State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
EMERGENT RELIEF

NORTH HUNTERDON / VOORHEES REGIONAL HIGH BOARD OF EDUCATION, Petitioner, v. **D.B. AND D.B. ON BEHALF OF H.B.,** Respondents.	OAL DKT. NO. EDS 8819-18 AGENCY REF. NO. 2018-28310
And	
D.B. and D.B. on behalf of H.B., Petitioners, v. **NORTH HUNTERDON / VOORHEES REGIONAL HIGH BOARD OF EDUCATION,** Respondent.	OAL DKT. NO. EDS 8956-18 AGENCY REF. NO. 2018-28231 **CONSOLIDATED**

George M. Holland, Esq., appearing for D.B. and D.B. on behalf of H.B. (Wanderpolo & Siegel, LLC, attorneys)

Teresa L. Moore, Esq., appearing for North Hunterdon / Voorhees Regional High Board of Education (Riker, Danzig, Scherer, Hyland and Perretti, LLP, attorneys)

BEFORE **MARY ANN BOGAN**, ALJ:

STATEMENT OF THE CASE

This matter was brought by North Hunterdon/Voorhees Regional High Board of Education ("Board" or "District") through a motion for emergent relief filed on June 21, 2018, with the New Jersey Department of Education, Office of Special Education Programs. The Board seeks relief from any non-educational costs associated with H.B.'s placement at Woods Services, as of June 30, 2018. The Board consents to the continued placement of H.B. at Woods Services after June 30, 2018, as long their responsibility is to pay only the educational costs of the placement. In response, H.B.'s parents, D.B. and D.B., filed a cross-motion on behalf of their daughter, seeking a stay-put order, in accordance with the 2017–2018 individualized education program (IEP) and the Stipulation of Settlement ("the Settlement") executed by all parties, on June 20, 2017, for continued residential placement at Woods Services, and continued payment of all costs of her residential school placement by the District associated with the program, including residential costs.

PROCEDURAL HISTORY

The District's motion for emergent relief was transmitted to the Office of Administrative Law ("OAL") on June 21, 2018, and the parents' motion on behalf of their daughter, H.B., was transmitted to the OAL on June 25, 2018. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Thereafter, the parties agreed to consolidate the cases. An Order of Consolidation was entered on June 26, 2018.

Oral argument was heard on the motions on June 26, 2018.

FACTUAL SUMMARY

H.B. is a minor student who is eligible for special education and related services. All parties agree that H.B. is severely developmentally disabled, with the classification of "autistic," and cognitive delays, with communication and behavioral issues. According to

the Settlement, the Board agreed to place the student out of district at the full-year residential school program at Wood Services, in Langhorne, Pennsylvania, for the school year that is defined as beginning July 1, 2017, and ending June 30, 2018. In accordance with the terms of the Settlement, an IEP was prepared, and dated October 19, 2017 (effective for the school year July 2017 through June 2018), that placed the student at a private residential school for students with disabilities, and the school was identified as Woods Services. Woods Services is a private school for students with disabilities and is approved by the New Jersey Department of Education. The student is provided with a five-day structured educational program, accompanied by a personal aide. The Settlement also provides for the payment by the District of all costs of that program, including residential costs, in accordance with the terms of the letter from Wood Services dated April 7, 2017.

At the annual review in May 2018, the child study team (CST) offered a therapeutic educational day program for the student at an approved private school for students with disabilities in New Jersey or the day program at Woods for the 2018–2019 school year. The student's parents rejected the CST day-program offer. The Board maintains its agreement to "stay-put" or "pendent placement" at Woods Services for the student as long as it is no longer responsible for the costs of the residential portion of that placement, as its obligation to pay any residential costs has been discharged pursuant to the terms of the Settlement. The Board asserts that the terms of the Settlement "explicitly and exclusively" set forth a one-year time limit on the Board's financial and placement obligations that ends on June 30, 2018. To be clear, the Board does not dispute its obligation to pay for the academic day program, and agreed to do so for the student's 2018–2019 placement at Woods Services. Moreover, the Board asserts that the parents were obligated under the terms of the Settlement to "take any and all steps necessary" to seek financial assistance from the State of New Jersey, Department of Children and Families, Children's System of Care, and their health-insurance coverage provider for the student's residential expense at Woods. To date, the parents have failed to do so. The student has since been accepted at two different residential placements in New Jersey, the Bancroft School and Legacy, and it appears that Perform Care would agree to pay the residential portion of the student's placement at the in-state programs, while rejecting any proposals to fund placements located outside of New Jersey. The parents have

rejected both in-state placements. The Board then filed this emergent application for stay-put with respect to payment of only educational costs associated with the placement at Woods Services, and the discharge of the Board's financial responsibility for any and all residential costs. The Board further requested authorization to send the student's records to day programs if necessary. The Board urges that the stay-put provisions do not squarely apply to the unique facts of this case, where a negotiated settlement agreement limited the terms of the student's placement to one year. In response, the parents filed a cross-emergent relief application seeking relief pursuant to the stay-put provision of the IDEA, compelling the Board to continue to pay the full costs of the student's residential placement at Woods Services, until the resolution of the due-process petition.

Prior to the commencement of oral argument, the parties conducted a conference call with the assistant general counsel of Woods Services, Sarah Rosenberg. Ms. Rosenberg clarified that the student's stay-put placement is acceptable; however, if the residential portion of the student's tuition bill is not paid by July 1, 2018, the school will issue a Letter of Intent to discharge the student unless the residential bill and all bills are paid within thirty days. The parents argue that their daughter would suffer a change in her program if the Board refuses to pay the residential portion of the student's placement at Woods Services during the stay-put, and that they are entitled to relief. Moreover, according to the terms of the Settlement, they specifically did not waive their daughter's right to remain in her current placement at Woods.

Paragraph 7 of the Settlement states in part:

> In the event a dispute arises in the future between the parties, all terms and condition of this Agreement shall remain in effect and shall be considered the "Stay-Put or Pendent Placement" in accordance with the IDEA, pending resolution of any dispute between the parties. No right to Stay-Put protection shall be considered waived by the parents.

LEGAL ANALYSIS

Pursuant to N.J.A.C. 1:6A-12.1(e) and N.J.A.C. 6A:14-2.7(s)(1), emergency relief may be granted if the judge determines from the proofs that:

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.

However, when the emergent-relief request effectively seeks a "stay-put" preventing the school district from making a change in placement from an agreed-upon IEP, the proper standard for relief is the "stay-put" provision under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, et seq. Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 (3d Cir. 1996) (citing Zvi D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982) (stay put "functions, in essence, as an automatic preliminary injunction")). The stay-put provision provides in relevant part that "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." 20 U.S.C. § 1415(j).

The relevant IDEA regulation and its counterpart in the New Jersey Administrative Code reinforce that a child must 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) (2017); N.J.A.C. 6A:14-2.7(u). 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. Drinker, 78 F.3d 859. Its purpose is to maintain the status quo for the child until the dispute under the underlying IDEA litigation is resolved. Ringwood Bd. of Educ. v. K.H.J., 469 F. Supp. 2d 267, 270–71 (D.N.J. 2006).

In the present matter, the parents filed an emergent petition regarding the Board's proposed action to pay the educational portion of the student's residential placement only, while discharging its obligation to pay the residential portion of the placement beginning July 1, 2018. The petitioner contends that the current out-of-district residential educational placement at Woods Services is the last agreed-upon placement and is set forth in the Settlement and identified in the October 19, 2017, IEP, prepared in accordance with the terms of the Settlement. The Board contends that it is no longer obligated to pay the residential portion of the costs associated with the stay-put placement at Woods Services, and further requests an order directing the parents to provide student records to any and all-day programs, if necessary.

The Board asserts that the parents' application of the merits of Rena C. v. Colonial School District, 890 F.3d 404 (3d Cir. 2018), favors the Board's relief from further residential payment after June 30, 2018. The Third Circuit addressed whether or not the school district's agreement to pay the costs of the student's unilateral placement constituted their agreement that the placement was appropriate. When addressing the applicability of stay put to a district's financial obligation, Rena states:

> By agreeing, without limitations, to pay tuition at a private school, the school district, as the local educational agency, agrees that the private school placement is appropriate and that paying tuition there fulfills its obligation to provide a free and appropriate public education. When parents and a local educational agency agree on a placement without limitations, that placement becomes the educational setting protected by the "stay-put" provision of 20 U.S.C. 1415(j).

Contrary to the Board's assertion, the Court's interpretation of without limitations refers to whether or not the student limited his or her options by waiving his or her right to stay put. As previously set forth in paragraph 7 of the Settlement, that did not happen here. Rather, the Board and the parents agreed and specifically set forth in the Settlement that "no right to Stay-Put protection shall be considered waived by the parents."

As the term "current educational placement" is not defined within the IDEA, the Third Circuit standard is that "the dispositive factor in deciding a child's 'current educational placement' should be the [IEP] . . . actually functioning when the 'stay put' is invoked." Drinker, 78 F. 3d at 867 (citing the unpublished Woods ex rel. T.W. v. N.J. Dep't of Educ., No. 93-5123, 20 I.D.E.L.R. 439, 440 (3d Cir. Sept. 17, 1993)); see also Susquenita Sch. Dist. v. Raelee S. by Heidi S. & Byron S., 96 F. 3d 78, 83 (3d Cir. 1996) (restating the standard that the terms of the IEP are dispositive of the student's "current educational placement"). The Third Circuit stressed that the stay-put provision of the IDEA assures stability and consistency in the student's education by preserving the status quo of the student's current educational placement until the proceedings under the IDEA are finalized. Drinker, 78 F. 3d 859.

Furthermore, the Third Circuit explained that the stay-put provision reflects Congress's clear intention to "strip schools of the *unilateral* authority they had traditionally employed to exclude [classified] students, particularly emotionally disturbed students, from school." Id. at 864 (citing Honig v. Doe, 484 U.S. 305, 323 (1988); School Comm. v. Dep't of Educ., 471 U.S. 359, 373 (1985)). Therefore, once a court determines the current educational placement, the petitioners are entitled to a stay-put order without having to satisfy the four prongs for emergent relief. Drinker, 78 F. 3d at 864 ("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.").

The placement in effect when the request for due process was made—the last uncontroverted placement—is dispositive for the status quo or stay put. Here, the request for due process was filed on June 21, 2018; thus, the "then-current" educational placement for the student at the time of this emergent action is the IEP that was developed for H.B. in October 2017, which reflects the placement and terms of the placement set forth in the Settlement dated June 20, 2017, both setting forth Woods Services with both residential and educational costs borne by the Board. Subsequent to the filing for due process, there has been no agreement between the parties to change the student's current placement.

When presented with an application for relief under the stay-put provision of the IDEA, a court must determine the child's current educational placement and enter an order maintaining the status quo. Drinker, 78 F. 3d at 864–65. Along with maintaining the status quo, the Board is responsible for funding the placement as contemplated in the IEP. Id. at 865 (citing Zvi D. v. Ambach, 694 F. 2d 904, 906 (2d Cir. 1982) ("Implicit in the maintenance of the status quo is the requirement that a school district continue to finance an educational placement made by the agency and consented to by the parent before the parent requested a due process hearing. To cut off public funds would amount to a unilateral change in placement, prohibited by the Act.").

For example, under R.S. & M.S. v. Somerville Board of Education, 2011 U.S. Dist. LEXIS 748, *34 (D.N.J. Jan. 4, 2011), a school district was even required to maintain a disabled child's placement in a sectarian school, despite possibly violating N.J.S.A. 18A:46-14, because the school was the child's "current educational placement" when litigation over the child's placement began. The Somerville court explained:

> We find that under the undisputed facts in the record, [Timothy Christian School ("TCS")] is the stay put placement of the student. We will call it the Stay Put Placement for purposes of this ruling. It was the approved placement in the 2008–2009 IEP signed by the parties . . . .
>
> This dispute arose in the Fall of 2008, when D.S. was actually attending TCS as a high school ninth grader under that placement. It is clear and we so find, that TCS was "the operative placement actually functioning at the time the dispute first [arose]." Drinker, 78 F. 3d at 867. We therefore conclude that it must remain the Stay Put Placement until the entire case is resolved either by agreement or further litigation.
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> The IDEA stay put law and regulations admit of only two exceptions where it is the Board, rather than the parents, seeking to change the operative placement during the litigation. The first is where the parents agree with the change of placement. 20 U.S.C. § 1415(j). The second exception arises under the disciplinary provisions of IDEA, 20 U.S.C. § 1415(k). Id. Clearly, neither exception applies here, and no party argued otherwise.

> Where, as here, neither exception applies, the language of the stay put provision is "unequivocal." Honig, 484 U.S. at 323. It functions as an "automatic preliminary injunction," substituting "an absolute rule in favor of the status quo for the court's discretionary consideration of the factors of irreparable harm and either a likelihood of success on the merits or a fair ground for litigation and a balance of hardships." Drinker, 78 F. 3d at 864 (quoting Zvi D., 694 F.2d at 906).
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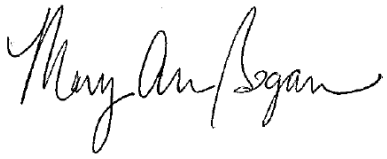
> [Id. at *32–33 (citations omitted) (emphasis added).]

Neither of the two exceptions to the stay-put law is applicable here because the parents have not agreed to the change in placement and the disciplinary provisions are not an issue in this matter.

The Board permitted the student to attend the out-of-district residential program and to pay the full costs associated with the placement from July 2017 to June 2018. The stay-put provisions must apply to this special-education student and she should remain at the Woods Services program with all costs paid by the Board pending determination of financial responsibility for the residential placement and disputed placement issues pertaining to the 2018–2019 school year.

The Board's motion for emergent relief is **DENIED**. The parents' motion for emergent relief is **GRANTED**. It is **ORDERED** that H.B. shall be permitted to continue to attend the program at Woods Services, and her placement shall continue to be fully funded by the Board beginning July 1, 2018, pursuant to stay-put. The issue of responsibility for residential costs will be determined as part of further proceedings.

This order on application for emergency relief shall remain in effect until issuance of the decision in the matter. The parties will be notified of the scheduled hearing dates. 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 27, 2018
DATE

MARY ANN BOGAN, ALJ

Date Received at Agency

Date Mailed to Parties:

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