State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
EMERGENT RELIEF
OAL DKT. NO. EDS 09808-18
AGENCY DKT.NO. 2018 28237

N.M. AND K.B. ON BEHALF OF K.M.,
Petitioners,
v.
ELIZABETH BOARD OF EDUCATION,
Respondent.

Jennifer Rosen Valverde, Esq., for petitioners (Rutgers Law School Education and Health Law Clinic, attorneys)

Richard Flaum, Esq., for respondent (DiFrancesco, Bateman, Kunzman, Davis, Lehrer & Flaum, attorneys)

Record Closed: August 27, 2018[1] Decided: September 4, 2018

BEFORE **ELISSA MIZZONE TESTA**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, N.M. and K.B. on behalf of K.M., filed a Due Process Petition on June 6, 2018, under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400 to 1482, alleging that the termination of K.M.'s individualized and specialized

[1] This matter is final only as to the Application for Emergent Relief. The Due Process Petition will remain at the OAL.

reading and writing services by the Elizabeth Board of Education (Respondent or District) deprived K.M. of a free and appropriate public education (FAPE). Petitioners filed a complaint for due process with the Office of Special Education Policy and Procedure (OSEPP). The petitioners also filed a Request for Emergent Relief seeking an Order that the District continue implementing K.M.'s September 13, 2017 Individualized Education Program (IEP) as the stay put placement. The June 6, 2018 Emergent Relief Request was returned to petitioners by the OSEPP due to issues with the timing of the request. A second Emergent Relief Request was filed with the OSEPP on July 6, 2018 and forwarded to the Office of Administrative Law (OAL) on July 11, 2018. Petitioners withdrew same without prejudice due to timing issues with the request. However, petitioners were advised by the undersigned to re-file their emergent request towards the end of August 2018, if it became necessary, and to file directly with the OAL to be scheduled before the undersigned. On August 20, 2018, petitioners filed a new Request for Emergent Relief with the OAL and the matter was heard on August 27, 2018.

STATEMENT OF FACTS

K.M. was born on February 18, 2003, and is a rising tenth grade student at Alexander Hamilton High School in the District and has at all relevant times been a student of the District. K.M. is diagnosed with Dyslexia. She is classified as having a specific learning disability and receives special education and related services from the District.

The IEP for the 2017–2018 school year, dated September 13, 2017, affords K.M. services, including but not limited to, in-class resource support for one full class period per day for English, Math, History and Science; individualized and specialized Orton-Gillingham reading instruction for one full class period five days per week, provided by a certified Orton-Gillingham reading specialist; and individualized and specialized direct instruction in language structure and written expression for 45 minutes per day, two days per week after school, provided by a certified special education high English/Language Arts teacher. The District provides and pays for all of the educational

programs and services in K.M.'s September 13, 2017. The IEP was silent as to 'stay put.'

Also, on September 13, 2017, petitioners and respondent entered into a Settlement Agreement wherein the above referenced reading and writing instruction were limited in duration to the 2017–2018 school year. The Settlement Agreement was also silent as to "stay put.'

Petitioners argue that on May 24, 2018, Mr. Flaum, counsel for the District, sent an email with a letter attached to petitioners' counsel which stated that the District would not continue providing K.M.'s specialized Orton-Gillingham reading instruction or her specialized writing instruction during the 2018–2019 school year, and that these services would end on the last day of school in June 2018, regardless of reevaluation. Further, petitioners' interpretation of what the letter states is that there is no argument that "stay put" for these services runs through September 13, 2018, the end date of the current IEP.

On or about June 6, 2018, within fifteen days of receiving written notice of the District's decision to not continue the reading and writing services, petitioners filed for due process against the District on the grounds that termination of these services will deprive K.M. of FAPE. Petitioners also filed a Request for Emergent Relief seeking an order that the District continue implementing K.M.'s September 13, 2017 IEP as the stay put placement.[2] This request along with a subsequent filing on July 6, 2018 were returned and/or withdrawn by petitioners due to timing issues. The request was refiled on August 20, 2018, due to the imminent start of the new school year in September 2018.

The District argues that the Orton-Gilligham and specialized language instruction were related services that were not otherwise part of the in-class support program set for in the September 13, 2017 IEP and it was determined by all relevant instructors, study teams, etc., that these services should no longer continue because K.M. had

[2] The Request for Emergent Relief was filed with OSEPP while the reading and writing services in question were still being provided to K.M. and prior to the discontinuation of the services.

made significant progress and was reading at grade level. Further, the District argues that they never proposed removing K.M. from in-class services and at all times acknowledged that these services run through September 13, 2018. The only services which were being discontinued were the reading and writing instruction. Respondent argues that the May 24, 2018 letter clearly acknowledges that only the in-class services would continue through September 13, 2018 and that the writing and reading services were to be discontinued at the end of the 2017–2018 school year in June 2018. The May 24, 2018 correspondence was sent in response to counsel for petitioners' correspondence dated May 15, 2018. Respondent argues that in that correspondence there was an acknowledgment and admission by the petitioners that the two related services would expire at the end of the school year.

The Request for Emergent Relief is only to address the sole issue of which services are included in the 'stay put' placement pending the full resolution of the underlying due process petition, which will address the underlying factors of the proposed elimination of the reading and writing services.

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;
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> 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
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> 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.

In this case, it is unnecessary for me to consider whether the criteria set forth in Crowe v. De Gioia, 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. § 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. § 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 case at hand, petitioners assert that the Settlement Agreement did not constitute a waiver of stay put and that without a specific waiver in the settlement agreement, the two related services are required to continue into the 2018–2019 school year. Further, the 2017–2018 IEP was also silent as to 'stay put' and is what should be utilized to determine the "current educational placement of the child" at the time the dispute arose. Respondent agrees with petitioners that IDEA requires a school district to maintain a student's placement and program pending the outcome of the due process proceedings pursuant to 20 U.S.C. 1415(j). Respondent also agrees that the corresponding provision of the New Jersey Administrative Code requires that a student's program and placement be maintained pending the outcome of a due process proceeding. N.J.A.C. 6A:14-2.7(u). However, respondent asserts that they have not

attempted to change K.M.'s placement or program and that this is supported by a lack of evidence presented by the petitioners. K.M. is a student placed at Alexander Hamilton Preparatory Academy in the in-class support program who has been classified as a student with a specific learning disability. However, they maintain that the September 13, 2017 Settlement Agreement and the IEP were specific as to the duration of time for the two related services (reading and writing services) and they were to end at the end of the 2017–2018 school year. Thus, respondent contends that stay-put would be as to the in-class services only, not the related reading and writing services.

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'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).

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 K.M. at the time of the due process filing and the initial request for emergent action is the IEP that was

developed for K.M. on September 13, 2017. Pursuant to that IEP, K.M. was to receive in-class services and the reading and writing instruction.

The Third Circuit has defined the stay put or "then current educational" placement as the "operative placement actually functioning at the time the dispute first arises." Pardini v. Allegheny Intermed. Unit., 420 F.3d 181, 190-192 (3d Cir. 2005) (quoting Thomas v. Cincinnati Bd. of Educ., 918 F.2de 618,625-626 (6th Cir. 1990); see also Drinker at 867. The IDEA does not define the term, "then-current placement." See generally 20 U.S.C. 1400 et seq. However, courts have found that Congress clearly intended this term to "encompass the whole range of services that a child needs" and that the term "cannot be read to only indicate which physical school building a child attends." See Spilsbury v. Dist. Of Columbia, 307 F. Supp. 2d 22, 26-27 (D.D.C. 2004). I **CONCLUDE** that all services which were developed for K.M. in the September 13, 2017 IEP were the "then-current" educational placement, inclusive of the related services (reading and writing instruction). The assertions that these related services were limited in duration are irrelevant because they were in effect at the time of the Due Process filing.

Further, stay put applies to the instant matter because the language of K.M.'s Settlement Agreement does not include any affirmative or effective waiver of stay put. The Settlement Agreement makes no mention of stay put. The only way that parents can "lose stay put protection" is by affirmative agreement to give it up." See Drinker at 868. Further, the Third Circuit has held, "unless there is an effective waiver of the protection of the 'stay put,' the dispositive factor in deciding a child's current education placement' should be the IEP . . . which is actually functioning when the 'stay put' is invoked. "Woods v. New Jersey Dept. of Educ., No. 93-5123, 20 IDELR 439, 440 (3d Cir. Sept. 17, 1993); see also Drinker at 868 (holding any waiver of a party's right to claim a placement as the "current educational placement" must be explicit). Not only is K.M.'s Settlement Agreement silent as to stay put but the IEP is silent as well. Therefore, I **CONCLUDE** that there is no affirmative or effective waiver of stay put.

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")).

After hearing the arguments of petitioners and respondent and considering all documents submitted, I **CONCLUDE**, that the petitioners' motion for emergent relief is **GRANTED**. It is **ORDERED** that K.M. shall be permitted to continue receiving all in-class services, inclusive of the Orton-Gillingham reading instruction and the language and writing instruction as defined in the September 13, 2017 IEP. It is **FURTHER ORDERED** that all services, whether in-service or related services are to resume at the start of the 2018–2019 school year.

This decision on application for emergency relief shall remain in effect until issuance of the decision in the matter. The parties will be notified of the scheduled hearing dates. 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.

September 4, 2018 _____

DATE **ELISSA MIZZONE TESTA**, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

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