State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION ON EMERGENT RELIEF

OAL DKT. NO. EDS 10533-19

AGENCY DKT. NO. 2020-30479

D.F. AND L.D. o/b/o R.F.,

Petitioners,

v.

MATAWAN-ABERDEEN REGIONAL BOARD OF EDUCATION,

Respondent.

_____

D.F. and L.D., parents, pro se

Isabel Machado, Esq., for respondent (Machado Law Group, attorneys)

Record Closed: August 14, 2019 Decided August 15, 2019

BEFORE **CARL BUCK III**, ALJ:

DECISION ON APPLICATION FOR EMERGENCY RELIEF

D.F. and L.D. ("petitioners") filed a request for emergent relief on behalf of their son, R.F., who is eligible for special education and related services under the category of Other Health Impaired. R.F. is a seventeen-year-old student diagnosed with Autism Spectrum Disorder, Attention Deficit/Hyperactivity Disorder and Anxiety and has a history of school refusal. R.F. anticipates commencing his senior year in high school in September 2019. He scored in the 96th percentile for his full-scale IQ, indicating superior

intelligence. Despite his intellectual capacity, R.F. failed his classes during his tenth-grade school year at Matawan-Aberdeen School District ("District") due to incomplete/missing assignments and homework and issues with school refusal. R.F. has expressed suicidal thoughts and ideations, which his parents and treating psychologist, Dr. Barbara Couvadelli, believe are related to his lack of success in school. Considering that the petitioners were not represented by counsel in this action (although they were represented by counsel in the prior referenced action) and in the interest of obtaining accurate information, the tribunal allowed Dr. Couvadelli to testify at the time of the hearing.

On March 7, 2019, petitioners filed for due process against the District, requesting that R.F. be placed at Fusion Academy. On May 3, 2019, petitioners, with the assistance of counsel, entered into a settlement agreement with the District. Pursuant to the agreement, R.F. would utilize Educere, an online program, with the assistance of a teacher, to complete tenth grade English and History and would subsequently complete eleventh grade English and P.E. in the summer of 2019. This would put him on track to enroll in twelfth grade courses for the 2019-20 school year and graduate on time. The District also agreed to provide R.F. with counseling, Effective School Solutions (ESS) services to provide learning strategies and social-emotional support and one period of one-on-one assistance with executive functioning skills.

It is undisputed that teacher assistance for the online program did not begin until the first week of June. This assistance was available once a week with only a few weeks left until the end of the school year. Consistent with his history of school refusal, R.F. did not attend, which put him off track to complete his eleventh-grade summer course work. Thereafter, at least for some part of the summer, R.F. again showed reluctance to complete his course work.

Petitioners argue that the District broke the agreement because the services were provided too late for R.F. to successfully complete his tenth-grade course work. They also assert that the District failed in its obligations under the agreement because the child study team did not employ proper behavioral supports to assist R.F. with his school

refusal issues during this time. Hence, on or about July 8, 2019, petitioner filed an action with OSEP to enforce the May 3, 2019 agreement.

Petitioners, currently unrepresented by counsel, filed a due process petition and an application for emergent relief seeking placement of R.F. at Fusion Academy on an emergent basis.

The main concern is R.F.'s emotionally fragile state, in which he has presented with anxiety, depression and suicidal thoughts. Petitioners argue that "without an immediate clear plan in place, R.F. will regress even further and be in danger of harming himself" and experiencing further delays emotionally and academically. Petitioners request immediate enrollment in Fusion to remove R.F. from what they describe as a current state of "limbo." The District opposes petitioners' request for emergent relief, arguing that this is a FAPE issue only, and therefore, the emergent relief standard cannot be satisfied.

The request for emergent relief was received by the Office of Special Education on August 5, 2019, and that same day, the matter was transmitted to the Office of Administrative Law for determination as a contested case. Oral argument regarding the application for emergent relief was conducted on August 7, 2019, at the Office of Administrative Law in Hamilton Township, New Jersey. The parties requested time to make additional submissions the last of which was received on August 14, 2019 and the record closed on August 14, 2019.

CONCLUSIONS OF LAW

Pursuant to N.J.A.C. 6A:14-2.7(r), emergent relief shall only be requested for the following issues:

i. Issues involving a break in the delivery of services;

> ii. Issues involving disciplinary action, including manifestation determinations and determinations of interim alternate educational settings;
>
> iii. Issues concerning placement pending the outcome of due process proceedings; and
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> iv. Issues involving graduation or participation in graduation ceremonies.

Here, the application for emergent relief concerns placement pending the outcome of due process proceedings in accordance with N.J.A.C. 6A:14-2.7(r)(1)(iii).

Before analyzing the legal criteria for emergent relief, it is important to recognize the "stay-put" provision under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C.A. § 1400, et seq.; 20 U.S.C.A. § 1415(j). That provision and its counterpart in the New Jersey Administrative Code require that a child remain in his or her current educational placement "during the pendency of any administrative or judicial proceeding regarding a due process complaint." 34 C.F.R. § 300.518(a); N.J.A.C. 6A:14-2.7(u). The stay-put provision functions as an automatic preliminary injunction and it assures stability and consistency in the student's education by preserving the status quo of the student's current educational placement until the proceedings under the IDEA are finalized. Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864--65 (3d Cir. 1996).

Therefore, petitioners, who are seeking to alter the status quo or change the stay-put placement, have the burden of satisfying the requisite emergent relief standards. As set forth in N.J.A.C. 1:6A-12.1(e), N.J.A.C. 6A:14-2.7(s), and N.J.A.C. 6A:3-1.6(b), codifying Crowe v. DeGoia, 90 N.J. 126 (1986), an application for emergent relief will be granted only if it meets all four of the following requirements:

> 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 a 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.

Here, petitioners' claims are based in a denial of a Free Appropriate Public Education (FAPE). Clearly, the provision of a FAPE is a settled legal right provided under the IDEA to all children with disabilities. 20 U.S.C. 1412(a)(1)(A). Hence, the legal right underlying petitioners' claims is well settled, and they can meet this prong in the analysis.

Regarding balancing of the equities, the District's interest is the financial burden of paying for a costly private placement. While this is a burden on the District's budget, the District has an obligation to provide a FAPE, regardless of cost. The concern here is that the District has expended resources to negotiate a settlement agreement with petitioners. The settlement agreement was executed through the mediation process, with both parties represented by counsel, and appears to be valid and enforceable. Therefore, changing R.F.'s placement at an emergent hearing may be unfair to the District if it has abided by its obligations under the agreement. Alternatively, petitioners have an interest in ensuring that their son has access to a proper education - an important constitutional right in the State of New Jersey. Petitioners assert that the District has not fulfilled the terms of the settlement agreement. It is clear from the record that petitioners have longstanding problems with the District, which has bred mistrust. R.F. is an exceptionally unique student and is at a critical point in his education. Despite his superior intelligence, his disability is hindering him from reaching his potential in the educational setting. In addition to his failing grades and school refusal, R.F.'s suicidal ideations are just cause for his parents concern and sense of urgency. Here, when weighing the equities, the scales tip in petitioners' favor.

The next consideration is petitioners' likelihood of prevailing on the merits of the underlying claim. The District claims that petitioners are bound by the terms of the settlement agreement and therefore cannot request an out-of-district placement for the remainder of the 2019-20 school year. However, the terms of the settlement agreement were cumulative. Hence, once the first goal of the agreement was not achieved, the rest of the agreement became extremely difficult to fulfill within the set timeframes. The District claims that since R.F. did not attend the online program, it was petitioners who broke the terms of the agreement. However, the settlement agreement was not intended to exist in a vacuum, and the outlined courses and schedule did not negate the District's continued responsibility to provide R.F. with a FAPE. The District was required to provide R.F. with an IEP that was reasonably calculated to allow R.F. to progress in the program specified in the settlement agreement. . Cutting class and refusing to attend school constitute behaviors that impede R.F.'s learning. Therefore, the District must consider "strategies, including positive behavioral interventions and supports to address that behavior." 34 C.F.R. 300.324; N.J.A.C. 6A: 14-3.7(c)(5). Additionally, the IDEA requires local education agencies to conduct assessments in all areas of suspected disability. 34 C.F.R. 300.304(c)(1)(4); N.J.A.C. 6A:14-2.5(b)(3). An updated functional behavioral assessment would have been appropriate to provide the District with the necessary data to develop a plan under which R.F. could have achieved success. Even if there was limited time to conduct a full assessment, the child study team should have at minimum addressed this need through his behavior intervention plan (BIP). See L.J. v. Sch. Bd., 2019 U.S. App. LEXIS 19094, at *34 (11th Cir. 2019) ("[T]he school cannot rely on [school] refusal as a hall pass to escape responsibility or as a license to give up"); A.W. v. Middletown Area Sch. Dist., 2016 U.S. Dist. LEXIS 147285 (M.D. Pa 2016) (Student was awarded compensatory education for the district's failure to intervene and develop an appropriate plan to address his school avoidance); Lexington County Sch. Dist. One v. Frazier, 2011 U.S. Dist. LEXIS 107813, at *27 (D.S.C. 2011) (finding that the school failed to provide the student with a FAPE because it did not appropriately address the student's school refusal in his IEP).

Here, the District was aware that R.F. had issues with school refusal, yet there is no evidence that the District took any steps to address this through his IEP. The District agreed to provide R.F. with services through ESS, which may include supports by a

behaviorist including conducting FBAs and developing behavior plans. Pet'rs ['s] Ex. 3. The settlement agreement specifies that services through ESS were "effective immediately and through the 19-20 school year, pending completion of the intake;" yet, there is no evidence that a behaviorist met with R.F. to conduct an FBA or develop a BIP to help ensure success in his courses. Moreover, R.F.'s IEP completely lacks a BIP, despite that fact that he has clearly engaged in behavior that impedes his learning. Pet'rs ['s] Ex. 2.

While voluntary settlement agreements are enforceable, there is a heightened standard when they implicate a child's rights under the IDEA. W.B. v. Matula, 67 F3d 484 (3d Cir. 1995), *overruled on other grounds by,* A.W. v. Jersey City Pub. Schs., 486 F.3d 791 (3d Cir. 2007. Further, the District cannot neglect its other obligations to provide the student with a FAPE. Here, there was no express waiver of rights under the terms of the agreement, including R.F.'s right to compensatory education.

The District further argues that Fusion Academy, the parent's choice of private placement, is not an appropriate Naples Placement. However, N.J.A.C. 6A:14-6.5 provides for certain circumstances in which an out-of-district placement does not have to meet the requirements of the Naples Amendment set forth in N.J.S.A. 18A:46-14. While Petitioners failed to put forth evidence to show that Fusion Academy is an appropriate placement, this tribunal takes into consideration that they are pro se and expressed at the hearing that they are looking for any appropriate out-of-district placement for their son.

Given R.F.'s unique profile and what appears from the record to be numerous IDEA violations, petitioners have demonstrated a likelihood of prevailing on the merits of the underlying claim.

The final consideration is whether petitioner will suffer irreparable harm if the requested relief is not granted. "Irreparable harm is shown when money damages cannot adequately compensate plaintiff's injuries." Hornstine v. Twp. of Moorestown, 263 F. Supp. 2d 887, 911 (D.N.J. 2003) (citing Sampson v. Murray, 415 U.S. 61, 90 (1974)). Petitioners' strongest argument relates to his risk of harming himself without an immediate intervention to change his placement. However, this argument was belied at the hearing

when Dr. Couvadelli testified that R.F. had no real intent of harming himself. This court does not make light of the emotional distress and anxiety R.F. may be currently experiencing, but petitioners have failed to show that R.F. will suffer irreparable harm if his placement is not immediately changed, especially considering the school year has yet to commence. The underlying issue here is the provision of a FAPE, which is most appropriately addressed through a full due process hearing. Moreover, to the extent petitioners allege that the harm involves a loss of education, the IDEA provides for compensatory education as a remedy. I **FIND** that petitioners have not met their burden of satisfying the irreparable harm standard for emergent relief.

Hence, since petitioners have not satisfied all four requirements, I **CONCLUDE** that the application for emergency relief must be denied.

Finally, the settlement agreement in this matter can no longer be executed as originally intended; therefore, I agree with petitioners that a clear plan needs to be developed to get R.F. back on track and prevent further emotional and academic regression. I encourage the parties to work collaboratively to revise R.F.'s IEP accordingly.

It is **ORDERED** that petitioner's motion for emergent relief is **DENIED**.

This decision on application for emergency relief shall remain in effect until the issuance of the decision on the merits in this matter. The hearing having been requested by the parents, this matter is hereby returned to the Department of Education for a local resolution session, pursuant to 20 U.S.C.A. § 1415 (f)(1)(B)(i). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education Programs.

August 15, 2019
DATE

CARL V. BUCK III, ALJ

Date Received at Agency

Date Mailed to Parties:

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