State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

EMERGENT RELIEF

OAL DKT. NO. EDS 08419-22

AGENCY DKT. NO. 2023-34734

C.O. AND M.O. ON BEHALF OF C.O.,

Petitioners,

v.

NORWOOD BORO BOARD OF EDUCATION

And

NORTHERN VALLEY REGIONAL,

Respondents

Lori E. Arons, Esq., for petitioners

Marie-Laurence Fabian, Esq., for Norwood Boro BOE (Porzio, Bromberg, & Newman, P.C., attorneys)

Isabel Machado, Esq., for Northern Valley Regional (Machado Law Group, attorneys)

Record closed: January 30, 2023 Decided: February 7, 2023

BEFORE **LESLIE Z. CELENTANO**, ALJ:

STATEMENT OF THE CASE

In a due process petition arising under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 to -1485, and the New Jersey regulations implementing the IDEA, N.J.A.C. 6A:14-1.1 to -10.2, petitioners C.O & M.O. (petitioners or parents), allege that respondents Norwood Board of Education (Norwood), which operates a K-8 district, and Northern Valley Regional High School District Board of Education (Northern Valley), which oversees a regional high school district that educates students from Norwood and several other constituent districts that do not have their own high schools, denied their disabled son, C.O. (C.O.), a free, appropriate public education (FAPE) when they offered the rising ninth-grader an individualized education program (IEP) placing him at Northern Valley Regional High School for the 2022-2023 school year.[1]

As part of this matter, pending a due process hearing, petitioners have applied for emergent relief in the form of an order finding that C.O.'s "stay-put" placement during the pendency of this dispute is Barnstable Academy (Barnstable), which C.O. attended at public expense during the 2020-2021 and 2021-2022 school years as a result of an agreement between petitioners and Norwood to settle a prior due process matter. Petitioners also seek a finding that Norwood and/or Northern Valley is responsible for funding the stay-put placement at Barnstable.

In response, Norwood has filed a motion to dismiss Norwood as a party to this matter, while Northern Valley opposes petitioners' application for emergent relief.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The following facts are not in dispute. C.O. was born in September 2008 and, at all times relevant to this matter, has lived with his parents in Norwood. Petition, ¶¶1-2. C.O. is classified as eligible for special education and related services under the category of "multiple disabilities," including autism. Id. at ¶¶ 4-5.

[1] To avoid confusion due to the fact that the mother and the child have the same initials, the mother and father shall be referred to as "petitioners" or "parents" and the child shall be referred to as "C.O."

In 2020, the parents filed a due process petition against Norwood disputing C.O.'s placement for seventh grade. Id. at ¶¶ 7-8. Norwood and the parents agreed to settle the matter by placing C.O. at Barnstable, a private school in Oakland (NJ) that is not specifically approved for the education of students with disabilities by the Commissioner of Education, at public expense for the 2020-2021 and 2021-2022 school years. Id. at ¶ 8. By virtue of the fact that the settlement placing C.O. at Barnstable was approved by the administrative law judge (ALJ) presiding over that matter, C.O. was legally permitted to attend Barnstable pursuant to N.J.S.A. 18A:46-14 and N.J.A.C. 6A:14-6.5(c). Ibid.

Although curiously none of the parties provided a copy of that settlement agreement, the parents included an excerpt from the settlement in their current petition. That excerpt reads:

> The obligation to develop an IEP for the 2022-2023 school year shall be the responsibility of [Northern Valley] since [Norwood's] obligation to provide C.O. a free and appropriate education ends on June 30, 2022. In the event of a dispute regarding the program and placement for the 2022-2023 school year, the 2021-2022 IEP shall constitute stay put.
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> [Id. at ¶ 10.]

C.O.'s IEP for the 2021-2022 school year, while he was in eighth grade, was prepared by Norwood and, as noted above, placed C.O. at Barnstable, with transportation and an extended school year (ESY) at Barnstable, all at public expense. Emergent Relief Application, Ex. A.

On June 7, 2022, Norwood and Northern Valley proposed an IEP placing C.O. at Northern Valley Regional High School for ninth grade during the 2022-2023 school year. Petition, ¶ 11; Northern Valley Opposition Brief, Ex. 1. That IEP did not provide for ESY services.

On June 21, 2022, the parents filed with the Office of Special Education (OSE) a request for mediation to challenge the proposed IEP for the 2022-2023 school year. Parents' Reply Brief, Ex. A. In that request, the parents stated that they oppose

placement at Northern Valley and instead seek to keep C.O.'s placement at Barnstable for ninth grade, with transportation and ESY services. Ibid.

On July 22, 2022, the parents asked OSE to convert their request for mediation to a request for a due process hearing. Parents' Reply Brief, Ex. B. In that petition, the parents allege that the proposed placement at the regional high school denies C.O. a FAPE and seek, among other relief, "[r]eimbursement for 2022 ESY at Barnstable" and "[a]n IEP placing C.O. at Barnstable with transportation and other services he was previously receiving." Ibid.

On September 26, 2022, OSE transmitted the matter to the Office of Administrative Law (OAL) for a due process hearing. On September 27, 2022, Norwood filed a motion with the settlement Judge, to dismiss the board as a party to this matter. On September 29, 2022, the parents submitted a brief in opposition to Norwood's motion. On September 30, 2022, Norwood filed a reply brief. On October 4, 2022, Northern Valley submitted a brief in opposition to the parents' due process petition and, on the same day, the parents responded to Northern Valley's brief. On October 6, the matter was assigned to the undersigned.

Then, on October 24, 2022, the parents applied for emergent relief, seeking an order finding that C.O.'s stay-put placement is Barnstable and "requiring Respondent(s) to immediately fund same." On November 18, 2022, Norwood and Northern Valley each submitted briefs in opposition to the parents' request for emergent relief. On December 2, 2022, the parents provided a brief in reply to each board's opposition papers. Following multiple adjournments at the parties' requests, and a subsequent telephone status conference on January 30, 2023, the record was closed.

The Parties' Arguments

The parents maintain that, by invoking the federal and state stay-put provisions, the former of which states 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. § 1415(j), the typical standards for emergent relief in special education disputes under N.J.A.C. 6A:14-2.7(s) and N.J.A.C. 1:6A-12.1 do not apply. Instead, the parents are entitled to an automatic injunction keeping C.O. at Barnstable as his "then-current educational placement," and requiring Norwood and/or Northern Valley to pay for the stay-put placement at Barnstable until the dispute over the proposed 2022-2023 IEP is resolved at a due process hearing.

Norwood contends that it should be dismissed as a party to this matter because Norwood, a K-8 district, no longer had responsibility for C.O.'s education after C.O. finished eighth grade at the conclusion of the 2021-2022 school year. Instead, Norwood argues that the dispute over the 2022-2023 IEP is between the parents and Northern Valley which, as the regional high school district to which Norwood residents are legally entitled to attend for grades nine through twelve, assumed responsibility for C.O.'s education for the 2022-2023 school year.

Northern Valley does not dispute its responsibility for C.O.'s education as of July 1st of the 2022-2023 school year. Rather, Northern Valley submits that by virtue of C.O.'s transition from the Norwood K-8 district to the Northern Valley 9-12 district, C.O. "transferred" from one New Jersey school district to another New Jersey school district, such that N.J.A.C. 6A:14-4.1(g), which governs "intrastate transfers," applies. Northern Valley maintains that its only responsibility under that regulation is to provide C.O. with an IEP that is "comparable" to his last IEP at Barnstable and that the proposed 2022-2023 IEP satisfies that requirement.

Northern Valley further contends that, under N.J.A.C. 6A:14-4.1(g), stay-put is inapplicable, and the parents must instead satisfy the standards for emergent relief under

N.J.A.C. 6A:14-2.7(s) and N.J.A.C. 1:6A-12.1.[2] The regional board argues that the parents cannot satisfy these standards, and thus are not entitled to emergent relief in the form of stay put at Barnstable at public expense.

Northern Valley also takes that position that they were not a party to, and thus are not bound by, the 2020 settlement placing C.O. at Barnstable and identifying the private school as C.O.'s stay-put placement in the event of a dispute over C.O.'s education for the 2022-2023 school year.

LEGAL DISCUSSION

I. Whether the stay-put rule or the Crowe standards govern the parents' application for emergent relief.

As an initial matter, it is necessary to resolve the parents' and Northern Valley's conflicting positions on the appropriate standard by which to adjudge the parents' emergent relief application. Again, the parents assert that Barnstable is C.O.'s "stay-put" placement because Barnstable was his "then-current educational placement" when the dispute over his education for the 2022-2023 school arose. As such, the parents argue that they are automatically entitled to an order keeping C.O. at Barnstable during the pendency of the due process matter and need not meet the Crowe standards to obtain the relief they seek.

The stay-put rule, which as stated above, provides that "during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational

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[2] Those standards, generally known in New Jersey as the Crowe standards (see Crowe v. De Gioia, 90 N.J. 126 (1982)), require an applicant for emergent relief to show 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.
> [N.J.A.C. 6A:14-2.7(s).]

agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child," 20 U.S.C. § 1415(j); see also N.J.A.C. 6A:14-2.7(u) (providing that "[p]ending the outcome of a due process hearing . . . no change shall be made to the student's classification, program, or placement unless both parties agree"). The stay-put rule "serves 'in essence, as an automatic preliminary injunction,' reflecting Congress' conclusion that a child with a disability is best served by maintaining her educational status quo until the disagreement over her IEP is resolved." M.R. v. Ridley Sch. Dist., 744 F.3d 112, 118 (3d. Cir. 2014) (quoting Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 (3d. Cir. 1996); citing Pardini v. Allegheny Interim Unit, 420 F.3d 181, 190 (3d. Cir. 2005)). Thus, "[o]nce 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." Drinker, 78 F.3d at 864 (internal quotation omitted). In New Jersey, this means the moving party does not have to satisfy the Crowe standards for injunctive relief.

Meanwhile, Northern Valley submits that the parents must satisfy the Crowe standards for emergent relief set forth in N.J.A.C. 6A:14-2.7(s) and N.J.A.C. 1:6A-12.1 because C.O. "transferred" from Norwood to Northern Valley for ninth grade and the stay-put rule does not apply to such "intrastate transfers" under N.J.A.C. 6A:14-4.1(g).

Under N.J.A.C. 6A:14-4.1(g):

> 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 school 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, as follows:
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> 1. For a student who transfers from one New Jersey school district to another New Jersey school district, the IEP shall be implemented as written if the parents and district board of education agree. If the appropriate district board of education staff do not agree to implement the current IEP, the district board of education shall conduct all necessary assessments

> and, within 30 days of the date the student enrolls in the school district, develop and implement a new IEP for the student.
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> [N.J.A.C. 6A:14-4.1(g)(1).]

The Third Circuit Court of Appeals has consistently, and most recently in Y.B. ex rel. S.B. v. Howell Twp. Bd. of Educ., 4 F.4th 196 (2021), held that "the 'stay-put' provision does not apply when a student voluntarily transfers districts within a state, and the new school district can satisfy the IDEA by complying with the intrastate transfer provision [at N.J.A.C. 6A:14-4.1(g)(1)]." According to the Third Circuit, the purpose of the stay-put rule – "implementing 'a type of "automatic preliminary injunction" preventing local educational authorities from unilaterally changing a student's existing educational program'" – "is not implicated . . . when a parent unilaterally acts to change a student's school district." Id. at 200 (quoting M.R., 744 F.3d at 118; Michael C. ex rel. Stephen C. v. Radnor Twp. Sch. Dist., 202 F.3d 642, 650 (3d Cir. 2000)). Instead, "[w]hen a student voluntarily transfers to a new district, 'the status quo no longer exists,'" and "[i]n such situations, the parents of the student must accept the consequences of their decision to transfer districts." Ibid (quoting Ms. S. v. Vashon Island Sch. Dist., 337 F.3d 1115, 1133 (9th Cir. 2003)).

The problem with Northern Valley's position is that C.O. and his parents did not "voluntarily transfer" from Norwood to Northern Valley. To the contrary, C.O. and his parents have, at all relevant times, lived in Norwood. It is by operation of the legal arrangement between Norwood and Northern Valley that C.O.'s "school district of residence" changed from Norwood to Northern Valley for the ninth grade.[3] In this sense, the "move" from the Norwood school district to the Northern Valley school district is "involuntary;" indeed they did not 'decide' to transfer districts. Thus, Northern Valley's argument that C.O. is an "intrastate transfer" student within the meaning of N.J.A.C. 6A:14-4.1(g)(1) is untenable because C.O.'s parents did not "voluntarily transfer" or "unilaterally" move their residence from one district to another.

[3] Neither Norwood nor Northern Valley fully addressed or explained the legal relationship or arrangement under which Norwood, a K-8 district, sends its students to Northern Valley, a regional high school district. Their relationship presumably arises under N.J.S.A. 18A:13-1 to -81, which govern regional school districts. In any event, the parties do not dispute C.O.'s right to attend a Northern Valley high school as a resident of Norwood.

Northern Valley, as C.O.'s "school district of residence" for ninth grade by virtue of where he lives, was responsible for developing an IEP for him for the 2022-2023 school year – not under N.J.A.C. 6A:14-4.1(g)(1) – but instead under the IDEA's general mandate that a child's "school district of residence" is "[responsible] for the location, identification, evaluation, determination of eligibility, development of an IEP and the provision of a free, appropriate public education to students with disabilities." N.J.A.C. 6A:14-1.1, -1.3.

Thus, the stay-put rule, and not the intrastate transfer provision, applies in this matter, such that it is necessary to identify C.O.'s "current educational placement" for purposes of the stay-put provision. According to the Third Circuit, "[t]he stay-put rule . . . requires that the child's placement under the IDEA at the time a disagreement arises between the parents and the school district — what the statute terms the 'then-current educational placement' — be protected while the dispute is pending." M.R., 744 F.3d at 118. And "[t]o determine that placement, this court has looked to the IEP 'actually functioning when the "stay put" is invoked.'" Ibid (quoting Drinker, 78 F.3d at 867; citing Susquenita Sch. Dist. v. Raelee S., 96 F.3d 78, 83 (3d Cir. 1996)). Moreover, "[t]he operative placement could be either a public school or a private school that the local district was financing to satisfy the requirement that every child be given a *free*, appropriate education." Ibid (citing Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 12 (1993)). Finally, "[a]lthough §1415(j) does not specify which party pays when a child's pendent placement [is] a private school . . ., the school district's obligation to do so is well established by case law." Id. at 119 (citing Raelee S., 96 F.3d at 84, 86). This means "the school district is obliged to fund a private placement if it was . . . the educational setting prescribed by the current IEP[.]" Ibid.

II. Barnstable is C.O.'s stay-put placement and Northern Valley is obliged to pay for it.

It is clear that, for purposes of 20 U.S.C. § 1415(j), Barnstable is C.O.'s stay-put placement as his "then-current educational placement," or "the IEP actually functioning," when the parents invoked "stay put." That is, the IEP actually functioning when the

parents rejected Northern Valley's proposed IEP for the 2022-2023 school year was the 2021-2022 IEP under which C.O. was placed at Barnstable, with transportation and ESY services.

The question then arises whether Norwood, Northern Valley, or both, are financially responsible for C.O.'s placement at Barnstable pending the outcome of the due process hearing. One other final administrative decision has addressed substantially similar issues. In that case, R.M. & M.M. ex rel. C.M. v. Manchester Reg'l Bd. of Educ., EDS 7678-20, 120 LRP 28233 (Aug. 31, 2020), in which parents contested the IEP offered to their rising ninth-grade child by a regional high school district and successfully invoked "stay put" at the private school at which the child's former K-8 district had placed the child at public expense the previous four school years.[4] The ALJ in that case determined that the private school was the child's stay-put placement because that is where the child was educated under the "then-current educational placement" when the dispute between the parents and the regional board of education arose. The ALJ in that case further determined that the regional board of education was "responsible for funding the placement as contemplated in the IEP," which included ESY services.

The only relevant distinction between that case and this one is that the parents in Manchester filed their due process claim against only the regional high school district, and not also the child's former K-8 district. However, like Northern Valley here, the regional high school district in Manchester conceded that, for purposes of the IDEA, the child became the responsibility of the regional high school district as of July 1st of the child's ninth-grade school year.

Like in Manchester, Northern Valley's assumption of legal responsibility as of July 1, 2022, and for developing an IEP for C.O. for the 2022-2023 school year is the crucial factor in placing financial responsibility on Northern Valley and Northern Valley alone. While Norwood was part of that IEP process, as Norwood persuasively argues, "[t]he fact that Norwood conducted an IEP meeting in June 2022 with the parents and representatives of Northern Valley present does not confer authorization upon Norwood

[4] It is noted that the parents in Manchester were represented by the same counsel as the parents in this case: Lori Gaines, Esq.

to provide special education and related services for C.O. who is no longer enrolled in Norwood." Although the parties did not explain the typical IEP process for special education students leaving Norwood for Northern Valley, it is safe to assume that Norwood and Northern Valley usually, if not always, confer with each other when a ninth-grade IEP placing the child at Northern Valley is developed. This would be logical given Norwood's presumed familiarity with the student.

Since Northern Valley was C.O.'s "school district of residence" as of July 1, 2022, and because Northern Valley, and not Norwood, was responsible for developing an IEP for C.O. for the 2022-2023 school year, and because it is the proposed 2022-2023 IEP that the parents ultimately challenge in the underlying due process matter, Northern Valley, and not Norwood, is responsible for funding C.O.'s stay-put placement at Barnstable, the 2021-2022 IEP for which included transportation and ESY services.

Given the arrangement by which Norwood's children are entitled to go Northern Valley for high school, C.O.'s school district of residence for the 2022-2023 school year, Northern Valley is thus the one responsible "for the location, identification, evaluation, determination of eligibility, development of an IEP and the provision of a free, appropriate public education to" C.O. In this case, Northern Valley "found" C.O. with an entitlement to stay-put at a private school at their expense even though they had nothing to do with his placement at Barnstable. This obligation does not arise from the settlement agreement between the parents and Norwood – as Northern Valley correctly argues, as a non-party to the agreement they are not bound by its terms, including the language, "[i]n the event of a dispute regarding the program and placement for the 2022-2023 school year, the 2021-2022 IEP shall constitute stay put." Instead, C.O.'s entitlement to stay put at Barnstable is due to the operation of, and the appropriate interpretation of, the stay-put rule. Northern Valley's financial responsibility for that placement derives from the fact that Northern Valley was responsible for developing the 2022-2023 IEP for C.O., and Barnstable was C.O.'s "current educational placement" when the parents challenged the IEP developed by Northern Valley and invoked stay put.

III. Norwood's motion to dismiss them as a party to this matter is granted.

Having concluded that Northern Valley was solely responsible for the development of the 2022-2023 IEP that the parents challenge and that Northern Valley is solely responsible for funding C.O.'s stay-put placement at Barnstable, the relevant IEP for which included transportation and ESY services, Norwood should be dismissed as a party to this matter.

CONCLUSION AND ORDER

Based upon all of the foregoing, I **CONCLUDE** and it is **ORDERED** that the parents are entitled to the following emergent relief: (1) C.O.'s stay-put placement at Barnstable at Northern Valley's expense; and (2) reimbursement from Northern Valley for any monies the parents expended to maintain C.O.'s placement at Barnstable for the 2022-2023 school year, ESY at Barnstable for the summer of 2022, transportation, and any other related expenses for which the parents can provide receipts or other proof of payment.[5] The appropriateness of the 2022-2023 IEP proposed by Northern Valley is a separate issue apart from this emergent matter, and shall be determined as part of the underlying due process matter. It is further **ORDERED** that Norwood's motion to dismiss the due process petition against Norwood is **GRANTED.**

[5] Although the parents argue that Norwood bears financial responsibility in part because the Barnstable ESY began on June 27, 2022, while Norwood was still responsible for C.O.'s education, in light of the conclusion that Northern Valley, not Norwood, must fund C.O.'s stay-put placement under the 2021-2022 IEP, which included the provision of ESY services, Northern Valley shall reimburse the parents for the full cost of the 2022 ESY at Barnstable, including the four days that overlapped with the normal 2021-2022 school year. By definition, ESY services are "special education and related services that are provided to a student with a disability *beyond the normal school year*." N.J.A.C. 6A:14-1.3 (emphasis added). In New Jersey, the normal school year ends on June 30th. That Barnstable's ESY program just happened to overlap the normal 2021-2022 school year for four days would seem to be an arbitrary reason to saddle Norwood with partial financial responsibility.

This decision on application for emergency relief shall remain in effect until issuance of the decision on the merits. The parties have been 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.

February 7, 2023
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency February 7, 2023

Date Mailed to Parties: February 7, 2023

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