State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
ON EMERGENT RELIEF
OAL DKT. NO. EDS 08688-23
AGENCY DKT. NO. 2024-36504

M.R. ON BEHALF OF D.P.,
Petitioner,
v.
FRANKLIN TOWNSHIP
BOARD OF EDUCATION,
Respondent.

Michelle M. Schott, Esq., for petitioner (Purcell Mulcahy Flanagan, LLC, attorneys)

Cameron R. Morgan, Esq., for respondent (Cleary, Giacobbe, Alfieri and Jacobs, LLC, attorneys)

Record Closed: September 7, 2023 Decided: September 11, 2023

BEFORE: **WILLIAM T. COOPER III**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

By a request for emergent relief petitioner seeks to have her son, D.P. placed in the Midland School (Midland) located in Branchburg, New Jersey, Franklin Township

Board of Education (Franklin or respondent) opposes this request and argues that free appropriate public education (FAPE) is being provided.

This matter was transmitted to the Office of Administrative Law (OAL) on September 5, 2023, for an emergent relief hearing and a final determination in accordance with 20 U.S.C.A. §1415 and 34 C.F.R. §§300.500 to 300.587, and the Director of the Office of Administrative Law assigned me to hear the case pursuant to N.J.S.A. 52:14F-5.

An oral argument on emergent relief was heard on September 7, 2023, and the record closed on that date.

PROCEDURAL HISTORY

Undisputed facts

M.R. (petitioner) filed a request for emergent relief on behalf of her minor child, D.P., who is eligible for special education and related services pursuant to the federal eligibility category of "Multiple Disabilities" (non-verbal and non-ambulatory). M.R. is a sixteen-year-old rising high school junior who previously attended, The Midland School pursuant to an Individualized Education Plan (IEP) developed by the Bridgewater-Raritan School District (Bridgewater). In June 2023, petitioner moved from Bridgewater Township to Somerset, New Jersey, and D.P. was registered with the Franklin Township Board of Education (Franklin). In anticipation of M.R.'s transition into the Franklin district an IEP dated August 1, 2023, (2023 IEP) was developed, wherein, D.P. would be placed into the "Multiple Disabilities Program" at the Franklin High School commencing September 7, 2023. The petitioner objected to this IEP and filed a due process claim against Franklin seeking D.P.'s continued placement at Midland.

In support of the emergent request the petitioner submitted the IEP report for the 2022–2023 school year from Midland, and a 2022–2023 progress report from Midland School Principal Kristen Massimo. Both documents underscore that D.P. is a medically

frail student with significant disabilities who requires assistance in every facet of his daily routine.

Under the IEP developed by Bridgewater-Raritan for the 2022–2023 school year (2022 IEP), in addition to attending a self-contained multiple disabilities program at Midland School, the Bridgewater IEP provided D.P. with related services in the form of an individual 1:1 aide daily; individual speech/language therapy three times per week for twenty minutes; small group speech/language therapy one time per week for twenty minutes; individual physical therapy three times per week for forty minutes; individual occupational therapy two times per week for forty minutes; specialized transportation to and from school with a wheelchair lift, air conditioning, and a bus aide; assistive technology services; and various other program modifications, accommodations, and supports.

On August 1, 2023, Franklin's child study team issued an IEP (2023 IEP) for D.P. to attend school for the upcoming 2023–2024 school year with the District's Multiple Disabilities Program at Franklin High School. D.P. would be in a full day, self-contained special education program designed for students with multiple disabilities and medically fragile students. The program is housed on a separate floor set apart from most of the student population at Franklin High School.

In addition to placement in a comparable self-contained Multiple Disabilities program, the 2023 IEP provides D.P. with the same related services and accommodations, modifications, and supports he received under the Bridgewater-Raritan IEP, including but not limited to: an individual 1:1 aide daily; individual speech/language therapy three times per week for twenty minutes; small group speech/language therapy one time per week for twenty minutes; individual physical therapy three times per week for forty minutes; individual occupational therapy two times per week for forty minutes; specialized transportation to and from school with a wheelchair lift, air conditioning, and a bus aide; assistive technology services; and various other program modifications, accommodations, and supports.

ARGUMENTS

The petitioner acknowledged that the 2023 IEP offers comparable programs and services to those provided to D.P. through the Bridgewater-Raritan IEP. However, petitioner had several safety concerns. First, the multiple disabilities and medically fragile students are located on the third floor of the Franklin High School. If an emergency arose, then D.P. could have difficulty exiting the building.

Second, petitioner questions whether the bathroom accessible to D.P. is compliant with the Americans Disability Act (ADA) and if the necessary equipment that allows D.P. to transfer from his wheelchair to the toilet would be available.

Lastly, petitioner noted that D.P. has difficulty in large, crowded rooms and was concerned that lunch in the cafeteria with so many other students would present difficulties. Petitioner argued that the Midland School is better equipped to handle D.P.'s fragile medical condition because it specializes in providing educational programs for disabled students and D.P. has been at the school for the last two years. Overall, petitioner argued that D.P. has attended Midland for two years and she believed that they provided a safer environment and was better suited to handling D.P.'s daily activities and needs.

Respondent argued that in addition to an elevator that is available for D.P.'s use, there would be an "evacuation chair" available that would allow him to descend stairs to evacuate the building in case of an emergency. Further respondent noted that all the bathrooms at Franklin High School are ADA compliant and that any equipment D.P. needs for toileting would be on hand or would be purchased as is necessary.

Respondent noted that D.P. would have a 1:1 aide with him throughout the day and if the cafeteria presented him with any difficulties, then D.P. would be allowed to take lunch in his classroom, which, students in the Multiple Disabilities Program are allowed to do.

Lastly, respondent argued that all the adaptive equipment that D.P. requires would be available to him. Respondent also stressed that Franklin High School has a more robust extra-curricular activities program than the Midland School. Finally, respondent argued that the 2023 IEP provides D.P. with the very same programs and services provided by the Bridgewater 2022 IEP.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

The issue here is whether the doctrine of "stay put" is applicable on an emergent basis so that Franklin could be compelled to maintain D.P. at the Midland School.

Pursuant to N.J.A.C. 6A:14-2.7(r), emergent relief shall only be requested for the following issues:

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.

Here, the application for emergent relief concerns placement pending the outcome of due process proceedings in accordance with N.J.A.C. 6A:14-2.7(r)(1)(iii).

In seeking emergent relief, the movant, has the burden of satisfying the requisite emergent relief standards. As set forth in N.J.A.C. 1:6A-12.1(e), N.J.A.C. 6A:14-2.7(s), and N.J.A.C. 6A:3-1.6(b), codifying Crowe v. DeGoia, 90 N.J. 126 (1986), an application for emergent relief will be granted only if it meets all four of the following requirements:

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 a 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.

The first consideration is whether petitioner will suffer irreparable harm if the requested relief is not granted. "Irreparable harm is shown when money damages cannot adequately compensate plaintiff's injuries." Hornstine v. Twp. of Moorestown, 263 F. Supp. 2d 887, 911 (D.N.J. 2003) (citing Sampson v. Murray, 415 U.S. 61, 90 (1974)). "More than a risk of irreparable harm must be demonstrated." Cont'l Grp., Inc. v Amococ Chemicals Corp., 614 F.2d 351, 359 (3rd Cir. 1980). "The requisite for injunctive relief has been characterized as a clear showing of immediate irreparable injury or a presently existing actual threat; [an injunction] may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights protected by statute or by common law." Id. This was further explained by the New Jersey District Court:

> "A party seeking a preliminary injunction must make a clear showing of immediate irreparable injury . . . Establishing a risk of irreparable harm is not enough. A plaintiff has the burden of proving a clear showing of immediate irreparable injury . . . Mere speculation as to an injury that will result, in the absence of any facts supporting such a claim, is insufficient to demonstrate irreparable harm." See Spacemax Int'l LLC v. Core Health & Fitness, LLC, No. CIV.A. 2:13-4015-CCC, 2013 WL 5817168, at 2 (D.N.J. Oct. 28, 2013) (internal citations and quotations omitted).

Petitioner's strongest argument relates to the risk that D.P. may regress in his learning without an immediate intervention to change his placement. However, this argument is speculative at this juncture of the proceedings. Petitioner has provided no medical or educational opinions in support of this consideration. While the potential for regression may exist, petitioner has failed to show that D.P. will suffer irreparable harm if his placement is not immediately changed, especially considering that the 2023–2024 school year has just begun. I **CONCLUDE** that petitioner have not met their burden of satisfying the irreparable harm standard for emergent relief.

The second consideration is whether petitioner has shown his claim to be well settled. Here, the petitioner argued that the doctrine of "stay-put" should apply while the due process claim is pending. However, that doctrine cannot be readily applied here since D.P. is transitioning from the Bridgewater-Raritan School District to the Franklin Township School District.

In practice, "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., Y.B. o/b/o S.B. v. Howell Twp. Bd. of Educ., 4 F.4th 196, 200 (3d Cir. 2021); J.F. v. Byram Twp. Bd. of Educ., 629 F. App'x 235 (3d Cir. 2015).

In Howell, 4 F.4th at 197, a family moved from the Lakewood Township School District into the Howell School District, after Lakewood had developed an IEP which placed the student at an out-of-district placement called the School for Children with Hidden Intelligence. The new school district, Howell, convened an IEP meeting and determined that the existing IEP could be implemented in an in-district classroom program. Ibid. An ALJ denied the family's request for emergent relief to maintain the School for Children with Hidden Intelligence as the "stay-put" placement during the pendency of their challenge to the Howell IEP. Ibid. The federal district court judge affirmed the ALJ's decision denying "stay-put" at the out-of-district school. Ibid. On further appeal, the Third Circuit upheld the denial of "stay-put." In applying the

"comparable services" test of the IDEA's intrastate transfer provision, the court held that "an IEP focuses on the services needed to provide a student with a FAPE, not on the brick-and-mortar location where those services are provided." Id. at 198. More importantly, after holding that the intrastate transfer provision applies, rather than the stay-put provision, the Third Circuit went on to analyze whether Howell had indeed provided the student with a program offering comparable services to those set forth in the Lakewood IEP, explaining:

> On the record before us, we cannot say the services were not comparable. Ample evidence shows Howell intended to provide "services comparable to those described in [S.B.'s] previously held IEP." 20 U.S.C. § 1414(d)(2)(C)(i)(I). After the Howell IEP Team met S.B. and reviewed his Lakewood IEP, it produced a memorandum listing these services S.B. would receive at Memorial Elementary: "speech therapy three times a week in an individual setting and once a week in a group setting; occupational therapy two times a week in an individual setting and once a week in a group setting; and physical therapy once a week in a group setting." Y.B. ex rel. S.B. v. Howell Twp. Bd. of Educ., 2020 WL 1320137, at *2 (D.N.J. Mar. 20, 2020). That therapy schedule matches the one S.B. received under his Lakewood IEP. Howell also "arranged for the provision of related services for S.B. consistent with the Lakewood IEP and . . . made arrangements for transportation services for S.B. and his *201 special need for a welcome on the school bus." Y.B., 2020 WL 1320137, at *2. Rather than sending S.B. to Howell and then challenging the services as inadequate through a due process hearing—the procedure contemplated by the IDEA—Appellant eschewed the school district's offer, refused to send S.B. to Howell, and unilaterally continued his placement at SCHI. In doing so, Appellant prevented Howell from implementing its services at all, so there is no evidence the services offered were not "comparable." Because the record lacks evidence of non-comparable services, Howell did not violate the IDEA. [Id. at 200-01.]

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). J.F. v. Byram Twp. Bd. of Educ., 629 F. App'x 235, 238 FN 3 (3d Cir. 2015) (internal citation omitted). "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." Ibid. 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. Thus, when a student with an IEP moves to a new school district, that district "meets its obligation" under the IDEA if the district complies with the IDEA's intrastate transfer provision, 20 U.S.C. § 1414(d)(2)(C)(i)(I), by providing the student "a free and appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents." Ibid. 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 transfer 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 D.P.'s high school following the transition in school districts, but acknowledged that the 2023 IEP offers comparable, if not the same program and services provided for in the Bridgewater 2022 IEP. Nevertheless, petitioner requests that D.P. remain at Midland while the due-process

complaint is pending. Petitioner has not set forth a legal basis for entitlement to "stay-put," and is not entitled to "stay-put" in Midland because petitioner unilaterally transferred D.P. from Bridgewater to Franklin. 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). Ibid. at 238. Thus, while respondent is required to provide services comparable to the Bridgewater 2022 IEP until an IEP is implemented, respondent is not required to place D.P. at Midland. Accordingly, I **CONCLUDE** that petitioner's claim for "stay-put" is not well settled.

The third consideration is whether petitioner has a likelihood of prevailing on the merits. Petitioner argues that D.P. should remain at the Midland School pursuant to the Bridgewater IEP for the 2023–2024 school 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) which 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 of 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]." Ibid. at 24.

Here, petitioner must provide respondent with the opportunity to provide a free and appropriate education. Petitioner's primary request is that D.P. remain at Midland, and petitioner focused on this request prior to working with the Franklin School District IEP team and continued to make this request following receipt of the 2023 IEP. The respondent is entitled to a good faith opportunity to comply with the IDEA. Accordingly, I **CONCLUDE** that petitioner's claim for "stay-put" is not likely to prevail on the merits.

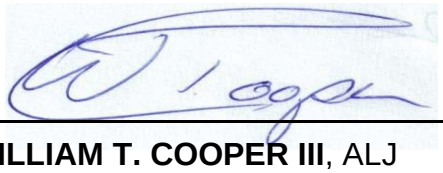
Regarding balancing of the equities, the petitioner argues that D.P. will suffer irreparable harm if the request for relief is not granted. Respondent argues that if relief is granted it would undermine the District's ability to make program determinations for each student. I **CONCLUDE** that the equities weigh in favor of the petitioner.

Since petitioner has not satisfied all the requisite emergent relief standards, I **CONCLUDE** that the application for emergency relief must be denied.

ORDER

It is **ORDERED** that petitioner's motion for emergent relief is **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.



September 11, 2023
DATE

WILLIAM T. COOPER III, ALJ

Date Received at Agency

Date Mailed to Parties:

WTC/am