



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION ON

EMERGENT RELIEF

OAL DKT. NO. EDS 05026-21

AGENCY DKT. NO. 2021- 32955

B.D. ON BEHALF OF R.D.,

Petitioners,

v.

EDISON TOWNSHIP

BOARD OF EDUCATION,

Respondent.

B.D., on behalf of **R.D.**, petitioners, appearing pro se

R. Scott Eveland, Esq., for respondent, Edison Township Board of Education
(Inglesino, Webster, Wyciskala, & Taylor, attorneys)

Record Closed: June 21, 2021

Decided: June 21, 2021

BEFORE **DOROTHY INCARVITO-GARRABRANT**, ALJ:

STATEMENT OF THE CASE

On June 14, 2021, petitioner, B.D. on behalf of R.D., an adult student, filed a request for emergent relief and a due process petition with the Department of Education,

Office of Special Education Policy and Dispute Resolution (SPDR).¹ Specifically, petitioner seeks emergent relief to preclude R.D.'s graduations as a result of "aging-out" from respondent's district, to permit R.D. to continue with another year of education at his current out-of-district placement, Developmental Learning Center-Warren, (DCL), and to attend DCL's 2021 Extended School Year Program, (ESY).

PROCEDURAL HISTORY

Petitioner filed this Emergent Petition with SPDR on June 14, 2021. SPDR transmitted the matter to the Office of Administrative Law (OAL), where it was filed on June 14, 2021, and scheduled for oral argument on June 17, 2021.

On June 16, 2021, S 3434, "[a]n Act concerning education and related services for students with disabilities and supplementing chapter 46 of Title 18A of the New Jersey Statutes" was signed into law. It became effective on the same date. This was the day before oral argument was scheduled in the instant matter. Oral argument was conducted on June 17, 2021, via ZOOM. Given the novel issues presented by the new law, petitioner and respondent were provided the opportunity to file closing summations and briefs on June 19, 2021. The record closed on June 21, 2021.

FACTUAL DISCUSSION

Arguments

For petitioner

B.D. and S.D. are R.D.'s parents and legal guardians. They both were sworn and provided arguments relative to this matter. Their statements and arguments provided a cohesive and continuous conveyance of their position on behalf of their son. As a result, their separate statements have been merged by this tribunal into this, their arguments section, to present their position in one argument. For this purpose and for efficiency they

¹ This underlying Due Process Petition has not been transmitted by SPDR to the Office of Administrative Law, at the time of this decision.

are referred to as petitioners, even though B.D. was the only named petitioner on the Emergent Application.

Petitioners explained that R.D. is their twenty-one year old son, who is severely autistic and non-verbal. He has multiple disabilities and exhibits self-injurious behavior, which has increased during the past year. R.D. attends an out-of-district placement at DCL Warren School, (DCL). R.D. is a special education student.

On March 16, 2020, DCL transitioned to remote learning pursuant to Governor Murphy's Executive Orders arising from the COVID-19 pandemic. Initially, DCL provided workbook and paper instruction, until it switched to virtual instruction before the end of the 2019-2020 school year. Petitioners maintained that R.D. missed receiving special education instruction for his Autism, speech therapy, occupational therapy, and community-based instruction provided for in his IEP. Petitioner explained that R.D. attended virtual ESY during the summer of 2020. They maintained he was unable to participate or receive benefit from the virtual ESY education and services. In September 2020, DCL began in-person instruction with reduced daily hours. R.D. did not receive any vocational classes or community based instructions due to COVID-19 restrictions.

During the 2020-2021 school year, R.D. was forced to transition to remote, virtual learning for a total of six weeks because he had been exposed to individuals who were found to be positive for COVID-19. Petitioners maintained that R.D. was unable to meaningfully participate in or receive benefit from the virtual ESY education and services. Petitioners contended that R.D. has limited abilities. He requires constant one to one attention for imparting instructions in a structured special education setting. During the 2020-2021 school year, R.D. also experienced the loss of both of his grandfathers which contributed to his difficulties, regression, and inability to benefit from his special education, related services, and transition services.

Petitioners explained that R.D. has severely regressed in all areas. He is exhibiting self-injurious behaviors which have increased in intensity. Petitioners argued that R.D. will suffer irreparable harm if he ages-out and is not provided with another year

of special education and related services, including transition services, at DCL. Petitioners argue that because R.D. has regressed and because he missed his related services and transition services, he is not ready to attend an adult day program. Petitioners stated that R.D. was more capable prior to the pandemic and is entitled to return to that position before transitioning to an adult day program next year. Petitioners maintained that the adult day program should be commensurate with his abilities after receiving the missed programming and services, so that it may provide a fruitful experience and life for R.D.

Petitioners argued that S 3434 is controlling in this matter. R.D. is a student identified as one covered by the law. The law provides for additional special education and related services, including transition services, and compensatory education for special education students who are aging out after the 2020-2021 school year. Petitioners acknowledged that they would have to have a meeting with the IEP team to determine that R.D. requires additional or compensatory special education and related services, including transition services, during the 2021-2022 school year. Petitioners acknowledge that ESY for 2021 at DCL was not included in the last IEP, because R.D. was aging out and it was produced prior to S 3434 becoming law. Finally, petitioners argued that S 3434 provides for stay-put rights. R.D.'s stay-put is a continuation of his out-of-district placement at DCL, including attendance at ESY this summer, which begins on June 23, 2021.

Petitioners seek emergent relief to preclude R.D.'s graduations as a result of aging-out from respondent's district, to permit R.D. to continue with another year of education at his current out-of-district placement, DCL, and to attend DCL's 2021 ESY.

For respondent

In its opposition brief to petitioner's emergent application, dated June 16, 2021, and submitted prior to S 3434 being signed into law, the respondent argued as follows. Respondent argued that petitioner must satisfy the four criteria established in Crowe v. DeGioia, 90 N.J. 126 (1982). Respondent argued that, even assuming as true, that

R.D. missed special education and related services from March 2020 through the present, that the due process complaint filed by the petitioner requesting compensatory education is the appropriate way to obtain relief for a student aging out of the district.

Respondent argued that the petitioner will not suffer irreparable harm if the relief is not granted. Petitioner has preserved his compensatory education claims by filing the underlying due process petition. Respondent argued that compensatory education claims are not appropriate for determination in an emergent application.

Respondent argued that the legal right underlying petitioner's claim is settled against petitioner's request. Respondent indicated that petitioner alleges that R.D. suffered a regression in life skills and is exhibiting self-injurious behavior due to the loss of in-person instruction due to the COVID-19 pandemic. Respondent argued that this argument is based on settled law regarding a student's entitlement to Free Appropriate Public Education (FAPE). Respondent argued that petitioner's compensatory education and denial of FAPE claims are not appropriately addressed in an emergent application. Those claims have been preserved by the filing of the due process petition and will continue to a plenary hearing even if R.D. graduates.

Respondent argued that petitioner is not likely to succeed on the merits or the underlying claim. Respondent argued that petitioner's request for emergent relief is devoid of any documentation to establish that services provided for in R.D.'s IEP had not been provided. No documents have been submitted substantiating petitioner's claim regarding R.D.'s self-harm. No documents have been provided to establish the impact that remote learning may have had on R.D. and the efficacy of the services required under his IEP. Respondent therefore argued that petitioner has not satisfied his burden to demonstrate that there is any likelihood of success on the merits. Additionally, respondent argued that aging out occurs by law and is not subject to a challenge. This further supported the conclusion that there is no likelihood of success on the merits.

Respondent argued that, when balancing the equities, the respondent would suffer great harm than the petitioner if the relief is granted. Petitioner seeks an ESY this summer and an additional year of services during the 2021-2022 school year. Respondent maintained that petitioner seeks this remedy on an emergent basis before there has been any opportunity to determine if there had been any failure to provide a FAPE. If the relief is granted, and the respondent is successful in defending against the due process claims, the respondent would have already provided months of service at its cost. Respondent argues that it is inequitable to award compensatory services on an emergent basis. Those issues should be addressed at a plenary hearing.

Respondent argued that petitioner failed to establish that emergent relief is appropriate under the circumstances and their application should be denied.

At oral argument, the day after S 3434 became law, respondent made the following additional arguments. Respondent argued that S 3434 provides in paragraph 1a for a mechanism for special education students to resolve their claims of missed special education and related services as a result of the impact of the COVID-19 pandemic restriction. S 3434, at 1a provides that a collaborative meeting between the parents and IEP team should occur to determine the amount of loss, if any, of education and services, and regression. That collaborative meeting would have to occur before any application due process or emergent can be made. Therefore, the petitioner's emergent application should be dismissed.

Respondent argued that stay-put protections are guaranteed by federal law. It is well-settled that New Jersey may not re-write the Individual with Disabilities Education Act (IDEA) and federal law. Stay-put protections were not specifically provided for in S 3434. Such a stay-put determination is not appropriate for an emergent application and should await the collaborative meeting or outcome of the due process petition.

Respondent argued that petitioner will suffer no irreparable harm if its claims are resolved through either the collaborative meeting or the due process proceedings, because petitioner's claims are compensatory education claims. That is the only relief

that respondent would have to provide if it was determined that R.D. was entitled to compensatory education and related services. Petitioner's due process petition preserved his compensatory education claims.

Respondent argued that the legal right underlying petitioner's claim is settled against petitioner's request, even in light of S 3434's enactment. Respondent argued that it is well settled that services cannot be ordered before there is a determination at the collaborative meeting that R.D. did in fact miss education or related services that were critical to him or his transition to adult programs. Respondent would be denied Due Process if it is ordered to provide services absent its right to contest the veracity of petitioner's claim and whether R.D. has missed services or been denied FAPE.

Respondent argued that petitioner cannot demonstrate a likelihood of success on the merits by clear and convincing evidence. Petitioner has failed to demonstrate by documentary evidence that he will prevail in the due process proceedings.

Respondent argued that, when balancing the equities, it is inequitable for petitioner to be granted attendance at ESY 2021 and an additional year at DCL without a determination as is required. Respondent maintained that petitioner seeks this remedy on an emergent basis before there has been any opportunity to determine if there had been any failure to provide a FAPE. If the relief is granted, and the respondent is successful in defending against the due process claims, the respondent would have already provided months of service at its cost. Respondent argues that it is inequitable to award compensatory services on an emergent basis. Those issues should be addressed at a plenary hearing.

As additional supplemental arguments, the respondent contended that S 3434 does not entitle R.D. to stay-put. S 3434 does not provide automatic continuance of special education and related services. As a result, respondent argued that the new law cannot be interpreted to provide for a stay-put placement during pendency of a due process proceedings. S3434 provides for remedies should parents disagree with the

IEP team during the collaborative meeting. Those remedies specifically do not include a stay-put placement.

Findings of Fact

For purposes of deciding this application for emergent relief, the following is a summary of the relevant facts derived from the contents of the petitions and from the arguments at the hearing, and therefore I **FIND** them as **FACTS**.

R.D. became twenty-one years old, during the 2020-2021 school year. R.D. is a special education student, who is disabled and autistic. R.D. has significant deficits arising from his autism and related conditions. R.D. is non-verbal. R.D. is classified as multiply disabled. R.D. resides in respondent's district with his parents, who are also his legal guardians. R.D. has been in an out-of-district placement at DCL. R.D. has attended DCL's extended school year each summer. R.D.'s IEP for the 2020-2021 school year provided for special education and related services, including transition services. The IEP contemplated that B.D. would age-out during the school year, and B.D. would transition to an adult day program.

A new IEP was developed towards the end of the 2020-2021, which provided for a transition for R.D. to the adult day program. The basic premise of this transition IEP was that R.D. would no longer be permitted by law to attend New Jersey public school, because he attained twenty-one years of age.

Last year, on March 16, 2020, DCL transitioned to remote learning in accordance with Governor Murphy's Executive Orders, resulting from the COVID-19 pandemic. Initially, DCL provided instruction via workbook pages and assignments. Subsequently, DCL provided virtual remote learning. R.D. had difficulty participating remotely. Virtual learning continued through the 2020 extended school year session.

In September 2020, DCL began hybrid in-person learning with reduced hours. For approximately six, non-consecutive weeks during the 2020-2021 school year, R.D. was transitioned back to virtual learning, as a result of his exposure to individuals, who tested positive for COVID-19 and quarantine requirements. Petitioners maintained that R.D. did not receive his programmed special education instruction, speech therapy,

occupational therapy, and community-based instruction provided for in his IEP. This programming was meant to assure R.D. made meaningful progress. R.D.'s parents expressed that over the course of the 2020-2021 school year, R.D.'s capabilities regressed, due to his inability to access his education and related services effectively, and that he became self-injurious. R.D.'s emotional well-being suffered. In this regard, his parents maintained that R.D.'s regression has negatively impacted his ability to transition to an adult program, at present.

Prior to S 3434's signing, by operation of law, R.D. would have aged-out during the 2020-2021 school year, despite his claims of unreceived special education and related services, including transition services, provided for in his IEP for that school year. As a result, petitioner filed a due process petition preserving R.D.'s claims for compensatory education.

Subsequently, on June 16, 2021, S 3434 became law. Petitioner's due process petition continues to be pending at SPDR. It has not been transmitted to the OAL. R.D. is a student, who is provided for in S 3434. R.D. had an IEP, providing for special education and related services, including transition services, for the 2020-2021 school year, that was impacted by the school closures and transition to remote and hybrid learning, arising from the COVID-19 pandemic. R.D. is classified as multiply disabled. As they specifically relate to the instant emergent matter, those claims were submitted to support the position that R.D. should not age-out now. The claims for a determination of the quality and quantity of undelivered services, if any, and the impact of the pandemic on his education and progress, are not ripe for determination in this emergent decision. They may require a plenary hearing. However, they are inextricably connected to the emergent relief requested relative to aging-out and graduating from the district and petitioner's request for stay-put.

As provided for in S 3434, petitioner on behalf of R.D. is entitled to a collaborative meeting with the CST to evaluate and determine if R.D. lost education and services provided for in his 2020-2021 IEP. Further R.D. is entitled to that collaborative meeting to determine if he requires an additional year of special education and related

services, including transition services, at DCL, or if the education and services which were missed may be delivered as compensatory education. If there is no agreement at that meeting, then those claims must be resolved through mediation or a full, plenary due process hearing. Such determinations, which are based in FAPE, are not appropriate for resolution in an emergent application.

R.D.'s stay-put placement is DCL. R.D. was a student at DCL at the time this emergent application and the due process petitioner were filed. This includes his enrollment in the 2021 ESY session, which begins on June 23, 2021.

LEGAL DISCUSSION AND CONCLUSIONS

New Jersey Administrative Code 1:6A-12.1(a) provides that the affected parent(s), guardian, board or public agency may apply in writing for emergency relief. An applicant for emergency relief must set forth in their application the specific relief sought and the specific circumstances they contend justify the relief sought. N.J.A.C. 1:6A-12.1(a).

Emergent relief shall only be requested for the following issues pursuant to N.J.A.C. 6A:14-2.7(r)1:

- i. Issues involving a break in the delivery of services;
- ii. Issues involving disciplinary action, including manifestation determinations and determinations of interim alternate educational settings;
- iii. Issues concerning placement pending the outcome of due process proceedings; and
- iv. Issues involving graduation or participation in graduation ceremonies.

Here, petitioner filed this emergent application seeking immediate relief to prevent R.D. from aging-out and graduating, from DCL at the end of the 2020-2021 school year, to permit R.D. to continue with another year of education at his current out-

of-district placement, DCL, and to attend DCL's 2021 ESY program beginning on June 23, 2021. Petitioner has a due process petition pending with SPDR, which includes claims related to the relief sought within this emergent application and compensatory education. The due process petition has not been transmitted to the OAL. As discussed more fully herein, S 3434 provided, in part, protections preventing some disabled students with IEPs from aging-out of public education, if it is determined they lost education and related services which they need and to which they are entitled, as a result of the COVID-19 pandemic.

Based on the totality of circumstances presented in the instant matter and S 3434, I **CONCLUDE** this matter involves the issue of graduation, which could require emergent relief, pursuant to N.J.A.C. 6A:14-2.7(r)1(iv).

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 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).

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”).

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. 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, 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).]

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.

On June 16, 2021, the day before the hearing in the instant matter, S 3434, an Act concerning education and related services for students with disabilities and supplementing chapter 46 of Title 18A of the New Jersey Statutes became law. S 3434 provides in pertinent part as follows:

1.a. Notwithstanding the provisions of N.J.S. 18A:46-6, N.J.s. 18A:46-8, or of any other law, rule, or regulation concerning the age of eligibility for special education and related services to the contrary, a board of education **shall**, in the 2021-2022 school year, provide special education and related services contained in an individualized education program to a student with disabilities who attains the age of 21 during the 2020-2021 school year, provided that the parent of the student and the individualized education program team determine that the student requires additional or compensatory special education and related services, including transition services, during the 2021-2022 school year. As student receiving special education and related services pursuant to this subsection shall not be eligible to receive such education and services beyond June 30, 2022, unless otherwise provided in a student's individualized education program or as ordered by a hearing officer, complaint investigation, or court of competent jurisdiction.

d. A student receiving special education and related services, including transition services, pursuant to this section shall be afforded the same rights, privileges, and remedies provided to students with disabilities pursuant to State law, State Board of Education regulations concerning special education and the federal "Individuals with Disabilities Education Act," 20 U.S.C. s.1400 et seq. Any disputes that arise with respect to the provision or nature of services provided to a student with disabilities in the additional year as provided under subsection a., b., and c., of this section may be addressed as determined by the parent of the student with disabilities by either:

(1) mediation;

(2) a written request for a complaint investigation submitted to the Director of the Office of Special Education Policy and Dispute Resolution in the Department of Education; or

(3) a special education due process hearing pursuant to the provisions of the "Individuals with Disabilities Education Act," 20 U.S.C. s.1400 et seq., chapter 46 of Title

18A of the New Jersey Statutes, or regulations promulgated thereto.

(e) (1) The special education and related services, including transition services, provided to students with disabilities pursuant to the provisions of this section shall, to the extent permitted by federal law, be paid for from the monies received by the State or a school district under the federal “Coronavirus Aid, Relief, and Economic Security (CARES) Act,” Pub.L.116-136, the federal “Coronavirus Response and Relief Supplemental Appropriations (CRRSA) Act, 2021.” Pub. L. 116-260, the federal American Rescue Plan (ARP) Act,” Pub.L. 117-2, or any other federal funding provided to address the impact of the coronavirus pandemic on elementary and secondary schools as it becomes available.

(2) To the extent that the federal funds described in paragraph (1) of this subsection do not cover the costs borne by the school districts to provide the special education and related services, including transition services to students with disabilities, pursuant to the provisions of this section, the State shall appropriate funds as necessary from the Property Tax Relief Fund to reimburse school districts for these costs....

(S 3434)[Emphasis added.]

Here, R.D. is a disabled student, who attained the age of twenty-one during the 2020-2021 school year. He had an IEP, which provided for an out-of-district placement at DCL and special education and related services, including transition services. I **CONCLUDE** B.D. is a student afforded rights and protections by S 3434.

The petitioner filed an emergent petition regarding R.D. aging-out and graduating from the District. The petitioner argued that R.D. is entitled to a determination pursuant to S 3434 of the scope of the undelivered special education and related services, including transition services, if any, which may have occurred as a result of the COVID-19 restrictions, and how such lost services may be delivered to R.D. during the 2021-2022 school year. The petitioner argued that R.D. is entitled to stay-put protections and continued placement at DCL, including this summer’s ESY program, until the issues regarding the undelivered education and services are resolved. The respondent

contended that stay-put rights were not provided for in S 3434. Rather, petitioner's right is still to receive compensatory education if warranted, because S 3434 serves only to provide for the collaborative meeting to resolve any compensatory education issues. It argued that S 3434 was to avoid this type of emergent application by providing the collaborative meeting mechanism to resolve disputes over alleged undelivered education and services during the pandemic. However, the respondent's position opposing the application, and arguing that the request for emergent relief and a stay-put determination are premature, because the collaborative meeting or a disagreement between the parties regarding any lost education and services has not been reached, also had the unintended consequence of invoking a stay put issue. If respondent's argument is successful, then it *de facto* divorces R.D. from the district, and changes his last agreed upon placement, prior to the resolution of the dispute between petitioner and respondent.

The purpose of S 3434 was to provide disabled students, who were deprived of programming provided for in their IEPs, that education and services to place them in a position comparable to that which they would have been in if the COVID-19 restrictions had not occurred if it is determined that that education and services are warranted and appropriate. I agree with respondent that S 3434 does not prevent aging-out and does not mandate a continuation of services. I agree with respondent that S 3434 provides for the possibility of an additional year of special education and related services for those students aging-out during the 2020-2021 school year. However, S 3434 cannot be interpreted to leave special education students without continuing special education and related services throughout the due process proceedings, which could last throughout the 2021-2022 school year, should there be no agreement reached at the collaborative meeting.

R.D.'s parents and respondent's IEP team are required to meet and determine if he requires additional or compensatory special education and related services, including transition services, during the 2021-2022 school year. This is to be a collaborative meeting between the petitioner and CST/District. If there is a disagreement between the petitioner and the respondent regarding this determination,

then pursuant to paragraph d of S 3434, the parties are permitted to pursue mediation, investigation, or due process proceedings to resolve the dispute.

It is uncontroverted that S 3434 provided special education students, like R.D., with either additional education, or compensatory education based on the student's lost programming and needs. S 3434 specifically provided that B.D. "shall be afforded the same rights, privileges, and remedies provided to students with disabilities pursuant to State law, State Board of Education regulations concerning special education and the federal 'Individuals with Disabilities Education Act,' 20 U.S.C. s.1400 et seq." To the contrary of respondent's argument, inherent in that provision is that additional education could include continued stay-put placement in the student's last agreed upon program provided for in their IEP, among other additional education options. To conclude otherwise would strain logic and would be inconsistent with the fundamental purpose of the law, to provide those most vulnerable students with the continued education and services they would have received, but did not, as a result of the pandemic, if determined to be appropriate in order to permit them to meaningfully progress to achieve their goals. The Legislature did not specifically exclude stay-put protections from the provisions of S 3434. Instead, it chose to include and re-affirm all of the rights, privileges, and remedies provided for in applicable federal and state laws.

Therefore, I **CONCLUDE** S 3434 provides the opportunity for R.D. to continue at DCL during the 2021-2022 school year, if needed and appropriate as determined at the collaborative meeting, mediation, agreed to by the parties, or ordered through a plenary hearing on a due process petition. I **CONCLUDE** that R.D.'s 2020-2021 IEP was dispositive of his program. That provided for R.D.'s "then-current" educational placement. A determination of any deprivation of education and services that may have occurred between March 2020 and the present must be, in part, based on that IEP.

While it is fully understood that a subsequent transition IEP for after the 2020-2021 school year ended was created, that IEP was promulgated on the presumption that R.D. would age-out at the end of the school year without any recourse other than claims for compensatory education. S 3434 did not negate that presumption.

However, S 3434 did provide substantive rights to R.D. for continued or compensatory education, after age twenty-one, if determined to be appropriate. Therefore, because the newly developed transition IEP could not have provided for a stay-put placement or for instruction and delivery of the missed education and services, it cannot serve as the last agreed upon IEP for educational placement purposes. Such a conclusion would be inconsistent with S 3434.

Indeed, this tribunal understands that S 3434 imposed new and unprecedented obligations upon the respondent, after the emergent application was filed and the day before the hearing commenced. Notwithstanding the respondent's significant concerns, about the unforeseen responsibilities and possible costs to it, which could be unwarranted if it is successful in its position after the collaborative meeting or disposition of the due process proceedings, here, the stay-put provisions must apply to this special education student. R.D. should remain at DCL. This stay-put status quo includes enrollment in DCL's ESY beginning on June 23, 2021, because R.D.'s IEPs have consistently provided R.D. with ESY during the summers. S 3434 specifically provides that the costs for additional education and related services, including transition services, or compensatory education, if it is determined that R.D. is entitled to either, will be funded by federal or state funds, and not entirely paid for by respondent.

When the parents invoke stay-put, the respondent must continue the placement called upon in the last agreed-upon IEP pending either resolution or judicial decision on the dispute. When stay-put is invoked, the student remains in the program and placement last agreed upon. I **CONCLUDE** that last agreed-upon program and placement here is DCL as clearly documented on the 2020-2021 IEP. I **CONCLUDE** that the latest transition IEP cannot be petitioner's stay-put because it was premised upon R.D.'s transition out of public school at age twenty-one by operation of law. It could not have been developed to include the rights provided in S 3434 because it had not been enacted at that time.

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 petitioner's motion for emergent relief is **GRANTED**.

ORDER

Petitioner’s motion for emergent relief is **GRANTED**. It is **ORDERED** that B.D. shall be permitted to continue to attend DCL and its ESY program which begins on June 23, 2021, until the first of the following events occur, to wit: 1. an agreement is reached between petitioner and the CST/District at the collaborative meeting, or subsequently between the parties, as to the appropriate additional special education and related services, including transition services, if any, or compensatory education to be delivered in an appropriate manner, if any; 2. all proper due process claims are resolved; or, 3. there is an Order to the contrary from any tribunal or court of competent jurisdiction. It is further **ORDERED** that the collaborative meeting between B.D.’s parents and the CST/District provided for in S 3434 shall occur within forty-five days.

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 Policy and Dispute Resolution.



June 21, 2021

DATE

DOROTHY INCARVITO-GARRABRANT, ALJ

Date Received at Agency:

Date Mailed to Parties:

/dm

LIST OF EXHIBITS

For petitioner:

P-1 2020-2021 IEP

P-2 Emails from petitioner to the District.

For respondent, Cinnaminson:

R-1 S 3434.