State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
EMERGENT RELIEF
OAL DKT. NO. EDS-00495-21
AGENCY DKT.NO. 2021-32431

M.D. ON BEHALF OF R.B.,
Petitioners,
v.
EAST ORANGE BOARD OF EDUCATION,
Respondent.

_____

M.D. pro se, for petitioner

Carolyn Chaundry, Esq., for respondent (Scarinci Hollenbeck, LLC, attorneys)

Record Closed: January 26, 2021 Decided: January 27, 2021

BEFORE: **DANIELLE PASQUALE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, M.D. on behalf of R.B., filed a Request for Emergent Relief seeking an immediate provision of in-person instruction at an appropriate out-of-district placement. To that end, I reviewed the file, petition and supporting documentation in support of the emergent application and opposition to same, conducted a telephonic conference on

January 22, 2021 to attempt resolution and heard oral argument via Zoom on January 26, 2021.

STATEMENT OF FACTS

Petitioner "R.B." is a six (6) year old boy who is classified under the Individuals with Disabilities Education Act "IDEA" as Autistic with Attention Deficit Hyperactivity Disorder "ADHD". As a result of his classification he has been found eligible to receive special education and related services under the IDEA starting around two-years-old when he received Early Intervention Services. When he was participating in person at school prior to the COVID-19 crisis M.D. says that he was happy at his in-district Autistic class at Bowser Elementary School and doing well.

It is undisputed that R.B. was placed in an in-district Autism class. There is disagreement, however about whether M.D. disenrolled R.B. from his current autism class at Bowser and now is in the Dionne Warwick Institute (Dionne Warwick) as a result. I will not discuss this at length because it is undisputed that now he is in district and thus the stay-put is an in- district autism class currently virtual. All of East Orange at the moment is virtual as are any out-of-district placements. Please note, no out-of-district placements were offered by Petitioner as a viable in-person option even if I could make the determination that there was an emergent reason to place R.B. there at this time. There was a discussion about an after-care YMCA program but was not an approved out-of-district placement.

Both parties agree that the District made attempts to provide a Chromebook to enable virtual learning at the beginning of the COVID crisis, but there is no substantial disagreement about whether mom thwarted said attempts or whether the District made an effort to assist Petitioner with internet set up and operation of the Chromebook. The disagreement is also over whether there was a disenrollment in the past and what appears to be a communication break down between mom and The District. I **FIND** that R.B. is still enrolled in East Orange but is now part of a different autism class (virtual of course during the COVID-19 pandemic while in-person instruction is disallowed). The District also noted that there are no out-of-district in person placements available for R.B.

right now assuming they agreed they could not provide FAPE (Free Appropriate Public Education) to R.B. which is not the District's contention.

In short, Petitioner contends that the District needs to provide immediate out-of-district in-person instruction and now seeks that on an emergent basis. It is also my understanding that the Chromebook, operation instructions/training, a mouse and an internet connection for same will be made available for Petitioner to pick up as early as Thursday, January 28, 2021 so that R.B. can at least attempt virtual instruction. It is undisputed that R.B. has not participated in virtual learning at all since it began. M.D. is understandably frustrated and I **FIND** the school is willing and able to get her the equipment she needs to help R.B. including something called "MiFi" that comes along with the Chromebook for internet access which will help since there are other children in the house using a hotspot for their virtual educations.

It should be noted that I have reviewed all corresponding certifications and documentation from both sides in this matter and discussed the matter at length both telephonically and virtually over Zoom in an attempt to resolve same, prior to having a formal Zoom oral argument and authoring this Final Decision.

LEGAL ANALYSIS

This tribunal and both parties understand that my determination is 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 . . .

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. 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 placement.

The "stay put" provisions of law operate as an automatic preliminary injunction. 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). In accordance with 20 U.S.C. 1415(j), I **CONCLUDE** that R.B. should start his in-district virtual instruction with his new teacher at Dionne Warwick as that is the stay-put. I **FURTHER CONCLUDE** that the Petitioner must cooperate with the District to pick up the appropriate technology this week to enable virtual instruction to start during the closure, and then to be in-person when the District opens (projected for March 1, 2021), in his current placement. As far as the allegation of disenrollment prior to the date of this matter; it is unnecessary to reach the issue in terms of this emergent application as it has been established that the current "stay-put" is an in-district autism class at Dionne Warwick.

The free appropriate public education required for disabled children must include related services when necessary. 20 U.S.C. 1401(9); 34 C.F.R. 300.34(a); N.J.A.C. 6A:14-1.1(b)(3), (d). Related services means:

> [T]ransportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and

> evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.
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> [20 U.S.C. § 1401(26)(A). See 34 C.F.R. § 300.34(a); N.J.A.C. 6A:14-3.9.]

In accordance with N.J.A.C. 1:1-12.6, emergency relief may be granted "where authorized by law and where irreparable harm will result without an expedited decision granting or prohibiting some action or relief connected with a contested case . . . ." My determination in this matter is further governed by the standard for emergent relief set forth by our Supreme Court in Crowe v. DeGioia, 90 N.J. 126 (1982), as follows:

Pursuant to N.J.A.C. 1:6A-12.1(e) and N.J.A.C. 6A:14-2.7(s)(1), emergency relief may be granted if the judge determines from the proofs that:

> i. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> ii. The legal right underlying the petitioner's claim is settled;
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> iii. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> iv. 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.

The relevant IDEA regulation and its counterpart in the New Jersey Administrative Code reinforce 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." 34 C.F.R. § 300.518(a) (2016); N.J.A.C. 6A:14-2.7(u). The stay-put provision functions as an automatic preliminary injunction which dispenses with the need for a court to weigh the factors for emergent relief such as irreparable harm and likelihood of success on the merits, and removes the court's discretion regarding whether an injunction should be

ordered. Drinker, 78 F.3d 859. Its purpose is to maintain the status quo for the child while the dispute over the IEP remains unresolved. Ringwood Bd. of Educ. v. K.H.J., 469 F.Supp.2d 267, 270–71 (D.N.J. 2006).

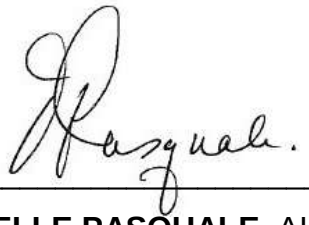
Regardless of the stay put, I will explore and examine the factors required for Petitioner to prevail in this matter. In this case, the Petitioner cannot convincingly argue irreparable harm will result in her child's current placement as she never availed herself of virtual learning for R.B. She was understandably frustrated over the technology difficulties and decided to do it on her own. Thus, the irreparable harm here will continue to occur to R.B. if the District is disallowed from attempting virtual instruction even in the new class. While there is disagreement about disenrollment; the child is undoubtedly enrolled in the new class and I **FIND** that it was due to a lack of communication between the parties and the stay-put as discussed at length in the oral argument is the in-district Autism class. Either way, the disagreement about "homeschooling" or "disenrollment" it is of no moment, if M.D. refuses to accept help to set up virtual learning as that is the only option in this District at this time during the current global health emergency.

In addition, Petitioner cannot argue that petitioner's claim is settled or there is a likelihood of success on the merits as this child has not been taught or observed by this District since his mother refused virtual learning. Furthermore, the last prong requires me to balance the equities and interests. Even if Petitioner could show the first three prongs; she would fail on the last. Even if virtual learning does not work for R.B., neither the District, the parent, nor the Child Study Team can make a determination of what R.B.'s goals and objectives should be, or measure his progress, or whether an out-of-district placement would be appropriate or necessary in the future when one becomes available. Thus, the irreparable harm here will be if Petitioner fails to attempt virtual learning which is all that is available now. Thus, the interests balance toward the District's position that the Emergent Relief is not appropriate as it does not currently exist, and I agree that R.B. needs to at least attempt virtual learning as soon as possible.

After hearing the arguments of petitioners and respondent and considering all documents submitted, I **CONCLUDE**, that the petitioners' motion for emergent relief is

DENIED. It is **ORDERED** that R.B. shall be permitted to receive all virtual classes with his current teacher. It is **FURTHER ORDERED** that all services, whether in-school or related services are to resume immediately virtually and when available, in-person at the district's earliest convenience given the the current public health emergency. **IT IS FURTHER ORDERED** the parties shall conduct and M.D. shall participate in a virtual IEP meeting at the parties' earliest convenience after the District gets an opportunity to assess R.B.'s present levels as he begins virtual learning.

This decision on application for emergency relief resolves all of the issues raised as there is no underlying 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 Policy and Dispute Resolution.



January 27, 2021
DATE

DANIELLE PASQUALE, ALJ

Date Received at Agency: January 27, 2021

Date E-Mailed to Parties: January 27, 2021

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