



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

EMERGENT RELIEF

OAL DKT. NO. EDS 00831-23

AGENCY DKT. NO. 2023-35409

C.C. ON BEHALF OF C.C.,

Petitioner,

v.

**TRENTON PUBLIC SCHOOL
DISTRICT BOARD OF EDUCATION,**

Respondent.

Bradley Flynn, Esq., for petitioner, C.C. on behalf of C.C. (Montgomery Law, LLC, attorneys)

Elesia L. James, Esq., for respondent (Trenton Board of Education) and **Cheri Adams**, Esquire, also for respondent (Adams, Gutierrez and Lattiboudere, LLC, attorneys)

Record Closed: February 2, 2023

Decided: February 3, 2023

BEFORE **DEAN J. BUONO**, ALJ:

STATEMENT OF THE CASE

C.C. on behalf of C.C. (petitioner) bring an action for emergent relief against Trenton Board of Education (Board/District), seeking an order for emergent relief including returning the child to the Burlington County Special Services Middle School with related services including transportation. The respondent opposes the relief requested.

PROCEDURAL HISTORY

Petitioner filed a request for emergency relief and a due process hearing at the State Office of Special Education Programs (OSEP). On January 27, 2023, OSEP transmitted the matter to the Office of Administrative Law (OAL) as a contested case seeking emergent relief for the petitioner. The parties presented oral argument on the emergent relief application on February 2, 2023, via Zoom teleconferencing system.

FACTUAL DISCUSSION

Petitioner argues that in August 2022, the parent and C.C. moved to the District from Ewing. The District agreed to implement and follow the Ewing Individualized Education Program (IEP), which placed C.C. at the Burlington County Special Services Middle School. The IEP specified that the District would provide transportation as a related service to and from Burlington County Special Services Middle School. In September, the District failed to provide the transportation to this placement. Furthermore, the District refused to find a solution to transport C.C. As a result, C.C. has not attended school since the beginning of the school year. In fact, they allege that the District failed to provide a single hour of instruction and services to C.C. C.C.'s complex needs require that he be educated in a specialized school. The District has not provided any instruction and related services to C.C. since the start of the 2022–2023 school year. During this time, it failed to implement his IEP.

To address it further, C.C. is a seventh-grade student, residing within the jurisdiction of the Trenton School District. C.C. is diagnosed with, autism, shaken-baby syndrome, and cortical vision blindness. He is also non-verbal and has seizures.

Whenever C.C. has seizures, he requires oxygen. Due to the complexities of C.C.'s medical needs, he requires twenty-four-hour-per-day nursing care. This means that his one-on-one nurse must accompany him on the bus and while he is at school.

In August 2022, the parent and C.C. moved to the Trenton District from the Ewing Township School District and enrolled C.C. to start school in the Trenton District. While the District verbally agreed to implement the Ewing IEP (the "Legacy IEP"), the District never developed a new IEP for C.C. Instead, it informed petitioner that it would simply follow the Legacy IEP. The Legacy IEP placed C.C. at Burlington County Special Services Middle School. In September 2022, the District informed petitioner that it would send C.C. to this school. Since September 2022, the District has failed to provide a single hour of instruction and related services to C.C.

They allege that the District failed to provide busing to C.C. and failed to educate him at his last-agreed-upon placement, which is the Burlington County Special Services Middle School. C.C.'s IEP requires that the District provide speech therapy, occupational therapy, and physical therapy. The District has failed to deliver a single hour of these related services to C.C. The Legacy IEP calls for transportation as a related service, which includes C.C.'s one-on-one nurse. They claim the District refuses to provide transportation per the IEP and because the District refuses to provide transportation, C.C. is unable to get to school.

Rather than following the IEP, the District offered home instruction to C.C. The District made this offer in December. They claim the District has yet to send a home instructor and since the District has illegally excluded C.C. from school, it does not even call to check on him at home. Finally, by excluding C.C. from school, the District is denying C.C. a Free Appropriate Public Education (FAPE). He has not been in school for the last ninety-one days. I agree.

The Board's position through counsel is that the attorneys have been working on these issues upon discovery at the beginning of the week. They offered to resolve the issues to the fullest extent but have been met with some difficulty. They arranged for the school to educate him and just (as of February 2, 2023) arranged for the transportation.

LEGAL ANALYSIS AND CONCLUSION

N.J.A.C. 1:6A-12.1(a) provides that the affected parent(s), guardian, district or public agency may apply in writing for emergent relief. An emergent 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.

Here, the petitioners seek an order and emergent relief where the standards for are set forth in Crowe v. DeGoia, 90 N.J. 126 (1982), and codified at N.J.A.C. 6A:3-1.6. These standards for emergent relief include 1) that the party seeking emergent relief will suffer irreparable harm if the requested relief is not granted; 2) the existence of a settled legal right underlying the petitioner's claim; 3) that the party seeking emergent relief has a likelihood of prevailing on the merits of the underlying claim; and 4) a balancing of the equities and interests that the party seeking emergent relief will suffer greater harm than the respondent. The petitioner bears the burden of satisfying all four prongs of this test. Crowe, 90 N.J. at 132-34. Arguably, the standard is a high threshold to meet and I will address each prong separately.

Irreparable Harm

Here, there has been a showing of irreparable harm to C.C. Petitioner argues irreparable harm is established because there is a tremendous risk of regressing in learning because he has not been educated since the beginning of the school year (ninety-one days). They claim that if C.C. is confined to home without proper instruction and related services he will continue to experience the same isolation, exclusion from education, and lack of opportunity to overcome his disabilities. Notably, confining C.C. to home without his last-agreed-upon placement, instruction, and related services will mean that C.C. receives no education. He will be denied the benefits of his IEP. Without instruction and related services, C.C. will continue to regress. C.C. will further regress without socialization with his classmates. Hence, the harm he is enduring is irreparable. To prevail under this prong, the harm must be substantial and immediate; the risk of harm to C.C. is not sufficient. Continental Group v. Amoco Chemicals Corp., 614 F.2d 351 (D.N.J. 1980). If relief is not granted it “could do irreparable harm” is insufficient. There is significant evidence presented that there is a scintilla risk of harm. Again, the risk of harm alone is not sufficient. However, a child not being educated for ninety-one days is undoubtedly harmful and a disgrace. **I FIND** as fact that there is actual proven risk of harm to C.C.

In light of the aforementioned, **I CONCLUDE** that petitioner has met their burden of establishing irreparable harm.

The Legal Right Is Settled

The petitioner demonstrates that the law favors C.C. as he has a legal right to F.A.P.E. in New Jersey. There is nothing in the record except purported speculation that anything has or will happen to C.C.’s progress in learning or that the District will not provide the services. Speculation is insufficient and that is all the petitioner has here. However, common sense does not go out the window. If C.C. has not been educated since the beginning of the school year its logical to conclude that C.C. is behind. Conversely, the law supports the petitioner’s position.

Thus, **I CONCLUDE** petitioner has met the second prong of the emergent relief standard in that a legal right underlying the claim is settled.

Likelihood of Prevailing on the Merits

Regarding whether the petitioner has a likelihood of prevailing on the merits of the underlying claim, there are no material facts in dispute that indicate petitioner's lack of likelihood of success. In fact, even a speculative assertion by petitioner is persuasive. While petitioner's belief that the best opportunity for C.C. is the IEP placement, this tribunal can conclude such result will benefit C.C. based on the petitioner's speculation. This tribunal can and will compel the District to provide FAPE while still affording them the opportunity to contest that conclusion at a due process hearing. This argument is appropriate for emergent relief.

Therefore, **I CONCLUDE** petitioner meets the third prong of the emergent relief standard.

Petitioner Will Suffer Greater Harm Than the Respondent

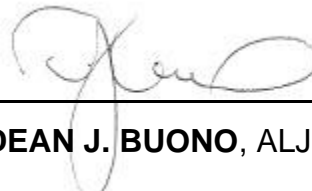
The next prong of the above test to be addressed is whether the equities and interest of the parties weigh in favor of granting the requested relief. The petitioner argues that "probable harms to C.C. of continuing in confinement in one of the most restrictive placements, without any instruction, are palpable, and include further deterioration of his desire and ability to learn, to make gains with related services, and to receive adequate instruction. Continuing without instruction or failing to place C.C. in the proper in-person placement would only further deny C.C. a FAPE, while causing him to regress." This argument has merit and relates to all the facts in evidence. Here, petitioner demonstrates immediate and real harm C.C. is suffering as a result of the actions of the District in failing to educate him. Thus, **I CONCLUDE** that C.C. would suffer greater harm if the requested relief was not granted and therefore petitioner has met the final prong of the analysis.

ORDER

Having concluded that the petitioner satisfied all of the four requirements for emergent relief, the petitioner's request for emergent relief is **GRANTED**. **IT IS ORDERED** that the District resume instruction to C.C. by returning him to Burlington County Special Services Middle School for the pendency of due process. **IT IS FURTHER ORDERED** that the District immediately provide busing services for C.C., per his IEP, so he may attend the Burlington County Special Services Middle School. **IT IS FURTHER ORDERED** that the District immediately provide instruction and related services to C.C. **IT IS FURTHER ORDERED** that the District convene an IEP meeting.

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 parent, 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 Policy and Dispute Resolution.

February 3, 2023 _____
DATE



DEAN J. BUONO, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

DJB/cb

APPENDIX

WITNESSES

For petitioner

For respondent

EXHIBITS

For petitioner

Affidavit of C.C.

Exhibit A: Immunization Record

Exhibit B: IEP, dated March 1, 2022

Exhibit C: Student Transfer Card

Exhibit D: Transportation Correspondence

For respondent

None