State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

EMERGENT RELIEF

OAL DKT. NO. EDS 12113-19

AGENCY DKT. NO. 2020-30371

M.V. and S.V. *o/b/o* C.V.,

Petitioner,

v.

MADISON BOROUGH BOARD OF EDUCATION,

Respondent.

Beth A. Callahan, Esq., for petitioners (Callahan & Fusco, attorneys)

Janelle Edwards Stewart, Esq**.,** for respondent (Porzio, Bromberg & Newman, attorneys)

Record Closed[1]: October 29, 2019 Decided: November 1, 2019

BEFORE **ERNEST M. BONGIOVANNI,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners filed a petition for Due Process with the Office of Special Education

[1] This matter is final with record closed only as to the Application for Emergent Relief. As set forth below, the due process petition remains at the OAL.
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Policy and Dispute Resolution (OSEPDR) in the New Jersey Department of Education (DOE). The contested matter was transferred to the Office of Administrative Law (OAL) on September 3, 2019. Petitioners made Application for Emergent Relief on October 11, 2019. Petitioners certification, exhibits and brief were submitted with the application. Owing to pre-existing travel plans of counsel for both parties, oral argument was rescheduled from October 21, 2019 to October 29, 2019. Respondent Madison Borough Board of Education (BOE) filed its response on October 28, 2019. Oral argument was held on October 29, 2019. The parties agreed that there would be no change in position of the parties until after this Final Decision on Emergent Relief, contemplated for no later than November 1, 2019, was issued.

Although the initial moving papers sought additional relief, including the enforcement of an Order previously issued Administrative Law Judge Tiscornia on an earlier Due Process petition and hearing, petitioner conceded at oral argument that petitioners now seek only an Order that placement of five-year-old C.V. remain through SEARCH Learning Group (SEARCH) and accordingly that respondent continues funding the placement. Respondent agrees that this is the issue to be decided on an emergent basis. Respondent proposes changing C.V.'s placement to the District school.

FACTUAL BACKGROUND

After hearings were held on an earlier due process petition, OAL Docket No. 09024-17, Administrative Law Judge Tiscornia issued a Final Decision which determined the District had failed to provide a Free and Appropriate Public Education (FAPE) to C.V. by failing to implement an Individualized Education Plan (IEP). Because of this determination, he ordered that the unilateral placement by C.V.'s parents through SEARCH was the appropriate placement, that the respondent reimburse petitioners for the cost of said placement from May 17, 2017 and for transportation to and from SEARCH. He ordered that, going forward, placement continue through SEARCH or with a State-approved school for children with Autism.

LEGAL ANALYSIS AND CONCLUSION

Petitioners contend that in the time following Judge Tiscornia's Order respondent has failed to provide a proper IEP, meaning one that includes the approved placement through SEARCH or with a State-approved school for children with Autism; instead the respondent has offered special education services at the District's public school for elementary education. This contention that the current IEP does not provide for placement through SEARCH nor at a State-approved school for Autism is not disputed by respondent. Petitioners seek an order that, pursuant to the Stay Put doctrine, pending the outcome of the current Due Process petition, C.V. continue his current placement through SEARCH during the school year commencing July 1, 2019, with continued funding by respondent.

Respondent does not dispute petitioner's contention contention that the current IEP does not provide for placement through SEARCH nor at a State-approved school for Autism. Respondent counters that the placement through SEARCH was based on evaluations of C.V. completed three years ago and that a current evaluation of C.V. shows that the now five-year old is regressing, in that she is less highly functioning than she was three years ago. The BOE posits this is because C.V.'s educational experience is limited to peers that are all severely autistic. The BOE argues that the District's special education services have advanced significantly since C.V. was placed through SEARCH. It also argues that the petitioners have failed to meet the four-prong test of Crowe v. Di Gioa, 90 N.J. 126 (1982), that petitioners voluntarily and unilaterally placed C.V. through SEARCH. Accordingly, petitioners cannot argue irreparable harm if relief is not granted, and respondent is not required by an Emergent order to continue funding private school placement at over $100,000 a year, because they created their own emergency by placing the child there rather than working with the District to develop an IEP which would show placement within the District school is now appropriate. Finally, they argue that even if the parents have met all four prongs of Crowe, a special circumstance, namely C.V.'s regression while placed through SEARCH, makes continuation of Stay Put inappropriate at this time. They note that they have provided expert proof that C.V. is

regressing and that the parents have provided no expert documentary evidence to counter their proofs, nor any counter evidence to the more current evaluations of C.V.

Petitioners contend that all of respondent's arguments and proofs are only proper at a final hearing on the merits of the due process hearing. Until then, Stay Put requires no interruption in the current services being provided to C.V.

LEGAL ANALYSIS AND CONCLUSION

In this case, it is unnecessary for me to consider whether the criteria set forth in Crowe have been satisfied in granting emergent relief. When the emergent-relief request effectively seeks a "stay-put" preventing the school district from making a change in placement from an agreed-upon IEP, the proper standard for relief is the "stay-put" provision under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, et seq. Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 (3d Cir. 1996) (citing Zvi D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982)).

It is not seriously contested that this matter is not controlled by 20 U.S.C. 1415(j), otherwise known as the "stay-put" provision of the IDEA. The statute states in pertinent part:

> . . . during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child . . .
> .

That provision and its counterpart in the New Jersey Administrative Code require that a child remain in his or her current educational placement "during the pendency of any administrative or judicial proceeding regarding a due process complaint." When a school district proposes a change in the placement of a student, it must provide notice to the parent or guardian, who may in turn request mediation or a due process hearing to resolve any resulting disagreements. N.J.A.C. 6A:14-2.3, 2.6 and 2.7. Once a parent timely requests mediation or due process, the proposed action by the school district cannot be implemented pending the outcome. Once the "stay-put" provision of

the IDEA, 20 U.S.C. 1415(j), and its New Jersey counterparts, N.J.A.C. 6A:14-2.6(d) and 2.7(u), are invoked, and unless the parties agree, no change shall be made to the student's classification, program or placement. 34 C.F.R. § 300.518(a); N.J.A.C. 6A:14-2.7(u).

The stay-put provision of law operate as an automatic preliminary injunction. It assures stability and consistency in the student's education by preserving the status quo of the student's current educational placement until the proceedings under the IDEA are finalized. IDEA's stay-put requirement evinces Congress' policy choice that handicapped children stay in their current educational placement until the dispute over their placement is resolved, and that once a court determines the current placement, petitioners are entitled to an order "without satisfaction of the usual prerequisites to injunctive relief." Drinker by Drinker v. Colonial School Dist., 78 F.3d 859, 864-65 (3d Cir. 1996).

Petitioners' claim that C.V. will be terminated for her current private school services by November 1, 2019 at her current private schools when current funding by respondent ends, was not seriously disputed by respondent and was supported by a certification by an appropriate officer of SEARCH. In sum, respondents cannot reasonably claim that the Petitioner here seeks more than what stay-put provides, just as they cannot reasonably posit that C.V. will be allowed to remain placed through SEARCH without the respondent funding it. As respondents do not contend that petitioners have failed to invoke stay-put, nor that the petitioners changed or agreed to change the current ordered placement, petitioners are entitled to maintain the current placement during the pendency of these proceedings and until such time as the placement is changed by agreement or order.

ORDER

I **ORDER** that placement through SEARCH is the stay-put placement for C.V. The emergent relief application, in seeking the continuation of this placement with continued funding by respondent, pending a final due process hearing, is **GRANTED**.

The order on application for emergency relief shall remain in effect until issuance of the decision in this matter. The parties will be notified of the scheduled hearing dates. 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.

November 1, 2019

DATE

ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency 11/1/19

Date Mailed to Parties:

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