UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 120

September Term, 2016

JENNIFER HEARN
v.

PAUL J. HINKLE

Eyler, Deborah S.,
Woodward,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: September 2, 2016

In 2011, in the Circuit Court for Baltimore City, Jennifer Hearn ("Mother") and Paul Hinkle ("Father") were divorced. They have two children. In this appeal, Mother challenges orders entered by the court dismissing her complaint to modify legal custody of the parties' son; denying her motions for injunctive relief; and granting a motion filed by the appointed child advocate attorney ("CAA") to revise her appointment to a best interest attorney ("BIA"). Father has moved to dismiss the appeal.

Mother presents three questions for review, which we have rephrased slightly:

> I. Did the circuit court err by dismissing her complaint to modify legal custody without a hearing and by ruling, incorrectly, that she failed to sufficiently plead a material change in circumstances?
>
> II. Did the circuit court abuse its discretion or otherwise err by denying her motions for injunctive relief?
>
> III. Did the circuit court abuse its discretion by converting the CAA appointment to a BIA appointment?

We shall deny Father's motion to dismiss the appeal and shall reverse the court's orders dismissing Mother's complaint to modify legal custody, denying Mother's second motion for injunctive relief, and granting the CAA's motion to revise. We shall remand this case to the circuit court for proceedings as described in this opinion. The mandate shall issue forthwith.

FACTS AND PROCEEDINGS

Mother and Father have two children together: a 17-year-old daughter and a 14-year-old son. This appeal only concerns their son ("Son").

The parties both live in Baltimore City. During their divorce proceedings, they entered into a "CUSTODY, ACCESS & PARENTING AGREEMENT," which was incorporated, but not merged, in an October 4, 2010 "CUSTODY CONSENT ORDER" ("2010 Custody Order"). As pertinent, that order granted Mother and Father joint legal custody of Son;[1] shared physical custody of Son equally on a specific 2/2/3 schedule;[2] access to Son for vacation time during the summer; and access to Son on a rotating basis for holidays. The order gave the parties "equal say in all matters of importance affecting [Son's] li[fe], including, but not limited to, education[.]" The parties agreed to engage the services of a parenting coordinator to assist them in resolving anticipated conflicts and disputes.

When the 2010 Custody Order was entered, Son was beginning the 3rd grade at Gilman, a private K-12 boys' preparatory school in Baltimore City. He had been enrolled

[1] The 2010 Custody Order pertained to both children, but we shall only make reference to Son.

[2] The 2/2/3 schedule rotated every other week. In week 1, one parent would have physical custody of Son on Monday and Tuesday and from Friday through Monday morning. The other parent would have physical custody of Son on Wednesday and Thursday. In week 2, the access schedule was reversed such that "the party that has the weekend with the children shall not have the following Monday and Tuesday." Thus, each parent had Son in his/her physical custody 7 days in each 14-day period.

there since the 1st grade. The order provided that Son would "continue to attend Gilman until such time as he graduates."[3]

In the 4th grade, Son began to struggle to keep up with the academic program at Gilman. In the spring of 2012, he began receiving tutoring twice weekly. The tutor, a former Gilman teacher, recommended that Mother and Father arrange for Son to undergo a neuropsychological evaluation.

On April 17, 2013, Mother filed an amended and supplemented motion for contempt and to enforce the 2010 Custody Order, alleging, *inter alia*, that Father was refusing to sign the necessary papers to reenroll Son in Gilman for his 6th grade year and to pay the tuition. Five days later, Father filed a counter-complaint for contempt and a motion to modify legal custody. He alleged that Son's academic difficulties were a material change in circumstances and that Mother was refusing to consent to a neuropsychological evaluation for Son. He asked the court to modify legal custody to grant him "tie-breaking authority with respect to educational decisions affecting [Son], including [his] participation in an educational evaluation, and selection of school [sic] for [him]."[4]

[3] Pursuant to a Voluntary Separation and Property Settlement Agreement incorporated, but not merged, in the parties' divorce judgment (entered on June 21, 2011), Father was ordered to pay Son's tuition at Gilman.

[4] "In a joint legal custody arrangement with tie-breaking provisions, the parents are ordered to try to decide together matters affecting their children. When, and only when the parties are at an impasse after deliberating in good faith does the tie-breaking (Continued…)

Son was enrolled at Gilman in the fall of 2013, and at that time was evaluated by neuropsychologist Vince Culotta, Ph.D. Dr. Culotta diagnosed Son with learning disorders in reading and math, a cognitive disorder related to executive function, and an adjustment disorder with anxiety. While Son's IQ was in the high average range, his processing speed was low average, which made it difficult for him to keep pace with his teachers and classmates and to retain information. His learning disorders, which were of moderate severity, flowed from this cognitive disorder, coupled with executive function weaknesses. Among other things, Dr. Culotta recommended that Son be placed in an academic setting that could offer him small class sizes, small group learning when acquiring new skills, repetition and rehearsal of previously acquired skills, access to a word processor with spell check and grammar check, organizational support, and movement breaks during the day. He further recommended that the parties discuss with Son's pediatrician the possibility that he be prescribed a stimulant medication, and that Son be reevaluated in three years.

On November 5, 2013, the parties entered into a new consent order ("2013 Custody Order"), with the following pertinent terms. Father's counter complaint for contempt was dismissed with prejudice. His request to modify legal custody to give him tie-breaking authority for educational decisions would be heard no earlier than March 1, 2014, and no later than June 30, 2014. The provision in the 2010 Custody Order that Son

(…continued)
provision permit one parent to make the final call." *Santo v. Santo*, 448 Md. 620, __, 141 A.3d 74, 81 (2016).

would attend Gilman until he graduates from high school was removed. The parties agreed that Son would continue to attend Gilman for the remainder of his 6th grade year and that he would be tutored during that time. They would meet with Gilman administrators to determine whether the school could implement Dr. Culotta's recommendations. They further agreed that if Gilman could not accommodate Son, they would submit applications for Son to other private schools for the 2014-2015 academic year.

On March 5, 2014, Mother filed a motion to modify legal custody of Son to grant her tie-breaking authority "as to all legal custody decisions concerning [Son]." With respect to educational decisions, she alleged that Son's academic performance at Gilman had stabilized; it was in his best interest to remain there; and Father was "demanding" that Son attend a school other than Gilman for the upcoming academic year.

Beginning on April 22, 2014, and continuing on July 8-9, 2014, a hearing on the motions to modify legal custody was held before a family division magistrate. Son was 12 years old. By the time the hearing concluded, he had completed 6th grade at Gilman. Mother, Father, Son's tutor, and the parenting coordinator testified. Dr. Culotta's deposition, taken on March 5, 2014, was moved into evidence.

Mother expressed the view that Son could succeed at Gilman with appropriate support, such as continued tutoring, and that it was in his best interest to remain there because he took pride in his school, had a supportive peer group, and was happy there. Father took the position that Son was too reliant on adult support at Gilman and that he

would be better able to thrive in an alternative academic setting like the Odyssey School ("Odyssey"), a private school in Baltimore County that specializes in educating students with dyslexia and other language-based learning disabilities. Odyssey only goes through 8th grade. Father recognized that if son left Gilman and attended Odyssey, he and Mother would soon have to make a decision about where Son would attend high school. Father testified that he was open to the possibility of Son's returning to Gilman for high school. He also expressed interest in Son's applying to Boys' Latin or the Jemicy School ("Jemicy"), both located in the Baltimore metropolitan area.

In his deposition, Dr. Culotta testified that Father had emailed him for his thoughts about Son continuing to attend Gilman, or attending Boys' Latin, the Cathedral of Mary our Queen-Regina Program ("Cathedral") (located in Baltimore), Odyssey, or Jemicy. Dr. Culotta explained that Jemicy and Odyssey are highly specialized schools for children with complex learning disorders, but they also have programs for children, like Son, who have moderate learning disorders. Cathedral is a parochial school "that addresses learning disabilities at a level less intensively than those addressed at Jemicy and Odyssey." He opined that Son was capable of continuing at Gilman or attending Boys' Latin but would need tutoring in either school. Boys' Latin provides "more intensive services and accommodations for learning differences" than Gilman does.

There was no testimony during the April 22 and July 8-9 hearings by Father or anyone else to suggest that Son would or should attend a boarding school or any school outside the Baltimore metropolitan area.

On August 26, 2014, the magistrate issued her report and recommendation. She found that the parties' "ongoing disagreement regarding [Son's] educational needs" and their inability to reach an agreement about his education was a material change in circumstances affecting Son's best interests. She further found that Father had quickly recognized that Son was struggling academically and consented to a neuropsychological evaluation for him and Mother had not. On this basis, she concluded that Father was better able to make timely and informed decisions about Son's education and recommended that he be awarded tie-breaking authority over educational decisions. The magistrate emphasized that the parents still would have joint legal custody, and Father was required to consult Mother about educational decisions and to try to reach an agreement with her about educational issues before exercising his tie-breaking authority.

The next day, Mother filed an emergency motion "for school placement to maintain status quo." She alleged that the new school year was beginning the following day (August 28) and the parties had not been able to reach an agreement about which school Son would attend for his 7th grade year. She asked the court to order that Son remain at Gilman pending further order of the court. Father promptly filed an opposition and asked the court to order that Son be enrolled at Odyssey pending further court order.

On September 5, 2014, the parties appeared before a special master for an emergency hearing. The special master recommended that Father be permitted to enroll Son at Odyssey immediately. That same day, the court issued an order (entered on

September 15, 2014) authorizing Father to enroll Son at Odyssey. Son was enrolled and entered Odyssey in 7th grade.

Also on September 5, 2014, Mother filed exceptions to the August 26, 2014 magistrate's report and recommendation and requested a hearing. The court did not hold the exceptions hearing until five months later, on January 29, 2015.[5] Then, the court did not rule on the exceptions for another nine months. On October 20, 2015—14 months after the magistrate filed her report and recommendation—the court issued a memorandum opinion overruling Mother's exceptions and adopting the magistrate's report and recommendation.

On November 5, 2015, the court entered an order modifying legal custody by giving Father tie-breaking authority for educational decisions for Son ("2015 Custody Order").[6] By then, Son was nearly 14 years old and was well into his 8th grade year at Odyssey.

On November 18, 2015, Mother filed a complaint to modify legal custody. She alleged that Father had "unilaterally decided" to apply for Son to attend the Trinity-Pawling School ("TPS"), a boys' boarding school located about 75 miles north of New York City, *i.e.*, over 250 miles from Baltimore, for the 2016-2017 school year. She

[5] The exceptions hearing originally was scheduled for December 8, 2014. Mother requested a postponement, however, because both of her attorneys were unavailable on that date. Mother noted in her motion to postpone that the exceptions hearing had been scheduled beyond the 60-day deadline for a hearing provided for in Rule 9-208(i)(2).

[6] The court entered another order to this effect on October 30, 2015. The November 5, 2015 Order differs slightly from the prior order.

claimed that Father had done so without engaging in good faith discussions with her about Son's high school application process. She alleged that Father also had applied for Son to attend Gilman and Boys' Latin, but on information and belief, he intended to withdraw those applications if Son were accepted at TPS. She claimed that Father's anticipated decision to enroll Son at TPS was an abuse of his tie-breaking authority that would interfere with and undercut her physical custody of Son. She alleged that Son had expressed "clear and strong wishes and views of his own, based on considered judgment," that he wanted to attend high school in the Baltimore area. Mother emphasized that even though the court recently had entered the 2015 Custody Order, there had been a material change in circumstances since the January 29, 2015 exceptions hearing that gave rise to that order.

On the same day, Mother filed a motion for a Temporary Restraining Order ("TRO") and for preliminary and permanent injunctive relief. She alleged the same facts as above and sought an order enjoining Father from enrolling Son at TPS; directing him to withdraw Son's application to TPS; and enjoining him from withdrawing the applications to Gilman and Boys' Latin. Finally, Mother also filed a motion to appoint a CAA. She argued that Son, then a month shy of his 14th birthday, was "at an appropriate cognitive, social, emotional and mental developmental stage where his opinions, particularly with regard to his education and whether he should live at home or at boarding school, should be considered."

The next day, Father filed an opposition to Mother's motion for injunctive relief, arguing that she had not alleged facts showing irreparable harm. Specifically, he asserted that merely because he had submitted an application for Son to TPS did not show that he had made a decision to enroll him there.

By order entered on November 20, 2015, the court denied Mother's request for a TRO and for preliminary and permanent injunctive relief.

A month later, Father filed a motion to dismiss Mother's complaint to modify legal custody. He argued that Mother had not alleged facts to support a finding of a material change in circumstances since the entry of the 2015 Custody Order on November 5, 2015, or since the magistrate's hearing in April and July 2014. He emphasized that his submitting an application to TPS for Son was not a material change in circumstances because there was no guarantee that Son would be admitted to or enrolled in that school. He asked the court to defer ruling on the motion to appoint a CAA or, in the alternative, to deny it.

Mother filed an opposition to the motion to dismiss and a request for hearing.[7] She maintained that the well-pleaded facts in her complaint and the reasonable inferences that could be drawn from them adequately alleged multiple material changes in circumstances, including, most significantly, that Father had applied to *and intended to enroll* Son in a boarding school in New York for high school where he would live for

[7] Mother's request for hearing was conditional. She asked the court to schedule a hearing unless it was inclined to deny the motion to dismiss on the papers.

nine months out of the year. According to Mother, her allegations about Father's plan to send Son to boarding school for most of the year, away from his family, friends, and support system, were sufficient to plead a material change in circumstances. Mother emphasized that she had alleged in her complaint that Son already was emotionally distraught about the prospect of being sent away to boarding school and that that also amounted to a material change in circumstances.

Meanwhile, in an order dated December 18, 2015 and entered on January 5, 2016, the court granted Mother's motion to appoint a CAA for Son and designated Mary Sanders, Esq., to serve in that capacity. Ms. Sanders had served as a BIA for Son and his sister during the parties' divorce proceedings.[8] On January 27, 2016, Mother filed a motion to revise the CAA appointment to remove Ms. Sanders and appoint another attorney in her place. Six days later, Ms. Sanders filed a motion to "modify" her appointment from a CAA to a BIA. We shall discuss that motion in greater detail below. Mother later supplemented her filing with a copy of a billing statement from Ms. Sanders reflecting that she had not communicated with Son since her appointment and therefore could not have made a determination that he lacked considered judgment.

On March 14, 2016, Mother filed a "Second Verified Petition for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction." She attached a letter of February 19, 2016, accepting Son to Boys' Latin; a letter of February 19, 2016,

[8] Ms. Sanders was appointed as a BIA on November 30, 2009, when Son was nearly 8 years old, and served in that capacity until June 2011, when Son was 10½.

accepting Son to Gilman; and a letter of March 10, 2016, accepting Son to TPS. The court denied the request for injunctive relief by order of March 18, 2016. It found that there was nothing to show that Son would suffer irreparable harm by attending boarding school at TPS, and there would be no irreparable harm to Mother's physical custody rights in Son because whatever time Son spent at home, when TPS was not in session, would remain shared on a 50/50 basis between Mother and Father.

On March 21, 2016, the circuit court entered an order granting Father's motion to dismiss Mother's complaint to modify legal custody of Son, for failure to allege a material change in circumstances. That same day the court entered the order denying Mother's second motion for injunctive relief and entered an order converting Ms. Sanders's appointment from a CAA to a BIA.

The next day—March 22, 2016—Father signed a contract enrolling Son at TPS for the 2016-2017 school year. Mother filed a notice of appeal on March 24, 2016.[9]

We shall include additional facts as necessary to our discussion of the issues.

MOTION TO DISMISS

Father has moved to dismiss the appeal. He asserts that after signing the contract enrolling Son at TPS, he paid two non-refundable tuition deposits totaling $45,185, which will be applied toward TPS's annual tuition of $65,550; and that he is

[9] On April 12, 2016, Mother filed a petition for a writ of *certiorari* pursuant to Rule 8-302(a). Her petition was denied by the Court of Appeals on April 25, 2016. *Hearn v. Hinkle*, 447 Md. 298 (2016). Judge Battaglia did not participate in that decision.

contractually obligated to pay the outstanding balance of $20,365 to TPS. He maintains that because Son is now enrolled at TPS and the deadlines for enrollment at Gilman and Boys' Latin for the 2016-2017 school year have passed, this appeal is moot.

This contention is without merit. "A case is moot when there is no longer any existing controversy between the parties at the time that the case is before the court or when the court can no longer fashion an effective remedy." *In re Kaela C.*, 394 Md. 432, 452 (2006). Here, with respect to the circuit court's dismissal of Mother's complaint to modify legal custody to give her tie-breaking authority over educational decisions, there is an existing controversy between the parties before this Court, and we can fashion an effective remedy.

Father moved to dismiss Mother's complaint on the ground that it did not allege facts to show a material change in circumstances as a matter of law. The court dismissed the complaint on that basis. Obviously, there is a controversy presently existing between the parties over whether the court erred in doing so. That controversy is before this Court to decide, and there is no reason why it cannot be decided. Moreover, if we decide that the circuit court erred by dismissing the complaint, we can reverse the dismissal order and remand the case for a hearing on the merits. Son was accepted for enrollment at Gilman and Boys' Latin, and there is nothing in the record before us to establish that, given the unusual and exceptional circumstances in this case, he could not still be enrolled at one of those schools for the 2016-2017 school year.

When Father accepted enrollment at TPS on behalf of Son, and paid the tuition deposit, he knew that Mother had a right to appeal the circuit court's dismissal order and that the ultimate result of such an appeal could be that Son would not attend TPS. He could not and did not foreclose Mother's appeal right by accepting enrollment and paying tuition, regardless of whether the tuition is nonrefundable.

DISCUSSION

I.

Dismissal of Mother's Complaint to Modify Custody

On review of a circuit court's decision to grant a motion to dismiss a complaint, "we accept all well-pled facts in the complaint, and reasonable inferences drawn from them, in a light most favorable to the non-moving party." *Converge Servs. Group, LLC v. Curran*, 383 Md. 462, 475 (2004). "We then determine whether the trial court was 'legally correct in its decision to dismiss.'" *Kendall v. Howard Cty.*, 431 Md. 590, 601-02 (2013) (quoting *Washington Suburban Sanitary Comm'n v. Phillips*, 413 Md. 606, 618 (2010)) (further citations omitted). Thus, our standard of review is *de novo*.

To adequately state a claim to modify custody, whether physical or legal or both, the moving party must allege facts that, if proved, will establish that there has been a material change in circumstances, *i.e.*, "a change that may affect the welfare of a child," since the entry of the last custody order, *and* that a modification of the terms of the custody order will be in the best interest of the minor child. *Wagner v. Wagner*, 109 Md.

App. 1, 28-9 (1996). "[T]he circumstances to which change would apply would be the circumstances known to the trial court when it rendered the prior order." *Id*. at 28.

Mother contends the court erred by dismissing her complaint to modify custody because she sufficiently pled facts that would support a finding that there had been a material change in circumstances since the prior best interests determination, and that the material change was affecting Son's welfare. She emphasizes that the "circumstances known to the trial court" when it entered the November 2015 Custody Order (on November 5, 2015) granting Father tie-breaking authority on educational decisions were those established at the evidentiary hearing before the magistrate in April and July 2014, more than 15 months before she filed her complaint to modify legal custody, and considered by the court during the exceptions hearing on January 29, 2015. She asserts that the conduct and events on which her claim of a material change in circumstances rested were not known to the magistrate when she made her report and recommendation and were not known to the court when it overruled Mother's exceptions and modified legal custody to grant Father tie-breaking authority over educational decisions.

Mother maintains that the conduct and events alleged—that Father applied for Son to be admitted to TPS, that Son had a "significant negative emotional reaction" to the prospect that he might be sent to boarding school in New York, and that Father refused to engage in good faith discussions with Mother about where Son should attend high school—all amounted to a material change in circumstances affecting Son's best interest. She argues that she sufficiently pleaded that the material change in circumstances had

and would continue to have a negative effect on Son's welfare because it was not in his best interest to be separated from his family, friends, and support structure.

Father responds, as he did below, that Mother's complaint alleged nothing more than "continued disagreement between the parties" about Son's schooling, which is not a material change in circumstances. He maintains that the court correctly concluded that Mother was attempting to relitigate the same issues heard by the magistrate in the 2014 hearings and resolved by the court in its 2015 Custody Order.

As we have explained, there was no indication whatsoever during the magistrate's hearing in April and July 2014 that Father (or Mother) had any interest in or intention to send Son to an out-of-state boarding school (or any boarding school), or to TPS in particular, at any time. Father was familiar with TPS when those hearings were held because he is an alumnus of TPS. The magistrate's consideration of whether legal custody should be modified to give Father or Mother tie-breaking authority over educational decisions, her recommendation that Father be given that authority, and the court's decision 14 months later to overrule Mother's exceptions and grant Father that authority were undertaken and made based solely upon Baltimore metropolitan area private school options for Son that, no matter which was selected, would have no impact on the physical custody provision of the prevailing consent order.

Only in the fall of 2015, shortly before the 2015 Custody Order was issued, did Father decide to apply for Son to be admitted to TPS for the 2016-2017 school year. It was shortly thereafter that Mother filed her complaint to modify legal custody, to give

her, not Father, tie-breaking authority over educational decisions for Son. At that point, Father had submitted three applications for Son—one to Gilman, one to Boys' Latin, and one to TPS—and Mother alleged, on information and belief, that Father intended to enroll Son at TPS if he were accepted there. As noted, she also alleged that Son was distraught at the thought of leaving home to attend boarding school in New York, away from his family (including his sister), his friends, and his support structure, and that Father's plan to send Son to TPS would undermine her physical custody rights. Father's motion to dismiss was premised on the notion that his merely submitting an application for Son to TPS, without anything more, could not be a material change in circumstances because Son had not yet been accepted there (or at Gilman or Boys' Latin) and of course had not been enrolled. The court granted the motion, apparently on that basis (as it gave no other).[10]

The court's ruling was legally incorrect. The parties' inability to agree about which school would be best for Son given his learning disabilities is what prompted the cross-motions to modify legal custody to give one parent or the other tie-breaking

[10] As Mother points out, the circuit court erred by granting Father's motion to dismiss her complaint without holding a hearing. Rule 2-311(f) provides that "[a] party desiring a hearing on a motion" shall request one in the title of the motion or response and in the body of the motion or response under a heading titled "Request for Hearing." It also provides that "the court may not render a decision that is dispositive of a claim or defense without a hearing if one was requested [in compliance with the rule]." In her opposition to Father's motion to dismiss, Mother requested a hearing in compliance with Rule 2-311(f). Contrary to Rule 2-311(f), the court granted Father's motion to dismiss without holding a hearing.

authority over educational decisions.[11] When the parties were before the magistrate litigating that issue, the world of educational choices under contemplation only encompassed private schools in the Baltimore metropolitan area. It was solely in that context that the magistrate considered the evidence. As noted, there was no school choice under consideration that, if selected, would have resulted in Son's moving out-of-state for most of the year, thereby effectively undoing the physical custody provisions of the prevailing consent order. Father's decision to include in the educational choices for Son over which he would have tie-breaking authority a boarding school 250 miles from Baltimore, where Son would live for most of the year, apart from his family, friends, and support structure, and contrary to the physical custody order in place, was a material change in the circumstances that existed at all the relevant times leading up to the entry of the 2015 Custody Order. Moreover, it was sufficient that Mother alleged that Father intended to enroll Son at TPS if he were accepted there. Like cases involving relocation of a parent, it was not necessary for actual enrollment in TPS to occur for there to be a material change in circumstances. It was enough that, as alleged, it was likely to occur. *See Domingues v. Johnson*, 323 Md. 486, 499 (1991) ("To determine that a modification is required, the chancellor need not find . . . that the changes have already caused identifiable harm to the children.")

[11] Although Mother originally sought tie-breaking authority for all legal custody decisions, by the time the motions were before the magistrate for decision, Mother (like Father) was seeking tie-breaking authority only for educational decisions.

We note further that by the time the court actually ruled on Father's motion to dismiss, Son had been accepted at Gilman, Boys' Latin, and, most recently (on March 10, 2015), TPS. At that point, there was no longer a factual basis for Father's contention that a material change in circumstances had yet to occur. Father did not withdraw his motion to dismiss or inform the court that the state of events had changed. Perhaps the court would have learned of this development had it held the required hearing, but it did not.

Mother's complaint adequately alleged facts to show a material change in circumstances affecting Son's welfare. Moreover, on the facts now existing—that Father applied for Son to attend TPS, enrolled him there when he was accepted, and declined to enroll him at either school at which he was accepted that is in the Baltimore metropolitan area—any finding that there is not a material change in circumstances affecting Son's best interest would be clearly erroneous.

Finally, it is evident to us that the scope of Father's tie-breaking authority for educational decisions under the 2015 Custody Order *did not* extend to making a school choice for Son that would undo the physical custody provisions of the prevailing consent order by relocating Son out-of-state for most of the year. There was no evidence presented or considered before the magistrate or the court on exceptions that could support such a broad scope to the tie-breaking authority, and Son's best interests were not considered in that context.

II.

Denial of Injunctive Relief

As discussed, Mother filed two motions for injunctive relief. In her first motion, filed in November 2015, with the complaint to modify custody, she sought a TRO, a preliminary injunction, and a permanent injunction enjoining Father from enrolling Son at TPS, enjoining Father from withdrawing the applications for Son to attend Gilman and Boys' Latin, and requiring Father to withdraw Son's application to TPS. She requested a hearing "on the first available date on the Court's calendar in the next two (2) weeks."

Mother's motion was denied two days later without a hearing. The court found that Father's "*mere submission*" of an application to TPS did not "pose any risk of irreparable harm," and that Mother had not demonstrated that she was likely to prevail on the merits of her complaint to modify custody because she was attempting to relitigate tie-breaking authority just weeks after that issue was finally resolved by the 2015 Custody Order and because the attachments to the motion for injunctive relief, which largely consisted of email correspondence between the parties, did not support Mother's position that Father was refusing to engage in good faith discussions. (Emphasis in original.)

On March 14, 2016, Mother again moved for a TRO and preliminary and permanent injunctive relief, and requested a hearing within two weeks. By then, Son had been offered admission to Gilman, Boys' Latin, and TPS. According to Mother, Father had "unilaterally rejected" Gilman and had refused to agree to enroll Son at Boys' Latin.

Mother alleged that the deadline to accept enrollment at Boys' Latin had passed, but she had persuaded the school to extend it to March 17, 2016. The deadline for TPS was April 10, 2016.

Mother asked the court to enjoin Father from enrolling Son at TPS and to order him to enroll Son at Boys' Latin. She argued that if Father were not enjoined from enrolling Son at TPS, she would suffer irreparable harm because she would be denied her court-ordered weekly access to Son for nine months out of the year. She also argued that Son would be irreparably harmed if he were enrolled at TPS against his wishes because he would be separated from his family, friends, and support structure. She maintained that Father would suffer no harm if the court ordered that Son be enrolled at Boys' Latin because that would maintain the status quo with respect to the parties' physical custody of Son. Moreover, she asserted that she was likely to prevail on her complaint to modify custody because the evidence would show that Father had abused his tie-breaking authority and that it was no longer in Son's best interest for Father to be charged with making educational decisions for him.

The court did not hold a hearing. It denied the second motion for injunctive relief on March 18, 2016, and entered the order to that effect on March 21, 2016, the same day it dismissed Mother's complaint to modify custody. The court found that Mother had failed to allege facts to support a finding of irreparable harm because she had not identified the injuries she or Son would suffer if Son were enrolled at TPS. The court reasoned that although enrolling Son in an out-of-state boarding school would "*physically*

separate[]" him from his family, friends, and support network, Mother had not shown that "such separation would cause [Mother] or [Son] to 'suffer grave, immediate, substantial, and irreparable injuries.'" (Emphasis in original.) With respect to the interference with Mother's access to Son under the physical custody schedule, the court concluded that "*both* parties will undoubtedly have less access time with [Son]" if he attends boarding school in New York, but there was "no support for the notion that the available time will not be shared 50/50." (Emphasis in original.) The court also found that Mother had not shown that she was likely to prevail on her complaint to modify legal custody, given that the court had issued its order granting Father tie-breaking authority over educational decisions only four months prior, and there was no public interest implicated by relitigation of the matter.

Mother contends the court erred procedurally and substantively in denying her motions for injunctive relief. Procedurally, the court erred by "ruling – solely on the papers, with no hearing." She asserts that the court should have first ruled on her request for a TRO, then scheduled a hearing on the request for preliminary injunction, and then ruled on the request for permanent injunction at the trial on the merits of her complaint to modify legal custody. Substantively, the court erred by misapprehending that a "[d]e facto" modification of the parties' physical custody schedule occasioned by Son's relocation to New York for nine months of the year necessarily would cause harm that could not be measured or remedied at law by the award of damages.

Father responds that the rules do not require that a hearing be held before a court denies injunctive relief and Mother was not otherwise entitled to a hearing as she did not request one in accordance with Rule 2-311(f). He maintains that the court properly exercised its discretion to deny the motions because it assessed the applicable factors and found that the balance of harms weighed against Mother.

We agree with Father that the court did not err by denying Mother's injunction motions without a hearing. Mother acknowledges that she did not make a proper request for a hearing under Rule 2-311(f). She argues that she nonetheless was entitled to a hearing under Rule 15-505. That rule states that a "court may not *issue* a preliminary injunction without notice to all parties and *an opportunity for a full adversary hearing* on the propriety of *its issuance*." (Emphasis supplied.) Here, the court declined to issue a preliminary (or permanent) injunction. In that instance, a hearing was not required by Rule 15-505.

Turning to the merits, we review the grant or denial of a request for preliminary injunction for abuse of discretion. *LeJeune v. Coin Acceptors, Inc.*, 381 Md. 288, 300 (2004). "Nonetheless, 'even with respect to a discretionary matter, a trial court must exercise its discretion in accordance with correct legal standards.'" *Id.* at 301 (quoting *Alston v. Alston*, 331 Md. 496, 504 (1993)).

In deciding whether to grant or deny an injunction, a court must consider four factors:

> "(1) the likelihood that the plaintiff will succeed on the merits; (2) the 'balance of convenience' determined by whether greater injury would be

> done to the defendant by granting the injunction than would result from its refusal; (3) whether the plaintiff will suffer irreparable injury unless the injunction is granted; and (4) the public interest."

Fogle v. H & G Restaurant, Inc., 337 Md. 441, 455-56 (1995) (quoting *Dep't of Transp. v. Armacost*, 299 Md. 392, 404-05 (1984)). The party seeking injunctive relief bears the burden of proof and the "failure to prove the existence of even one of the four factors will preclude the grant of preliminary relief." *Id*. at 456. The factors are not to be viewed in a vacuum, however, and the crucial inquiry involves the balance of harm to the moving party if injunctive relief is not granted versus the harm to the non-moving party if injunctive relief is granted. *See Lerner v. Lerner*, 306 Md. 771, 783-84 (1985) (courts must "balance the 'likelihood' of irreparable harm to the plaintiff against the 'likelihood' of harm to the defendant; and if a decided imbalance of hardship should appear in plaintiff's favor, then the likelihood-of-success test is displaced . . . [because] it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation.") (citations omitted).

Because the grant of the second motion for injunctive relief would have mooted the first motion, we are concerned only with the court's ruling on the second motion. We conclude that the court abused its discretion by denying that motion because it failed to exercise discretion in accordance with the correct legal standards.

As explained, the critical undertaking for the court was to balance the harm to Mother if the injunction were denied against the harm to Father if the injunction were

granted. The court focused on the harm to Mother, but, in doing so, misconstrued the "status quo" under the prevailing custody order, and misapprehended the nature of the harm to Mother. The court found that the status quo was a "50/50 access schedule," plus joint legal custody with Father having tie-breaking authority over educational decisions. Thus, in the court's view, so long as Mother and Father continued to have access to Son on a 50/50 basis when he was home from boarding school, the status quo would be maintained. This was plainly wrong. The 2010 Custody Order provided that each party would have Son in his or her physical custody *for 7 days out of every 2-week period*, unless overridden by the holiday or vacation access provisions. That was the status quo with respect to physical custody when Mother moved for injunctive relief. Mother's access to Son would be severely curtailed if he were relocated to New York State to attend boarding school for nine months out of the year.

The court also erred by concluding that Mother needed to prove additional harm beyond this curtailment of her physical custody rights. An injury is irreparable "whenever money damages are difficult to ascertain or are otherwise inadequate." *Md.-Nat'l Capital Park & Planning Comm'n v. Washington Nat'l Arena*, 282 Md. 588, 615 (1978). Here, the injury to Mother was quintessentially irreparable as the loss of court ordered access to Son plainly could not be remedied by money damages.

Because the court concluded (incorrectly) that Mother had not shown that she would be harmed by the denial of the injunction, it did not expressly assess the harm to Father if the injunction were to be granted. It was implicit in the court's order, however,

that it viewed the harm to Father to be an interference with his tie-breaking authority over educational decisions. This harm is negligible, because, for the reasons we have explained, the evidence on which legal custody was modified to give Father tie-breaking authority over educational decisions did not contemplate that any such decision would result in Son's being moved out-of-state to live other than in the physical custody of his parents, contrary to the physical custody provisions of the prevailing consent order, which were not being challenged.

In assessing Mother's likelihood of success on the merits of her complaint for modification, the court erred by viewing her complaint merely as an effort to relitigate a matter decided in Father's favor four months earlier. As is clear from our resolution of the first question in this appeal, the issue of Father exercising his tie-breaking authority for the purpose of sending Son to boarding school more than 250 miles from Baltimore never was litigated and was a material change in circumstances justifying a new consideration of the issue of which parent should have tie-breaking authority.

Relatedly, the court found that Mother had failed to demonstrate a public interest in "re-litigating [Father's] recently court-ordered tie-breaking authority." There clearly is a public interest in ensuring that a party to a contested custody proceeding does not interfere with the other party's court-ordered access rights to the child. For all of these reasons, we conclude that the court abused its discretion by denying Mother's second motion for preliminary injunctive relief.

III.

Revision of CAA Appointment

Maryland Code (1999, 2012 Repl. Vol.), section 1-202 of the Family Law Article ("FL"), permits the court to "appoint a lawyer who shall serve as a [CAA] to represent the minor child" in any "action in which custody, visitation rights, or the amount of support of a minor child is contested." FL § 1-202(a)(i). Alternatively, the court may appoint a lawyer "who shall serve as a [BIA] to represent the minor child." *Id*. at (a)(ii).

Rule 9-205.1 sets forth the procedure for making an appointment of counsel for a child in either capacity. At section (b), it lists non-exclusive factors that may weigh in favor of appointing counsel for a child, including: "(5) past or current mental health problems of the child or party"; "(6) special . . . educational, or mental health needs of the child that require investigation or advocacy"; and "(10) relocation that substantially reduces the child's time with a parent, sibling, or both."

In 2007, the Court of Appeals adopted the *Maryland Guidelines for Practice for Court-Appointed Lawyers Representing Children in Cases Involving Child Custody or Child Access* ("*Maryland Guidelines*"). *See* Rules Order (May 8, 2007). The Maryland Guidelines make clear that CAAs and BIAs serve different roles in contested custody and visitation matters. A BIA is bound to advocate for the "child's best interests, without being bound by the child's directives or objectives." *Maryland Guidelines* at § 1.1. While the BIA must make the court aware of the child's position, he or she "advances a

position that the attorney believes is in the child's best interest," even if that position differs from the child's position. *Id*. at § 2.2.

In contrast, a CAA "owes the child the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client." *Id*. at § 1.2. Appointment of a CAA is appropriate "when the child is in need of a voice in court, such as in relocation cases . . . or where the child is sufficiently mature and sees his or her interests as distinct from the interests of the child's parents." *Id.*

Both a BIA and a CAA must make an initial determination as to whether the child has "considered judgment." *Id*. at § 2.1. That determination "focus[es] on the child's decision-making process, rather than the child's decision." *Id.* The attorney must assess whether the child "can understand the risks and benefits of the child's legal position and whether the child can reasonably communicate the child's wishes." *Id*. In making that assessment, the attorney may consider the child's developmental stage, his or her expression of the "relevant position," reports from professionals who have evaluated the child, and the views of family members or others who know the child. *Id*.

If a CAA is appointed and he or she determines that the child does not have considered judgment, the attorney "should petition the court to (1) alter the attorney's role to permit the attorney to serve as [a BIA] or (2) appoint a separate [BIA]." *Id*. at § 2.3.

As mentioned, when Mother filed her complaint to modify legal custody, she also filed a motion for appointment of a CAA. In his response to that motion, Father argued

that the court should defer ruling on the motion until such time as it ruled on his motion to dismiss the complaint or, in the alternative, it should deny the motion because Son's views could be assessed *via* an *in camera* interview by the court without the need for the appointment of any counsel to represent him.

On January 5, 2016, the court granted Mother's motion and entered an order appointing Ms. Sanders to serve as CAA for Son "in accordance with the [*Maryland Guidelines*]." Father moved for reconsideration, arguing that the court had issued the order before considering his timely motion to defer or, in the alternative, to deny Mother's motion to appoint counsel. Six days later, Ms. Sanders emailed counsel for the parties advising them that she was "uncomfortable" serving as Son's CAA because of her "prior working relationship with [his] family." She said that she did not know the nature of the issues in dispute except that they concerned Son's education. She asked the parties if they would consent to her serving as a BIA, instead of a CAA. If not, she would file a motion to modify her appointment to that of a BIA.

Mother's lawyer responded that same day, explaining that Mother was opposed to the appointment of a BIA in light of Son's age (14) and his strong views. He asked Ms. Sanders to decline the appointment if she could not serve as a CAA.

On February 2, 2016, Ms. Sanders filed a motion to revise appointment. She alleged that she had represented Son previously as a BIA and, because there had been "no determination that [Son] has considered judgment," she could not accept an appointment to serve as his CAA until she had "establish[ed] [Son's] capacity." She asserted that it

was her opinion that it was in Son's best interests for her to serve as a BIA and advocate for his "best interest, not just his wishes."

Mother opposed Ms. Sanders's motion and filed a motion for the court to appoint a different attorney to serve as the CAA. Mother argued that Ms. Sanders was not permitted to move to revise her appointment unless and until she had met with Son (and considered other information) *and* had determined that he did not have considered judgment, and she had not done so.

By order entered on March 21, 2016, the same day the court dismissed Mother's complaint to modify custody, the court granted Ms. Sanders's motion to revise her appointment. In the order, the court analyzed the Rule 9-205.1(b) factors and determined that under factors (5) and (6), it was "well settled that . . . [Son] *experiences certain learning disabilities in reading and mathematics, and related executive functioning issues,*" and that under factor (10) it was "highly possible that this case may involve relocation that substantially reduces the child's time with a parent, sibling or both." (Emphasis in original)(Footnote omitted). The court further found that it would be in Son's best interest for a BIA to be appointed.

On appeal, Mother contends the court erred by converting the appointment of a CAA to a BIA because, by her own admission, Ms. Sanders did not determine whether Son had considered judgment and because Father was attempting to impose an educational choice on Son that would relocate him to New York State.

Father responds that the court did not err by revising the appointment of child's counsel because the court was "merely correcting a procedural error and factual error that led to [Ms. Sanders] appointment as a CAA in the first place." He argues, moreover, that Ms. Sanders properly moved to revise her appointment because "[b]ased on her prior representation of [Son]," she was "uniquely suited to understand that [Son] required a BIA, not a CAA." He disagrees that under the *Maryland Guidelines* Ms. Sanders was not permitted to move to revise her appointment without first assessing whether Son had considered judgment.

Initially, Father is incorrect that the court's March 21, 2016 order vacating its appointment of Ms. Sanders as a CAA and reappointing her as a BIA merely corrected a procedural error, *i.e.*, that the court had ruled on the motion to appoint counsel prematurely. In its order, the court made plain that it was granting Ms. Sanders's motion to revise and that it had determined that it was in Son's best interest for a BIA to be appointed. This was not the relief requested by Father in his motion for reconsideration.

On the merits, we agree with Mother that the court abused its discretion by granting Ms. Sander's motion to revise her appointment. The *Maryland Guidelines* contemplate the appointment of a CAA, not a BIA, in a case such as this where a parent, by a decision affecting the child, is attempting to relocate the child. *Maryland Guidelines* at § 1.2. Having properly appointed Ms. Sanders to serve as a CAA in keeping with the *Maryland Guidelines*, the court only could revise that appointment upon a proper request by Ms. Sanders (or one of the parties). In her motion to revise, Ms. Sanders alleged that

she could not serve as a CAA for Son "until such time as she establishes [his] capacity." Thus, it was clear on the face of the motion that Ms. Sanders had not undertaken to "determine whether [Son] has considered judgment," as required by section 2.1 of the *Maryland Guidelines*. Under those guidelines, an attorney appointed as a CAA must first make that determination and, only if the attorney determines that a child *lacks considered judgment*, should the attorney petition the court to alter the appointment. *Maryland Guidelines* at § 2.3. Because Ms. Sanders did not make any determination as to whether Son, who is now 14½ years old, is able to understand the risks and benefits involved relative to his Father's tie-breaking authority over educational decisions and to express his legal position to his attorney, the court abused its discretion by granting the motion to revise.[12]

CONCLUSION AND PROCEEDINGS ON REMAND

From the time of their divorce, the parties have had shared physical custody of Son on a 2/2/3 schedule under which he is in each parent's physical custody 7 out of every 14 days. Physical custody was established by court order (upon the parties' consent) and has never been modified, or even challenged. From the time of their divorce until November 5, 2015, the parties also had joint legal custody of Son. The order entered that day modified legal custody to give Father tie-breaking authority over

[12] We also note that the court emphasized in its order that Son suffers from learning disabilities. While certainly relevant to the determination whether Son has considered judgment, the guidelines make clear that a child "may be capable of considered judgment even though [he or she] has a significant cognitive or emotional disability." *Maryland Guidelines* at § 2.1.

educational decisions for Son, *i.e.*, Father would make the final decision as to where Son would attend school if the parties were at an impasse after discussing the schooling options in good faith. The November 5, 2015 order did not modify physical custody.

Because TPS is a boarding school 250 miles away from Baltimore, Father's selection of that school for Son necessarily is inconsistent with the court's prevailing physical custody order. Without modification of physical custody, Son cannot attend TPS and at the same time live with his parents at their houses in Baltimore every day on a 2/2/3 rotating schedule. Father did not seek to modify physical custody before selecting TPS as the school Son would attend. Unless and until physical custody is modified, so that sending Son to TPS will not be contrary to the court's physical custody order, TPS is not an available option for Son to attend school.

For the reasons we have explained, the circuit court abused its discretion in declining to enjoin Father from exercising his tie-breaking authority by selecting TPS as the school Son will attend in the 2016-2017 school year. Accordingly, on remand, and commencing no later than five business days after the date of the mandate herein, the circuit court shall hold an emergency evidentiary hearing at which it shall decide, expeditiously, which available high school Son *presently* will attend. The court shall appoint a CAA to represent Son at the emergency hearing. The school shall be in a location that will not effectively alter the court's physical custody consent order. (Of course, the parties are free to agree on a school option themselves.)

The circuit court then shall expeditiously schedule and hold an evidentiary hearing on the merits of Mother's motion to modify legal custody to give her, instead of Father, tie-breaking authority over educational decisions. A CAA also shall represent Son in that hearing and in any subsequent hearings.

ORDERS OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS IN COMPLIANCE WITH THIS OPINION. COSTS TO BE PAID BY THE APPELLEE. MANDATE TO ISSUE FORTHWITH.