State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
ON EMERGENT RELIEF
OAL DKT. NO. EDS 09090-21
AGENCY DKT. NO. 2022 33538

R.H. ON BEHALF OF B.H.,
Petitioners,
v.
IRVINGTON TOWNSHIP BOARD OF EDUCATION,
Respondent.

R.H., petitioner appearing pro se

Ronald C. Hunt, Esq., for respondent (Hunt, Hamlin & Ridley, attorneys)

Record closed: November 10, 2021 Decided: November 10, 2021

BEFORE **NANCI G. STOKES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, R.H., applies for emergent relief on behalf of her seventeen-year-old minor child, B.H., who is eligible for special education, and related services based on the criteria for autistic. While B.H. and R.H. resided in Irvington, B.H. attended the Westlake School (Westlake) in Westfield, New Jersey, an out-of-district placement

specializing in autistic educational services for five years. However, at the end of November 2019, B.H. and R.H. moved from Irvington, New Jersey, to North Carolina but returned to New Jersey in December 2020. Despite B.H.'s return to New Jersey, the Irvington Township Board of Education and School District (Irvington) was unwilling to transfer B.H. back to Westlake.

On October 20, 2021, R.H., on behalf of B.H., filed a request for emergent relief and a due process hearing with the Office of Special Education Programs (OSEP). R.H. seeks an Order for "stay-put" or continuing B.H.'s out-of-district placement at Westlake, at the cost of the district, pending the due process hearing. Irvington opposes this application asserting that no "stay-put" is applicable at Westlake and that R.H. does not meet the criteria under N.J.A.C. 1:6A-12.1(e) and N.J.A.C. 6A:14-2.7(s) for the relief she seeks.[1]

On November 1, 2021, OSEP transmitted the emergent application to the Office of Administrative Law for a determination as a contested matter. Irvington submitted papers in opposition to the request for emergent relief on November 8 and 9, 2021, and I conducted oral argument on November 9, 2021, via Zoom due to continuing COVID-19 restrictions.

FINDINGS OF FACT

Based on the documentary evidence presented by the parties in support of and in opposition to the motion, and based on the arguments presented during oral argument and my assessment of petitioner's credibility, I **FIND** the following as **FACT** for purposes of this application only:

B.H. resides in the Irvington Township School District with his mother, R.H. B.H. is eligible to receive special education and related services with the classification of autistic. Before living in Irvington, B.H. resided in Jersey City. The Jersey City School District established an IEP that allowed an out-of-district placement at Westlake with transportation to and from the school at the district's cost. B.H. attended Westlake since he was six years old. Upon moving to Irvington, Irvington continued B.H.'s

[1] Irvington initially questioned R.H.'s residence in Irvington but subsequently acknowledged her residence in the school district.

placement at Westlake with transportation for five years. At Westlake, B.H. received special education and related services geared towards students with autism through ninth grade.

At the end of 2019, R.H. and B.H. moved to North Carolina and B.H. enrolled in the tenth grade at the Athens Drive School. Although North Carolina established an IEP, the contents of that IEP are unknown to this tribunal. At some point, North Carolina set up virtual learning due to COVID-19 restrictions. B.H. did not regularly attend school in North Carolina and received no credits. R.H. was working and unavailable to assist B.H. with virtual instruction required because of COVID-19.

R.H. and B.H. returned to New Jersey in December 2020. Soon after, R.H. notified Westlake, believing that she could re-enroll B.H. in his prior placement. Westlake advised R.H. that she must contact Irvington, his home school, to effectuate his transfer and placement out-of-district.

R.H. began her contact with Irvington in January 2021 and believes she registered B.H. for school in February or March 2021. Irvington acknowledges that R.H. registered B.H. at Irvington High School in at least May 2021. R.H. had difficulties logging onto the virtual learning option established by Irvington, and B.H. did not attend classes in the remainder of the 2020-21 school year.

R.H. explained that B.H. is fearful of the public high school because B.H. was never successfully present in such an environment. R.H. brought B.H. to Irvington High School for a psychological assessment required before beginning school, but she is unaware of the results of that assessment. R.H. then advised B.H that this would be his new school, and he ran away from her, distressed.

For the 2021-22 school year, Irvington offered in-person instruction to B.H., arranged for transportation, and obtained a donated uniform. Irvington suggests the in-district autism program is comparable, if not superior, to the North Carolina program. Yet, Irvington supplies no information concerning their program or that of North Carolina in this application. This school year, B.H. attended several days of online instruction in

Irvington but ceased participating after October 6, 2021. Again, R.H. explains that she was working and unable to assist B.H. with online instruction. Regardless, Irvington advises that only in-person instruction is now available to B.H.

Irvington scheduled an IEP meeting for B.H. upon his return to New Jersey for November 15, 2021. Irvington presents no evidence of an earlier scheduled IEP meeting, and R.H. maintains that this is the first IEP invitation she received. Still, Irvington acknowledges that the last IEP is outdated, and that Irvington must re-assess and "upgrade" to develop the proper IEP.

After R.H. filed with OSEP, Irvington notified the Division of Child Protection and Permanency (DCPP), formerly the Division of Youth and Family Services (DYFS) of the situation. The DCPP worker met with R.H. and B.H. at her residence in Irvington, is assisting R.H. in this process, is scheduled to visit the Irvington High School with R.H. and is expected to participate in the IEP meeting.

LEGAL ANALYSIS AND CONCLUSIONS

This case arises under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 to 1482. One purpose of the Act is to ensure that all children with disabilities have available to them a "free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). This "free appropriate public education" is known as FAPE.

In New Jersey, the State Board of Education has promulgated rules following the standards outlined in the Act. N.J.A.C. 6A:14-1.1(b)(1); N.J.A.C. 6A:14-1.1 to -10.2.

Under those rules, a parent or adult student may request a due process hearing before an administrative law judge (ALJ) to resolve disputes "regarding identification, evaluation, reevaluation, classification, educational placement, the provision of a free, appropriate public education, or disciplinary action." N.J.A.C. 6A:14-2.6(a); N.J.A.C. 6A:14-2.7(a). As in this case, a parent or adult student may seek emergent relief for

"[i]ssues concerning placement pending the outcome of due process proceedings." N.J.A.C. 6A:1-2.7(r); N.J.A.C. 1:6A-12.1.

Under N.J.A.C. 1:6A-12.1(e), an ALJ may order emergency relief pending decision in the case, if the judge determines from the proofs that:

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
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> 2. The legal right underlying the petitioner's claim is settled;
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> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
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> 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.
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> [Ibid.]

To be successful, an applicant must satisfy all four requirements. Crowe v. DiGioia, 90 N.J. 26 (1982).

Generally, a school district can make no changes 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). Indeed, 20 U.S.C.. § 1415(j) sets forth one of the most significant safeguards in the Act, often called the "stay-put" provision. Id. This section provides that a child is to remain in their "then-current educational placement" during the "pendency of any proceedings conducted pursuant to [IDEA]." Id.; N.J.A.C. 6A:14-2.6(d)(10); N.J.A.C. 6A:14-2.7(u).

Notably, the "stay-put" provision "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) (discussing 20 U.S.C.. § 1415(j), the federal analog to New Jersey's stay-put provisions). C.H. v. Cape Henlopen Sch. Dist., 606 F.3d 59, 71-72 (3d Cir. 2010). In essence, the petitioner need not demonstrate that she meets the requirements of Crowe v. DiGioia, 90 N.J. 26 (1982), ***if*** the stay-put is appropriately invoked. Drinker, 78 F.3d at 864.

Although “stay put” provisions under N.J.A.C 6A:14-2.7(u) ordinarily apply, these considerations yield to certain circumstances, including the school district transfer provisions of N.J.A.C. 6A-14-4.1(g). See J.F.v Byram Twp. Bd. of Educ., 629 F. App’x 235 (3rd Cir. 2015),[2] see also. Michael C. ex rel. Stephen C. v. Radnor Twp. Sch. Dist., 202 F.3d 642 (3rd Cir. 2000) (quoting Drinker, 78 F.3d at 864) ("[W]here a parent unilaterally removes a child from an existing placement . . . the protections of the stay-put provision are inoperative"). If a parent chooses to move to a new school district, the same procedural safeguards are not required. J.F., 629 F. App’x 235 at 237. Instead, the new school district must follow the law governing interstate transfers. Id. at 238.

N.J.A.C. 6A-14-4.1(g) addresses student transfers from one New Jersey school district to another New Jersey school district or from another state to a New Jersey school district, requiring the provision of a comparable program:

> When a student with a disability transfers from one New Jersey school district to another or from an out-of-State school district to a New Jersey school district, the child study team of the district into which the student has transferred shall conduct an immediate review of the evaluation information and the IEP and, without delay, in consultation with the student's parents, provide a program comparable to that set forth in the student's current IEP until a new IEP is implemented.
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> [Ibid.]

Moreover, the regulation further instructs that when a student transfers from out-of-state into a New Jersey school district, “the appropriate district board of education staff shall conduct any assessments determined necessary and, within 30 days of the date the student enrolls in the school district, develop and implement a new IEP for the student.” N.J.A.C. 6A:14-4.1(g)(2).

[2] The J.F. case is not considered binding precedent in the Third Circuit as it was not an opinion of the full court.

Similarly, under the federal regulation, 34 C.F.R. § 300.323(f), the new district must provide comparable services pending an initial evaluation if a child with a disability, who had an agreed-upon IEP in effect in a previous public agency in another State, transfers to a public agency in the new State, and enrolls in a new school within the same school year. Ibid.; see also 20 U.S.C.§ 1414(d)(2)(C)(i)(I) (requiring the new district to provide FAPE, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the [new district] conducts an evaluation . . . develops a new IEP"). This regulation and its New Jersey counterpart preserve both a school district's right to evaluate and the child's continuity of special-education services.

In Michael C,, the court acknowledged that the transfer provisions may "bind the hands" and create an "unfortunate reality" for parents who believe their transfer student requires private school services, but must accept comparable public school services because they are unable to "pay private school tuition out-of-pocket and await future reimbursement." Michael C. 202 F.3d at 652. Yet, the court also anticipated that this unfortunate reality facing parents of transfer students desiring private school placement was limited in time because "federal and state regulations impose strict timing requirements" on implementing IEPs and adjudication of due process hearings. Id.

However, even where districts do not comply with the district transfer requirements, there is no automatic default remedy to the creation of a 'stay put' placement for a transfer student. Cinnaminson Twp. Bd. of Educ. v. K.L. o/b/o R.L., 2016 U.S. Dist. LEXIS 104706 *19 (D.N.J. Aug. 9, 2016). Indeed, K.L. argued that when Cinnaminson failed to adhere to the regulation's timing requirements for implementing the IEP, it defaulted to accepting the prior district's IEP and private placement as R.L.'s "stay-put." Id. at 22-23. Yet, the court rejected that position. Id. Here, R.H. seeks not to enforce North Carolina's IEP, but the IEP existing before her move, providing for an out-of-district placement at Westlake. Similar to J.F., Michael C., and Cinnaminson, I must **CONCLUDE** that the stay-put injunctive relief R.H. seeks is inapplicable to the situation presented, the transfer into a school district from an out-of-state district that implemented an IEP.

In Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176, 206-07, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982), the Supreme Court directed that a school district's liability for violations of the Act is a two-fold inquiry: (1) Has the school district complied with the procedures outlined in the Act?; and (2) Has the school district fulfilled its obligation to provide the student with a FAPE? Notably, a procedural violation "is actionable under the IDEA only if it results in a loss of educational opportunity for the student, seriously deprives parents of their participation rights, or causes a deprivation of educational benefits." Ridley Sch. Dist. v. M.R., 680 F.3d 260, 274 (3d Cir. 2012). (citing Winkleman v. Parma City Sch. Dist., 550 U.S. 516, 525-26, 127 S. Ct. 1994, 167 L. Ed. 2d 904 (2007)).

Indeed, the Cinnaminson court addressed remedies that may be available where a school district deprives a student's rights under the Act in transfer situations or where the district fails to adhere to regulatory time limitations:

> This Court recognizes that had K.L. not been able to afford R.L.'s tuition at [her out-of-district placement under the former district's IEP] for the four months between R.L.'s registration in Cinnaminson and the eventual settlement [following an emergent application and due process filing], this may have placed R.L. without services for that period of time. While this is not a desirable result, there are remedies for such deprivations, such as "compensatory education," which is available when "a student's substantive rights are affected by a school district's non-compliance with the IDEA." D.K. V Abington Sch. District, 696 F.3d 233, 249 (3d Cir. 2012).
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> [id. at 25].

This application for relief likewise fails under a traditional emergent relief analysis under N.J.A.C. 6A:14-2.7 and Crowe v DeGioia, 90 N.J. 126 (1982). Here, R.H. has not shown how attendance in the comparable program offered by Irvington will cause irreparable harm to B.H. while Irvington develops a new IEP under N.J.A.C. 6A:14-4.1(g), even considering the delay in implementing the IEP. B.H.'s fears in attending school are relevant and understandable but do not impact the issue of whether the program itself is comparable. Irvington maintains that it is still entitled to determine if its in-district program meets B.H.'s needs before transferring B.H. to the out-of-district

placement at Westlake. Any failures in the process can be addressed through compensatory education if determined through a plenary hearing that Irvington denied B.H. of FAPE. Still, R.H. did not establish a legal right to "stay put," therefore, she cannot demonstrate a likelihood of success on the merits of her claim.

Notably, disputes over the specific form of education to provide a FAPE require a full plenary due process hearing and are not appropriate for emergent belief. E.B. v. Alpine Bd. of Educ., 2007 NJ AGEN LEXIS 833 (December 21, 2017); J.B. v. Ocean Twp. Bd. of Ed., 2005 N.J. AGEN LEXIS 1267 (December 27, 2005). The Act does not require that a school district place a student at a specific school chosen by his or her parents. W. Windsor-Plainsboro Reg'l Sch. Dist. Bd. of Educ. v. J.S., 2005 U.S. Dist. LEXIS 25855 (D.N.J. Oct. 31, 2005).

This tribunal believes that the equities favor B.H. given Irvington's inaction and apparent unwillingness to address B.H.'s understandable fear in attending public school, not only because of COVID transitional difficulties but also because he only attended Westlake regularly. Yet, petitioner must satisfy all emergent relief requirements and does not.

Therefore, I **CONCLUDE** that petitioner is not entitled to the relief she seeks and that the application for emergency relief must be **DENIED**.

Yet, I also **CONCLUDE** that because Irvington did not act within the timeframes under N.J.A.C. 6A:14-4.1(g)(2) or avail itself to remedies if it believed R.H. hindered the necessary actions, it must now do so. Indeed, all parties must work towards assessing B.H., and implementing a new IEP designed to provide FAPE within thirty days under N.J.A.C. 6A:14-4.1(g)(2). To that end, the parties must attend the November 15, 2021, IEP meeting and appropriately consider and address B.H.'s fears about attending Irvington High School and determine all necessary assessments. See N.J.A.C. 6A:14-3.4(a)(1) (school district's program must review "information provided by the parents" and "consider the need for any health appraisal or specialized medical evaluation"). Moreover, Irvington must complete all agreed-upon assessments and propose an IEP by December 15, 2021.

ORDER

Accordingly, I **ORDER** that petitioner's request for emergent relief be **DENIED.**

I further **ORDER** that the parties attend the November 15, 2021, initial IEP meeting and appropriately consider and address B.H.'s fears about attending Irvington High School and determine all necessary assessments.

I also **ORDER** that Irvington complete all agreed-upon assessments and propose an IEP by December 15, 2021.

This decision shall remain in effect until a decision on the merits of the underlying petition for due process hearing is issued, meanwhile, this case shall be returned to the Office of Special Education Policy and Dispute Resolution for a local resolution session under 20 U.S.C.A. § 1415 (f)(1)(B)(i).

If the parent or adult student believes that this decision is not being fully implemented with respect to a program or service at issue, then this concern should be communicated in writing to the Director of the Office of Special Education Policy and Dispute Resolution.

November 10, 2021

DATE

NANCI G. STOKES, ALJ

Date Received at Agency November 10, 2021

Date Mailed to Parties: November 10, 2021