



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

ON EMERGENT RELIEF

OAL DKT. NO. EDS 05398-21

AGENCY DKT. NO. 2021-33021

K.P. on behalf of A.P.,

Petitioner,

v.

MANVILLE BOROUGH BOARD

OF EDUCATION, SOMERSET COUNTY,

Respondent.

K.P. on behalf of **A.P.**, petitioner, pro se

David B. Rubin, Esq., for respondent

Record Closed: July 1, 2021

Decided: July 2, 2021

BEFORE **SUSAN L. OLGATI**, ALJ:

STATEMENT OF THE CASE

This case arises out of a request for emergent relief, bought by petitioner, K.P. on behalf of A.P., seeking respondent, Manville Borough Board of Education (Board) to provide an immediate stay-put of the current program and placement in general education.

PROCEDURAL HISTORY

On or about June 21, 2021, petitioner filed a complaint for due process with the N.J. Department of Education, Office of Special Education Policy and Dispute Resolution seeking to maintain current program and placement in the general education setting.¹ Then on or about June 29, 2021, petitioner filed a request for emergent relief seeking an immediate stay-put of the current program and placement in general education. On the same date, the emergent petition was transmitted to the Office of Administrative Law (OAL) for an emergent hearing.² Oral argument on emergent relief was held via Zoom Video Communications (Zoom) on July 1, 2021, and the record closed on that date.

FACTUAL DISCUSSION AND FINDINGS

According to the IEP dated October 28, 2020, A.P. is an eleven-year-old (date of birth, December 9, 2008) eligible for special education and related services. He is classified as Autistic. His placement category indicates “[i]n the presence of general education students for 80 percent or more . . .” His program and services include in-class resource for language arts and math five days per week, forty minutes per session. He also receives group occupational and counseling services, two times per month, thirty minutes per session. The projected start date of the IEP was October 28, 2020. The projected end date of the IEP is October 27, 2021. The October 2020 IEP does not provide for extended school year (ESY). The parties do not dispute that the October 2020 IEP was operative during the 2020-2021 school year.

During a June 14, 2021, eligibility meeting proposed changes were made to the October 2020 IEP including that A.P. would attend ESY beginning on July 1, 2021. During an April 2021 re-evaluation planning meeting, a neuro-developmental evaluation was proposed for A.P. On or

¹ Petitioner entitled her original filing supporting her complaint “Due Process/Emergent Relief Application and Filing by Parent.” It appears however that petitioner then clarified with OSEP that she sought only to file a complaint for due process and did not, at that time, intend to request emergent relief.

² The case information sheet from the NJ Department of Education, Office of Special Education Policy and Dispute Resolution notes, “ER only sent at this time. Underlying DP to remain with SPDR.”

about June 14, 2021, K.P. provided the Board with her signed consent to perform the evaluation. While K.P. contended at oral argument that she did not receive a copy of the proposed June 14, 2021, changes to the IEP, she acknowledged that she failed to pick up the proposed IEP as she had advised.³ Petitioner acknowledged that she requested ESY services for A.P. but contends that the Board has failed to provide A.P. with appropriate supports for same. Petitioner contends that the Board is aware of A.P.'s behavioral issues and that the proposed ESY is inappropriate. Petitioner further contends that the proposed ESY constitutes an interim alternate educational setting. Additionally, petitioner expressed concern that the neurological evaluation, which she seeks for A.P., could take approximately five months to complete and thus believes that it could impact the type of services A.P. receives and/or his general education placement. Petitioner also advised that she seeks compensatory education for A.P. Petitioner seeks to maintain the October 2020 IEP as A.P.'s stay put placement.

Respondent maintains that the only change to the October 2020 IEP is the addition of the customized ESY program for A.P. Respondent believes that ESY is appropriate for A.P. and that he would benefit from same but acknowledged it could not force petitioner to send A.P. to ESY. Indeed, petitioner advised that A.P. did not attend the first day of ESY as the family was on vacation. Respondent argues that petitioner has failed to demonstrate that this matter involves issues appropriate for emergent relief.

LEGAL ANALYSIS AND CONCLUSIONS

N.J.A.C. 1:6A-12.1(a) provides that as part of hearing request the affected parent may apply in writing for emergent relief. N.J.A.C. 6A:14-2.7(r) further provides that emergent relief shall only be requested for the following issues:

- i. Issues involving a break in the delivery of services;

³ The Board contends that, upon petitioner's request, it did not previously email her a copy of the proposed IEP. The Board however made the IEP available for petitioner to pick up. During oral argument, the Board offered to email petitioner, within one day, a copy of the proposed IEP. This ALJ gave petitioner the option of adjourning the emergent hearing to allow her time to receive and review the proposed changes. Petitioner declined that offer and advised that she wished to proceed with the emergent hearing.

- 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.

In her request for emergent relief, petitioner indicates that she is entitled to request emergent relief based upon “issues involving disciplinary action, including manifestation determinations and determinations of interim alternate educational settings.” At oral argument, petitioner explained her belief that the proposed ESY constitutes an interim alternate educational setting.

Contrary to petitioner’s argument, there has been no suggestion nor representation by either party that this matter involves issues of disciplinary action or that the Board is seeking to place A.P. in an interim alternate educational placement as a result of any disciplinary action. ESY is an extension of special education and related services provided to students beyond the regular school year. An ESY program is provided in accordance with the student’s IEP when an interruption in educational programming causes the student’s performance to revert to a lower level of functioning and recoupment cannot be expected in a reasonable amount of time. N.J.A.C. 6A:14-4.3. Thus, petitioner fails to demonstrate an entitlement to request emergent relief on this issue.

Petitioner however also argues that the proposed addition of ESY constitutes a change in A.P.’s program and placement thus I **CONCLUDE** that that she has demonstrated an entitlement to request emergent relief on this issue.

New Jersey Regulations N.J.A.C. 1:6A-12.1(e) and N.J.A.C. 6A:14-2.7(s)(1), set forth the four-prong standard for granting emergency relief. However, when the emergent relief request effectively seeks a “stay-put” preventing the school district from making a change in

program or 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.A. § 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.A. § 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)(2014). N.J.A.C. 6A:14-2.7(u) further provides:

(u) Pending the outcome of a due process hearing, including an expedited due process hearing, or any administrative or judicial proceeding, no change shall be made to the student's classification, program or placement unless both parties agree, or emergency relief as part of a request for a due process hearing is granted by the Office of Administrative Law according to (m) above or as provided in 20 U.S.C. § 1415(k)4 as amended and supplemented.

Here, the Board acknowledges that the proposed addition of ESY constitutes a change to A.P.'s programming. Petitioner acknowledges that she seeks ESY for A.P. but contends the proposed program is inappropriate as it does not provide appropriate behavioral supports for A.P. to succeed. As a result, she seeks an order declaring the October 2020 IEP to be A.P.'s stay put placement⁴. Thus, because petitioner does not agree to the proposed change in programming,

⁴ While petitioner requests stay put of the current program and placement directed by the October 2020 IEP, it appears that such request is contrary to petitioner's objectives and/or requests on behalf of A.P. For example, petitioner indicates that she wants A.P. to attend ESY with appropriate supports yet acknowledges that the October 2020 IEP does not provide for ESY. Additionally, despite her request for stay put of the current program and placement, petitioner indicates in her due process complaint that she seeks a change in A.P.'s classification and also “seeks out of district placement and ABA 1:1 classroom support for all classes as may be determined necessary” Like ESY, none of these are provided for in and/or are consistent with the October 2020 IEP. Nevertheless, petitioner repeatedly asserted at oral argument that she seeks stay put of the October 2020 IEP.


the change cannot be made pending disposition of the due process hearing. Accordingly, I **CONCLUDE** that petitioner's request for emergent relief seeking a stay put of the current program and placement as directed by the October 2020 IEP should be **GRANTED**.

ORDER

For the reasons stated above, I hereby **ORDER** that the stay put placement pending disposition of the due process complaint is the current program and placement as directed by the October 2020 IEP.

This decision on application for emergency 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 parents 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.

July 2, 2021 _____
DATE



SUSAN L. OLGATI, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

SLO/nd