State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION -EMERGENT RELIEF

OAL DKT. NO. EDS 17514-17

AGENCY DKT. NO. 2018-27179

Y.H.S. AND H.Y. ON BEHALF OF C.H.S.,

Petitioners,

v.

WEST ORANGE BOARD OF EDUCATION,

Respondent.

John D. Rue, Esq., and **Krista Haley**, Esq., (John Rue & Associates, attorneys) for petitioners

Marc G. Mucciolo, Esq., and **Raina M. Pitts**, Esq., (Methfessel & Werbel, attorneys) for respondent

Record Closed[1]: January 8, 2018 Decided: January 9, 2018

BEFORE **GAIL M. COOKSON**, ALJ:

Petitioners Y.H.S. and H.Y. filed their due process petition on or about November 15, 2017, on behalf of their son C.H.S., who is thirteen years old and in eighth grade at an out-of-district placement from the West Orange Board of Education (District), regarding

[1]This matter is final with record closed only as to the Application for Emergent Relief. As set forth below, the due process petition remains at the OAL.

the home program component of his Individualized Education Plan (IEP). It is not disputed that C.H.S. is entitled to special educational services under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §1400 et seq., as a child classified with Autism.

The Office of Special Education Programs (OSEP) transmitted the due process petition to the Office of Administrative Law (OAL) on November 29, 2017.[2] On December 14, 2017, petitioners submitted a Letter-Brief and supporting certifications in support of an application for emergent relief. As a result, a previously scheduled settlement conference at the OAL was adjourned. The District filed a Letter-Brief in Opposition and supporting certifications on or about January 4, 2018. The emergency application was scheduled for oral argument on January 8, 2018, on which date the record closed. The substance of this written decision was read from the bench into the record.

For the reasons set forth on the record and after due consideration of the briefs, certifications and oral argument received, I **CONCLUDE** that petitioners' request for emergent relief must be **DENIED**.

It is well-established that a special corollary of injunctive relief under the IDEA and one of that law's important procedural safeguards is its "'pendent placement' or 'stay put' provision." Susquenita Sch. Dis't v. Raelee S., 96 F.3d 78, 82 (3d Cir. 1996). The IDEA provides:

> During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.
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> [20 U.S.C. § 1415(e)(3)(A)]

Consistent therewith, state regulations provide:

> 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 by the Office of Administrative Law according to (m) above or as provided in 20 U.S.C. § 1415(k)4 as amended and supplemented.
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> [N.J.A.C. 6A:14-2.7]

If the "stay put" provisions of the law are not met, then petitioners must meet the standard injunctive requirements if they are to succeed on their application for emergent relief. Here, there is no genuine dispute as to whether this emergency application triggers "stay put" consideration; rather, the issue is whether petitioners have proven a violation of such.

Petitioners' present emergent application is not about their son's current out-of-district school placement at Academy 360 – Lower School; rather, it is with respect to the implementation of the home ABA instructional component of his IEP. They argue that the District violated their child's rights when they removed and replaced Christa Barone-Schneider as C.H.S.'s ABA instructor with a new individual, Judia Garrett-Hill, because of her lack of credentials. Garrett-Hill is an employee of EPIC Developmental Services (EPIC), a newly-retained contract vendor with the District.

By way of background, as part of the prior due process action, the District retained Nicole Bednarski, a Board-Certified Behavior Analyst (BCBA). Following a review of records and observation of C.H.S at school and at home, Bednarski concluded that while C.H.S. did not require home ABA instruction in order to satisfy, in her opinion, the IDEA requirement of a free and appropriate public education (FAPE), in-home therapy could be helpful. Therefore, for the then-current school year, the Child

[2] As both parties note, there was an earlier due process petition filed but then closed. OAL DKT.# EDS19256-16.

Study Team (CST) agreed to leave in place C.H.S.'s in-home, ABA therapy of six (6) hours per week as part of his October 10, 2016 IEP. Those services were provided by Barone-Schneider, who had been in the home for instruction in earlier years (2010-2014).

On October 5, 2017, the parents and the CST convened for the annual IEP review meeting. The CST agreed to continue to provide a total of six (6) hours per week of in-home behavioral services; however, because the CST felt that it would best suit C.H.S.'s needs, it proposed that the same six (6) hours of weekly in-home service hours be allocated as follows: two (2) hours of direct ABA instruction; three (3) hours of parent training; and one (1) hour of supervision by a BCBA. The petitioners filed a due process petition and a Request for Mediation from this IEP on October 20, 2017. Mediation was conducted on November 15, 2017, but was not successful. On November 17, 2017, Barone-Schneider's employment was terminated by the District. Thus, the number and breakdown of home ABA hours in the 2017-2018 IEP is the basis for the due process appeal of petitioners presently pending at the OAL; while the firing of Barone-Schneider and her replacement with someone of much lesser credentials is the basis for the present application for emergent relief.

Respondent argued in its opposition papers that petitioner cannot receive the benefit of a stay put on a specific staffing assignment; that is, so long as the child is receiving home ABA programming, the petitioners have no right to insist on the presence in their home of a particular instructor, or even an instructor with a particular level of credentials. They argue that Garrett-Hill was trained and is supervised by Jilian Planer, BCBA, and is providing the level of services specified in the governing "stay put" IEP. I concur at this time, under these circumstances, and on this record.

"Stay put" controls here because there is an IEP that provides for the services that the petitioners are seeking through this emergency application. In fact, there is no dispute as to the operative IEP or the operative home ABA instruction. The only dispute is the identity of the person who will provide that instruction. I concur with respondent that the law does not require that an IEP specify the name of an instructor

or that such is ever written into the IEP. The law does not allow me to interfere with the staffing decisions of respondent unless it otherwise breaches an IEP or a stay put.

> To dismiss Johnson's and McCullough's qualifications is to adopt exactly the sort of potential-maximizing standard rejected by the Supreme Court in Rowley. We think the Court's admonition that the IDEA does not require "the furnishing of every special service necessary to maximize each handicapped child's potential," Rowley, 458 U.S. at 199, encompasses the notion that the IDEA likewise does not require special education service providers to have every conceivable credential relevant to every child's disability.
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> [Hartmann by Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 1004 (4th Cir. 1997), cert. den. 522 U.S. 1046, 118 S. Ct. 688, 139 L. Ed. 2d 634 (1998).]

Here, in addition to directly training her as an ABA provider, Planer has certified that Garrett-Hill has passed all of EPIC's competency checks and tests. Garrett-Hill is, therefore, qualified to administer the ABA home instruction at issue in the within petition. I note that it is not unusual for an ABA program to provide its own training, properly supervised by a BCBA. Moreover, the District argues, that nothing in C.H.S.'s educational record suggests that a new, qualified provider would disrupt his education program or progress, or more importantly, that he would be harmed specifically by a change in personnel. That petitioners argue and may well be correct that Barone-Schneider possesses additional experience beyond that of Garrett-Hill does not change the fact that Garrett-Hill, under supervision of a BCBA, is still qualified to administer the same service. Moreover, I note that statements to the effect that a change between 2014 and 2015 impacted C.H.S. does not make today's change of circumstances an emergency or of significant impact to the child.

In M.K. v. Roselle Park Bd. of Educ., CIV A 06-4499 JAG, 2006 U.S. Dist. LEXIS 79726 (D.N.J. Oct. 31, 2006), a case relied upon by petitioners and admittedly the only case any party could find that discussed personnel changes as impacting "stay put" in an IEP, the federal district court did find that the change from a one-on-one RN to administer feeding tube to a child to an LPN in a not one-on-one setting violated that particular stay

put. Frankly, my reading of that case indicates that many other physical plant issues also concerned the judge and may have influenced the decision, based largely on the one-to-one aspect of the nursing comparisons, and not the relative credentials:

> A shift in the provision of medication and nourishment through a medically-trained and certified RN working one-on-one with the child to the provision of such services by a LPN, who has not been trained as extensively as an RN, and may not work one-on-one with the child, surely constitutes a "change in educational placement" under the IDEA.
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> [Id. at *34]

Furthermore, the district judge immediately went on to compare M.K. to another feeding treatment "change" that underlaid a "stay put" emergent application that was denied:

> Compare Lunceford [v. Dist. Of Columbia Bd. of Educ.] 745 F.2d [1577], 1582-84 [(D.C. Cir. 1984)] ("The main change appellee-surrogate parent has alleged is in the feeding treatment Pierce will receive at Forest Haven. Appellee does not dispute that Pierce will be fed on a one-to-one basis at Forest Haven, as he is in HSC, or that the Forest Haven feeding program was developed by a nutritionist. Appellee contends only that the overworked Forest Haven staff cannot administer its feeding program as well as HSC administers its program. This can be a problem, and the subject of a complaint and hearings under the EAHCA. But it is not alone sufficient to constitute a change in educational placement, requiring the District to keep Pierce at HSC or a comparable facility until hearings are completed") (internal citations omitted).
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> [Ibid.]

Here, I **CONCLUDE** that the change in home ABA instructors is more akin to Lunceford than M.K., and is not a compelling basis upon which to order emergent relief.

ACCORDINGLY, it is on this 8th day of January 2018, **ORDERED** that petitioners' application for emergent relief is and the same is hereby **DENIED**. It is further

ORDERED that the District will provide any missed home instructional hours to the petitioners, at their mutual convenience.

This order on application for emergency relief shall remain in effect until issuance of the decision in the matter. The parties will be notified of the scheduled hearing dates. If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education Programs.

Gail M. Cookson

January 9, 2018

DATE

GAIL M. COOKSON, ALJ

Date Received at Agency 1/9/18

Date Mailed to Parties:

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