State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
GRANTING EMERGENT RELIEF
OAL DKT. NO. EDS 00046-18
AGENCY DKT.NO. 2018 27370

K.W., ON BEHALF OF MINOR CHILD M.G.,
Petitioner,
v.
SALEM CITY BOARD OF EDUCATION,
Respondent.

Jaime Epstein, Esquire**,** for petitioner

Corey Ahart, Esquire, for respondent

Record Closed: January 11, 2018 Decided: January 12, 2018

BEFORE **DEAN J. BUONO,** ALJ:

STATEMENT OF THE CASE

Petitioner brings this emergency relief-only action seeking an order compelling respondent, Salem City Board of Education, (respondent, District or Salem) to immediately return M.G. to the Salem Middle School and be removed from home instruction. Petitioner also seeks 1:1 aide with behavioral training and a behavioral plan based on an independent Functional Behavioral Assessment (FBA) to be conducted by

Kathleen McCabe-Odri, Ed.D. The District's placement of M.G. in home instruction was due to his significant behavioral incidents and the concern for the safety and welfare of students and staff.

PROCEDURAL HISTORY

Petitioner filed a complaint for due process with the Office of Special Education Programs (OSEP). The Complaint was filed under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §§1400 to 1482.

Petitioner filed an emergent relief application with the Office of Special Education Policy and Procedure on January 5, 2018. On that same date, the Office of Special Education Programs transmitted the matter to the Office of Administrative Law (OAL). A hearing on the request for Emergent Relief was held on January 11, 2018, and the record closed at that time.

STATEMENT OF FACTS

M.G. is a ten-year-old fifth-grader at the Salem City Middle School. He has been classified and involved in the special education program since 2015. M.G.'s most recent IEP, authored on May 24, 2017, speaks to his classification being based on being emotionally disturbed and other disabilities including but not limited to attention deficit hyperactivity disorder (ADHD) and oppositional defiant disorder (ODD). The IEP claims that "the behavior of this student does not impede his or her learning or that of others. Therefore, a behavior intervention plan is not required for this student." However, the most recent unofficial attempt at an IEP addresses that M.G. is "prone to swift mood changes, however he can quickly escalate into defiance of classroom rules and/or violence."

Since October of 2017, in just three months, Salem suspended M.G. over twenty-four days in the 2017-18 school year and he is currently being kept out of school on home instruction. His most recent three-day suspension occurred on December 13,

2017. However, the readmittance meeting did not occur until December 22, 2017, where it was decided to place M.G. in home instruction.

Petitioner alleges that as required by the IEP, M.G. had a one-on-one aide from the school that did not provide any assistance. The petitioner's claim that M.G.'s evaluations and programs including his aide and IEP related to his behavior are inappropriate. K.W. expressed her concerns to the child study team on several occasions. But on January 2, 2018, the result was that M.G. was placed out of school on home instruction. Salem changed his placement to home instruction without K.W.'s consent and when asked for information in writing they refused to provide any information. K.W. attempted to return M.G. to school on January 2, 2018, but received an e-mail that if M.G. showed up to school the authorities would "remove him and bring charges against him." Salem denies these allegations.

K.W. invoked M.G.'s stay-put rights with the complaint and application for emergent relief. Petitioner alleges that M.G. has been improperly removed and there was no proper determination of whether his behavior was related to his disabilities provider prior to being placed on home instruction. His IEP and reports indicate that these kinds of behaviors are typical of M.G. K.W. indicates the need to provide M.G. with a behavior plan that meets his needs based upon proper behavior assessment performed by a qualified behavioral professional.

The District argues, understandably, that due to the number and tenor of the incidents they placed M.G. on home instruction in an abundance of caution for the safety and welfare of its students and staff. Also, they offered alternative placement at Pinelands and the Salem Vo-Tech in an effort to further facilitate his education.

FINDINGS OF FACT

Based upon the documents in evidence and review of the testimony, I **FIND** the following facts undisputed:

M.G. is a rising fifth grade special education student who resides in the District. His current IEP, dated May 24, 2017, was developed as a result of the prior school year. **I FURTHER FIND** as **FACT** that M.G. has exhibited significant behavioral incidents since October 2017 including but not limited to attacking students and staff. **I FURTHER FIND** as **FACT** that M.G.'s behavior is consistent with his IEP and that a behavioral assessment has not been performed by the District.

Petitioner argues that a stay-put is appropriate at Salem Middle School and a Functional Behavioral Assessment is needed. Respondent essentially argues that pursuant to Crowe v. De Gioia, 90 N.J. 126 (1982), N.J.A.C. 6A:14-2.7(m), and N.J.A.C. 1:6A-12.1, the petitioner must, in order to have the relief requested granted, demonstrate that: (a) they will suffer irreparable harm if the requested relief is not granted; (b) the legal right underlying their claim is well settled; (c) they have a likelihood of prevailing on the merits of the underlying claim; and (d) when the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent if the relief requested is not granted. As a result, petitioners fail to meet their burden of proof. I do not agree.

LEGAL ANALYSIS

Pursuant to N.J.A.C. 1:6A-12.1(e) and N.J.A.C. 6A:14-2.7(s)(1), emergency relief may be granted if the judge determines from the proofs that:

> i. The petitioner will suffer irreparable harm if the requested relief is not granted;
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> ii. The legal right underlying the petitioner's claim is settled;
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> iii. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
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> 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.

In this case, it is unnecessary for me to consider whether the criteria set forth in Crowe v. De Gioia, 90 N.J. 126 (1982) have been satisfied in granting emergent relief. When the emergent-relief request effectively seeks a "stay-put" preventing the school district from making a change in placement from an agreed-upon IEP, the proper standard for relief is the "stay-put" provision under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C.A. § 1400, et seq. Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 (3d Cir. 1996) (citing Zvi D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982)) (stay-put "functions, in essence, as an automatic preliminary injunction"). The stay-put provision provides in relevant part 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.A. § 1415(j).

The relevant IDEA regulation and its counterpart in the New Jersey Administrative Code reinforce that a child remain in his or her current educational placement "during the pendency of any administrative or judicial proceeding regarding a due process complaint." 34 C.F.R. § 300.518(a) (2016); N.J.A.C. 6A:14-2.7(u). The stay-put provision functions as an automatic preliminary injunction which dispenses with the need for a court to weigh the factors for emergent relief such as irreparable harm and likelihood of success on the merits, and removes the court's discretion regarding whether an injunction should be ordered. Drinker, 78 F.3d 859. Its purpose is to maintain the status quo for the child while the dispute over the IEP remains unresolved. Ringwood Bd. of Educ. v. K.H.J., 469 F.Supp.2d 267, 270–71 (D.N.J. 2006).

In the present matter, the petitioner filed an emergent petition regarding the District's placement of M.G. on home instruction, and by way of the emergent application, invoked "stay-put." The petitioner contends that the current educational placement is the last agreed-upon placement of M.G. as set forth in the May 24, 2017, IEP. The Board contends that stay-put would be the at-home instruction because it can implement the appropriate integrated program.

As the term "current educational placement" is not defined within the IDEA, the Third Circuit standard is that "the dispositive factor in deciding a child's 'current

educational placement' should be the [IEP] . . . actually functioning when the 'stay put' is invoked." Drinker, 78 F.3d at 867 (citing the unpublished Woods ex rel. T.W. v. N.J. Dep't of Educ., No. 93-5123, 20 IDELR 439, 440 (3d Cir. Sept. 17, 1993)); see also Susquenita Sch. Dist. v. Raelee S. by Heidi S. & Byron S., 96 F.3d 78, 83 (3d Cir. 1996) (restating the standard that the terms of the IEP are dispositive of the student's "current educational placement"). The Third Circuit stressed that the stay-put provision of the IDEA assures stability and consistency in the student's education by preserving the status quo of the student's current educational placement until the proceedings under the IDEA are finalized. Drinker, 78 F.3d 859.

Furthermore, the Third Circuit explained that the stay-put provision reflects Congress's clear intention to "strip schools of the unilateral authority that they had traditionally employed to exclude [classified] students, particularly emotionally disturbed students, from school." Id. at 864 (citing Honig v. Doe, 484 U.S. 305, 323, 108 S. Ct. 592, 604, 98 L. Ed. 2d 686, 707 (1988)); School Comm. v. Dep't of Educ., 471 U.S. 359, 373, 105 S. Ct. 1996, 2004, 85 L. Ed. 2d 385, 397 (1985). Therefore, once a court determines the current educational placement, the petitioner is entitled to a stay-put order without having to satisfy the four prongs for emergent relief. Drinker, 78 F.3d at 864 ("Once 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").

The placement in effect when the request for due process was made—the last uncontroverted placement—is dispositive for the status quo or stay-put. Here, it is uncontroverted that the "then-current" educational placement for M.G. at the time of this emergent action is the IEP that was developed for him on May 24, 2017. Pursuant to that IEP, M.G. was to attend the program at Salem Middle School. Subsequent to the filing for due process, there has been no agreement between the parties to change M.G.'s current placement.

When presented with an application for relief under the stay-put provision of the IDEA, a court must determine the child's current educational placement and enter an order maintaining the status quo. Drinker, 78 F.3d at 864–65. Along with maintaining

the status quo, respondent is responsible for funding the placement as contemplated in the IEP. Id. at 865 (citing Zvi D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982) ("Implicit in the maintenance of the status quo is the requirement that a school district continue to finance an educational placement made by the agency and consented to by the parent before the parent requested a due process hearing. To cut off public funds would amount to a unilateral change in placement, prohibited by the Act")).

For example, under R.S. & M.S. v. Somerville Bd. of Educ., No. 10-4215 (MLC), 2011 U.S. Dist. LEXIS 748, *34 (D.N.J. Jan. 4, 2011), a school district was even required to maintain a disabled child's placement in a sectarian school, despite possibly violating N.J.S.A. 18A:46-14, because the school was the child's "current educational placement" when litigation over the child's placement began. The Somerville court explained:

> We find that under the undisputed facts in the record, [Timothy Christian School ("TCS")] is the stay put placement of the student. We will call it the Stay Put Placement for purposes of this ruling. It was the approved placement in the 2008–2009 IEP signed by the parties. . . . This dispute arose in the Fall of 2008, when D.S. was actually attending TCS as a high school ninth grader under that placement. It is clear and we so find, that TCS was "the operative placement actually functioning at the time the dispute first [arose]." Drinker, 78 F.3d at 867. We therefore conclude that it must remain the Stay Put Placement until the entire case is resolved either by agreement or further litigation.
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> The IDEA stay put law and regulations admit of only two exceptions where it is the Board, rather than the parents, seeking to change the operative placement during the litigation. The first is where the parents agree with the change of placement. 20 U.S.C. § 1415(j). The second exception arises under the disciplinary provisions of IDEA, 20 U.S.C. § 1415(k). Clearly, neither exception applies here, and no party argued otherwise.
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> Where, as here, neither exception applies, the language of the stay put provision is "unequivocal." Honig, 484 U.S. at 323. It functions as an "automatic preliminary injunction," substituting "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 fair ground for litigation and a balance of hardships." Drinker, 78 F.3d at 864 (quoting Zvi D., 694 F.2d at 906).
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> [Id. at 32–33 (citations omitted) (emphasis added).]

Neither of the two exceptions to the stay-put law is applicable here because the parents have not agreed to the change in placement and the disciplinary provisions do not rise to the level in this matter.

As demonstrated in Somerville, the fact that a current educational placement for a child may even violate N.J.S.A. 18A:46-14 has no bearing on a request for stay-put. Somerville, 2011 U.S. Dist. LEXIS 748 at 34 ("the protestations by the Somerville Board, true as they seem to be—that at the time D.S. was originally placed at TCS . . . it was a mistake . . . and . . . that even when both the Branchburg and Somerville Boards apparently approved the 2008–2009 IEP, they only later found out that they had made a mistake—are unavailing under IDEA's stay put provision") (emphasis added). It remains the law in the Third Circuit that when a petition for due process is filed, deciding stay-put requires only a determination of the child's current educational placement and then, simply, an order maintaining the status quo.

Respondent seems to argue that the standard for the granting of emergent relief is set forth in N.J.A.C. 6A:3-1.6(b). However, in Drinker v. Colonial School District, 78 F.3d 859 (3d Cir. 1996), the Third Circuit held that a judge should not look at the irreparable harm and likelihood of success factors when analyzing a request for a stay-put order. A parent may invoke the stay-put provision when a school district proposes "a fundamental change in, or elimination of, a basis element of "the current educational placement." Lunceford v. D.C. Bd. Of Educ., 745 F. 1577, 1582 (D.C. 1984). "The current educational placement refers to the type of programming and services provided rather than the physical location of the student's services. J.F., et al. v. Byram Township Board of Education, No. 2:2014cv05156 - Document 31 (D.N.J. 2015). The stay-put provision represents Congress's policy choice that all handicapped children, regardless of whether their case is meritorious or not, are to remain in their current educational placement until the dispute with regard to their placements is ultimately resolved.

Drinker at 859. The Third Circuit declared that the language of the stay-put provision is "unequivocal" and "mandated." Drinker at 864.

After hearing the arguments of petitioner and respondent and considering all documents submitted, I **CONCLUDE**, in accordance with the standards set forth in Drinker v. Colonial School District, that the petitioner's motion for emergent relief is **GRANTED**. It is **ORDERED** that M.G. shall be permitted to continue to attend the fifth-grade program at Salem Middle School. It is **FURTHER ORDERED** that M.G. be subject to an independent Functional Behavioral Assessment to be conducted by Kathleen McCabe-Odri, Ed.D.

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 Programs.

January 12, 2018
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: January 12, 2018

Date Sent to Parties: January 12, 2018

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