



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**ORDER ON**  
**EMERGENT RELIEF**

OAL DKT. NO. EDS 05884-22

AGENCY DKT. NO. 2022-34506

**J.M. AND D.M. ON BEHALF OF N.M.,**

Petitioner,

v.

**POINT PLEASANT BORO BOARD OF  
EDUCATION,**

Respondent.

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**Lori Gaines, Esq., and Alyssa Drazin, Esq.,** for petitioners (Barger & Gaines, attorneys)

**Brittany Halpern, Esq.,** for respondent (Comegno Law Group, attorneys)

BEFORE **KIM C. BELIN, ALJ:**

**STATEMENT OF THE CASE**

Petitioners, on behalf of their minor child, N.M., seek an Order Granting Emergent Relief, pursuant to N.J.A.C. 1:6A-12.1(a), N.J.A.C. 6A:14-2.7(l) and 20 U.S.C. § 1415(k)(2) applying the doctrine of stay put and ordering the respondent, Point Pleasant Boro Board of Education (Board or respondent), to continue providing supplemental

reading services during the 2022 extended school year (ESY) and into the 2022-23 school year as provided during the preceding school year.

### **PROCEDURAL HISTORY**

On June 15, 2022, the New Jersey Department of Education received petitioners' request for a due process hearing. That matter was transmitted to the Office of Administrative Law, where it was filed on July 18, 2022. N.J.S.A. 52:14F-5(e), (f), and (g) and N.J.A.C. 1:6A-1 through 18.5. On August 2, 2022, the petitioners requested emergent relief and filed a letter brief in support of emergent relief with exhibits A-C. The respondent submitted a response in opposition to the request for emergent relief which was received on August 5, 2022. Oral argument on the motion was held on August 8, 2022, and the record was closed on that date.

### **FACTUAL DISCUSSION**

A summary of the pertinent evidence presented is as follows, and I **FIND** the following **FACTS**:

N.M. is a rising sixth-grade student deemed eligible for special education and related services under the classification of Other Health Impaired. For the 2021-2022 school year, N.M. was in the fifth grade and on January 19, 2022, the parties held a meeting to assess N.M.'s progress. This meeting resulted in an individualized education program (IEP) Amendment for N.M. This IEP Amendment identified N.M. as being diagnosed with Attention Deficit Disorder, Hyperactive type (ADD). She also met the criteria for Generalized Anxiety Disorder. N.M.'s identified areas of weakness were math and reading. N.M. has received supplemental reading support using the Wilson Intensive Reading System since in the third grade. (Petitioner, D.M.'s Certification.) N.M.'s current reading teachers stated that N.M. made progress in decoding words, phonetic word accuracy, independent silent and oral reading and comprehension. Areas of weaknesses included phonetic word automaticity, dictation, and oral reading proficiency.

The following evaluations were completed:

- educational on March 26, 2019,
- psychological on March 28, 2019,
- speech and language on April 9, 2019, and
- neuropsychological on December 1, 2019.

The Wilson Intensive Reading Program (Wilson) is a twelve-step program with each step increasing in complexity. N.M. completed six of the twelve steps by the end of the 2021-2022 school year.

The January 19, 2022 IEP mandated supplemental group reading instruction four times per week for forty-five minutes during the school day and individual instruction twice per week for sixty minutes after school. Under the Language Arts Goals and Objectives, the IEP identified the following overall goal for N.M.: “Apply phonics and word analysis skills in decoding and encoding words from the Wilson Program.” (Petitioners’ Exh. A, at 16.) Thereafter twelve specific goals for decoding, spelling, and reading were listed to be achieved by the end of the IEP. Specifically, “[N.M.] will read Wilson high frequency [sic] words from Levels 5 and 6 independently [with] 90% accuracy over 3 trials as measured by informal assessment and as measured by teacher observation and input. By the end of this IEP, [N.M.] will spell Wilson high frequency [sic] words from Levels 5 and 6 independently [with] 80% accuracy over 3 trials as measured by informal assessment and as measured by teacher observation and input.” Ibid. N.M.’s placement was between 40-79% of the school day in the presence of regular education students. (Petitioners’ Exh. A, at 23.)

N.M. was deemed eligible for ESY services from July 1, 2021 through August 12, 2021 four times per week for 45 minutes.<sup>1</sup> According to this January 19, 2022 IEP, the “[s]upplemental services will be with a certified special education teacher in a 1:1 setting, 4 days a week for 45 minutes a session.” (Petitioners’ Exh. A, at 27.)

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<sup>1</sup> The parties agree that the ESY dates extend to 2022.

Petitioners did not oppose the IEP within the fifteen days allotted and thus by operation of law, the IEP became N.M.'s "stay put" IEP.

The respondent presented an IEP dated May 26, 2022, for the 2022-23 school year that reduced N.M.'s supplemental instruction to once per week for sixty minutes for individual instruction during the school year and twice per week for sixty minutes for ESY due to N.M.'s "great progress." The petitioners filed for due process on June 15, 2022.

The respondent agreed to implement N.M.'s January 19, 2022 IEP from July 1, 2022 and into the 2022-2023 school year until all pending evaluations are completed and another IEP meeting is convened.

During the 2021-2022 school year, the supplemental reading instruction was provided to N.M. by a certified Wilson Level 1 instructor. (Certification of Lisa Moran.)

### **LEGAL ANALYSIS, CONCLUSIONS AND ORDER**

N.J.A.C. 1:6A-12.1(a) provides that the affected parent may apply in writing for emergent relief. An emergent relief application is required to set forth the specific relief sought and the specific circumstances that the applicant contends justify the relief sought. Each application is required to be supported by an affidavit prepared by an affiant with personal knowledge of the facts contained therein.

Emergent relief shall only be requested for specific issues, namely i) issues involving a break in the delivery of services; ii) issues involving disciplinary action, including alternate educational settings; iii) issues concerning placement pending the outcome of due process proceedings; and iv) issues involving graduation. N.J.A.C. 6A:14-2.7(r). Here, petitioners have requested emergent relief to maintain N.M.'s supplemental reading instruction using the Wilson reading program during the pendency of the due process proceedings. Petitioners assert that N.M. no longer receives instruction in the Wilson reading program by a Wilson-certified teacher for the ESY program and the Board will not provide the Wilson reading program to N.M. in the 2022-

2023 school year. Therefore, I **CONCLUDE** that petitioners have established that the issue in this matter concerns a current and potential break in the delivery of supplemental instruction to N.M.

The standards for emergent relief are set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), and are codified at N.J.A.C. 6A:3-1.6. The petitioners bear the burden of proving:

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

[Crowe, 90 N.J. at 132-34.]

The petitioner must establish all the above requirements in order to warrant relief in their favor and must prove each of these Crowe elements "clearly and convincingly." Waste Mgmt. of N.J. v. Union Cnty. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008); D.I. and S.I. on behalf of T.I. v. Monroe Township Board of Education, 2017 N.J. Agen LEXIS 814, 7 (OAL Dkt No. EDS 10816-17, October 25, 2017).

The petitioners here contend that they are invoking the "stay put" provision to require the Board to continue to provide supplemental instruction to N.M. by certified Wilson instructors during the 2022 ESY program (July 1, 2022 through August 12, 2022) and into the new school year just as N.M. received during the 2021-2022 school year. With a "stay put" claim, the petitioners are seeking an automatic statutory injunction against any effort to change N.M.'s program at the time the provision is invoked. Drinker by Drinker v. Colonial School Dist., 78 F.3d 859, 864 (3d Cir. 1996). 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. [Emphasis added.]

The "stay-put" provision acts as an automatic preliminary injunction, the overarching purpose of which is to prevent a school district from unilaterally changing a disabled student's placement or program. See Drinker, 78 F.3d at 864. In terms of the applicable standard of review, the emergent relief factors set forth in N.J.A.C. 6A:14-2.7(r)-(s), N.J.A.C. 1:6A-12.1, and Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982), are generally inapplicable to enforce the "stay-put" provision. As stated in Pardini v. Allegheny Intermediate Unit, 429 F.3d 181, 188 (3d Cir. 2005), "Congress has already balanced the competing harms as well as the competing equities."

In Drinker, the court explained:

The [IDEA] substitutes an absolute rule in favor of the status quo for the court's discretionary consideration of the factors of irreparable harm and either a likelihood of success on the merits or a . . . balance of hardships.

[78 F.3d at 864 (citations and internal quotations marks omitted).]

In other words, in cases where the "stay-put" provision applies, injunctive relief is available without the traditional showing of irreparable harm. Ringwood Bd. Of Educ. v. K.H.J. o/b/o K.F.J., 469 F. Supp. 2d 267 (D.N.J. 2006). Under those circumstances, it becomes the duty of the court to ascertain and enforce the "then-current educational placement" of the handicapped student. Drinker, 78 F.3d at 865. "[T]he dispositive factor in deciding a child's 'current educational placement' should be the individualized education program . . . actually functioning when the 'stay put' is invoked." Id. at 867,

quoting Woods v. N.J. Dept. of Ed., No. 93-5123, 20 Indiv. Disabilities Educ. L. Rep. (LRP Publications) 439, 440, 3<sup>rd</sup> Cir. September 17, 1993.

Here, the last agreed upon and operative IEP is dated January 19, 2022. It is not factually disputed that the Board complied with the IEP's requirements to provide N.M. with supplemental instruction four times a week for forty-five minutes in group instruction during the school day and twice per week for sixty minutes for individual instruction after school. Although not required by the IEP, these services were provided by a Wilson-certified teacher. The controversy stems from the petitioners' belief that "stay put" mandates that a Wilson-certified instructor must provide supplemental reading instruction to N.M. during the ESY program because the teaching staff member who provided the supplemental reading instruction to N.M. during the school year was a Wilson-certified instructor. The petitioners contend that any deviation represents a violation of stay put. However, the operative IEP when stay put was invoked provided that supplemental reading instruction for ESY services was to be provided by a certified special education teacher, not a Wilson-certified teacher. Thus, I **CONCLUDE** that the respondent followed the "stay put" IEP that was dispositive of N.M.'s stay put program.

Petitioners also assert that the respondent failed to use the Wilson reading program during the ESY sessions. And as a result, N.M. missed thirteen sessions of Wilson reading instruction requiring compensatory education. However, the respondent failed to provide any evidence to support this claim. There was no certification from the ESY teacher stating she/he was not using the Wilson program. Petitioners failed to submit any proof that the respondent was not providing the desired programming. The operative IEP called for four times a week of supplemental instruction for forty-five minutes with goals of applying "phonics and word analysis skills in decoding and encoding words from the Wilson Program." Robert Dunn, the Supervisor of Pupil Personnel Services for the respondent, stated that he agreed with following the January 19, 2022, IEP which included but was not limited to using the Wilson Reading program for the ESY and beyond. Mr. Dunn also confirmed in writing to the petitioners that the ESY teacher would be working on N.M.'s reading goals as stated in the IEP. (Exh. K, Dunn's Certification.) Accordingly, I **CONCLUDE** the petitioners failed to establish that the respondent did not use the Wilson program during the 2022 ESY program.

Our courts recognize compensatory education as a remedy under the IDEA, which should be awarded “for the time period during which the school district knew or should have known of the inappropriateness of the IEP, allowing a reasonable time for the district to rectify the problem.” M.C. ex rel. J.D.C. v. Cent. Reg’l Sch. Dist., 81 F.3d 389, 397 (3d Cir. 1996). Compensatory education requires school districts to “belatedly pay expenses that [they] should have paid all along.” Id. at 395. In the present controversy, the parties have agreed that the IEP was appropriate and thus I further **CONCLUDE** that N.M. is not entitled to compensatory education because there is insufficient showing that she missed educational services pursuant to the IEP.

Finally, the petitioners contend that failure to continue to provide the same program and services in the 2022-2023 school year violates stay put. The respondent proposed in the new IEP dated May 26, 2022, to reduce the amount of supplemental reading instruction and change to a less intensive Wilson reading program. Unless the parties agree to this change, I agree that the reduction in services and change in programming would violate stay put. Because the respondent provided a Wilson-certified teacher during the 2021-2022 school year to provide supplemental reading services, stay put mandates that N.M. receive the same level of services until the underlying due process petition is adjudicated or the parties approve a new IEP. Accordingly, I **CONCLUDE** that the respondent must continue to provide a Wilson-certified teacher for the new school year as was provided in the last school year until the parties meet and agree upon a new IEP or the underlying due process matter is decided.

### **ORDER**

Accordingly, I **ORDER** that the petitioner’s application for emergent relief is **GRANTED IN PART** and **DENIED IN PART**. The Point Pleasant Boro Board of Education is hereby directed to continue to provide the Wilson Reading Program to N.M. in accordance with the January 19, 2022, IEP for the ESY program and to provide a Wilson-certified instructor for the 2022-2023 school year to provide supplemental reading



instruction as stated in the January 19, 2022, IEP until the parties agree to a new IEP or the underlying due process petition is adjudicated, whichever occurs first.

This order on application for emergency relief shall remain in effect until the issuance of the decision in this matter. The telephone hearing shall take place on August 11, 2022, at 3:00 p.m. 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.

August 9, 2022 \_\_\_\_\_

DATE

*Kim C. Belin* \_\_\_\_\_

**KIM C. BELIN, ALJ**

Date Received at Agency: \_\_\_\_\_

Date Mailed to Parties: \_\_\_\_\_

KCB/am

**APPENDIX**

**EXHIBITS**

**For petitioner:**

P-1 Letter Brief with Exhibits A-C

**For respondent:**

R-1 Letter Brief

R-2 Certification of Robert Dunn with Exhibits A-K

R-3 Certification of Lisa Moran with Exhibits 1-4