State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
EMERGENT RELIEF
OAL DKT. NO. EDS 00667-22
AGENCY DKT.NO. 22-33830

B.N. ON BEHALF OF B.N.,
Petitioners,
v.
ORANGE BOARD
OF EDUCATION,
Respondent.

_____

B.N. pro se, for petitioner

Jessica Kleen, Esq., for respondent (Machado Law Group, attorneys)

Record Closed: February 4, 2022 Decided: February 7, 2022

BEFORE: **DANIELLE PASQUALE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, B.N. on behalf of B.N., filed a Request for Emergent Relief seeking an immediate provision an out-of-district placement at Essex Valley School from "Respondent" and/or the "District". To that end, I reviewed the file, petition and supporting documentation in support of the emergent application and opposition to same, conducted

a telephonic conference on January 31, 2021 to attempt resolution and heard oral argument via Zoom on February 4, 2022. As the facts are largely undisputed, I **FIND** them as fact in this matter as outlined below.

FINDINGS OF FACT

Petitioner "B.N." is a nineteen (19) year old boy who was previously classified under the Individuals with Disabilities Education Act "IDEA" and found eligible for special education and related services under the classification Emotionally Disturbed. His date of birth is October 14, 2002. See Respondent's Exhibits A and B.

B.N.'s initial eligibility determination took place in 2009 while enrolled in the East Orange School District. B.N.'s most recent IEP ("Individualized Education Program") expired on April 1, 2021. It provided for an out-of-district placement at Essex Valley School. (Pursuant to said IEP, B.N.'s last evaluations took place in 2016.) See Respondent's Exhibit A.

On or about September 10, 2020, Petitioner disenrolled B.N. from the East Orange School District. B.N. did not attend any school since Spring of the 2020 school year. See Respondent's Exhibits C and D. Shortly thereafter, the family moved to Orange.

The parties agree that Petitioner enrolled B.N. in the District of Orange in October 2021. See Request for Emergent Relief. The student records indicate, and the Executive Director of Special Services certified that when the District received B.N. upon enrollment the records did not include evaluations or progress reports, and only two IEPs, dated April 12, 2019, and April 2, 2020.

The District offered placement in general education classes at its high school, in its twilight program, or home instruction. See Request for Emergent Relief and Respondent's Exhibits. Petitioner, on behalf of B.N., refused each of the proposed placements, and instead, demanded placement at Essex Valley School. See Request for Emergent Relief.

On or about November 19, 2021, Petitioner's former counsel wrote to Board counsel and requested a meeting with the Child Study Team ("CST"). See Respondent's Exhibit D. A meeting was scheduled for December 15, 2021, at 11:00 a.m. See Respondent's Exhibit E.

On December 14, 2021, Board counsel wrote to Petitioner's former counsel and advised her that B.N. had enrolled with an expired IEP so the District would need to evaluate him in order to develop an appropriate program. Therefore, the scheduled meeting would be an evaluation planning meeting, rather than an IEP meeting. See Respondent's Exhibit F. To that end, Board counsel further advised that because B.N. was an adult student, he would have to attend the meeting or provide written authorization to allow Petitioner to act on his behalf. See Respondent's Exhibit F. Please note that this instruction was in the initial IEP that expired in April of 2021 that all rights would flow to the student at the age of 18. That was acknowledged by both the parent and the student.

Petitioner admitted that she never provided written authorization and no meeting was held on December 15, 2021. On January 10, 2022, Petitioner's former counsel wrote to Ms. Kleen on behalf of the Board and advised she was no longer representing Petitioner. See Respondent's Exhibit F.

Prior to filing her Application for Emergent Relief, neither Petitioner nor her son B.N., responded to the District's requests to perform evaluations or for written authorization allowing Petitioner to act on B.N.'s behalf. The Respondent's exhibits were certified to by the Executive Director of Special Services Shelly Harper at the oral argument.

It is undisputed that B.N. is enrolled in Orange. Both parties agree that the District made attempts to set up an evaluation meeting to determine which program would be the best fit. There is no substantial disagreement about whether mom made any attempts or whether the District made an effort to assist petitioner with these evaluations. The disagreement appears to be whether there was miscommunication between mom and The District. I **FIND** that B.N. is enrolled in Orange but without a valid IEP and with expired

evaluations that date back to 2016 and thus there is no "stay put" argument as there is no "actually functioning" IEP. I **FIND** that Orange is attempting, in good faith, to get the evaluations to determine his present levels to formulate an appropriate IEP. I **FIND** that mom and her son have not availed themselves of that process.

In short, Petitioner contends that the District needs to provide immediate out-of-district placement at Essex Valley pursuant to the old IEP as a transfer student and now seeks that on an emergent basis. It is undisputed that B.N. has not participated in any in-person or virtual learning at any school for the school year since Spring of 2020. Mom is understandably frustrated, and I **FIND** the school is willing and able to get her son the appropriate evaluations should they receive the appropriate authorization from her son as she did to file this emergent.

It should be noted that I have reviewed all corresponding certifications and documentation from both sides in this matter and discussed the matter at length both telephonically and virtually over Zoom in an attempt to resolve same, prior to having a formal Zoom oral argument and authoring this Final Decision.

LEGAL ANALYSIS

This tribunal and both parties understand that my determination is controlled by 20 U.S.C. 1415(j), otherwise known as the "stay put" provision of the IDEA. The statute states in pertinent part:

> . . . 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 . . .

When a school district proposes a change in the placement of a student it must provide notice to the parent or guardian, who may in turn request mediation or a due process hearing to resolve any resulting disagreements. N.J.A.C. 6A:14-2.3, 2.6 and 2.7. Once a parent timely requests mediation or due process, the proposed action by the

school district cannot be implemented pending the outcome. The "stay put" provision of the IDEA, 20 U.S.C. 1415(j), and its New Jersey counterparts, N.J.A.C. 6A:14-2.6(d) and 2.7(u), are invoked, and unless the parties agree no change shall be made to the student's placement.

The "stay put" provisions of law operate as an automatic preliminary injunction. IDEA's "stay put" requirement evinces Congress' policy choice that handicapped children stay in their current educational placement until the dispute over their placement is resolved, and that once a court determines the current placement, petitioners are entitled to an order "without satisfaction of the usual prerequisites to injunctive relief." Drinker by Drinker v. Colonial School Dist., 78 F.3d 859, 864-65 (3d Cir. 1996). In accordance with 20 U.S.C. 1415(j), I **FIND** that B.N. has no valid stay-put as his IEP expired in April of last year. Thus, he should start his in-person instruction in Orange and be re-evaluated so that Orange can formulate an appropriate IEP. Thus, I **CONCLUDE** that if the petitioner and her son want instruction, they must cooperate with the District to have said evaluations and provide the appropriate paperwork for mom to attend the IEP meetings or alternatively for son B.N. to attend in person.

The free appropriate public education required for disabled children must include related services when necessary. 20 U.S.C. 1401(9); 34 C.F.R. 300.34(a); N.J.A.C. 6A:14-1.1(b)(3), (d). Related services means:

> [T]ransportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

> [20 U.S.C. § 1401(26)(A). See 34 C.F.R. § 300.34(a); N.J.A.C. 6A:14-3.9.]

In accordance with N.J.A.C. 1:1-12.6, emergency relief may be granted "where authorized by law and where irreparable harm will result without an expedited decision granting or prohibiting some action or relief connected with a contested case . . . ." My determination in this matter is further governed by the standard for emergent relief set forth by our Supreme Court in Crowe v. DeGioia, 90 N.J. 126 (1982), as follows:

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.

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).

Since the stay-put fails in this case since I **FIND** there is no actually functioning IEP, the current placement is the District of Orange. To that end, I must explore and examine the factors required for Petitioner to prevail in this matter. In this case, the Petitioner cannot convincingly argue irreparable harm will result in her child's current placement as she never availed herself of the evaluations sought by Orange and he was not going to Essex Valley School or Orange or any other school since Spring of 2020. Petitioner was understandably frustrated over the difficulties in the transfer process between East Orange to Orange and simply did not respond to what was necessary to have a successful transfer with current evaluations to draft a current IEP . Thus, the irreparable harm here will continue to occur to B.N. if the District is disallowed from attempting evaluations in the new district. The child is undoubtedly enrolled in Orange and thus, I so **FIND**. Either way, the disagreement over the stay put is of no moment if mom or son refuse to engage in the evaluations that are necessary to formulate an appropriate IEP at Orange. Again, the last IEP and corresponding evaluations were formulated 2016 when he was in 8th grade (13-14 years old); he is now almost twenty (20) years old.

In addition, petitioner cannot argue that petitioner's claim is settled or there is a likelihood of success on the merits as this young man has not been taught or observed by this District since his mother refused to participate in evaluations or discussions with Orange. Furthermore, the last prong requires me to balance the equities and interests. Even if Petitioner could show the first three prongs; she would fail on the last. Even if Orange is not the school for B.N., neither the District, the student, the parent, nor the Child Study Team can make a determination of what B.N.'s goals and objectives should be, or measure his progress, or whether an out-of-district placement would be appropriate or necessary in the future. Thus, the irreparable harm here will be if Petitioner fails to attempt the evaluations required by Orange which is all that is available now since the old IEP is defunct. Thus, the interests balance toward the District's position that the Emergent Relief is not appropriate as it does not currently exist, and I agree that B.N. needs to at least attempt participation the evaluations as soon as possible.

After hearing the arguments of petitioners and respondent and considering all documents submitted and facts found above, I **CONCLUDE**, that the petitioners' motion for emergent relief is **DENIED**. **IT IS ORDERED,** the parties shall conduct and B.N. and/or (mom or guardian) shall participate in the IEP meetings and/or evaluations at the parties' earliest convenience so the District can get an opportunity to assess B.N.'s present levels as he begins at Orange.

This decision resolves the application raised for emergency relief only as upon information and belief there is not yet an underlying due process complaint. This decision on application for emergency relief is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. § 1415(i)(2). 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 Policy and Dispute Resolution.

February 7, 2022
DATE

DANIELLE PASQUALE, ALJ

Date Received at Agency: February 7, 2022

Date Mailed to Parties: February 7, 2022

lr