State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

DECISION ON

EMERGENT RELIEF

OAL DKT. NO. EDS 07853-23

AGENCY DKT. NO. 2024-36381

E.H. and J.O. ON BEHALF OF O.O.,

Petitioners,

v.

BURLINGTON CITY

BOARD OF EDUCATION,

Respondent.

Samuel Watson, Esq., for petitioners (South Jersey Legal Services, attorneys)

William C. Morlok, Esq. for respondent (Parker McCay, P.A., attorneys)

Record Closed: August 28, 2023 Decided: August 29, 2023

BEFORE **JUDITH LIEBERMAN**, ALJ:

STATEMENT OF THE CASE

Petitioners E.H. and J.O., parents of minor student O.O., seek emergent relief and reinstatement of O.O. in a preschool program, as a "stay-put" placement, pending resolution of their underlying due process petition. They assert that O.O.'s evaluations show that he has not "maxed out" in preschool "on his ability to socially and emotionally

develop and to develop the necessary practical and life skills to succeed in the school environment." Pet. Brf. at 3. They assert that these skills are particularly important for a child with Down syndrome and are necessary for him to succeed in kindergarten, which is more academically oriented than preschool, which focuses on social and emotional development. Because kindergarten will provide "completely different services" than that were provided in preschool, this would constitute a change in placement and, thus, permit enforcement of a "stay-put" placement.

Respondent Burlington City Board of Education (respondent or District) argues that emergent relief is not permissible because grade level promotion, from preschool to kindergarten, does not constitute a change in placement. Also, grade promotion or retention do not implicate "stay-put" rights.

PROCEDURAL HISTORY

Petitioners filed a Request for a Due Process Hearing and Request for Emergent Relief with the Office of Special Education Programs of the New Jersey Department of Education, (OSEP). The Request for Emergent Relief was transmitted by OSEP to the Office of Administrative Law, (OAL) where it was filed on August 22, 2023, as a contested case. N.J.S.A. 52:14B-1 to N.J.S.A. 52:14B-15; N.J.S.A. 52:14F-1 to N.J.S.A. 52:14F-13. A hearing was conducted on August 28, 2023, during which oral argument and brief testimony was heard. The record closed that day.

FACTUAL DISCUSSION

The underlying facts, derived from the oral argument, testimony, and the contents of the petitions and briefs, are undisputed:

O.O. was born on June 26, 2018, and is now five years old. He has been diagnosed with Down syndrome. He is enrolled in the Burlington City School District.

During the 2022-2023 school year, O.O. was eligible for special education and related services under the classification of preschool child with a disability. Resp. Exh.

A. He attended and completed pre-kindergarten ("Pre-K4"[1]) during the 2022–2023 school year. His individualized education program ("IEP") for that school year provided for a preschool inclusion classroom with an aide assigned to O.O., in addition to other services. Ibid.

O.O. was eligible for special education and related services during the 2023–2024 school year under the classification of moderate intellectual disability. Resp. Exh. B. The IEP for the 2023–2024 school year provides for a self-contained special education kindergarten classroom with an aide assigned to O.O. as well as other services. Ibid. The classroom will have a total of six special education students.

Petitioners did not agree to the 2023–2024 IEP because they believe that O.O. requires another year of preschool to help him develop the skills he needs to maximize his ability to function in kindergarten. On July 15, 2023, they requested that O.O. be retained in preschool for the 2023–2024 school year. Resp. Exh. C.

In a certification, petitioner E.H., O.O.'s mother, wrote that she holds a master's degree in special education and has taught preschool and kindergarten for almost seven years. She believes that, during the 2022–2023 school year, O.O.'s social and emotional development and practical and life skills readiness did not progress. She cited the following examples of areas in which he did not develop: taking turns, sharing, expressing wants and needs without guidance, cleaning up after himself and independently moving through routines and activities. Certification of E.H. ("E.H. Cert.") at ¶¶1, 7. E.H. referenced assessments of O.O. that showed "major deficits in social, language, practical and life skills." Id. at ¶8.[2] She asserted, "Students with Down Syndrome are able to develop strong emotional and social capabilities[.]" Id. at ¶12. She "believe[s] that, with another year of Pre-K4 spent honing those social, emotional, practical and life skills that preschool is all about, O.O. could be far more

[1] "Pre-K4" refers to the preschool program for students who are four years old.
[2] E.H. referred to an April 12, 2023, psychological evaluation report,(Pet. Exh. A), an April 6, 2023, speech-language evaluation report (Pet. Exh. B), and an April 17, 2023, occupational therapy reevaluation report (Pet. Exh. C).

developed in these areas, giving him the best chance at success in his education and life." Ibid.

In response to petitioners' objection to the 2023–2024 IEP and request that O.O. be retained in Pre-K4, Jacqueline O'Brien, the District's Director of Child Study Team and Pupil Personnel Services, sent a July 27, 2023, letter in which she detailed testing scores that show O.O.'s "extremely low range of cognitive ability[.]" Resp. Exh. D. She wrote that, "even with retention, we do not anticipate [O.O.] would be on grade level" but the child study "team does anticipate and strive for continued personal growth in the various domains of development as defined in his IEP goals and objectives. Retention is not be [sic] determined solely on such scores, especially for a student with [O.O.'s] profile." Ibid.

O'Brien added that, during the 2022–2023 school year, O.O. "exhibited growth in the preschool inclusion classroom environment in the areas including but not limited to social-emotional development, play skills, name writing, rote counting, increased attention to tasks, and motor development. Furthermore, [O.O.] exhibited progress and/or mastery toward numerous individualized goals and objectives outlined in his IEP in the areas of emergent reading and math skills, social/emotional/behavior (i.e., play activities, turn taking, social interactions with peers, etc.), speech and language (e.g., expressive labeling[)], and fine motor development (i.e., basic cutting skills, tracing, first name writing, dressing, etc.)."[3] Ibid. O'Brien cited academic studies that concluded "retention is not an effective strategy to address academic deficits." Ibid. The District thus recommended O.O. attend kindergarten "with the opportunity to socialize with age-appropriate peers, further develop his skills, and work toward his individualized goals that are tailored to meet his unique needs." Ibid. She explained that the "multiple disabilities kindergarten self-contained special education class would allow for repetition of skills and concepts while accessing the general education curriculum, at a slower

[3] A July 17, 2023, Progress Report listed each of the goals and objectives in O.O.'s 2022-2023 IEP and identified the degrees of progress he achieved with respect to each, if any. Resp. Exh. E. Of his social/emotional/behavioral goals, he achieved goals eight (participate in associative play activities in the classroom and on the playground) and ten (communicate and interact in a positive manner with peers for thirty seconds). He progressed satisfactorily with respect to the other goals. Of his motor skills goals, he achieved goals eleven (concerning use of scissors); he progressed satisfactorily or gradually with respect to the other goals). Ibid.

pace." Ibid. His social, emotional, behavioral and language skills would continue to be addressed. O'Brien anticipated that O.O. would be eligible for special education throughout his education and that "he would continue to be promoted with his age-appropriate peers, regardless of whatever grade-level our diagnostic testing shows." Ibid.

The 2022–2023 and 2023–2024 IEPs require the same modifications to be utilized for O.O. Resp. Ex. A at 10, Exh. B at 11. The 2023–2024 IEP includes social, emotional and behavioral goals and objectives and motor skills and occupational therapy goals and objectives. It also continues the related services of occupational and speech therapy and provides for an aide dedicated to O.O. It explains that a self-contained classroom was selected for O.O. since he needs "a more comprehensive specialized program that cannot be provided in general education class with in-class support or a pull out replacement. It also affords [O.O.] to be with his non-disabled peers in the regular school activities, where appropriate." O.O. will receive "more specialized instruction, more intensive modifications and more supplemental aids and services that cannot be provided in the general education setting." Resp. Exh. B at 12.

Petitioners acknowledged that the two IEPs are similar, with the 2023–2024 IEP having been slightly updated.

LEGAL ANALYSIS AND CONCLUSION

The questions presented here, whether petitioners are entitled to a stay-put placement and to emergent relief, both require an analysis of whether the District has proposed a change of placement. Petitioners argue that promotion to kindergarten constitutes a change in placement while respondent contends that a grade level promotion does not constitute a change in placement.

"Stay-Put"

The Individuals with Disabilities Education Act (IDEA) contains procedural safeguards intended to guarantee that parents are entitled to an "impartial due process

hearing" before a local educational agency if they object to the decisions of the local school regarding the education of their disabled child. 20 U.S.C. § 1415(c)(2). The Act provides, "[D]uring the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child" 20 U.S.C. § 1415(j). 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. "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." Drinker v. Colonial School District, 78 F.3d 859, 864 (3d Cir. 1996).

The IDEA regulation and 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). N.J.A.C. 6A:14-2.7(u) provides, "Pending the outcome of a due process hearing, including an expedited due process hearing, or any administrative or judicial proceeding, no change shall be made to the student's classification, program or placement unless both parties agree, or emergency relief as part of a request for a due process hearing is granted by the Office of Administrative Law according to (m) above or as provided in 20 U.S.C. § 1415(k)4 as amended and supplemented."[4] See also N.J.A.C. 6A:14-2.6(d)10 (concerning changes in placement pending mediation). As such, a "stay-put" placement applies when a special education student's placement is challenged.

Emergent Relief

Emergent relief shall only be requested for the following issues:

[4] 20 U.S.C. § 1415(k) addresses two exceptions: when the parents agree with the change of placement, pursuant to 20 U.S.C. § 1415(j), or pursuant to the disciplinary provisions of IDEA. See R.S. & M.S. v. Somerville Bd. of Educ., No. 10-4215 (MLC), 2011 U.S. Dist. LEXIS 748, *32-33 (D.N.J. Jan. 4, 2011). N.J.A.C. 6A:14-2.7(m) addresses disputes concerning whether a student's behavior was a manifestation of his disability or decisions regarding placement pursuant to U.S.C. § 1415(k).

i. Issues involving a break in the delivery of services;

ii. Issues involving disciplinary action, including manifestation determinations and determinations of interim alternate educational settings;

iii. Issues concerning placement pending the outcome of due process proceedings; and

iv. Issues involving graduation or participation in graduation ceremonies.

[N.J.A.C. 6A:14-2.7(r)1.]

As noted, only the third category, change in placement, is at issue here.

Neither party has cited, nor have I found, a case that expressly addresses whether grade promotion or retention constitutes a change in placement. In De Leon v. Susquehanna Community School Dist., 747 F.2d 149 (3d Cir. 1984), the Third Circuit addressed whether a change in the method in which a student's transportation was provided constituted a change in placement such that the "stay-put" provision applied pending a due process proceeding.[5] The "touchstone in interpreting section 1415 has to be whether the decision is likely to affect in some significant way the child's learning experience." Ibid. To conduct its analysis, the court considered the affidavits submitted by the parent and a doctor. It found that neither indicated that the proposed changes to the student's transportation would have a "substantial, detrimental impact" on his education. Id. at 154. Rather, the parent expressed conclusory concerns and the doctor did not suggest that the proposed change would make a difference to the student's education. The court thus concluded that the transportation change did not amount to a change in educational placement within the meaning of EHA's "stay-put" provision.

[5] The child was eligible for special education pursuant to the Education of All Handicapped Children Act (EHA). The stay-put provision was found at 20 U.S.C.S. 1415(e)(3). Although this case applied a different statute, "EHA jurisprudence concerning appropriate remedies has . . . been incorporated wholesale into IDEA jurisprudence." Y.B. on behalf of S.B.; F.B. on behalf of S.B. v. Howell Township Board of Education, 4 F.4th 196, 201 n.4 (3d Cir. 2021)(quoting D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488, 496 n.8 (3d Cir. 2012)).

In Lunceford v. District of Columbia Bd. of Education, 745 F.2d 1577, 1582 (D.C. Cir. 1984), a student was eligible for special education and resided in a hospital that served children with chronic illnesses or other conditions that required residential care. He had multiple disabilities, profound mental retardation and "crippling conditions." Id. at 1579. The student received therapy and treatment for seizures and feeding difficulties. A determination was made that he would be discharged from residential care and placed in an outpatient program. Appellee sought a preliminary injunction staying the change in placement. The circuit court held that he was required to "identify, at a minimum, a fundamental change in, or elimination of a basic element of the education program in order for the change to qualify as a change in educational placement." Id. at 1582. The court found that appellee had not met this standard because he contended only that the outpatient program could not administer the feeding program as well as the residential program. This alone was insufficient to constitute a change in education placement requiring that the student remain at the residential placement, or a comparable placement, until the underlying hearing is completed. See also Weil v. Board of Elementary and Secondary Education, 931 F.2d 1069, 1072 (5th Cir. 1991) cert. denied, 502 U.S. 910 (1992)(no change in educational placement when the prior and new programs provided "substantially similar classes, and both implemented the same IEP"); E.Z. on behalf of J.M. v. Bayonne Board of Education, OAL DKT. No. EDS 03419-02[6] (student was transferred from one school to another and the student's IEP was "essentially . . . carried forward intact[.]" As there was "no competent proof of any meaningful discrepancies between the two programs[,]" there had been no change in educational placement that would trigger the "stay-put" provision).

Here, petitioners contend that there will be a change of placement because there are "enormous 'meaningful discrepancies' between the curriculums and educational programs" of the Pre-K4 and kindergarten classrooms. Pet Brf. at 2. They believe their son has not fully developed in the areas of social and emotional development and practical and life skills and they want him to maximize his capacity in these areas before

[6] Administrative decisions are not precedential. They are referenced here because they provide relevant guidance.

entering kindergarten.[7] They assert that Pre-K4 focuses on these areas while kindergarten does not. They also assert that the manner in which the kindergarten class is structured will make it difficult for O.O. to further develop these skills. In support of these assertions, they rely almost exclusively upon E.H.'s assessment of the programs. While she holds a master's degree in special education and has taught preschool and kindergarten for almost seven years, she addressed only kindergarten and preschool classes in general, highlighting the skills that she asserts are required for kindergarten that O.O. has not yet mastered. She did not discuss the specific program that is proposed for O.O., which is a self-contained special education kindergarten classroom that will have no more than six students, or his IEP. Also, she did not provide specific evidence supporting the assertion that the program offered to O.O. will be fundamentally different. Moreover, while petitioners relied upon the experts' reports that highlighted the areas in which O.O. is deficient and scored poorly on tests, none of the experts opined that O.O. needed to repeat Pre-K4. Furthermore, petitioners acknowledged that the 2023–2024 IEP that places O.O. in a kindergarten classroom specifically addresses social, emotional and behavioral goals and objectives. It also includes motor skills and occupational therapy goals and objectives.

Petitioners have expressed with obvious sincerity their concern for their child and their belief that he requires additional time in preschool before he can be able to access his kindergarten education. However, they did not cite specific aspects of the kindergarten curriculum, program or structure that would cause O.O. to be denied the fundamental aspects of his education upon which they focus. This case is akin to De Leon v. Susquehanna Community School Dist., 747 F.2d 149, in that there is an absence of evidence that promotion to kindergarten will have a "substantial, detrimental impact" on O.O.'s education because the evidence provided by petitioners is conclusory and not specific to the District's specific kindergarten class. Moreover, the experts who documented O.O.'s needs did not recommend that he be retained in preschool. For these reasons, I am constrained to **CONCLUDE** that promotion to kindergarten does not, on its own, constitute a change in placement. Accordingly, pursuant to 20 U.S.C. §

[7] Underlying these assertions is petitioners' position that O.O. was denied a free appropriate public education (FAPE) because the Pre-K4 class was not a true inclusion class given the absence of a full-time special education teacher. Petitioners believe that this has caused O.O. to not develop in these areas as well as he could have.

1415(j) and N.J.A.C. 6A:14-2.7(u), a "stay-put" placement is not warranted. For the same reasons, pursuant to N.J.A.C. 6A:14-2.7(r)1, emergent relief is not warranted.

Had a change of placement been at issue, the emergent petition would be reviewed in accordance with N.J.A.C. 1:6A-12.1(e) and N.J.A.C. 6A:14-2.7(s)(1), which provide that emergent relief may be granted if the judge determines from the proofs that the following conditions have been established:

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.

See also Crowe v. DeGioia, 90 N.J. 126 (1982), codified at N.J.A.C. 6A:3-1.6(b).

The petitioner bears the burden of satisfying all four prongs of this test. Crowe, 90 N.J. at 132-34. Harm is irreparable when there can be no adequate after-the-fact remedy in law or in equity; or where monetary damages cannot adequately restore a lost experience. Crowe, 90 N.J. at 132-133; Nabel v Board of Education of Hazlet, EDU 8026-09, Final Decision on Application for Emergent Relief (June 24, 2009). As discussed above, there is insufficient evidence tending to show that the special education and related services to be provided to O.O. in the kindergarten classroom will be inappropriate and that O.O. will be unable to access his education. Petitioners offered broad statements about kindergarten and preschool classrooms but did not address the specific class provided for in the 2023–2024 IEP. Moreover, the experts upon whom they relied did not recommend that O.O. repeat preschool. For these reasons, I am constrained to find that petitioners have not demonstrated that O.O. will

suffer irreparable harm. Further, the IDEA contemplates compensatory damages when there has been a finding that a FAPE was not provided.

Petitioners argue that their legal right is settled because they are entitled to a "stay-put" placement. They have not offered additional argument concerning their settled legal right. Without more, they have not demonstrated that there is a well-settled right to remain in preschool.

With respect to the likelihood of success on the merits, petitioners assert that, given the likelihood that O.O. will never achieve grade level performance, it is "imperative" that the school "focus[es] on maximizing his social and emotional development as children with Down Syndrome can thrive in this area with the right support." Pet. Brf. at 3. Also, the evaluation reports show that he has not "maxed out in Pre-K4 on his ability to socially and emotionally develop and to develop the necessary practical and life skills to succeed in the school environment." Ibid. Rather, he scored below average or low on the evaluations. Another year in Pre-K4 "may help him" develop these skills further. Id. at 4.[8] This is speculative. Moreover, the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 1001 (2017). The "educational program 'must be reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential and individual abilities.'" Dunn v. Downingtown Area Sch. Dist., 904 F.3d 248, 254 (3d Cir. 2018) (quoting Ridley Sch. Dist. v. M.R., 680 F.3d 260, 269 (3d Cir. 2012)). In addressing the quantum of educational benefit required, the Third Circuit has made clear that more than a "trivial" or "de minimis" educational benefit is required, and the appropriate standard is whether the IEP provides for "significant learning" and confers "meaningful benefit" to the child. T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000); Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999); Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 180, 182–84 (3d Cir. 1988), cert. den. sub. nom., Cent. Columbia Sch. Dist. v. Polk, 488 U.S.

[8] Petitioners also contend that the prior year's IEP (2022–2023) was not properly implemented and that this denied O.O. "the benefits of a true inclusion classroom." Ibid. However, they acknowledged during oral argument that the IEP, which was agreed upon, was implemented in accord with its terms.

1030 (1989). The IDEA thus does not require that the District maximize O.O.'s potential or provide him the best education possible. Carlisle Area Sch. v. Scott P., 62 F.3d 520, 533–34 (3d Cir. 1995). The District will have satisfied the requirements of law by providing him with personalized instruction and sufficient support services "as are necessary to permit [him] 'to benefit' from the instruction." G.B. v. Bridgewater-Raritan Reg'l Bd. of Educ., 2009 U.S. Dist. LEXIS 15671, *5 (D.N.J. Feb. 27, 2009) [9] (citing Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 189 (1982)).

"And while parents often play a role in the development of an IEP, they do not have a right to compel a school district to provide a specific program or employ specific methodology in educating a student." E.E. v. Ridgefield Park Bd. of Educ., 2020 U.S. Dist. LEXIS 102249, *8 (June 11, 2020)(quoting Ridley Sch. Dist., 680 F.3d at 269, 278). School districts' determinations are subject to deference. The "IDEA does not 'invite the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.'" Damarcus S. v. District of Columbia, 190 F.Supp. 3d 35, 56 (D.C. Cir. 2016), (quoting Rowley, 458 U.S. at 206); see also E.E. v. Ridgefield Park Bd. of Educ., 856 Fed. Appx. 367, *7 (3d Cir. 2021). See also R.L. and D.L. on behalf of E.L. v. Holmdel Township Board of Education, OAL DKT. No. EDS 08811-09 ("promotion and retention are matters within the Board's discretion and the courts give substantial deference to school boards on these issues"). Without substantive evidence supporting the contention that the specific kindergarten class offered by the District will not offer O.O. personalized instruction and sufficient support services as are necessary to permit him to benefit in a meaningful way from the instruction, I am unable to conclude that petitioners have demonstrated a likelihood of success on the merits.

Having found that petitioners failed to satisfy three of the four criteria required for emergent relief, I **CONCLUDE** that they have failed to meet their burden for an order directing the emergent relief they seek. Accordingly, I **ORDER** that the request for emergent relief be **DENIED**.

[9] Unpublished decisions are not precedential. They are cited here because they provide relevant guidance.

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.

August 29, 2023
DATE

JUDITH LIEBERMAN, ALJ

Date Received at Agency

Date Mailed to Parties:

JL/jm/mph

APPENDIX

WITNESSES

For petitioner

E.H.

For respondent

None

EXHIBITS

For petitioner

P-A Psychological evaluation report, April 12, 2023

P-B Speech-language evaluation report, April 6, 2023

P-C Occupational therapy reevaluation, April 17, 2023

Certification of E.H.

For respondent

R-A IEP, April 28, 2023 – June 30, 2023

R-B IEP, September 1, 2023 – June 30, 2024

R-C E.H. letter

R-D O'Brien letter

R-E July 18, 2023, progress report

Certification of Jacqueline O'Brien