State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
EMERGENT RELIEF
OAL DKT. NO. EDS 00016-21
AGENCY DKT. NO. 2021-32388

ELIZABETH CITY BOARD OF EDUCATION,
Petitioner,
v.
N.R. AND M.R. ON BEHALF OF M.R.,
Respondents.

Amy A. Pujara, Esq., petitioners, Elizabeth City Board of Education, (DiFrancesco Bateman, Kunzman, Davis, Lehrer & Flaum, LLC, attorneys)

Victor Monterrosa, Jr. Esq., for respondents, N.R. and M.R. on behalf of M.R., (Monterrosa Law, LLC, attorneys)

Record Closed: April 30, 2021 Decided: May 3, 2021

BEFORE **JULIO C. MOREJON**, ALJ:

STATEMENT OF THE CASE

Petitioner, Elizabeth City Board of Education (District) seeks an order by way of application for emergent relief to have respondents, N.R. and M.R. on behalf of M.R (Respondents), virtually attend her educational program in the District, where M.R. will receive a free, appropriate public education (FAPE); compelling Respondents'

cooperation in performing its requested assessments, which includes educational, neurological, psychological, OT and speech/language evaluations.

PROCEDURAL HISTORY

On December 22, 2020, the District filed with the New Jersey Department of Education (Department of Education) Office of Special Education Policy and Procedure (OSEP) a Petition for Due Process (Petition) against Respondents, seeking an order to deny Respondents' request for independent evaluations, compel consent for reevaluations, and that the District's proposed program and placement provides FAPE. OSEP transferred this matter to the Office of Administrative Law (OAL), where it was filed on December 14, 2020.

On or about January 7, 2021, Respondents' filed with OSEP a response to the District's Petition for Due Process, and a Petition for Due Process. In both the response and petition, Respondents' withdrew their request for independent evaluations. I am presiding over the petitions filed by the District and Respondents.

An initial telephone status conference was held on February 12, 2021. Thereafter, on or about March 19,2021, the District filed the within application for emergent relief. The Respondents' opposition was filed on or about March 29, 2021.

Several telephonic status conferences were held between February 12, 2021 and April 20, 2021, during which time the parties attempted to settle this matter. Since no settlement could be reached oral argument was held on April 29, 2021.[1] On April 30,

[1] Prior to the commencement of oral argument on April 29, 2021, counsel for the District informed the undersigned that it was amending the emergent application due to the following: 1) the District was amending its application for emergent relief seeking in class instruction, as the District had resumed class instruction on April 19,2021, and 2) the District was no longer seeking emergent relief concerning the reevaluations of M.R., as a result of Respondents agreement to sign the Reevaluation Planning-Proposed Action form (Consent Form) consenting to have the District conduct the proposed evaluation assessments as stated in the District's application for emergent relief. Counsel for Respondents confirmed that Respondent, M.R. ("Mother") had signed the Consent Form and the same was provided to me on April 30, 2021. As a result of the same, the Districted informed the undersigned that it would not seek emergent relief on the issue of performing the requested assessments, but that it still requested Respondents' cooperation in the same.

2021, Respondents provided the executed copy of the Consent Form and the record was closed.

The party's inability to settle resulted in petitioners' filing the within request for emergent relief on September 26, 2019, pursuant to N.J.A.C. 6A-12.1 and N.J.A.C. 6A:14-2.7(r). On October 3, 2019, the District filed its opposition to the petitioners' request for emergent application. Oral argument was taken on the emergent application on October 4, 2019.

FACTUAL SUMMARY

M.R. is a second-grade classified student in an in-class resource program at School #6 in the District. Respondents were not domiciled in the District during a significant portion of the 2017-2018 academic year but returned to the District in or around May of 2018. See Certification of Diana Pinto-Gomez ("Pinto-Gomez Cert.") at ¶ 4. Upon returning to the District in May 2018, Respondents provided several evaluations that were conducted by the Irvington School District. Id. at ¶ 5. M.R. was subsequently placed in a program which provided M.R. with in-class support, speech-language therapy, occupational therapy, a shared aide, and other supports.

In the Spring of 2020, the District sought to schedule an Annual review to discuss M.R.'s educational progress/needs and to identify which additional assessments and evaluations were required to ensure that M.R.'s program and placement were appropriate and that M.R. received a FAPE. Id. at ¶ 6. The parties did not meet, however, for reasons that are in dispute in the respective petitions for due process filed by the District and Respondents. At issue is the Mother's request for a Swiss German language interpreter. The District contends that the Mother's request for an interpreter was made after several meetings in which the Mother spoke English and did not previously indicate at any time that an interpreter was required. Id.

The District alleges that it has attempted to communicate with Respondents via email, phone, and regular mail several times from April to December 2020 to schedule an IEP meeting. Id. at ¶ 7. Although Respondents have attended many IEP meetings with

the District since 2016 without the aid of interpreting services and/or the attendance of any advocates, Respondents advised that the proposed Annual review and Re-evaluation Planning meeting could not take place unless the District provided a High Swiss- German interpreter with a Bernese dialect. Id. at ¶ 8.

Ultimately, a virtual meeting was scheduled for December 18, 2020. Id. at ¶ 12. Both Respondents attended. At the meeting, after the Mother spoke with the Swiss-German interpreter, Respondents stated that the interpreter couldn't help her. Id. at ¶ 13. Therefore, the IEP meeting could not proceed due to the Mother's request for a "High Swiss-German" interpreter. Id.

On or about December 22, 2020, the District filed its underlying due process petition. The parties participated in a settlement conference with Judge Cohen on January 22, 2021. At the time, a tentative settlement agreement was reached, and Respondents agreed to complete the consent forms needed to begin M.R.'s evaluations. Thereafter, Respondents retained counsel. The settlement agreement was not executed, and the District never received the consent forms from Respondents.

Throughout February 2021, the District attempted to contact Respondents multiple times to check on M.R.'s well-being as M.R. failed to participate in remote instruction for more than one month. Pinto-Gomez Cert. at ¶ 14. Respondents have stated throughout that M.R. has not been able to attend remote classes as Respondents have Wi-fi issues where they reside and cannot logon to the District's network. Respondents also contend that M.R. cannot sit in front of a laptop for an extended period and therefore remote learning is not beneficial. Respondents also refuse to allow M.R. to attend in class learning as they are concerned about the pandemic and potential for M.R.'s infection and that of Respondents.

Respondents have now signed the Consent Form agreeing to have the District perform the proposed evaluation assessments for educational, psychological, social history, speech/language and occupational therapy. Respondents no longer request independent evaluations. The District has represented that it has located the services of a High Swiss- German interpreter with a Bernese dialect to assist the Mother in future

meetings. The only issue remaining is the District's requested relief that M.R. be compelled to attend in class instructions at the District. Respondents' argue that the District has not presented "hard evidence" that the District will suffer irreparable harm, as the District may be required to provide compensatory education to M.R.

LEGAL ANALYSIS AND CONCLUSION

N.J.A.C. 1:6A-12.1(a) provides that the affected parent(s), guardian, District or public agency may apply in writing for emergent relief. An emergent relief application is required to set forth the specific relief sought and the specific circumstances that the applicant contends justify the relief sought. Each application is required to be supported by an affidavit prepared by an affiant with personal knowledge of the facts contained therein and, if an expert's opinion is included, the affidavit shall specify the expert's qualifications.

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

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

iv. Issues involving graduation or participation in graduation ceremonies.

There is no dispute that M.R. has not attended her virtual instruction program pursuant to her IEP, since January 21, 2021, and that the parents refuse to have her attend in class instruction since, which commenced at the District on April 19, 2021. The District now seeks an order to have M.R. attend her in class programs in order to provide her with FAPE. Therefore, I **CONCLUDE** it has been established the issue involves a break in the delivery of services pursuant to N.J.A.C. 6A:14-2.7(r) i.

The standards for emergent relief are set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), and codified at N.J.A.C. 6A:3-1.6(b):

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.

The petitioner, District bears the burden of satisfying all four prongs of this test. Crowe, 90 N.J. at 132–34.

Here, the District is prevented from fulfilling its legal obligation to provide FAPE to M.R. due to her parent's refusal to have her attend in class learning for her IEP programs and have not cooperated in having M.R. participate in her virtual program learning. Therefore, I **CONCLUDE** that the District has met its burden of establishing irreparable harm that due to the parent's failure to cooperate the District is prevented from providing M.R. with FAPE.

N.J.A.C. 6A:14-2.7(a) provides that any party may request a due process hearing. N.J.A.C. 6A:14-2.7(r) provides that any party may seek an order of emergent relief. The District is the responsible local education agency for M.R., and legally obligated to provide her FAPE. Accordingly, I **CONCLUDE** that the District has met its burden that the legal right of their claim is settled.

Finally, when the interests of the parties are balanced, it is clear that the District would sustain more harm than Respondents, if this application is not granted. The continued lapse in services would severely undermine the District's ability to provide appropriate academic instruction and services for the health and welfare of M.R. This

would be extremely prejudicial to the District. Furthermore, M.R. would not be harmed if compelled to attend her programs with supports and accommodations that are specifically tailored to address her disabilities. Instead, M.R. would be provided with a FAPE pursuant to federal and state law.

As stated above, the District is the responsible local education agency for M.R. and legally obligated to provide her FAPE. Here, the District is prevented from fulfilling its legal obligation to M.R. to provide FAPE due to her parent's refusal to have M.R. attend the virtual or in class attendance of her programs. Therefore, I **CONCLUDE** that the equities and interests of the parties are balanced, the District will suffer greater harm than the Respondents will suffer if the requested relief is not granted.

Having concluded that the District has satisfied the four prongs for emergent relief under Crowe v. DeGioia, 90 N.J. 126, the question that must be addressed is whether M.R. must attend virtual remote learning or in class learning of her programs? In the initial application for emergent relief filed by the District, it sought an order to compel M.R. to attend virtual class attendance of her programs. However, the District requested to amend its emergent relief application to in class instruction as the District commenced offering in class learning on April 19, 2021.

On March 16, 2020, Governor Murphy issued Executive Order 104, which among other things, temporarily called for schools to halt in-person instruction to protect the State from the spread of COVID-19. Despite many school district's efforts to commence in-person learning, Executive Order 104 remains in effect, and Districts like Elizabeth City offer both in-class learning and virtual learning. Respondents represent that they do not object to M.R. participating in virtual learning, but that due to poor wi-fi access and the parents' opinion that due to M.R.'s disabilities she cannot learn her lessons on a laptop computer, M.R. has not commenced her virtual learning. The Respondent parents object to in class learning due to health concerns related to COVID-19.

I **CONCLUDE** that the District having established the four-prongs required for emergent relief under Crowe, and that since the District offers both in class and virtual learning under Executive Order 104, the Respondent parents must choose either in class

or virtual learning to ensure M.R.'s participation in her program and the District's ability to provide her with FAPE.

I **CONCLUDE** that having heard the arguments of the District, and Respondents, and considering all documents submitted, the District's application for emergent relief is **GRANTED** and that all issues raised in the District's underlying due process petition have been resolved herein.

ORDER

IT IS ORDERED that having heard the arguments of the District, and Respondents, and considering all documents submitted, the District's application for emergent relief is **GRANTED** and that all issues raised in the District's underlying due process petition have been resolved herein.

IT IS ORDERED that since the District offers both in class and virtual learning under Executive Order 104, the Respondent parents must choose either in class or virtual learning for M.R., to ensure her participation in her program and the District's ability to provide M.R. with FAPE.

Finally, **IT IS ORDERED** that Respondents having signed the Consent Form, shall fully cooperate with the District in all efforts, requests and requirements having to do with the District's performance of the proposed evaluation assessments for educational, psychological, social history, speech/language and occupational therapy.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2018) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.516 (2018). 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.

May 3, 2021
DATE

JULIO C. MOREJON, ALJ

Date Received at Agency May 3, 2021

Date E-Mailed to Parties: May 3, 2021

JCM/lr