State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

EMERGENT RELIEF

OAL DKT. NO. EDS 15280-19

AGENCY DKT. NO. 2020-30724

Y.R. o/b/o D.R.,

Petitioner,

v.

WEST NEW YORK TOWN BOARD OF EDUCATION,

Respondent.

Esther Canty-Barnes, Esq., and Carol Houston,[1] for petitioners

Allan C. Roth, Esq**.,** for respondent (Law Offices of Allan C. Roth, attorneys)

Record Closed[2]: December 18, 2019 Decided: December 19, 2019

BEFORE **ERNEST M. BONGIOVANNI,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about September 4, 2019**,** petitioners filed a petition for Due Process with the Office of Special Education Policy and Dispute Resolution (OSEPDR) in the New

[1] A third-year law student, appearing pursuant to NJ R. 1:21-3 (e)

[2] This matter is final with record closed only as to the Application for Emergent Relief. As set forth below, the due process petition remains at the OAL.

Jersey Department of Education (DOE). The contested matter was transferred to the Office of Administrative Law (OAL) on October 29, 2019. Petitioners made Application for Emergent Relief on December 6, 2019. Petitioners certification, exhibits and brief were submitted with the application, and respondent's reply filed on December 13, 2019. Respondent West New York Board of Education (BOE) filed its response on October 28, 2019. Oral argument was held on December 18, 2019.

Petitioners' application for emergent relief is predicated on the last agreed upon IEP, which petitioner alleges was the 2018-2019 year, where placement was at the Washington South Emerson School. (Emerson), an out of district placement through the Bergen County Special Services Committee. Respondent counters that on May 30, 2019, Y.R. agreed to the IEP for the 2019-20 school year (and also extended summer sessions) as evidenced by Y.R.'s signature to the last page of the IEP agreement which was signed that same day. Further respondent argues the IEP was implemented without any objection by petitioners, and pursuant thereto, D.R. attended the summer sessions. Both parties agree that the law governing "stay-put" applies to their position on the requested relief, but factually differ on what the placement was pursuant to the last agreed upon IEP placement.

BACKGROUND AND FACTUAL CONTENTIONS

The following is undisputed or essentially not contested: D.R. is age 12. He was first determined eligible and classified as preschool disabled on November 28, 2012. He was classified as autistic in June 2013. At that time, the District recommended and placed him in out of district placement at the Bergen County Special Services Program. Pursuant thereto and until this school year, D.R. attended and was successfully progressing at Emerson through the 2018-2019 school year. On May 30, 2019, Y.R. attended an IEP meeting. At that point and thereafter, the parties dispute almost all the essential facts.

Petitioners argue that while Y.R. intended the IEP meeting, she speaks Spanish and had no translator with her. She had no attorney, nor her husband with her. At the

meeting, she says there was no draft copy of the IEP, or at least none that was provided to her. During the meeting, "Most of the time was spent discussing the evaluations and not my son's placement." (Certification of Y.R., page 2, paragraph 5). She was only provided the "Procedural safeguards" page of the IEP (P-8) which she admits signing. She never saw the IEP until a copy of it was mailed to her on June 20, 2019. She maintains she filed for Due Process before the IEP could be implemented.

Respondent alleges that at the meeting of May 30, 2019, "Y.R. was issued a full IEP document which included the placement at the District's program." (Certification of Mariely Manresa, Case Manager, page 2, paragraph 11). Moreover, at the meeting, Y.R. was always addressed in Spanish. The Case Manager personally explained to Y.R. in Spanish the most current evaluations, her son's progress, and the District's proposed placement. No one on the Child Study team, nor D.R.'s teacher for 2018-2019 objected to the proposed placement. D.R. did not object, but rather voluntarily executed the full IEP document that day. As provided by the agreed to IEP May 30, 2019, the extended school year began July 1 and D.R. attended those summer sessions.[3]

LEGAL ANALYSIS AND CONCLUSION

Here, petitioner's application for emergent relief is almost entirely predicated on the theory that stay put provides for continuation of the 2018-2019 placement at Emerson. Therefore, if correct, petitioners need not prove the four-prong test for emergent relief as provided in Crowe v. Di Gioa, 90 N.J. 126 (1982) has been met. (Brief in Support of petitioner's Emergent Relief Petition, pages 5-6). 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. In Re 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)).

[3] At oral argument, respondent stated D.R. attended class for seven days that summer. However, petitioners claimed, he attended many more sessions, for the entire summer.

It is not seriously contested that this matter is not controlled by 20 U.S.C. 1415(j), otherwise known as the "stay-put" provision of the IDEA. The statute states in pertinent part:

> . . . 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 . . .
> .

That provision and its counterpart in the New Jersey Administrative Code require 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." Once the "stay-put" provision of the IDEA, 20 U.S.C. 1415(j), and its New Jersey counterparts, N.J.A.C. 6A:14-2.6(d) and 2.7(u), are invoked, and unless the parties agree, no change shall be made to the student's classification, program or placement. 34 C.F.R. § 300.518(a); N.J.A.C. 6A:14-2.7(u).

The stay-put provision of law operates as an automatic preliminary injunction. It 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. IDEA's stay-put requirement evinces Congress' policy choice that handicapped children stay in their current educational placement until the dispute over their placement is resolved, and that once a court determines the current placement, petitioners are entitled to an order "without satisfaction of the usual prerequisites to injunctive relief." Drinker 78 F.3d 859, at 864-65.

Here, petitioners attempt in the emergent application to invoke the stay put doctrine, however in order to do so, there must be a determination as to the last implemented placement.

Based on the supporting documents including diametrically opposed certifications by Y.R. and the Case manager, I would have to disregard what appears to be an executed IEP from the May 30, 2019 in order to grant relief to the petitioner. I gave both parties the opportunity to expand the record by having Y.R. who attended the hearing on

emergent relief with a translator, and Ms. Manresa, also present. Both sides declined to offer testimony. Accordingly, petitioners did not make a compelling case that the respondent's claim that petitioner was given a full IEP document and accordingly signed it after it was explained to her in her native Spanish, is based entirely on lies. Furthermore, petitioners failed to give a reasonable explanation as to why D.R. attended the summer sessions. I must agree with respondent that the 2019-2020 was implemented, in that the summer sessions were not part of the 2018-2019 IEP, but were part of the 2019-2020 IEP. Therefore, the May 30, 2019 IEP, which provides for placement in the District's ABA Autistic Program, rather than placement at the Emerson School, is the "operative placement actually functioning" at the time this dispute arose. See Drinker, 78 F.3d, 859 at 867.

Petitioners argue in the alternative that they meet all four prongs of Crowe for granting emergent relief, notwithstanding any contrary determination on stay put. As to the first prong, a showing of irreparable harm, petitioners claim D.R. will suffer irreparable harm because the prior placement was appropriate. However, even if the prior placement was appropriate, that contradicts the current IEP which says the current placement is appropriate. One would have to disregard the current IEP to agree with petitioner on this point. Petitioner's certification points out D.R. has missed three months of school already, but that has been Y.R.'s decision. They claim D.R. is suffering extreme anxiety and depression "due to his placement issues." However, such anxiety and even depression owing to change of schools is a common condition which is not only treatable, but which may be alleviated if the child is permitted to attend without further delay. At this stage in the proceedings, there is insufficient evidence to warrant a finding of irreparable harm if relief is not granted. The second prong of the test requires the showing of an identified legal right is well settled entitling them to emergent relief. However, they argue the legal right is the right to stay put, which is being denied, however, I have now decided the stay put is already in effect. Similarly, the third prong requires a showing of the likelihood of success on the merits of petitioner's claim. They claim a litany of procedural violations. At this stage I cannot find any of the alleged procedural defects separately or in combination are enough to show it is likely that petitioners shall succeed on the merits. Notwithstanding their claims that Y.R. was denied a meaningful participation in the

proceedings much of the indicated facts, even at this stage appear otherwise. Y.R. probably knew from past experience the purpose of the IEP meeting on May 30, 2019. Although her son has been classified for 6 years through the same process, she failed to explain her apparent total lack of understanding of the process. Although she complains of not having all the evaluations before the meeting ten days in advance, she apparently would have ignored them, just as she ignored, she says, the psychological evaluation she received the day before the meeting (Y.R.'s certification page 3, paragraph 7d.) More significantly, the two competing certifications offered by both sides show diametrically opposed asserted facts as to what happened at the May 30, 2019 IEP meeting. Even if an interpreter was not provided, the respondent asserts all of the terms of the IEP were explained in Spanish by the Case Manager. If an interpreter was so essential, why did Y.R. sign the IEP procedural safeguards page? Further, the parties have diametrically opposed asserted facts as to whether the developed IEP document was present at the meeting or given to Y.R. Overall, the record does not support that petitioner is likely to succeed on the merits of her claim. As all four prongs of the test must be met, I shall not discuss and make no determination on the fourth prong, balancing the interests of the respective parties.

ORDER

I **ORDER** that placement at the District's ABA Autistic Program is the stay-put placement for D.R. The emergent relief application, to return D.R. to his placement at the Bergen Special Services Washington Emerson School, pending a final due process hearing, is **DENIED**.

The order on application for emergency relief shall remain in effect until issuance of the final decision in this 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.

December 19, 2019

Ernest M. Bongiovanni

DATE

ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency 12/19/19

Date Mailed to Parties:

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