



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

**FINAL DECISION – EMERGENT
RELIEF**

OAL DKT. NO. EDS 05781-21

AGENCY DKT. NO. 2021-32990

J.S. ON BEHALF OF D.D.,

Petitioner,

v.

**WAYNE TOWNSHIP BOARD OF
EDUCATION,**

Respondent.

George M. Holland, Esq., for Petitioner

Carolyn Chaudry, Esq., (Scarinci & Hollenbeck, LLC) for Respondent

Argued: July 15, 2021

Decided: July 16, 2021

BEFORE JUDE-ANTHONY TISCORNIA, ALJ:

J.S. o/b/o D.D. (petitioner) filed a request for emergent relief seeking enforcement of stay put protection regarding placement of D.D., a twenty-one-year-old adult who is eligible for special education and related services based on his classification as autistic. D.D. had been receiving services out of district at the

Chancellor Academy, and Chancellor Academy is the stay put placement under the current IEP, dated on or about June 6, 2021. The aforementioned IEP requires D.D. to transition out of all district services due to the pupil's age (over twenty-one). Petitioner has filed an underlying due process petition seeking an additional year of special education services, notwithstanding pupil's age, under the new law, **S3434**, which requires boards of education to provide additional or compensatory special education and related services, beyond achieving twenty-one years of age, in certain circumstances.

PROCEDURAL HISTORY

The request for emergent relief was received by the Office of Special Education Policy and Planning on July 12, 2021, and the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case. A hearing was scheduled at the Office of Administrative Law in Newark, New Jersey for July 15, 2021, Oral argument was conducted, and the record was closed.

FACTS

The following **FACTS** are undisputed.

D.D. is a twenty-one-year-old adult who is eligible for special education and related services based on his classification as autistic. D.D. had been receiving services out of district at Chancellor Academy, a private school, and Chancellor Academy is the stay put placement under the current IEP, which D.D., himself, signed on or about June 6, 2021. The aforementioned IEP requires D.D. to transition out of all district services due to D.D. having achieved twenty-one years of age.

Subsequent to D.D. signing the June 2021 IEP, Governor Murphy signed **S3434** into law, which extends a special education student's ability to receive special education services beyond the age of twenty-one. Petitioner then filed a due process petition

disputing the current IEP and seeking an additional year of services under **S3434**. D.D. filed the foregoing petition for emergent relief along with the underlying due process petition. Petitioner seeks enforcement of the stay put provision of the current IEP on an emergent basis, essentially as a form of injunctive relief, to ensure that D.D. will receive services while the underlying due process petition is pending.

Respondent objects to the emergent petition on the basis that D.D. is over twenty-one years of age, has already signed off on an IEP phasing out special education services, and points to D.D.'s overall progress and ability to function on his own outside of the District's program.

LEGAL ANALYSIS AND CONCLUSIONS

One applicable regulation is N.J.A.C. 6A:14-2.7(r), which provides in pertinent part as follows:

1. Emergent relief shall only be requested for the following issues:
 - 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 seeks enforcement of the stay put provision of the current IEP to ensure that D.D. receives services while the underlying due process petition is pending. Thus, petitioner is attempting to avoid a break in services should the underlying due process petition succeed, and thus, I conclude that D.D.'s petition for emergent relief satisfies (i) and (iii), above.

More generally, emergent relief is available pursuant to N.J.A.C. 1:6A-12.1(e), N.J.A.C. 6A:3-1.6(b) and N.J.A.C. 6A:14-2.7(s), if the application meets the following four requirements:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying the petitioner's claim is settled;
3. The petitioner has a 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.

Petitioner, however, argues he does not need to meet the four-prong requirements of the above-cited regulation, and instead relies on the seminal case of Drinker by Drinker v. Colonial School District, 78 F.3d 859 (3d Cir. 1996), which identifies section 1415(e)(3) of the IDEA as a form of injunctive relief, to which a petitioner is entitled, pending the outcome of an underlying due process petition:

Section 1415(e)(3) of the IDEA functions, in essence, as an automatic preliminary injunction. Zvi D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982). As the Court of Appeals for the Second Circuit has stated, "the statute substitutes 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." Id. (citations omitted); see also Woods v. New Jersey Dep't of Educ., No. 93-5123, [**15] 20 Indiv. Disabilities Educ. L. Rep. (LRP Publications) 439, 440 (3d Cir. Sept. 17, 1993). 12 As we have stated:

The provision represents Congress' policy choice that all handicapped children, regardless of whether their case is meritorious or not, are to remain in their current educational placement until the dispute with regard to their placement is ultimately resolved. 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.

[*865] Woods, 20 Indiv. Disabilities Educ. L. Rep. (LRP Publications) at 440. The relevant inquiry under section 1415(e)(3) thus becomes the identification of "the then current educational placement," 13 of the handicapped student and, further, the identification of who should pay for it. See Woods, 20 Indiv. Disabilities Educ. L. Rep. (LRP Publications) at 440; Zvi D., 694 F.2d at 906. As the Court of Appeals for the Second Circuit explained in Zvi D.:

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 [**16] 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.

Id. at 864 (quoting Zvi D. v. Ambach, 694 F.2d 904, 906 (2d Cir.1982)).

Based on the foregoing, I **CONCLUDE** that Petitioner does not need to meet the four pronged requirements to succeed on an emergent action as cited above, because he is entitled to enforcement of the stay put provision of the IEP as a form of injunctive relief pending the outcome of the due process petition. I further **CONCLUDE**, that the stay put provision in section 1415(e)(3) of the IDEA requires the District to maintain and support D.D.'s continued placement at Chancellor Academy pending the outcome of the underlying due process petition and any subsequent appeal. Petitioner's application must therefore be **GRANTED**.

ORDER


It is, hereby, **ORDERED** that petitioner's request for emergent relief be **GRANTED**, and that the stay put provision of the current IEP placing D.D. at Chancellor Academy be enforced.

This decision on application for emergent relief shall remain in effect until the issuance of the decision on the merits in this matter. The hearing having been requested by the parents, this matter is hereby returned to the Department of Education

for a local resolution session, pursuant to 20 U.S.C. § 1415 (f)(1)(B)(i). If the parent or adult student feels that this decision is not being fully implemented with respect to the program or services, this concern should be communicated in writing to the Director, Office of Special Education Policy and Dispute Resolution.

July 16, 2021

DATE



JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency

7/16/21_____

Date Mailed to Parties:

7/16/21_____

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