State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION - EMERGENT RELIEF

OAL DKT. NO. EDS 11066-20

AGENCY DKT. NO. 2021-32336

P.R. AND A.R. ON BEHALF OF P.R.,

Petitioners,

v.

WAYNE TOWNSHIP BOARD OF EDUCATION,

Respondent.

P.R. and **A.R.**, petitioners pro se

Carolyn R. Chaudry, Esq., for respondent Wayne Township Board of Education (Scarinci and Hollenbeck, attorneys)

Record Closed[1]: December 16, 2020 Decided: December 16, 2020

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

Petitioners P.R. and A.R. filed their due process petition on or about April 14, 2020, on behalf of their son P.R., who is fourteen years old and in eighth grade in the Wayne Township Board of Education (District). [OAL Dkt. EDS 4308-20.] On or before

[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.

that date, the District filed a separate petition seeking an order denying a parental request for

independent evaluations. [OAL Dkt. EDS 4322-20.] It is not disputed that P.R. 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. On or about March 30, 2020, the parents and the CST convened for an Individual Education Plan (IEP) review meeting. The challenged IEP set forth that P.R. would be educated at an out-of-district placement at the Mount Carmel Guild School in West Orange, New Jersey. The petitioners did not agree with this placement because of major safety and educational concerns on their part.

The Office of Special Education Programs (OSEP) transmitted the petitions to the Office of Administrative Law (OAL) on or about April 22, 2020. The cases were assigned to the Honorable Ellen S. Bass, A.L.J. On or about May 14, 2020, hearing dates were set down for July 20-22, 2020. In June 2020, the matters were re-assigned to the undersigned. Numerous case management and settlement conferences have been conducted in the interim, including on some of the scheduled and rescheduled hearing dates. The current Covid-19 state of emergency has impacted both the processing of these cases and the underlying educational program for P.R.: (1) Mount Carmel no longer had an opening for P.R. in September 2020; and (2) petitioners opted for all-virtual learning for P.R. because of an at-risk, multi-generational household. Accordingly, many of our off-the-record discussions have revolved around an appropriate placement when and if petitioners agree that P.R. can be taught in-person.

On or about December 3, 2020, petitioners filed an application for emergent relief with OSEP seeking an immediate placement of P.R. in the autism program at Caldwell University because their son is in crisis and has not had a full day of school allegedly since September 2019. Apparently, and as discussed herein, this was triggered by a settlement proposal floated by the District in mid-November. OSEP transmitted just the emergency application to the OAL on December 4, 2020. Because of the underlying due process petition, the request for emergency relief was also assigned to the undersigned. The District filed a Letter-Brief in Opposition and supporting certifications prior to the argument on December 16, 2020. The emergency application was scheduled for oral argument on December 16, 2020, on which date the record closed.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

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

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;
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> ii. Issues involving disciplinary action, including manifestation determinations and determinations of interim alternate educational settings;
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> 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); Susquenita Sch. Dis't v. Raelee S., 96 F.3d 78, 82 (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.

The touchstone of emergent relief is whether irreparable harm will befall the petitioning party prior to the ability of the forum to hear the underlying merits of the due process petition. Thus, it is well established that a judge may order emergent relief if the judge determines that the balance of equities favors granting relief. My. determination is controlled by N.J.A.C. 1:6A-12.1, which provides that a judge may order emergency relief pending issuance of the final decision in a special education matter if it appears from the proofs that:

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
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> 2. The legal right underlying the petitioner's claim is settled;
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> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
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> 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.

See also N.J.A.C. 1:1-12.6; N.J.A.C. 6A:14-2.7(s); and Crowe v. DeGioia, 102 N.J. 50 (1986), which echoes the regulatory standard for this extraordinary relief. It is well established that a moving party must satisfy all four prongs of the regulatory standard to establish an entitlement to emergent relief. See also: Crowe at 132-35. I **CONCLUDE** that petitioners cannot meet the standard for an award of emergent relief and that their application must be denied.

As stated, and supported by the District, in the special education context, irreparable harm is generally substantiated when there is a substantial risk of physical injury to the child, or others, or when there is a significant interruption in or termination of educational services. M.H. v. Milltown Board of Education, 2004 N.J. AGEN LEXIS 677 (OAL Dkt. No. EDS 8411-03). For example, in S.V., M.R. and G.R. o/b/o K.V., E.R. and F.H. v. Board of Educ. of the City of Camden, 2012 N.J. AGEN LEXIS 537, the Court found no irreparable harm where students are left in their current placements which parents are claiming are not in general providing an appropriate education but provide no credible evidence to support their claims. See also J.P. o/b/o J.P. v. Pemberton Bd. of Educ., 2001 N.J. AGEN LEXIS 278, *29-30 (finding that compensatory services available under the IDEA is a form of relief which resembles actions to recover damages caused by another.).

In M.H., the parents of a five-year old preschool student sought to change their child's agreed upon placement to include attendance at a private out of district school through emergent relief. The ALJ held that the parents were not entitled to emergent relief as the student would not experience irreparable harm if the requested relief was not granted. In the decision on the underlying due process matter in that case, the ALJ expounded upon his decision, noting that during the emergent relief hearing, he could not make a preliminary determination on the appropriateness of the IEP's placement to find irreparable harm. M.H., 2004 N.J. AGEN LEXIS 677 at *2.

Petitioners' present emergent application seeks to change their son's current virtual Covid-19 home instruction wherein he has only been receiving a couple of hours of instruction per day, some of which they claim he cannot access because of his emotional and learning issues. They claim that the District is refusing to find a full-time placement for P.R. and that is the heart of this emergency application: a request to mandate the location of an acceptable out-of-district placement, which makes their application similar to that discussed in M.H..

Petitioners describe P.R. as having Post-Traumatic Stress Disorder (PTSD), and is subject to sensory overload and extreme noise sensitivities. Petitioners have

sometimes argued that their son cannot be placed in a classroom with other peers unless they can have veto power over the specific peers. They have also argued at times that he is not ready to be in a classroom with any peers. They also argue that P.R. has regressed during this period of Covid virtual home instruction and the previous months of in-home instruction. He has become more inhibited and socially deficient because of isolation from peers. They acknowledge in this application that "[h]is anxiety and long absence from a classroom will require the care of highly trained professionals to monitor him for safety and psychological reasons. It will be difficult for our son at first and these supports are needed to make sure he transitions smoothly back into social settings with limited negative reactions." [Pg. 3.]

Specifically, petitioners seek on an expedited basis that P.R. be provided with immediate therapeutic care in conjunction with a hands-on IEP of a placement with additional upper tier supports of psychological professionals and BCBA supervision. They claim he must be provided with a full-time program which can provide close monitoring, socialization opportunities, and routine physical activities. Petitioners' research informed them that Caldwell University Center for Autism and Applied Behavioral Analysis (Caldwell), which has been accepted as a Naples placement, N.J.S.A. 18A:46-14, was an appropriate placement for P.R. Independently and without prior or contemporary notice to the District, petitioners asked Caldwell to undertake an intake of P.R. on or about November 25, 2020, and set forth that the center has accepted him for immediate enrollment. [Caldwell Letter, dated November 30, 2020.] Accordingly, petitioners herein request an Order mandating P.R. be placed at Caldwell with transportation provided by the District.

Respondent argues that petitioner cannot be granted this extraordinary relief in the form of a mandatory, unilateral out-of-district placement because the relief sought is not likely to succeed at a hearing on the merits, and at this emergency stage, cannot be supported. The District also claims that it has been willing and able to provide P.R. with an appropriate educational program supported by in-district resources, in a hybrid learning environment of 2:1 in-person support and virtual learning and behavioral supports in the home.

I agree with the District and **CONCLUDE** that petitioners have not met the Crowe emergent factors because petitioners have also not demonstrated a likelihood of success on the merits. It is well-settled that a school district satisfies the requirements of law by providing personalized instruction and sufficient supports services "as are necessary to permit [the student] to 'benefit' from the instruction. G.B. and D.B. o/b/o J.B. v. Bridgewater-Raritan Reg'l. Bd. of Educ., 2009 U.S. Dist. Lexis 15671(D.N.J. 2009)(citing Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 203, (1982). The IDEA does not require that a school district maximize a student's potential or provide him the best education possible. Instead, the IDEA requires a school district to provide a basic floor of opportunity. Carlisle Area Sch. Dist. v. Scott P., 62 Fed 520, 533-34 (3d Cir. 1995) See also Bayonne Bd. of Educ. v. L.Y. o/b/o J.Y. and Elysian Charter Sch., 2010 N.J. AGEN LEXIS 438, *31-32.

I also **CONCLUDE** that petitioners have not supported their argument that P.R. will suffer irreparable harm. Parents who disagree with an IEP's proposed program or placement may make a unilateral placement while due process is pending, at their financial risk. N.J.A.C. 6A:14-2.10. The IDEA authorizes tuition reimbursement for parents who unilaterally decide to place their child in an out-of-district school if the IEP proposed by the school district fails to offer the child a FAPE and the placement the parents chose was appropriate under the IDEA, although not necessarily an unapproved school. Sch. Comm. of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 370, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985); Florence Cty. Sch. Dist. Four v. Carter, 510 U.S. 7, 15, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993). Therefore, any harm is actually reparable through a later award of tuition reimbursement.

The petitioner's argument that Caldwell could be approved on an emergency basis as a Naples placement is unavailing. As stated by the courts, "the terminology used in the last sentence of the [N.J.S.A. 18A:46-14 "Naples Amendment"] further clarifies that the Amendment governs only placements recommended by a child study team and effectuated by the [local education agency (LEA)]." Therefore, it has been held that this language makes clear that Naples does not apply to unilateral parental

placements. L.M. v. Evesham Twp. Bd. of Educ., 256 F. Supp. 2d 290, 300 (D.N.J. 2003). It is also premature on this record. A private therapeutic placement, such as at Caldwell, is one of the most restrictive types of placement and is only granted in very limited circumstances. N.J.S.A. 18A:46-14. See 20 U.S.C. § 1412(a)(5)(A); Oberti v. Bd. of Educ. of Clementon Sch. Dist., 995 F.2d 1204, 1214 (3d Cir. 1993). This forum can only reach a conclusion for such a placement on a complete record and only after the District has had the opportunity to carry its burden of proving that the IEP provided FAPE to P.R.

Furthermore, I **CONCLUDE** that petitioners' objections and concerns about an unexecuted proposed settlement position of the District is neither a compelling nor a lawful basis upon which to grant emergent relief. The settlement proposal presented to petitioners by the District under cover of November 13, 2020, has not been agreed upon by both parties. It is entirely inappropriate for its outline to be considered as evidence of anything other than an attempt at a resolution. Under the well-established principle that discussions toward an amicable resolution are most fruitful when they are conducted in confidence and without fear of publication, settlement proposals may not be submitted into the record. See, e.g., N.J.R.E. 408.

"[T]here is a vital public policy in encouraging voluntary dispute resolution that would be thwarted if a settlement proposal could only be made at the peril of knowing that it could be used in court against the maker of the proposal if no settlement was achieved." Wyatt [v. Wyatt], 217 N.J. Super. [580,] 586 [(App. Div. 1987)]; see also McCormick on Evidence § 266 at 411 (Strong ed., 5th ed. 1999) (noting the "social desirability of promoting settlements of controversies over disputed claims"). Accord Ciolli v. Iravani, 625 F. Supp. 2d 276, 285 (E.D. Pa. 2009). New Jersey Evidence Rule 408 reflects this tradition. Brown v. Pica, 360 N.J. Super. 565, 570 (Law Div. 2001).

In sum, petitioners' demand that I review and reject a proposed and unexecuted settlement offer in favor of their unilateral, preemptive placement of P.R. at Caldwell

must be denied. The issues involved in an appropriate placement in the least restrictive setting are complex and must abide a plenary hearing or a new IEP.[2]

ORDER

ACCORDINGLY, it is **ORDERED** that petitioners' application for emergent relief is and the same is hereby **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 Policy and Dispute Resolution.

December 16, 2020
DATE

GAIL M. COOKSON, ALJ

Date Received at Agency 12/16/20

Date Mailed to Parties: 12/16/20

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[2] In fact, it appears that the March 2020 IEP which formed the basis of the pending due process petition might be moot and in need of immediate amendment due to circumstances outside the control of either party because of both Covid and the lack of the designated out-of-district placement specified therein. This will have to be the subject of a separate determination on those other OAL matters. I have required expedited briefing on the issue of mootness insofar as negotiations have failed to result in a mutually agreeable replacement IEP.

LIST OF EXHIBITS IN EVIDENCE

For Petitioner:

P-1 Naples exemplar

For Respondent:

None.