State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
EMERGENT RELIEF
OAL DKT. NO. EDS 06534-18
AGENCY DKT. NO. 2018 27953

N.M. AND J.M. ON BEHALF OF V.M.,
Petitioners,
v.
CHESTER TOWNSHIP BOARD OF EDUCATION,
Respondent.

Julie M. W. Warshaw, Esq., for petitioners (Warshaw Law Firm, attorneys)

Jodi S. Howlett, Esq., for respondent (Cleary, Giacobbe, Alfieri, Jacobs, attorneys)

Record Closed: May 11, 2018 Decided: May 11, 2018

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

STATEMENT OF THE CASE

Petitioners, N.M. and J.M. on behalf of V.M., request an emergent order seeking the following: the termination of any home instruction services and the immediate return of the student to the District with all supports and services as set forth in the IEP;

the placement of the student in a different resource room with a one-to-one aide while independent educational evaluations are completed; the completion of independent educational evaluations with psychological and behavioral evaluations as well; the exemption of the student from the "points" and "level" systems conducted by the District; allowing the student to participate in all recesses available to 4th grade students who do not receive special education services; and an adjudication that the student's placement cannot be changed without a new IEP.

PROCEDURAL HISTORY

On May 4, 2018, petitioners' request for emergent relief and a due process hearing was filed with the Office of Special Education Programs (OSEP) of the New Jersey Department of Education. On May 7, 2018, the emergent relief only was transmitted to the Office of Administrative Law for oral argument, which was held on May 11, 2018.

FACTUAL DISCUSSION

V.M. is a ten-year-old male student in the 4th grade who is eligible for special education and related services under the classification of Other Health Impaired (OHI).

V.M.'s initial IEP was implemented by the District on June 9, 2017. Pursuant to this IEP, V.M. was placed in a classroom with four other students and V.M. was diagnosed with ADHD and Oppositional Defiant Disorder (ODD) for the 2017–2018 school year. It is alleged by the petitioners that in this classroom, two other older students "tend to team up against V.M." This caused V.M. to experience increased stress and frustration. V.M. was placed in a resource classroom for reading and math with in-class support with a paraprofessional for science and social studies.

It was agreed by the parties that Independent Evaluations (IE) would be conducted. Furthermore, V.M. also received Occupational Therapy (OT), social skills group and individual counseling sessions (counseling) with a school social worker as

set forth in his IEP. V.M. also received a positive behavioral program to address V.M.'s behavioral needs.

In V.M.'s classroom, the District implemented a "point system" as part of the "class positive behavior plan" under which students are able to earn recess privileges based on behavior and academic standards. This was started by the District in January 2018 and is not part of V.M.'s IEP. The parents did not consent to the change of the IEP and are opposed to same. Under this system if the requisite number of points is not earned by a student, that student is prohibited from engaging in recess time.

Petitioners maintain that based on V.M.'s ADHD, regular recess and exercise are important to his well-being and ability to succeed in his educational program. Despite this position, V.M. has been deprived of recess on numerous occasions during the 2017–2018 school year based on his failure to earn sufficient points.

In addition to the point system, the District has implemented a "positive behavior medication system/plan" which involves "levels." Under this plan, students are able to earn academic and behavior points and move from Level I (lowest) to Level III (highest). It is the parents' belief that as V.M. is in the lowest level (Level I), his self-esteem was reduced and had feelings of hopelessness and frustration.

On March 13, 2018, an Annual Review/IEP meeting took place with the parents and the District. At this meeting, the District proposed a possible out-of-district placement which was rejected by the parents. The parents also objected to the "point system" which they believed was hindering their son in school.

It is the District's position that V.M. struggled behaviorally in the District educational program. The District states that V.M. engages in aggressive/physical behaviors which were harmful to peers and adults and potentially to himself. Based on these allegations, the District continued to assess the appropriateness of V.M. in-District program and considered other viable program options including programming requested by the petitioners. The District maintains that due to V.M.'s escalating and

more frequent aggressive behaviors, there was a need for a change in placement to a program which could help regulate his emotions and behaviors.

Despite the above, an IEP meeting took place on March 13, 2018 wherein the District proposed an out-of-district therapeutic school such as the Windsor Academy, the Cornerstone Day School, the Shepard Elementary School and the Rutgers Day School. Petitioners did not support an out-of-district school placement. The IEP team concluded that V.M. needed additional therapeutic supports and thus could not be appropriately educated in an in-District program. Thereafter, a draft IEP was prepared and sent to the parents on April 5, 2018. There was no filing for mediation or due process by the parents within fifteen days after the Annual IEP meeting on March 13, 2018.

After the March 13, 2018 Annual Review/IEP meeting, the parents requested an Independent Educational Evaluation for their son. This request was granted by the District, however, to date, has not been completed. On May 1, 2018, the District states that V.M. engaged in disruptive behaviors and was given an out-of-school suspension for one day, i.e., May 2, 2018. There was no bodily harm caused by V.M.'s acts; however, the District described the behavior as violent and aggressive acts toward a staff member. There was no request by the District for a psychiatric clearance in order to return to school but V.M. was given a one day out of school suspension. The proposed home instruction provides ten hours of home instruction per week pursuant to the March 13, 2018 IEP. The District states that the petitioners at first refused the home instruction, but later allowed same which commenced on May 7, 2018. Petitioners stated that V.M. will not receive other supports, including social skills group and individual counseling or participation in other activities; however, the District states that it will be providing V.M. with the related services as set forth in the March 2018 IEP including counseling, OT and PARCC testing.

The District maintains that the petitioners refuse to consent to have V.M.'s records sent to proposed out-of-district schools. The District continued to obtain said consent to assist in V.M.'s placement in an out-of-district school and during this time

V.M.'s behavior at school continued to escalate.

CONCLUSIONS OF LAW

N.J.A.C. 1:6A-12.1(a) provides that the affected parent(s), guardian, board or public agency may apply in writing for emergency relief. An emergency-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 and, if an expert's opinion is included, the affidavit shall specify the expert's qualifications.

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.

In this case, it is clear that there is an issue which stems from the delivery of educational services provided at home and issues concerning placement pending the outcome of due process proceedings. Petitioners allege that they are entitled to the termination of home instruction and an immediate return of the student to the District with all supports and services as set forth in the first IEP; placement in a different resource room with a one-to-one aide while IE are conducted; completion of the IEs; the exemption from the "points" and "level" systems; V.M.'s participation in all recesses; and a finding that V.M.'s placement cannot be changed without a new IEP. Therefore, I

CONCLUDE it has been established there exists issues which warrant a request for emergent relief.

EMERGENT RELIEF

The standards which must be met by the moving party in an application for emergent relief in a matter concerning a special needs child are embodied in N.J.A.C. 6A:14-2.7(m)1, N.J.A.C. 1:6A-12.1, and Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982). Emergency relief may only be granted if the judge determines that:

1. The petitioner will suffer irreparable harm if the relief is not granted;
2. The legal right underlying the petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

Petitioners must satisfy all four prongs of the Crowe test, unless this test if not applicable based on stay put issues and the burden is on the petitioners. Id. at 132-133. In addition, the standard requires that the harm suffered must be both substantial and immediate. Subcarrier Communications, Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997).

STAY PUT ISSUE

The "stay put" provision of the Individuals with Disabilities Education Act (IDEA) provides in pertinent part:

> [D]uring 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.A. § 1415(j).]

Furthermore, 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. N.J.A.C. 6A:14-2.7(u) specifically provides:

> 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.

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. 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, 420 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:

> "[T]he [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).]

In other words, if the "stay put" provision applies, injunctive relief is available without the traditional showing of irreparable harm. Ringwood Bd. of Educ. v. K.H.J. ex rel 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.

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, V.M.'s current IEP places him in at home instruction.

In this case, the District is within its rights to implement the March 13, 2018 IEP in the absence of the petitioners filing a petition for due process and/or mediation within fifteen (15) days of receiving the IEP. Counsel for the petitioners admitted in oral argument that although she did not represent the parents at the time the IEP was drafted in March 2018, her clients did fail to file for due process or mediation within fifteen (15) days of the IEP being implemented. In addition, the District's decision to place V.M. on home instruction is not a change in placement and was not a result of discipline. The decision to place V.M. on home instruction was the result of the implementation of the March 13, 2018, IEP when the District determined that the in-district educational program was not providing V.M. with a proper education.

Counsel for the petitioners cited K.W. on behalf of M.G. v. Salem City Board of Education, OAL DKT EDS 00046-2018, (decided on January 12, 2018) for the position that the stay put provision applies to the last agreed upon placement and, in this case, not the IEP implemented from the IEP meeting on March 13, 2018. I **FIND** that the K.W. on Behalf of M.G. matter is inapplicable in this case as it is factually different. In this case, the IEP was implemented as a matter of law because it is undisputed that the petitioners failed to file a petition for due process and/or mediation within fifteen days after the service of the IEP on the parents. As such by operation of law, V.M.'s program is an out-of-district school, subject to the petitioners' challenge in the due process petition.

Therefore, I **CONCLUDE** that the IDEA's stay put provision requires V.M. to remain in the home instruction placement pending the outcome of the underlying due process petition. See, e.g., E.S. o/b/o J.S. v. Union Twp. Bd. of Educ., EDS 11355-07,

Final Decision (Nov. 1, 2007) <http://njlaw.rutgers.edu/collections/oal/> (finding that stay put required the child to remain in her stay put placement despite allegations that the child had not made any academic or social progress and had become extremely uncomfortable with some teachers and students at the school and that the child was refusing to attend the stay put placement.).

For the foregoing reasons, the petitioners have not demonstrated entitlement to emergent relief on the basis of stay put as stay put places V.M. on home instruction pursuant to the March 2018 IEP which was implemented by operation of law. The relief sought by the petitioners is, therefore, **DENIED**. In the event that the petitioners otherwise seek emergent relief in this matter beyond their argument under stay put, they must satisfy all four prongs under Crowe v. DiGioia, 90 N.J. 126 (1982). The burden to meet all four prongs is on the petitioners. See also N.J.A.C. 1:6A-12.1(e); N.J.A.C. 6A:3-1.6(b).

IRREPARABLE HARM

Turning to the first requirement for emergent relief, it is well settled that relief should not be granted except "when necessary to prevent irreparable harm." Crowe, 90 N.J. at 132. In this regard, harm is generally considered irreparable if it cannot be adequately redressed by monetary damages. Id. at 132-33. In other words, it has been described as "'substantial injury to a material degree coupled with the inadequacy of money damages.'" Judice's Sunshine Pontiac, Inc. v. General Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976) (citation omitted). See New Jersey Dep't of Environmental Protection v. Circle Carting, Inc., 2004 N.J. AGEN LEXIS 968 (April 2, 2004) (finding no irreparable harm in connection with the revocation of respondent's solid waste license in that financial loss is generally insufficient to demonstrate this requirement). The moving party bears the burden of proving irreparable harm. More than a risk of irreparable harm must be demonstrated. Continental Group, Inc. v. Amoco Chemicals Corp., 614 F. 2d 351, 359 (D.N.J. 1980). The requisite for injunctive relief is a "clear showing of immediate irreparable injury," or a "'presently existing actual threat; (an injunction) may not be used simply to eliminate a possibility of a remote

future injury, or a future invasion of rights, be those rights protected by statute or by common law.'" Ibid. (citation omitted.)

In the instant matter, there has not been a showing of "immediate irreparable injury." Petitioners did argue that there is a risk of irreparable harm in the event that V.M. is not placed in a program in district. In oral argument, there was much emphasis by petitioners' counsel on a lack of educational services and socialization even though the home instruction appears to have begun on May 7, 2018. I have no reason to question the good intentions and skills of the Chester School District's special education staff and teachers at this point especially in light of the allegations of V.M.'s extensive history of erratic and troublesome behavior.

None of the petitioners' broad and vague assertions support a conclusion that V.M will suffer irreparable harm, and no other facts have been offered to support a claim that V.M. will suffer substantial, immediate, and irreparable harm if he is not returned to in-district placement pending the outcome of the due process hearing. For the foregoing reasons, I **CONCLUDE** that petitioners have not demonstrated that V.M. will suffer irreparable harm if the requested relief is not granted.

LEGAL RIGHT IS SETTLED/LIKELIHOOD OF PREVAILING ON THE MERITS

For the petitioners to prevail in this emergent relief application, they must demonstrate that the legal right to their underlying claim is settled and must make a preliminary showing of a reasonable probability of an ultimate success on the merits. Petitioners have failed to demonstrate that they have a likelihood of prevailing on the merits on the underlying claim nor that their legal right to their claim is settled. Petitioners asked that the District place V.M. in a resource room in-district. However, there is no legal entitlement for V.M. to continue his education in-district pending the outcome of the due process petition. There is no requirement that V.M. receive an in-district placement at this time. See J.F. and J.F. o/b/o J.F. v. Byram Twp. Bd. of Education, OAL Dkt. No. EDS 9803-14 (2014) where a request for emergent relief was

denied based on the fact that the new school district offered comparable programming to what was required in the last IEP from the previous school district; aff'd in unpublished U.S. District Court, Civil Case No. 14-5156.

The law is in fact well-settled in the District's favor. Pursuant to N.J.A.C. 6A:14-3.7, "for other than the initial implementation of special education, consent is not required." Furthermore, according to N.J.A.C. 6A:14-4.8, a student may receive instruction via home instruction and the IEP shall be implemented therein. In addition, in accordance with N.J.A.C. 6A:14-2.8, "removals of a student with a disability from the student's current educational placement for disciplinary reasons constitutes a change in placement if the removal is for more than 10 consecutive school days or the student is subjected to a series of short-term removals that constitute a pattern because they cumulate to more than 10 school days in a school year . . . ." This is not the case herein as the student has been suspended for one day and the home instruction is based on the March 2018 IEP.

Accordingly, I must **CONCLUDE** that petitioners have failed to demonstrate a likelihood of success on the merits of the case and have not demonstrated that their legal right to the underlying claim is well-settled.

For the same reasons I **CONCLUDE** that petitioner has failed to demonstrate that V.M. will suffer greater harm than respondent will suffer if the requested relief is not granted.

Based on the foregoing, I **CONCLUDE** that petitioners have failed to meet the requirements set forth in N.J.A.C. 6A:3-1.6(b), warranting a stay or emergent relief in this matter.

There are issues raised by the petitioners, and clearly the petitioners have sincere significant concerns, regarding the placement of V.M. which are the subject of the due process matter. Such issues cannot not be granted on an emergent basis in their favor and a full plenary hearing is necessary before the full merits of their claim

can be determined. Whether an out-of-district placement itself provides an appropriate setting and is an appropriate program, is not at issue in this emergent proceeding unless and until the petitioner has demonstrated a likelihood that the District's proposed setting would be found inappropriate. Such is not the case in the current matter.

The fact that no evidence beyond assertion is offered that V.M. will suffer irreparable harm if he participates in the district's proposed home instruction and a failure to demonstrate a likelihood of success on the merits as to the home instruction placement cause me to **CONCLUDE** that the petitioners have not met their burden required to obtain emergent relief. Consequently, the petitioners' request for emergency relief is **DENIED**.

ORDER

For the foregoing reasons, I **ORDER** that the petitioners are not entitled to the requested emergent relief and that the petitioners' request for emergency 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 Programs.

May 11, 2018
DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency ______________________

Date Mailed to Parties: ______________________
jb