State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
EMERGENT RELIEF
OAL DKT. NO. EDS 09797-22
AGENCY DKT. NO. 2023-35119

G.W. and K.W. on behalf of M.W.,
Petitioners,
v.
LAKELAND REGIONAL BOARD OF EDUCATION,
Respondent.

G.W. and K.W., petitioners appearing pro se

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

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

Record closed: January 25, 2023 Decided: January 26, 2023

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On November 2, 2022, petitioners G.W. and K.W., filed a request for emergent relief with the Office of Special Education (OSE) seeking an order to invoke "stay-put" protections from the last-agreed upon IEP placement for their minor child, M.W.

Petitioners highlight that Lakeland failed to incorporate their concerns or provide accommodations they believe are necessary in the recently proposed IEP of September 23, 2022, modified on October 18, 2022. Petitioners also seek an IEP meeting as they dispute the proposed IEP.

Lakeland opposes this application asserting that petitioners fail to meet the criteria for emergent relief under N.J.A.C. 1:6A-12.1(e) and that usual stay-put protections are not applicable under the circumstances.

On November 2, 2022, OSE transmitted the emergent application to the Office of Administrative Law (OAL) for a determination as a contested matter. Lakeland submitted opposition to the request for emergent relief on November 7, 2022.

The parties agreed to several adjournments due to scheduled vacations and to allow petitioners to consider other potential educational placements. On January 23. 2023, petitioners replied to Lakeland's opposition. On January 25, 2023, I conducted an oral argument application via zoom, and the record closed.

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, I **FIND** the following as **FACT** for purposes of this application only:

M.W. is a ninth-grade student residing with his parents in Ringwood, New Jersey. M.W. is eligible to receive special education and related services with the classification of other health impaired with a primary diagnosis of a Static Encephalopathy and other secondary diagnoses, including Attention Deficit Disorder, with Hyperactivity (ADHD). Although M.W. attended Ringwood Public Schools until eighth grade, the Ringwood School District does not have a high school. Instead, M.W. is eligible to participate in Lakeland Regional High School as a Ringwood resident, and petitioners enrolled M.W. at Lakeland High School on September 6, 2022. Significantly, the Lakeland Board of

Education and school district (Lakeland) is distinct from the Ringwood school district or its Board of Education.

Usually, the lower school, Ringwood, and the regional high school, Lakeland, would have a joint child study team meeting to transition students moving to the high school, Petitioners refused to release any information to Lakeland before the end of M.W.'s eighth-grade year. Ringwood omitted M.W. on the transfer list to Lakeland because petitioners did not inform Ringwood that they would enroll M.W. at Lakeland.

Petitioners should have shared information with Lakeland before M.W. completed his eighth-grade year but did not. Thus, Lakeland was unaware that petitioners were enrolling a student with an IEP.

After that, petitioners supplied Lakeland with an IEP for M.W.'s sixth and seventh grade, and his school transcript. See, Petitioner's Appendix 1. Petitioners seek a stay put regarding this IEP as the last agreed-upon IEP. The IEP provided by petitioners contains summaries from an educational evaluation, a psychological evaluation, and a social evaluation, apparently conducted by the previous district's child study team, in 2014. Petitioners appear to have undertaken privately the other evaluations noted in the IEP, with the most recent in 2016. That IEP places M.W. in a general education/inclusion class for ELA (eighty minutes), Math (eighty minutes), History (forty minutes), and Science (forty minutes). All four of these core classes are eighty minutes at the high school level as high school educational standards necessitate more time in the schedule.

The IEP provided by the petitioners also provides for modifications and accommodations, including the provision of the student completing a self-monitoring chart, which Lakeland replaced with a weekly e-mail from the teacher to the parents. Further, the IEP provided by the petitioners also indicates the student was virtual at some point due to COVID restrictions and includes actions should the student be remote. Yet, M.W. is off from remote learning as the school can accommodate in-person learning. Lakeland did create or agree to this IEP.

Notably, Lakeland believes only some of these modifications or accommodations are appropriate for a general education setting at the high school level. As such, and because of the highly outdated information, Lakeland requested a reevaluation planning meeting to determine which evaluations were necessary to plan and program for M.W appropriately.

Despite this, Lakeland is implementing the earlier IEP to the extent possible.

Still, Lakeland proposed an initial IEP on October 6, 2022, developed after an IEP meeting held on September 15, 2022. Although petitioners informed Lakeland that they privately conducted other evaluations, they supplied Lakeland with none. Petitioners suggest that Lakeland advised evaluations were unnecessary, but Lakeland disputes this again, noting that M.W.'s evaluations are outdated, and petitioners refuse to attend a reevaluation meeting.

Petitioners responded to the initial proposed IEP with requests made through e-mails and additional in-person meetings. Lakeland modified the IEP and provided petitioners with a final proposed IEP on October 18, 2022, which remains unimplemented absent parental consent.[1]

Pending federal cases involves the IEP provided by the petitioners Indeed, petitioners challenge a decision that Ringwood substantially implemented the IEP and denied petitioners' requested remedies. Lakeland is uninvolved with that case.

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

[1] Notably, the Director of Special Services asserted that the fifteen-day IEP review period expired following the initial proposed IEP when the parents emailed her in October about items they felt were accounted for from the September 15, 2022, IEP meeting. Still, Lakeland submitted a finalized IEP on October 18, 2022, that it believes addresses some of the parent's concerns.

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).

Further, under N.J.A.C. 6A:14-2.7(r), a party may request emergent relief for the following issues:

> 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.

Petitioners argue that this matter involves a break in the delivery of services and issues regarding placement during the outcome of a due process petition.

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;
> 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.
>
> [Ibid.]

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

Petitioners seek to invoke the “stay put” from the last agreed upon IEP, which can prevent a school district from making changes to the student's program or placement pending 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). The purpose of “stay put” is to maintain the status quo for the child while the dispute over the placement or program remains unresolved. Ringwood Bd. of Educ. v. K.H.J., 469 F.Supp.2d 267, 270–71. (D.N.J. 2006.)

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 provision N.J.A.C 6A:14-2.7(u)). 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. Indeed, petitioners assert that they are not bound by these requirements to obtain relief they seek.

Here, petitioners do not seek to keep their son at the middle school. Instead, this application seeks to require the high school to continue the modifications and accommodations from the last-agreed-upon IME by invoking "stay-put" that the proposed IEP lacks. Petitioners recognize specific changes at the high school are not violative of the stay-put of the earlier IEP. For example, petitioners understand that high school has longer classes in certain core subjects. Petitioners know that the school replaced a self-monitoring chart with the school's weekly e-mail progress report to the parents. Arguably, this provides a more unambiguous indication of M.W.'s progress. Further, while the earlier IEP addressed remote learning that M.W. no longer needs under COVID restrictions, petitioners view this only as a requirement if M.W. needed remote education. But this application seeks to avoid implementing the proposed IME until the due process proceeding addresses its propriety and the removal of accommodations that the petitioners maintain should stay.

Still, recognized exceptions exist to stay-put protections. Relevant here, stay-put considerations can yield to the intra-state school district transfer provisions of N.J.A.C. 6A-14-4.1(g), requiring only "comparable" services to the prior program until a new IEP is implemented. See J.F. v Byram Twp. Bd. of Educ., 629 F. App'x 235 (3rd Cir. 2015); see also 20 U.S.C. § 1414 (d)(2)(C)(i)(I) (also requiring only comparable services for intra-state district transfers until a new IEP is implemented). Here, Ringwood is a different school district than Lakeland.

Petitioner maintains that the stay-put still controls because the intra-state transfer provisions allowing "comparable services" rather than the "stay-put" only apply when the family voluntarily moves to another school district, changing the status quo that the stay-put typically protects. Indeed, Lakeland is now the Local Educational Agency ("LEA") as defined by 20 U.S.C. §1401(19) and 34 CFR §300.28 and did not participate in creating the IEP for which petitioners want the stay-put. Here, petitioners did not move to another school district. Instead, their son moved to a regional high school that happens to be another school district because the Ringwood District has no high school.

Both parties rely upon case law to support their respective positions. Respondent cites an unpublished District Court case, that discusses an ALJ's earlier

denial of emergent relief under a similar fact pattern. G.E. & J.E. v. Freehold Reg'l High Sch. Dist. Bd. of Educ., OAL Dkt. No. EDU 160-00, Final Decision (August 3, 2022. Indeed, petitioners, in this case, sought to invoke the stay-put of the earlier middle school IEP rather than the proposed high school IEP. Significantly, the parties did not dispute that the earlier IEP was the stay-put. Final Decision at p.2. In particular, the child was in a multiply disabled program at the middle school. The high school prepared a proposed IEP that placed the student in an Autism program at Howell High School but also has a Mild Impairment program at the Freehold Regional High School (Freehold) where the parents enrolled the student. The parents asserted that the Mild Impairment program was the closest equivalent to the prior multiply disabled program. Still, Freehold chose the Howell autism program best suited for the child without evaluating the child. Id. at 2-3.

Since neither school had a multiply disabled class, usual stay-put considerations were not readily discernible. Thus, the ALJ considered the competing medical evidence of the program best suited for the child. Id. At the same time, the ALJ denied the petitioner's emergent relief under the Crowe v. DeGioia standards, even though the stay-put acts as an automatic injunction that does not require such an analysis. Drinker, 78 F.3d at 864; see also Michael C. ex rel. Stephen C. v. Radnor Twp. Sch. Dist., 202 F.3d 642, 650 (3d Cir. 2000) (where the court explained that "stay-put" implements an 'automatic preliminary injunction' preventing *local educational authorities* from unilaterally changing a student's existing educational program." (emphasis in original.) After that, the District Court denied petitioner's motion for emergent relief seeking the same relief because he failed to exhaust administrative remedies that would permit that Court to adjudicate the request and declined to address the motion. G.E. & J.E. v. Freehold Reg'l High Sch. Dist. Bd. of Educ.3:22-cv-05049, U.S. Dist. LEXIS 187276 (D.N.J. Oct. 13, 2022). Even if this case supported Lakeland's position that it could offer what it believed to be a better program, the same problem in the Freehold case does not exist because this is not a question of program availability. In other words, Lakeland is implementing the prior IEP nearly exactly with the modifications and accommodations the parents maintain Lakeland cannot remove.

Petitioners offer support for its position under Y.B. v. Howell Twp. Bd. of Educ., 4 F. 4th 196 (3rd Cir. 2021, where parents moved to another school district and sought to require the new school district to continue the former district's IEP providing for an out-of-district placement. Id. at 197. The Howell court highlighted that the stay-put and intra-state transfer provisions address transitional times:

> In a broad sense, both provisions discuss the procedural safeguards afforded to students during periods of educational transition. Unlike the "stay-put" provision—which requires the continued implementation of the child's original IEP—the intrastate transfer provision only requires that the new district provide "services comparable" to those in the child's most recent IEP.

The Howell court agreed with Howell that it only need provide comparable services. The Howell court held that holding that "in a voluntary intrastate transfer, the "stay-put" provision does not apply, and the new school district needs only provide "services comparable" to those the student had been receiving under the IEP in effect before the transfer." In those voluntary transfer situations, "parents of the student must accept the consequences of their decision to transfer districts. Id. at 200. However, as the petitioners highlight, this case involves no voluntary transfer. The petitioner correctly highlights the court's focus on only requiring comparable services and not invoking "stay-put" as the parents urged. In that situation, a parent seeking emergent relief could not rely on the stay-put as an automatic injunction but would need to meet emergent relief standards. Given the lack of a voluntary transfer to the regional high school, I **CONCLUDE** that M.W.'s enrollment in Lakeland requires continuation of the last-agreed-upon IEP as the "stay-put.[2]

Notably, even the temporary provision of comparable services still required Howell to develop, adopt, and implement a new IEP if it were not going to adopt the prior IEP. Id. at 201. Notably, Lakeland has attempted to do just that. However, the

[2] Notably, the concurring opinion acknowledges many of the concerns raised by Lakeland. Specifically, Lakeland had no part of the earlier IEP's creation. It has an obligation to adopt its own "policies, procedures, and programs that are consistent with the State policies and procedures" for providing a FAPE." Id at 203. Still, the concurring opinion highlighted that the stay put yielded because when "a student voluntarily transfers to a new district, the parents must accept the consequences of their decision." Id. The opinion also noted that id did not have to address a situation where "intrastate-transfer renders strict compliance with the previous IEP impossible." Id.

Howell court cautioned that "when a parent's conduct bypasses the procedures contemplated by the IDEA, the parent deprives the school of the opportunity to comply with the law", preventing that development, adoption, or implementation of an IEP, "the new district cannot be liable for not creating a tailored IEP for the child. "Id.

Although Lakeland asserts that its proposed IEP should be considered the "stay-put" IEP, this assertion is largely because of its belief that it only needs provide comparable services and because clear differences exist to programming provided in middle schools and high schools. Yet, the parents disagree with Lakeland's proposed IEP. Disputes as to the proposed IEP are not appropriate for emergent relief but require a full plenary hearing. E.B. v. Alpine Bd. of Educ., 2007 NJ AGEN LEXIS 833 (December 21, 2017) J.B. v. Ocean Township Bfd. Of Educ., 2005 N.J. AGEN LEXIS 1267 (December 27, 2005).

ORDER

Based on the foregoing, I **ORDER** that petitioners are entitled to emergent relief and that Lakeland must continue its implementation of the prior IEP pending the due process petition.

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.A. § 1415 (f)(1)(B)(i). 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.

January 26, 2023

DATE

NANCI G. STOKES, ALJ

Date Received at Agency January 26, 2023

Date Mailed to Parties: January 26, 2023