State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

EMERGENT RELIEF

OAL DKT. NO. EDS 12309-19

AGENCY DKT. NO. 2020-30629

E.B. ON BEHALF OF F.B.,

Petitioner,

v.

UNION TOWNSHIP BOARD OF EDUCATION,

Respondent.

_____

E.B., petitioner, pro se

Christine Ann Soto Esq., for respondent (Florio, Perrucci, Steinhardt & Cappelli, LLC, attorneys)

Record Closed: September 13, 2019 Decided: September 16, 2019

BEFORE **JULIO C. MOREJON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, E.B. on behalf of F.B., seeks an order by way of emergent relief to have the respondent, Union Township Board of Education, (District) allow F.B. to remain in his current educational placement of the June 18, 2019, IEP, during the pendency of the within administrative proceeding regarding a due process petition filed September 5, 2019; and prevent an alleged break in the delivery of services to F.B.

On September 5, 2019, petitioner filed a request for emergent relief pursuant to N.J.A.C. 6A-12.1 and N.J.A.C. 6A:14-2.7(r). as well as a Due Process on behalf of O.B. and F.B. [1] with the Office of Special Education Policy and Procedure (OSEPP). The request for emergent relief alleges 1) issues related to a break in services; and 2) issues concerning placement pending the outcome of the due process hearing.

The matter was transferred to the Office of Administrative Law (OAL) and filed at the OAL on September 6, 2019, as an emergent matter.

Oral argument and testimony were taken on the emergent application on September 10, 2019. On September 11, 2019, the parties submitted written summations. On September 12, 2019, E.B. submitted a letter regarding O.B.'s medical care plan for his in-school feeding, which resulted in a telephonic conference to determine if the matter could be settled following receipt of the pediatrician's letter. The telephone conference was inclusive as to a settlement, and on September 13, 2019, the District submitted correspondence that the matter could not be settled as petitioner requested. Thereafter, E.B. submitted a response to the district's letter of non-settlement, and the record closed on September 13, 2019.

FACTUAL SUMMARY [2]

O.B. and F.B. are six (6) year old students, who are classified as Other Health Impaired. O.B. and F.B. attended PG Chambers during the 2017-2018 and 2018-2019 school years as an OOD placement. On May 28, 2019, a draft IEP was developed at an IEP meeting with Petitioner E.B., and O.B.'s father, T.B.[3], which placed O.B. and F.B. in

[1] O.B. and F.B. are twins. E.B. has filed a separate Due Process petition and application for emergent relief on behalf each minor child. The matter involving F.B. was assigned OAL docket number EDS 12309-19. Consolidation of the two matters was not addressed on the date of the hearing for the emergent relief of each minor child. However, the parties agreed that for purposes of the application for emergent relief the matter would be heard together, as the underlying issues are identical to each minor child. A decision will be made as to each docketed case, however, the facts and relief sought will be the same for O.B. and F.B.

[2] The facts and legal analysis herein will pertain to O.B. and F.B., and a separate decision containing the same will be made as to each docketed case.

[3] T.B. has joint educational decision-making authority per the Judgment of Divorce provided to the District.

the District's program with appropriate supports, including placement in a full-day kindergarten class with in-class Resource for Reading/Language Arts and Math; Group speech and physical therapy, individual occupational and physical therapy, a shared aide, and an extended school program. Neither E.B. nor T.B. signed the May 28, 2019 IEP.

The parties then met for another IEP meeting on June 18, 2019 to further discuss O.B. and F.B.'s program and placement in the District. The June 18, 2019 IEP (June 18 IEP) contained among other things, the following services for O.B. and F.B:

1) O.B. and F.B. would each require a 1:1 personal aide in order to maintain safety and participate educationally throughout their school day.
2) It was determined that the 1:1 personal aide would be trained to carry-out mealtime plan as well as hold a certification in CPR/First Aid/choking in order to prevent and/or respond to an emergency while eating in school, and
3) It was determined that a feeding evaluation would be performed in order to confirm the needs of O.B. and F.B. listed in the IEPs.

During the summer of 2019, the Pediatric Feeding & Swallowing Evaluation (Feeding Evaluation) of O.B. completed by Stephanie Bolinder and Dr. John Kintiroglou (Kintiroglou Pediatrics) dated July 23, 2019. The same did not recommend feeding therapy for O.B. but did provide "Guidelines for Mealtime Implementation" which specifically required that O.B. be directly supervised during eating activities by a "CPR, first aid and choking certified professional." O.B.'s need for a CPR, first aid and choking certified professional during all meal activities was also confirmed in the Medical Care Plan by Kintiroglou Pediatrics provided to the District by Petitioners on or about August 8, 2019. [4] Petitioners also shared with the District a "Neuro-Optometric Rehabilitation Analysis" by Dr. Vincent R. Vicci Jr. of O.D. dated 8/3/19 which recommended classroom accommodations and "occupational-vision therapy" in school.

[4] Subsequent to the September 10, 2019, hearing, E.B. would submit a copy of a letter dated September 12, 2019, from Kintiroglou Pediatrics, which provided in relevant part: "I have reviewed the Feeding Evaluation from New Jersey Pediatric feeding Associates and the implications set forth in the June 18, 2019, IEP. As stated in my previously submitted Medical Care Plan Aid/chocking [sic]. A 1.1 nurse is not required."

On July 2, 2019, petitioner filed a due process petition (July Petition) contesting the omission of several requests from the final June 18 IEP with regard to modifications/supports, related services, and recess. On August 29, 2019, the parties participated in mediation regarding the July Petition. Petitioner was represented by an advocate. No agreement was reached by the parties and the matter was transmitted to the OAL for a settlement conference scheduled for September 5, 2019. On or about September 3, 2019, petitioner's July Petition was withdrawn, and the matter did not proceed.

On September 4, 2019, via counsel, the District forwarded to E.B. and T.B. a detailed letter (September 4th letter) informing them that the withdrawal of the July Petition does not "automatically entitle O.B. and F.B. to start school in the [District] on September 5, 2019. F.B. and O.B. **cannot** attend school in the District, until one of the following occurs." The September 4th letter then listed what steps petitioner needed to take to facilitate O.B. and F.B.'s admittance to school.

The September 4th letter advised E.B. and T.B. that they can sign an "amended IEP without an IEP meeting", provided either E.B. or T.B. submitted the executed June 18 IEP. The letter stated that if E.P. or T.B. did not want to execute the June 18 IEP, then the District would convene an IEP meeting and offered dates in lieu of amending an IEP without a meeting. The September 4th letter further informed E.B. and T.B. that in the absence of an executed IEP setting forth all of O.B. and F.B.'s services and accommodations, "O.B. and F.B. could be admitted to school upon a note from a medical doctor stating that O.B. and F.B. no longer needed direct supervision by a CPR, first Aide and choking certified professional during mealtime." The September 4th letter also advised E.B. and T.B. that with respect to any medical condition, the District is obligated to provide medical information to the school nurse and/or the school physician for recommendations. Thus, the District also included the appropriate releases to E.B. and T.B. with the letter.

On September 5, 2019 via counsel, the District forwarded E.B. and T.B. a letter (September 5th letter) along with a revised IEP and a Request to Amend an IEP Without a Meeting Form.

Petitioner argues that once the July Petition was withdrawn on September 3, 2019, the June 18 IEP for both O.B. and F.B., issued by the District became effective. Petitioner argues that the District's actions to "amend" the June 18 IEP, is an admission that the said IEP is in play, and that the District's refusal to allow O.B. and F.B. to commence classes on September 5, 2019, unless petitioner consent to the amend IEP constitutes a "break in services".

The District argues that petitioner has not properly signed any IEP for O.B. or F.B. which places him in District. The District acknowledges that on September 4, 2019, E.B. did attempt to sign the June 18, 2019 IEP that she had rejected when she filed for Due Process. However, the District contends that E.B. signed a consent for an initial IEP. The District argues that the June 18, 2019 IEP was not an "initial" IEP, and petitioner's attempt to implement the June 18, 2019 IEP was well beyond the 15-day time period.

Therefore, the District argues the only IEP signed and executed properly by petitioner was the one that placed O.B. F.B. at PG Chambers for the 2018-2019 school year, and therefore, for the purposes of stay-put the last agreed upon placement for O.B. and P.G. is PG Chambers.

As to amending the June 18 IEP, to include the school nurse, the District argues that it decided to offer O.B. and F.B. a shared nurse for the length of the school day even though the feeding evaluation only required supervision during eating activities, due to E.B.'s "consistent communications" about O.B. and F.B.'s safety in school.

DISCUSSION

N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief. The regulation instructs in salient part:

> A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):

1. The petitioner will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying petitioner's claim is settled;

3. The petitioner has the likelihood of prevailing on the merits of the underlying claim; and

4. 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.

[N.J.A.C. 6A:3-1.6(b).]

In the underlying case, it is unnecessary 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 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). 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).

There is no dispute that on July 2, 2019, petitioner filed a due process petition contesting the omission of several requests from the June 18 IEPs regarding modifications/supports, related services, and recess. Similarity, there is no dispute that petitioner then withdrew, her July Petition on September 3, 2019. The within due process petition was then filed on September 6, 2019, following petitioner's receipt of the September 4th letter, denying O.B. and F.B. attendance at the District. What is in dispute is which due process petition is in effect and thus subject to the "stay put" provision; the June 18 IEP, placing O.B. and F.B. in the District or the "stay put" IEP for the 2018-2019 school year, placing them in P.G. Chambers.

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 last IEP agreed to between petitioner and the district, which is the "then-current" educational placement for O.B. and F.B. at the time of the due process filing on September 6, 2019, and the request for emergent action is the IEP that was developed for on June 18, 2019. Petitioner's action in withdrawing the July Petition, then submitting the executed "Consent to implement Initial IEP", which was submitted in error, along with the District's request on September 6, 2019 to "amend" the IEP as a condition for O.B. and F.B. to attend the District, is dispositive that the "current educational placement" is the June 18, 2019, IEP.

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).

CONCLUSION

I **CONCLUDE** that all services which were developed for O.B. and F.B. in the June 18, 2019, IEP were the "then-current" educational placement, and the District's attempt to amend this IEP remains the subject of the due process petition filed by E.B in this matter. The District's assertions that O.B. and F.B. cannot attend the District pending review of Kintiroglou Pediatrics' letter of September 12, 2019, and development of an Individualized Health Plan (IHP) are without merit, as the June 18 IEP provides for proper medical care, and the delay, if any, in processing the same are addressed in the June 18 IEP, and as confirmed by the District hired pediatric (Kintiroglou Pediatrics). I **CONCLUDE** that The District's failure to acknowledge the June IEP and prevent O.B.

and F.B. from attending the District constitutes a break in the delivery of services under the said IEP.

I **CONCLUDE** further, stay put applies to the instant matter because petitioner has not affirmatively or effectively waived the stay put. E.B. and T.B. took affirmative steps, and have confirmed the same in withdrawing the July Petition, and submitting the incorrect consent form to implement the June IEP. Petitioner has consistently argued the same in her moving papers, and at the emergent relief hearing, that E.B. and T.B. agreed with the terms of the June 18 IEP. 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). Therefore, I **CONCLUDE** that there is no affirmative or effective waiver of stay put.

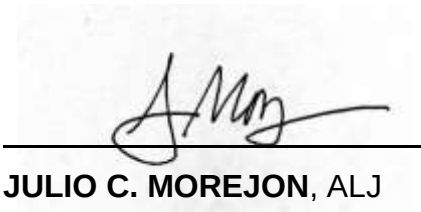
After hearing the arguments of petitioner and respondent and considering all documents submitted, I **CONCLUDE**, that the petitioner's motion for emergent relief is **GRANTED**.

ORDER

It is **ORDERED** that O.B. and F.B. shall be permitted to attend the District immediately under the current educational placement of the June 18, 2019 IEP, and during the pendency of the administrative proceeding before the OAL regarding the due process petition filed herein.

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.



September 16, 2019
DATE

JULIO C. MOREJON, ALJ

Date Received at Agency: September 16, 2019

Date Mailed to Parties: September 16, 2019

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