State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION DENYING
EMERGENT RELIEF
OAL DKT. NO. EDS 13180-18
AGENCY DKT. NO. 2019-28779

M.F. AND W.W. ON BEHALF OF A.F.,
Petitioners,
v.
COLLINGSWOOD BOROUGH
BOARD OF EDUCATION, CAMDEN COUNTY,
Respondent.

Andrew J. Morgan, Parent Advocate, for petitioners pursuant to N.J.A.C. 1:1-5.4(a)(7)

Robert A. Muccilli, Esq., for respondent (Capehart & Scatchard, P.A., attorneys)

Record Closed: September 17, 2018 Decided: September 18, 2018

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

By a request for emergent relief, petitioners M.F. and W.W. on behalf of A.F., seek a continued out-of-district placement pending the outcome of due process proceedings. Respondent Collingswood Borough Board of Education, Camden County (Collingswood or the District) opposes this request on the grounds that petitioners have not satisfied the requirements for obtaining emergent relief.

On September 11, 2018, petitioners filed a complaint for due process and a request for emergent relief with the Office of Special Education Programs (OSEP). This matter was transmitted to the Office of Administrative Law (OAL) on September 12, 2018, for an emergent relief hearing.

On September 14, 2018, respondent filed a notice of motion to disqualify Andrew J. Morgan (Morgan), petitioners' non-lawyer representative. Morgan responded by letter dated September 16, 2018. On September 17, 2018, following a brief conference with counsel for respondent and Morgan, I heard oral argument on the motion. I concluded that respondent had not proved Morgan to be unqualified and denied respondent's motion. Following a brief recess, respondent chose not to appeal this decision. Oral argument on emergent relief was held on September 17, 2018, and the record closed.

FACTUAL DISCUSSION AND FINDINGS

The following facts are not in dispute and form the basis for the below decision. Accordingly, I **FIND** the following as **FACTS:**

A.F. is a nineteen-years old female who is eligible for special education and related services in the Multiply Disabled[1] classification category. A.F. moved with her family from Haddonfield Township to Collingswood Township on July 23, 2018. She was enrolled in the Collingswood Township School District on August 1, 2018.

As a student in the Haddonfield Township School District (Haddonfield), A.F. was placed at The Newgrange School (Newgrange), an out-of-district private day school for students with disabilities in Hamilton Township, New Jersey. The Individual Educational Plan

[1] M.F., A.F.'s mother, describes her as having autism spectrum disorder, fetal alcohol effect, major depressive disorder, mood disorder, attention deficit hyperactivity disorder, articulation deficits, dyslexia, central auditory processing disorder, expressive language deficit, language-based reading disorder and fine motor and visual motor coordination disorder. Certification of Petitioner M.F. in Support of Request for Emergent Relief (September 10, 2018), p. 1.

(IEP) developed for A.F. for the 2018-19 school year (the Haddonfield IEP), before she moved to Collingswood, called for her to continue at Newgrange.

Prior to enrolling A.F. in Collingswood, M.F. contacted Dr. Joanne Plescia (Plescia), Director of Special Education, regarding A.F. and shortly thereafter, on August 1, 2018, M.F. and A.F. met with Plescia. The next day, M.F. called Plescia to ask if there was any possibility for A.F. to attend Newgrange. M.F. and Plescia otherwise disagree as to the content of their discussions at the August 1, 2018, meeting and the August 2, 2018, telephone call.

A.F.'s parents and the Haddonfield School District provided respondent with extensive records regarding A.F., including the Haddonfield IEP (and the IEP for the prior year), reports of recent psychological and learning evaluations, certain medical records, grade transcripts and report cards, progress reports regarding A.F.'s goals and objectives, and standardized test results. At the time of her transfer to Collingswood, A.F. needed to complete three classes to earn a New Jersey high school diploma: world language, science and financial literacy.

Respondent determined that it would not implement the Haddonfield IEP, which called for placement at Newgrange. On August 28, 2018, respondent convened a meeting to develop a new IEP; petitioners, Morgan, and Dr. Howard Kaplan (Kaplan), principal of Newgrange, participated.[2] On August 29, 2018, respondent transmitted the completed IEP (the Collingswood IEP) to petitioners and Morgan.

The parties are in complete disagreement over the sufficiency of the methods used to develop the Collingswood IEP, whether the Collingswood IEP offers comparable services to those found in the Haddonfield IEP, whether Collingswood intends to place A.F. in an appropriate educational setting, and whether Collingswood offers A.F. a free and appropriate public education (FAPE) in the least restrictive environment (LRE).

[2] In her certification, M.F. refers to Kaplan as the assistant principal of Newgrange. M.F. Certif., p. 6. Both parties agree that Kaplan knows A.F. and participated fully in the IEP meeting, albeit by telephone.

The 2018-19 school year is already underway; petitioners have elected to keep A.F. at home rather than send her to Collingswood. Petitioners contend that they did not agree to the Collingswood IEP as they first wanted to observe the program in which A.F. would be placed; similarly, petitioners claim that because respondent had not observed A.F. in an educational setting and does not know her, the Collingswood IEP does not reflect her particular educational, social, behavioral and psychological needs.

Respondent contends they were not required to provide a program comparable to that found in the Haddonfield IEP as they completed the new IEP within thirty days, that the program Collingswood offers A.F. is actually better in many respects than the services she received at Newgrange, and that the new IEP takes A.F.'s specific needs into account. Respondent also notes that they asked for A.F. to come in and meet with Collingswood staff prior to the IEP meeting, but that petitioners declined as A.F. was on a previously arranged vacation.[3]

LEGAL ANALYSIS AND CONCLUSIONS

N.J.A.C. 1:6A-12.1(a) provides that the affected parent 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. Emergent relief shall only be requested for specific issues, including a break in the delivery of services and/or placement pending the outcome of due process proceedings. N.J.A.C. 6A:14-2.7(r). Here, A.F. has experienced a break in the delivery of services as she has not attended school yet this school year (albeit by the choice of petitioners) and petitioners have initiated due process proceedings to challenge her placement for the 2018-19 school year.

The standards for emergent relief are set forth in Crowe v. DeGoia, 90 N.J. 126 (1982), and codified at N.J.A.C. 6A:3-1.6. The petitioner bears the burden of proving:

[3] At oral argument, respondent stated that they made this same offer to M.F., but she too declined.

> 1. that the party seeking emergent relief will suffer irreparable harm if the requested relief is not granted;
>
> 2. the existence of a settled legal right underlying the petitioner's claim;
>
> 3. that the party seeking emergent relief has a likelihood of prevailing on the merits of the underlying claim; and
>
> 4. when the equities and the interests of the parties are balanced, the party seeking emergent relief will suffer greater harm than the respondent.
>
> [Crowe, 90 N.J. at 132-34.]

Petitioners first appear to claim that, because the emergent relief request effectively seeks a "stay-put" preventing Collingswood from changing A.F.'s placement from Newgrange, the proper standard for relief is the stay-put provision in the federal Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1515(j), and its counterpart in the New Jersey Administrative Code, N.J.A.C. 6A:14-2.7(u). These regulations provide that no change shall be made to a student's educational placement "pending the outcome of a due process hearing," and function as an automatic preliminary injunction, dispensing with the need for the judge to weigh the above factors for emergent relief. Drinker v. Colonial Sch. Dist., 78 F.2d 859, 864 (3d Cir. 1996).

There is, however, a specific regulation which addresses the current situation, one in which the student transfers from one New Jersey school district to another. This regulation provides, in pertinent part, as follows:

> (g) When a student with a disability transfers from one New Jersey school district to another or from an out-of-State school district to a New Jersey school district, the child study team of the district into which the student has transferred shall conduct an immediate review of the evaluation information and the IEP and, without delay, in consultation with the student's parents, provide a program comparable to that set forth in the student's current IEP until a new IEP is implemented, as follows:

> 1. For a student who transfers from one New Jersey school district to another New Jersey school district, if the parents and the district agree, the IEP shall be implemented as written. If the appropriate school district staff do not agree to implement the current IEP, the district shall conduct all necessary assessments and, within 30 days of the date the student enrolls in the district, develop and implement a new IEP for the student.
>
> [N.J.A.C. 6A:14-4.1.]

The stay-put provision yields to the procedures related specifically to intrastate transfers. L.H. ex rel. E.T. v. N. Brunswick Twp. Bd. of Educ., EDS 14911-17 (October 16, 2017), http://njlaw.rutgers.edu/collections/oal/ (citing J.F. v. Byram Twp. Bd. of Educ., 629 F. App'x 235, 238 (3d Cir. 2015)). "While this means a child does not receive the exact continuity that a 'stay-put' placement provides, a new school district is still required to provide the child with . . . services comparable to those described in the previously held IEP, until a new IEP is agreed upon." Cinnaminson Twp. Bd. of Educ. v. K.L., 2016 U.S. Dist. LEXIS 104706 (D. N.J. Aug. 9, 2016) at *12, *13–14 (citing 20 U.S.C. § 1414(d)(2)(C)(i)).

While the parties agree that the court's ruling in Cinnaminson is on point here, they completely disagree as to the meaning of the phrase "until a new IEP is agreed upon." At oral argument, petitioners claimed (using a blog post from the law firm representing respondent for support) that the Haddonfield IEP will be operative unless and until petitioners and respondent agree on the new IEP. Respondent, however, argued more persuasively that the obligation of the school district is to complete development of the new IEP within the thirty-day period required by N.J.A.C. 6A:14-4.1(g)(1). To accept petitioners' position would give parents the ability to unilaterally prevent the implementation of a new IEP. See L.H. v. N. Brunswick, p. 5 ("It follows that respondent is obligated in this case to provide a program that is comparable to the one set forth in E.T.'s current IEP, until respondent develops a new IEP for E.T."). "[T]he use of 20 U.S.C. § 1414 (d)(2)(C)(i), instead of 'stay-put' placements, balances the goal of maintaining

educational consistency for special needs students with the recognition that families have accepted some amount of discontinuity in their child's education when they voluntarily change school districts." Cinnaminson, p. 14.

While emergent relief is not available to petitioners based upon the stay-put provision in N.J.A.C. 6A:14-2.7(u), emergent relief may be available using the Crowe criteria, described above.

Irreparable Harm

To obtain emergent relief, petitioners must demonstrate more than a risk of irreparable harm to A.F.; they must make a "clear showing of immediate irreparable injury," or a "presently existing actual threat; (an injunction) may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by common law." Cont'l. Group, Inc. v. Amoco Chems. Corp., 614 F. 2d 351, 359 (D.N.J. 1980).

Respondent chose not to implement the Haddonfield IEP and, therefore, under N.J.A.C. 6A:14-4.1(g)(1), had thirty days from the date A.F. enrolled in the district to develop and implement a new IEP. Respondent shared the new IEP with petitioners on August 29, 2018, and intends to implement it as soon as A.F. attends school.

In light of the above, I **CONCLUDE** that the petitioners have not met the burden of establishing that A.F. will experience irreparable harm.

The Legal Right Is Settled

The second consideration is whether the legal right underlying petitioners' claim is settled. N.J.A.C. 6A:3-1.6(b)(2). Petitioners meet this requirement; their underlying claim is

that A.F. is guaranteed FAPE in the LRE under Federal law which is being denied by respondent for failure to accept the Haddonfield IEP.[4]

As a recipient of federal funds under the IDEA, the State of New Jersey must have a policy that assures all children with disabilities the right to FAPE, 20 U.S.C.A. § 1412, which includes special education and related services. 20 U.S.C.A. § 1401(9); N.J.A.C. 6A:14-1.1 et seq. The responsibility to provide FAPE rests with the local public school district. N.J.A.C. 6A:14-1.1(d). The local district satisfies the requirement that a child with disabilities receive FAPE by providing personalized instruction with sufficient support services to permit that child to benefit educationally from instruction. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 203, 102 S. Ct. 3034, 3049, 73 L. Ed. 2d 690, 710 (1982).

The law describes a continuum of placement options, ranging from mainstreaming in a regular public school as least restrictive to enrollment in a non-approved residential private school as most restrictive. 34 C.F.R. § 300.115 (2012); N.J.A.C. 6A:14-4.3. Further, New Jersey law requires that "students with disabilities shall be educated in the [LRE]." N.J.A.C. 6A:14-4.2(a).

Likelihood of Prevailing on The Merits

Petitioners' claim is to maintain A.F.'s placement at Newgrange because "the Collingswood IEP is inappropriate and not geared toward providing A.F. with any educational benefit and does not represent [LSE]," does not provide A.F. with FAPE, and is inconsistent with New Jersey law, N.J.A.C. 6A:14-4.1 et seq. Petit'rs Ltr. Br. in Support of Due Process Complaint (September 11, 2018), pp. 8-9. Petitioners submitted M.F.'s certification, in which she detailed her daughter's medical condition and educational history and described her interaction with respondent over the course of the month after A.F. was enrolled in Collingswood, during which the Collingswood IEP was being developed. While petitioners did not provide the certification of

[4] In its brief, respondent contends that petitioners fail to establish a settled legal right underlying their claim because the "stay put" rule is inoperable, but respondent does not address A.F.'s right to FAPE as meeting the second requirement for emergent relief. Resp't. Br. in Opposition to Application for Emergent Relief (September 14, 2018), p. 16.

any of the medical or educational professionals familiar with A.F. to support their objections to the Collingswood IEP, they intend to call many at the due process hearing. Id., pp. 9-10.

Respondent contends that while it had no obligation to provide a comparable program under the new IEP, it has in fact developed a comparable and, in some respects, better, program for A.F. Respondent has submitted Plescia's certification, which describes the process conducted by respondent to develop the new IEP for A.F., explains how and in what respects the Collingswood IEP addresses A.F.'s issues differently than the Haddonfield IEP (and, in some cases, improves upon the Haddonfield IEP), and specifically disputes many of the statements made by M.F. in her certification. Significantly, contrary to petitioners' claims, the Collingswood IEP does represent LRE, placing A.F. in special education classes in her home district with supplemental services within the community. Under the circumstances and prior to a full hearing, petitioners have not demonstrated a likelihood of prevailing on the merits of their claim.

Therefore, I **CONCLUDE** petitioners do not meet the third prong of the emergent relief standard.

The Petitioner Will Suffer Greater Harm Than the Respondent

The final prong of the above test is whether the equities and interests of the parties weigh in favor of granting the requested relief to A.F. Petitioners argue that A.F. will suffer greater harm if emergent relief is not granted, such harm being "severe regression without a routine-based program designed around her unique disabilities." Br. in Support of Petit'rs Request for Emergent Relief (September 11, 2018), p. 8. Respondent claims to be ready to provide A.F. with FAPE in LSE, her community and home school district, through an IEP which it developed to address A.F.'s unique disabilities. While it is understandable that petitioners are reluctant to tinker with an educational placement which has been of benefit to their daughter, they chose to relocate one month before the start of the new school year with the apparent expectation that A.F. would be able to continue at Newgrange. Despite the short notice provided, and the reluctance of petitioners to make A.F. available, respondent met its regulatory obligation to develop a new IEP that it contends addresses A.F.'s unique disabilities in the LRE.

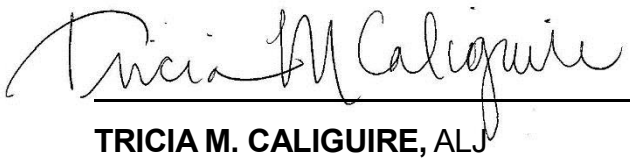
It appears unreasonable to expect respondent to pay for an out-of-district placement pending resolution of the underlying dispute.

I **CONCLUDE** that the District would suffer greater harm if the requested relief was granted. Here, petitioners satisfy only one of the four requirements for emergent relief.

ORDER

I **CONCLUDE** that petitioners' request for emergent relief does not satisfy the applicable requirements. For the reasons stated above, I hereby **ORDER** that petitioners' application for emergent relief for A.F. to continue at Newgrange for the 2018-19 school year while the due process proceeding is pending 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. § 1415(f)(1)(B)(i). If the parents 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.



September 18, 2018
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: _____

Date emailed to Parties: _____

TMC/nd