State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION ON
EMERGENT RELIEF
OAL DKT. NO. EDS 14364-23
AGENCY DKT. NO. 2024-36885

N.G. AND E.G. ON BEHALF OF C.G.,
Petitioners,
v.
UNION TWP. BOARD OF EDUCATION
AND MORRIS-UNION JOINTURE COM
Respondent.

Catherine Reisman, Esq., for petitioners (Reisman Carolla Gran, Zuba LLP, attorneys)

Lester E. Taylor Esq., for respondent, Union BOE (Taylor Law Group, LLC, attorneys)

Marc Mucciolo, Esq., for respondent Morris-Union Jointure Commission (The Busch Law Firm)

Record Closed: January 17, 2024 Decided: January 19, 2024

BEFORE **ANDREW M. BARON**, ALJ**:**

STATEMENT OF THE CASE

Petitioners, on behalf of their minor child, C.G., 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, Union Township Board of Education (Board or co- respondent in its capacity as the sending District) and co-respondent, Morris-Union Jointure Commission, the receiving District) to continue providing full and complete educational services for the reminder of the 2023-24 school year and reinstating C.G. as a student at DLC a school in Warren, New Jersey, operated by the Morris-Union Jointure Commission, which a contract to provide services to C.G. between the co-respondents was unilaterally terminated by the DLC and the Jointure Commission.

The District, Union Township Board of Education, by way of cross-motion, seeks emergent relief ordering a revision to C.G.'s Individualized Education Program ("IEP") to institute home schooling for a period of 30-45 days until such time as a more suitable day program and/or residential program can be located for C.G. to attend.

Co-respondent Morris-Union Jointure Commission filed opposition to both motions in essence saying with its termination of the contract with Union, it no longer has any further obligations to either Union, and/or C.G.

PROCEDURAL HISTORY

On December 28, 2023, the New Jersey Department of Education received petitioners' request for emergent relief seeking an order requiring the Union Township Board of Education and co-respondent DLC under the operation by the Morris-Union Jointure Commission to implement C.G.'s stay put at DLC unless and until petitioners agree to a change of placement. Prior thereto, and without notice or warning or time to find a comparable educational alternative, on December 15, 2023, DLC unilaterally terminated its service agreement with Union providing educational services to C.G. saying it "could no longer handle his multiple challenges and that he was a danger to himself,

the staff and other students. Petitioners were simultaneously notified he was no longer eligible to attend DLC. That matter was transmitted to the Office of Administrative Law, where it was filed on December 28, 2023. N.J.S.A. 52:14F-5(e), (f), and (g) and N.J.A.C. 1:6A-1 through 18.5. Oral argument and limited testimony on the motion was held on January 11, 2024, and by consent of all parties involved, was continued on January 17, 2024. The record was closed on that date.

By way of additional procedural background, this was at least the second emergent due process application between petitioners and Union, the first being in the Spring of 2023, when petitioner successfully challenged the District to provide appropriate services and placement to C.G. who had been left on home schooling for several months during the 2022-23 school year following the end of the Covid educational transition. The parties had previously agreed several months earlier to have C.G. attend DLC, a school located in Warren, New Jersey, which is part of the Morris-Union Jointure Commission. Several months later, after Union was unable to complete the enrollment arrangements, petitioner filed her first due process petition seeking to compel Union to comply with C.G.'s enrollment plan at DLC, which as finally implemented in May 2023.

At the time of this new proceeding, a separate full due process petition remained at OSE pending the 30-day resolution period.

FACTUAL DISCUSSION

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

C.G. is now an eighteen-year-old student deemed eligible for special education and related services. Among other things, he was previously diagnosed with Autism Spectrum Disorder. According to his recent IEP, he has a history of "crises" each of which required mental health clearance, poor impulse control, and inappropriate discussions about violence. He is under the care of a neurologist but has had more than one episode of a psychiatric nature requiring him to be evaluated at Trinitas Hospital. Petitioner admits to concerns about C.G.'s interest in violence and weapons. Each time C.G. has

been brought to Trinitas, he has been cleared to return to his home by the hospital's crisis team. Recognizing C.G.'s multiple challenges which could not be properly handled within the Union Township schools, during the summer of 2022, the parties agreed to have C.G. placed at DLC for the 2022-23 school year.

For reason unknown, Union was unable to arrange for C.G. to start the 2022-23 school year at DLC and for most of that school year, he remained on home instruction which he did not successfully navigate or learn from. It was not until some time in the spring of 2023, following an initial emergent due process petition, that C.G. was enrolled at DLC effective April 28, 2023.

Among other things, his IEP calls for him to have a 1:1 paraprofessional to assist him, and with this help, he successfully completed the remaining few weeks of the May and June 2023 calendar at DLC. Since he missed out on all but two months of in person learning that year, C.G. was also enrolled by consent at DLC's summer ESY program, which again, with the help of a 1:1 paraprofessional, he successfully completed.

Upon returning to DLC for the 2023-24 school year, in September 2023, the paraprofessional assigned to C.G. left and was not replaced. Though DLC attempted to replace the assistance he was getting from the 1:1 with a rotation of staff, the arrangement did not work, and C.G.'s behavioral episodes escalated to a point where C.G. was repeatedly sent out for psychiatric clearance, following incidents with teachers, school staff and other students. Both Union and DLC cite the fact that paraprofessionals and BCBA professionals are in short supply throughout the State, and often move freely from district to district.

Each time, the crisis management team from Trinitas cleared C.G. to return, but with the notation: "needs to be in a structured school program. It is not disputed that the incidents continued and escalated, and at least two DLC staff members were injured in two of the incidents.

Still without the required 1:1, C.G. engaged in another behavioral incident on November 13, 2023, which required another psychiatric clearance. Shortly thereafter,

DLC filed a HIB bullying incident which was later deemed unfounded as it was more of a manifestation of his disability.

The District requested that an IEP meeting be held the next day, and on November 14, 2023, the parties met and agreed that both a Functional Behavioral Assessment and a psychiatric evaluation were necessary, as well as putting additional supports in place pursuant to the student safety plan. Petitioner and the parties also agreed that should another behavioral incident occur; C.G. would be placed into a separate classroom in order to de-escalate the situation. Counseling sessions were also increased to twice a week.

The next day, C.G. was placed in a separate classroom, away from the other students. Though petitioner immediately signed the waiver for the FBA to be done, the District admits only one observation was made and the report was never completed. Petitioner also complains that she was never provided with the name and place for the psychiatric evaluation to be done.

The parties met again on November 29, 2023. At no time during either the meeting on November 14, and/or the 29th was petitioner and her representative given notice that C.G.'s placement was about to be unilaterally terminated with no plan for an alternative in place. In fact. On December 11, 2023, the DLC Superintendent determined that the alleged HIB incident was a manifestation of C.G.' disability, and the matter was dismissed, with a recommendation for a review of the need for additional supports and strategies.

Through DLC never exercised its right to suspend C.G. for his conduct, four days later, without any notice or time to find a suitable educational alternative, DLC at the direction of its Superintendent, issued a letter signed by its principal Dan Sanacore to petitioner and Union abruptly and unilaterally terminating its contract with Union and advising petitioner that C.G. was no longer welcome or enrolled at DLC.

In defense of its actions, DLC by its principal Mr. Sanacore by way of certification recited a history of facts and events which gave rise to the unilateral termination which neither petitioner nor Union had notice or time to find a proper and suitable educational

alternative. It is undisputed that commencing on September 12, 2023 through December 12,2023, there are numerous documented incidents of significant behavioral episodes involving C.G. while in attendance at the school, two of which involve injuries suffered by teachers, one of whom suffered a concussion, October 25th, a teacher was assaulted with a closed fist to the back. November 13th, student threatened to harm, and harm other students self, lash his face, December 12th, kicking, biting, and verbal threats to other students regarding knives.

Mr. Sanacore confirms that at the beginning of the 2023-24 school year, C.G.'s behavior technician was replaced with a 1:1 teacher assistant. Though C.G. did show progress in May and June of the 2023 school year and during summer ESY, Mr. Sanacore contends it became apparent that C.G. had ongoing behavior that DLC and its staff could not properly contend with. He states that other students in C.G.'s classroom have what are referred to as "target behaviors," such as episodes of inappropriate behavior, elopement and episodes of aggression, unlike C.G., their behavior does not create imminent risks of harm and their behavior does not result in a disruption of other student's learning to the extent that it would prevent the school from providing appropriate programming that provides a meaningful educational benefits to all students.

Mr. Sanacore also specifies and contrasts C.G.'s behavior by saying that he targets other students and staff with intent to hurt them, and over time, his conduct increased in intensity and duration warranting greater staff resources. He cites injuries suffered by his primary teacher assistant as well as his speech/language specialist, as well as threats made to others.

Though C.G. was sent out for mental health clearance at least six times from September to December 2023, each time he was cleared to return.

Simply put, with the level of perceived and actual threats by C.G. rising, out of concern for C.G., the other students, staff and faculty, DLC says it is unable to properly and safely handle C.G. and his behavioral and educational needs. Other than to admit he was directed to send the termination letter four days after the HIB matter was dismissed, Mr. Sanacore was unable to explain how and why DLC unilaterally and

arbitrarily terminated its contract with Union on the eve of the Christmas holiday recess thereby giving no time or notice to the parties to identify and place C.G. in a suitable alternative educational placement that would better fit his educational and behavioral needs.

Though it can't explain the extended delay in placing C.G. at DLC until May 2023 following the first due process petition, Union says it has fulfilled its obligations under FAPE, and both it and DLC have a legal right to terminate the DLC placement, and he "stay put" mandate is not without limits if a student engages in behavior that jeopardizes their own safety, as well as the safety of other student and school staff.

Within five days of the December 15th DLC letter of termination, the District scheduled a meeting with petitioner to further discuss how to address C.G.'s academic and behavioral needs in light of the unilateral DLC action. According to the District, that meeting was postponed by mutual consent and the District was advised that petitioner had decided to place C.G. in the Rutgers PHP medical day program starting December 28, 2023. That same day, petitioner filed the instant emergent relief application, and it is undisputed that C.G. did not start the medical day program, information from which might have been helpful for purposes of this proceeding.

Shortly thereafter, another IEP meeting was convened on January 4, 2024 at which time the primary emphasis was on finding a suitable alternate academic placement for C.G. since DLC indicated in no uncertain terms it was incapable of addressing his educational and behavioral needs and would not take him back.

Following that meeting, at least three packages were sent out to day programs for consideration of C.G. as a student, and at the time of the second day of hearing, three more packages went out with at least one to a residential placement.

Union also reported back on the day of the second hearing that it had contracted with an experienced mental health nurse, Mr. Steven Neff, who could provide a full review as to whether or not C.G. should be cleared to return to DLC or elsewhere, as well as

contacting with a BCB service and a BCBA technician, as well as re-engaging the behavioral specialist who started but did not complete the behavioral analysis.

When asked about security at DLC, the principal Mr. Sanacore indicated that despite the size of its student population and the nature of the issues and challenges its staff deals with on a daily basis, the school did not employ any security on the premises, in the event DLC was ordered to take C.G. back.

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 C.G.'s enrollment as a student at DLC despite DLC's candid presentation that it is unable to meet his educational and behavioral needs. In its presentation, DLC further argues it has an affirmative obligation not just to C.G., but to the entire student population, its staff and faculty regarding safety and their well-being as a whole. Petitioners assert that C.G. no longer receives instruction at DLC under a contract with Union Township schools that was unilaterally terminated, both Union and DLC have violated his rights under FAPE, and pursuant to the doctrine of stay put," he should be immediately re-enrolled at DLC at least until such time as a suitable alternate academic setting which will accept him can be identified, whether it be a day program or residential.

Despite the unilateral and short notice in its December 15th letter, DLC contends having put its best effort forward to maintain and educate C.G. with escalating behavioral

issues throughout, it has no further obligations to C.G. and the mandate to provide FAPE to him falls within Union's responsibility.

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.
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> [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 and DLC to continue to provide instruction to C.G. With a "stay put" claim, the petitioners are seeking an automatic statutory injunction against any effort to change C.G.'s program for a period of 30-45 days until a suitable alternative either day or residential can be identified. 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 Individual. Disabilities Educ. L. Rep. (LRP Publications) 439, 440, 3rd Cir. September 17, 1993.

Here, the last agreed upon and operative IEP is dated November 14, 2023, one month before DLC unilaterally terminated its contract with Union and advised petitioner C.G. is no longer welcome at the school. It is not factually disputed that the Board complied with the IEP's requirements to provide C.G. with placement effective May 1, 2023 with certain supports at DLC. Though I **CONCLUDE** that at least until December 15, 2023 the respondent Union essentially followed the "stay put" IEP that was dispositive of C.G.'s. stay put program, **I ALSO CONCLUDE** that certain actions and inactions by both Union and DLC starting in September 2023 rendered each of them unable to continue to fulfill their FAPE obligations to C.G. More specifically, the staffing that C.G. started with in May 2023 was not there when school resumed in September 2023. Without the proper supports in place, C.G.'s behavioral incidents escalated, thereby interfering with both his and the other student's ability to receive an appropriate education under FAPE.

Recognizing that in these times, specialists and other support staff move freely from district to district, it is unclear why Union and DLC failed to recognize that if they were unable to provide C.G. with the proper supports since his behavior and manner of conducting himself was unlike others, they did not approach petitioner sooner and search immediately for either a new day placement or a residential program that would better fit his needs.

By its own conduct in December 2023, DLC also contributed and interfered with C.G.'s rights under FAPE by unilaterally terminating its contract with Union, four days after its own Superintendent determined that C.G. was not responsible for a HIB violation. I won't speak much more to this here and leave it for the future due process case to be heard once it is transmitted, including but not limited to whether C.G. is entitled to some form of compensatory education, both for the period of time from September 2022 to May 2023 when he was out of school, and again from December 15, 2023 to present. Recognizing DLC's desire to protect its staff and other students, which it has a legal and regulatory right to do, the manner in which it took action against C.G., with other remedies available such as suspension, which would have given everyone more breathing room could have and should have been handled in a more professional manner.

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, that may be considered during the course of the underlying full due process petition once it is transmitted.

Here petitioners contend that failure to continue to provide the same program at DLC and services during the balance of the school year violates stay put and C.G.'s IEP. It is no secret that petitioner, Union and myself, were greatly frustrated with the precarious position in which DLC left Union and petitioner was surprised on December 15th with a unilateral termination. Those actions may become the subject of a separate action in a different forum at a later time.

Despite my own frustration and concern, however, I am left with the legal obligation to determine whether or not petitioner on behalf of C.G. is entitled to emergent relief under the four prongs of Crowe. While it is certainly a close call, **I CONCLUDE** that petitioner is unable to meet all four criteria and on that basis, **I FURTHER CONCLUDE** while C.G. is still entitled to FAPE, at least for the next three years as he transitions into adulthood, I cannot **CONCLUDE** that a forced return to DLC, even on a short term basis, is in anyone's best interests, especially C.G., and that the most prudent course of action at the present time, is a consolidated and expedited effort to place him in either day program or a residential placement that can better meet all of his needs.

With the unilateral termination and removal from DLC on December 15th, petitioner is able to meet the first of four prongs of Crowe, that he has suffered irreparable harm. As to the second prong, petitioner can also demonstrate a settled area of law may have been violated, under FAPE, IDEA and "stay put." But a student's rights under "stay put" are not absolute. Unlike in other cases, we do not have a district that is simply taking away a service or modifying a service which is contrary to a student's IEP. Instead, what we have is a student, now age 18, with recognized and documented behavioral and safety

issues, that conceivably threatens the rest of the student population, and certainly the faculty and staff. DLC has no school security or safety personnel on site, and so each time there is an episode, they are forced to remove C.G. for a short-term evaluation, which no student should have to go through on a regular basis. Though their methods in the end were less than ideal, the school is simply not equipped to handle C.G.

Therefore, as to prong three of Crowe, **I AM UNABLE TO CONCLUDE** is the likelihood of success on the merits in petitioner's favor, given the multiple incidents, two of which involved assaults on teachers during a short period of time, together with the threats made against other students. With regard to prong four of Crowe, whether the equities balance in favor of petitioner over that of DLC and Union, **I AM ALSO UNABLE TO REACH THIS CONCLUSION,** in C.G.'s favor as well**,** when balanced against the interests of the other 130 students in the school as well as the staff and faculty, whose safety is also of paramount importance. Accordingly, much as I am concerned about the manner in which DLC took unilateral steps leaving Union's ability to deliver FAPE compromised, I am equally concerned, even with Union's indicated and appreciated efforts to now find a BCBA and an outside mental health professional to conduct a clearance review, that with the history of threatened violence, the actual violence against two teachers and the fixation on weapons may escalate into a more severe and tragic situation should C.G return to DLC. Though it is clear that C.G.'s mother is loving, caring and is a zealous advocate for his interests, it is unclear why C.G. did not at least start the Rutgers medical day program following the termination from DLC, even for a short period, while the litigation was pending. Any information from such a program, even over a three-week period, might have provided more insight and reassurance into the safety and security concerns as expressed by C.G.'s behavior and discussion about violence and weapons. Though DLC could have and should have been more candid about its intentions so both petitioner and Union could plan accordingly, it does have the right under the law to protect itself, its students and its staff from unruly and dangerous behavior. "Stay put" is not an absolute right, particularly in these times of violent incidents at schools.

Though it is a close call, and FAPE remains a paramount right belonging to petitioner and C.G., **I AM UNABLE TO CONCLUDE AT THIS TIME** that petitioner is able

to meet all four prongs of Crowe, and I am therefore obligated to deny petitioner's application for emergent relief. Due to what appears to be a significant lag in time with implementing the original placement and not equipping DLC with the necessary staff to deliver FAPE to C.G., petitioner may have a valid claim for compensatory education in the underlying due process claim. For purposes of Union's cross-claim, however, **I CONCLUDE** that Union is entitled to limited emergent relief temporarily changing C.G.'s IEP to afterhours home instruction of two hours a day, ten hours a week for no more than 30-45 days until either a new day program or a residential program can be implemented. If, for some reason such a program is not implemented in that time, either or both parties may seek additional relief from whoever is assigned to hear the underlying primary due process matter which has not yet been transmitted.

The issues involved which are attributable to DLC's termination action in December may be addressed in the underlying due process action, and/or in another forum.

ORDER

Accordingly, I **ORDER** that the petitioner's application for emergent relief is **DENIED**. The Union Board of Education's crossclaim for emergent relief seeking a change in C.G.'s IEP to home instruction for a period of 30-45 days is **GRANTED in part**, conditioned upon an expedited and concentrated good faith effort by Union to locate either a new day placement or in the alternative which may be preferable a residential placement. Union is hereby **ORDERED** to **immediately** continue its search, on behalf of C.G. on an expedited basis no longer than 30-45 days for a more appropriate and suitable day or residential program where C.G. can receive the FAPE education he is entitled to. In the interim Union **shall** provide a minimum of two hours a day of home schooling, after 3:00 PM which petitioner has stated is more psychologically suitable for C.G. which effectively changes his IEP on a short-term basis, up to ten hours a week, while the search for a new placement continues. Once such a program is identified, the parties shall meet and agree to a new IEP prior to the underlying due process petition is adjudicated.

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 Office of Special Education.

January 19, 2024
DATE

ANDREW M. BARON, ALJ

Date Received at Agency: January 19, 2024

Date E-Mailed to Parties: January 19, 2024

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