State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
EMERGENT RELIEF
OAL DKT. NO. EDS 00218-23
AGENCY DKT. NO. 2023-35347

ELIZABETH CITY BOARD OF EDUCATION,
Petitioner,
v.
D.F. ON BEHALF OF N.F.,
Respondent.

Mallory J. Benner, Esq., for petitioner (DiFrancesco, Bateman, Kunzman, Davis, Lehrer & Flaum, P.C., attorneys)

D.F., respondent, pro se

Record Closed: January 17, 2023 Decided: January 18, 2023

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioner, Elizabeth City Board of Education (the District), seeks an order to compel the immediate compliance with the IEP and placement of the respondent minor student at the Developmental Learning Center ("DLC") in Warren, alleging the student's behavior poses a danger to himself, staff and other students. The respondent previously

voiced objection to the placement but has not filed a written objection or request for due process.[1]

The District filed a Verified Petition for Due Process and Request for Emergent Relief with the Office of Special Education Programs of the New Jersey Department of Education (OSEP) on January 6, 2023. The emergent relief sought, as well as the underlying due process claim, is to compel the immediate placement of the minor student pursuant to an Individualized Education Program (IEP) dated June 24, 2022.

The emergent matter was transmitted by OSEP to the Office of Administrative Law, (OAL) where it was filed on January 9, 2023, as a contested case. N.J.S.A. 52:14B-1 to B-15; N.J.S.A. 52:14F-1 to F-13. The parties were notified by the OAL that the emergent request would be heard on January 17, 2023, at 1:30 p.m. via Zoom. The parties presented oral argument and the record closed.

FACTUAL DISCUSSION

For purposes of deciding this application for emergent relief, the following is a summary of the relevant facts derived from the contents of the petition and oral argument. Therefore, I **FIND** the following as **FACTS**:

Petitioner operates a public school system, grades Pre-K through 12, established pursuant to the New Jersey education laws, and provides programs and services for students with disabilities pursuant to the Individuals with Disabilities in Education Act ("IDEA"). Respondent D.F. is the parent of N.F., a sixth-grade special education student. N.F. is eligible for special education and related services under the classification of Other Health Impairment and attended William F. Halloran #22 ("School 22") in the Elizabeth Public School District during the 2021-2022 school year.

On February 17, 2022, the District filed a due process petition for emergent relief seeking, among other things, D.F.'s cooperation with the District's three-year re-

[1] The transmittal indicates "Underlying Due Process is the same issue as the emergent relief request."

evaluation as mandated by the IDEA, and an interim alternative placement of home instruction for N.F. pending the re-evaluations for an appropriate placement, as N.F.'s behavior posed a danger to himself, staff and other students. There had been multiple incidents where N.F. was physically aggressive towards District staff, engaged in classroom elopement, and exhibited selfinjurious and suicidal behavior. In one reported instance, he strangled his special education teacher and stated "I want to kill you and slit your throat."

As a result of that application, on February 24, 2022, Administrative Law Judge ("ALJ") Thomas R. Betancourt entered a Final Decision in Elizabeth City Board of Education v. D.F. o/b/o N.F., OAL Dkt. No. EDS 01330-22, Agency Ref. No. 2022/33913, granting the District's application and ordering in relevant part the following:

> (1) [N.F.] is to continue on home instruction. D.F. shall cooperate with the implementation of home instruction;
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> (2) [District] is to commence the triennial re-evaluation process as soon as is practicable, but in no event later than forty-five days from the date hereof;
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> (3) Evaluations done by the District shall consist of a Psychological Evaluation, an Educational and Social Evaluation, and a Psychiatric Evaluation;
>
> (4) Respondent is to fully cooperate with Petitioner concerning the triennial reevaluations; and
>
> (5) All re-evaluations are to be completed no later than ninety days from the date hereof.

On March 2, 2022, the parties appeared for a settlement conference on another matter between the parties, Elizabeth City Board of Education v. D.F. o/b/o N.F., OAL Dkt. No. EDS 00844-22, Agency Ref. No. 2022-33758, and set forth a Settlement Agreement on the record before ALJ Barry E. Moscowitz wherein the parties agreed to conduct certain evaluations.

Thereafter, the District began communicating with D.F. to try to schedule the evaluations. However, the District was met with resistance from D.F. and filed an

enforcement action in Superior Court on April 5, 2022. The re-evaluations of N.F. were then completed, and on June 24, 2022, an IEP meeting was convened with D.F.

Upon reviewing the result of the evaluations the CST determined that N.F. could not return to his prior placement at School 22 because this placement could not meet his academic and behavioral needs, as he requires specialized instruction, pacing, and support that an in-district placement cannot provide; rather, he requires placement in an out-of-district self-contained class with supports appropriate to his needs. Based upon those results, the CST recommended N.F. be placed out-of-district and recommended (3) possible placements.

During this IEP meeting, D.F. objected to the CST's recommendation to place N.F. out-of-district. The proposed IEP was provided to D.F. on June 28, 2022. D.F. did not sign the IEP and refused to give the District consent to submit N.F.'s records to possible out-of-district placements, which are needed for placement applications.

Although D.F. verbally objected to the IEP, he did not file for due process or request mediation within fifteen (15) days of receiving the IEP, nor did he provide any written objection to the IEP pursuant to N.J.A.C. 6A:14-2.3(h)(3)(i),(ii). Therefore, on July 14, 2022, the District implemented the June 24, 2022, IEP, as required by the IDEA and its implementing regulations.

On July 27, 2022, the District filed a Due Process Petition seeking emergent relief for an order compelling D.F. to consent and cooperate with the District in determining an out-of-district placement for N.F., including D.F.'s consent for the release of any necessary records. On August 2, 2022, the parties conferenced with ALJ Susana E. Guerrero and reached an agreement on the then-pending Due Process Petition. The agreement was placed on the record and D.F. explicitly agreed to abide by the terms as follows:

> Sign releases for the release of school records of N.F. to six potential out of district placements. Three [] from the district and three [] requested by the parent . . . West Bridge Academy, Newmark School in Scotch Plains, New View

> School in Piscataway, North Hudson Academy in North Bergen, Greenbrook Academy and DLC in Warren. These releases will be emailed to Mr. F. today and he will sign off on these releases, they can be signed electronically by tomorrow so that the records can be released to these schools.
>
> . . .
>
> There will be an in-take process and once you hear back from all of these schools the district and the parent will hold a meeting to discuss placement at that time.

On August 2, 2022, following the parties' settlement agreement, the District emailed D.F. the six (6) consent forms for the release of N.F.'s school records to each applicable school. D.F. did not provide the releases, nor did he respond to the District's email. On August 8, 2022, the District sent a follow-up email to D.F. reminding him that the District had not received the signed consent forms for the release of records. D.F. did not respond. On August 8, 2022, the District's attorney wrote to ALJ Guerrero apprising her of D.F.'s noncompliance with the parties' settlement agreement.

Thereafter, ALJ Guerrero scheduled a phone conference with the parties on August 29, 2022, to try to resolve these issues. D.F. failed to attend the phone conference.

Thereafter, on September 23, 2022, the District filed an Order to Show Cause to enforce the settlement agreement. The Honorable Robert J. Mega, P.J. Ch. heard arguments on October 21, 2022, and ordered in relevant part the following:

> **ORDERED** that Plaintiff shall provide Defendant with six meeting times for intake interviews—one for each of the six schools Plaintiff provided applications for—to take place between Monday, October 24, 2022 and Monday, November 14, 2022. These meetings shall be scheduled to take place after 12:00pm, Monday through Friday; and it is
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> **ORDERED** that Defendant shall comply with the meeting times provided by Plaintiff in accordance with the aforementioned restrictions; and it is
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> **ORDERED** that Defendant shall otherwise comply with the terms of the Settlement Agreement set forth on the record on August 2, 2022, in the matter of Elizabeth City Board of

Education v. D.F. o/b/o N.F., OAL Dkt. No. EDS 06228-22, Agency Docket No. 2023-34747.

Despite the settlement agreement and Order enforcing the same, D.F. continued to be uncooperative and obstruct the intake meetings and out-of-district placement process.

District staff ultimately coordinated the application process with D.F. at five of the six agreed upon out-of-district placements during the Fall of 2022.

Greenbrook Academy informed the District that it was unable to accommodate a placement for N.F.

The Newmark School informed the District that it was at full enrollment for the 2022-2023 school year.

After intake meetings, Nuview Academy and North Hudson Academy did not accept N.F. to their programs.

Westbridge Academy, a school chosen by D.F., accepted N.F. and notified D.F. of the same at the intake meeting on November 3, 2022.

Thereafter notwithstanding multiple requests from the District, D.F. failed to advise the District whether he was accepting the placement and instead, D.F. insisted that N.F. attend the intake meeting at the DLC, as well as other placement options not agreed to by the parties.

D.F. attended the intake meeting at the DLC on December 12, 2022. On December 21, 2022, the District Director of Special Services informed D.F. that N.F. had been accepted to the DLC and as well as by the Westbridge Academy. She requested he provide the District with his placement decision by noon on Friday December 23. In the same correspondence, she also advised him that if the District did not hear from him by

the requested date and time, the District would make a unilateral decision on school placement.

On December 22, 2022, D.F. responded by accusing Dr. Pinto-Gomez "or the District" to have deliberately delayed, restricted, and obstructed the out-of-district process. He then requested the acceptance letter from the DLC stating it was purposefully withheld because it provides evidence of obstruction. Dr. Pinto-Gomez responded and informed him that the DLC principal had sent an email and not a letter and reiterated that a choice of school needed to be made by D.F.; and that the District would choose a school by Friday at noon if he had not chosen one. At no point did D.F. provide the District with his choice of school.

On December 23, 2022, Dr. Pinto-Gomez received the formal acceptance letter from the DLC, which she had requested. She immediately forwarded the letter to D.F. and informed him that the District selected the DLC as the out-of-district placement for N.F. since he had not informed the District of his choice of school by the requested date and time. She also advised him that the District would be setting up transportation and letting him know N.F.'s start date.

D.F. responded at 10:57pm on December 23, 2022, again accusing the District of obstructing the out-of-district placement process, restricting N.F.'s educational rights, and fabricating events involving N.F. D.F. also accused the OAL and Superior Court Judges of "biased judgment and abuse of judicial authority or judicial misconduct" concerning court matters involving N.F. this past year.

The District enrolled N.F. at the DLC and on January 4, 2023, Dr. Pinto-Gomez informed D.F. that N.F. would officially start school at the DLC on January 5 and that home instruction would be terminated at that time since N.F. would now be attending school at the DLC. D.F. responded, stating among other things, that he does not agree with the placement at the DLC and instead wants N.F. to attend Westbridge Academy.[2]

[2] Westbridge Academy is no longer able to accommodate a placement for N.F. due to the passage of time.

D.F. has known about N.F.'s acceptance to Westbridge since November 3, 2022, but despite the District's repeated requests, he continuously failed to communicate with the District on whether or not he was accepting this placement until the day before N.F. was to start at the DLC. This was almost (2) months from the date of N.F.'s acceptance to Westbridge and a week and a half after he was notified that the District enrolled N.F. at the DLC.

Dr. Pinto-Gomez replied to D.F.'s email informing him to have N.F. ready for school at DLC on January 5 as DLC had been contracted to instruct N.F. since D.F. had failed to inform the District on his choice of school.

On January 5, 2023, transportation arrived at D.F.'s residence to transport N.F. to school. D.F. refused to place N.F. on the bus and stated he does not agree to the school and will not place him on the bus.

Due to D.F.'s actions, N.F. is not currently receiving any educational instruction and thus there is a break in the delivery of required services for N.F.

The District seeks to compel the immediate placement of the student at the DLC pursuant to the June 24, 2022 IEP. N.F. voiced objection to an out-of-district placement at the IEP meeting, but never filed a written objection to the placement and did not request mediation or file for due process within fifteen (15) days of receiving the IEP pursuant to N.J.A.C. 6A:14-2.3(h)(3)(i) and (ii). Thus, on July 14, 2022 the June 24, 2022 IEP went into effect as mandated by the IDEA and its implementing regulations and is the governing placement for the student. He should be compelled to attend the DLC to ensure that he receives a free and appropriate public education (FAPE) and the services he needs, which are not being provided. The District is required to place the student at an out-of-district placement pursuant to his IEP.

The respondent vocalized his objection to an out-of-district placement. He did not file a written objection or request for a due process hearing.

LEGAL ANALYSIS AND CONCLUSION

New Jersey Administrative Code 1:6A-12.1(a) provides that the affected parent(s), guardian, board or public agency may apply in writing for emergency relief. An applicant for emergency relief must set forth in their application the specific relief sought and the specific circumstances they contend justify the relief sought. N.J.A.C. 1:6A-12.1(a).

Emergent relief shall only be requested for the following issues pursuant to N.J.A.C. 6A:14-2.7(r):

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.

On January 4, 2023, the District informed D.F. that N.F. would start at DLC on January 5 and that home instruction was being terminated since N.F. would now be attending school. On January 5, 2023, transportation arrived to transport N.F. to school, but D.F. refused to place N.F. on the bus. The student is thus currently not receiving any educational instruction. The District asserts this is a break in services since the student has not started school where he would receive the recommended services, in addition to appropriate academic instruction. I **CONCLUDE** this matter involves the issue of a break in services, which could require emergent relief, pursuant to N.J.A.C. 6A:14-2.7(r)1.

Emergency relief may be granted pursuant to N.J.A.C. 1:6A-12.1(e) and N.J.A.C. 6A:14-2.7(s)(1), if the judge determines from the proofs that the following conditions have been established:

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.S.A. 6A:14-2.7(s); Crowe v. DeGioia, 90 N.J. 126 (1982), codified at N.J.A.C. 6A:3-1.6(b).

The petitioner bears the burden of satisfying all four prongs of this test. Crowe, 90 N.J. at 132-34. First, the petitioner must demonstrate irreparable harm will occur if N.F. is not immediately placed at DLC. Harm is irreparable when there can be no adequate after-the-fact remedy in law or in equity; or where monetary damages cannot adequately restore a lost experience. Crowe, 90 N.J. at 132-133; Nabel v Board of Education of Hazlet, EDU 8026-09, Final Decision on Application for Emergent Relief (June 24, 2009).

The student himself is subject to irreparable harm, because he is not receiving the services he is to be provided. The District is required to provide a FAPE. 34 CRF § 300.17. The respondent is preventing that from occurring. N.F. is not receiving counseling and support services and is not receiving an education among his peers. There is no other remedy in law or equity, or monetary damages, to restore this lost experience, for the student, or for the District. I **CONCLUDE** that irreparable harm will occur, to the student and the District, if N.F. is not compelled to attend the DLC program.

Second, the District must demonstrate it has a settled legal right to the relief requested. When a district recommends a change in placement, it shall provide written notice to the parent at least fifteen calendar days prior to the implementation of the proposed action, to allow the parent to consider the proposal. N.J.A.C. 6A:14-2.3(h)2.

Respondent had the legal right to reject the June 24, 2022, IEP within fifteen days of the notice of the change. N.J.A.C. 6A:14-2.3(h)3ii. The respondent did not submit written objection or otherwise file for a due process hearing. The District is mandated to implement the proposed action after the opportunity for the parent to contemplate same has expired unless the parent disagrees with the proposed action and the district attempts to resolve the disagreement; or the parent requests mediation or a due process hearing prior to the expiration of the fifteenth calendar day. N.J.A.C. 6A:14-2.3(h)3i. and 14-2.3(h)3ii.

The District candidly acknowledges they were aware of the respondent's disagreement with the change in placement and noted same in the IEP. The District asserts that the regulations require a parent to file a written objection to the IEP. The failure to sign the IEP does not constitute an objection to it. N.J.A.C. 6A:14-2.3(h)3ii. I **CONCLUDE** that parent's vocalized objections was not enough to stall or prevent the implementation of the June 24, 2022 IEP. I thus **CONCLUDE** that the June 24, 2022, IEP is the controlling IEP for placement. The District is mandated to implement the proposed action. N.J.A.C. 6A:14-2.3(h)3ii. Therefore, I **CONCLUDE** the District has a settled legal right to compel the change in placement.

The District argues that they are entitled to enforce "stay put" at DLC if the June 24, 2022 IEP is found to be the "then-current educational placement" for N.F. The "stay put" provision of the Individuals with Disabilities Education Act (IDEA) provides that "during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents agree otherwise, the child shall remain in the then-current educational placement of the child." 20 U.S.C. § 1415(j).

Pursuant to the New Jersey Administrative Code, no changes are to be made to a child's classification, program, or placement unless emergency relief is granted. Specifically, N.J.A.C. 6A:14-2.7(u) provides that:

> 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 by the Office of Administrative Law according to (m) above or as provided in 20 U.S.C. § 1415(k)4 as amended and supplemented.
>
> N.J.A.C. 6A:14-2.7(u).

This prohibition of a change in placement, commonly referred to as "stay put", acts as an automatic preliminary injunction. The overarching purpose is to prevent a school district from unilaterally changing a disabled student's placement. Drinker v Colonial School District, 78 F.3d 859, 864 (3d Cir. 1996). Regarding the standard of review for a "stay put" request, 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. "Congress has already balanced the competing harms as well as the competing equities." Pardini v. Allegheny Intermediate Unit, 420 F.3d 181, 188 (3d Cir. 2005). In Drinker, the court explained that 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." Drinker, 78 F.3d at 864 (citations omitted.) If the "stay put" provision applies, injunctive relief is available without the traditional showing of irreparable harm. Ringwood Board of Education v. K.H.J. ex rel K.F.J., 469 F. Supp. 2d 267 (D.N.J. 2006). Under such circumstances, it becomes the duty of the court to ascertain and enforce the "then-current educational placement" of the student. Drinker, 78 F.3d at 865.

The purpose of "stay put" is to maintain stability and continuity for the student. The first preference for interim placement is one agreed to by the parties. However, when the parties are unable to agree, the placement in effect when the due process request was made, i.e., the last uncontroverted placement or program, is the status quo. In this matter, the June 2022 IEP provided for the student to receive his education and services at DLC. The June 24, 2022, IEP came about because of N.F.'s escalating discipline and behavioral issues. The parent voiced objection to a change in placement. The fact remains that the respondent never filed a written objection within fifteen days. Having concluded that the June 24, 2022, IEP is controlling, I further **CONCLUDE** that IEP is the

"then-current educational placement" of this student. Therefore, I **CONCLUDE** "stay put" is appropriate injunctive relief, which requires the student's placement is at DLC.[3]

The third prong of the factors the District must satisfy is whether it has a likelihood of prevailing on the merits of the underlying claim. Although "stay put" is an automatic injunction and further analysis under Crowe is not necessary, the District's emergent request is to compel placement at DLC, not just on a "stay put" basis. Since I have concluded "stay put" is appropriate at DLC, pursuant to the IEP, this results in the District being mandated to implement the placement. Therefore, their request to compel such placement is appropriate and I **CONCLUDE** that the student shall be compelled to attend placement at DLC. Logically, it flows from this conclusion that the District not only has the likelihood of prevailing on the merits of its underlying claim, it has prevailed on its underlying due process claim. Therefore, the third prong for emergent relief is satisfied as I **CONCLUDE** that the District will prevail on the merits of the underlying due process claim, which satisfies its requirement to demonstrate a likelihood of prevailing on the merits.

The final prong of the test the District must satisfy to be entitled to the emergent relief sought is to demonstrate it will suffer greater harm than the respondent student if the relief is not granted. This is shown by a balancing of the equities and interests of the parties. Here, if the District's requested relief is granted, the respondent is foreclosed from objecting to the change in placement. Yet, the respondent has not come forward to present any evidence or indication that the student will be harmed if compelled to attend the program that provides academic and behavioral services. By remaining out of school, the student prevents the District from being able to provide FAPE. Even if the student had sought to return to District, such placement thwarts the District's ability to provide appropriate academic instruction and services for the health and welfare of N.F. and safeguard the student body population. It is the defiant behavior by the respondent that results in the scales being tipped to the District suffering greater harm if the student is not compelled to be placed pursuant to the IEP. I **CONCLUDE** the petitioner has

[3] DLC has informed the District that it cannot continue to hold the placement for N.F. much longer.

demonstrated it will suffer greater harm than the respondent if the emergent relief is not granted.

The District has demonstrated all four conditions set forth in Crowe and as codified in N.J.A.C. 6A:3-1.6(b). The District has made every effort to educate N.F. Therefore, I **CONCLUDE** that the petitioner is entitled to the emergent relief to compel the immediate placement of the minor student at DLC.

ORDER

It is **ORDERED** that the emergent relief requested by the District to compel compliance with the IEP and require the immediate placement of the minor student at DLC is **GRANTED**.

This decision on application for emergency relief resolves all of the issues raised in the due process complaint; therefore, no further proceedings in this matter are necessary. 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.

January 18, 2023 

DATE **LESLIE Z. CELENTANO**, ALJ

Date Received at Agency January 18, 2023

Date Mailed to Parties: January 18, 2023

dr