State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION ON
EMERGENT RELIEF
OAL DKT. NO. EDS 05268-22
AGENCY DKT. NO. 2022-34580

J.S. and L.S. ON BEHALF OF C.S.,
Petitioners,
v.
MIDDLESEX BORO BOARD
OF EDUCATION,
Respondent.

Lenore Boyarin, Esq., for petitioners (Sussan, Greenwald & Wesler, attorneys)

Rita F. Barone, Esq., for respondent (Flanagan, Barone, O'Brien, attorneys)

BEFORE **SARAH H. SURGENT**, ALJ:

Record Closed: June 29, 2022 Decided: June 30, 2022

STATEMENT OF THE CASE

In this matter, J.S. and L.S. on behalf of their minor child, C.S. (petitioners), bring an action for emergent relief against the Middlesex Boro Board of Education (Board),

seeking an order to continue C.S.'s placement at the SEARCH Day Program (SEARCH) pending the outcome of petitioners' due process hearing. The Board maintains that relief contravenes two settlement agreements between the parties that the Board's Child Study Team's (CST) recommendation on program and placement for the 2022-2023 school year, in this case, the Academy Learning Center (ALC), will be the stay-put school pending the outcome of the due process hearing.

PROCEDURAL HISTORY

On June 20, 2022, petitioners filed a complaint for due process with the Office of Special Education (OSE). The complaint was filed under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400 to 1482. Petitioners seek an order that C.S.'s stay-put out-of-district placement is SEARCH, pending the due process hearing. Petitioners filed an emergent relief application with the undersigned on June 28, 2022. Oral argument was heard remotely on June 29, 2022, due to the ongoing COVID-19 pandemic. The record closed on that date.

FACTUAL DISCUSSION AND FINDINGS OF FACT

These salient points are not in dispute. I therefore **FIND** the following as **FACT**.

C.S. is an eight-year-old rising third grade student currently enrolled in SEARCH pursuant to two settlement agreements between the parties. He has been diagnosed with Autism Spectrum Disorder, Anxiety, Mixed Receptive/Expressive Language Disorder, Apraxia, and Dyspraxia. On October 14, 2019, the parties resolved a disagreement regarding C.S.'s placement at SEARCH by executing a settlement agreement and release. (R-A). That agreement provides, in relevant part:

> 1. The Board will place C.S. at the SEARCH school in Marlboro, a New Jersey State approved school for students with disabilities and fund C.S.'s tuition to attend SEARCH for the remainder of the 2019-20 school year, 2020-

> 21 school year and 2021-22 school year. Including ESY for the summer of 2020, and 2021 which is held at the Marlboro and/or Ocean Campus. It is understood that SEARCH has accepted C.S. based on the related services, aides and supplementary supports as set forth in C.S.'s IEP dated August 30, 2019 which does not include a one to one aide. . . .
>
> . . . .
>
> 3. The Parties agree that C.S. will be reevaluated during the 2021-22 school year in anticipation of a program and placement decision for C.S. for the 2022-23 school year **to be determined through an annual review reevaluation IEP meeting during the 2021-22 school year. If there is dispute as to C.S.'s program and placement for the 2022-23 school year, it is agreed by the Parties that the Board's Child Study Team's recommendation on program and/or placement will be considered Stay Put for any future due process filing by either party**. The Board acknowledges that the parents seek to have C.S. remain at SEARCH through ESY [extended school year] 2022 in the event the Parties are not in agreement as to C.S.'s IEP for the 2022-23 school year which starts on July 1, 2022. The Board agrees to revisit this request during the 2021-22 school year.
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> [(R-A at 2-3) (bold and emphasis added) (second emphasis in original).]

Following another dispute, on February 11, 2021, the parties executed another settlement agreement and release which states, in relevant part, "**The District agrees to continue CS's placement at the SEARCH School pursuant to the terms and conditions set forth in the Settlement Agreement between the parties approved by a Final Decision Approving Settlement dated October 25, 2019[,] attached hereto as Exhibit A**." (R-B at 1-2) (bold and emphasis added).

In accordance with the agreements, the Board's CST issued an IEP dated May 4, 2022, recommending placement for the 2022-23 school year. (R-C at 1, 34). The Board proposed that C.S. remain at SEARCH for the extended school year, but that placement

at ALC, a different New Jersey State approved out-of-district placement, should start in September 2022. The ALC placement was approved by the Board on June 21, 2022.

Petitioners disagree with that placement and have filed a due process petition. The issue of which placement is appropriate for C.S. will be litigated in a plenary hearing as required by the IDEA and implementing State regulations. The issue of Stay Put placement was settled, twice, pursuant to the above agreements that the Board's recommended placement, ALC, would be the Stay Put school in the event of this litigation.

Petitioners hired a Board-Certified Behavior Analyst, Dr. Lisa Spano, Psy.D., BCBA-D (Spano), to conduct two program evaluations and provide recommendations for C.S.'s placement. (P-1 at 2-3). According to L.S., Spano recommended that C.S. remain at SEARCH. Id. at 3. L.S. opined that moving C.S. from SEARCH to ALC "would be detrimental to his progress." Id. at 7.

LEGAL ANALYSIS AND CONCLUSIONS

I.

To prevail on a request for emergent relief in a special education matter, petitioners must demonstrate that their request falls within one of the four categories set forth in N.J.A.C. 6A:14.2.7(r), which provides:

> **(r)** Either party may apply, in writing, for a temporary order of emergent relief as a part of a request for a due process hearing or an expedited hearing for disciplinary action, or at any time after a due process or expedited hearing is requested pending a settlement or decision on the matter. The request shall be supported by an affidavit or notarized statement specifying the basis for the request for emergency relief. The applicant shall provide a copy of the request to the other party. The request for emergent relief shall note that a copy was sent to the other party.
>
> **1.** Emergent relief shall be requested only for the following issues:

> **i.** Issues involving a break in the delivery of services;
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> **ii.** Issues involving disciplinary action, including manifestation determinations and determinations of interim alternate educational settings;
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> **iii.** Issues concerning placement pending the outcome of due process proceedings; and
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> **iv.** Issues involving graduation or participation in graduation ceremonies.

[N.J.A.C. 6A:14-2.7(r) (emphasis added).]

Pursuant to N.J.A.C. 6A:14-2.7(u):

> 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 between the district board of education and the parents for the remainder of any court proceedings.
>
> [N.J.A.C. 6A:14-2.7(u) (emphasis added).]

In this case, neither of the above regulations applies because the settlement agreements between the parties have already resolved the stay-put issue by providing that C.S.'s placement will be governed by the Board's CST recommendation pending the outcome of any due process filings filed by either party. (R-A; R-B). In short, there is no issue before me to consider for emergent relief. In essence, petitioners are requesting that I vacate the agreements, because they are not now happy with their terms. That, I cannot do.

New Jersey has a strong public policy in favor of settlements. See Williams v. Vito, 365 N.J. Super. 225, 230 (App. Div. 2003). That policy is based upon "the notion that the parties to a dispute are in the best position to determine how to resolve a contested matter in a way which is least disadvantageous to everyone. In recognition of this principle,

courts will strain to give effect to the terms of a settlement whenever possible." Dep't of Pub. Advocate v. N.J. Bd. of Pub. Utils., 206 N.J. Super. 523, 528 (App. Div. 1985).

Only if the moving party can demonstrate, by clear and convincing proof, fraud or other compelling circumstances exist, can a court vacate a settlement. De Caro v. De Caro, 13 N. J. 36 (1953). In determining whether the circumstances of the case are sufficiently compelling to vacate a settlement, courts generally focus on the moving party's representation by competent legal counsel, their awareness of the terms of the agreement, and whether they knowingly and voluntarily entered into the settlement agreement. A showing of "deception, lack of independent advice, abuse of confidential relation, or similar indicia generally found in the reported instances where equity has declined to enforce, as unfair or unconscionable, an agreement voluntarily executed by the parties" may justify setting aside a settlement. Id. at 44.

Second thoughts fail to satisfy the test for vacating a settlement. Pascarella v. Bruck, 190 N.J. Super. 118, 126 (App. Div. 1983). "If later reflection were the test of the validity of . . . an agreement, few contracts of settlement would stand." Ibid. Setting aside a settlement agreement based on second thoughts would allow petitioners to avoid a "fair agreement duly entered into to resolve pending and burdensome litigation." Bistricer v. Bistricer, 231 N.J. Super. 143, 151 (Ch. Div. 1987). "Second thoughts are entitled to absolutely no weight as against our policy in favor of settlement." Id. at 152 (internal quotation marks omitted). The Third Circuit Court of Appeals has adopted the same principles of law when reviewing settlements in the IDEA context. See, e.g., D.R. v. East Brunswick Bd. of Educ., 109 F.3d 896, 898 (3d Cir. 1997) (holding that when a settlement agreement was voluntarily and willingly entered into by the parties the agreement constitutes a binding contract between the parties and should be enforced as written).

In this case, there is no evidence that petitioners were unaware of the terms of the agreements, and petitioners have failed to present clear and convincing proof of fraud or other compelling circumstances that would permit me to vacate the agreements. I therefore **CONCLUDE** that the agreements are valid, enforceable contracts which should

not be disturbed, and that ALC is therefore C.S.'s stay-put school commencing on September 1, 2022, pending the outcome of petitioners' due process hearing.

II.

Furthermore, N.J.A.C. 6A:14-2.7(s)1 provides, in relevant part:

> 1. Emergent relief may be requested according to N.J.A.C. 1:6A-12.1. Emergent relief may be granted if the administrative law 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;
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> > 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.
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> [N.J.A.C. 6A:14-2.7(s)1 (emphasis added).]

In order to prevail on an emergent appeal from the Board's decision, the moving party must demonstrate each of the above four elements "clearly and convincingly." Waste Mgmt. of N.J., Inc. v. Union Cty. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

Irreparable Harm

Irreparable harm is a "substantial injury to a material degree coupled with the inadequacy of money damages." Judice's Sunshine Pontiac v. General Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976). An injunctive relief award requires a "clear showing of irreparable injury" or a "presently existing actual threat." Cont'l Grp. v. Amoco

Chems. Corp., 614 F.2d 351, 359 (D.N.J. 1980) (internal quotation marks and citations omitted). "[M]ore than a risk of irreparable harm must be demonstrated." Ibid. The irreparable harm standard contemplates that the harm be both substantial and immediate. Subcarrier Communications v. Day, 229 N.J. Super. 634, 638 (App. Div. 1977). In addition, "[i]n order to demonstrate irreparable harm the plaintiff must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial." Waterfront Comm'n of New York Harbor v. Philip Murphy, in his official capacity as Governor of New Jersey, et al., 2018 AMC 2222, 2242 (D.N.J. June 1, 2018).

I **CONCLUDE** that petitioners have failed to demonstrate by clear and convincing evidence that C.S. will suffer irreparable harm if he is placed at ALC commencing September 1, 2022. Petitioners misplace their reliance on Spano's hearsay reports, which were not submitted to this tribunal, and on which no testimony was heard. The Board has allowed C.S. to remain at SEARCH for the extended school year, and then transition to ALC. If petitioners do not want C.S. to make that transition, they may unilaterally place C.S. at SEARCH and seek reimbursement through their due process hearing in due course. Petitioners' speculation that C.S. will regress or decompensate if he is transferred to ALC can be addressed by monetary damages if they choose to leave him at SEARCH, and therefore does not rise to the level of imminent irreparable harm.

Right to the Underlying Claim Must be Settled

Petitioners must also establish clearly and convincingly that the legal right underlying their claim is settled. I **CONCLUDE** that they have not done so. As noted above, pursuant to their agreements with the Board, petitioners specifically agreed, twice, that the Board's CST placement recommendation for the 2022-23 school year "will be considered Stay Put for any future due process filing by either Party." (R-A at 3; R-B at 1-2). At the due process plenary hearing, petitioners may be heard as to whether the CST's placement recommendation at ALC will provide C.S. with FAPE, but that is not an emergent issue to be decided at this juncture.

Likelihood of Prevailing on the Merits

For the foregoing reasons, I **CONCLUDE** that petitioners have not clearly and convincingly demonstrated any likelihood of prevailing on the merits at this juncture.

Balancing of the Equities

Finally, for the foregoing reasons, I **CONCLUDE** that petitioners have not clearly and convincingly demonstrated that they will suffer greater harm if C.S. is transitioned to ALC or remains unilaterally at SEARCH, pending the outcome of the due process hearing. The equities of enforcing the agreements between petitioners and the Board greatly outweighs any speculative and remote harm that might befall the petitioners.

Based on the foregoing, I **CONCLUDE** that petitioners have failed to clearly and convincingly establish any of the factors required by N.J.A.C. 6A:14-2.7(s)1 to obtain emergent relief from the Board's CST 2022-23 placement recommendation at ALC, and I therefore **CONCLUDE** that their motion must be **DENIED**.

ORDER

I, therefore, **ORDER** that petitioners' motion for emergent relief be and is hereby **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. § 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.

June 30, 2022
DATE

Sarah H. Surgent
SARAH H. SURGENT, ALJ

Date Received at Agency June 30, 2022

Date Mailed to Parties: June 30, 2022

SHS/dw

APPENDIX

Witnesses

For petitioners:

None

For respondent:

None

Exhibits

For petitioners:

P-1 Certification of L.S., dated June 24, 2022

For respondent:

R-A Settlement Agreement and Release, dated October 14, 2019
R-B Settlement Agreement and Release, dated February 11, 2021
R-C Draft IEP dated May 4, 2022