State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

DECISION

EMERGENT RELIEF

OAL DKT. NO. EDS 8743-18

AGENCY DKT. NO. 2018-28288

S.M. o/b/o D.M.,

Petitioner,

v.

ROBBINSVILLE TOWNSHIP BOARD OF EDUCATION, MERCER COUNTY,

Respondent.

_____

S.M., petitioner, pro se

Eric Harrison, Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: June 20, 2018 Decided: June 25, 2018

BEFORE **CARL V. BUCK III,** ALJ:

STATEMENT OF THE CASE

This matter arises under the Individuals with Disabilities Education Act, 20 U.S.C. § 1415 et seq. on June 19, 2018, petitioner filed a request for emergent relief on behalf

of her son D.M. The petition disputes district's proposed graduation of minor student and petitioner seeks to keep student in school in order to better transition to adulthood.

PROCEDURAL HISTORY

On June 19, 2018, petitioner filed a complaint for due process with the Office of Special Education Policy and Procedure (OSEP). The complaint was filed under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §§1400 to 1482.

Petitioner also filed an emergent relief application with OSEPP on June 19, 2018. The emergent relief application was transmitted to the Office of Administrative Law (OAL) on June 20, 2018. The application for emergent relief states that S.M., on behalf of D.M. seeks a "stay put" with the Robbinsville District Board of Education during the pendency of the due process hearing as well as prohibiting D.M. from "graduating" (and thus removed as a student of the Robbinsville BOE) today, June 20, 2018, at a graduation ceremony scheduled for 6:00 PM.

A telephone conference was scheduled for 10:30 a.m. and oral argument was scheduled for 12:00 p.m. at the OAL. The parties were notified by telephone and email of this schedule at approximately 9:30 a.m. This office did not hear from petitioner and she did not make herself available for the 10:30 a.m. telephone conference. Respondent appeared at 12:00 p.m. for the oral argument. Petitioner did not. As the tribunal was in the process of dismissing this matter due to petitioner's failure to appear at approximately 12:35 p.m., the petitioner called my assistant and relayed that she had just received the message and would appear at the oral argument shortly. The oral argument commenced at approximately 1:30 p.m. and the record closed at approximately 4:30 p.m.

LEGAL DISCUSSION AND CONCLUSIONS

S.M., petitioner and mother of D.M., made an initial statement. She testified that she filed this request for emergent relief in the form of a "stay put" action. This request was filed because she feels that D.M. is unable to take a test and to asume adult

responsibilities. Therefore, she does not want him graduated from the school system and precluded from further educational services.

Kathryn Austin testified on behalf of the respondent. She is a social worker at Robbinsville High School. She testified that D.M. is a 12th grade special education student who resides in the Robbinsville School District. His current IEP, issued May 23, 2018[1] (R-2), was developed as a result of concerns expressed by S.M., specifically concerns about D.M.'s ability to graduate and enter an adult environment. D.M.'s prior IEP was issued on April 11, 2018 and stated on page 17 of 18 that "7. We are moving forward with the expectation that D. will graduate in June." (R-1).

The IEP of May 23, 2018 contained the same statement but also a second #7 which stated

> Ms. M. advocated for D. to not graduate as she feels he is not emotionally prepared for college and/ or work. This was taken into consideration; however, the district feels strongly that since has (sic) completed all graduation requirements, remaining in his school would not help him to develop the independence skills noted in his PCAST. D. noted that he wanted another year to allow him structure and time to practice his emotional regulations skills. Again, it was noted that these real-life goals (PCAST goals) are best addressed with post-graduation pursuits.

(R-2)

S.M. then testified that she was not certain if she had received the April 11, 2018 IEP but, in any event, she had not read that document. She further testified that the BOE sent her letters weekly due to issues with her son but stated that she did not read them - as she dealt primarily with email correspondence. She acknowledged that she was unable to attend the April 11, 2018 IEP meeting due to a medical appointment.

[1] Although this IEP is dated April 11, 2018, it was issued on May 23, 2018. The May 23, 2018 IEP is a modification of the April 11, 2018 IEP and, although evident modifications were made, the date was not changed to reflect the May 23, 2018 issuance. It will be referred to as the May 23, 2018 IEP for specificity.

FINDINGS OF FACT

Based upon the documents in evidence and review of the testimony, I **FIND** the following facts:

D.M. is a 12th grade student in the Robbinsville School District and was scheduled to graduate on June 20, 2018. He resides in the district. D.M.'s current IEP, of May 23, 2018, was modified to reflect concerns expressed by S.M.

D.M.'s prior IEP was developed as a result of a meeting held on April 11, 2018. D.M. attended that meeting, but his mother, S.M. did not. S.M. was invited to attend the meeting but declined due to medical appointments. During that IEP meeting D. expressed that he was ready to graduate and move forward with his life (paraphrased).

An IEP for D.M. was discussed on April 11, 2018, and mailed by Austin to S.M. on April 12, 2018. That IEP stated, among other things, that "We are moving forward with the expectation that D. will graduate in June." (R-1).

S.M. and Austin exchanged text messages and emails relating both to D.M. graduating (C-1) and to D.M. continuing education with the District. These exchanges occurred on April 13, 2018, April 16, 2018 and May 7, 2018. (R-3). These exchanges were read into the record and only a printed version of one exchange was made available to the court (C-1). The email and text messages sent by petitioner referenced the possibility of D.M graduating and discussing the alternative of remaining in school. The email and text messages were convoluted at best and should be further explored in the underlying due process hearing.

That “Graduation”, pursuant to the statement by the BOE, does not only constitute a “ceremonial” action, it also constitutes a “substantive” action whereby a student would no longer be considered a student entitled to education within the district.

I **FURTHER FIND** as **FACT** that petitioner filed a petition for emergent relief regrading D.M. on June 19, 2018, which was received by the OSEP on June 19, 2018 and transmitted to this office on June 20, 2018.

I **FURTHER FIND** as **FACT** that S.M. received the IEP of April 11, 2018, and that correspondence initiated by S.M. after April 12, 2018, constituted an objection to the IEP of April 11, 2018. Further, conversations and correspondence between the parties shows objections by S.M. to the subsequent IEP of May 23, 2018.

LEGAL ANALYSIS

In most cases, 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;
>
> 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.

However, in this case, it is unnecessary for me to consider whether the criteria set forth in Crowe v. DeGioia, 90 N.J. 126 (1982) 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.A. § 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)) (stay-put "functions, in essence, as an automatic preliminary injunction"). The stay-put provision provides in relevant part that "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." 20 U.S.C.A. § 1415(j).

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).

In the present matter, the petitioner filed an emergent petition regarding the District's intent to graduate D.M. on June 20, 2018 and by way of the emergent application, invoked "stay put" due to his pending graduation. The petitioner contends that the current educational placement should stand and preclude D.M. from graduating. In this case, the IEP of May 23, 2018 was objected to; thereby reverting to the IEP of April 11, 2018. However, the IEP of April 11, 2018, was also objected to; thereby reverting to the IEP in place prior to April 11, 2018. That document was not presented by either party at the hearing, nor could they specify the terms, conditions and recommendations of that IEP.

As the term "current educational placement" is not defined within the IDEA, the Third Circuit standard is that "the dispositive factor in deciding a child's 'current educational placement' should be the [IEP] . . . actually functioning when the 'stay put' is

invoked." Drinker, 78 F.3d at 867 (citing the unpublished Woods ex rel. T.W. v. N.J. Dep't of Educ., No. 93-5123, 20 IDELR 439, 440 (3d Cir. Sept. 17, 1993)); see also Susquenita Sch. Dist. v. Raelee S. by Heidi S. & Byron S., 96 F.3d 78, 83 (3d Cir. 1996) (restating the standard that the terms of the IEP are dispositive of the student's "current educational placement"). The Third Circuit stressed that the stay-put provision of the IDEA 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. Drinker, 78 F.3d 859.

Furthermore, the Third Circuit explained that the stay-put provision reflects Congress' clear intention to "strip schools of the unilateral authority that they had traditionally employed to exclude [classified] students, particularly emotionally disturbed students, from school." Id. at 864 (citing Honig v. Doe, 484 U.S. 305, 323, 108 S. Ct. 592, 604, 98 L. Ed. 2d 686, 707 (1988)); School Comm. v. Dep't of Educ., 471 U.S. 359, 373, 105 S. Ct. 1996, 2004, 85 L. Ed. 2d 385, 397 (1985). Therefore, once a court determines the current educational placement, the petitioners are entitled to a stay-put order without having to satisfy the four prongs for emergent relief. Drinker, 78 F.3d at 864 ("Once a court ascertains the student's current educational placement, the movants are entitled to an order without satisfaction of the usual prerequisites to injunctive relief").

The placement in effect when the request for due process was made—the last uncontroverted placement—is dispositive for the status quo or stay put. Here, it is uncontroverted that the "then-current" educational placement for D.M. at the time of this emergent action is the IEP that was developed for him prior to April 11, 2018. Pursuant to that IEP, the student should continue with placement in the Robbinsville School District. Subsequent to the filing for due process, there has been no agreement between the parties to change D.M.'s current placement.

When presented with an application for relief under the stay-put provision of the IDEA, a court must determine the child's current educational placement and enter an order maintaining the status quo. Drinker, 78 F.3d at 864–65. Along with maintaining the status quo, respondent is responsible for funding the placement as contemplated in the IEP. Id. at 865 (citing Zvi D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982) ("Implicit in the

maintenance of the status quo is the requirement that a school district continue to finance an educational placement made by the agency and consented to by the parent before the parent requested a due process hearing. To cut off public funds would amount to a unilateral change in placement, prohibited by the Act")).

For example, under R.S. & M.S. v. Somerville Bd. of Educ., No. 10-4215 (MLC), 2011 U.S. Dist. LEXIS 748, *34 (D.N.J. Jan. 4, 2011), a school district was even required to maintain a disabled child's placement in a sectarian school, despite possibly violating N.J.S.A. 18A:46-14, because the school was the child's "current educational placement" when litigation over the child's placement began. The Somerville court explained:

> We find that under the undisputed facts in the record, [Timothy Christian School ("TCS")] is the stay put placement of the student. We will call it the Stay Put Placement for purposes of this ruling. It was the approved placement in the 2008–2009 IEP signed by the parties. . . .
> This dispute arose in the Fall of 2008, when D.S. was actually attending TCS as a high school ninth grader under that placement. It is clear and we so find, that TCS was "the operative placement actually functioning at the time the dispute first [arose]." Drinker, 78 F.3d at 867. We therefore conclude that it must remain the Stay Put Placement until the entire case is resolved either by agreement or further litigation.
>
> The IDEA stay put law and regulations admit of only two exceptions where it is the Board, rather than the parents, seeking to change the operative placement during the litigation. The first is where the parents agree with the change of placement. 20 U.S.C. § 1415(j). The second exception arises under the disciplinary provisions of IDEA, 20 U.S.C. § 1415(k). Clearly, neither exception applies here, and no party argued otherwise.
>
> Where, as here, neither exception applies, the language of the stay put provision is "unequivocal." Honig, 484 U.S. at 323. It functions as an "automatic preliminary injunction," substituting "an absolute rule in favor of the status quo for the court's discretionary consideration of the factors of irreparable harm and either a likelihood of success on the merits or a fair ground for litigation and a balance of hardships." Drinker, 78 F.3d at 864 (quoting Zvi D., 694 F.2d at 906).

[Id. at *32–33 (citations omitted) (emphasis added).]

Neither of the two exceptions to the stay-put law is applicable here because the parent has not agreed to the change in placement and disciplinary provisions are not an issue in this matter.

As demonstrated in Somerville, the fact that a current educational placement for a child may even violate N.J.S.A. 18A:46-14 has no bearing on a request for stay put. Somerville, 2011 U.S. Dist. LEXIS 748 at *34 ("the protestations by the Somerville Board, true as they seem to be—that at the time D.S. was originally placed at TCS . . . it was a mistake . . . and . . . that even when both the Branchburg and Somerville Boards apparently approved the 2008–2009 IEP, they only later found out that they had made a mistake—are unavailing under IDEA's stay put provision") (emphasis added). It remains the law in the Third Circuit that when a petition for due process is filed, deciding stay-put requires only a determination of the child's current educational placement and then, simply, an order maintaining the status quo.

Petitioner argues that a stay-put is appropriate because D.M. does not possess the appropriate skills to be graduated. She alleges that she did not receive the April 11, 2018 IEP stating that, "We are moving forward with the expectation that D. will graduate in June."

Respondent argues that pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982), N.J.A.C. 6A:14-2.7(m), and N.J.A.C. 1:6A-12.1, the petitioners must, in order to have the relief requested granted, demonstrate that: (a) they will suffer irreparable harm if the requested relief is not granted; (b) the legal right underlying their claim is well settled; (c) they have a likelihood of prevailing on the merits of the underlying claim; and (d) when the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent if the relief requested is not granted. As a result, petitioner fails to meet her burden of proof.

Looking at the counter-argument that the standard for the granting of Emergent Relief is set forth in N.J.A.C. 6A:3-1.6(b); in Drinker v. Colonial School District, 78 F3d 859 (3d Cir. 1996), the Third Circuit held that a judge should not look at the irreparable harm and likelihood of success factors when analyzing a request for a stay-put order. A parent may invoke the stay-put provision when a school district proposes "a fundamental change in, or elimination of, a basis element of "the current educational placement." Lunceford v. D.C. Bd. Of Educ., 745 F. 1577, 1582 (D.C. 1984). "The current educational placement refers to the type of programming and services provided rather than the physical location of the student's services. J.F., et al. v. Byram Township Board of Education, need proper cite). The stay-put provision represents Congress' policy choice that all handicapped children, regardless of whether their case is meritorious or not, are to remain in their current educational placement until the dispute with regard to their placements is ultimately resolved. Drinker at 859. The Third Circuit declared that the language of the stay-put provision is "unequivocal" and "mandated." Drinker at 864.

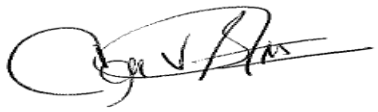
After hearing the arguments of petitioner and respondent and considering all documents submitted, I **CONCLUDE**, in accordance with the standards set forth in Drinker v. Colonial School District, that the petitioner's motion for emergent relief is **GRANTED**.

ORDER

It is **ORDERED** that D.M. shall be permitted to continue as a student in the Robbinsville School District.

It is **FURTHER ORDERED** that D.M. shall be able, should he wish, to participate in the graduation ceremony scheduled for June 20, 2018. However, participation in such ceremony shall not preclude D.M. from further educational opportunities nor should it be considered as an acknowledgement that he has graduated out of the educational system

This decision on application for emergency relief shall remain in effect until a new IEP agreed to by the parties is put in place or until the issuance of the decision on the merits in this matter. The hearing having been requested by the mother, 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 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.



June 25, 2018
DATE

CARL V. BUCK III, ALJ

Date Received at Agency:

Date Mailed to Parties:

/lam

LIST OF EXHIBITS

Court:

C-1 Text message

For petitioner:

None

For respondent:

R-1 Attendance Sheet and IEP of April 11, 2018

R-2 IEP

R-3 Letter from Robbinsville Public School to petitioner, dated June 7,2018