State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION GRANTING EMERGENT RELIEF

OAL DKT. NO. EDS 08994-18

AGENCY DKT. NO. 2018-28335

P.W. ON BEHALF OF D.W.,

Petitioner,

v.

BURLINGTON COUNTY VOCATIONAL BOARD OF EDUCATION,

Respondent.

P.W., petitioner, on behalf of **D.W.**, pro se

William Burns, Esquire for respondent (Capehart and Scatchard, attorneys)

Record Closed: June 26, 2018 Decided: June 26, 2018

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

By a request for emergent relief petitioner seeks to have her son, D.W. participate in a graduation ceremony scheduled for June 27, 2018, but not receive his diploma. The petition disputes the District's proposed graduation of minor student, D.W., and petitioner seeks to keep the student in school in order to better transition to

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adulthood. Respondent, Burlington County Vocational Board of Education (Burlington or BCIT) opposes this request and argues that he has completed the curriculum necessary to graduate. The petitioner acknowledges that D.W. completed his course requirement but is not ready to graduate and participate in the job world. She does not seek a diploma, only to have D.W. walk with his classmates at graduation. This matter was transmitted to the Office of Administrative Law (OAL) on June 25, 2018, for an emergent relief hearing and a final determination in accordance with 20 U.S.C.A. §1415 and 34 C.F.R. §§300.500 to 300.587, and the Director of the Office of Administrative Law assigned me to hear the case pursuant to N.J.S.A. 52:14F-5. The emergent relief hearing was scheduled for oral argument on June 26, 2018. Oral argument was held and arguments were made by both, the petitioner and the respondent, and the record closed. Exhibits were submitted by both parties. No papers were submitted by the respondent.

FACTUAL DISCUSSION

For purposes of deciding this request for emergent relief, the following facts which form the basis for the determination herein, are not in dispute. D.W. is a senior at Burlington County Vocational High School. He receives special education and related services under the category of multiply disabled. A copy of the IEP for D.W. was provided and entered in evidence as R-1. There is a dispute that although a senior, D.W. has not met the requirements for graduation. Respondent alleges that he has met and exceeded the requirements of graduation. P.W. “feels” that he is not ready. However, the petitioner does not seek a diploma, only to allow her son to walk in graduation with his class.

P.W. argues that during D.W.’s sophomore year at BCIT the school changed the testing and program as well as his teachers. She indicated that toward the end of the year the teacher “didn’t care at all.” Thereafter in his junior year, there was a substitute teacher who did not understand or know anything about computer science. In his senior year, he was transitioned into a new room and the case manager and child study team constantly changed, which impeded his learning. Also, the school would pass students without establishing any proficiency in the curriculum. Nevertheless, D.W. passed the

Microsoft Technology Assessment exam and was proficient in his academic classes. In fact, in the Microsoft testing, he was only one of eight students that passed the exam. She noted that he had “not gotten the education” from BCIT which she believes was “not intentional.” She noted that “he is not mature” and only possesses “average organizational skills.” Although his social skills in school are very good, when he encounters situations outside of school, he is socially inept. She claimed that there were areas where he needs help, including maturity. Frankly P.W. “feels he is not ready to graduate.”

Respondent indicated that D.W. possesses excellent academic skills. In fact, despite the fact that he is a special education student, D.W. attended all general education classes and has maintained an 80 percent average throughout the school year. Laura Rieglsberger, director of personnel services, indicated that D.W. has met the graduation requirements in his chosen curriculum of computer science. Also, he has a possibility of attending RBC which is a continued education program after graduation. Out of the twenty students who participated in the Microsoft Technology Assessment, D.W. was only one of eight students who passed the exam. There is no reason that he should not graduate. Accordingly, I **FIND** no legitimate legal or factual basis to refuse to allow D.W. to walk with his class and receive his earned and deserved diploma at graduation.

LEGAL DISCUSSION

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.

Through any standard analysis, the petitioner fails to meet any degree of the Crowe v. DeGioia analysis. Her arguments fail significantly short of any lucid rationale to hold this young man back from graduation. 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.W. on June 27, 2018 and by way of the emergent application, invoked "stay-put" due to his pending graduation. In fact, in her initial comments to the court at oral argument she intimated that her advocate said it was a

"stay put." The petitioner contends that the current educational placement should stand and preclude D.W. from graduating.

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 mediation 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.W. at the time of this emergent action is the IEP that was developed for him. Pursuant to that IEP, the student should continue with placement in the Burlington County Vocational School

District. Subsequent to the filing for mediation, there has been no agreement between the parties to change D.W.'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.W. does not possess the appropriate life skills to be graduated. I reluctantly agree because the student performed the appropriate tasks and skills to matriculate through the twelfth grade with exceptional results. To inhibit his progression in life because of an unsubstantiated "feeling" is counter-defeating to his success.

Along those same lines, 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 petitioner 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. However again, this is not the standard.

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, No. 2:2014cv05156 - (D.N.J. 2015). 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 argument by 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.W. shall be permitted to continue as a student in the Burlington County Vocational School District.

Under all of the foregoing, **IT IS FURTHER ORDERED** that D.W. participate in the June 27, 2018, graduation ceremony, albeit only to receive a blank diploma.

DECISION AND ORDER

For the reasons stated above, I hereby **ORDER** that petitioner's application for emergent relief to stay put and permit D.W. to participate in the graduation ceremony on June 27, 2018, is hereby **GRANTED** and the Burlington County Vocational Board of Education shall permit D.W. to participate in graduation ceremony.

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.

June 26, 2018

DATE

DEAN J. BUONO, ALJ

Date Received at Agency

Date Mailed to Parties:

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APPENDIX

WITNESSES

For petitioner:

P.W.

For respondent:

Laura Rieglsberger

EXHIBITS

For petitioner:

P-1 Handwritten letter by P.W.

For respondent:

R-1 IEP