



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION GRANTING
MOTION TO DISMISS

OAL DKT. NO. EDS 06666-21

AGENCY DKT. NO. 2022-33140

N.S. o/b/o N.S.,

Petitioner,

v.

EDISON TOWNSHIP BOARD OF EDUCATION,

Respondent.

N.S., petitioner, pro se

Jaclyn S. D'Arminio, Esq., for respondent (Inglesino, Webster, Wyciskala, Taylor,
LLC., attorneys.)

Record Closed: November 16, 2021

Decided: December 6, 2021

BEFORE **JACOB S. GERTSMAN**, ALJ t/a:

STATEMENT OF THE CASE

Respondent Edison Township Board of Education (District or Edison) filed a motion for summary decision seeking the dismissal of the matter arguing that the petitioner is not entitled to the relief she is requesting. The motion further argues, inter alia, that Edison provided a FAPE in the least restrictive environment, and that procedural requirements of the IDEA have been followed.

PROCEDURAL HISTORY

This due process petition concerns petitioner's challenge to the District's Individualized Education Plan ("IEP") which places N.S. in an inclusion classroom in Edison's half-day kindergarten program and seeks placement in the Sayreville School District's ("Sayreville") full-day kindergarten program, following N.S.' transfer from Sayreville.

On July 1, 2021, petitioner filed a request for mediation with the Office of Special Education Policy and Dispute Resolution (OSEP) which later became the subject Due Process Petition (the "Petition") on behalf of J.S. On July 28, 2021, respondent filed an Answer. On August 9, 2021, the case was transmitted to the Office of Administrative Law ("OAL") to be heard as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14 F-1 to -13. On the initial telephone status conference, the District advised the undersigned that it would be filing a motion for summary decision. Respondent's motion was filed on October 26, 2021.

The deadline for petitioner's response to the motion was on November 9, 2021, and none was received. By letter dated November 12, 2021, I informed the parties that the due date was extended to noon on November 16, 2021, and no if response was received, the motion would be considered unopposed. Petitioner failed to file a response to the motion, and accordingly, the motion is unopposed and ripe for determination.

FACTUAL DISCUSSION

Based on the briefs submitted for purposes of the motion, I **FIND** the following to be the undisputed facts:

N.S. is a five (5)-year-old student enrolled in the Edison who is eligible for special education services based on the classification of Autism. (Respondent Brief at 2; Toohey Cert. Ex. M.) N.S. has been diagnosed with Autism spectrum disorder, mixed receive-

expressive language disorder, and sensory processing difficulties. Ibid. Petitioner indicates he is being monitored for ADHD. (Petition at 32.)

In June of 2021, petitioner, N.S.' mother, and her children, moved from Sayreville to Edison due to a housing voucher requirement. (Respondent Brief at 3; Petition at 32.) Petitioner enrolled N.S. in the Edison District on June 14, 2021, and N.S. was permitted to continue his education in Sayreville until the conclusion of the 2020-2021 school year and to attend the Sayreville Extended School Year Program in the Summer of 2021. (Respondent Brief at 3; Toohey Cert. Ex. J.)

Prior to moving to Edison, N.S. attended the full-day preschool program at Project Before at Cheesequake School in the Sayreville Public School District ("Sayreville"). (Respondent Brief at. at 2). On April 29, 2021, the IEP Team at Sayreville met and proposed an IEP for N.S. with a projected start date of July 6, 2021, to follow N.S. through the 2021 Extended School Year and the 2021-2022 School Year, at which time he would be in Kindergarten ("Sayreville IEP"). (Respondent Brief at 2-3; Toohey Cert. Ex. I.) The Sayreville IEP placed N.S. in the presence of general education students between 40% and 79% of the day. (Respondent Brief at 3; Toohey Cert. Ex. I.) Sayreville's general education kindergarten program is a full day program. Ibid.

On June 14, 2021, petitioner emailed a request for an IEP meeting and specifically requested that N.S. remain in the Sayreville School District and stated that N.S. needs the offerings in the Sayreville District to "continue to thrive" and "be placed among the general education students in order to not set back [his] progress." (Respondent Brief at. at 3; Ex. K.) On June 18, 2021, petitioner was invited to an Evaluation Planning IEP Meeting scheduled for June 21, 2021, and accepted the invitation but did not attend. (Toohey Cert. ¶ 14; Ex. L.)

The IEP meeting was held by the Edison Child Study Team ("CST") on June 21, 2021, and an IEP was proposed for N.S. for the 2021-2022 school year which placed N.S. in an inclusion kindergarten classroom in the presence of general education students for 80% or more of the school day with in class resource for language arts and math, speech-language therapy (group) and occupational therapy (consultation), a bus with an

attendant and provided for extended school year during the 2021 summer (“June Edison IEP”). (Toohey Cert. ¶ 15; Ex. M.)¹ On June 24, 2021, petitioner submitted a letter to the superintendent of schools in Edison, Dr. Bragen, expressing concern about the June Edison IEP. (Ex. N.) In particular, petitioner expressed concern over the difference in education time between the Sayreville program (six hours) and the Edison program (two and a half hours). Ibid. The Edison general education kindergarten program is a half-day program. (Toohey Cert. ¶ 18; Ex. M.).

On July 1, 2021, petitioner filed a Request for Mediation with OSEP and provided two letters which were not provided to the Edison School District prior to the June IEP Meeting: (1) Letter to Dr. Bragen, Superintendent of Schools, and (2) a “Letter of Medical Necessity” by Lavinia Stoicescu, M.D. FAAP, dated July 1, 2021. (See Petition; Toohey Cert. ¶ 19; Ex. N.) The Petition requests to “have [N.S.] remain in Sayreville School District for one year 2021-2022 full day structured kindergarten program for educational, cognitive, psychological development.”

On September 1, 2021, N.S. entered the Edison Public School District for the first time, and on that date, Special Education and related services commenced in accordance with the June Edison IEP. (Toohey Cert. ¶ 20.) On September 23, 2021, at the request of petitioner, an IEP Team meeting was held and N.S.’ progress was reviewed, and no changes were made as a result of that meeting. Id. at ¶ 21. At a thirty-day Assess Progress and Review or Revise IEP meeting held on October 8, 2021, the Edison CST recommended the removal of N.S. from the inclusion classroom into a Learning or Language Disabilities Self Contained Classroom. Petitioner consented to this IEP, and it was implemented on October 25, 2021 (“October Edison IEP”). (Toohey Cert. ¶ 21.)

¹ As compared to the Sayreville IEP, the June Edison IEP provided the following differences: (1) in-class language arts resource instead of pull-out resource and decrease of ten minutes daily; (2) in-class math resource instead of pull-out resource and decrease in duration by twenty minutes daily, and (3) increase of speech-language therapy by five minutes a session or ten minutes weekly. (See Respondent’s Brief at 4; Ex. l & m.)

LEGAL ANALYSIS

Edison is required to provide N.S. with a free and appropriate public education in the least restrictive environment. See 20 U.S.C.A. §1412(a); N.J.A.C. 6A:14-1.1(d). Public education, including education for children with a disability, must be provided free of charge to persons between the ages of five and twenty if they are "domiciled within the school district." Somerville Bd. of Educ. V. Manville Bd. of Educ., 332 N.J. Super. 6, 11 (App. Div. 2000); N.J.A.C. 6A:22-3.1(a).²

The Individuals with Disabilities Education Act (IDEA) "protects the rights of disabled children by mandating that public educational institutions identify and effectively educate those children or pay for their education elsewhere if they require specialized services that the public institution cannot provide." D.K. v. Abington Sch. Dist., 696 F.3d 233, 244 (3d Cir. 2012) (citation omitted). Once a school has identified a student is eligible for IDEA services, it must create and implement an Individualized Education Plan ("IEP") based on the student's needs and areas of disability. Munir v. Pottsville Area Sch. Dist., 723 F.3d 423, 426 (3d Cir. 2013) (citation omitted). The school district must offer an IEP that is "reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential." Id. at 434 (citations omitted).

Furthermore, the IDEA also includes a "mainstreaming" component which requires the placement of a student with disabilities in the least restrictive environment that will provide the child with a meaningful educational benefit. D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 556—57 (3d Cir. 2010). New Jersey's regulations provide that "all students shall be considered for placement in the general education class with supplementary aids and services" and "[i]f it is determined that a student with a disability cannot remain in the general education setting . . . a full continuum of alternative placements . . . shall be available." N.J.A.C. 6A:14-4.3(a)—(b). The IDEA regulation 34 C.F.R. § 300.116 requires that:

² "Domicile" means a permanent home from which a person does not intend to move. Lipman v. Rutgers-State Univ. of N.J., 329 N.J. Super. 433, 444 (App. Div. 2000). A child's domicile is normally that of his parents. Roxbury Twp. Bd. of Educ. v. West Milford Bd. of Educ., 283 N.J. Super. 505, 521—22 (App. Div. 1995).

(a) The placement decision—

(1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(2) Is made in conformity with the LRE provisions of this subpart, including §§300.114 through 300.118;

(b) The child's placement—

(1) Is determined at least annually;

(2) Is based on the child's IEP; and

(3) Is as close as possible to the child's home;

(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;

(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and

(e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

The IDEA contains various procedural safeguards to protect the rights of special education students. 20 U.S.C. §1400, et seq. One such safeguard is known as “stay-put,” which provides that “during the pendency of any proceedings conducted pursuant to [the IDEA],” absent an agreement otherwise, “the child shall remain in the then-current educational placement of the child.” 20 U.S.C. 1415(j). The purpose of this provision is to maintain the child in their current educational placement while the dispute over the IEP remains unresolved. Ringwood Bd. of Educ. V. K.H.J., 469 F.Supp.2d 267, 270 (D.N.J. 2006). In practice, “stay-put” functions as “an automatic preliminary injunction.” Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 (3d Cir. 1996). This provision, the Supreme Court explained, was “very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school.” Honig v. Doe, 484 U.S. 305, 323 (1988).

In practice today, “stay-put” is often invoked in a particular context. In the typical case, a school district will propose a change to a child’s educational program. If the parents disagree with the proposed change, they can file a due process petition. In this instance, “stay-put” entitles the child to remain in their “then-current educational placement” while the due process hearing is pending. 20 U.S.C. 1415(j). The child’s “then-current educational placement” is the IEP that is “actually functioning” at the time the parents invoked “stay-put.” Drinker v. Colonial Sch. Dist., 78 F.3d 859, 867 (3d Cir. 1996) (internal citations omitted). Thus, “stay-put” maintains the status quo and effectively blocks “school districts from effecting unilateral change in a child’s educational program.” Susquenita Sch. Dist. v. R.S., 96 F.3d 78, 83 (3d Cir. 1996).

The “stay-put” protection, however, is not absolute. Courts have held that “stay-put” is not available when parents voluntarily relocate a student to another school district. See e.g., J.F. v. Byram Twp. Bd. of Educ., 629 F. App’x 235 (3d Cir. 2015). When parents “unilaterally” transfer a student in-state to a new school district and a different section of the IDEA applies: 20 U.S.C. §1414(d)(2)(C)(i). Id. at 238. “In these circumstances,” the court explained, “the purpose of the stay-put provision, which is to maintain the status quo in situations where the *school district* acts unilaterally, is not implicated.” Id. at 237. “While the new district is required to provide services comparable to those described in the previously held IEP, the IDEA does not compel allowing a student to continue at the student’s current brick-and-mortar placement.” J.F. v. Byram Twp. Bd. of Educ., 629 F. App’x 235, 238 FN 3 (3d Cir. 2015) (internal citation omitted).

Therefore, when a student with an IEP moves to a new district, that district will “meet its obligation” under the IDEA if the district complies with 20 U.S.C. § 1414(d)(2)(C)(i)(I). Id. at 238. This provision requires school districts to provide in-state transfer students, “a free and appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents” until a new IEP is adopted. 20 U.S.C. § 1414(d)(2)(C)(i)(I).

In New Jersey, the procedures governing transfer students are more specifically outlined at N.J.A.C. 6A:14-4.1(g)(1):

(g) When a student with a disability transfers from one New Jersey school district to another . . . the child study team of the district into which the student has transferred shall conduct an immediate review of the evaluation information and the IEP and, without delay, in consultation with the student's parents, provide a program comparable to that set forth in the student's current IEP until a new IEP is implemented, as follows:

1. For a student who transfers from one New Jersey school district to another New Jersey school district, the IEP shall be implemented as written if the parents and district board of education agree. If the appropriate district board of education staff do not agree to implement the current IEP, the district board of education shall conduct all necessary assessments and, within 30 days of the date the student enrolls in the school district, develop and implement a new IEP for the student.

Here, petitioner expresses concerns regarding the change in N.S.'s educational plan following the transition in school districts, and in particular requests he be placed in Sayreville's "full day structured Kindergarten program for educational, cognitive, psychological development" for the 2021-2022 year. (Petition at 33.) However, petitioner has not set forth a legal basis for entitlement to a request for a placement in Sayreville. Petitioner includes that given a living voucher, she was only provided sixty days to uproot to Edison. Id. at 32. However, notwithstanding the circumstances surrounding the reasons petitioner unilaterally moved, N.S. is not entitled to "stay-put" in Sayreville because petitioner unilaterally transferred N.S. to Edison.

Indeed, the third circuit has made clear that the purpose of "stay-put" is to maintain the status quo in situations where the *school district* acts unilaterally. J.F. v. Byram Twp. Bd. of Educ., 629 F. App'x 235, 237 (3d Cir. 2015). Rather, as here, where parents "unilaterally" transfer a student in-state to a new school district, "stay-put" does not apply, and a different section of the IDEA applies: 20 U.S.C. §1414(d)(2)(C)(i). Id. at 238. Thus, while Edison is required to provide comparable services to the Sayreville IEP until an IEP is implemented, Edison is not required to place N.S. in the full day kindergarten program

in Sayreville. Accordingly, I **CONCLUDE** that N.S. is not entitled to “stay-put” in the Sayreville’s full-day kindergarten program for the 2021-2022 year

Upon a move to a new school district, parents are not entitled to an alternative placement for their child if they have not “first given the public school a good faith opportunity to meet its obligations.” K.G. v. Cinnaminson Twp. Bd. of Educ., 2018 U.S. Dist. LEXIS 159909, * 24 (D.N.J. Sept 19, 2018) (citing C.H. v. Cape Henlopen Sch. Dist., 606 F.3d 59, 72 (3d. Cir. 2010). Indeed “the core of the [IDEA] ... is the cooperative process that it establishes between parents and schools. Schaffer ex. Re. Schaffer v. Weast, 546 U.S. 49, 53 (2005).

In K.G. v. Cinnaminson Twp. Bd. of Educ., the District Court affirmed the ALJ’s finding that the plaintiff failed to provide the defendant with a good faith opportunity to comply with the IDEA where the petitioner moved to a new district (Cinnaminson) who proposed an IEP with an in-district placement, and petitioner chose to keep the student in the private placement she attended prior. There, the ALJ found that plaintiff deprived Cinnaminson the opportunity to demonstrate the education available to the student where: (1) plaintiff failed to provide input at the CST meeting regarding the IEP; (2) plaintiff failed to cooperate with the defendant in working on an IEP; (3) plaintiff prevented defendant from fully addressing the student’s needs or adjusting the IEP, and (4) plaintiff denied Cinnaminson the ability to determine if services for the extended school year were appropriate. K.G. v. Cinnaminson Twp. Bd. of Educ., EDS 14389-15 (March 30, 2017), <https://njlaw.rutgers.edu/collections/oal/html/initial/eds14389-15_1.html>, aff’d, 2018 U.S. Dist. LEXIS 159909, * 22 (D.N.J. Sept 19, 2018). The ALJ noted “[w]hen a parent does not cooperate in the process, it is not possible to know whether a district can provide FAPE for a student until it has had an opportunity to do so,” and “[d]eterminations regarding whether meaningful educational benefit can be achieved cannot be made without an educational experience with the Cinnaminson [district].” Id. at *24.

Here, petitioner must provide Edison with the opportunity to provide a free and appropriate education. It is clear that petitioner’s primary request of Edison and this tribunal is placement of N.S. in the full-day kindergarten program in Sayreville, and petitioner began making this request prior to petitioner’s experience in the Edison District

working with the IEP team and continued to make this request following receipt of Edison's proposed June IEP. Although petitioner is not entitled to placement in the Sayreville District at this time, petitioner is not without possible future remedies. Certainly, if following cooperation with Edison, petitioner finds that Edison has violated the procedures set forth in the IDEA with regards to the implementation of an IEP, or otherwise fails to provide N.S. a free and appropriate education, petitioner may bring the appropriate action. Therefore, I **CONCLUDE** that respondent is entitled to a good faith opportunity to comply with the IDEA.

Based on the foregoing, given that N.S. is not entitled to "stay-put" in the Sayreville's full-day kindergarten program for the 2021-2022 year, I **CONCLUDE** that petitioner is seeking relief that cannot be granted, and this matter should therefore be dismissed. I **FURTHER CONCLUDE** that as this matter has been dismissed, the substantive issues presented in the Motion for Summary Decision will not be considered.

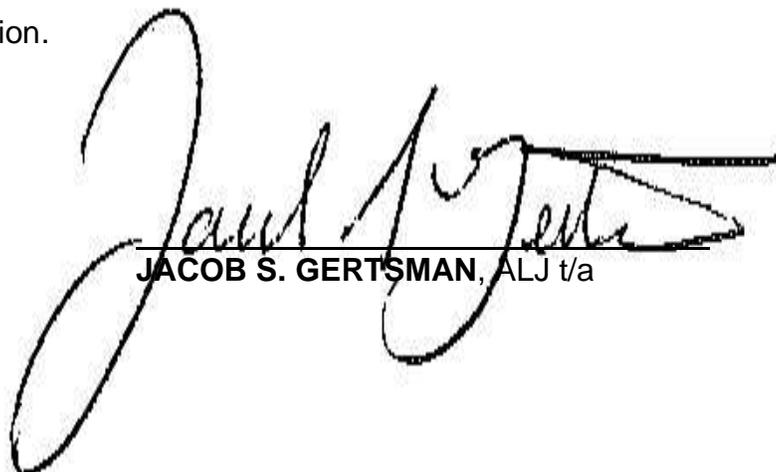
ORDER

It is hereby **ORDERED** that Respondent's motion to dismiss is **GRANTED**.

This decision is final under 20 U.S.C. §1415(i)(1)(A) and 34 C.F.R. §300.514 (2021) and is appealable by filing a complaint and bringing a civil action in either the Law Division of the Superior Court of New Jersey or a district court of the United States. 20 U.S.C. §1415(i)(2); 34 C.F.R. § 300.516 (2021). If the parent or adult student believes that this decision is not being fully implemented with respect to a program or a service, then this concern should be communicated in writing to the Director, Office of Special Education Policy and Dispute Resolution.

December 7, 2021

DATE



JACOB S. GERTSMAN, ALJ t/a

Date Received at Agency

Date Mailed to Parties:
JSG/sm

APPENDIX

EXHIBITS

For petitioner:

None

For respondent:

Brief, dated October 26, 2021