*State of New Jersey*
OFFICE OF ADMINISTRATIVE LAW

**FINAL DECISION**

**EMERGENT RELIEF**

OAL DKT. NO. EDS-00827-21

AGENCY DKT.NO. 2021-32480

**L.S. ON BEHALF OF C.M.,**

Petitioner,

v.

**GLOUCESTER CITY BOARD OF EDUCATION,**

Respondent.

_____

**L.S.,** pro se, for petitioner

**William C. Morlok**, Esq., for respondent (Parker McCay, P.A., attorneys)

Record Closed: February 8, 2021 Decided: February 11, 2021

BEFORE: **KATHLEEN M. CALEMMO**, ALJ:

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, L.S., on behalf of C.M., filed a Request for Emergent Relief seeking "stay put" protection to allow C.M. to remain in the out-of-district placement he attended prior to petitioner's move and enrollment in the Gloucester City School District. To that end, I reviewed the file, petition and supporting documentation in support of the emergent application. I also reviewed the opposition brief filed by the Gloucester City Board of Education (Gloucester), Certification of Eliza Rawley, Director of Special Services, with exhibits, and Gloucester's request for emergent relief to compel evaluations. I conducted

a telephonic conference on February 5, 2021[1] and heard oral argument via zoom on February 8, 2021.

## STATEMENT OF FACTS

Petitioner, L.S., moved her family to Gloucester City and enrolled her son, C.M., in the Gloucester City School District on January 14, 2021. Prior to the move, C.M., who is classified under the Individuals with Disabilities Education Act (IDEA), attended Reed Academy, an out-of-district placement under his Individual Education Program (IEP) from his former school district in Paterson, New Jersey.

By letter, dated January 21, 2021, Social Worker, MaryAnn McNally (McNally), of the Child Study Team (CST), notified L.S. that upon a review of C.M.'s records, Gloucester would not be continuing C.M.'s out-of-district placement but would "mirror" C.M.'s prior IEP program plan in district. (Exhibit A, Rawley Certification.) As stated in the letter, Gloucester offered the following program at its five-half-day-in-person GMS Autism program:

> Instruction from a Special Education teacher to include core academic subjects, life skills, special electives and PE/Health
>
> Behavior consultation with a Board Certified Behavior Analyst (BCBA), Applied Behavior Analysis teaching strategies
>
> Speech and language therapy
>
> Curb to Curb transportation
>
> 1:1 supplemental support service
>
> [Exhibit A, Rawley Certification]

The above program was being offered while Gloucester developed a new IEP for C.M. To that end, Gloucester proposed conducting re-evaluations. Gloucester's CST

[1] Petitioner's failure to participate in the telephone conference had no bearing on the hearing and did not adversely affect her application. At the telephone conference, Gloucester's attorney, Mr. Morlok, advised me that Gloucester was withdrawing its emergent application because the evaluations of C.M. were completed as of February 5, 2021.

completed the evaluations on Friday, February 5, 2021, and it's anticipated IEP meeting is scheduled for February 12, 2021.

C.M. continues to attend Reed Academy located in Bergen County, New Jersey, which is approximately a two hour drive from Gloucester. Due to the continuing Covid-19 pandemic, C.M. currently attends virtual classes and is fully remote from his home in Gloucester. In McNally's letter of January 21, 2021, Gloucester gave L.S. the option for C.M. to begin instruction in-person, hybrid model, or fully remote but recommended his participation in person.

Petitioner's emergent application is governed by 20 U.S.C. §1414(d)(2)(C)(i)(I) and N.J.A.C. 6A:14-4.1(g)(1). The Individuals with Disabilities Act, 20 U.S.C. §1414(d)(2)(C)(i)(I), provides as follows:

> (C) Program for children who transfer school districts.
>
> (i) In general.
>
> (I) Transfer within the same State. In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same State, the local educational agency shall provide such child with a free appropriate public education, **including services comparable to those described in the previously held IEP**, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law.
>
> [Emphasis Added]

N.J.A.C. 6A:14-4.1(g)(1), provides as follows:

> When a student with a disability transfers from one New Jersey school district to another or from an out-of-State to a New Jersey school district, the child study team of the 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:
>
> > 1. for a student who transfers from one New Jersey school district to another New Jersey school district, if the parents and the district agree, the IEP shall be implemented as written. If the appropriate school district staff do not agree to implement the current IEP, the district shall conduct all necessary assessments and within 30 days of the date the student enrolls in the district, develop and implement a new IEP for the student.

Petitioner voluntarily decided to move and thus, transferred C.M. to respondent for school on January 14, 2021. Under the IDEA, as specified in the above code section, respondent was required to provide C.M. with a free appropriate public education (FAPE) that included services comparable to those described in his Paterson IEP. Under the New Jersey regulation, respondent was also required to act without delay and provide a program comparable to that set forth in the student's current IEP. I **FIND** that Gloucester acted without delay in reviewing C.M.'s current IEP program and offered a comparable program. I **FURTHER FIND** that Gloucester took immediate action to conduct evaluations to develop and propose a new IEP for C.M. as required under the regulation.

Petitioner contends that the District should continue C.M.'s out-of-district placement until it proposes and implements a new IEP and seeks relief on an emergent basis. It should be noted, as set forth in petitioner's application and as testified to by Ms. Rawley, Gloucester proposed C.M. start its proposed in district program on January 25, 2021. L.S. filed her application for emergent relief requesting "stay put" the same day she received the CST's letter of January 21, 2021, offering comparable services.

## LEGAL ANALYSIS

This emergent application asks me to apply the protections afforded by the "stay put" provision of the IDEA, 20 U.S.C. 1415(j), and its New Jersey counterparts, N.J.A.C.

6A:14-2.6(d) and 2.7(u), to a situation wherein the parent voluntarily moved and enrolled her child in a new school district. The "stay put" provisions of law operate as an automatic preliminary injunction. IDEA's "stay put" requirement evinces Congress' policy choice that handicapped children stay in their current educational placement until the dispute over their placement is resolved, and that once a court determines the current placement, petitioners are entitled to an order "without satisfaction of the usual prerequisites to injunctive relief". Drinker by Drinker v. Colonial School Dist., 78 F.3d 859, 864-65 (3d Cir. 1996.)

But the requirements of "stay put" are a bit more nuanced in this context. The holding in J.F. v. Bryam Twp. Bd. of Educ., 629 Fed. Appx. 235, 237-238 (3d Cir. Oct. 29, 2015),[2] supports the position that when a student transfers under an existing IEP, the new district's obligation under the IDEA is to provide comparable services, but not necessarily the out-of-district placement. In Byram, the school district advised it could implement the student's IEP in district and would not pay for the continued placement at a private school. The petitioner in Byram advanced the same position, as the parent herein, namely that during the pendency of the due process petition, unless there is an agreement, the IDEA's stay-put provision, 20 U.S.C. §1415(j), requires that "the child shall remain in the then-current educational placement." Id. at 237. As noted, in Byram, the purpose of the "stay-put" provision is to maintain the status quo in situations where the school district acts unilaterally. In situations where a parent chooses to move to a new school district, the same procedural safeguards are not required. Id.

Likewise, the United States District Court for the District of New Jersey in Cinnaminson Township Board of Education v. K.L. o/b/o R.L., 2016 WL 4212121 *5 (D.N.J. Aug. 9, 2016), determined:

[2] The Byram case is not considered binding precedent in the Third Circuit as it was not an opinion of the full court.

> The use of 20 U.S.C. §1414 (d)(2)(C)(i)(I), instead of "stay-put" placements, balances the goal of maintaining educational consistency for special needs students with the recognition that families have accepted some amount of discontinuity in their child's education when they voluntarily change school districts.
>
> [Id. at 5.]

Consistent with the holdings in Byram and Cinnaminson, "comparable services" does not require the new school district to continue the private school placement specified in the prior school's IEP. Because Gloucester satisfied the controlling New Jersey regulation by offering comparable services and conducting all necessary assessments within thirty days of the date the student enrolled in the district, towards the development and implementation of a new IEP for the student under N.J.A.C. 6A:14-4.1(g), I **CONCLUDE** that stay-put does not apply.

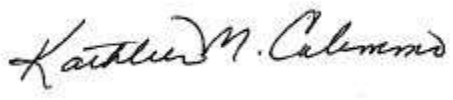
Finally, it is noted that this application for relief likewise fails under a traditional emergent relief application analysis. See: N.J.A.C. 6A:14-2.7; Crowe v DeGioia, 90 N.J. 126 (1982). The parent has not shown how attendance in the comparable program offered by Gloucester will cause irreparable harm to C.M. while Gloucester develops a new IEP within the parameters of N.J.A.C. 6A:14-4.1(g). The parent's legal right to "stay put" has not been established, therefore, she cannot demonstrate a likelihood of success on the merits of her claim. A balancing of the equities militates against granting the relief requested for the reasons expressed above.

## ORDER

Based on the foregoing, the request for emergent relief is **DENIED**.

This decision on application for emergency relief resolves all the issues raised as there is no underlying 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 Policy and Dispute Resolution.



February 11, 2021 _____

DATE

**KATHLEEN M. CALEMMO**, ALJ

Date Received at Agency _____

Date E-Mailed to Parties: _____

KMC/tat

## APPENDIX

## WITNESSES

**For petitioner:**

L.S., mother

S.S., grandmother

**For respondent**:

Eliza Rawley, Director of Special Services

## EXHIBITS

**For petitioner**:

Request for Emergent Relief with attached Certification and IEP

**For respondent**:

Certification of Eliza Rawley with attached Exhibit A