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

**FINAL DECISION**

**EMERGENT RELIEF**

OAL DKT. NO. EDS 9064-18

AGENCY REF. NO. 2018-28352

**A.S. ON BEHALF OF S.F.,**

Petitioner,

v.

**RUMSON BOROUGH BOARD OF EDUCATION,**

Respondent.

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**A.S.**, petitioner, appearing pro se[1]

**Athina Lekas Cornell**, Esq., appearing for respondent, Rumson Borough Board of Education (Sciarrillo, Cornell, Merlino, McKeever & Osbourne, LLC, attorneys)

Record Closed: June 29, 2018 Decided: June 29, 2018

BEFORE **JEFFREY N. RABIN**, ALJ:

[1] Petitioner A.S. filed the within petition for emergent relief on her own, then retained Ira M. Fingles, Esq. (Hinkle, Fingles & Prior, attorneys) to represent her as legal counsel in this matter. Mr. Fingles had a personal issue that prevented him from appearing on behalf of petitioner, and petitioner opted to represent herself at this emergent hearing.

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was initiated by A.S. on behalf of her daughter, S.F. ("petitioner"), through a motion for emergent relief filed on June 25, 2018, with the New Jersey Department of Education ("DOE"), Office of Special Education Programs ("OSEP"). Petitioner sought "stay put" relief from the Rumson Borough Board of Education ("Board") in the form of an order to compel the Board to continue S.F. in her present program at Cornerstone Day School ("CDS"), including the Extended School Year ("ESY"), pending the outcome of a due process hearing.

The motion for emergent relief was transmitted to the Office of Administrative Law ("OAL") on June 26, 2018. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

Oral argument was heard on the motion on June 29, 2018, and the record closed on that date.

## FACTUAL SUMMARY

S.F. is a fifteen-year-old student who is eligible for special education and related services with the classification of "autistic." She has also been diagnosed with Post Traumatic Stress Disorder and Chronic, Reactive Attachment Disorder. S.F. was born in Morocco in 2003, was raised in an orphanage from age two, where she suffered both physical and sexual abuse. S.F. was adopted and brought to the United States in 2009. Her adoptive mother, A.S., is a resident of Rumson, New Jersey.[2] S.F. has had a history of self-injury since 2011, and of suicidal and homicidal ideation and psychotic symptoms since 2014. In November 2013, S.F.'s parents removed her from public school for homeschooling due to being bullied and related self-injury. In May 2016, S.F. was hospitalized in a psychiatric hospital for genital self-injury. In May through June 2016, S.F. participated in a psychiatric outpatient treatment program. In January 2017, S.F. was hospitalized for homicidal ideation. Pursuant to an IEP dated August 3, 2016, S.F. began attending CDS. CDS works with students who, like S.F., have severe emotional

[2] Petitioner's motion for emergent relief refers to "parents", but the only parent participating in this motion is S.F.'s adoptive mother, A.S. No information has been provided as to S.F.'s adoptive father.

and psychiatric issues that interfered with their ability to learn. The CDS educational program is a twelve-month program, and encompasses what would typically be referred to as an ESY program.

On April 12, 2018, CDS informed petitioner that although S.F. would be allowed to remain at CDS through Summer 2018, they could no longer meet S.F.'s academic and clinical needs, and recommended that a new academic placement be identified for the school year beginning in Fall 2018. On June 15, 2018, the Board issued a new proposed IEP which indicated that S.F. could remain in CDS through August 30, 2018.

## LEGAL ANALYSIS

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, 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, supra, 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 Board's proposed removal of S.F. from CDS, in which petitioner invoked stay-put.[3] The petitioner contended in her moving papers that the current educational placement was the last agreed-upon placement of S.F. as set out in the IEP of August 3, 2016. Petitioner also contended that the respondent Board's proposed IEP of June 15, 2018, was not appropriate, because it: failed to indicate a placement for S.F. for the 2018-19 school year (referring to her placement only as "TBD"); did not specify residential placement; improperly removed the ESY component; and failed to take into consideration the various psychiatric reports provided to the Board.[4]

Respondent has contended that this matter is not ripe for emergent relief because: petitioner did not meet the prerequisites for emergent relief set out in N.J.A.C. 6A:14-2.7(r); the CDS program is a twelve-month program, and therefore does not use the term "ESY" to refer to education during the summer months; and the controlling IEP from

[3] Although petitioner also sought emergent relief regarding the potential discharge of S.F. from the group home she was residing in, that issue is not before this Court, and the stay-put provisions referred to herein apply only to S.F.'s academic programming.

[4] While referred to herein at the "June 15, 2018" proposed IEP, the proposed IEP was dated May 25, 2018. The issue of the academic placement of S.F. for the 2018-19 school year is the basis of petitioner's due process hearing, which has not yet been transmitted to the Office of Administrative Law and is not before this Court as part of this motion for emergent relief.

August 3, 2016, called for S.F. to remain at CDS through August 30, 2018, and therefore there was no change in her current educational placement for which stay-put would be applicable.

Although respondent cites N.J.A.C. 6A:14-2.7(r) in its Brief dated June 28, 2018, its analysis of the prerequisites contained therein is inaccurate. Pursuant to N.J.A.C. 6A:14-2.7(r), a petitioner must show that it meets one of four conditions in order to be eligible for emergent relief. Subsection (i.) covers "[i]ssues involving a break in the delivery of services." Although both parties appear eager to work diligently to finalize a new IEP for S.F. prior to CDS' end date of August 30, 2018, it is wholly possible that no IEP will be in place by that date, creating a very real possibility of a break in the delivery of educational services to S.F. at the beginning of school year 2018-19. Additionally, subsection (iii.) covers "[i]ssues concerning placement pending the outcome of due process proceedings", which is the exact situation petitioner finds herself in. If no new IEP is created in a timely fashion, petitioner would have no choice but to proceed with a full due process hearing, in which case it is possible S.F. would have no school to attend during the pendency of that process.

Accordingly, I **FIND** that petitioner meets the prerequisites of N.J.A.C. 6A:14-2.7(r) and is eligible for emergent relief. Because there is an end date to S.F.'s attendance at CDS, that being August 30, 2018, a stay-put analysis is warranted in this matter.

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, supra, 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 assured 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, supra, 78 F.3d 859.

Furthermore, the Third Circuit explained that the stay-put provision reflected Congress's 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 determined the current educational placement, the petitioner was entitled to a stay-put order without having to satisfy the four prongs for emergent relief. Drinker, supra, 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, the request for due process was filed on June 25, 2018, after petitioner rejected the Board's proposed IEP of June 15, 2018; thus, the "then-current" educational placement for S.F. at the time of this emergent action would be the placement called for in the IEP dated August 3, 2016, which called for S.F. to attend CDS. Subsequent to the filing for due process, there has been no agreement between the parties to change S.F.'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, supra, 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 are applicable here. The Board has not yet proposed a new school placement for S.F., although they have stated that she may no longer attend CDS; therefore, there is no specified change in placement which the parents could agree to. As to the second exception, the IDEA disciplinary provisions have not been raised as 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, supra, 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.

Pursuant to the most recent IEP, S.F.'s current educational placement is at CDS. It is therefore **CONCLUDED** that the stay-put provisions apply to this special education student and that S.F. should remain at CDS pending completion of a due process hearing in this matter.

## ORDER

The petitioner's motion for academic placement emergent relief is **GRANTED**. It is **ORDERED** that S.F. be permitted to stay-put and continue to attend the educational program at Cornerstone Day School (which covers the Extended School Year period), pending completion of the due process hearing in this matter. All other requested relief is hereby **DENIED**.

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 29, 2018
DATE

**JEFFREY N. RABIN**, ALJ

Date Received at Agency

Date Mailed to Parties:

JNR/cb

## APPENDIX

## BRIEFS

**For petitioner:**

None

**For respondent:**

Letter-brief, dated June 28, 2018