205-18

J.M., on behalf of minor child, J.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BYRAM, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Pro se petitioner challenged the Board's decision to rescind J.M.'s admission into the respondent school district's Interdistrict Public School Choice Program (the "choice program"), and requested placement in the choice program for the 2018-2019 school year on an emergent basis. On December 27, 2017, petitioner – a resident of Hopatcong – was informed that as a result of a random lottery for admission, J.M. was "conditionally accepted" into the choice program for the 2018-2019 school year. The respondent Board subsequently rescinded its conditional acceptance of J.M., claiming he should not have been included in the lottery as a Tier 1 student. Petitioner contended that since the preschool program offered in Hopatcong is not a "public preschool" – as it is only available to students with disabilities, and is not a "state-funded" preschool program – J.M. was properly considered a Tier 1 student when the lottery was conducted, and that J.M. should be admitted into respondent's choice program for the upcoming school year. Petitioner also alleged that J.M.'s acceptance into the choice program may have been rescinded due to his status as a classified student. The Board maintained that J.M. is a Tier 2 student who was erroneously included in the lottery with Tier 1 students during the application process.

At the OAL, the ALJ addressed only petitioner's application for emergent relief, which requested that J.M. be placed in respondent's choice program for the 2018-2019 school year. The ALJ determined that petitioner failed to demonstrate entitlement to emergent relief pursuant to *N.J.A.C.* 6A:3-1.6 and *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), as petitioner did not sufficiently show that J.M. would suffer irreparable harm if emergent relief was not granted. Accordingly, emergent relief was denied, and the matter was returned to the Commissioner for review of the ALJ's decision.

Upon review of the record, the Commissioner determined that there are no material facts in dispute, and that the underlying petition can be decided herein as a matter of law. The Commissioner found, *inter alia*, that: J.M. was improperly categorized as a Tier 2 student when his "conditional acceptance" was rescinded by the Board; J.M. was appropriately a Tier 1 student pursuant to the criteria set forth in the subject regulations and the respective tiers; and the crux of the issue here is that Hopatcong does not offer a state-funded preschool program for its students, and therefore – regardless of where he attends preschool – J.M. meets the eligibility requirement for Tier 1. Accordingly, the Commissioner granted the relief requested in the petition, and J.M. shall be placed in the respondent Board's choice program for the 2018-2019 school year.

July 6, 2018

OAL DKT. NO. EDU 07159-18
AGENCY DKT. NO. 118-5/18

J.M., on behalf of minor child, J.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BYRAM, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the sound recording of the proceedings at the Office of Administrative Law ("OAL"), the recommended Order of the Administrative Law Judge ("ALJ"), and the parties' submissions have been reviewed. Petitioner filed a petition of appeal challenging the Board's decision to rescind J.M.'s admission into the respondent school district's Interdistrict Public School Choice Program (the "choice program"), and requesting placement in the choice program for the 2018-2019 school year on an emergent basis.

Petitioner, a resident of Hopatcong, applied to respondent's choice program in November 2017. On December 27, 2017, petitioner was informed that as a result of a random lottery for admission, J.M. was "conditionally accepted" into the choice program for the 2018-2019 school year. Subsequent to this notification, respondent rescinded its conditional acceptance of J.M., claiming he should not have been included in the lottery as a Tier 1 student.

Petitioner argues that since the preschool program offered in Hopatcong is not a "public preschool" – as it is only available to students with disabilities, and is not a "state-funded" preschool program – J.M. was properly considered a Tier 1 student when the lottery was conducted, and that J.M. should be admitted into respondent's choice program for the upcoming school year. Petitioner also

alleges that J.M.'s acceptance into the choice program may have been rescinded due to his status as a classified student.

Respondent asserts that J.M. is not eligible to be placed in the lottery for the choice program as a Tier 1 student because he did not attend the public preschool program available in Hopatcong during the 2017-2018 school year and, therefore, he should have been deemed a Tier 2 student. Respondent maintains that J.M. is a Tier 2 student who was erroneously placed in the lottery with Tier 1 students during the application process.

The hearing at the OAL only addressed petitioner's application for emergent relief requesting placement of J.M. in respondent's choice program for the 2018-2019 school year. This application was denied because the ALJ determined that petitioner failed to demonstrate entitlement to emergent relief pursuant to *N.J.A.C.* 6A:3-1.6 and *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), as petitioner did not sufficiently show that J.M. would suffer irreparable harm if emergent relief was not granted.

Although no determination concerning the ultimate issue in this matter was made as part of the emergent hearing, the Commissioner's review of the record in this matter indicated that there are no material facts in dispute. As such, the Commissioner invited the parties to comment as to whether this matter could be disposed of on a summary basis. Based on the parties' responses, and consistent with the Commissioner's authority and discretion to hear contested cases pursuant to *N.J.A.C.* 6A:3-1.11, the Commissioner has determined to reach a decision that will dispose of both the emergent application and the underlying petition of appeal, as there are no material facts in dispute and the issue can be decided as a matter of law.

The Commissioner finds that J.M. was improperly categorized as a Tier 2 student when his "conditional acceptance" was rescinded by the Board. The Commissioner finds that J.M. is a Tier 1 student pursuant to the criteria set forth in the subject regulations and the respective tiers.

N.J.S.A. 18A:36B-14 *et seq.* enables "choice districts" to enroll Kindergarten through twelfth grade students who do not reside within the choice district without cost to the non-resident parents. *N.J.A.C.* 6A:12-2.2 sets forth the eligibility requirements for enrollment in a choice district. *N.J.A.C.* 6A:12-2.2(a) provides that in order to be eligible to participate in the choice program, the applicant student must have attended a public school in the sending district for at least one full year immediately preceding enrollment in the choice district. *N.J.A.C.* 6A:12-2.2(a) further provides that "[t]he one-year requirement shall not apply to a student applying to enroll in kindergarten in a choice district if that student already has a sibling enrolled in and attending the choice district and if the district of residence of that student does not offer a public pre-school program." Therefore, the one-year requirement with regard to Kindergarten enrollment only applies to students who live in districts that offer a public preschool program.

Based on the eligibility criteria set forth in the governing regulations, the Department has established a tier system. In order to be eligible for Tier 1, a student must be enrolled in a public school in their resident school district for the entire year immediately preceding enrollment in a choice district. Tier 2 students are those who have not attended their resident district's public school for the entire year immediately prior to enrollment in the choice district and do not otherwise meet the requirements of Tier 1. To qualify as a Tier 1 applicant for Kindergarten, however, a student must either: attend a state-funded pre-school in their resident district; or reside in a district that does not offer a state-funded preschool program; or have a sibling currently attending the choice district.

Hopatcong does not have a public pre-school program for its preschool age students, and the preschool program through NORWESCAP – a private, non-profit agency – does not constitute a public preschool program in that district. Therefore, J.M. should be classified as a Tier 1 student. The fact that J.M. is eligible for special education and related services, and attended a non-public program, has no bearing in this case. The crux of the matter is that Hopatcong does not offer a state-funded preschool program for its students; therefore, irrespective of where J.M. attends preschool, he

meets the eligibility requirement for Tier 1. To suggest otherwise – that J.M., a classified student who resides in a district that does not offer a public preschool program, is a Tier 2 student because he attended a (for profit) private preschool – is improper.[1]

Accordingly, the Commissioner grants the relief requested in the petition of appeal, finding that J.M. is a Tier 1 student and his "conditional acceptance" was improperly rescinded based on respondent's erroneous categorization of J.M. as a Tier 2 student.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: July 6, 2018
Date of Mailing: July 6, 2018

[1] Had petitioner never sought Hopatcong's services and J.M. was unilaterally placed in a non-public school despite Hopatcong having a state-funded pre-school program, respondent's contention could have been merited. However, it is foreseeable that a classified student – entitled to special education and related services tailored to meet their needs in the least restrictive environment – could be placed in an appropriate program in another public school district or in a non-public school if the resident district cannot provide the necessary programming and services to the student. Such placement could be with a private agency such as NORWESCAP, or a non-public school approved for the education of students with disabilities, or a private placement pursuant to *N.J.A.C.* 6A:14-6.5. None of these options should prevent a classified student from being categorized as Tier 1 if the resident district does not offer a state-funded pre-school program, or if the parties agree to an out-of-district placement even where a state-funded pre-school program exists.

[2] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
DENYING EMERGENT RELIEF
OAL DKT. NO. EDU 07159-18
AGENCY DKT. NO. 118-5/18

J.M., ON BEHALF OF MINOR CHILD, J.M.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BYRAM, SUSSEX COUNTY,
Respondent.

J.M., petitioner, pro se

Robin Ballard, Esq., for respondent (Schenck, Price, Smith & King, attorneys)

Record Closed: May 25, 2018 Decided: May 29, 2018

BEFORE **SUSANA E. GUERRERO**, ALJ:

STATEMENT OF THE CASE

Petitioner, J.M., filed a petition on behalf of her son, J.M., a minor, challenging the decision of the Board of Education of the Township of Byram (Board or respondent) not to admit her son into the choice school program. Petitioner seeks an order on emergent relief requiring respondent to admit and enroll minor child J.M. into the respondent's Interdistrict

Public School Choice Program. Respondent opposes petitioner's application for emergent relief.

PROCEDURAL HISTORY

Petitioner filed a petition seeking emergent relief with the New Jersey Department of Education, Office of Controversies and Disputes on May 14, 2018. On May 17, 2018, the matter was filed with the Office of Administrative Law (OAL). Oral argument was held on May 25, 2018, at which time the record was closed.

FACTUAL DISCUSSION

Many of the facts do not appear to be disputed. J.M. is a five-year-old boy who resides in Hopatcong, New Jersey. In May 2016 and May 2017, the Hopatcong Board of Education determined J.M. eligible for special education and related services. J.M. has never attended a school in Hopatcong. In or around July 2017, petitioner entered into a Settlement Agreement with the Hopatcong Board of Education. The Settlement Agreement states in part "J.M. will be privately placed by his Parents at the Goddard School for the 2017–2018 school year and 2018 Extended School Year (ESY) . . . . [T]he parents disagree with the District's previously proposed placement for 2017–2018, despite the fact that such placement was designed to provide an appropriate education according to the requirements of the IDEA." The Settlement Agreement also indicates that "to avoid the cost of litigation," the Hopatcong Board of Education agrees to reimburse petitioner a certain amount towards J.M.'s tuition at the Goddard School, and any related or additional services provided to J.M. during the 2017–2018 school year and 2018 ESY program. According to the Settlement Agreement, J.M.'s parents agree to provide J.M. with transportation to Goddard School and the Hopatcong Board of Education will provide them with "aide in lieu of transportation." All other costs attributable to J.M.'s placement would be the parents' responsibility, and the Hopatcong School District would have no responsibility to oversee J.M.'s program at the Goddard School. J.M. has attended the Goddard School's pre-school program, which is a private school, since April 2016.

Byram Township Board of Education participates in the Interdistrict Public School Choice Program. In November 2017, petitioner completed an application to have J.M. considered for a Choice seat in the incoming kindergarten class. According to respondent, nineteen applications were received for four open spots, and one of the four spots was offered to the sibling of an existing Byram District student. J.M.'s application, as one of the remaining eighteen applications, was included in a lottery. On December 27, 2017, petitioner was informed that, through the lottery, J.M. had been "conditionally accepted" as a Choice student for kindergarten beginning September 2018. Nearly four months later, petitioner was notified by respondent that the conditional application for J.M. to be admitted as a Choice student had been denied "according to the requirements of the law" as set forth in the letter, and that as a Tier 2 student, J.M. should not have been included in the random lottery as there were several Tier 1 students on the Choice wait list.

Respondent admits that it made an error in conducting its lottery for the Choice program by failing to separate the Tier 1 and Tier 2 applicants before conducting the lottery, rather than conducting the lottery with only Tier 1 applicants first.[1] Respondent maintains that J.M. is a Tier 2 student because he attends a private school, does not have a sibling attending a Hopatcong school, he did not attend public school provided in Hopatcong; and he does not reside in a district that does not have public pre-school. Respondent also asserts that a public pre-school program is operated in the resident district of Hopatcong through NORWESCAP, "a private, non-profit corporation established under the Economic Opportunity Act which provides services, such as Early Head Start and Head Start

[1] Respondent refers to "Tier 1" and "Tier 2" applicants. While these terms do not appear in the applicable codes, the New Jersey Department of Education (NJDOE) defines these designations on its website. See http://www.state.nj.us/education/choice/parents/faq.htm#g1l1 Tier 1 students "must be enrolled in a NJ public school in his or her resident school district for the entire year immediately preceding enrollment in a Choice district . . . . **If applying for kindergarten, a Tier 1 student must attend his or her resident district's public and free pre-school (this is limited to districts that are considered 'former Abbott' districts [NJDOE includes a link to these districts, and Hopatcong does not appear on the list], a student who resides in a district that does not offer public and free pre-school, and a student who has a sibling currently attending the Choice district.** Choice districts must first fill their available seats with Tier 1 students. If the number of Tier 1 applicants exceeds the number of Choice seats available, the Choice district must hold a lottery to randomly select students for enrollment and for the waitlist." (emphasis added.)

According to the NJDOE website, Tier 2 student include "NJ residents who have not attended their resident public school for the entire year immediately prior to enrollment in the desired Choice district and do not otherwise meet the requirements for Tier 1. Choice districts are not obligated to accept Tier 2 students. If a choice district accepts Tier 2 applicants, they may do so only after all the qualified Tier 1 applicants have been accepted . . . ."

programs, primarily to low-income families within Hunterdon, Sussex and Warren Counties." Respondent maintains that J.M. does not attend an out-of-district placement. Rather, petitioner had the option to send J.M. to the NORWESCAP program in Hopatcong but opted to send him to a private pre-school, and private school students are considered Tier 2.

Petitioner asserts in her petition that J.M. "is being denied his tier 1 seated [sic] based on a comment made by Tammy Miller in our resident school district of Hopatcong, NJ which stated that we (his parents) refused to send him to the Hopatcong pre-school program in which we have a legal agreement for out of district placement due to the fact that Hopatcong does not offer an inclusion program with typically functioning peers." Petitioner argues that Hopatcong's program is not a public pre-school because it is only available to children with disabilities, and Hopatcong does not offer an "inclusion" pre-school program. At oral argument, petitioner asserted that Hopatcong does not have a State-funded pre-school program, and is not a former Abbott district offering free public pre-school (which would make J.M. a Tier 1 student according to the NJDOE website). Petitioner conceded that J.M. had the option to attend the pre-school program in Hopatcong offered through NORWESCAP, but the parents opted to place J.M. in the Goddard school because they believed that program was not appropriate for J.M. Petitioners also maintain that NORWESCAP is federally-funded, and not a State-funded pre-school program, as Hopatcong was not included in the NJDOE's list of State-funded pre-schools (i.e., former Abbott districts).

Petitioner also suggested that J.M.'s application may have been rescinded four months after being selected by Byram because he has a diagnosis of autism and requires special services. Petitioner requested this emergent hearing because it is near the end of the school year and placement for J.M. for the 2018–2019 school year "must be handled prior to the current school year ending." Petitioner's application asserts that if the emergent relief is not granted, the Choice seat that was originally offered to J.M. will be given to another candidate. It would be a significant financial burden to pay for an out-of-district placement for J.M., yet the Byram school district would provide J.M. with "the necessary services he requires in a district where he will not be a target for discrimination."

Respondent opposes petitioner's application, asserting that petitioner is unable to satisfy the requirements for emergent relief. First, petitioner is unable to demonstrate that J.M. will suffer irreparable harm if he is not placed in Byram's Choice Program. If not placed, J.M. will not be deprived of an education as he can enroll in the Hopatcong kindergarten program. The Hopatcong school district has already held an IEP meeting for J.M., and has prepared an IEP for the 2018–2019 school year containing the services his IEP team have determined to be appropriate for him. There is no concern about J.M.'s educational services being interrupted or terminated if he is not immediately placed in Byram. Any problems petitioner may have had with J.M.'s home district is not sufficient reason to grant the relief requested. Moreover, J.M.'s spot in the choice program was only extended to him conditionally and was revoked when it was determined that an error was made in offering him the spot when a Tier 1 applicant had not been prioritized as required by law.

Second, respondent asserts that petitioner has no legal right to force respondent to admit J.M. as a Choice student on an immediate basis, no likelihood of success on the merits, and that petitioner does not have a well-settled legal right to the requested relief. Respondent cites to the relevant statutes and regulations concerning the requirements to apply to a Choice district, classification of Tier 1 and Tier 2 students, and the legal standards for accepting applicants into the program, and concludes that J.M. is a Tier 2 applicant as he does not have a sibling currently enrolled in Byram; he did not attend pre-school in his resident district for at least one full year; and instead petitioner chose to have J.M. attend a private school. Respondent was legally required to conduct a lottery with all Tier 1 applicants before any Tier 2 application could be considered. Here, Byram mistakenly included Tier 2 applicants in the lottery and Byram is now attempting to correct this error by conducting a new lottery with the Tier 1 applicants only.

Finally, respondent asserts that the interests of Byram strongly outweigh those of petitioner. As indicated above, petitioner has not demonstrated that any type of harm will come to J.M. if Byram does not immediately offer him a Choice seat. On the other hand, granting emergent relief here—by compelling respondent to give a Choice seat to a Tier 2

applicant before offering it to Tier 1 applicants--would require respondent to violate the statutory provisions of the Interdistrict Public School Choice program, N.J.S.A. 18A:36B-14 et seq. To award petitioner immediate placement for J.M. on an emergent basis on the facts of this matter would set a dangerous precedent that would disrupt well-established practices for school districts to accept Choice students in accordance with the parameters set forth in the applicable statute and codes, and this could lead to increased litigation for all Choice districts and unnecessarily burden the taxpayers of these and other school districts.

LEGAL DISCUSSION

The standards which must be met by the moving party in an application for emergent relief are embodied in N.J.A.C. 1:1-12.6 and Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982). Emergency relief may only be granted if the judge determines that:

> 1. The petitioner will suffer irreparable harm if the relief is not granted;
> 2. The legal right underlying the petitioner's claim is settled;
> 3. The petitioner has a likelihood of prevailing 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 requested relief is not granted.

Petitioners must satisfy all four prongs of the Crowe test.

New Jersey's Interdistrict Public School Choice Program, N.J.S.A. 18A:36B-14 et seq., and its applicable regulations provide a process for selecting students to enroll in a Choice program. N.J.S.A. 18A:36B-20(a) provides in part:

> To be eligible to participate in the [choice] program, a student shall be enrolled at the time of application in grades pre-school through 12 in the school of the sending district and have attended school in the sending district for at least one full year immediately preceding enrollment in the choice district, provided that a "sending district" includes any school district that a student in a particular district of residence is required by law to attend. The one year enrollment shall not apply to a student enrolling in pre-school or kindergarten in the choice

> district. Openings in a designated school of a choice district shall be on a space-available basis, and if more applications are received for a designated school than there are spaces available, a lottery shall be held to determine the selection of students. Preference for enrollment may be given to siblings of students who are enrolled in a designated school . . . . If there is an opening in a designated school of a choice district and there is no student who is enrolled in a sending district who meets the attendance requirements of this subsection, including a student who has been placed on a waiting list based on a lottery held in the choice district, then the choice district may fill that opening with a public school student who does not meet the attendance requirements of this subsection or a nonpublic school student.

N.J.A.C. 6A:12-2.2 addresses the eligibility criteria, including attendance requirement, for students to participate in a choice program. It states in relevant part:

> (a) To be eligible to participate in the program a student shall be enrolled at the time of application in grades pre-school through 12 in a public school of the sending district and have attended school in the sending district for at least one full year immediately preceding enrollment in a choice district including time spent at any school that a student in a particular district of residence is required by law to attend . . . . The one-year requirement shall not apply to a student applying to enroll in kindergarten in a choice district if that student already has a sibling enrolled in and attending the choice district and if the district of residence of that student does not offer a public pre-school program. (b) A public school student who does not meet the eligibility requirements found in (a) above or a non-public school student may nonetheless apply to enroll pursuant to N.J.S.A. 18A:36B-20a . . . .

The Choice district is prohibited from discriminating in its admission policies or practices on the basis of an applicant's status as a person with a disability, or any basis prohibited by State or federal law. N.J.S.A. 18A:36B-20(b)

With regard to the first required prong in resolving an emergent relief request, "irreparable harm" is defined as the type of harm "that cannot be redressed adequately by monetary damages." Crowe, 90 N.J. at 132-33. In addition, 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). However, pecuniary

damages may sometimes be inadequate because of the nature of the injury or the right affected. Crowe, 90 N.J. at 133. For example, in Crowe the Court determined neither an unwarranted eviction nor reduction to poverty could be compensated adequately by monetary damages awarded after a distant hearing. Ibid.

In the present matter, petitioner has failed to establish irreparable harm if J.M. is not admitted into the Byram Choice program at this time. J.M. is currently enrolled in the Goddard school and expects to participate in its ESY program this summer. If he does not attend the Byram program in the fall, he is not left with no other educational options for the 2018–2019 school year. For one, he has the option to attend kindergarten in the Hopatcong school district, his home district. While petitioner clearly believes that Byram would be the better choice for J.M., and that it would provide him with the services he requires, petitioners offered no evidence to suggest that Hopatcong could not, or would not, provide J.M. with those needed services and supports. In fact, Hopatcong's child study team has evaluated J.M. and determined him eligible for special education and related services. IEPs were prepared in 2017 and more recently for the 2018–2019 school year, which petitioner initially agreed to but has recently rescinded. Accordingly, I **CONCLUDE** that petitioner has not sufficiently demonstrated that J.M. will suffer irreparable harm if emergent relief is not granted.

As petitioner is unable to satisfy the first prong of the Crowe test, further analysis of the other criteria for emergent relief is not required. It is noted, however, that petitioner does make a compeling argument that the sending district does not provide a State-funded pre-school program, which may therefore qualify J.M. as a Tier 1 applicant.

Based upon the arguments made and record before me, I **CONCLUDE** that petitioner has not not satisfied all four criteria required for emergent relief. As petitioner has failed to satisfy all four prongs of the Crowe test for emergent relief, and for the foregoing reasons, petitioner's request for emergent relief is **DENIED**.

ORDER

It is hereby **ORDERED** that petitioner's request for emergent relief is **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

May 29, 2018

DATE

SUSANA E. GUERRERO, ALJ

jb