



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

EMERGENT RELIEF

OAL DKT. NO. EDS 05447-21

AGENCY DKT. NO. 2022-33078

F.R. AND N.R. ON BEHALF OF C.R.,

Petitioners,

v.

**FREEHOLD REGIONAL BOARD OF
EDUCATION,**

Respondent.

Lori Gaines, Esq., for petitioners (Barger and Gaines, attorneys)

Alexandra A. Stulpin, Esq., for respondent (Comegno Law Group, attorneys)

Record Closed: July 7, 2021

Decided: July 8, 2021

BEFORE **MARY ANN BOGAN**, ALJ:

STATEMENT OF THE CASE

Petitioners F.R. and N.R., on behalf of their son, C.R., an adult student, filed an application for Emergent Relief and a due process petition against the respondent, Freehold Regional Board of Education. Petitioners seek emergent relief to preclude C.R.

from “aging out” of respondent district, to permit C.R. to remain at his current placement, the Children’s Center, including attendance at extended school year program (ESY) through stay-put pending final resolution of the due process matter consistent with S 3434 passed on June 16, 2021. Petitioners’ also request determination that they are the prevailing party for purposes of seeking reimbursement of attorney fees and costs. Respondent opposes this request as inconsistent with S 3434 and finds that continuing C.R.’s attendance at The Children’s Center for the 2021–2022 school year is unnecessary, including attendance in ESY, in that C.R. has made progress throughout the 2020–2021 year and has turned age twenty-one. Respondent further argues that petitioners have not demonstrated they are entitled to emergent relief.

PROCEDURAL HISTORY

Petitioners filed both an application for emergent relief, dated June 30, 2021, and a request for due process dated June 28, 2021, with the Office of Special Education Policy and Dispute Resolution (SPDR), seeking immediate placement in an ESY for the 2021 summer, and continued placement at The Children’s Center for the 2021–2022 school year pursuant to S 3434. The application for emergent relief was transmitted to the Office of Administrative Law (OAL) on June 30, 2021, as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The parties presented oral argument on the emergent relief application on July 7, 2021, and the record closed.

FACTUAL DISCUSSION

Petitioner

Petitioners F.R. and N.R. set forth in their certifications that C.R., their son, is twenty-one (21) years old, severely disabled as a result of autism, non-verbal, and has been receiving special education and related services in an out-of-district placement, The Children’s Center. Petitioners claim that C.R. has not been provided with in-person special education instruction related to his Autism, including instruction through applied behavioral analysis, speech therapy, occupational therapy, and community-based instruction including other transition services as set forth in his IEP, due to COVID-19

restrictions. In addition, he is not ready to transition to the adult day care programs because he has yet to qualify and his regressive behaviors during remote instruction, which includes self-harming behaviors will likely limit him from being accepted at this time. Furthermore, petitioners maintain that C.R. was unable to participate in or receive any benefit from virtual learning which extended over eight months. Even when C.R. attended some in-person instruction, he was not able to participate in community-based instructions due to ongoing COVID-19 restrictions.

Specifically, C.R. transitioned to remote learning pursuant to Governor Murphy's Executive Orders issued as a result of the COVID-19 pandemic. As previously set forth, C.R. was expected to attend virtual learning but was unable to attain any meaningful benefit during this time and any necessary supports such as a 1:1 aide like he is supported by while in-person was not available due to the pandemic restrictions.

Petitioners in their certification assert that C.R. significantly regressed in all areas and even more because his self-injurious behavior intensified. Petitioners through their submissions set forth that C.R. will continue to suffer irreparable harm if he is forced to age out of the school year and he is not provided with another school year of in-person special education and related services, including transition services at The Children's Center. Petitioners' further assert that without another year of special education and related services, C.R. is not prepared to attend an adult day program.

On June 7, 2021, petitioners formally notified the respondent that they requested extending C.R.'s special education and related services as set forth in the (proposed) legislation S 3434 if the bill should be signed by the Governor. The notification stated:

I am writing to you in reference to your letter that we received concerning the conclusion of C.R.'s services. It is our understanding that at this time C.R. is aging out of the system as he is now 21. We understand that as the law is written and stands today C.R. is aging out of the system. The purpose of me corresponding with you is to inform you formally in writing that should Governor Murphy sign into law Assembly Bill NJ S 3434 <https://www.billtrack50.com/BillDetail/1314808> which has passed both houses, we would demand that C.R. be provided services for an additional year. At this time we are

requesting no action on the part of the Freehold Regional High School Districts as current law does not permit services to continue for C.R. This correspondence is to serve as notice that in the event that Governor Murphy signs into law this bill C.R. will require an amended IEP for services to continue for the additional year for C.R.

Lastly, even though the 2020–2021 IEP does not include ESY this is only because C.R. at that time was to age out because the legislative remedy, S 3434 had not been passed at that time into law. Further, petitioners' urge that stay-put is a remedy set forth in S 3434 and, therefore, any stay-put relief should include a continuation of his out-of-district placement at The Children's Center, including his attendance at ESY which is currently in session.

Respondent

Respondent submits that C.R. has aged out of his 2020–2021 school year program and further that he will be age twenty-two this October and no longer eligible. The respondent also asserts that C.R. has made measurable progress commensurate with his abilities. (Respondent's Exhibits D and E.) Furthermore, although C.R.'s prior IEPs all contained ESY services, his November 2020 and June 2021 IEPs did not contain an ESY provisions because he was aging out of the program and no longer entitled to special education after June 18, 2021. (Exhibit C.) The Children's Center provided education in its entirety in a hybrid learning environment with partial in-person and partial remote sessions beginning in September 2020. During these in-person sessions, C.R. did attend school with the benefit of his 1:1 aide and participated in an in-person program, although he was not able to physically go into the community to receive community-based transition services. Respondent argues that C.R. has received appropriate services, made measurable progress and is ready to transition to an adult day program which was contemplated in his IEP. Any regressive behaviors that the parents may have observed at home were recouped and maintained once C.R. began attending in-person learning. They are not responsible for bridging the gap between graduation and the start of an adult day care program.

On June 11, 2021, the District met with the petitioners to discuss C.R.'s program. The IEP team reviewed C.R.'s progress and noted how well he had done and determined that additional services were not warranted. The proposed June 11, 2021, IEP provided that C.R.'s special education and related services being provided to him at The Children's Center, the out-of-district school for students with disabilities, would terminate on June 18, 2021. The District met with the petitioners at their request a second time on June 22, 2021, when the parents again requested another year of compensatory education. The Board's Child Study Team denied the request stating that C.R.'s IEP was implemented to the fullest extent during the COVID-19 pandemic, C.R. either maintained or made progress on his IEP goals and objectives, and any increase in maladaptive behavior occurred at home rather than the educational setting. (See, Respondent's Exhibit C.)

Respondent asserts that petitioners' application for emergent relief should be denied in its entirety. Respondent argues that S 3434 provides only for a collaborative meeting to discuss compensatory education and does not include remedies such as an automatic stay-put provision. Furthermore, respondent urges that petitioners have not met the Crowe standard for emergent relief which requires irreparable harm if the relief is not granted; a settled legal right underlying a petitioner's claim; a likelihood that petitioner will prevail on the merits of the underlying claim; and a balancing of the equities and interest that petitioner will suffer greater harm than respondent.

FINDINGS OF FACT

The content of the parties' submissions were sufficient to determine relevant facts and, therefore, I **FIND** them as **FACTS**. In addition, I **FIND**, C.R., age 21, who is disabled and severely autistic, is entitled to a plenary hearing to determine whether or not he did regress during the mandated remote learning necessitated by the COVID-19 pandemic and whether subsequent hybrid in-person learning with reduced hours and reduced weeks did not provide C.R. with sufficient time to receive his programmed special education instruction, including instruction through applied behavioral analysis, speech therapy, occupational therapy and community-based instruction provided for in his IEP.

Two collaborative meetings took place in June 2021, to discuss whether C.R. requires an additional year of special education and related services, including transition services at The Children’s Center for the 2021–2022 school year. The District determined that an additional year of special education and related services including transition services was not necessary. Petitioners filed an application for emergent relief seeking a stay-put placement and due process petition seeking special education and related services for the 2021–2022 school year at The Children’s Center. This includes the 2021 ESY session which began on July 7, 2021.

LEGAL ANALYSIS AND CONCLUSION

N.J.A.C. 1:6A-12.1(a) provides that the affected parent(s), guardian, board or public agency may apply in writing for emergency relief. An emergency relief application is required to set forth the specific relief sought and the specific circumstances that the applicant contends justify the relief sought. Each application is required to be supported by an affidavit prepared by an affiant with personal knowledge of the facts contained therein and, if an expert’s opinion is included, the affidavit shall specify the expert’s qualifications.

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

- 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.

In this case, petitioners filed an emergent application seeking stay-put to prevent C.R. from aging out and graduating from his out-of-district placement, The Children’s

Center at the end of the 2020–2021 school year. In accordance with S 3434, petitioners seek to continue C.R. with another year of education at his current out-of-district placement and to also attend 2021 ESY with The Children’s Center that began on July 7, 2021. Additionally, petitioners have a due process petition pending with SPDR which seeks an additional year of education for the 2021–2022 school year so that C.R. can receive the education and related services they believe he lost, and which petitioners assert he is entitled to, in accordance with S 3434 which provides some disabled students with IEPs from aging out of public education as a result of the COVID-19 pandemic.

Respondent contends that C.R. has received all the appropriate services pursuant to his IEP and is now graduated and ready to transition to an adult day care program.

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).

The standards for emergent relief are set forth in Crowe v. DeGoia, 90 N.J. 126 (1982), and codified at N.J.A.C. 6A:3-1.6.

In this matter, petitioners have requested emergent relief. Generally, the standards to be met by the moving party in an application for emergent relief in a matter concerning a special needs student are set forth in N.J.A.C. 1:6A-12.1(e) and N.J.A.C. 6A-14.2.7(s)1. They provide that a judge may order emergency relief if the judge determines from the proofs that:

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.

However, in a matter involving the application of “stay-put,” the above criteria do not need to be met.

Generally, like under the IDEA, no change shall be made to the student’s program or placement pending the outcome of a due process hearing. N.J.A.C. 6A:14-2.6(d)(10); N.J.A.C. 6A:14-2.7(u); see also 20 U.S.C. § 1415(j). Under IDEA, 20 U.S.C. § 1400 et seq, the Third Circuit has held that when the emergent relief seeks a “stay-put” the proper standard for relief is the “stay-put” provision that “acts as an automatic preliminary injunction” and “protects the status quo of a child’s educational placement while a parent challenges a proposed change to, or elimination of, services.” Drinker by Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 (3d Cir. 1996) (citing Zvi D. v. Ambach, 694 F.2d 904 (2d Cir. 1982)). 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 purpose of the relevant IDEA regulation and its counterpart in the New Jersey Administrative Code that reinforces a child’s 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), 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.").

On June 16, 2021, 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, C.R. 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 The Children's Center and special education and related services, including transition services. I **CONCLUDE** C.R. is a student afforded rights and protections by S 3434.

The petitioners filed an emergent petition regarding C.R. aging-out and graduating from the District. The petitioners argued that C.R. 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 C.R. during the 2021–2022 school year. The petitioners argued that C.R. is entitled to stay-put protections and continued placement at The Children's Center, 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, petitioners' 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 and at the meetings the respondent disagreed with petitioners' request to continue C.R.'s placement for the 2021–2022 school year.

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. S 3434 does not prevent aging-out and does not mandate a continuation of services. Furthermore, 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.

Here, when there is a disagreement between the petitioners and the respondent at the collaborative meeting(s) like in this case regarding C.R.'s continuing placement, 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 C.R., with either additional education, or compensatory education based on the student's lost programming and needs. S 3434 specifically provided that C.R. "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. 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 C.R. to continue at The Children's Center 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 further **CONCLUDE** that C.R.'s 2020–2021 IEP provided for C.R.'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 the subsequent transition IEP for after the 2020–2021 school year ended was drafted, that IEP was promulgated on the presumption that C.R. 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 C.R. 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.

Accordingly, this stay-put status quo includes enrollment in The Children's Center ESY which commenced on July 7, 2021, because C.R.'s IEPs have consistently provided C.R. 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 C.R. 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 the last agreed-upon program and placement here is The Children's Center as set forth in the 2020–2021 IEP which shall include ESY which commenced on July 7, 2021. I **CONCLUDE** that the latest transition IEP cannot be petitioner's stay-put because it was premised upon C.R.'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 petitioners' motion for emergent relief is **GRANTED**.

ORDER

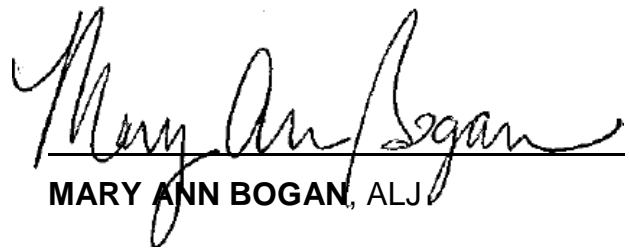
Petitioners' motion for emergent relief is **GRANTED**. It is **ORDERED** that C.R. shall be permitted to continue to attend The Children's Center and its ESY program which commenced on July 7, 2021, until the first of the following events occur, to wit: 1. an agreement is reached between petitioners and the CST/District 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 a telephone prehearing conference be conducted on **July 15, 2021, at 4:00 p.m.** to schedule the due process hearing in this matter.

This order on application for emergency relief shall remain in effect until issuance of the decision in the matter. The parties will be notified of the scheduled hearing dates. If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education Programs.

July 8, 2021
DATE



MARY ANN BOGAN, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

MAB/jb

APPENDIX

WITNESSES

For Petitioners:

None

For Respondent:

None

EXHIBITS

For Petitioners:

- Exhibit A Certification of Noelle Reck
- Exhibit B Certification of Frederick Reck
- Exhibit C Affidavit Seeking Emergent Relief and Application for Emergent Relief
- Exhibit D Petition for Due Process
- Exhibit E Individualized Education Program November 20, 2017
- Exhibit F Senate No. 3434
- Exhibit G Final Decision on Emergent Relief dated June 21, 2021
- Exhibit H Order on Emergent Relief

For Respondent:

- Exhibit A Individualized Education Program, November 2, 2020
- Exhibit B Email correspondence dated June 7, 2021
- Exhibit C Individualized Education Program, June 11, 2021
- Exhibit D Progress Reports dated March 2021
- Exhibit E Progress Report dated June 2021
- Exhibit F Email correspondence