C. 6A:3-1.6(c)(3).

At such a hearing, the petitioner must show that he or she satisfies the following four standards:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying 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.

N.J.A.C. 6A:3-1.6(b); citing Crowe v. DeGioia, 90 N.J. 126 (1982). The petitioner must prove each of these standards by clear and convincing evidence. Garden State Equal. v. Dow, 216 N.J. 314, 320 (2013) (citation omitted).

I. Irreparable Harm

As the Supreme Court explained in Crowe, 90 N.J. 126, “[o]ne principle is that a preliminary injunction should not issue except when necessary to prevent irreparable harm.” Id. at 132 [citing Citizens Coach Co. v. Camden Horse R.R. Co., 29 N.J. Eq. 299, 303 (E. & A. 1878)]. Indeed, the purpose of emergent relief is to “prevent some

threatening, irreparable mischief, which should be averted until opportunity is afforded for a full and deliberate investigation of the case.” Ibid. [quoting Thompson ex rel. Bd. of Chosen Freeholders v. Paterson, 9 N.J. Eq. 624, 625 (Sup. Ct. 1854)].

The threshold standard for irreparable harm in education is showing that once something is lost, it cannot be regained. M.L. ex rel. S.L. v. Bd. of Educ. of Ewing, EDU 4949-09, Initial Decision (June 15, 2009), modified, Acting Comm’r (June 15, 2009), <http://njlaw.rutgers.edu/collections/oal/>. L.A. is a child entitled to special education services in Salem City, which was the last district of residence, prior to the family’s eviction. L.A. had received no education for the past two months, and I conclude that this is indeed, irreparable harm. He has no transportation, and the District unilaterally terminated his out-of-district placement. It is undisputed that Salem is the last district of residence and he is currently not being provided any education. Accordingly, I **CONCLUDE** that the harm to L.A. is irreparable.

II. Settled Legal Right

Next, emergent relief “should be withheld when the legal right underlying plaintiff’s claim is unsettled.” Crowe, 90 N.J. at 133 (citing Citizens Coach Co., 29 N.J. Eq. at 304–05). Here, the legal right underlying L.A.’s claim is settled, such that the McKinney-Vento Act and the New Jersey regulations governing the education of homeless children, provide that a local educational agency shall determine a homeless child’s district of enrollment in light of the child’s best interests and give a parent with notice of his right to appeal the agency’s enrollment decision, and also provide that, if a parent disputes the enrollment decision, the children shall be immediately enrolled in the District of the parent’s choice pending final resolution of the dispute. 42 U.S.C. § 11432(g)(3)(E); N.J.A.C. 6A:17-2.5.

The petitioner has demonstrated to the undersigned that she is homeless, and that Salem was the last district of residence. Accordingly, Salem has an obligation to provide a free and appropriate education to L.A. The last agreed upon IEP provides for the out-of-district placement at Creative, and thus, I **CONCLUDE**, that the legal right of

L.A. to be provided FAPE by Salem while he is homeless is a settled legal right. I therefore, that Salem is obligated to transport, or contract for L.A.'s transportation to Creative, and to re-enroll L.A. at Creative.

III. Likelihood of Success on the Merits

T.R. on behalf of L.A. has demonstrated that she is likely to succeed on the merits of his underlying claim. Under this emergent relief prong, “a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits.” Crowe, 90 N.J. at 133 [citing Ideal Laundry Co. v. Gugliemone, 107 N.J. Eq. 108, 115–16 (E. & A. 1930)]. This typically “involves a prediction of the probable outcome of the case’ based on each party’s initial proofs, usually limited to documents.” Brown v. City of Paterson, 424 N.J. Super. 176, 182–83 (App. Div. 2012) [quoting Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 397 (App. Div. 2006)].

New Jersey regulations provide that children are homeless when they stay in the home of relatives or friends, with whom they are temporarily residing because the family lacks a regular or permanent residence of its own. N.J.A.C. 6A:17-2.3(a)(3). Similarly, the McKinney-Vento Act describes homeless children as those “who lack a fixed, regular, and adequate nighttime residence . . .” including, “children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason [.]” 42 U.S.C. 11434a(2)(A), (B)(i). “Thus, an evaluation of ‘homelessness’ cannot rest upon a simple calculation of the amount of time that children have spent in a particular location or municipality. The reasons for the children's homelessness, their living conditions, and the resources and intentions of the parents or custodians are relevant.” M. O’K. and S.O’K. o/b/o K.O’K., A.O’K., and C.O’K. v. BOE of Borough of Cresskill, Bergen Cty. and BOE of Little Ferry, Bergen Cty., OAL Docket No. EDU 14830-13, Final Decision (Aug 12, 2014).

It is clear, and I have FOUND that L.A. and his mother were evicted from their Salem City home and moved to the Camden City out of necessity. They were homeless as defined by the regulations. See, N.J.A.C. 6A:17-2.2(a)(3). The District

has conceded that their truancy officer saw mail piled up and no one residing at the home. It is not necessary to resolve the issue of who contact who and when. The relevant fact is that L.A. is homeless and residing with relatives in Camden temporarily. Accordingly, the District of residence of L.A. is Salem, the District in which he resided prior to becoming homeless. N.J.S.A. 18A:7B-12(c). This designation did not change until L.A. and his family are “deemed domiciled in another jurisdiction, pursuant to N.J.S.A. 18A:38-1.d.” N.J.A.C. 6A:17-2.3(c). The date of homelessness as stated on the record by T.R. was October 3, 2019. At that time the family moved in with L.A.’s aunt in Camden City. Salem will remain the District of residence until they relocate, remain in Camden for one year or on October 3, 2020, or choose to enroll in Camden City School District. N.J.S.A. 18A:38-1(d).

IV. Balancing the Equities

The fourth and final emergent relief standard involves “the relative hardship to the parties in granting or denying relief.” Crowe, 90 N.J. at 134 [citing Isolantite Inc. v. United Elect. Radio & Mach. Workers, 130 N.J. Eq. 506, 515 (Ch. 1941), mod. on other grounds, 132 N.J. Eq. 613 (E. & A. 1942)]. There is no doubt that L.A. will suffer greater harm than the District, if the requested relief is not granted. L.A. has been out of school for two months, and the balancing of the equities requires that L.A. be re-enrolled and transported to school immediately.

ORDER

For the reasons set forth above, it is hereby **ORDERED** that T.R.’s request for emergent relief directing Salem to provide L.A. with transportation or contract with another District for such transportation to the last agreed upon placement at Creative Academy in Vineland is hereby **GRANTED**. It is also **ORDERED** that should L.A. miss five consecutive days without a doctor’s note, the out-of-district placement will cease, and petitioner will be required to register L.A. with the City of Camden if still residing there, or return to an in-district placement in Salem City. This final provision is based on

a showing by the District due to the high volume of unexcused absences by L.A. and the need to have T.R. make school attendance a priority for L.A.

This decision on application for emergency relief resolves all of the issues raised in the due process complaint; therefore, no further proceedings in this matter are necessary. This decision on application for emergency relief is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. § 1415(i)(2). 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 3, 2019

DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency:

Date Mailed to Parties:

SGC/cb

APPENDIX

EXHIBITS

For petitioner:

None

For respondent Salem City Board of Education:

RS-1 Letter brief supporting Salem's position and opposing the application

For respondent Camden City Board of Education:

RC-1 Letter brief supporting Camden's position and opposing the application