State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON
EMERGENT RELIEF
OAL DKT. NO. EDS 9950-19
AGENCY DKT. NO. 2019-30164

R.B. and S.B. on behalf of G.B.,
Petitioners,
v.
BRANCHBURG TOWNSHIP BOARD OF EDUCATION,
Respondent.

Lori M. Gaines, Esquire, for petitioners (Barger & Gaines, attorneys)

Rita F. Barone, Esquire, for respondent (Purcell, Mulcahy, O'Neill and Hawkins, attorneys)

BEFORE **DEAN J. BUONO**, ALJ:

STATEMENT OF THE CASE

In this matter, R.B. and S.B. (petitioners) bring an action for emergent relief against the Branchburg Township Board of Education (respondent or District) to: (1.) continue the placement of G.B. (their daughter) at the Summit Speech School pending the outcome of the due process hearing.

PROCEDURAL HISTORY

On July 25, 2019, petitioners filed a complaint for due process with the Office of Special Education Programs (OSEP). The complaint was filed under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400 to 1482. Petitioners sought out-of-district placement, reimbursement of fees and compensatory education.

Petitioners filed an emergent relief application with the undersigned on September 13, 2019. The application alleges that R.B. and S.B., on behalf of G.B. seek a stay-put at Summit Speech School during the pendency of the due process hearing as well as appropriate program and placement despite being a rising kindergarten student. Stay put-order for the minor child is an effort to provide her with a FAPE.

Oral argument was heard on September 25, 2019, at the Office of Administrative Law.

FACTUAL DISCUSSION AND TESTIMONY

Although the factual recitations by both parties appear to be in confluence, they warrant their respective recitation.

Petitioners allege that G.B. is a five-year-old little girl carrying a diagnosis of Charge Syndrome, which according to the Charge Syndrome Foundation is an, ". . . extremely complex syndrome involving extensive medical and physical difficulties that differ from child to child." She is a kindergarten student who is eligible for special education and related services under the classification category of Other Health Impaired.

Unfortunately, G.B. presents with the daily struggles of her disability including profound hearing loss, which require her to wear cochlear implants in her left and right ears. She further struggles with great behavioral issues, oral motor and articulation issues, sensory processing issues, and executive functioning difficulties. It is alleged that for instance, G.B. will stomp and roll around on the floor, yell, bite, and hit. She will rip her cochlear implants out of her ears. She experiences anxiety whenever her routine is

changed, and she experiences much difficulty making transitions. In fact, she presents with obsessive compulsive behaviors as well. She is also unable to navigate or focus within larger group settings and does not understand social cues due to her social difficulties. For example, G.B. does not understand how to keep an appropriate space from others or how hard to touch someone.

Recognizing G.B.'s significant and complex educational needs, the District placed G.B. at Summit Speech School for two years of preschool (2017-2018 and 2018-2019) under the provisions of her IEP. G.B.'s last agreed-upon IEP calls for her placement out-of-district at Summit Speech School.

At Summit Speech School, G.B. progressed within the individualized and specialized programming provided to her. However, she continued to present with challenges that necessitated ongoing placement in very small classes with lots of behavioral and auditory support. In anticipation of her transition to kindergarten for the 2019-2020 school year, the District re-evaluated G.B.. The District's own assessment confirmed that G.B. is easily frustrated, struggles with sequencing, craves predictability, and is distressed by loud noises. Even at her tiny school setting at Summit Speech where auditory conditions are tightly controlled and where the setting is overwhelmingly calm and quiet, due to its students all presenting with hearing loss, G.B. engaged in frequent outbursts during recess, at lunch, and at assemblies. Placement in larger groups for instruction (albeit still very small groups) was disorienting and dysregulating for her, leading to frequent behavioral responses. There are times when G.B. elopes from instruction within the classroom. There are also times during pick up and drop off at Summit Speech School where G.B. will have difficulty transitioning. This can lead to behavioral responses, such as slumping to the floor, yelling, or removing her cochlear implants, or as great as safety concerns, where G.B. will run out of the building. The District confirmed that she presents as distracted and highly frustrated. However, G.B. simultaneously presents with strong cognitive and academic abilities and a full-scale IQ score of 94. In fact, she tested at the 99^{t} percentile for reading skills.

The District's educational evaluation recognized that G.B. is distracted and becomes highly frustrated if the teacher does not adhere to her script, is overwhelmed by

larger classrooms, requires sensory input, and will wander or elope at times during instruction. The District's occupational therapy evaluation determined that G.B. tends to be in constant motion due to her impaired vestibular system and seeks changes in her head position such as being upside down. The evaluator confirmed that G.B. presents with poor balance and poor motor planning that interferes with her self-help skills. This evaluation also confirmed that G.B. struggles with handwriting and engages in frequent outbursts during gym, class, lunch, and assemblies even within the small school setting at Summit Speech School. The District's evaluator further opined that G.B. struggles with transitions, her use of force, and understanding the concept of personal space.

The District's physical therapy evaluation confirmed that G.B.'s locomotion and object manipulation skills are poor. In fact, her total gross motor skill score was a 74, which is 26 points below the mean. The evaluator confirmed that G.B. presents with balancing issues, particularly when toileting. The District's behavioral observation found that even in a group of just nine students, G.B. struggled to participate, follow directions, and presented with noncompliant behaviors. She was observed to roll on the floor, away from the group, while everyone else was engaged in answering the teacher's questions. On the District's speech language evaluation, G.B. scored at the 25th percentile in core language and at only the 7th percentile in articulation.

Again, G.B. attended her out-of-district placement at Summit Speech School for the 2017-2018 and 2018-2019 school years under the provisions of her IEP. On March 11, 2019 and March 25, 2019, the District convened a two-part IEP meeting, during which time the District proposed G.B.'s eligibility for special education and related services under the classification of Auditorily Impaired. Petitioners voiced their concern that the Auditorily Impaired category, alone, failed to encapsulate the entirety of G.B.'s educational needs. They instead pointed out that G.B. would be more appropriately classified under either the category of Deaf/Blindness or Multiply Disabled.

The District proposed that G.B. transition to the public school for kindergarten (2019-2020) and be placed part-time in the general education classroom and part-time in the resource center classroom.

The District's proposed IEP, which was finalized by the District on June 5, 2019, calls for G.B. to be removed from her appropriate placement out-of-district in a specialized program that can meet her significant educational needs and change her classification category to Other Health Impaired. Within the fifteen-day review period from the date the final IEP was proposed, petitioners filed a Petition for Due Process and by doing so, it is alleged that they invoked stay-put on G.B.'s last agreed-upon IEP and, specifically, G.B.'s placement out-of-district.

Summit Speech School advised that it can provide continued programming to G.B. for the 2019-2020 school year. As such, the District graciously agreed that it will continue G.B.'s placement out-of-district at Summit Speech School for the month of September. Now, the District is refusing to continue G.B.'s placement at Summit Speech School beyond the month of September.

Respondents allege that both parties agree that G.B. matriculated to kindergarten and is a student that is eligible to receive special education and related services under the category of Other Health Impaired as set forth in paragraph 2 of the petitioners' Statement of Facts. Branchburg also agrees that it placed G.B. at the Summit Speech School to address her needs as they presented in the 2017-18 and 2018-19 school year while she was classified as a pre-school student with a disability. However, she aged out of that program and Branchburg's agreement to continue to fund her placement for the month of September was just a concession so that the court could decide this issue. It in no way was an admission that the Speech School can provide the kindergarten program she deserves while this matter is litigated. Rather, this is simply an agreement between counsel to allow for an orderly briefing and decision by the court.

It is also agreed to by both parties that G.B. has hearing, speech and behavioral support needs along with an average IQ and superior reading skills. However, it is the extent of her needs and how to address those needs in her 2019-20 IEP which are in dispute between the parties and the subject of the due process petition, The District also does not concede that Summit Speech School can provide continued programming for G.B.

As indicated above, it is undisputed that G.B. is a kindergarten student. Petitioners cannot dispute that the Summit Speech School is approved by the New Jersey Department of Education as a private school for disabled students for students that are age three to five classified as preschoolers with a disability under the Code. The goal of the program is to prepare students for kindergarten. Additionally, Summit Speech School follows the New Jersey Core Curriculum Standards for preschool, more specifically the Preschool Teaching and Learning Standards. They do not follow a kindergarten curriculum. This is significant because G.B. has an average IQ and superior reading skills. As such, arguably failing to provide her a kindergarten curriculum but instead having her complete another possible year of pre-school in no way furthers the goals of the IDEA.

Tina Neely, Director of Special Services for the Branchburg School District, testified that Branchburg does follow a kindergarten curriculum and can provide all the services outlined in G.B.'s December 7, 2018 IEP. She said that Branchburg provides a comparable program to Summit Speech and can provide the same to G.B. More specifically, Branchburg's in-district program for G.B. would be self-contained with a low student- to- teacher ratio taught by a special education teacher. G.B.'s specials, lunch and recess would be in a small setting as well. G.B. would be provided audiological services from a certified teacher of the deaf daily, would be provided occupational therapy, speech therapy and physical therapy on an individual basis and in group. Branchburg also proposes BCBA consultation, social skills group and parent training above and beyond what G.B. was receiving at the Summit Speech School.

FINDINGS OF FACT

Based upon the documents in evidence and review of the testimony, **I FIND** the following facts undisputed:

G.B. is a five-year-old kindergarten special education student who resides in the District. **I FURTHER FIND** as **FACT** that she is carrying a diagnosis of Charge Syndrome, which according to the Charge Syndrome Foundation and unfortunately presents with the

daily struggles of her disability including profound hearing loss, which require her to wear cochlear implants in her left and right ears. She further struggles with great behavioral issues, oral motor and articulation issues, sensory processing issues, and executive functioning difficulties. **I FURTHER FIND** as **FACT** that G.B. will stomp and roll around on the floor, yell, bite, and hit. She will rip her cochlear implants out of her ears. She experiences anxiety whenever her routine is changed, and she experiences much difficulty making transitions. She presents with obsessive compulsive behaviors as well. She is also unable to navigate or focus within larger group settings and does not understand social cues due to her social difficulties. G.B. does not understand how to keep an appropriate space from others or how hard to touch someone.

G.B.'s last agreed upon IEP, was developed as a result of the prior school year. G.B. attended kindergarten at the Summit Speech School, an out-of-district placement. **I FURTHER FIND** as **FACT** that G.B. attended her out-of-district placement at Summit Speech School for the 2017-2018 and 2018-2019 school years under the provisions of her IEP. **I FURTHER FIND** as **FACT** that Summit Speech School advised that it can provide continued programming to G.B. for the 2019-2020 school year. As such, the District graciously agreed that it will continue G.B.'s placement out-of-district at Summit Speech School for the month of September.

Petitioners' argue that stay-put is appropriate at Summit Speech School because it is the last agreed-upon placement and is capable of accommodating her needs despite the fact that G.B. has matriculated to kindergarten. I agree.

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.

In this case, it is unnecessary for me 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 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 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).

In the present matter, the petitioners filed an emergent petition regarding the District's proposed placement of G.B. and by way of the emergent application, invoked "stay put." The petitioners contend that the current educational placement is the last

agreed-upon placement of G.B. The Board contends that stay-put would be in Branchburg because they can implement the appropriate integrated inclusion program for a matriculated kindergarten student.

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' 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). 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, it is uncontroverted that the "then-current" educational placement for G.B. at the time of this emergent action is the IEP that was developed for her in June 2016. Pursuant to that IEP, the student was to attend the kindergarten program at Summit Speech School in

Moorestown. Subsequent to the filing for due process, there has been no agreement between the parties to change G.B.'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, respondent is responsible for funding the placement as contemplated in the IEP.[1] 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 Bd. of Educ., No. 10-4215 (MLC), 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.
>
> The IDEA stay put law and regulations admit of only two exceptions where it is the Board, rather than the parents,

[1] This is a significant issue in this matter. It would appear that Seaside Park may be responsible for all or part of the costs of the student's placement at TRR depending upon whether the petitioners and the Board had reached an agreement as to responsibility for payment of in-district tuition.

> 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). 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).
>
> [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.

As demonstrated in Somerville, the fact that a current educational placement for a child may even violate N.J.S.A. 18A:46-14 has no bearing on a request for stay-put. Somerville, 2011 U.S. Dist. LEXIS 748 at *34 ("the protestations by the Somerville Board, true as they seem to be—that at the time D.S. was originally placed at TCS . . . it was a mistake . . . and . . . that even when both the Branchburg and Somerville Boards apparently approved the 2008–2009 IEP, they only later found out that they had made a mistake—are unavailing under IDEA's stay put provision") (emphasis added). It remains the law in the Third Circuit that when a petition for due process is filed, deciding stay-put requires only a determination of the child's current educational placement and then, simply, an order maintaining the status quo.

Indeed, I commend the District here for permitting the student to attend her program for September pending the outcome of this application. Notwithstanding the District's contentions here, the stay-put provisions must apply to this special education student and she should remain at the Summit Speech School. Here, when the parents invoke stay-put, the District must continue the placement called upon in the last agreed-

upon IEP pending either resolution or judicial decision on the dispute. This timely filing bars the school district from unilaterally changing a student's placement during the pendency of a challenge to a proposed IEP. In the instant matter, petitioners timely filed a petition for due process within fifteen days of receiving the District's proposed IEP and, therefore, properly invoked stay-put of the last agreed upon IEP, which called for G.B.'s placement at Summit Speech School. This is not a situation where G.B. cannot continue to attend her last agreed-upon program and placement. Summit Speech School can continue G.B.'s program there. As such, G.B.'s stay-put placement is Summit Speech School. The stay-put provision, therefore, mandates GB's continued placement at Summit Speech School pending either resolution of this dispute or a judicial decision in this Due Process matter.

Here, Summit Speech School has specifically advised that it can continue to provide programming to G.B. for the 2019-2020 school year. In fact, it is alleged that the Summit Speech School has done so for other students in the past. To its credit, the District agreed for G.B.'s placement at Summit Speech School to continue for the month of September; thereby, acknowledging that Summit Speech can, in fact, continue programming for GB. When stay-put is invoked, the student remains in the program and placement last agreed upon. That last agreed-upon program and placement here is Summit Speech School as clearly documented on the IEP.

Also, and more important to the undersigned, is the fact that G.B. suffers from a diagnosis of Charge Syndrome, which according to the Charge Syndrome Foundation is an, " . . . extremely complex syndrome involving extensive medical and physical difficulties that differ from child to child." Unfortunately, GB presents with the daily struggles of her disability including profound hearing loss, which require her to wear cochlear implants in her left and right ears. She further struggles with great behavioral issues, oral motor and articulation issues, sensory processing issues, and executive functioning difficulties. For instance, GB will stomp and roll around on the floor, yell, bite, and hit. She will rip her cochlear implants out of her ears. She experiences anxiety whenever her routine is changed, and she experiences much difficulty making transitions. In fact, she presents with obsessive compulsive behaviors as well. She is also unable to navigate or focus within larger group settings and does not understand social cues due to her social

difficulties. For example, GB does not understand how to keep an appropriate space from others or how hard to touch someone.

In this regard, it is a fact that the Summit Speech School can accommodate G.B.'s needs as they have for the past two years. I will not subject this five-year-old to a transition to a new environment in such a fragile state. It is not appropriate.

Respondent seems to argue that not only has G.B. aged out of the Summit Speech School but the Branchburg School District can provide a comparable program to what G.B. was receiving at the Summit Speech School in-district. Although the testimony of Tina Neely was compelling with the attached comparison chart making it clear that Branchburg School District's in-district program for G.B. is essentially the same in all respects other than the size of the school building, it is not the size of the school building that is the substance of the program in G.B.'s stay-put IEP. Rather, it is the services she received at Summit Speech including a self-contained class with a special education teacher and teacher of the deaf, related services of speech, occupational therapy and physical therapy. It is argued that Branchburg can provide all this in addition to an appropriate academic program utilizing a kindergarten curriculum, which Summit Speech cannot. However, these are issues for a full due process hearing, not for an emergent application on an immediate placement.

"A determination of current educational placement 'cannot be resolved simply by determining whether the School District is proposing to change the physical location where [a student] will attend school.'" J.F. v. Byram Twp. Bd. of Educ., 2014 U.S. Dist. LEXIS 158433 (D.N.J. Nov. 7, 2014) (citing W.R. v. Union Beach Bd. of Educ., 2009 U.S. Dist. LEXIS 108148 (D.N.J. Nov. 19, 2009)). See also White v. Ascension Parrish Sch. Bd., 343 F.3d 373, 379 (5th Cir. 2003)(defining "educational placement" as the educational program, not the institution where that program is implemented). Accordingly, when making a comparable program analysis the focus should be on the program and services offered in the stay-put IEP, not the physical or type of location.

Here, it is alleged that Branchburg can provide the program and services as outlined in G.B's December 7, 2018 IEP in-district. The comparison chart prepared by

Branchburg personnel indicates that it can provide a self-contained program for G.B. at a ratio comparable to that which G.B. is presently receiving at Summit Speech School for the entirety of her day, which includes academics, specials, lunch and recess. In addition, related services and teacher of the deaf services are comparable in-district; this includes speech therapy, occupational therapy and physical therapy along with audiological equipment management and a teacher of the deaf on staff to provide GB individual services daily. On top of this, Branchburg is offering the services of a BCBA, parent training and a social skills group for G.B, although technically not part of her stay-put IEP. However, the Summit Speech School has a proven track record for the past two years and I am not willing to risk a possibly difficult transition for such a short period of time on such a fragile individual. Again, these are issues for a full due process hearing, not for an emergent application on an immediate placement.

After hearing the arguments of petitioners and respondent and considering all documents submitted, **I CONCLUDE**, in accordance with the standards set forth in Drinker v. Colonial School District, that the petitioners' motion for emergent relief is **GRANTED**. It is **ORDERED** that G.B. shall be permitted to continue to attend the kindergarten program at Summit Speech School.

This order on application for emergency relief shall remain in effect until issuance of the decision in the matter. Hearing is scheduled to go forward on February 12, 2020. 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.

September 26, 2019 _____

DATE

DEAN J. BUONO, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

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