



***State of New Jersey***  
OFFICE OF ADMINISTRATIVE LAW

**FINAL DECISION**

**EMERGENT RELIEF**

OAL DKT. NO. EDS 00677-21

AGY REF NO. 2021-32401

**S.S. ON BEHALF OF C.S.,**

Petitioners,

v.

**VERONA BOROUGH BOARD OF EDUCATION,**

Respondents,

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**Robyn Wapner, Esq.,** for Petitioners

**Gabrielle A. Pettineo, Esq.,** for Respondents (Kenney, Gross, Krovats & Parton,  
attorneys)

Record Closed: January 28, 2021

Decided: January 28, 2021

BEFORE **THOMAS R. BETANCOURT, ALJ:**

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

Petitioner filed a Request for Emergent Relief with the Office of Special Education Policy and Procedure (OSEP) in the New Jersey Department of Education (DOE). The contested matter was transferred to the Office of Administrative Law (OAL),

pursuant to N.J.A.C. 1:6A-12.1, where it was filed on January 22, 2021, to be heard on an emergent basis.

Petitioner seeks a determination on behalf of the student that the current Individualized Education Program (IEP) is the stay put placement and program.

Oral argument on the request for emergent relief was heard on January 28, 2021.

### **FACTUAL BACKGROUND**

C.S. is a seven year old first grade student in the Respondent District. He is eligible to receive special education and related services under the category "autistic". C.S. has an IEP, which covers the time period from May 20, 2020 to May 19, 2021.

A fair reading of the IEP contemplates in school learning. However, the IEP is dated May 20, 2020, during the COVID-19 pandemic. No one was attending school in person at the time the IEP was adopted. All learning was remote. S.S. advocated for her son for some sort of accommodation.

Currently, C.S. attends school in person on Monday and Tuesday. On Wednesday he alternates between in person and remote livestream instruction. On Thursday and Friday he attends school remotely via livestream without the support of a shared aide. He is in a general education class.

The IEP provides, among other things, that C.S. receive the support of a shared aide 375 minutes daily, for a total of 1,875 minutes per week. The IEP also provides for the following modifications: adjust number of items student is expected to complete; allow extra time for task completion; use of a consistent daily routine; break down tasks into manageable units; frequently check for understanding; simplify task directions; allow for repetition and/or clarification of direction, as needed; provide multi-sensory instruction; preferential seating; stand in proximity to student to focus attention; provide short breaks when refocusing is needed; refocusing and redirection; provide

opportunities for peer interaction; provide positive reinforcement; modify homework, as needed; provide visual models of completed tasks when possible.

The District is in Stage 3 of its School Reopening Plan due to the COVID-19 pandemic. C.S.'s weekly schedule is pursuant to this.

Due to the COVID-19 pandemic the District is not able to provide fully the services set forth in the IEP.

The District argues to the contrary: that the services set forth in the IEP are being provided; and, that the IEP has no requirement that those services be provided in person while C.S. is in school.

A fair reading of the IEP indicates that it is to be implemented in person and in school. While that may not have been possible at the time it was adopted, as all learning was remote, it is possible now.

Current cohort sizes are 12 students. If C.S. were added so that he could attend school five days per week there would be 13 students in the cohort. The Board argues that this would violate social distancing guidelines but offered no evidence as to why.

I find as fact that the IEP is the stay put and that it is not being implemented as written.

### **LEGAL ANALYSIS AND CONCLUSION**

Initially, it must be determined if petitioners are entitled to request emergent relief.

A party may only request emergent relief for the following reasons, in accordance with N.J.A.C. 6A:14-2.7(r)1:

- i. Issues involving a break in the delivery of services;
- ii. Issues involving disciplinary action, including manifestation determinations and determinations of interim alternate education settings;
- iii. Issues concerning placement pending outcome of due process proceedings; and
- iv. Issues involving graduation or participation in graduation ceremonies.

The District, in their brief, take the position that Petitioners are not entitled to seek emergent relief in the instant matter. The District further maintains that services pursuant to the IEP are being delivered. Accordingly, they argue there is no issue involving a break in the delivery of services. The Districts posits that the IEP does not set forth that the services required thereunder must be provided in person at the school.

Petitioner argues the contrary. Petitioner maintains that services are indeed interrupted due to the ongoing COVID-19 pandemic.

While the litigants herein may differ as to whether or not services pursuant to the IEP are being delivered, it is certain that the within request for emergent relief centers around non-delivery of services. Accordingly, Petitioner is entitled to seek emergent relief.

Specifically, Petitioner is seeking stay put and maintaining that the current IEP is the stay put. As this matter revolves around stay put, the elements of Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982) (enumerating the factors later codified at N.J.A.C. 6A:14.2-7(s)1) need not be analyzed.

The question that requires resolution herein is not whether the May 20, 2020, IEP is the stay put, but whether the services set forth therein are disrupted and should be enforced.

I find that the IEP is not being implemented as written and that there is a break in the delivery of services.

The IDEA is designed to assure that every disabled student between the ages of three and twenty-one may access within his school district of residence a free appropriate public education that is tailored to his specific needs. 20 U.S.C.A. §§ 1400(c), 1412(a), 1413. In New Jersey, the State Board of Education has promulgated rules in accordance with the standards set forth in the IDEA. N.J.A.C. 6A:14-1.1(b)(1); N.J.A.C. 6A:14-1.1 to -10.2.

Under those rules, a parent or adult student may request a due process hearing before an administrative law judge (ALJ) to resolve disputes “regarding identification, evaluation, reevaluation, classification, educational placement, the provision of a free, appropriate public education, or disciplinary action.” N.J.A.C. 6A:14-2.6(a); N.J.A.C. 6A:14-2.7(a). A parent or adult student may also seek emergent relief for “[i]ssues concerning placement pending the outcome of due process proceedings.” N.J.A.C. 6A:14-2.7(r); N.J.A.C. 1:6A-12.1.

Generally, no change shall be made to the student’s program or placement pending the outcome of a due process hearing. N.J.A.C. 6A:14-2.6(d)(10); N.J.A.C. 6A:14-2.7(u); see also 20 U.S.C.A. § 1415(j). The “stay-put” provision “acts as an automatic preliminary injunction” and “protects the status quo of a child’s educational placement while a parent challenges a proposed change to, or elimination of, services.” Drinker by Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 (3d Cir. 1996) (discussing the federal analogue to New Jersey’s stay-put provisions) (citation omitted); C.H. v. Cape Henlopen Sch. Dist., 606 F.3d 59, 71-72 (3d Cir. 2010).

In the instant matter the IEP was adopted during the COVID-19 pandemic and could not possibly be implemented as written. At the time, May 20, 2020, there was no in person attendance at school. However, I do not perceive any COVID-19 exception to stay put. The IEP says what it says. It is entirely silent on how it is to be implemented in a pandemic; and stay put dictates that it be implemented as written.

In lieu of the pandemic, however, certainly there are areas that can be explored with some imagination so as to accommodate the spirit, if not the exact written requirements, of the IEP. Perhaps the parties can reach an accommodation regarding how to implement the IEP during the ongoing pandemic.

I **CONCLUDE** that the IEP dated May 20, 2020 is the stay put in the instant matter, and that the District is not providing the services therein stated; and that the Petitioner's request for emergent relief be **GRANTED**.

**ORDER**

It is hereby **ORDERED** that petitioner's request for emergent relief is **GRANTED**;  
and

It is further **ORDERED** that the IEP of May 20, 2020 is the stay put and be implemented as written pending the outcome of the due process petition.

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.

A rectangular box containing a handwritten signature in cursive script, which appears to read "Thomas A. Blum".

January 28, 2021 \_\_\_\_\_

DATE

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**THOMAS R. BETANCOURT, ALJ**

Date Received at Agency

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Date Mailed to Parties:

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**APPENDIX**

List of Moving Papers

For Petitioner:

Memorandum of Law in Support of Request for Emergent Relief – Stay Put

Certification of S.S. in Support of Request for Emergent Relief

Reply letter brief

Supplemental Certification of S.S. in Support of Request for Emergent Relief

with

Exhibit A

For Respondent:

Letter brief in opposition to request for emergent relief with Exhibit A

Certification of Frank Mauriello

Witnesses

S.S., Petitioner