State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
EMERGENT RELIEF
OAL DKT. NO. EDS 05159-22
AGENCY DKT. NO. 2022-34565

T.G. ON BEHALF OF J.G.,
Petitioner,
v.
LINDENWOLD BORO BOARD OF EDUCATION,
Respondent.

Philemon Enoch, Esq., for petitioner (Enoch Law Firm)

Christopher F. Long, Esq., for respondent (Wade, Long, Wood, & Long, LLC, attorneys)

Record Closed: June 28, 2022 Decided: June 29, 2022

BEFORE **DAVID M. FRITCH, ALJ**

STATEMENT OF THE CASE

The petitioner, on behalf of their minor child, J.G., seeks an Order Granting Emergency Relief, pursuant to N.J.A.C. 1:6A-12.1(a) and 20 U.S.C. § 1415(k)(2) ordering the respondent, Lindenwold Board of Education (Board), to provide extended school year (ESY) services to J.G. because J.G. has been on home instruction through

the District since March 11, 2022, and the petitioner asserts that services provided by the Board for home instruction during this time were inadequate causing J.G. to regress and seeks ESY services "to address this regression." Although the District has offered J.G. ESY services either through the District via home instruction, or at an out-of-district placement, the petitioner contends that the ESY offered via home instruction is inadequate and placement at an out-of-district placement does not meet the requirement that services be provided to J.G. in the least restrictive environment. The petitioner seeks the respondent to provide ESY services to J.G. for the summer of 2002 in-person at a District school.

On March 3, 2022, J.G. was a student at Lindenwold School Number 4, a school within the Lindenwold School District (District). As a result of an incident at school where it is alleged that J.G. pushed another student at the school, requiring the student to seek medical attention, and hit a school administrator in the head with a white board, requiring the administrator to seek medical attention at the hospital, the District determined that, because the District does not offer a behavioral or emotional support program, J.G. required an out-of-district placement to be provided with a Free Appropriate Public Education (FAPE). J.G. has been on home instruction since March 11, 2022, as a result of this incident pending a placement determination. The petitioner filed for due process on March 30, 2022, which was transmitted to the OAL on June 6, 2022, and docketed under OAL Docket No. EDS 04558-33, seeking an order returning J.G. to school in Lindenwold School Number 4. The District sought to place J.G. at an out-of-district placement and filed a request for emergent relief on May 6, 2022, seeking an order to have J.G. placed at the Hampton Academy, an out-of-district placement which was transmitted to the OAL on May 19, 2022, and docketed under OAL Docket No. EDS 04701-22. The petitioner obtained legal counsel and the District withdrew the emergent status of their petition docketed under EDS 04701-22 pending the holding of an Individualized Education Program (IEP) Review for J.G., which was held on June 7, 2022. The IEP from that meeting sought an out-of-district placement for J.G., and that IEP was rejected by the petitioner on June 17, 2022. On June 23, 2022, the petitioner filed the present action seeking emergent relief regarding the provision of ESY services to J.G. for the summer of 2022.

PROCEDURAL HISTORY

On June 23, 2022, the New Jersey Department of Education received a request for a due process hearing and emergency relief. That matter was transmitted to the Office of Administrative Law, where it was filed on June 24, 2022. N.J.S.A. 52:14F-5(e), (f), and (g) and N.J.A.C. 1:6A-1 through 18.5. The respondent submitted a response in opposition to the motion which was received on June 27, 2022. Oral argument on the motion was held on June 28, 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**:

1. J.G. is a ten-year-old student who, until March 2022, was attending Lindenwold School Number 4, a public school operated by the District.
2. J.G. is currently eligible for special education and associated services under the classification of Other Health Impairment.
3. J.G. received extended school year (ESY) services through the District for the summer of 2021 as a result of the District offering expanded ESY services for that year due to students missing school due to the COVID pandemic.
4. J.G.'s most recent Individualized Education Program (IEP) through the District dated November 2021 had J.G. attending Lindenwold School Number 4 in a fourth-grade inclusion classroom with a general education and special education teacher for the 2021/22 school year.
5. J.G.'s mother received a copy of that November 2021 IEP and agreed to its implementation.
6. J.G.'s November 2021 IEP did not contain provisions for J.G. to receive ESY services for 2021/2022 school year.

7. During the 2021/2022 school year, J.G. began showing aggressive behaviors in class, including ripping paper, breaking pencils, throwing classroom items such as books and chairs that were observed multiple times per week. (McManis Cert. at ¶ 2.)

8. On March 3, 2022, while at school, J.G. pushed a fellow student at recess causing the student to be sent to the nurse's office for medical attention. (Id. at ¶ 3.)

9. On March 3, 2022, an administrator was called to J.G.'s classroom to support J.G. who was throwing chairs over his head and books. (Id. at ¶ 4.)

10. While the administrator was sitting with J.G., J.G. grabbed a personal white board and slammed it over the administrator's head, requiring the administrator to seek medical attention at the hospital. (Id. at ¶ 4.)

11. The Lindenwold School District does not offer a behavioral or emotional support program. (Id. at ¶ 4.)

12. The District believes that, based on J.G.'s emotional and behavioral needs, they cannot provide him with a FAPE in-district and believe that an out-of-district placement with appropriate supports is required to provide J.G. with a FAPE in the least restrictive environment. (Id. at ¶ 4.)

13. As a result of the incident on March 3, 2022, J.G. has been on home instruction through the District since March 11, 2022, pending a new educational placement.

14. The 2021/2022 school year for J.G.'s school in the Lindenwold School District ended on June 17, 2022.

15. In April 2022, during a mediation session, the District offered for J.G. to attend an ESY program. The District offered a program for J.G. either at an out-of-district placement (Hampton Academy in Burlington County New Jersey) with accompanying transportation or a program offered in-district through remote home instruction. (Id. at ¶ 5.)

16. J.G. is currently receiving remote home instruction services through the District's ESY program which runs until the last week of July 2022.

17. The petitioner contends that the present ESY program through home instruction is inadequate for J.G.

On June 7, 2022, the District held an IEP meeting for J.G. The resulting IEP recommends that J.G. be placed in an out-of-district placement. That IEP was rejected by the petitioner.

LEGAL DISCUSSION

N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief:

> A motion for stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. Degioia, 90 N.J. 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
> 2. The legal right underlying petitioner's claim is settled;
> 3. The petitioner has the 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.

The petitioner has the burden of establishing all of 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 petitioner contends that she is invoking the "stay put" provision to require the District to offer J.G. ESY services in the educational environment specified in J.G.'s last implemented IEP from November 2021, which had J.G. attending Lindenwold School Number 4. With a "stay put" claim, the petitioner is seeking an automatic statutory injunction against any effort to change J.G.'s placement 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.

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. 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. The purpose of "stay-put" is to maintain stability and continuity for the student. The first preference for placement is one agreed to by the parties. However, when the parties are unable to agree, the placement in effect when the due process request was made, i.e., the last uncontroverted placement, is the status quo.

While the District is seeking a change in J.G.'s placement with the revised IEP from June 7, 2022, for the upcoming school year and this change is being contested in an ongoing due process claim what is at issue in the present matter is the District's

offering J.G. an ESY program for the summer of 2022. The last implemented IEP from November 2021 governs to specify J.G.'s then-current educational placement for purposes of a stay-put provision. While the petitioner contends that J.G.'s November 2021 IEP should have offered J.G. ESY services, it is uncontested that J.G.'s November 2021 IEP did not offer J.G. ESY services for the 2021/2022 school year, and that IEP had been implemented by the District since November 2021 without objection by the petitioners. This means that the "operative placement actually functioning at the time [this] dispute [arose]" or the current status quo was that J.G. did not have an ESY program for the 2021/2022 school year for purposes of determining a stay-put placement. M.K. v. Roselle Park Board of Education, 2006 U.S. Dist. Lexis 79726 (D.N.J. 2006) at *27-28. In the absence of a current stay-put provision to govern the offering of an ESY placement to J.G. for the upcoming ESY session, I **CONCLUDE** that this tribunal must evaluate the petitioner's application for placement for ESY services under the standard for emergent relief set forth in Crowe.

Beginning with the first requirement, it is well-settled that relief should not be granted except "when necessary to prevent irreparable harm." Crowe, 90 N.J. at 132-33. In this regard, harm is generally considered irreparable if it cannot be adequately redressed by monetary damages. Id. at 132-33. In other words, it has been described as "substantial injury to a material degree coupled with the inadequacy of money damages." Judice's Sunshine Pontiac v. General Motors Corp., 418 F.Supp. 1212, 1218 (D.N.J. 1976) (citation omitted).

The moving party bears the burden of proving irreparable harm. More than a risk of irreparable harm must be demonstrated. Continental Group v. Amoco Chemicals Corp., 614 F.2d 351, 359 (D.N.J. 1980). The requisite for injunctive relief requires "a 'clear showing of immediate irreparable injury,' or a 'presently existing actual threat; (an injunction) may not be used simply to eliminate the possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by common law.'" Id. (citations omitted) (emphasis added).

The Individuals with Disabilities Education Act (IDEA) requires New Jersey to effectuate procedures which ensure that all children residing in the State have available

a FAPE consisting of special education and related services provided in conformity with an IEP. 20 U.S.C. § 1401 (9) and 1412(a)(1). Emergent relief may be granted where there exists an issue involving a break in the delivery of these educational services. N.J.A.C. 6A:14-2.7(r)(1)i. The break in delivery of educational services in this case occurred back in March 2022 when J.G.'s behavior impaired the ability of the District to provide him with a FAPE as well as impairing the District's ability to provide other students in J.G.'s school with a FAPE due to J.G.'s conduct in the school. J.G. has been on home instruction since that time following the District's assessment that they lacked the appropriate resources to provide J.G. with a FAPE within the district schools pending J.G.'s placement at an alternative educational placement. The current school year for J.G. ended June 17, 2022.

The present emergent matter, however, does not address the placement of J.G. on home instruction back in March 2022, but rather seeks the provision of an ESY program for J.G. for the summer of 2022. J.G. did not have the benefit of an ESY program in his prior IEP through the District, and the District's provision of ESY services for the upcoming summer is a new service that, if accepted, will be added to J.G.'s educational program as set forth in his last implemented IEP from November 2021. Accordingly, the dispute over whether the ESY is provided in an out-of-district or in-district placement does not involve a break in services currently being provided to J.G., but rather the provision of an entirely new service to J.G. that was not offered in J.G.'s last functioning November 2021 IEP. In other words, the "status quo" for the coming summer with respect to ESY programs is that there would be no ESY service offered under J.G.'s last implemented IEP. The District, in offering J.G. an ESY program for the coming summer is offering to add a new program to J.G.'s IEP rather than modify or cause a break in J.G.'s current educational services.

Further, the petitioner's petition for emergent relief clarifies that they are seeking the ESY services "to address the lack of schooling that was provided under the District provided home instructions" indicating that the petitioners are seeking these ESY services as a form of compensatory education for alleged past failings of the District in providing J.G. with a FAPE since March 2022. Rather than seeking relief to address a threat of an immediate irreparable injury, the petitioner in this matter is trying to utilize

the present action to obtain compensation for a claim of previously lost educational opportunity. I **CONCLUDE** therefore that the petitioner has failed to meet their burden to satisfy the irreparable harm standard under Crowe.

Secondly, the petitioner must also demonstrate that the legal right underlying their claim is settled and they must make a preliminary showing of a reasonable probability of success on the merits. Crowe, 90 N.J. at 133. The District's responsibilities under the IDEA to provide L.R. with a FAPE are well-defined in state and federal law. 20 USA § 1415(5)(B); N.J.A.C. 6A:14-4.2. Where the "nature and severity of the [student's] disability" are such that an appropriate education cannot be offered by the student's home school, the District must provide other accommodations to the student. N.J.A.C. 6A:14-4.2(2). J.G.'s behavior demonstrates that continuing J.G.'s education at Lindenwold district schools will likely disrupt J.G.'s own education as well as that of other students in the school and pose escalating danger of disruption and physical assault to staff and other students. The District concedes that they cannot provide J.G. with the services he requires in a public-school environment within the District and are seeking to find an appropriate accommodation for J.G. out-of-district. Consistent with the requirements of N.J.A.C. 6A:16-10.1, the District convened an IEP meeting to review and revise J.G.'s IEP accordingly and the District is attempting to implement this revised IEP which calls for J.G. to be placed in an out-of-district placement. While J.G.'s mother has not consented to this revised IEP, the present matter is a question of whether the ESY program the District offered to J.G. at an out-of-district placement complies with the requirements that services be offered in the "least restrictive environment." N.J.A.C. 6A:14-4.2.

The petitioner claims that, because the proposed out-of-district placement for ESY only serves special education students, it is not the least restrictive environment for J.G. The petitioner further contends that the only satisfactory environment that meets this standard for J.G. would be enrollment back in the District's ESY program at a public school in the District where J.G. could attend with his general education peers. Placement in a "least restrictive environment," however, requires a consideration of "the potentially harmful effects which a placement may have on the student with disabilities or the other students in the class." N.J.A.C. 6A:14-4.2(8)(iii). On the record presented,

the District contends that they are not capable of providing a FAPE to J.G. with the resources available in an in-district placement. J.G. was in an inclusion classroom with both a general education and special education teacher on March 3, 2022, when J.G. physically attacked a fellow student and a school administrator, causing injuries to both individuals. (See McManis Cert. at ¶¶ 2-4.) While the petitioner contends that the District has not provided adequate evidence such as medical records to determine if the severity of the injuries caused by J.G.'s conduct on March 3, 2022, were adequate to justify the District's position that J.G. requires an out-of-district placement, the petitioner has not presented any tangible evidence to otherwise contradict the District's assessment beyond a desire for J.G. to remain in an in-district placement and, on this motion, the petitioner bears the burden of proof to a "clearly and convincingly" standard. Waste Mgmt. of N.J., 399 N.J. Super. at 520. On this record, I **CONCLUDE** that, while the petitioner has met her burden to demonstrate she has a settled legal right to contest J.G.'s placement at an out-of-district placement for J.G.'s ESY services, I **CONCLUDE** that she has failed to demonstrate a reasonable probability of success on the merits of that claim.

Finally, in balancing the relative equities of the parties' respective positions, the District is likely to suffer greater harm than the petitioner if the petitioner's request is granted. In addition to its responsibilities for providing J.G. with an appropriate FAPE, the District has a responsibility for the safety of the students placed in its care as well as its staff. J.G.'s prior conduct not only has proven disruptive to the District's ability to provide him and other students with appropriate educational benefit, but has manifested itself in a manner placing other students and District staff at a risk of physical harm from J.G.'s conduct. These strong interests are not adequately counter-balanced by the petitioner's interests in maintaining J.G.'s placement at a school within the District. I **CONCLUDE** that the petitioner has failed to meet her burden to demonstrate that she will suffer greater harm than the respondents if the requested relief is not granted.

To justify the granting of emergent relief, all four of the Crowe v. De Gioia standards as codified in N.J.A.C. 6A:3-1.6 must be met and, for the reasons detailed above, three of the four required standards have not been met in this matter. I

CONCLUDE, therefore, the petitioner has not met these required standards, and the petition for emergent relief therefore must be **DENIED**.

ORDER

Accordingly, **I ORDER** that the petitioner's application for emergent relief be and hereby is **DENIED**.

This decision on application for emergency relief is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. § 1415(i)(2). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education.

June 29, 2022	
DATE	**DAVID M. FRITCH**, ALJ
Date Received at Agency:	June 29, 2022
Date Mailed to Parties:	June 29, 2022

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