I.R. NO. 2021-3

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HANOVER PARK REGIONAL HIGH SCHOOL
BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2020-294

HANOVER PARK REGIONAL EDUCATION
ASSOCIATION,

Charging Party.

**SYNOPSIS**

A Commission Designee grants an application for interim relief, in part, filed by the Hanover Park Regional Education Association (Association), alleging that the Hanover Park Regional Board of Education (Board) violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4a (1), and (5), when it unilaterally changed health insurance carriers from Horizon Blue Cross Blue Shield (Horizon) to Aetna on January 1, 2020 that resulted in "less than equal to or better than coverage and is a violation of the Act." The actual language from the parties' current Collective Negotiations Agreement is "same or better than those now being provided."

The Designee determined that the Association had established a substantial likelihood of prevailing in a final Commission decision and that irreparable harm would occur for one dependent of an Association member who was covered by the health insurance plan. The Designee Ordered that the Board appoint a person as a liaison to work with Aetna and the Association to ensure that the dependent received the same medical care as under the previous Horizon plan for her specific medical condition. The Designee also Ordered the Board to establish a fund for the dependent to ensure she received the same level of medical treatment as under the previous Horizon plan. All other relief requested by the Association was denied. The unfair practice charge was transferred to the Director of Unfair Practices for further processing.

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Appearances:

For the Respondent,
Sciarrillo, Cornell, Merlino, McKeever and
Osborne, LLC, attorney
(Dennis McKeever, of counsel)

For the Charging Party,
Oxfeld Cohen, attorneys
(Sanford R. Oxfeld, of counsel)

**INTERLOCUTORY DECISION**

The Hanover Park Regional Education Association (Association) filed an unfair practice charge accompanied by a request for interim relief on June 5, 2020. The charge alleges that the Hanover Park Regional Board of Education (Board) violated the New Jersey Employer-Employee Relations Act (Act), specifically N.J.S.A. 34:13A-5.4a (1) and (5),[1/] when it

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act"; and "(5) Refusing to (continued...)

unilaterally changed health insurance carriers from Horizon Blue Cross Blue Shield (Horizon) to Aetna on January 1, 2020 that resulted in "less than equal to or better than coverage and is a violation of the Act."

The current collective negotiations agreement (CNA) between the parties from July 1, 2019 to June 30, 2021 at Article XVII "Health Insurance" provides at paragraph A, "The Board agrees to continue during the current contract years health insurance benefits being provided at the time of the execution of this Agreement, provided, however, the Board may substitute other insurance carriers so long as the insurance coverage's [sic] are the same or better than those now being provided." (emphasis added).

The Association requests the following relief:

a. An Order declaring that the Respondent has violated the Act.
b. An Order requiring the Respondent to post that it has violated the Act.
c. An Order requiring the Respondent to cease and desist from violating the Act.
d. An Order requiring the Respondent to return to the previous level of benefits.

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1/ (...continued)
negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

e. An Order requiring the Respondent to immediately set a fund to provide members and their dependents with financial resources pending the outcome of this charge.
f. All such other just and equitable relief.

The Association submitted a brief and a certification from Michael Salerno (dated May 28, 2020), an Associate Director of the New Jersey Education Association's Research Division (Salerno) and a second certification (dated June 17, 2020) from the dependent daughter of an Association member who is covered under the health insurance plan with the Board. (DD).[2/]

On June 9, 2020, I issued an Order to Show Cause with an initial return date via telephone conference call for June 23rd, however that date was changed based on the request from the Board, with the consent of the Association, and the return date was set for July 7th and then changed to July 9th.

In response to the Association's application, the Board filed a brief and a certification with exhibits (dated July 1, 2020) from Patricia Pokrywa (Pokrywa), an Account Executive within the Employee Benefits Division of Brown & Brown Benefit Advisors ("Brown & Brown").[3/]

**FINDINGS OF FACT**

2/ Her initials are not actually "DD" (this in order to protect her privacy regarding her medical condition-the parties know her identity); she is currently a student in the Washington, D.C. area that receives treatment from an Aetna in-network provider at George Washington University Hospital (GWU).

3/ The Association was authorized to file a reply brief but did not submit one.

Salerno certifies that the Board unilaterally changed health insurance providers from Horizon to Aetna on January 1, 2020:

> On or about January 1, 2020 the Hanover Park Regional School District changed insurance providers from Blue Cross/Blue Shield to AETNA. This was done without negotiations with, nor approval of, the Hanover Park Regional Education Association. Pursuant to the terms of the CBA, while the Board could make a change in provider, the level of benefit was required to be at least equal to or better than previous level of benefit.
>
> [Salerno cert., para. 3].

Salerno certifies that DD suffers from a rare neurological disorder called "Spinocerebeller Ataxia Type 8."[4/] The only valid treatment modality to prevent progression is consistent physical therapy. (Salerno cert., para. 2).

Salerno also states that under the previous Horizon plan, DD had unlimited physical therapy without a pre-certification requirement, and that in the booklet that her mother received from the District, there is no indication that pre-certification is required for physical therapy. Additionally, there is a list of services that do require pre-certification and neither physical nor occupational therapy are listed. (Salerno cert., para. 4).

Salerno further certifies:

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4/ https://rarediseases.info.nih.gov/diseases/4956/spinocerebellar-ataxia-8

> This specific AETNA Plan farms out its pre-certification to a Third Party named NIA (National Imaging Associates). After [DD] underwent surgery on March 18th 2020, she needed a referral for PT due to a change in her circumstances. The referral was submitted by her treating physician and the NIA bureaucrat approved only 48 units, which is the equivalent of only 12 physical therapy sessions until September 1, 2020. This is a drastic reduction from what she enjoyed previously of either weekly or biweekly session for an entire year.
>
> [Salerno cert., para. 5].

Regarding the pre-certification issue, Pokrywa certifies: "AETNA contracts with a third-party entity named National Imaging Associates, Incorporated ("NIA") to provide review services pursuant to AETNA's plan utilization review services. Horizon did not use NIA for its review process, so the manner in which providers submit claims for reimbursements may differ between Horizon and AETNA." (Pokrywa cert., para. 12). "As part of this partnership, AETNA modified the billing process with its providers, including physical therapists, to ensure that certain procedural requirements are met prior to all services in order for the provider to receive payment." (Pokrywa cert., para. 13).

Salerno certifies with respect to the issue of "units":

> NIA uses a system in which "units" of care are pre-approved and that a "unit" in physical therapy is a treatment, such as icing, heat, massage, or ultra-sound. One visit to a physical therapist is usually three or four units and because NIA only approves a limited number of "units," the

> pre-approved therapy ends without the patient being ready to discontinue their therapy."
>
> [Salerno cert., para. 6].

Regarding the role of NIA in the approval process, Pokrywa states, "In order to properly identify a service, a provider is required to notify NIA of the type of service to be performed as identified by a Current Procedural Terminology ("CPT") code, the number of units requested, and the period of service during which the requested units will be utilized." (Pokrywa cert., para. 18). Additionally, "A 'unit' of a particular CPT code typically correlates to 15 minutes of specific type of service, known as a 'modality.'" (Pokrywa cert., para. 19).

Salerno certifies regarding DD, "Presently AETNA allotted her 38 units from March, 2020 to September, 2020. For comparison sake she used 31 units in just the months of January and February, 2020." (Salerno cert., para. 9).

Pokrywa certifies "The provider [GWU] requested NIA approval on March 24, 2020 for thirty-six (36) units of CPT code 97110 ("active procedure") and twelve (12) units of CPT code 97760 ("orthotic management training – 1st encounter) for approval." (Pokrywa cert., para. 35). Pokrywa further certifies that the provider [GWU] identified that the 48 requested units would be utilized during the period of March 24, 2020 through September 20, 2020 and that NIA approved all 48 units requested by GWU for the designated period of service on March 31, 2020. (Pokrywa cert., para. 36, para. 37).

On May 22, 2020, AETNA advised Pokrywa that it had been in contact with the provider to ensure that the provider [GWU] understood the NIA approval process and further that the provider [GWU] "advised that they understand the process and acknowledged that if units are needed for the March 24 through September 20 period of service, the provider would request additional units." (Pokrywa cert., para. 39, para. 40).

On June 10, 2020, the provider [GWU] submitted a request for additional units. Specifically, the provider [GWU] requested an additional twenty-six (26) units of CPT code 97110 and six (6) units of CPT code 97760; the thirty-two (32) units were approved by NIA. (Pokrywa cert., para. 42, para. 43).

DD certifies regarding the above thirty-two (32) units, "On June 17, 2020, I just heard back from NIA and I have a major problem. NIA has approved additional units — but only 26 more units. This equates to only six more 1-hour physical therapy sessions. NIA also approved six units for prosthetics and orthotics." (DD cert., para 4).

DD further certifies, "These 26 units are, as before, only for Code 97110. Several codes were requested, including Code 97110. The other codes that were requested were not approved." (DD cert., para 5). "I called NIA and was told that it is their policy that for physical therapy they approve only Code 97110 and not the other "active" codes. These are the codes I need for my condition. (DD cert., para 6).

As of June 23, 2020, [GWU] has been compensated for all the claims it submitted for physical therapy services since the Board's move to AETNA effective January 1, 2020 and that NIA has not denied any request for additional units made by the provider [GWU]. (Pokrywa cert., para. 44, para. 45).

Finally Pokrywa certifies, "In an email dated June 9, 2020, AETNA advised that [DD] has not incurred any out of pocket expenses related to her physical therapy services. (Pokrywa cert., para. 46). "As long as [GWU] continues to follow AETNA's required procedures, [DD] will receive all approved physical therapy services without interruption." (Pokrywa cert., para. 47).

DD certifies, "Prior to AETNA's imposition of the NIA Pre-Certification process, I knew nothing of codes and what was needed for which treatment. I've had to emerge myself in all of this to advocate for the treatments I need. I never had to do this prior to AETNA as each and every of my doctors' prescriptions were uniformly followed automatically." (DD cert., para 8). "I am extremely concerned for my health." (DD cert., para 7).

**ANALYSIS**

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a

final Commission decision on its legal and factual allegations[5/] and that irreparable harm will occur if the requested relief is not granted; in certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); Burlington Cty., P.E.R.C. No. 2010-33, 35 NJPER 428 (¶139 2009), citing Ispahani v. Allied Domecq Retailing United States, 320 N.J. Super. 494 (App. Div. 1999) (federal court requirement of showing a substantial likelihood of success on the merits is similar to Crowe); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975). In Little Egg Harbor Tp., the designee stated:

> [T]he undersigned is most cognizant of and sensitive to the extraordinary nature of the remedy sought to be invoked and the limited circumstances under which its invocation is necessary and appropriate. The Commission's exclusive remedial powers, normally intended to be exercised subsequent to a plenary hearing, will not be called into play for interim relief in advance of such hearing except in the most clear and compelling circumstances.

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5/ All material facts must not be controverted in order for the moving party to have a substantial likelihood of success before the Commission. Crowe at 133.

The issue in this interim relief application is whether the Board's unilateral change in health insurance carriers from Horizon to Aetna on January 1, 2020 resulted in health benefit levels that are the "same or better than those now being provided."

Unilateral changes in health benefits violate the obligation to negotiate in good faith. Union Tp. and FMBA Local No. 46, FMBA Local No. 246 and PBA Local No. 69, I.R. No. 2002-7, 28 NJPER 86 (¶33031 2001), recon. den. P.E.R.C. No. 2002-55, 28 NJPER 198 (¶33070 2002); Bor. of Closter, P.E.R.C. No. 2001-75, 27 NJPER 289 (¶32104 2001) City of South Amboy, P.E.R.C. No. 85-16, 10 NJPER 511 (¶15234 1984); Bor. of Metuchen, P.E.R.C. No. 84-91, 10 NJPER 127 (¶15065 1984); Piscataway Tp. Bd. of Ed., P.E.R.C. No. 91, 1 NJPER 49 (1975).

The Commission held in Rockaway Bor. Bd. of Ed., P.E.R.C. No. 2010-9, 35 NJPER 293 (¶102 2009) regarding the change in health insurance carriers:

> An employer's choice of health insurance carriers is not mandatorily negotiable so long as the negotiated level of benefits is not changed. City of Newark, P.E.R.C. No. 82-5, 7 NJPER 439 (¶12195 1981). Where changing the identity of the carrier changes terms and conditions of employment, i.e., the level of insurance benefits, and the administration of the plan, it becomes a mandatory subject for negotiations. Bor. of Metuchen, P.E.R.C. No. 84-91, 10 NJPER 127 (¶15065 1984). However, parties can agree to permit an employer to change carriers consistent with the collective negotiations

> agreement. See Camden Cty. College, P.E.R.C. No. 2008-67, 34 NJPER 254 (¶89 2008) (many contracts permit changes to equivalent or substantially equivalent benefit plans).

The Board asserts that the level of benefits between the Horizon and Atena plans with respect to DD's physical therapy is "identical" (this is disputed by the Association as set forth above), and that the issue is essentially the confusion of the in-network provider, GWU, as to the pre-authorization process with NIA. Further, the Board argues that DD can receive the same medical care as under Horizon if GWU requests the appropriate "units."

However, what is not in dispute between the parties is that after the change of carriers to Aetna, a pre-approval requirement with NIA was implemented and the physical therapy changed from "sessions" to the 15 minute "units." It is clear that the use of the pre-approval process by NIA, as required by Aetna, changed the "administration of the plan" from the previous Horizon plan. Union Tp.; Metuchen.

Additionally, there is no dispute between the parties as to the serious nature[6/] and need for medical care regarding DD's medical condition, Spinocerebeller Ataxia Type 8.

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6/ Both the Board's attorney and the Association's attorney acknowledged the serious nature of DD's medical condition during oral argument on the return date.

As evidenced by the Salerno and DD certifications referenced above, DD requires more physical therapy than what is currently being provided by Aetna based on the changed administrative burden of the pre-approval requirement, the 15 minute "units," and the codes used by NIA.

As set forth above, "In certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief." Crowe at 133.

Based on the evidence in the record, I find that if DD is not provided the required medical treatment that was provided to her under the Horizon plan, she will suffer irreparable harm.

As a result, an interim relief program will be established where the Board will appoint a specific individual as a liaison that will work with Aetna and the Association to ensure that DD receives the same medical treatment that would have been covered under the Horizon plan. Second, a fund will be created solely for DD for her medical treatment specifically at her GWU provider as long as GWU maintains its in-network relationship with Aetna, again to ensure that DD receives the same medical treatment that would have been covered under the Horizon plan. I find that the creation of this fund is necessary, even though DD has not had any out of pocket expenses at this point, because if her required medical treatment is not approved by Aetna/NIA, as under the Horizon plan, she may be forced to forgo the required medical

treatments based on her student status. See Closter (fund created where the employer's unilateral action increased the cost for prescriptions).

I also find that the Association has demonstrated that the relative hardship to the parties in granting interim relief weighs in their favor and that the public interest will not be injured by an interim relief order. The Board argues that the relative hardship weighs in its favor since a dedicated fund would harm the public interest based on the "unclear financial landscape" that has resulted from the COVID-19 pandemic, and that DD has not been harmed at this point. I reject this argument since the fund is for only one specific person for an in-network provider (GWU) and the Board has maintained in its response to this application that the Aetna plan is identical to the previous Horizon plan. In Union Tp., the Commission rejected a similar argument based on the employer's argument regarding difficulty in administering a fund:

> The employer also argues that the interim program will not be easy to administer. That argument seems to undermine its argument that very few employees will suffer any detrimental change in health coverage. If the employer is correct in its prediction that most employees' providers are in the Oxford/Multi-Plan network, few employees will need to seek funds from the employer to cover up-front payments and the burden of the interim relief order on the employer will be small.

Finally, I find that the public interest is furthered by requiring adherence to the tenets expressed in the Act which require parties to negotiate prior to implementing changes in terms and conditions of employment.

Based on all of the above, I find that the Association has sustained the heavy burden required for interim relief and has established a substantial likelihood of prevailing in a final Commission decision on their legal and factual allegations, a requisite element to obtain interim relief. Crowe.

Accordingly, this case will be transferred to the Director of Unfair Practices for further processing.

**ORDER**

IT IS HEREBY ORDERED, that the Hanover Park Regional Board of Education is directed to:

(1) appoint a specific individual as a liaison that will work with Aetna and the Hanover Park Regional Education Association to ensure that DD receives the same medical treatment that would have been covered under the Horizon plan; and,

(2) establish and fund an interim program solely for DD for her medical treatment specifically at her George Washington University Hospital (GWU) provider, as long as the GWU provider maintains its in-network relationship with Aetna, to ensure that DD receives the same medical treatment that would have been covered under the Horizon plan.

This Order will remain in effect during the pendency of this litigation or until this matter is otherwise resolved.

All other relief requested in the Unfair Practice Charge, Docket No. CO-2020-294, is denied.

This matter will be returned to the Director of Unfair Practices for further processing.

/s/ David N. Gambert
David N. Gambert
Commission Designee

DATED: July 24, 2020

Trenton, New Jersey