State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION GRANTING IN RESPONDENT'S MOTION FOR SUMMARY DECISION

OAL DKT. NO. EDS 12331-18
AGENCY DKT. NO. 2019-28565

D.S. AND R.S. ON BEHALF OF J.S.,
Petitioners,
v.
HOWELL TOWNSHIP BOARD OF EDUCATION,
Respondent.

Michael I. Inzelbuch, Esq., for petitioners

Viola Lordi, Esq., for respondent (Wilentz, Goldman & Spitzer, PA, attorneys)

Record Closed: June 7, 2019 Decided: June 11, 2019

BEFORE **DOROTHY INCARVITO-GARRABRANT,** ALJ:

STATEMENT OF THE CASE

This matter arises from a Due Process Petition filed by petitioners on behalf of their six-year-old son,[1] J.S., a special education student, seeking an appropriate out of district

[1] J.S. was six years old when the 2018-2019 school year commenced. J.S. is presently seven years old.

placement, transportation, reimbursement for the Extended School Year program (ESY), compensatory damages and reimbursement for all fees associated with this matter. Respondent filed a motion for summary decision seeking an order determining that "stay-put" does not apply and that petitioners are not entitled to reimbursements for costs or any other relief arising from their decision to continue J.S.'s enrollment at the School for Children with Hidden Intelligence (SCHI) after respondent's offer to implement the Lakewood Individualized Education Plan (IEP) in Howell and provide a Free and Appropriate Public Education (FAPE) to J.S. Respondent further seeks a dismissal of petitioners' due process petition. Petitioners oppose the motion.

PROCEDURAL HISTORY

This matter arose with the July 27, 2018 filing of a parental request for a due process hearing with the Office of Special Education Programs (OSEP) under the IDEA, 20 U.S.C.A. §§1400 to 1482, by petitioners, D.S. and R.S. on behalf of J.S. Respondent filed its Answer on August 6, 2018. The contested case was transmitted to the Office of Administrative Law (OAL) on August 27, 2018.

The OAL issued a notice of settlement conference dated August 27, 2018, scheduling the conference before Susan Scarola, A.L.J. to be held on September 13, 2018. By correspondence dated September 12, 2018, petitioners' counsel requested an adjournment of the settlement conference because the petitioners were out of the country. The correspondence requested that this matter be rescheduled for a settlement conference on October 11, 2018. By correspondence dated September 12, 2018, respondent's attorney consented to the adjournment. The settlement conference was conducted on October 11, 2018.

This matter was assigned to Judith Lieberman, A.L.J. on October 11, 2018. A pre-hearing conference was held on October 22, 2018 and a pre-hearing Order dated October 26, 2018 was entered. Said ordered memorialized that respondent's counsel advised that respondent intended to file a motion for summary decision. A motion briefing schedule was established providing for the filing of respondent's motion by November 30, 2018, petitioner's opposition by January 7, 2019, and respondent's reply by February 4,

2019. The Order provided that for a second pre-hearing conference on February 18, 2019, which was agreed to by both counsel. The Order provided that hearing dates would be scheduled after the February 18, 2019 conference.

This matter was re-assigned to the undersigned A.L.J. on October 29, 2018. A pre-hearing conference was conducted by the undersigned on November 1, 2018. A pre-hearing Order was entered by the undersigned dated November 9, 2018. During the pre-hearing conference, both counsel represented that they had been provided with a motion briefing schedule by Judge Lieberman. It was incorporated into the November 9, 2018 pre-hearing order. A hearing date of June 12, 2019 was scheduled, and it was noted that it was anticipated that additional hearing dates would be added, if the motion was denied.

By correspondence from respondent's counsel dated November 28, 2018, respondent and petitioner jointly requested an adjournment of the motion filing and briefing dates. This request was granted. An amended motion briefing schedule was established providing for the filing of respondent's motion by December 14, 2018, petitioner's opposition by January 21, 2019, and respondent's reply by February 18, 2019.

On December 14, 2018, the respondent filed its motion for summary decision. Petitioners filed their opposition on December 27, 2018. Respondent replied to the opposition on February 21, 2019.

Legal Arguments

For respondent

Respondent seeks summary decision dismissing the petition. Respondent argues as follows.

First, respondent argues that it satisfied its legal obligations to petitioners pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. and N.J.S.A 18A:46-1 et seq., upon the family's relocation into its district. Petitioners had resided in Lakewood Township School District (Lakewood) prior to moving their residence to Howell Township School District (Howell), respondent's district. J.S.'s last Lakewood IEP was dated April 26, 2018. Petitioners participated in the IEP meeting with Lakewood representatives and consented to the April 26, 2018 IEP. Pursuant to that IEP, J.S. continued enrollment in an out of district placement at SCHI.

Petitioner's relocated to Howell in July 2018. Upon notice petitioners' relocation to Howell, which was less than three months after the April 26, 2018 IEP, respondent took all required actions. It reviewed the recent, in-depth Lakewood IEP which was consented to by petitioners and which petitioners agreed provided J.S. with a FAPE. It reviewed the Lakewood IEP's supporting and related information including the following:

1. Present Levels of Academic Achievement & Functional Performance;
2. Evaluation Summary—Educational Evaluation, Occupational Evaluation, Physical Therapy Evaluation, Speech and Language Evaluation;
3. Statement of Eligibility;
4. Health/Medical Background;
5. Special Team Considerations;
6. Goals and Objectives;
7. Accommodations, Personal Support and Progress Reporting;

8. Placement in Lease Restrictive Environment;
9. Extended School Year;
10. Classroom Modifications
11. Criteria for Extended School Year;
12. Statement of Special Education Related Services;
13. Notice of Requirements for the IEP and Placement; and
14. Procedural Safeguards Statement.

Respondent considered its own special education programs. It met with the petitioners. It observed J.S. at SCHI.

Respondent determined it could implement the Lakewood IEP in its Special Class Program—CMI for the ESY program beginning in July 2018, and for the school year beginning in September 2018. Respondent contends it did not breach its duties under the IDEA. Respondent developed and offered petitioners and J.S. an individualized educational program for the 2018-2019 school year in Howell, which was comparable to the program set forth in the Lakewood IEP. Additionally, Howell's program was offered to petitioners for the respondent's ESY program in the same month the family had relocated to Howell and less than three months after the implementation of J.S.'s Lakewood IEP. Therefore, respondent argues that it satisfied its legal obligation to offer J.S. with a FAPE by providing the program that petitioners had developed with Lakewood and consented to, less than three months earlier. Despite these actions, J.S. did not attend ESY or school in Howell. Petitioners unilaterally continued J.S.'s attendance at SCHI.

Second, respondent claims that, as a matter of law, "stay-put" does not apply in this case because petitioners unilaterally moved from Lakewood to Howell. Respondent contends that the law imposes a responsibility on the professionals of the new school district to meet with the parents, review the student's last implemented IEP, determine whether it can be implemented in the new school district. Respondent submits that it acted in accordance with 10 U.S.C. §1414(d)(2)(C)(i)(I) and N.J.A.C. 6A;14-4.1(g)(1). Respondent argues that the Cinnaminson Twp. Bd. of Ed. v. K.L. o/b/o R.L, 2016 WL

4212121 (D.N.J. Aug. 9, 2016)[2], and J.F. v. Byram Township Board of Education, 629 F.App'x 235, 238 (3d Cir. 2015) cases confirm that "stay-put" and reimbursement of expenses are not appropriate when parents unilaterally relocate to a new district.

Three days after petitioners registered J.S. in Howell, the respondent's staff met with petitioners. Respondent's IEP Team had reviewed the Lakewood IEP, which was implemented less than three months earlier. Respondent's Supervisors of Special Education observed J.S. in his then-program at SCHI. An IEP meeting was held on July 19, 2018. Petitioners were informed at this meeting that the Lakewood IEP could be implemented in respondent's district for the 2018-2019 school year and in the respondent's ESY program that July. J.S. did not attend one day of ESY or school in Howell. Respondent contends it satisfied its legal obligations to petitioners. Respondent's further contend that petitioners refused to cooperate with respondent and did not act in good faith. Petitioners intended to continue J.S.'s placement at SCHI, only.

Respondent requests an order determining that "stay-put" does not apply in this matter as a result of the petitioners' voluntary relocation to Howell. It further requests an order determining that petitioners are not entitled to any reimbursement for costs or any other relief arising from their decision to continue J.S.'s enrollment at SCHI after respondent's offer to implement the Lakewood IEP in Howell and provide a FAPE to J.S.

Third, respondent contends that the facts in this matter are not in dispute and the matter is ripe for summary decision.

For petitioners

Petitioners oppose respondent's motion for summary decision and argue as follows:

[2] There are two cases involving the Cinnaminson Township Board of Education which are identified in this Final Decision. The first is Cinnaminson Township Board of Education v. K.L. o/b/o R.L., 2016 WL 4212121 *5 (D.N.J. Aug. 9, 2016), hereinafter referred to as Cinnaminson. The second is K.G. v. Cinnaminson Twp. Bd. of Ed., 2018 WL 4489672 (D.N.J. Sept. 19, 2018), hereinafter referred to as K.G. v Cinnaminson.

First, petitioners contend that respondent failed to offer an appropriate educational program for J.S. Petitioners acknowledge that when a student transfers jurisdictions, the status quo protections of "stay-put" no longer exist. However, petitioners argue that the status quo protections still exist to protect the relocating student, when the new district fails to take all of the steps they would be required to take to propose an IEP for any student, who had been attending their school and residing in the district. The status quo protections should continue in a situation like this, in which respondent failed to make any real attempts to facilitate a smooth transition, as occurred in Cinnaminson.

Alternatively, if "stay-put" protections are inapplicable, the law still requires that services comparable to those described in the previously held IEP be provided. Respondent had no basis to support their offer to provide those services in district. Petitioner contends the SCHI program and the one offered by respondent are vastly different and not comparable. Petitioners submit that respondent's program includes a class size three times larger than SCHI's and that it requires transferring between different buildings across a parking lot. The students at Howell are higher functioning which could impact J.S. when working in groups. Petitioners submit that these issues would be detrimental to J.S. Petitioner further contends that respondent's position that its singular, brief observation of J.S. at SCHI is sufficient to support a finding that respondent's program is substantially similar is without merit.

Second, petitioners argue that respondent is obligated to reimburse them for their costs for SCHI for the 2018-2019 school year. When respondent failed to offer J.S. a FAPE, it breached its duty under IDEA and New Jersey law. Petitioners rejected the respondent's IEP. They submit they provided notice to respondent that J.S. would continue at SCHI and therefore, reimbursement would be mandated. Respondent's failure to provide a FAPE dictated that J.S. continue at the SCHI school and that respondent must reimburse petitioners for their costs.

STATEMENT OF FACTS

The following facts pertinent to the motion for summary decision are uncontroverted, and I **FIND** as follows:

J.S. was born on April 17, 2012. The family resided in Lakewood, New Jersey until July 2018. J.S. has attended SCHI in Lakewood, since he was three years old. This was an out-of-district placement. J.S. is classified as eligible for Special Education and Related Services pursuant to the federal eligibility category of "Other Health Impaired." J.S. suffers from WAGR syndrome, aniridia, genet touring anomalies, and retardation. He has considerable developmental delays and significant impairment of his vision.

On April 26, 2018, petitioners attended an IEP-Annual Review meeting in Lakewood. Petitioners and Lakewood's representatives participated in that in-depth meeting. Extensive documentation and evaluation information was considered. This Lakewood IEP was developed and accepted by petitioners, who also agreed that the IEP be implemented prior to the expiration of the fifteen-day notice period. The IEP was implemented on April 28, 2018. The Lakewood IEP continued J.S.'s placement at SCHI. By consenting to the IEP, petitioners agreed it provided a FAPE to J.S.

Less than three months later in July 2018, petitioners relocated to Howell. Petitioners registered J.S. for school in Howell on July 16, 2018. Respondent requested a transfer card from Lakewood on July 18, 2018, which Lakewood issued for the 2018-2019 school year.

Respondent immediately took action to comply with the IDEA and the New Jersey administrative code. It scheduled an IEP meeting for July 19, 2018, for petitioners and respondent's IEP team. Respondent requested and received J.S.'s Lakewood IEP, which was implemented on April 28, 2018 and reviewed it. Respondent's staff reviewed the extensive supporting information and evaluation summaries. Respondent's Supervisor of Special Education, Susan Spill, transmitted J.S.'s Lakewood IEP to five of respondent's professional staff members, who would be attending the IEP meeting.[3] Respondent's Supervisors of Special Education observed J.S. at SCHI.

[3] Petitioners do not dispute that the five staff members and the one general education teacher were the pertinent members of respondent's IEP team who were required to be in attendance and participate in the IEP meeting.

On July 19, 2018, respondent's representatives met with petitioners for the scheduled IEP meeting. In attendance were the petitioners, the five staff members who had been provided with the Lakewood IEP, and a general education teacher. Respondent reviewed the Lakewood IEP and supporting information. Respondent considered their observations at SCHI. Respondent considered its own special education programs and capability to provide a FAPE to J.S. Respondent determined that it could implement the Lakewood IEP in district in the Special Class Program—CMI at Griebling Elementary School for the 2018-2019 school year and at Memorial Elementary School during its ESY program. Respondent informed petitioners that J.S. could begin in the ESY program within days of the IEP meeting. Petitioners did not send J.S. to the respondent's ESY program.

Subsequently, petitioners observed respondent's program. By email dated July 27, 2018, petitioners indicated that they did not feel the Special Class Program—CMI in Howell was appropriate for J.S., based on their observations. They requested that J.S.'s SCHI teacher and social worker observe Howell's program to make a final decision relative to Howell's program. Mina Fund, LCSW and Aliza Fund, Teacher of the Handicapped observed respondent's program. They stated that the class size is larger than at SCHI, (three students versus 9-12 students). The other students are more advanced than J.S. The playground is separated from the school building by a parking lot that J.S. would have to cross to access the playground. The ESY program is located in a different building than that of the school year program.

J.S.'s Lakewood IEP did not mandate a certain number of students in his small class size, a certain composition of classmates, a playground attached to or immediately adjacent to the school building, or that the ESY program must occur in the same building as the school year program. These observations did not violate or contradict any provision, goal, or objective of the Lakewood IEP and were not material to the program providing a FAPE to J.S. These differences did not make respondent's program incomparable or justify a continued out of district placement at SCHI.

Petitioners rejected the suggested placement and unilaterally continued J.S.'s placement at SCHI. Petitioners' actions demonstrated that they solely intended to

continue J.S.'s out of district placement. No adjustment would have been accepted. Petitioners lost their "stay-put" protections when they voluntary moved to Howell. Petitioners did not make a good faith effort to provide respondent with an opportunity to meet its obligations to J.S. It could not be concluded by petitioners that respondent could not provide a FAPE to J.S. without providing respondent the opportunity to do so. Instead, petitioners did not permit J.S. to attend one day at Howell in ESY or the school year.

Petitioners are not entitled to any reimbursement for costs or any other relief arising from their decision to unilaterally continue J.S.'s enrollment at SCHI.

Respondent satisfied its obligations to petitioners and J.S., pursuant to the IDEA and New Jersey administrative code. Respondent provided a comparable program and a FAPE to J.S.

LEGAL DISCUSSION

Summary Decision

Summary Decision may be rendered in an administrative proceeding if the pleadings, discovery, and affidavits "show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). The standard to be applied in deciding a motion pursuant to N.J.A.C. 1:1-12.5(b) is essentially the same as that governing a motion under R. 4:46-2 for summary judgment in civil litigation. Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 121, (App. Div. 1995), certif. denied, 145 N.J. 372 (1996).

A court should grant summary judgment when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-529 (1995). The Supreme Court of New Jersey has adopted a standard that requires judges to "engage in an analytical process to decide whether the evidence presents a sufficient disagreement

to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 533.

A court should deny a motion for summary decision when the party opposing the motion has produced evidence that creates a genuine issue as to any material fact challenged. Brill, 142 N.J. at 528-29. When making a summary decision, the "judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 540.

In the instant matter, there is no dispute as to material facts and the matter is ripe for summary decision.

Individuals with Disabilities Education Act

The IDEA is designed to assure that every disabled student between the ages of three and twenty-one may access within his school district of residence a free appropriate public education that is tailored to his specific needs. 20 U.S.C.A. §§ 1400(c), 1412(a), 1413. In New Jersey, the State Board of Education has promulgated rules in accordance with the standards set forth in the IDEA. N.J.A.C. 6A:14-1.1(b)(1); N.J.A.C. 6A:14-1.1 to -10.2.

Under those rules, a parent or adult student may request a due process hearing before an administrative law judge (ALJ) to resolve disputes "regarding identification, evaluation, reevaluation, classification, educational placement, the provision of a free, appropriate public education, or disciplinary action." N.J.A.C. 6A:14-2.6(a); N.J.A.C. 6A:14-2.7(a). A parent or adult student may also seek emergent relief for "[i]ssues concerning placement pending the outcome of due process proceedings." N.J.A.C. 6A:14-2.7(r); N.J.A.C. 1:6A-12.1.

Generally, no change shall be made to the student's program or placement pending the outcome of a due process hearing. N.J.A.C. 6A:14-2.6(d)(10); N.J.A.C. 6A:14-2.7(u); see also, 20 U.S.C.A. § 1415(j). The "stay-put" provision "acts as an automatic preliminary injunction" and "protects the status quo of a child's educational

placement while a parent challenges a proposed change to, or elimination of, services." Drinker by Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 (3d Cir. 1996) (discussing the federal analogue to New Jersey's stay-put provisions) (citation omitted); C.H. v. Cape Henlopen Sch. Dist., 606 F.3d 59, 71-72 (3d Cir. 2010).

The parties agree that this dispute is governed by 20 U.S.C. §1414(d)(2)(C)(i)(I) and N.J.A.C. 6A:14-4.1(g)(1). The Individuals with Disabilities Act, 20 U.S.C. §1414(d)(2)(C)(i)(I), provides as follows:

> (C) Program for children who transfer school districts.
>
> (i) In general.
>
> (I) Transfer within the same State. In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same State, the local educational agency shall provide such child with a free appropriate public education, **including services comparable to those described in the previously held IEP**, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law.
>
> [Emphasis Added]

N.J.A.C. 6A:14-4.1(g)(1), provides as follows:

> When a student with a disability transfers from one New Jersey school district to another or from an out-of-State to a New Jersey school district, 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, if the parents and the district agree, the IEP shall be implemented as written. If the appropriate school district staff do not agree to implement the current IEP, the district

> shall conduct all necessary assessments and within 30 days of the date the student enrolls in the district, develop and implement a new IEP for the student.

Petitioners voluntarily decided to move and thus, transferred J.S to respondent for school on July 18, 2018. J.S.'s IEP, prepared by Lakewood and accepted by petitioners, was implemented less than three months before family's move and the transfer of J.S. to Howell. Under the IDEA, as specified in the above code section, respondent was required to provide J.S. with a FAPE that included services comparable to those described in his Lakewood IEP. Under the New Jersey regulation, respondent was also required to act without delay and provide a program comparable to that set forth in the student's current IEP.

Respondent relies on J.F. v. Bryam Twp. Bd. of Educ., 629 Fed. Appx. 235, 237-238 (3d Cir. Oct. 29, 2015),[4] to support its position that when a student transfers under an existing IEP, the new district's obligation under the IDEA is to provide comparable services to what the student received from the prior district, but not necessarily the out-of-district placement. In Byram, the school district advised J.F.'s parents that it could implement the student's IEP in district and would not pay for J.F.'s continued placement at a private school. The parents in Byram filed for injunctive relief to enforce the private school placement for J.F. The petitioners in Byram advanced the same position, as the parents herein, namely that during the pendency of the due process petition, unless there is an agreement, the IDEA's stay-put provision, 20 U.S.C. §1415(j), requires that "the child shall remain in the then-current educational placement." Id. at 237. As noted by the Third Circuit in Byram, the purpose of the stay-put provision is to maintain the status quo in situations where the school district acts unilaterally. However, in situations where a parent chooses to move to a new school district, the same procedural safeguards are not required. Id. The United States District Court for the District of New Jersey in Cinnaminson Township Board of Education v. K.L. o/b/o R.L., 2016 WL 4212121 *5 (D.N.J. Aug. 9, 2016), determined as follows:

[4] The Byram case is not considered binding precedent in the Third Circuit as it was not an opinion of the full court.

> While the 'stay-put' provision is an important procedural safeguard for special education students, it is not the only safeguard contained in IDEA, nor does it apply in every situation where a parent and school district have a dispute.

The District Court in Cinnaminson found the reasoning expressed by the Third Circuit in Byram to be pertinent to the analysis of whether the stay-put provision is operative when a student transfers school districts mid-year and the new school district becomes obligated under 20 U.S.C. §1414(d)(2)(C)(i)(I) to provide comparable services. The Byram and the Cinnaminson courts agreed that "stay-put" is not implicated because there is no unilateral act by a school district that is being imposed upon a student when it is the family who decides to transfer educational districts. The parents have foregone the status quo by their decision to move. In Cinnaminson, the court reasoned as follows:

> The use of 20 U.S.C. §1414 (d)(2)(C)(i)(I), instead of "stay-put" placements, balances the goal of maintaining educational consistency for special needs students with the recognition that families have accepted some amount of discontinuity in their child's education when they voluntarily change school districts.
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> [Id. at 5.]

The holding in Cinnaminson required the Cinnaminson School District to provide the transfer student with comparable services to the IEP issued in the student's prior district. However, "comparable services" did not require the new school district to continue the private school placement specified in the prior school's IEP.

It is the court's discussion of the "stay-put" placement as it applies to 20 U.S.C. §1414(d)(2)(C)(i) when a parent unilaterally moves a child to a new school district that is illustrative. The court understood that the transfer student may not receive the exact continuity provided by a "stay-put" placement, but the new school district is still required to provide a FAPE, with services comparable to those described in the previously held IEP until a new IEP is implemented.

Here, petitioners take exception to Howell's ability to implement the Lakewood IEP, without the private placement at SCHI. Through the Affidavits of Mina Mund, Licensed

Clinical Social Worker, and Aliza Fund, Certified Teacher of the Handicapped, petitioners attempt to support their position that the placement was not appropriate for J.S. by stating that the class size is larger; the other students are more advanced that J.S.; the playground is separated from the school building by a parking lot; that J.S. would have to cross the parking lot to go to the playground; and the ESY program is located in a different building than that of the school year program. J.S.'s Lakewood IEP does not mandate a certain number of students in his small class size, a certain composition of classmates, a playground attached to or immediately adjacent to the school building, or that the ESY program must occur in the same building as the school year program. Petitioners maintain that their observations of respondent's program and those of the SCHI social worker and teacher demonstrate that respondent's program would not be appropriate for J.S. However, these concerns, as raised by the SCHI teachers, are insufficient to demonstrate that respondent was unable to implement the Lakewood IEP and provide a comparable program and services to J.S. Additionally, they are insufficient to justify petitioners' actions to continue J.S.'s unilateral placement at SCHI. In fact, the petitioners' misplaced reliance on a few, immaterial concerns support the conclusion that petitioners intended to continue J.S. in his out of district placement whether or not respondent could provide a comparable program.

The court in Cinnaminson stated that even where parents are aggrieved under the above state regulation, there is no automatic default remedy to the creation of a "stay-put" placement for a transfer student.

> It is imperative to stress that in no way is the court suggesting that it is permissible for a school district to ignore mandates set forth in 6A:14-4.1(g)(1). What this court holds however, is that a breach of this regulation does not give the wronged party the leave to determine its own remedy without any basis in legislation or case law. What the breach does give the wronged party the right to do however, is to file a petition for emergent relief under New Jersey Administrative Code 6A:3-1.6, seeking the provision of appropriate services.
>
> [Id. at 7.]

Respondent agreed to provide an in-district program comparable to that provided and agreed to by petitioners in the Lakewood IEP. Respondent complied with the

requirements of the pertinent IDEA provisions and New Jersey regulations. It satisfied its obligations to J.S.

Therefore, for purposes of this motion, even accepting petitioners' position that they did not agree to respondent's program, I **CONCLUDE** that the safeguard of the "stay-put" provision is not implicated in this matter. The petitioners made the unilateral decision to move from Lakewood to Howell and transfer their child to the new school district that offered "comparable services" in-district to those described in J.S.'s very current IEP. 20 U.S.C. §1414(d)(2)(C)(i)(i). Petitioners acknowledge that when a student transfers jurisdictions, the status quo protections of "stay-put" no longer exist. Accordingly, I **CONCLUDE** that there are no facts in dispute and respondent is entitled to a determination as a matter of law denying petitioners claim for "stay-put" placement at SCHI.

As a result, the issue is whether the respondent provided a FAPE when it agreed to implement the Lakewood IEP through a comparable in-district program. I **CONCLUDE** that the respondent attempted to provide a FAPE to J.S. in the Special Class Program—CMI in Howell during the school year and ESY. Petitioners did not meaningfully consider placement within the district. While petitioners' reservations about a change of placement are understandable, they have presented an insufficient basis upon which to mandate that the respondent maintain J.S.'s program at SCHI. Petitioners changed J.S.'s circumstances by voluntarily relocating to Howell.

I **CONCLUDE** that the respondent did provide a FAPE to J.S. by offering to implement the Lakewood IEP in district and provide a comparable program. By refusing to send J.S. to Howell after relocating, petitioners prevented respondent from addressing J.S.'s needs by depriving respondent of the opportunity to demonstrate the education available to J.S. at Howell. K.G. v. Cinnaminson Twp. Bd. of Ed., 2018 WL 4489672 (D.N.J. Sept. 19, 2018).

Reimbursement for SCHI

Pursuant to 20 U.S.C. §1414(d)(2)(C)(i)(1), respondent was required to provide a

FAPE to J.S. by providing him with "comparable services" to those described in his existing IEP. Respondent offered to implement J.S.'s existing Lakewood IEP, in district, beginning with its ESY program and then at its middle school for the 2018-2019 school year. While petitioners had accepted the IEP on April 26, 2018 in Lakewood, they never agreed to respondent's in-district program implementing the Lakewood IEP, which was developed and consented to by petitioners less than three months earlier.

Instead, petitioners maintain that without their agreement to the proposed in-district placement, respondent violated the IDEA and New Jersey law. This position lacks merit. Petitioners failed to provide respondent with a good faith opportunity to comply with IDEA.

> "Parents who believe that a public school is not providing a FAPE may unilaterally remove their disabled child from that school, place him or her in another school, and seek tuition reimbursement for the cost of the alternate placement," but "[t]he IDEA was not intended to fund private school tuition for the children of parents who have not first given the public school a good faith opportunity to meet its obligations. Cape Henlopen, 606 F.3d at 72. Moreover, 'the core of the statute . . . is the cooperative process that it establishes between parents and schools. Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 53, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005).
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> K.G. v. Cinnaminson, at 23.

Additionally, the Cinnaminson, (2016), and Byram cases confirm that "stay-put" and reimbursement of expenses for are not appropriate when parents unilaterally relocate to a new district.

Respondent had the benefit of extensive current data and information supporting an IEP that was less than three months old. Respondent was tasked under 20 U.S.C. §1414(d)(2)(C)(i)(1) and N.J.A.C. 6A:14-4.1(g)(1) with using that information to provide a program that was comparable for J.S. Respondent satisfied its obligations.

There is nothing in the record to suggest that respondent failed to provide J.S. with a FAPE in compliance with 20 U.S.C. 1414(d)(2)(C)(i)(1). Under 20 U.S.C. 1412(a)(10)(C)(i)-(iii), a District is not required to pay for the cost of education, including

special education and related services, of a child with a disability enrolled in a private school, if that district made a FAPE available to the child and the parents elected to place the child in a private facility. This is what occurred in the instant matter. By failing to send J.S. to respondent's ESY or school program, petitioners did not provide respondent with the opportunity to provide J.S. with a meaningful FAPE. Therefore, I **CONCLUDE** that summary decision is granted to respondent denying petitioner's claim for reimbursement for any costs or other relief associated with J.S.'s attendance at SCHI.

ORDER

Based on the foregoing, I **ORDER** that respondent's motion for summary decision denying petitioners' claim for "stay-put" placement at SCHI is **GRANTED**. I **ORDER** that respondent's motion for summary decision denying petitioners' claim for reimbursement for any costs or other relief associated with J.S.'s attendance at SCHI is **GRANTED**. I **ORDER** that petitioners' Due Process Petition is **DISMISSED**.

I **FURTHER ORDER** that the telephone hearing scheduled for June 12, 2019 at 3:00 p.m. is hereby cancelled.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2018) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.516 (2018). 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.

June 11, 2019
DATE

DOROTHY INCARVITO-GARRABRANT, ALJ

Date Received at Agency

Date Mailed to Parties:

/caa