



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**ORDER**

**EMERGENT RELIEF**

OAL DKT. NO. EDS 07327-22

AGENCY DKT. NO. 2023-34719

**M.S. AND N.S. ON BEHALF OF R.S.,**

Petitioners,

v.

**EAST BRUNSWICK TOWNSHIP BOARD  
OF EDUCATION,**

Respondent.

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**Amelia Carolla**, Esq., for petitioners (Reisman, Carolla & Gran, LLP, attorneys)

**Jodi S. Howlett**, Esq., for respondent (Cleary, Giacobbe, Alfieri & Jacobs, LLC,  
attorneys)

BEFORE **DEAN J. BUONO**, ALJ:

**STATEMENT OF THE CASE**

In this matter, M.S. and N.S. on behalf of R.S. (petitioners) bring an action for Emergent Relief against the East Brunswick Township Board of Education (respondent or District) to: (1.) continue the placement of R.S. (their son) as provided in the last agreed upon IEP dated April 21, 2022, which provided for in class resource program in general

education for language arts/literacy and math. The District indicated that it would only allow R.S. to receive his education in a “special class: autism” for language arts and math.

### **PROCEDURAL HISTORY**

On July 19, 2022, petitioners filed a complaint for due process with the Office of Special Education Programs (OSEP). The complaint was filed under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §§1400 to 1482. Petitioners sought a stay put order for the minor child in an effort to provide him with a FAPE.

Petitioners filed an emergent relief application with the Office of Special Education Policy and Procedure on September 9, 2022. The application alleges that M.S. and N.S. on behalf of R.S., seek a stay put during the pendency of the due process hearing as well as appropriate program and placement. Both myself and the parties felt it was best if the undersigned conduct the settlement conference on September 13, 2022, prior to the motion. The settlement conference was unsuccessful. Oral argument was heard on the Emergent application September 15, 2022.

### **FACTUAL DISCUSSION**

R.S. is an eight-year-old student with disabilities going into second grade at Central Elementary School in the East Brunswick School District. He is eligible to receive special education and related services under the category Multiply Disabled and has been diagnosed with Down Syndrome and expressive-receptive language disorder. For the past first grade school year, he participated in a general education class throughout almost the entire school day, specifically In-Class Resource for Language Arts/ Literacy and Math, Science/Social Studies, pursuant to his annual review IEP prepared on April 22, 2021. Because R.S. was not eligible to receive the COVID-19 vaccine due to his age and school closure due to COVID, he participated in remote learning for the 2021-22 school year until January 18, 2022, when he finally was able to regularly begin attending classes in-person. See Certification of N.S., dated August 31, 2022 (“Cert.”) at ¶¶ 1-3, Ex. A.

The District held R.S.'s annual review IEP meeting on April 19, 2022. See Cert. at ¶ 4. At that time, the District proposed a new placement to begin May 4, 2022, and for the 2022-2023 second grade school year: Special Class: Autism for Language Arts and Math, pulling him from In-Class Resource for Language Arts and Math to a more restrictive setting. See Cert. at ¶ 4-5, Ex. B. Petitioners objected and explained that this proposal was problematic for R.S. who they firmly believe is benefiting from exposure to typical peers. Petitioners contend several less restrictive options exist.

On April 19, 2022, the petitioners received a draft IEP that reflected the change in placement. See Cert. at ¶ 5. On April 20, 2022, petitioners sent an email expressing their disagreement with the change in placement and the draft IEP. Id. at ¶ 7 and Exhibit C. On May 6, 2022, the District sent petitioners another draft IEP through a "collaboration portal," which petitioners had not used before. It was still marked "draft" and proposed that R.S.'s placement for Language Arts and Math be changed to Special Class: Autism. On May 17, 2022, the District case manager Julia Kushnir sent petitioners a duplicate copy of the draft IEP and told them to let her know "if they have any questions before it goes into effect." Ms. Kushnir referred petitioners to the Parental Rights in Special Education ("PRISE") booklet if they needed to assert their parental rights. Id. at ¶ 8-9 and Exhibits D and E.

On May 25, 2022, petitioners again emailed the District and explained that they did not agree with the proposed change in placement. Id. at ¶ 4 and Exhibit F. On June 3, 2022, case manager Ms. Kushnir indicated to petitioners that the draft IEP was sent to them on May 6, 2022, and went into effect on May 21, 2022. Sometime thereafter the District changed R.S.'s placement for the remainder of the 2021-2022 school year despite that petitioners did not agree. Id. at ¶ 10-11 and Exhibit G. The petitioners again objected on June 10, 2022, Ms. Kushnir told petitioners that the change had been made because fifteen days had passed since May 6, 2022, again referring them to PRISE if they wanted to exercise their parental rights. Id. at ¶ 13 and Exhibit H and E. At petitioners' request, the parties attended another meeting to discuss R.S.'s IEP on June 14, 2022, but the District refused to allow R.S. to remain in In-Class Resource for Language Arts and Math. Id. at ¶ 14. Petitioners filed a Complaint for Due Process to challenge the District's actions on July 19, 2022, and to assert that the District has not offered R.S. an IEP that constitutes

a free and appropriate education consistent with the Individuals with Disabilities Act's guarantee of placement in the least restrictive environment.

The parties held mediation August 23, 2022, but it was unsuccessful. Cert. at ¶ 17. Petitioners allege that attending school on the first day, in his current placement, is important for R.S. He needs the opportunity to learn classroom expectations and practice routines to make the transition back to school as easy as possible. Cert. at ¶ 20.

Respondents argue that a Reevaluation Eligibility Determination with Annual Review Meeting was held on April 19, 2022, to discuss R.S.'s placement for the 2022-2023 school year. The District reviewed and considered the recent reevaluation of R.S., which consisted of the following assessments: (i) psychological; (ii) speech/language; and (iii) a functional behavioral assessment. See Sultana Aff. at ¶ 17.

At that time, the District proposed placement for Second (2<sup>nd</sup>) Grade in the Special Class Autism classroom for Language Arts and Math, and the In-Class Resource setting for Science and Social Studies. R.S. continued to receive the related services of a 1:1 aide, speech and language therapy, occupational therapy, and physical therapy. See Sultana Aff. at ¶ 18. Petitioners attended the meeting virtually on April 19, 2022. See Sultana Aff. at ¶ 19. After the meeting on April 19, 2022, a copy of the proposed IEP was emailed to petitioners. See Sultana Aff. at ¶ 20; See Also Exhibit A.

The following day, April 20, 2022, petitioner N.S. emailed the District with comments on the proposed IEP. See Sultana Aff. at ¶ 21; See Also Respondent Exhibit A. On May 6, 2022, after consideration of petitioners' comments, and a subsequent meeting between petitioner N.S. and the District staff, a revised IEP was sent to petitioners. See Sultana Aff. at ¶ 23; See Also Exhibit B. On May 17, 2022, the District again contacts petitioners to remind them of the revised IEP. Petitioner N.S. acknowledges receipt of the IEP. See Sultana Aff. at ¶ 23; See Also Exhibit C.

On May 21, 2022, the IEP dated April 19, 2022, was implemented and R.S. was placed in the Special Class Autism classroom at Central Elementary School. See Sultana Aff. at ¶ 24; See Also Exhibit D. R.S. attended the Special Class Autism classroom for

Second (2<sup>nd</sup>) Grade from May 21, 2022, through June 21, 2022. See Sultana Aff. at ¶ 25. The fifteen-day time period had past and therefore the IEP was implemented. The petitioners had the right to file to challenge the IEP but chose not too until July 19, 2022.

Upon commencement of the 2022-2023 school year on September 6, 2022, through the present, R.S. has attended the Special Class Autism classroom for Third (3<sup>rd</sup>) Grade. See Sultana Aff. at ¶ 26. However, petitioners, filed a Petition for Due Process challenging the April 19, 2022, IEP placing R.S. in the Special Class Autism classroom.

### **FINDINGS OF FACT**

Based upon the documents in evidence and review of the testimony, I **FIND** the following facts undisputed:

R.S. is a second-grade special education student who resides in the District. R.S.'s current IEP, dated April 21, 2022, was developed as a result of the prior school year. I **FURTHER FIND** as **FACT** that the IEP dated April 21, 2021, provided for In-Class Resource Program in general education for Science/Social Studies, Language Arts/Literacy and Math. I **FURTHER FIND** as **FACT** that the April 19, 2022, IEP will allow R.S. to receive his education in a "Special Class: Autism" for Language Arts and Math.

Respondent argues that pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982), N.J.A.C. 6A:14-2.7(m), and N.J.A.C. 1:6A-12.1, the petitioners must, in order to have the relief requested granted, demonstrate that: (a) they will suffer irreparable harm if the requested relief is not granted; (b) the legal right underlying their claim is well settled; (c) they have a likelihood of prevailing on the merits of the underlying claim; and (d) when the equities and interests of the parties are balanced, the petitioners will suffer greater harm than the respondent if the relief requested is not granted. As a result, petitioners fail to meet their burden of proof. However, more importantly, the specific "stay put" requested is already in place and being followed and therefore this application is moot. I agree.

## LEGAL ANALYSIS

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.

Furthermore, a parent or school district may request emergent relief for the following reasons, in accordance with *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 education settings;
- iii. Issues concerning placement pending outcome of due process proceedings; and
- iv. Issues involving graduation or participation in graduation ceremonies.

Here, petitioners allege that the requested emergent relief is the issue that squarely concerns (iii), placement pending outcome of due process proceedings.

Also, in this case, it is unnecessary for me to consider whether the criteria set forth in Crowe v. Di Gioa, 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 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) (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).

In the present matter, the petitioners filed an emergent petition regarding the District’s placement of R.S. and by way of the emergent application, invoked “stay put.” The petitioners contend that the current educational placement is the last agreed-upon placement of R.S. as set forth in the April 21, 2021, IEP. However, there seems to be some confusion by the parties about the rules and the law. Critical is the fact that the petitioners failed to challenge the proposed IEP prior to filing a complaint for Due Process on July 19, 2022. Nearly three months later.

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").

The placement in effect when the request for due process was made—the last uncontroverted placement—is dispositive for the status quo or stay put. Here, it is uncontroverted that the "then-current" educational placement for R.S. at the time of this emergent action is the April 19, 2022, unchallenged IEP that was developed for him. Pursuant to that IEP, the student was to attend the Special Class Autism. Subsequent to the filing for due process or mediation, there has been no agreement between the parties to change R.S.'s current placement. However, the petitioners failed to do anything for three months.

Respondent correctly argues that petitioners' failure to sign the IEP nor their vocalized objections, constitute a "dispute" for purposes of the IDEA. To the contrary, it is well settled that merely vocalizing opposition to an IEP does not prevent implementation, but that petitioners are required to file a petition for due process to formally challenge a school district's proposed placement. See, e.g., D.S. o/b/o R.W. v. Stafford Twp. Bd. of Educ., OAL Dkt. No. EDS 1492-12 (2012). (holding that while parent may not have agreed with the IEP, she did not file for due process until after its



implementation); Hamilton Township Bd. of Educ. v. L.E. and A.E. o/b/o J.E. Here, petitioners failed to formally object to implementation of the April 19, 2022, IEP until July 19, 2022, which is directly on point with the ruling in Hamilton.

Furthermore, petitioners' argument that simply stating *disagreement* with an IEP prevents its implementation, is contrary to the plain language of both the IDEA and N.J.A.C. 6A:14-2.3(h). Specifically, in order to delay the implementation of a proposed action, a parent must file a request for mediation or a due process hearing prior to the expiration of the fifteenth calendar day following written notice of the proposal. See N.J.A.C. 6A:14-2.3(h). None of which was done here.

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) (emphasis added).]

Neither of the two exceptions to the stay put law is applicable here because the petitioners 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.

Indeed, the District here implemented the April 19, 2022, IEP and the student has been attending this program. Notwithstanding the petitioners' artful contentions here, the stay put provisions must apply to this special education student, and he should remain at the current educational plan as set forth in the April 19, 2022, IEP. To rule otherwise would obfuscate the District's ability to implement an IEP or educational plan without parent approval. That would be contrary to the spirit and purpose of the law to not disrupt the educational process for these students.

In Drinker v. Colonial School District, 78 F.3d 859 (3d Cir. 1996), the Third Circuit held that a judge should not look at the irreparable harm and likelihood of success factors when analyzing a request for a stay put order. A parent may invoke the stay put provision when a school district proposes "a fundamental change in, or elimination of, a basis element of "the current educational placement." Lunceford v. D.C. Bd. Of Educ., 745 F. 1577, 1582 (D.C. 1984). "The current educational placement refers to the type of programming and services provided rather than the physical location of the student's services. J.F., et al. v. Byram Township Board of Education, need proper cite). The stay put 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 placements is ultimately resolved. Drinker at 859. The Third Circuit declared that the language of the stay put provision is "unequivocal" and "mandated." Drinker at 864. This is the case here.

Respondent correctly argues that the IDEA's "stay put" provision provides:

(j) Maintenance of current educational placement  
Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local education agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

20 U.S.C. § 1415(j) (emphasis added). See also, N.J.A.C. 6A:14-2.7(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 . . .). In other words, the IDEA, and corresponding State regulations, expressly require the local educational agency to maintain the status quo for the child while the dispute over the IEP remains unresolved. See Ringwood Bd. of Educ. v. K.H.J., 469 F.Supp.2d 267, 270–71 (D.N.J. 2006). (emphasis added.)

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 **DENIED**. It is **ORDERED** that R.S. shall be permitted to continue the last implemented IEP, dated April 19, 2022, and current educational placement.

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.



September 16, 2022

DATE

DEAN J. BUONO, ALJ

Date Received at Agency

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Date Mailed to Parties:

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DJB/cb