State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
EMERGENT RELIEF
OAL DKT. NO. EDS 08412-23
AGENCY DKT. NO. 2024-36451

J.M. ON BEHALF OF G.M.,
Petitioner,
v.
HUNTERDON CENTRAL
REGIONAL BOARD OF EDUCATION,
Respondent.

Julie Warshaw, Esq., for petitioner (Warshaw Law Firm, LLC, attorneys)

Robin S. Ballard, Esq., for respondent (Schenck, Price, Smith & King, LLP, attorneys)

Record closed: September 5, 2023 **Decided:** September 6, 2023

BEFORE **JOAN M. BURKE**, ALJ**:**

STATEMENT OF THE CASE

Petitioner, on behalf of her minor child, G.M., seek an Order Granting Emergent Relief, pursuant to N.J.A.C. 1:6A-12.1(a), N.J.A.C. 6A:14-2.7(l) and 20 U.S.C. §

1415(k)(2) and request an Order for stay-put placement at the Cambridge School in accordance with the negotiated terms of a settlement agreement. Respondent opposes petitioner's request for emergent relief**.**

PROCEDURAL HISTORY

On August 29, 2023, the New Jersey Department of Education received petitioner's request for emergent relief. That matter was transmitted to the Office of Administrative Law, where it was filed on August 30, 2023. N.J.S.A. 52:14F-5(e), (f), and (g) and N.J.A.C. 1:6A-1 through N.J.A.C. 1:6A-18.5. The respondent submitted a response in opposition to the request for emergent relief which was received on September 1, 2023. Petitioner submitted a reply that was received on September 5, 2023. Oral argument on the motion was held on September 5, 2023, and the record was closed on that date.

FACTUAL DISCUSSION

A summary of the pertinent evidence presented is as follows, and I **FIND** the following **FACTS**:

G.M. is a rising ninth-grade student deemed eligible for special education and related services under the classification of Other Health Impaired due to a diagnosis of ADHD. Because of a dispute regarding G.M.'s educational program for the 2018-2019 academic year, a settlement agreement (Agreement) was entered into between Flemington-Raritan Regional Board of Education (Flemington Board) and petitioner. The Agreement allowed for the unilateral placement of G.M. by the petitioner at Cambridge School, in Pennington, NJ for grades five through eight which encompasses academic years 2019-2020; 2020-2021; and 2022-2023. In addition, under the Agreement the District also reimbursed petitioner $65,000 per year for tuition and $3,775 for transportation. (See Settlement Agreement and Release, paragraphs 1,2,3.)

Petitioner seeks to invoke paragraph 13, of the Agreement, which in part states: "At the conclusion of the term of this agreement, and upon G.M.'s entry into high school,

Cambridge shall be the stay put placement should a dispute arise regarding recommended programming and placement." (Petitioner's Brief in Support of Emergency Relief at 2.) G.M. is scheduled to attend Hunterdon Central Regional High School (Hunterdon).

Petitioner argues that at first glance, the program is not "comparable to Cambridge where G.M. has been comfortable and successful for the past four years." Petitioner further argues that the placement is therefore not appropriate. Petitioner brings this emergent application because the District contends that petitioner's stay-put rights do not exist. Cambridge School is set to begin on September 6, 2023; a tuition contract must be signed in advance to the start of school.

Respondent contends that Hunterdon Central Regional High School District (District), provides secondary education to the Flemington Raritan Regional School District which consists of Delaware Township, East Amwell Township, Readington Township, Flemington Borough, and Raritan Township. The respondent contends that the District was not a party to the Agreement between the petitioner and Flemington-Raritan Regional Board of Education. When G.M.'s records were provided to the District, there was no IEP or an Individual Service Plan (ISP). The District was provided a copy of a March 2023 private psycho-educational evaluation from Dr. Rebecca J. Yun and progress report from Cambridge for the 2022-2023 academic year. (Respondent's Brief at 4.)

G.M. became a student of the District on July 1, 2023. To prepare for entry into Hunterdon High School, for September 2023, a number of evaluations were done. The District Child Study Team (CST) created an evaluation plan in June 2023 to include educational, psychological, speech/language and social assessment. This was signed off by the parent. (Respondent's Brief at 4.) According to the respondent, on August 24, 2023, an initial eligibility meeting was conducted and G.M. was found eligible for special education and related services and was categorized as "Other Health Impairment." On August 24, 2023, the District also held an IEP meeting and considered the District's CST evaluations, information from the parent, documents from Cambridge and the report from Dr. Yun. (Ibid.)

A draft IEP was prepared for G.M. The IEP called for "pull-out replacement for Math; pull-out replacement for English; in-class support for Social-Studies; in-class support for Science; and pull-out resource replacement for Support Study." Ibid. The IEP also had modifications in both general and special education "modifying curriculum content and homework assignments; guided instruction; multisensory presentation; use of mnemonic services; and verbal cues to reinforce visual directions. Accommodations in the general and special education classroom were provided as well, including but not limited to extra time for task completion; simplify directions; repetition, clarification and rewording as needed; use of manipulative; preferential seating; refocusing and redirection; frequent check-ins for attention and understanding; and short breaks." Id. at 4-5. There was no conclusion that Cambridge was appropriate or necessary to offer a free appropriate education to G.M. Respondent contends that G.M. has a placement at Hunterdon Regional High School.

The petitioner did not sign off on the proposed IEP, but instead, filed this emergent action invoking the stay-put provision listed in the Agreement.

LEGAL ANALYSIS, CONCLUSIONS AND ORDER

N.J.A.C. 1:6A-12.1(a) provides that the affected parent may apply in writing for emergent relief. An emergent 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.

Emergent relief shall only be requested for specific issues, namely i) issues involving a break in the delivery of services; ii) issues involving disciplinary action, including alternate educational settings; iii) issues concerning placement pending the outcome of due process proceedings; and iv) issues involving graduation. N.J.A.C. 6A:14-2.7(r). Here, petitioner has requested emergent relief requesting the tribunal to invoke the stay-put provision contained in 20 U.S.C. 1415(j) and N.J.A.C. 6A:14-2.7(u), otherwise G.M. will be without a proper placement. Therefore, I **CONCLUDE** that

petitioner has established that the issue in this matter concerns placement pending the outcome of the due process proceeding.[1]

The standards for emergent relief are set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), and are codified at N.J.A.C. 6A:3-1.6. The petitioner bears the burden of proving:

> 1. that the party seeking emergent relief will suffer irreparable harm if the requested relief is not granted;
>
> 2. the existence of a settled legal right underlying the petitioner's claim;
>
> 3. that the party seeking emergent relief has a likelihood of prevailing on the merits of the underlying claim; and
>
> 4. when the equities and the interests of the parties are balanced, the party seeking emergent relief will suffer greater harm than the respondent.
>
> [Crowe, 90 N.J. at 132-34.]

The petitioner must establish all the above requirements in order to warrant relief in their favor and must prove each of these Crowe elements "clearly and convincingly." Waste Mgmt. of N.J. v. Union Cnty. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008); D.I. and S.I. on behalf of T.I. v. Monroe Township Board of Education, 2017 N.J. Agen LEXIS 814, 7 (OAL Dkt No. EDS 10816-17, October 25, 2017).

The petitioner here contends that she is invoking the "stay-put" provision to require G.M. to remain at Cambridge as the appropriate placement for the upcoming 2023-2024 school year. The petitioner argues that this is based on the Agreement which specifically designated the Cambridge School as the stay-put placement in the event that a dispute arises as to G.M.'s program and or placement. With a "stay-put" claim, the petitioner is seeking an automatic statutory injunction against any effort to change G.M.'s program at the time the provision is invoked. Drinker by Drinker v. Colonial School Dist., 78 F.3d 859, 864 (3d Cir. 1996). Pursuant to N.J.A.C. 6A:14-2.7(u):

[1] Petitioner has yet to file for a due process hearing but represents to the tribunal that she is in the process of preparing a due process petition.

> 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, or emergency relief as part of a request for a due process hearing is granted between the district board of education and the parents for the remainder of any court proceedings.
>
> [Emphasis added.]

The "stay-put" provision acts as an automatic preliminary injunction, the overarching purpose of which is to prevent a school district from unilaterally changing a disabled student's placement or program. See Drinker, 78 F.3d at 864. In terms of the applicable standard of review, the emergent relief factors set forth in N.J.A.C. 6A:14-2.7(r)-(s), N.J.A.C. 1:6A-12.1, and Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982), are generally inapplicable to enforce the "stay-put" provision. As stated in Pardini v. Allegheny Intermediate Unit, 429 F.3d 181, 188 (3d Cir. 2005), "Congress has already balanced the competing harms as well as the competing equities."

In Drinker, the court explained:

> The [IDEA] substitutes 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 . . . balance of hardships.
>
> [78 F.3d at 864 (citations and internal quotations marks omitted).]

In other words, in cases where the "stay-put" provision applies, injunctive relief is available without the traditional showing of irreparable harm. Ringwood Bd. Of Educ. v. K.H.J. o/b/o K.F.J., 469 F. Supp. 2d 267 (D.N.J. 2006). Under those circumstances, it becomes the duty of the court to ascertain and enforce the "then-current educational placement" of the handicapped student. Drinker, 78 F.3d at 865. "[T]he dispositive factor in deciding a child's 'current educational placement' should be the individualized education program . . . actually functioning when the 'stay put' is invoked." Id. at 867, quoting Woods v. N.J. Dept. of Ed., No. 93-5123, 20 Indiv. Disabilities Educ. L. Rep. (LRP Publications) 439, 440, 3rd Cir. September 17, 1993. "And where . . . the disputes arises

before any IEP has been implemented, the 'current educational placement' will be the operative placement under which the child is actually receiving instruction at the time the dispute arises." Thomas v. Cincinnati Bd. of Educ., 918 F.2nd 618, 625-626(6th Cir.1990).

Here, there was no IEP and none presented by the parents from Cambridge. Petitioner had an agreement with Flemington-Raritan that it would reimburse $68,775.80 for tuition and transportation cost for G.M.'s private placement at Cambridge. From June 30, 2019 through August 31, 2023, G.M. was considered to be a non-public student unilaterally placed in a private program by the petitioner. See paragraph 5 of the Agreement. The Agreement further states that "[p]etitioner shall not seek . . . financial contribution towards educational services, from the district after June 30, 2023." See Paragraph 6 of the Agreement. The controversy stems from the petitioner invoking paragraph 13, of the Agreement that calls for Cambridge to be the "stay-put" placement should a dispute arise regarding any recommended programming or placement and binding the Hunterdon Central Regional Board of Education to this agreement that was made on June 15, 2023, between the petitioner and Flemington-Raritan Regional Board of Education.

Respondent argues that the District was not a party to the Agreement and although the Flemington-Raritan Regional Board of Education ratified the Agreement, Hunterdon Central Regional High School District Board of Education did not and thus cannot be bound by the stay-put provision therein. I agree. I therefore **CONCLUDE** that Hunterdon Central Regional Board of Education is not bound by the stay-put provision in the Agreement dated June 15, 2019, between the petitioner and Flemington-Raritan Regional Board of Education.

Furthermore, the stay-put provision is only triggered when an Individuals with Disabilities Education Act (IDEA) complaint is filed and not before. Here the petitioner's attorney represented at oral argument that they are in the process of filing a due process complaint. "The stay put provision may only be invoked during the pendency of any proceedings." 20 U.S.C. § 1415(j). Accordingly, the stay-put provision does not apply unless and until a request for a due process hearing is filed." K.D. v. Dept of Educ, 665F.3d 1110 (quoting Zvi D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982) See Clarfeld

v. Department of Educ., State of Hawaii, 2021 U.S. Dist. LEXIS 8234, cert. denied, 143 S. Ct. 171 (2022)(holding that a parent of a fourteen-year-old boy could not invoke the stay-put provision before he filed his due process complaint.).

While emergent relief is not available to petitioner based upon the stay-put provision in N.J.A.C. 6A:14-2.7(u), emergent relief may be available using the Crowe criteria, described above.

Petitioner bears the burden of satisfying all four prongs of this test. Crowe, 90 N.J. at 132–34. The first requirement is whether G.M. will suffer irreparable harm if the requested relief is not granted. N.J.A.C. 6A:3-1.6(b)1 Harm is considered to be irreparable if it cannot be remedied by money damages. Crowe v. DiGioia, 90 N.J. 126, 132-33 (1982). Moreover, the harm must be substantial and immediate; risk of harm alone is not sufficient.

Petitioner argues that G.M. will be irreparably harmed by not having an appropriate educational placement and services provided to G.M. by the District. However, respondent created a new IEP and shared it with the petitioner on August 24, 2023, and intends to implement it as soon as the petitioner signs off on it. There is a placement for G.M. at Hunterdon High School. It follows that G.M. will not experience irreparable harm because she has a placement at Hunterdon..

I therefore **CONCLUDE** that the petitioner has not met the burden of establishing that G.M. will experience irreparable harm.

The second consideration is whether the legal right underlying petitioner's claim is settled. N.J.A.C. 6A:3-1.6(b)(2). Petitioner's underlying claim is for stay-put rights at Cambridge. As set forth above, the "stay-put" provision acts as an automatic preliminary injunction, the overarching purpose of which is to prevent a school district from unilaterally changing a disabled student's placement or program. See Drinker, 78 F.3d at 864. In terms of the applicable standard of review, the emergent relief factors set forth in N.J.A.C. 6A:14-2.7(r)-(s), N.J.A.C. 1:6A-12.1, and Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982), are generally inapplicable to enforce the "stay-put" provision. As stated in Pardini v.

Allegheny Intermediate Unit, 429 F.3d 181, 188 (3d Cir. 2005), "Congress has already balanced the competing harms as well as the competing equities. However, stay-put is inoperable in this case. If there is an IEP, then there is no stay-put violation. "[T]he dispositive factor in deciding a child's 'current educational placement' should be the individualized education program . . . actually functioning when the 'stay put' is invoked." Id. at 867, quoting Woods v. N.J. Dept. of Ed., No. 93-5123, 20 Indiv. Disabilities Educ. L. Rep. (LRP Publications) 439, 440, 3rd Cir. September 17, 1993. G.M. here has no IEP and therefore the stay-put provision of the IDEA was not triggered.

I therefore **CONCLUDE** that the petitioner has not met her burden of establishing that her underlying claim was settled.

The third prong that must be met is that there is likelihood of success on the merits. Petitioner claims that the law is clear that the parties are bound by the terms of the Agreement "voluntarily entered into by the parties and despite the fact that Hunterdon Central Regional High School district is not the same school district that entered into the settlement agreement, the case law is clear that it is still bound by the terms of that agreement." (Petitioner's Brief at page 13.)

The respondent argues that it was never a party to the Agreement. A settlement agreement is a contract governed by fundamental principles of contract law. As such, the settlement agreement comes into being as soon as an offer, acceptance, and consideration are exchanged. See Lucas v. United States, 25 Cl. Ct. 298 (1992) (contract is a written or oral exchange containing agreement, mutual assent); Martin v. Ewing, 112 W. Va. 332, 164 S.E. 859 (W. Va. 1932) a contract must be a mutuality of agreement and obligation (West Legal Dictionary). The main tenet of a contract involves an offer and acceptance. Here the Agreement was between the petitioner and Flemington-Raritan Regional Board of Education. Since respondent was not a party to the Agreement it cannot be bound by it.

Furthermore, as respondent argues, the Agreement did not make Cambridge an IEP placement for G.M. Flemington Raritan agreed only to pay $65,000 "per school year towards the tuition cost of the unilateral placement in Cambridge during the 2019-2020, 2020-2021,2021-2022 and 2022-2023 year.". (Settlement Agreement, paragraph 3.)

Under the circumstances and prior to a full hearing, petitioner has not demonstrated a likelihood of prevailing on the merits of her claim.

Therefore, I **CONCLUDE** petitioner does not meet the third prong of the emergent relief standard.

The final prong of the emergent relief standard is whether the equities and interests of the parties weigh in favor of granting the requested relief to G.M. Petitioner argues that if the requested relief is not granted, "the hardship would be severe. G.M. would not have an appropriate placement for the upcoming school year and would therefore be denied a free appropriate public education." (Brief in Support of Petitioner's Request for Emergent Relief, at 13-14.) Respondent at oral argument states that G.M. has a placement at Hunterdon Regional High School and an IEP has been prepared. Respondent further argues that "to award petitioner a continuation of placement in an up-to-now unsupervised placement in an unapproved school would disrupt the required and well established practice that an IEP team must collaboratively make program and placement decisions. There has been no IEP Team review of G.M.'s education at Cambridge at all, as settlement giving rise to the current dispute made her a non-public student in exchange for Flemington-Raritan contributing money to the placement." (Respondent's Brief In Opposition to Emergent Relief, at 16.)

Despite no IEP and only having responsibility for G.M. starting on July 1, 2023, respondent met its regulatory obligation by having a CST in place in June 2023, created an evaluation plan, and conducted various evaluations to include educational, psychological, speech/language and social assessments. On August 24, 2023, an Initial Eligibility Meeting was conducted, G.M. was found eligible for special education and related services. An IEP was created. The IEP members did not conclude that G.M. should continue at Cambridge but rather that the high school is prepared to offer FAPE in the least restricted environment. It appears unreasonable to expect respondent to pay for an out-of-district placement based on a contractual agreement that it was not a party to when a placement is available and determined by the IEP team members appropriate at Hunterdon Regional High School.

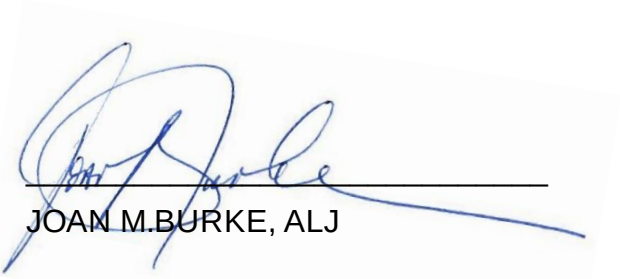
I **CONCLUDE** that the respondent would suffer greater harm if the requested relief was granted.

Therefore, for all of the foregoing reasons, I **CONCLUDE** that petitioner has not demonstrated entitlement to the emergent relief requested, since she has not satisfied any of the four prongs of the test.

ORDER

It is **ORDERED** that the petitioner's application for emergent relief is **DENIED**.

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.



September 6, 2023

JOAN M. BURKE, ALJ

Date Received at Agency: September 6, 2023

Date Mailed to Parties: September 6, 2023

JMB/jm/mph

APPENDIX

EXHIBITS

For petitioner

P-1 Petitioner's submission accompanying the emergent appeal

P-2 Reply Brief, dated September 4, 2023

For respondent

R-1 Respondent's September 1, 2023, Brief in Opposition to the Application for Emergent Relief with Certification of Dr. Carol A. Webb with Exhibits A through B