



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**FINAL DECISION**

**EMERGENT RELIEF**

OAL DKT. NO. EDS 09511-19

AGENCY DKT. NO. 2019/30090

**S.S. AND D.S. ON BEHALF OF R.S.,**

Petitioners,

v.

**MADISON BORO BOARD OF EDUCATION,**

Respondent.

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**Beth A. Callahan, Esq.,** petitioners (Callahan & Fusco, LLC, attorneys)

**Marc G. Mucciolo Esq.,** for respondent (Methfessel & Werbel, attorneys)

Record Closed: October 4, 2019 <sup>1</sup>

Decided: October 7, 2019

BEFORE **JULIO C. MOREJON, ALJ:**

**STATEMENT OF THE CASE**

Petitioners, S.S. and D.S. on behalf of R.S., seek an order by way of emergent relief to have respondent, Boro of Madison Board of Education, (District), implement an IEP placing R.S. at the SEARCH Learning Group (SEARCH) and that the District pay for the tuition at SEARCH for the 2019-2020 school year, and 2020 Extended School Year.

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<sup>1</sup> This matter is final only as to the Application for Emergent Relief. The Due Process Petition will remain at the OAL.

In addition, petitioners seek a Stay Put order that the then “current education placement” of R.S. is SEARCH, which was ordered in the Final Decision issued in OAL Docket Number EDS 03514-7 on March 22, 2019.<sup>2</sup>

### **PROCEDURAL HISTORY**

On June 11, 2019, petitioners filed with the New Jersey Department of Education (Department of Education) Office of Special Education Policy and Procedure (OSEP) a Petition for Due Process (Petition) against the District seeking reimbursement for unilateral placement at SEARCH for school year 2017-2018 and school year 2018-2019, and extended school years, along with reimbursement for transportation for the same time periods, and development of an IEP to continue placement in the twelve-month, center-based, ABA program at SEARCH with 1:1 instruction and transportation. OSEP transferred this matter to the Office of Administrative Law (OAL), where it was filed on July 16, 2019.

A telephonic status conferences was held on August 28, 2019, September 4, 2019 and September 12, 2019, during which time the parties attempted to settle this matter.

The party’s inability to settle resulted in petitioners’ filing the within request for emergent relief on September 26, 2019, pursuant to N.J.A.C. 6A-12.1 and N.J.A.C. 6A:14-2.7(r). On October 3, 2019, the District filed its opposition to the petitioners’ request for emergent application. Oral argument was taken on the emergent application on October 4, 2019.

### **FACTUAL SUMMARY**

R.S. is currently five-years of age and is eligible for special education and related services under the classification category of Autistic. R.S. currently attends SEARCH and

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<sup>2</sup> S.S. and D.S. on behalf of R.S. v. Madison Board of Education, EDS 03514-17, 2019 N.J. AGEN LEXIS 164

has so attended for the last three school years, through the unilateral placement effectuated by his parents prior to School Year 2016-2017.

Petitioners' filing of the within Petition and emergent relief stems from their filing of a Petition against the District on February 7, 2017, for the 2016-2017 School Year, seeking continued unilateral placement at SEARCH requesting the following; up to forty hours of home programming, and reimbursement for all costs for SEARCH, including transportation costs and parent training. The matter was heard at the OAL before Judge Kelly Kirk, who issued a Final Decision on March 22, 2019.<sup>3</sup> (Final Decision). The Final Decision found in favor of the parents request that SEARCH is the IEP placement for School Year 2016-2017, and that the District was responsible for payment of the same:

Based upon the testimony and documentary evidence, I **CONCLUDE** that the District's IEP was not appropriate to meet R.S.'s educational needs for the 2016-2017 school year and did not provide him with a FAPE.

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The District failed to provide R.S. with a FAPE and I **CONCLUDE** that it was reasonable for petitioners to unilaterally place R.S. at SEARCH for the 2016-2017 school year.

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As set forth above, the District failed to provide R.S. with a FAPE for the 2016-2017 school year. Having reviewed the criteria for reimbursement, I **CONCLUDE** that the District should reimburse petitioners for the cost of R.S.'s placement at SEARCH, including transportation, for the 2016-2017 school year, beginning November 18, 2016, R.S.'s third birthday.

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Based on the foregoing, it is hereby **ORDERED** that certain relief sought by petitioners is **GRANTED** as to the 2016-2017 school year. Specifically, it is **ORDERED** that the District reimburse petitioners for the costs of R.S.'s placement at SEARCH,

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<sup>3</sup> Id.

including tuition and transportation, for the 2016-2017 school year, beginning on November 18, 2016.

It is further **ORDERED** that petitioners and the District should meet within thirty days of this decision to create an IEP for R.S. to reflect his placement at SEARCH for the 2016-2017 school year.

[S.S. and D.S. on behalf of R.S. v. Madison Board of Education, EDS 03514-17, 2019 N.J. AGEN LEXIS 164]

On June 20, 2019, the District filed a complaint with the United States District Court for the District of New Jersey (District Court), <sup>4</sup> appealing the portion of the Final Decision that ordered the District to reimburse Petitioners for the costs of SEARCH.

On July 15, 2019, the Petitioners filed with the Department of Education a Request for Enforcement of the Decision [Final Decision] of March 22, 2019. On July 15, 2019, the Department of Education alerted the District's counsel that the District had not yet reimburse Petitioners per the Final Decision and requested that the District the necessary documentation for reimbursement by July 26, 2019.

On August 12, 2019, OSEP alerted the District's counsel that the District had still not complied with the Final Decision and that a stay had not been granted regarding the same. OSEP warned the District that continued failure could result in sanctions by the Department of Education and demanded that the District comply with the Final Decision by September 20, 2019.

On September 11, 2019, the District moved before the District Court for a stay of the portion of the Final Decision that granted reimbursement to Petitioners. On September 19, 2019, the District's motion to stay the Final Decision's order of reimbursement was denied by the District Court.

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<sup>4</sup> Madison Board of Education v. S.S. and D.S. o/b/o R.S., U.S. District Court, Case No. 2:19-cv-14090-KM-MAH

On September 9, 2019, the District submitted to Petitioners a unilateral IEP for an in-district placement of R.S. in district kindergarten for the 2019-2020 school year.

On September 26, 2019, the District complied with the Final Decision and reimbursed Petitioners the cost of SEARCH for the 2016-2017 school year, and revised R.S.'s 2016-2017 IEP to reflect placement at SEARCH.

Petitioners have filed the within request for emergent relief to address R.S.'s continued placement at SEARCH for the 2019-2020 school year and the District's funding of the same. Petitioners argue that failure to grant the emergent relief will result in a break in services for R.S.

In addition to their request for emergent relief, Petitioners' also seek a "stay-put" order that SEARCH is the "stay put" provision "during the pendency of any proceedings . . . the child shall remain in the then-current educational placement of the child." 20 U.S.C. § 1415(j).

The District argues in its opposition that Petitioner's request for emergent relief should be denied as they have failed to demonstrate irreparable harm if the District does not fund the 2019-2020 school year at SEARCH; and that Petitioners' request for emergent relief "circumvents" the procedural requirements in N.J.A.C. 6A: 14-2.7(t), regarding the procedure to enforce a Final Decision, and thus the OAL did not have jurisdiction over this matter. Finally, the District argues that Petitioners' emergent relief seeks to enforce the Final Decision which limited Petitioners' IEP placement to the 2016-2017 school year, and that the determination of IEP for subsequent school years are the subject of the Petition filed herein.

Despite its argument opposing the relief sought by Petitioners herein, the District has conceded that the last "current educational placement of the child" is SEARCH for the school year 2016-2017, as ordered in the Final Decision, and that the District cannot ignore the Final Decision's order setting the SEARCH as the IEP placement for 2016-2017, including funding of the same. Nevertheless, the District argues the placement and funding for the remaining school years are the subject of the Petition.

## DISCUSSION

N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief. The regulation instructs in salient part:

A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):

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 the 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.

[N.J.A.C. 6A:3-1.6(b).]

In the underlying case, it is unnecessary to consider whether the criteria set forth in Crowe v. De Gioia, 90 N.J. 126 (1982) have been satisfied in granting emergent relief. 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 relevant IDEA regulation and its counterpart in the New Jersey Administrative Code reinforce 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." 34 C.F.R. § 300.518(a) (2016); 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 while the dispute over the IEP remains unresolved. Ringwood Bd. of Educ. v. K.H.J., 469 F.Supp.2d 267, 270–71 (D.N.J. 2006). 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. A. §1415(j).

While there is no dispute that I cannot rule on the merits of the Final Decision, it is also undisputed that I cannot ignore the order contained in the Final Decision, which found in favor of the parents, on the issue of FAPE and ordered SEARCH as the appropriate placement to address R.S.'s individualized needs. The Final Decision specifically ordered that “petitioners and the District should meet within thirty days of this decision to create an IEP for R.S. to reflect his placement at SEARCH for the 2016-2017 school year.” On September 26, 2019, in compliance with the Final Decision, counsel for the District submitted to the Department of Education “an updated IEP for R.S. for the 2016-2017 school year”, and confirmed that Search was the student's placement for 2016-2017: “We trust that the initial reference to Search Learning Group as the designated location in the ‘Extended Related Services’ category provides sufficient clarification for purposes of the IEP that Search Learning Group is indeed the ‘Service Provider Location.’”

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 IDELR 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 that 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, 108 S. Ct. 592, 604, 98 L. Ed. 2d 686, 707 (1988)); School Comm. v. Dep't of Educ., 471 U.S. 359, 373, 105 S. Ct. 1996, 2004, 85 L. Ed. 2d 385, 397 (1985).

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, it is undisputed that the IEP for the 2016-2017 school year, providing that SEARCH is the service provider therein, is what should be utilized to determine the "current educational placement of the child" at the time the dispute arose. Although the District may disagree with the District disagrees with the Final Decision's order that it reimburse Petitioners for the cost of SEARCH, the District agrees with petitioners that IDEA requires a school district to maintain a student's placement and program pending the outcome of the due process proceedings pursuant to 20 U.S.C. 1415(j). The District also agrees that the corresponding provision of the New Jersey Administrative Code requires that a student's program and placement be maintained pending the outcome of a due process proceeding. N.J.A.C. 6A:14-2.7(u).

Along with maintaining the status quo, the District is responsible for funding the placement as contemplated in the IEP. Drinker v. Colonial Sch. Dist., 78 F.3d 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")).



## **CONCLUSION**

I **CONCLUDE** that SEARCH is the “stay put” placement for R.S. pending the outcome of this Due Process in accordance with 20 U.S.C.A §1415(j); N.J.A.C. 6A:14-2.3(h)(3)(i), insofar as the same is the “current educational placement” for R.S. for the 2016-2017 school year. I further **CONCLUDE** that the District finance R.S.’s educational placement at SEARCH for the 2019-2020 school year, pending the outcome of the underlying Due Process.

After hearing the arguments of Petitioner and the District and considering all documents submitted, I **CONCLUDE**, that the petitioner’s motion for emergent relief is **GRANTED** as to the “stay put” order stated herein.

## **ORDER**

It is **ORDERED** that SEARCH is the “stay put” placement for R.S. and related services, pending the outcome of the underlying due process filed in accordance with 20 U.S.C.A §1415(j); N.J.A.C. 6A:14-2.3(h)(3)(i), insofar as the same is the “current educational placement” for R.S. for the 2016-2017 school year. I further **ORDER** that the District finance R.S.’s educational placement at SEARCH and related services for the 2019-2020 school year and pending the outcome of the underlying due process petition.

After hearing the arguments of Petitioner and District and considering all documents submitted, I **CONCLUDE**, that the Petitioner’s motion for emergent relief is **GRANTED** as to the “stay put” order for the reasons stated herein.

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.

October 7, 2019

DATE



JULIO C. MOREJON, ALJ

Date Received at Agency

October 7, 2019

Date Mailed to Parties:

October 7, 2019

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