State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
EMERGENT RELIEF
OAL DKT. NO. EDS -07678-20
AGENCY DKT.NO. 2021-31861

R.M. AND M.M. ON BEHALF OF C.M.,
Petitioners,
v.
PASSAIC CO. MANCHESTER REG. BOARD OF EDUCATION,
Respondent.

Lori Gaines, Esq., for petitioners (Barger & Gaines, attorneys)

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

Record Closed: August 31, 2020 Decided: August 31, 2020

BEFORE, **DANIELLE PASQUALE** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, R.M and M.C. on behalf of C.M., filed a Due Process Petition on August 19, 2020, under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400 to 1482, alleging that the Passaic County Manchester Reg. Board of Education (Respondent or District) deprived C.M. of a free and appropriate public education (FAPE) disputing the District's proposed program, and seeing out-of-district placement; a revised IEP, compensatory education and reimbursement. Petitioners filed a complaint for due process with the Office of Special Education Policy and Procedure (OSEPP). The

petitioners also filed a Request for Emergent Relief seeking an Order that the District continue implementing C.M.'s most-recent Individualized Education Program (IEP), but where C.M. was placed by North Haledon from 2016-2019 (fifth through ninth grades). That IEP is dated May 20, 2020 which notes the Craig School services and placement as the "stay put" placement. The Emergent Relief application was filed prior to the first OAL settlement conference scheduled for September 3, 2020 seeking a judicial order that the District abide by "stay put" by continuing C.M.'s placement at the Craig School where classes start this week on September 3, 2020. To that end, I reviewed the file, the brief in support of the emergent application and opposition to same and heard oral argument on August 31, 2020 via Zoom.

STATEMENT OF FACTS

C.M. was born on December 25, 2005, and is a rising ninth grade student at The Craig School as per his latest IEP, dated May 20, 2020. He has resided in North Haledon, the Respondent's District for all his school-age years. C.M. is diagnosed with Dyslexia, with Specific Learning Disability (SLD) in Reading, Decoding, Fluency, Comprehension, he is also classified SLD in Writing and Math. In addition, he is classified as having a Language Disorder (auditory, memory, and listening), as well as Attention Deficit Hyperactivity Disorder- Inattentive Type (ADHD) as well as Oppositional Defiant Disorder (ODD). As a result, he has been receiving out-of-district special education and related services at The Craig School for 5th, 6th, 7th and 8th grades as a result of his District's placement, noting that the K-8 District could not meet his needs.

The IEP in question, May 20, 2020, affords C.M. services, including but not limited to, specialized instruction in very small classes, with Orton-Gillingham-trained reading specialists throughout much of his school day and placement out-of-district at the Craig School. The IEP was determined in large part by the input of the independent evaluation of Dr. Jane Healy, a Neuropsychologist. Specifically, Dr. Healy confirmed that C.M. remains a student with significant learning needs who requires continued specialized instruction and placement out-of-district. Most notably, she noted in her opinion specifically that "I do not recommend a large public High School setting for [C.M.]". To

that end, she determined that placement in smaller resource classes within a public high school would be inappropriate for C.M.

Counsel for Petitioners note that effective July 1, 2020, C.M.'s IEP from the K-8 District expired and the Manchester District assumed responsibility for his education. It should be noted that C.M. has always lived in North Haledon and thus in both previously mentioned K-8 and high school districts.

The District then proposed and finalized as a result of a July 8, 2020 IEP meeting attached to Petitioner's Exhibit B, which calls for removal of C.M. from the out-of-district placement. The Petitioner notes it is a "radical change in placement" because it was done without further evaluation of C.M. by the District, and no formal observation of C.M. at Craig and notes that the ratios and certifications of the teachers are not at all what is provided for in the IEP in question. As a result, the Petitioners filed due process in a timely fashion and thus invoked the "stay put" on C.M.'s last agreed placement out-of-district at the Craig School. See Petitioner's Exhibit C. As a result, Petitioner's note and Respondent does not dispute that C.M. did not receive Extended School Year services as provided for in his most-recent IEP this summer.

Amongst other things, the May 20, 2020 IEP provided for The Craig School Placement which had a 4-to-1 student/teacher ratio in very small classes with all Orton-Gillingham trained special education teachers that worked with C.M. as per the IEP in the smaller classes several periods a day. The IEP was silent as to 'stay put.'

The District argues that their newest proposals in June took Dr. Healy's Evaluation into consideration, but admittedly did not take all her recommendations about the necessary program and related services for C.M. In addition, they did not reevaluate C.M. or observe the Craig School program. Regardless, the District continued that in July, their July 2, 2020 IEP could meet C.M.'s needs within the Manchester High School District. Including among other things: a pull-out resource program, accompanied with counseling 2x/month. The District freely admits that the pull-out resource placement was chosen as it was "comparable" to the program at Craig. It noted "individualized pacing", small student to teacher ratio, and promotion of self-esteem to gain confidence with

academic success. They also included home instruction in Algebra and English for 120/minutes/week each for the 2020 ESY. The Certification from the District's Director of Special Services noted that there is no Orton-Gillingham but rather Wilson trained reading specialist that would teach C.M. in pull-out resource at Manchester High School. Again, as noted by Petitioners, "comparable" is not relevant for the purposes of this emergent hearing given that C.M. has lived in District and never unilaterally placed; rather the District noted that he should be placed at The Craig School. While these differences may ultimately be "comparable" or considered FAPE after a full hearing that remains to be proved as part of the underlying due process and not germane to my decision here.

To that end, the Request for Emergent Relief is only to address the sole issue of invoking the 'stay put' placement on CM's last-agreed upon IEP of May 20, 2020 which calls for CM's placement at the Craig School with extended school year programming pending the full resolution of the underlying due process petition.

LEGAL ANALYSIS

Pursuant to N.J.A.C. 1:6A-12.1(e) and N.J.A.C. 6A:14-2.7(s)(1), emergency relief may be granted if the judge determines from the proofs that:

> i. The petitioner will suffer irreparable harm if the requested relief is not granted;
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> 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
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> 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.

In this case, it is unnecessary for me to consider whether the criteria set forth in Crowe v. De Gioia, 90 N.J. 126 (1982) have been satisfied in granting emergent relief. When the emergent-relief request effectively seeks a "stay-put" preventing the school district from making a change in placement from an agreed-upon IEP, the proper standard

for relief is the "stay-put" provision under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, et seq. Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 (3d Cir. 1996) (citing Zvi D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982)) (stay-put "functions, in essence, as an automatic preliminary injunction"). The stay-put provision provides in relevant part that "during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child." 20 U.S.C. § 1415(j).

The relevant IDEA regulation and its counterpart in the New Jersey Administrative Code reinforce that a child remain in his or her current educational placement "during the pendency of any administrative or judicial proceeding regarding a due process complaint." 34 C.F.R. § 300.518(a) (2016); N.J.A.C. 6A:14-2.7(u). The stay-put provision functions as an automatic preliminary injunction which dispenses with the need for a court to weigh the factors for emergent relief such as irreparable harm and likelihood of success on the merits, and removes the court's discretion regarding whether an injunction should be ordered. Drinker, 78 F.3d 859. Its purpose is to maintain the status quo for the child while the dispute over the IEP remains unresolved. Ringwood Bd. of Educ. v. K.H.J., 469 F.Supp.2d 267, 270–71 (D.N.J. 2006).

In the case at hand, the May 20, 2020 IEP was also silent as to 'stay put' and is what should be utilized to determine the "current educational placement of the child" at the time the dispute arose. Respondent agrees with petitioners that IDEA requires a school district to maintain a student's placement and program pending the outcome of the due process proceedings pursuant to 20 U.S.C. 1415(j). Respondent also agrees that the corresponding provision of the New Jersey Administrative Code requires that a student's program and placement be maintained pending the outcome of a due process proceeding. N.J.A.C. 6A:14-2.7(u). However, respondent asserts that since C.M. is entering a new district, they merely have to provide something "comparable" to C.M. to equal stay put. That is not the case here as is contrary to the law as cited throughout this Order and Petitioner's brief. While stay-put is not always a brick and mortar placement but a program, the description of the programs at the different schools do not sound comparable. Furthermore, as Petitioner correctly notes, that is not the standard to be

applied here for the purposes of the Emergent Application. In fact, it will take a full due process hearing to determine if the newly proposed program amounts to FAPE. Again, the only thing at issue in this application is whether the stay-put at Craig School applies and it clearly does.

C.M. is a student placed at The Craig School for the last four years. While the High School at Craig is perhaps located in a different building; it is located at the same small school. The Respondent's High School District is different than the K-8 District that placed C.M., but no further evaluation or observation of C.M. has taken place to determine if the proposed IEP is adequate. Therefore, the Petitioners rejected same especially after not receiving Extended School Year as a part of the newly proposed IEP.

As the term "current educational placement" is not defined within the IDEA, the Third Circuit standard is that "the dispositive factor in deciding a child's 'current educational placement' should be the [IEP] . . . actually functioning when the 'stay put' is invoked." Drinker, 78 F.3d at 867 (citing the unpublished Woods ex rel. T.W. v. N.J. Dep't of Educ., No. 93-5123, 20 IDELR 439, 440 (3d Cir. Sept. 17, 1993)); see also Susquenita Sch. Dist. v. Raelee S. by Heidi S. & Byron S., 96 F.3d 78, 83 (3d Cir. 1996) (restating the standard that the terms of the IEP are dispositive of the student's "current educational placement"). The Third Circuit stressed that the stay-put provision of the IDEA assures stability and consistency in the student's education by preserving the status quo of the student's current educational placement until the proceedings under the IDEA are finalized. Drinker, 78 F.3d 859.

Furthermore, the Third Circuit explained that the stay-put provision reflects Congress's clear intention to "strip schools of the unilateral authority that they had traditionally employed to exclude [classified] students, particularly emotionally disturbed students, from school." Id. at 864 (citing Honig v. Doe, 484 U.S. 305, 323, 108 S. Ct. 592, 604, 98 L. Ed. 2d 686, 707 (1988)); School Comm. v. Dep't of Educ., 471 U.S. 359, 373, 105 S. Ct. 1996, 2004, 85 L. Ed. 2d 385, 397 (1985).

The placement in effect when the request for due process was made—the last uncontroverted placement—is dispositive for the status quo or stay-put. Here, it is

uncontroverted that the "then-current" educational placement for C.M. at the time of the due process filing and the initial request for emergent action is the IEP that was developed for C.M most recently on May 20, 2020. Pursuant to that IEP, C.M. was to placed at the Craig School by the District's expert Dr. Jane Healy, who projected that C.M would not do well at any large public high school; it is undisputed by the parties that Manchester is a large regional high school. Again, the ultimate placement is not at issue here, merely the stay-put for the purposes of this emergent application pending a full hearing since The Craig School is scheduled to start in person Thursday, September 3, 2020. All parties agreed The Craig School is entirely devoted to special education students were C.M. receives a 4 to 1 ratio of Orton-Gillingham trained special education teachers.

The Third Circuit has defined the stay put or "then current educational" placement as the "operative placement actually functioning at the time the dispute first arises." Pardini v. Allegheny Intermed. Unit., 420 F.3d 181, 190-192 (3d Cir. 2005) (quoting Thomas v. Cincinnati Bd. of Educ., 918 F.2de 618,625-626 (6th Cir. 1990); see also Drinker at 867. The IDEA does not define the term, "then-current placement." See generally 20 U.S.C. 1400 et seq. However, courts have found that Congress clearly intended this term to "encompass the whole range of services that a child needs" and that the term "cannot be read to only indicate which physical school building a child attends." See Spilsbury v. Dist. Of Columbia, 307 F. Supp. 2d 22, 26-27 (D.D.C. 2004). I **CONCLUDE** that all services which were developed for C.M. in the May 20, 2020 IEP were the "then-current" educational placement, inclusive of the related services, and Extended School Year at the **CRAIG SCHOOL.**

Further, "stay put" applies to the instant matter because there was no prior settlement or any affirmative or effective waiver of "stay put". The only way that parents can "lose stay put protection" is by affirmative agreement to give it up." See Drinker at 868. Further, the Third Circuit has held, "unless there is an effective waiver of the protection of the 'stay put,' the dispositive factor in deciding a child's current education placement' should be the IEP . . . which is actually functioning when the 'stay put' is invoked. "Woods v. New Jersey Dept. of Educ., No. 93-5123, 20 IDELR 439, 440 (3d Cir. Sept. 17, 1993); see also Drinker at 868 (holding any waiver of a party's right to claim a placement as the "current educational placement" must be explicit). C.M.'s IEP is silent

as to "stay put". Therefore, I **CONCLUDE** that there is no affirmative or effective waiver of "stay put".

Along with maintaining the status quo, respondent is responsible for funding the placement as contemplated in the IEP. Id. at 865 (citing Zvi D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982) ("Implicit in the maintenance of the status quo is the requirement that a school district continue to finance an educational placement made by the agency and consented to by the parent before the parent requested a due process hearing. To cut off public funds would amount to a unilateral change in placement, prohibited by the Act")).

After hearing the arguments of petitioners and respondent and considering all documents and legal submissions, I **CONCLUDE**, that the petitioners' motion for emergent relief is **GRANTED**. It is **ORDERED** that C.M. shall be permitted to continue receiving all in-class services, inclusive of the Orton-Gillingham instruction and related services as defined in the May 20, 2020 IEP. It is **FURTHER ORDERED** that all services, whether in-service or related services are to resume at the start of the 2020-2021 school year at the Craig School, which upon information and belief is September 3, 2020.

Accordingly, the issue of FAPE, compensatory education and reimbursement are accordingly not being addressed in this Order as discussed during today's Oral Argument.

This decision on application for emergency relief shall remain in effect until issuance of the decision in the matter. The parties will reach out with agreed upon available dates for pre-hearing conference and hearing dates and check with this Tribunal for its availability. 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 Programs.

August 31, 2020 *Danielle Pasquale*

DATE

DANIELLE PASQUALE, ALJ

Date Received at Agency

August 31, 2020

Date Mailed to Parties:

August 31, 2020

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