State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION GRANTING EMERGENT RELIEF

K.M. and D.M. on behalf of C.M.,
Petitioners**,**
v.
BRICK TOWNSHIP BOARD OF EDUCATION,
Respondent.

OAL DKT. NO. EDS 05778-21
AGENCY DKT. NO. 2022-33150

Sarah E. Zuba, Esquire, on behalf of petitioners, (Reisman Carolla Gran and Zuba, LLP, attorneys)

Paul C. Kalac, Esquire, on behalf of respondent (Weiner Law Group, attorneys)

Record Closed: July 16, 2021 Decided: July 19, 2021

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

STATEMENT OF THE CASE

K.M. and D.M. on behalf of C.M. (petitioners), bring an action for emergent relief against Brick Township Board of Education (Board/District), seeking an order for emergent relief including a determination that the stay-put placement is in an LLD program for the 2021 extended school year, and a resource program for the 2021-2022 school year.

PROCEDURAL HISTORY

Petitioners filed a request for emergency relief and a due process hearing at the Office of Special Education Programs (OSEP). On July 12, 2021, OSEP transmitted the matter to the Office of Administrative Law (OAL) as a contested case seeking emergent relief for the petitioner. The parties presented oral argument on the emergent relief application on July 16, 2021, via Zoom teleconferencing system due to COVID-19 restrictions.

FACTUAL DISCUSSION

Petitioners argue in their request for emergent relief that Brick Township Board of Education honor the stay-put provisions of the Individuals with Disabilities Education Act by maintaining C.M.'s last agreed upon placement. C.M. is an eight-year-old student with disabilities who attends Lanes Mill Elementary School in Brick, New Jersey. He is eligible to receive special education and related services under the category Mild Intellectual Disability, and he has been diagnosed with Down Syndrome and apraxia, with some related medical needs. For the past school year, he participated in an In-Class Resource (Support) general education class throughout the entire school day pursuant to his annual review IEP prepared on February 19, 2020. See Certification of Petitioners, dated July 12, 2021 ("Petitioners Cert.") at ¶ 3, Ex. A. The District convened an IEP meeting on December 18, 2020, to revise C.M.'s IEP but chose to maintain the same placement. Petitioners Cert. at ¶¶ 3, 6, Ex. B. The District then held C.M.'s annual review IEP meeting on February 5, 2021. See Petitioners Cert. at ¶ 7, Ex. C. Again, the District proposed an IEP that maintained C.M.'s placement in an In-Class Resource (Support) general education class for the entire day from February 6, 2021 to June 30, 2021, and from September 1, 2021 through February 4, 2022. It also provided for placement in a Special Class Mild/Moderate Learning or Language Disabilities ("LLD") for Extended School Year (ESY) 2021, from July 1, 2021 through August 12, 2021. Id. This was the same placement for ESY that C.M. had participated in during ESY 2020. Petitioners Cert. at ¶ 4, Ex. A. 3 C.M. remained in his In-Class Resource (Support) general education class for the entire 2020-2021 school year. Petitioners Cert. at ¶ 3. The District then convened an IEP meeting to assess progress and review or revise the IEP on June 8, 2021. At that meeting,

the District proposed to change C.M.'s placement for both ESY 2021 and the 2021-2022 school year to Special Class Autism. Petitioners Cert. at ¶ 9, Ex. D. Because his parents disagreed with this proposed change in program and placement, they shared their disagreement at the meeting and filed for mediation on June 16, 2021, to resolve the dispute and demanded that the District honor C.M.'s stay-put placement until resolution was reached. Request for Mediation, Ex. G to Petitioners Cert.; Petitioners Cert. at ¶¶ 10-11. The petitioners received a welcome letter from the teacher of the LLD ESY class, Mrs. Schmidt, on July 4, 2021. That class was slated to begin on July 12, 2021. Petitioners Cert. at ¶ 12. On July 6, after the school day was already over, they were contacted by C.M.'s case manager via email. The case manager wrote, "I was asked to reach out to you after speaking with my superiors to let you know that Mrs. Schmidt will not be C.M.'s teacher during the ESY program this summer. It will be Mrs. Royds who is a teacher in our Autism program." The Autism program started on that very day, July 6, 2021. Petitioners Cert. at ¶ 13; Ex. E. The attorney for petitioners, wrote to attorney for the District to confirm that the District would, in fact, honor the automatic preliminary injunction in favor of C.M.'s last agreed upon placement in the LLD ESY class, asking for a response by the end of the date on Thursday, July 8, 2021. No reply was received by the end of the day on Sunday, July 11, 2021, the day before that class would begin. Petitioners Cert. at ¶¶ 14-15, Ex. F.4

Petitioners argue that a parent or school district may request emergent relief for the following reasons, in accordance with N.J.A.C. 6A:14-2.7(r)1: (i.) Issues involving a break in the delivery of services; (ii.) issues involving disciplinary action, including manifestation determinations and determinations of interim alternate education settings; (iii.) issues concerning placement pending outcome of due process proceedings; and (iv.) issues involving graduation or participation in graduation ceremonies. However, here, petitioners are entitled to request emergent relief as this issue squarely concerns placement pending outcome of the due process proceedings. Under the IDEA's "Stay Put" provision, the District must maintain C.M.'s "current educational placement" pending the outcome of the due process proceeding and the District has the burden of proof to demonstrate that stay-put doesn't apply.

In the application for emergent relief, petitioners seek an order requiring the school district to maintain C.M.'s placement in the LLD class for ESY and the In-Class Resource (Support) class for the 2021-2022 school year under IDEA's stay-put provision, 20 U.S.C. § 1415(j). The stay-put provision is one of the centerpieces of IDEA's protections for children crafted by Congress to prevent them from suffering harm arising from tug-of-war between parents and school districts. In any suit brought by a parent seeking relief under IDEA's stay-put provision, the burden rests with the school district to demonstrate that the educational status must be altered. Honig v. Doe, 484 U.S. 305, 328 n.10 (1988). See also Olu-Cole v. E.L. Haynes Public Charter Sch., 930 F.3d 519 (D.C. Cir. 2019) ("local educational agency must overcome a heavy evidentiary burden to displace the default rule that the child will stay put").

The IDEA gives parents the right to mediation and an impartial due process hearing on complaints regarding the identification, evaluation, or educational placement or the provision of a free appropriate public education ("FAPE") to their children. and to state or federal judicial review of final administrative decisions. 20 U.S.C. § 1415(b) & (i)(2); 34 C.F.R. 300.507-516; N.J.A.C. 6A:2.7(a) & (v). Recognizing that the dispute-resolution process can take time, IDEA provides that once a parent or student initiates a proceeding under 20 U.S.C. § 1415, the student's educational status is maintained pursuant to the stay-put provision until the proceedings have concluded. Proceedings include mediation and due process. IDEA mandates that: "Except as provided in subsection (k)(4),1 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) (emphasis supplied). See also 34 C.F.R. 300.518(a); N.J.A.C. 6A:14-2.7(u). New Jersey's special education regulation also require that, "pending the outcome of a 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 . . ." N.J.A.C. 6A:14- 2.7(u)(emphasis supplied). The same applies to mediation. N.J.A.C. 6A:14-2.6(d)(10) ("Pending the outcome of mediation, no change shall be made to the student's classification, program, or placement, unless both parties agree. Subsection (k)(4) refers to temporary placement changes to interim alternative educational settings in response to disciplinary issues related to student conduct. The Third Circuit Court of

Appeals first addressed IDEA's stay-put provision in 1982 when it held that withdrawing funding for a private school placement during court or administrative proceedings violated the IDEA's stay-put provision. Grymes v. Madden, 672 F.2d 321, 322-323 (3d Cir. 1982). In DeLeon v. Susquehanna Community Sch. Dist., 747 F.2d 149, 153-154(3d Cir. 1984), it ruled that the term "change in educational placement" must be given an expansive reading and that the "touchstone in interpreting section 1415 has to be whether the decision is likely to affect in some significant way the child's learning experience." In 1988, the United States Supreme Court was asked to read a "dangerousness" exception into IDEA's stay-put provision so that school officials could unilaterally exclude dangerous students from the classroom. The Supreme Court, however, refused, saying that "we decline petitioner's invitation to rewrite the statute." Instead, the Court held that "The language of §1415(e)(3)2 is unequivocal. It states plainly that during the pendency of any proceedings initiated under the Act, unless the state or local educational agency and the parents or guardian of a disabled child otherwise agree, the child shall remain in the then current educational placement." Honig v. Doe, 484 U.S. 305, 323 (1988) (emphasis in original). The Court ended by saying that the stay-put provision "means what it says." Id. at 324. Thus, IDEA's stay-put functions, in essence, as an automatic preliminary injunction which dispenses the need for a court to weigh the factors for emergent relief such as irreparable harm and likelihood of success on the merits. M.R. v. Ridley Sch. Dist., 744 F.3d 112, 118 (3d Cir. 2014), cert. denied, 135 S. Ct. 2309 (2015). In Drinker v. Colonial Sch. Dist., 78 F.3d 859, 865 (3d Cir. 1996), the Court held that "[T]he purpose of the 'stay-put' is to preserve the status quo of the child's functioning placement and program." (internal quotations and citation omitted). It explained that the Act "the stay-put provision could be found in Section 1415(e)(3).7 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." Id. at 864. The Court went on to say that "[t]his provision represents Congress' 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 placement is ultimately resolved." Id. at 864-65 (citing Woods v. New Jersey Dep't of Educ., No. 93-5123, 20 Indiv. Disabilities Educ. L. Rep. (LRP Publications) 439, 440 (3d Cir. Sept. 17, 1993)). As the Third Circuit has revisited the application of IDEA's stay-put over the years, it has continued to hold that it is "unequivocal," applies regardless of the merits of the

student's case and its purpose is the preservation of the status quo during disputes about the child's education. See J.O. v. Orange Twp. Bd. of Educ., 287 F.3d 267, 272 (3d Cir. 2002) ("Stay-put orders are designed to maintain the status quo during the course of proceedings"); Pardini v. Allegheny Intermediate Unit, 420 F.3d 181, 193 (3d Cir. 2005) (stay-put applies when a student turns three years of age and transitions from Early Intervention under Part C of IDEA to Part B); Ridley, 744 F.3d at 126- 27 (the right to remain in the stay-put placement continues throughout "any. . . judicial proceedings," including the Court of Appeals, and the school district was obligated to pay for the during-dispute costs of the private school placement that was rejected as unnecessary by the court). Courts did this to "to protect a child's educational status quo." Id. at 128. The Ridley court explained, "[w]e see this not as 'an absurd result,' but as an unavoidable consequence of the balance Congress struck to ensure stability for a vulnerable group of children." (citations omitted). Id. at 128. A student's right to his stay-put placement is so unequivocal that it has been applied in this Circuit even when the student's "current educational placement" arguably violates the constitution or other statutes or regulations. e.g., D.M. v. New Jersey Dep't of Educ., 801 F.3d 205 (3d Cir. 2015) (Third Circuit affirmed injunction ordering that student had right to remain in a placement that violated New Jersey Department of Education regulations, regardless of the merits of the claim or likely outcome); R.S. and M.S. v. Somerville Bd. of Educ., 2011 U.S. Dist. LEXIS 748 (D.N.J. January 5, 2011) (student placed at sectarian school via IEP was entitled to remain there while the due process hearing took place). The New Jersey Office of Administrative Law has reached the same conclusion. See, e.g., S.F. and J.B. o/b/o E.B. v. Plainfield City Bd. of Educ., OAL DKT NO. EDS 10123-19 (SEA N.J. August 5, 2019) (despite regulation requiring district to immediately seek alternative placement when private school lost state approval, immediate removal would "offend the provisions of Federal law and that the stay-put requirements of IDEA govern the rights and obligations of these parties"); N.W. and R.W. o/b/o M.W. v. Lakewood Bd. of Educ., OAL Dkt. No. EDS 9524-13 (June 19, 2013) (stay-put invoked even though the placement at issue was unapproved, unaccredited, could not satisfy "Naples" requirements, N.J.A.C. 6A:14-6.5 and despite the fact that the child's removal was directed by the New Jersey Department of Education). The district court in Somerville pointed out that IDEA's stay-put law and regulations admitted only two exceptions where it is a school district, rather than the parents, seeking to change the operative placement during the litigation. The first

exception 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). Id. The district court found that neither exception applied in the Somerville case and ruled that "[w]here, 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.'" Id. 9 Similarly, neither exception applies here. The parents clearly disputed the change in placement and asserted C.M.'s right to stability in his stay-put placement by filing for mediation on June 15, 2021, and no disciplinary action against C.M. has been taken. The District has known that C.M.'s parents rejected the Special Class Autism ESY placement since June 15, 2021, and it took no action to overcome the legally binding automatic preliminary injunction in favor of C.M.'s placement in the last agreed ESY, the LLD class. It is alleged by the petitioner that the District's refusal to honor C.M.'s clear-cut right to placement in the LLD ESY class is a "brazen denial of one of the central procedural protections for students in IDEA." In light of the Third Circuit's unflagging support for the broadest application of IDEA's stay-put provision, C.M. is entitled to remain in his last agreed upon placement for ESY and the regular school year while this dispute, whether in mediation or due process, takes place and through any subsequent appeals. C.M.'s case is a quintessential disagreement between parents and administrators about where a student can make meaningful progress, the very kind that the stay-put provision was enacted to prevent from yanking a student from placement to placement while adults in the school, at home, and in court figured out a resolution. This basic dispute calls for a straightforward application of the "unequivocal" stay-put provision in favor of C.M.'s status quo, to protect him from the educational and emotional harm that may arise from sudden, unilateral, premature, and temporary transitions without the agreement of parents on his behalf.

The IDEA protects the educational stability of vulnerable students by imposing an "absolute rule" in favor of the status quo that operates as an "automatic preliminary injunction" requiring school districts to implement the last IEP that was agreed upon by parents and the district while programming is in dispute. C.M.'s last agreed upon IEP provided for In-Class Resource (Support) in general education for all classes during the regular school year, during both the 2020-2021 and 2021-2022 school years. It also provided for placement in a Special Class Mild/Moderate Learning or Language

Disabilities ("LLD") for Extended School Year 2021, from July 1, 2021, through August 12, 2021. It is alleged that the District refused to allow C.M. to attend the LLD classroom for ESY 2021 and unilaterally changed his placement to "Special Class Autism," first proposed on June 8, 2021, even though petitioners filed for mediation on June 16, 2021, to dispute this change. Petitioners tell the Court that it should require Brick to implement the last agreed upon programs until the dispute is resolved.

Respondent argues that petitioners have taken the position that this matter involves issues pending the outcome of the due process hearing. Respondent Board is in agreement. Petitioners have also taken the position that this dispute calls for a straightforward application of the "unequivocal" stay-put provision in favor of C.M.'s status quo, to protect him from the educational and emotional harm that may arise from sudden, unilateral, premature, and temporary transitions without the agreement of parents on his behalf. Respondent is not in agreement with that position.

The District recognizes that in any suit brought by a parent seeking relief under IDEA's stay-put provision, the burden rests with the school district to demonstrate that the educational status must be altered. See Honig v. Doe, 484 U.S. 305, 328 n.10 (1988). See also Olu-Cole v. E.L. Haynes Public Charter Sch., 930 F.3d 519, 522 (D.C. Cir. 2019) ("local educational agency must overcome a heavy evidentiary burden to displace the default rule that the child will stay put").

The District asserts that none of the four (4) prongs necessary for the granting of emergent relief can be satisfied by petitioners. Since all four (4) prongs require satisfaction, emergent relief cannot be granted and must be denied.

First, C.M. will not suffer irreparable harm if his educational placement is changed from ESY 2021 LLD to the autism class as proposed for the student's 2021-2022 school year. Both educational placements are self-contained, have small student-to-staff ratios, and the teacher has the ability to modify the curriculum to the specific needs of the student. Although C.M. attended an in-class resource placement for 2020-2021, it was determined he needed an extended school year program for summer 2021 in a self-contained setting. In-class resource programs do not have ESY programs because

students in those classes do not qualify for ESY services. However, C.M., despite being in an IC/R setting, he was still eligible to receive services in a self-contained setting for ESY 2021.

Second, the legal right underlying petitioners' claim is not settled. Petitioners are demanding continuation of C.M. in an IC/R setting for 2021-2022 despite all current educational records demonstrating that setting, "despite the panoply of services and interventions provided in 2020- 2021" was simply not an appropriate educational setting. The District, without hesitation, recognizes that it provided all possible educational services in the IC/R setting to C.M., and despite those efforts, a free and appropriate public education ("FAPE") in the least restrictive environment ("LRE") could not be delivered effectively to C.M. based upon the severity of his disabling conditions.

Third deals with the petitioners' likelihood of prevailing on the merits of the underlying claim. Respondent claims they do not. The underlying claim is that the IC/R class is appropriate to address C.M.'s special educational needs for the 2021-2022 school year. The District recognizes that despite all of the services implemented in good faith to address C.M.'s unique, specialized needs, all of those services were not enough to satisfy the District's obligation to provide a FAPE in the LRE. The IC/R placement was not (for 2020-2021) and cannot for 2021-2022 provide the student the ability to make meaningful education progress in light of his circumstances.

Finally, the District claims that when the equities and interests of the parties are balanced, the petitioners will not suffer greater harm than the District will suffer if the requested relief is not granted. If the requested relief is granted, "the District will have no choice but to continue to provide an inappropriate program to a student in an IC/R class who demonstrates no academic or behavioral progress towards meeting his educational goals." The District will continue to provide educational services in a setting which is not restrictive enough to address C.M.'s own needs. As such, the child will continue to suffer educational setbacks, and the District will have no choice but to repeat the same actions for which it knows, despite gigantic efforts, did not afford the student with the ability to progress commensurate with his abilities.

The District provides the following in support of its position that the educational status must be altered for C.M.'s 2021-2022 school year to place him in the Autism class pursuant to the District's June 8, 2021 IEP.

The District recognizes an IEP was developed on February 5, 2021, and implemented on behalf of C.M. In that same IEP, on page 34 of 35, under the heading: “If applicable, describe any factors that are relevant to the proposed action,” the IEP states: “The IEP team will meet again in 60 school days (week of May 3, 2021) to discuss the effectiveness of the interventions put into place based on all of the data that will be collected moving forward.”

The District's meeting did not take place until June 8, 2021, and was evident to the District that all of its interventions were designed to elicit educational progress, but the student’s disabilities are so great that the services did not prove effective for addressing C.M.’s multi- faceted disabling conditions.

During the 2020-2021 school year, the District provided the following services to C.M. in theICIR setting:

- 1:1 Paraprofessional Support Daily
- RBT Support Daily
- BCBA Support Daily
- BIP in IEP
- IPAD Communication Device
- Positive Reinforcement System/Preference List
- Zones of Regulation Cards
- Dimple Cushion
- Rifton Activity Chair and Tray
- Use of Alternate Reading and Math Programs
- Highly Trained Staff in Shaping Behaviors
- Preferential Seating (own area toward back of the classroom that has enough space toassist student)
- Alternated-Arrangement—to Accommodate Student Needs

(desk,bathroom)

- Staff and Parents will have Training on the Communication Device with ProlOQuo2Go.

Additionally, the District and the parents participated in the following IEP meetings to amend/revise C.M.'s IEP during 2020-2021:

August 27, 2020: The District agreed to change C.M.'s building location to Lanes Mill Elementary School per parental request.

October 27, 2020: The District discussed transition C.M.'s overall behavioral difficulties that are affecting him throughout the school day. District determined C.M. will have access to an RBT all day beginning November 9, 2020.

December 18, 2020: Reevaluation and annual review meeting. Student was administered six (6) assessments as part of his reevaluation plan.

February 5, 2021: Annual review meeting to discuss results of reevaluation and identified his three (3) individual professionals assigned him and IEP would be re-visited in 60 school days to determine status of programming/placement.

February 16, 2021: Amendment of the IEP without a meeting to include data collection being shared with parents on a weekly basis, student be wheeled throughout the building in his Rifton chair instead of strapped into it, and inclusion of a visual schedule to be used dailyfor transitions and will be used during all therapies and special area classes.

June 8, 2021: Recommended placement in Autism class for 2021-2022.

The District and the student's parents worked cooperatively during the 2020-2021 school year to continually address C.M.'s education programming. As such, during the 2020-2021 school year, C.M. was included in a mainstream educational setting, was responsible for the first grade regular education curriculum, and had the assistance of three (3) full-time adults dedicated solely to him on a daily basis (1:1 paraprofessional, RBT, and BCBA). In addition, C.M. had the assistance of a special education teacher and a regular education teacher in that classroom. Despite all of those services, C.M. was unable to demonstrate meaningful educational progress

in that environment.

The District alleges that C.M.'s behaviors primarily interfered with his ability to attend the educational services. Throughout the 2020-2021 school year, the District kept a daily communication log which it shared with the student's parents. The District provided a daily brief description of how C.M. performed/behaved in each and every period of his classes throughout the year. Throughout the 2020-2021 school year, there were times when C.M. refused to complete any work for his subjects. There were other days when he required assistance throughout the day to simply remain in his seat without flopping to the floor. The District also tracked target behaviors which the student exhibited that interfered with his ability to be educated, as well as his fellow students' ability to be educated. The targeted behaviors included:

1. Hitting/pushing staff and/or students.
2. Throwing items.
3. Work refusal.
4. Banging desk.
5. Moving desk.
6. Flopping/running.
7. Yelling.
8. Taking shoes off.

Those behaviors continued throughout the entire 2020-2021 school year despite the interventions provided by the 1:1 paraprofessional, the RBT, the BCBA, and the student's teachers. There were multiple days throughout the school year where the child engaged in maladaptive behaviors on a daily basis for several consecutive hours. The child's behaviors were so disruptive at certain points that the District was taking data every single minute for several consecutive hours.

C.M. also had a behavioral intervention plan in place that was implemented on a daily basis. Despite intense fidelity to the plan, the District was unable to fully contain the maladaptive behaviors which disrupted the child's ability to be educated and the other children's abilities to be educated.

At the June 8, 2021, IEP meeting, the District discussed all behavioral data recently collected from February 5, 2021. The District also discussed overall progress in all academic, behavioral, social, and toileting domains. As a result of the meeting, the District recommended C.M. attend the District's Autism program for 2021-2022 beginning with ESY 2021 effective July 6, 2021. The District increased C.M.'s speech to four times per week in twenty-minute sessions, offered the RBT and 1:1 paraprofessional daily. The BCBA was reduced to weekly support (not daily) as provided in the In-Class/Resource placement.

The District recognized that despite the extensive list of supplementary aids and services provided to the student throughout the year, C.M. was not making meaningful educational progress towards his IEP goals. The District recommended that due to limited progress and the severity of C.M.'s disability, the Autism program was recommended in order to provide the child with a free and appropriate public education in the least restrictive environment. The Autism program is a language-enriched classroom where C.M. would have the opportunity for intensive teaching procedures and more frequent opportunities for movement breaks throughout the school day.

Additionally, C.M. would have a highly modified academic curriculum that is individualized and targets his current developmental levels. He would continue to have additional support with his individually assigned paraprofessional and RBT as well as weekly BCBA consultation. C.M. requires a small group setting with individualized instruction presented at a slower pace with reinforcement of learned skills, drill and opportunities for immediate feedback. C.M. will have the opportunity to mainstream for lunch, recess, and during his special areas classes.

The District claims that it did not make the decision lightly. Rather, after a year's worth of intensive interventions, C.M. had not made adequate progress in the IC/R classroom setting. The District reviewed all progress reports, his report card, the daily communication log, the behavioral data tracked, discussions with his teachers, concerns of his related services providers, and, in toto, the decision was to offer a more restrictive, but educationally appropriate placement for C.M.'s 2021-2022 school

year.

C.M.'s yearly progress report showed “Ns” for all four marking periods for all academic subjects. “N” means “Needs Further Development.” A copy of those progress reports is attached hereto as Exhibit l. Additionally, C.M.'s 2020-2021 Grade 1 report card also reflected “Ns” for all core academic classes. “N” means "Not meeting the expectations of the grade level standards: Unable to demonstrate grade level skills and concepts even with frequent support.” A copy of C.M.'s 2020-2021 Grade 1 report card is attached hereto as Exhibit 2.

C.M.'s support in his first grade IC/R class for 2020-2021 was more than frequent. It was daily, and there was a team of professionals assigned to assist the child in receiving his educational services. Through no fault of the child and through no fault of the District, the child's disabling conditions were so severe that he was unable to demonstrate progress sufficient to warrant his continued placement in the IC/R class setting for 2021-2022.

During the 2020-2021 school year, the focus of C.M.'s educational services was his maladaptive behaviors. His maladaptive behaviors interfered with his learning, and his cognitive deficits disallowed him to reap the academic benefits of an IC/R classroom.

The District claims that “to put him back into that setting for 2021-2022 would be educationally harmful to C.M., and, as a student with severe disabling conditions, repetition of the same programming that did not benefit the student in 2020-2021 would be akin to ’educational malpractice.’” Essentially, there are no additional services that could be provided to C.M. in the IC/R placement. To force the student back into that setting is not in C.M.'s best educational interests.

Furthermore, they claim that if the District is required to maintain C.M. in an IC/R placement for the 2021-2022 school year, the District will be flatly denied the opportunity to educate a child in the least restrictive environment as required under operative special education law. N.J.A.C. 6A:14-4.2, in relevant part, requires: “Students

with disabilities shall be educated in the least restrictive environment. Each district board of education shall ensure that: 1. To the maximum extent appropriate, a student with a disability is educated with children who are not disabled. 2. Special classes, separate schooling or other removal of a student with a disability from the student's general education class occurs only when the nature or severity of the educational disability is such that education in the student's general education class with the use of appropriate supplementary aids and services cannot be achieved satisfactorily." "Consideration is given to: 1. Whether the student can be educated satisfactorily in a regular classroom with supplementary aids and services; a comparison of the benefits provided in a regular class and the benefits provided in a special education class; and the potentially beneficial or harmful effects which a placement may have on a student with disabilities or the other students in the class.

During the 2020-2021 school year, C.M. was educated to the maximum extent appropriate with children who are not disabled. He was in an IC/R class with three (3) adults assigned to him full-time throughout the school day. He also had the benefits of a general education teacher and a special education teacher. C.M. attended all his core academic classes with children who were not disabled. However, in order to attend those classes, C.M. was isolated and physically distant from the children who were not disabled. C.M.'s behaviors were so severe and pervasive that such actions were necessary to protect the safety interests of C.M. and his classmates as well as to be able to implement all behavioral strategies/interventions on his behalf.

The regulation considers an "Autism Class" a "special class", and, as such, after an entire year's worth of good faith efforts towards accommodating C.M., in an IC/R placement, the District recognized the recommendation for removal of C.M. from the general education class for 2021-2022 occurred only when the nature and severity of the educational disability was such that education in the general education class with the use of supplementary aids and services cannot be achieved satisfactorily. The District unquestionably provided the maximum usage of supplementary aids and services to C.M. in 2020-2021, but, despite all of that, the nature and severity of C.M.'s disabilities proved continuation in that particular setting to be inappropriate.

When considering the Autism class for 2021-2022, it claims that the District recognized C.M. could not be educated in a regular classroom with supplementary aids and services. The District identified the benefits provided in the special education class as being those specifically geared towards C.M.'s educational needs. Additionally, the District recognized that, based upon all education data gathered in 2020-2021, continuing C.M. in an IC/R class for 2021-2022 would have harmful effects on him. Additionally, the other students in the IC/R class would continue to have their classroom disrupted throughout the upcoming school year like what happened in 2020-2021.

The District has an affirmative duty to continuously seek appropriate educational program/placement for C.M. The District argues that placing C.M. in an autism program for September 2021 would not be "'yanking him' from placement to placement while adults in the school, at home, and in court figured out a resolution. Rather, C.M. would receive the necessary educational services to which he is entitled under State/Federal special education laws." However, I do not agree because the IDEA Stay Put provision entitles petitioners to an "automatic preliminary injunction."

LEGAL ANALYSIS AND CONCLUSION

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;
>
> 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.

In this case, it is unnecessary for me to consider whether the criteria set forth in Crowe v. Di Gioa, 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. § 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. § 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 petitioners filed an emergent petition for a determination that the stay-put placement is in a placement in the LLD class for ESY and the In-Class Resource (Support) class for the 2021-2022 school year under IDEA's stay-put provision, 20 U.S.C. § 1415(j)., and by way of the emergent application, invoked "stay-put." The petitioners contend that the current educational placement (February 5, 2021 IEP) is the last agreed-upon placement of C.M. The Board contends that the more appropriate placement would be in Autism class because they can implement the appropriate integrated inclusion program that can deal with his growing needs.

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' 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 petitioners are 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 C.M. at the time of this emergent action is the LLD class setting for ESY as discussed in the IEP that was developed for him in June 2021. Subsequent to the filing for due process, there has been no agreement between the parties to change C.M.'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.[1] 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.
>
> 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.
>
> 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

[1] This is a significant issue in this matter. It would appear that Seaside Park may be responsible for all or part of the costs of the student's placement at TRR depending upon whether the petitioners and the Board had reached an agreement as to responsibility for payment of in-district tuition.

> 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).
>
> [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 are not an issue in this matter. Although there is some mention of "C.M.'s behaviors primarily interfered with his ability to attend to educational services throughout the 2020-2021 school year" it is a mention of behaviors and not disciplinary problems. Examples given by the District were: "Hitting/pushing staff and/or students, Throwing items, Work refusal, Banging desk, Moving desk, Flopping/running, Yelling and Taking shoes off." These behaviors are not significant enough to warrant a departure from the critically important bastion of "stay-put."

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.

Indeed, the District here has done an excellent job in assessing and providing appropriate programming ideas. Notwithstanding the District's contentions here, petitioners are correct, "the IDEA protects the educational stability of vulnerable students by imposing an "absolute rule" in favor of the status quo that operates as an "automatic preliminary injunction" requiring school districts to implement the last IEP that was agreed upon by parents and the district while programming is in dispute. C.M.'s last agreed-upon IEP provided for In-Class Resource (Support) in general education for all classes during

the regular school year, during both the 2020-2021 and 2021-22 school years. It also provided for placement in a Special Class Mild/Moderate Learning or Language Disabilities ("LLD") for Extended School Year 2021, from July 1, 2021, through August 12, 2021."

However, respondent 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. The stay-put provision represents Congress' 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.

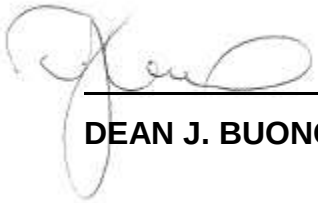
After hearing the arguments of petitioners and respondent and considering all documents submitted, **I CONCLUDE**, in accordance with the standards set forth in Drinker v. Colonial School District, that the petitioners' motion for emergent relief is **GRANTED**. It is **ORDERED** that C.M. shall be permitted to continue to attend the LLD class for ESY and a resource program for the 2021-2022 school year.

ORDER

Having concluded that the petitioners satisfied the IDEA requirement for stay-put for emergent relief, the petitioners' request for emergent relief is **GRANTED**.

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 Policy and Dispute Resolution.



July 19, 2021
DATE

DEAN J. BUONO, ALJ

Date Received at Agency

Date Mailed to Parties:

mph

APPENDIX

EXHIBITS

For petitioners:

Affidavits

For respondent:

Affidavits