State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
EMERGENT RELIEF
OAL DKT. NO. EDS 04671-22
AGENCY DKT.NO. 2022-34462

M.P. AND N.P. o/b/o D.P.,
Petitioners,
v.
ROXBURY TOWNSHIP BOARD OF EDUCATION,
Respondent.

M.P. on behalf of D.P., petitioner, pro se

Nathanya G. Simon, Esq., for respondent (Scarinci & Hollenbeck, LLC., attorneys)

Record Closed: June 15, 2022 Decided: June 15, 2022

BEFORE , **DANIELLE PASQUALE** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, M.P. and N.P. on behalf of D.P., filed an application for emergent relief disputing their adult student D.P.'s graduation and seek an order that the stay-put is the Child Development Associate ("CDA") program. They bring the action pursuant to S3434 passed as a result of the COVID school shut down for adult students extending their eligibility for services for an additional year. The Petitioner asserts, as graduation is approaching and the District's intention is to tender a diploma to D.P. by June 30, 2022,

the petitioners seek emergent relief in accordance with N.J.A.C. 6A:14-2.7(r). They are also filing an underlying due process complaint Due Process Petition on under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400 to 1482, alleging that the Roxbury (Respondent or District) deprived D.P. of a free and appropriate public education (FAPE) disputing the District's proposed program, and seeking compensatory education along with a 1:1 aide in the CDA program. The Emergent Relief is the only transmitted action to date and the only one for me to decide. To that end, I reviewed the file, the brief in support of the emergent application and opposition to same, the Certification of Director of Special Services Amy Gallagher, the Settlement in question, and corresponding exhibits. I also had an initial settlement conference on the Emergent application and heard oral argument on June 15, 2022. I emphasize that the Settlement is not in dispute as Petitioner's filing states explicitly "we seek continuance despite a settlement agreement on OAL DKT. No. EDS 05765-21 AGENCY REF. NOS.: 2021-33052 AND 2021-32533 (Reference S3434)" These sentiments were also relayed to me several times.

STATEMENT OF FACTS

D.P. is a twenty-one (21) year old adult with a date of birth of June 27, 2000, turning age twenty-two (22) prior to June 30, 2022. She is eligible for special education and related services under the classification "Multiple Disabilities" ("MD") based on evidence of a Specific Learning Disability ("SLD") and prior documented diagnoses of Attention Deficit Hyperactivity Disorder ("ADHD") and Autism Spectrum Disorder ("ASD"). The District is the local educational agency responsible for her education. For the past several years, her Individualized Education Program ("IEP") placed D.P. at Hunterdon Preparatory School ("HPS"), a State approved private school for students with disabilities. In spite of the difficulties of the COVID-19 pandemic, D.P. met the requirements for graduation from HPS in June 2021. In June 2021, to address the delays and as an offer of compensatory education to make up for learning loss due to COVID per the applicable statute, the IEP Team proposed an extension of services past D.P.'s aging out of special education.

It is undisputed that the District entered into a settlement which allowed for additional services to assist with D.P. obtaining a Child Development Associate Certificate ("CDA"), with the support of the District SUCCESS program at Roxbury High School ("SUCCESS"). (See Respondent's opposition). The prior Parental Petition for Due Process and Request for Emergent Relief dated July 12, 2021 objected to the proposed extension of services through SUCCESS and alleged a break in service and issues regarding placement pending a due process hearing. Parents alleged learning loss due to COVID-19 and demanded a "stay-put" at HPS for 2021, including an extended school year for 2021, an entire additional school year at HPS for 2021-2022, reimbursement, and compensatory education as D.P. was already twenty-one (21) years old in July 2021, and until recently would have automatically aged out of special education on June 30, 2021. Petitioners were reliant upon A5366/S3434 - P.L.2021, c.109 ("S3434") in an attempt to claim a legal right to further education through the District. Just as before S3434, all decisions regarding a potential extension of eligibility remain an individualized determination for D.P. by the entire IEP Team.

At one point, the Parties reached a Settlement Agreement and Release of Claims which was the incorporated into a Final Decision Approving Settlement (Consolidated) ("August 2021 Agreement"), dated August 5, 2021 by the Honorable Margaret M. Monaco, A.L.J. As per the terms of the August 2021 Agreement, D.P. would attend the SUCCESS program in the District during the 2021-2022 school year with a "focus on the acquisition of the CDA license". As evidenced in the clear language of the settlement, the Board did not agree to or promise that D.P would *acquire* the CDA license. In return, Petitioners agreed that in no case would D.P. receive any further educational services or funding of any private placement or compensatory education beyond June 30, 2022. Petitioners explicitly waived any and all claims or potential claims against the Board for any compensatory education as a result of D.P.'s placement in SUCCESS along with all other claims or potential claims through to the date of to the date of execution and entire term of the August 2021 Agreement. D.P. completed all academic requirements for graduation as of June 2021. The Board also maintains that the August 2021 Agreement was limited in scope and the District fulfilled its obligations as set out in the August 2021 Agreement and argue that Petitioners have not met any of the criteria for the extraordinary equitable remedy sought and, accordingly, that the instant Request must be denied.

Further, the District argues there is no credible evidence or legal basis for D.P. to continue to receive special education and related services for an additional school year. Therefore, it is the Board's position that Petitioners are not entitled to the demanded relief. Conversely, Petitioner's argue that due to the failure to complete the CDA program that they should be entitled to compensatory education in the due process petition yet to be transmitted. Petitioners also argue that I should rule that CDA is the stay-put.

It is undisputed that there is a settlement that resolved this matter taking S3434 into consideration. (See Judge Monaco's Final Decision Approving Settlement dated August 4, 2021.) The plain language of the agreement makes clear that S3434 was taken into consideration and used to properly extend services for an additional year. In short, Respondent argues that this very issue was resolved in that settlement which serves as an acknowledgment and admission by the petitioners that the IEP and related services would expire at the end of June 2022. More to the point, the settlement states in pertinent part: "in no case shall the Board have any further obligations to D.P. or Petitioners including but not limited to any further educational services or funding of any private placement or compensatory education beyond June 30, 2022. D.P. will be considered aged out from special education and related services under all Federal and State laws including S3434 as of June 30, 2022." As these facts are undisputed by Petitioner, and are clearly spelled out in the agreement and supported by the Affidavit of the Director of Special Services, I **FIND** them as **FACT** in this matter.

LEGAL ANALYSIS

In accordance with N.J.A.C. 1:1-12.6, emergency relief may be granted "where authorized by law and where irreparable harm will result without an expedited decision granting or prohibiting some action or relief connected with a contested case . . . ." My determination in this matter is further governed by the standard for emergent relief set forth by our Supreme Court in Crowe v. DeGioia, 102 N.J. 50 (1986), as follows:

> The judge may order emergency relief … if the judge determines from the proofs that:

1. The petitioner will suffer irreparable harm if the requested relief is not granted.

2. The legal right underlying the petitioner's claim is settled.

3. The petitioner has a likelihood of success 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 relief is not granted.

ANALYSIS AND CONCLUSIONS

The issue before me is two-fold whether, based on the disputed and the undisputed facts and procedural history before me, the criteria for the granting of emergency relief have been met for a diploma to be issued with services to end at the end of this school year, on June 30, 2022, and second whether the stay-put is CDA, SUCCESS or if it is even an issue in dispute. The applicable regulation incorporates the well-established standard for injunctive relief set forth in Crowe v. DeGioia, 90 N.J. 126 (1982) above. [N.J.A.C. 6A:3-1.6]

With respect to the first prong, I **FIND** that petitioner will not suffer irreparable harm if the requested relief is not granted. No such harm has been identified here on Petitioner's behalf. She is set to graduate and has already received the benefit of her bargain in terms of the settlement. The argument that the CDA license has not been secured is not clear and convincing evidence that D.P. will be irreparably harmed by not having that by June 30, 2022. There is no evidence to support that she cannot obtain said CDA license on her own in her own time. The case law is clear that the harm must be both substantial and immediate. See Subcarrier Communications, Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997). As the District correctly argues, in the special education context, irreparable harm is generally substantiated when there is a substantial risk of physical injury to the child, or others, or when there is a significant interruption in or termination or educational services. M.H. v. Milltown Board of Education, 2004 N.J. AGEN LEXIS 677 (OAL Dkt. No. EDS 8411-03).

The threshold standard for irreparable harm in the area of education is showing that once something is lost, it cannot be regained. M.L. o/b/o S.L. v. Bd. of Educ. of the Twp. of Ewing, EDU 4949-09, Emergent Relief (June 15, 2009). Since money damages are not available in education cases, and compensatory education is the only relief available, the analysis to be used is that if compensatory education, provided at a later date, cannot remedy the situation, then the harm is irreparable. Howell Twp Bd. of Educ. v. A.I. and J.I. o/b/o S.I., EDU 5433-12, Emergent Relief (May 2, 2012).

I have reviewed the second and third prong together because the merits and rights are intertwined here. Petitioner has a very high burden on this application with respect to proving that this forum is likely to reverse the discretionary determination of the Child Study Team and the confines of the settlement which already take the S3434 legislation into consideration. To that end, I **FIND** that Petitioner's rights are not settled in this matter and thus, there is no likelihood of success on the merits.

On the last prong, I **FIND** that as there is no harm to D.P. in not receiving services past June 30, 2022 and that when the equities and interests of the parties are balanced Petitioner will NOT suffer greater harm that Respondent should the requested relief be denied. I also **FIND** that D.P. has met her graduation requirements and can finish her CDA requirements on her own.

In balancing these interests, I **CONCLUDE** that petitioner has not satisfied her burden of proof on the Crowe factors regarding receiving continued services as laid out in her emergent application and that they weigh in favor of denying the relief sought herein. I **FURTHER CONCLUDE** that there is no stay-put as the settlement is intentionally silent as to same and the settlement is clear that it was to end all Special Education and Related Services on June 30, 2022. This is consistent because stay-put is a component of the IDEA and a parent cannot invoke the stay-put provision once the student becomes ineligible for IDEA services due to age.

If stay-put were at issue here, 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).

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).

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 D.P. at the time of the due process filing and the initial request for emergent action is the settlement that was negotiated, and it lists SUCCESS as the placement not CDA and that the "stay-put" is

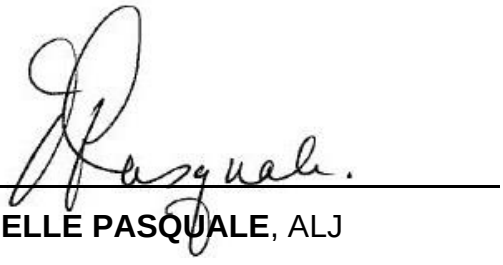
intentionally silent in said settlement as all matters were to be disposed of by June 30, 2022 the end date of the Settlement.

The Third Circuit has defined the stay-put or "then current educational" placement as the "operative placement actually functioning at the time the dispute first arises." Pardini v. Allegheny Intermed. Unit., 420 F.3d 181, 190-192 (3d Cir. 2005) (quoting Thomas v. Cincinnati Bd. of Educ., 918 F.2de 618,625-626 (6th Cir. 1990); see also Drinker at 867. The IDEA does not define the term, "then-current placement." See generally 20 U.S.C. 1400 et seq. However, courts have found that Congress clearly intended this term to "encompass the whole range of services that a child needs" and that the term "cannot be read to only indicate which physical school building a child attends." See Spilsbury v. Dist. Of Columbia, 307 F. Supp. 2d 22, 26-27 (D.D.C. 2004). I **CONCLUDE** that all services which were developed for D.P. in the IEP as confirmed in the Settlement Agreement were the "then-current" educational placement, inclusive of the related services.

Further, stay-put DOES NOT apply to the instant matter because the language of D.P.'s Settlement Agreement does not include any affirmative or effective waiver of stay-put as it is clearly moot in this Settlement disposing of all issues. The Settlement Agreement makes no mention of stay-put because all services were to end on June 30, 2022. The only way that parents can "lose stay-put protection" is by affirmative agreement to give it up." See Drinker at 868, which I **FIND** they did in this case. Further, the Third Circuit has held, "unless there is an effective waiver of the protection of the 'stay-put,' the dispositive factor in deciding a child's current education placement' should be the IEP . . . which is actually functioning when the 'stay-put' is invoked. "Woods v. New Jersey Dept. of Educ., No. 93-5123, 20 IDELR 439, 440 (3d Cir. Sept. 17, 1993); see also Drinker at 868 (holding any waiver of a party's right to claim a placement as the "current educational placement" must be explicit). Not only is D.P.'s Settlement Agreement silent as to stay-put but the IEP is silent as well as the Special Education Services were to expire at the end of this month. Therefore, I **CONCLUDE** that there is an affirmative or effective waiver of stay-put as it is moot in this case as negotiated and outlined in the terms of the settlement and as certified by the Director of Special Services and the District's attorney.

After hearing the arguments of petitioners and respondent and considering all documents submitted, I **CONCLUDE**, that the petitioners' motion for emergent relief is **DENIED**. It is **ORDERED** that D.P. shall be permitted to continue receiving all in-class services through the end of June 30, 2022, as defined in the last IEP and the Settlement Agreement in question. It is **FURTHER ORDERED** that all services, whether in-service or related services are to cease as per the settlement agreement on June 30, 2022.

This decision on application for emergency relief resolves all of the issues raised in the due process complaint; therefore, no further proceedings in this matter are necessary. This decision on application for emergency relief is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. § 1415(i)(2). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education.



June 15, 2022 — **DANIELLE PASQUALE**, ALJ

DATE

Date Received at Agency: June 15, 2022

Date Mailed to Parties: June 15, 2022

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