

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDS 16718-17

AGENCY DKT. NO. 2018-27043

S.P.,

Petitioner,

v.

**BRICK TOWNSHIP BOARD OF
EDUCATION,**

Respondent.

Hillary D. Freeman, Esq., for petitioner (Freeman Law Firm, attorneys)

Sebastian Ferrantell, Esq., for respondent (Montenegro, Thompson,
Montenegro & Genz, attorneys)

BEFORE **JOSEPH ASCIONE, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, petitioner S.P., a nineteen-year-old student eligible for special education and related services, seeks emergent relief in the form of an order requiring respondent Brick Township Board of Education (Board) (1) “to pay Woods Services the balance due in order to maintain [S.P.’s] placement” and (2) “to take all steps necessary to maintain [S.P.’s] placement at Woods Services on a residential placement pursuant to the ‘stay put’ provision of the IDEA until the underlying proceedings have been completed.” In opposition, the school board argues that S.P. is not entitled to the relief he seeks

because he is not a resident of Brick, but of Pennsylvania, where Woods Services is located and where S.P. has been living since September 2016.

On October 12, 2017, S.P. filed with the Office of Special Education Programs (OSEP) a request for a due process hearing to challenge the Board's proposed Individualized Education Program (IEP) placing him in a day program at Woods Services, in Langhorne, Pennsylvania for the 2017-2018 school year. On November 13, 2017, OSEP transmitted the matter to the Office of Administrative Law (OAL) for a due process hearing. On November 20, 2017, S.P. filed with the OAL an application for emergent relief, which was heard on November 27, 2017.

FACTUAL DISCUSSION

S.P., who was born on September 4, 1998, is eligible for special education and related services based on a classification of "autistic." On September 7, 2016, while S.P. and his adoptive mother, S.V., were residents of Staten Island, New York, the Committee on Special Education of Staten Island implemented an IEP placing S.P. in a residential-educational program at Woods Services for the 2016-2017 school year. According to that IEP, which provided him with a special education program and related services such as counseling and occupational, physical, and speech-language therapy, S.P. "needs a highly-structured, therapeutic program that provides 24-hour support."

In June 2017, S.V. moved to Brick, New Jersey, and on July 14, 2017, she enrolled S.P. in the Brick Township Public Schools. On September 26, 2017, an IEP team from the Brick school district met with S.P. and staff members from Woods Services, and offered S.P. an IEP that placed him in an educational program at Woods Services. While, at the meeting, S.P. consented to the IEP, he later revoked his consent and filed his due process petition when he realized that the IEP would provide him only with day services, and not residential services, as he had received under his previous IEP.

On November 13, 2017, Woods Services issued a Notice of Discharge indicating that the facility had not received payment for S.P.'s residential services since June 30, 2017, and that, as a result, S.P. would be discharged from the facility in ten days. In the meantime, S.P. filed with the OAL his application for emergent relief seeking to compel the Board to pay the balance due to Woods Services so that he would not be discharged and to pay for S.P.'s residential placement at Woods Services during the pendency of the underlying due process hearing.

In his emergent relief application, S.P. argues that under the "stay-put" provisions of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §§ 1400 to -1485, and the New Jersey regulations implementing the IDEA, N.J.A.C. 6A:14-1.1 to -10.2, he is entitled to remain, at the Board's expense, in the residential placement under his previous IEP pending the outcome of his due process petition challenging the Board's proposed IEP.¹ S.P. also contends that the Board violated state and federal law by failing to timely provide him with services comparable to those he received under his previous IEP upon his enrollment in the Brick school district.

In opposition, the Board argues that S.P.'s application should be denied because he is not a resident of Brick. According to the Board, S.P. turned eighteen while a resident of New York, and has lived in Langhorne, Pennsylvania, since he was placed in a residential program at Woods Services in September 2016. The Board maintains that, while S.V. is a resident of Brick, S.P., an adult, has never resided in Brick, and the Board mistakenly implemented an IEP for S.P. based on S.V.'s representations that S.P. was, in fact, a resident of Brick. As such, the Board asserts that it is not responsible for S.P.'s education.

LEGAL DISCUSSION

¹ Under 20 U.S.C.A. § 1415(j), Maintenance of current educational placement:

... during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child ...

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).

While “the stay-put provision was intended to serve as a type of ‘automatic preliminary injunction’ preventing local educational authorities from unilaterally changing a student’s existing educational program,” there are certain circumstances in which the stay-put provision does not apply. Michael C. ex rel. Stephen C. v. Radnor Twp. Sch. Dist., 202 F.3d 642 (3rd Cir. 2000) (quoting Drinker, supra, 78 F.3d at 864). For example, in Michael C., supra, 202 F.3d 642, the Third Circuit held that the stay-put

provision does not apply to interstate transfers, such that “when a student moves from State A to State B, any prior IEP in effect in State A need not be treated by State B as continuing automatically in effect.” Id. at 651. This is because, when a student unilaterally moves from one state to another, “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.” J.F. v. Byram Twp. Bd. of Educ., 629 Fed. Appx. 235 (3rd Cir. 2015) (citations omitted). Instead, in such cases, the new school district must follow the law governing interstate transfers. Id. at 238.

Under N.J.A.C. 6A:14-4.1:

(g) When a student with a disability transfers ... from an out-of-State school district 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 ...

2. If the student transfers from an out-of-State district, the appropriate school district staff shall conduct any assessments determined necessary and, within 30 days of the date the student enrolls in the district, develop and implement a new IEP for the student.

Thus, the question becomes whether the Board complied with N.J.A.C. 6A:14-4.1(g)(2) upon S.P.'s enrollment in the Brick school district.² First, there is no indication that, as required by N.J.A.C. 6A:14-4.1(g), the Board “provide[d] a program comparable to that set forth in the student's current IEP until a new IEP is implemented.” Specifically, the Board did not offer S.P. any type of program between July 14, 2017, the date of his enrollment, and September 26, 2017, the date on which the Board

² Contrary to the Board's contention, the Board is responsible for S.P.'s education because he is currently enrolled in the Brick school district. In New Jersey, if a school district believes that a currently enrolled student is ineligible to attend its schools because he does not live in the district, the school district must afford the student certain due process rights, such as notice and the opportunity for a hearing, before removing the student. N.J.A.C. 6A:22-4.1 to -4.3. To date, it does not appear that the Board has taken any action to remove S.P. in accordance with state law.

developed a new IEP. Second, the Board failed to develop and implement a new IEP for S.P. within thirty days of his enrollment, as required by N.J.A.C. 6A:14-4.1(g)(2). Instead, the Board waited over sixty days after S.P.'s enrollment before offering him a new IEP.

ORDER

In light of the Board's failure to strictly follow N.J.A.C. 6A:14-4.1(g), while recognizing both the inapplicability of the stay-put provision to this matter and the fact that the Board did not egregiously ignore its obligations under special education law, I hereby **ORDER** the Board (1) to pay for S.P.'s residential placement for the period during which the Board failed to provide him with services comparable to the ones he received under his previous IEP, or from the time of S.P.'s enrollment in the Brick school district until the date on which the Board offered him a new IEP, and (2) to implement the September 26, 2017, IEP during the pendency of the underlying due process dispute, unless the parties can agree to a different placement or program. As such, the Board shall pay for S.P.'s residential placement at Woods Services from July 14, 2017, to September 26, 2017, and shall pay for S.P.'s day placement at Woods Services from September 26, 2017, until the outcome of the due process hearing.

A telephone prehearing has been scheduled for December 11, 2018, at 4:00 pm. Notices will be generated separately.

This order on application for emergency relief shall remain in effect until issuance of the decision in the matter. 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.

DATE

JOSEPH A. ASCIONE, ALJ

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