State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION DENYING
EMERGENT RELIEF
OAL DKT. NO. EDS 00718-20
AGENCY DKT. NO. 2020-31123

M.L. AND A.M. ON BEHALF OF A.L.,
Petitioners,
v.
FRANKLIN TOWNSHIP BOARD
OF EDUCATION, SOMERSET COUNTY,
Respondent.

Susan Schroeder Clark, Esq., and **Maria Franceschini**, Esq., for petitioners (Susan Clark Law Group, LLC, attorneys)

Cameron R. Morgan, Esq., for respondent (Capehart Scatchard, P.A., attorneys)

Record Closed: January 22, 2020 Decided: January 23, 2020

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

STATEMENT OF THE CASE

This case arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §§1401 to 1484(a) and C.F.R. §§300.500. By a request for emergent relief, petitioners M.L. and

A.M. on behalf of A.L., seek the immediate return of A.L. to his placement at Claremont Elementary School (Claremont), Franklin Township School District, pending his placement at the New Roads School, Parlin, New Jersey, and/or the outcome of due process proceedings. Respondent Franklin Township Board of Education, Somerset County (Franklin or the Board) opposes this request on the grounds that petitioners have not satisfied the requirements for obtaining emergent relief.

PROCEDURAL HISTORY

On January 14, 2020, petitioners filed a complaint for due process with the New Jersey Department of Education (DOE), Office of Special Education Programs, and a request for emergent relief with the DOE, Office of Special Education Policy and Dispute Resolution. On January 15, 2020, the emergent petition only was transmitted to the Office of Administrative Law (OAL) for an emergent relief hearing. Oral argument on emergent relief was held on January 22, 2020, 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.L. is a seven-year-old male who is eligible for special education and related services in the Communication Impaired[1] classification category. A.L. was initially found eligible for special education and related services in 2015, and has since continually received such services.

During the 2019-2020 school year, A.L. attended first grade at Claremont in a self-contained autism class where he received all developmental instruction pursuant to an Individual Education Program (IEP) adopted on May 30, 2019. He also received speech therapy (ST), occupational therapy (OT), and life skills training. A.L. spent less than forty percent of the school

[1] In his May 30, 2019, Individual Education Program, A.L.'s diagnosis is described as autism disorder, mixed receptive-expressive language disorder, and sensory integration disorder. Petition for Due Process and Appeal of Manifestation Determination (January 13, 2020), Exhibit A.

day in the presence of general education students. See, Petition for Due Process and Appeal of Manifestation Determination (January 13, 2020), Exhibit A.

The May 20, 2019 IEP contains the following description of A.L.'s behavior:

> When [A.L.] becomes upset, he displays tantrums portrayed by crying, yelling, screaming, hitting and/or eloping a setting. Hitting and eloping can be dangerous to himself and/or others. When he hits or attempts to hit, we block as much as possible and remove [A.L.] from the situation to another isolated space until he calms down. . . . We try our best to position ourselves, [A.L.] and furniture/ objects in a way to prevent or block [A.L.] from running and getting to a door but unfortunately, sometimes he gets out if we are busy taking care of other students or if he's just too quick for us to catch. This would be easier to implement if he could receive more individualized supervision from additional staff support. All eloping or attempts to elope have been documented and we are worried about the growing safety concern.
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> Id., Exhibit A, at 7.

From the beginning of the 2019-2020 school year, A.L.'s classroom teacher, Casey Clark (Clark), communicated frequently with M.L. by text message with information regarding A.L., most of which was positive in nature. Id., Exhibit I. At the same time, from the first week of October 2019, Clark kept a handwritten diary in which she described escalating aggressive behaviors of A.L. directed at himself and others and frequent episodes of elopement. Ibid.

On or about November 13, 2019, Clark and the school principal, Nicole Bevere (Bevere), contacted M.L. to discuss A.L.'s aggressive and self-injurious behavior. On November 15, 2019, Clark, Bevere and Susan Libourel, A.L.'s case manager, contacted M.L. to report another incident of such behavior in the classroom. Bevere stated that A.L. was not to return to Claremont until his parents provided a professional assessment that A.L. would be safe in the classroom. Id., Exhibit J. The parties dispute whether respondent made clear that A.L. needed to be evaluated by a psychiatrist, as opposed to a psychologist or other professional.

On November 20, 2019, M.L. sent a letter to the Superintendent of the District requesting a Functional Behavioral Assessment (FBA) of A.L. and a meeting to revise A.L.'s IEP. Ibid. On November 21, 2019, Bevere notified petitioners by letter that A.L. would be excluded from school effective November 25, 2019, pending medical documentation supporting his return due to the severity of behavioral issues. Ltr. Br. in Opposition to Petition for Emergent Relief (January 21, 2020), Exhibit A. A.L. has not returned to Claremont since November 25, 2019.

On November 22, 2019, at petitioners' request, the child study team (CST) scheduled an IEP meeting for November 25, 2019. Petitioners claim not to have been notified of this meeting. Petitioners did not appear for this meeting, but A.M. participated briefly by telephone. Id., Exhibit B.

On December 2, 2019, A.M. attended a meeting with Claremont administrators during which A.M. stated that A.L. had been evaluated by a psychiatrist, but could not provide the name or practice of the psychiatrist. On December 3, 2019, M.L. requested that an IEP meeting be held on December 6, 2019. Petitioners arrived for the meeting late and left after just ten minutes. Petitioners claim they left the meeting as Bevere was the only member of the CST present and she did not acknowledge their presence; respondent claims that the entire CST was present. Id., Exhibit C.

Late in the day on December 6, 2019, M.L. asked for another IEP meeting, which the CST scheduled for December 9, 2019. Id., Exhibit D. A notice for this meeting was sent to petitioners on December 6, 2019. Ibid. The notice included in the heading the words "Manifestation Determination Meeting." The notice also included the name of the Board's attorney in the list of attendees. Id., Exhibit E. Petitioners did not attend this meeting.

On December 9, 2019, prior to the scheduled IEP meeting, petitioners provided respondent a letter from Peter Vietze, Ph.D., a psychologist who evaluated A.L. on December 1, 2019. Though he noted that he had yet to complete his review, Vietze recommended that A.L. receive applied behavior analysis at home and at school and that A.L. was "safe to return to

school under the proper supervision," that being a one-to-one paraprofessional with adequate behavioral training. Petition for Due Process, Exhibit Q.

On December 9, 2019, the CST conducted the meeting in the absence of petitioners and, as a result of this meeting, the CST determined that A.L.'s behavior was "not a manifestation of his diagnosis of an Autism Spectrum Disorder or his communication impairment." Ltr. Br. of Resp't, Exhibit F. By letter dated December 9, 2019, petitioners were advised that the CST proposed to modify A.L.'s IEP to provide for home instruction and that the District proposed to conduct a psychiatric evaluation of A.L. at the District's expense. Ibid. Home instruction for A.L. began on December 11, 2019, and continues to date.

Petitioners consented to A.L.'s psychiatric evaluation on December 12, 2019; the evaluation will be conducted on January 28, 2020. Ltr. Br. of Resp't, at 7.

Both parties agree that A.L. was not disciplined or suspended from school; rather, his placement was changed to home instruction due to the alleged threat that A.L. presents to the safety of himself and others.

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.L. receives home instruction and there has not been a break in the delivery of services. But petitioners have initiated due process proceedings to obtain an appropriate program for A.L. in an out-of-district placement and have requested emergent relief to return A.L. to his placement at Claremont pending the outcome of those

proceedings. Therefore, I **CONCLUDE** that petitioners have established that the issue in this matter concerns placement of A.L. pending the outcome of due process proceedings.

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

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

Irreparable Harm

To obtain emergent relief, petitioners must demonstrate more than a risk of irreparable harm to A.L. Petitioners 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).

Petitioners contend that irreparable harm is established because A.L. has been kept out of school since November 25, 2019, when he was placed on home instruction under a revised IEP that does not provide A.L. with the related services described in the May 30, 2019 IEP, including OT, ST, and life skills instruction.

Further, petitioners contend that home instruction has had a detrimental emotional and financial impact on A.L. and his parents. A.L.'s home instruction lasts from 4:00 p.m. to 6:00 p.m. on school days; this schedule is disruptive of the routine to which A.L. is accustomed. Routine is particularly important for autistic children. Further, M.L. and A.M. must pay a babysitter to watch A.L. during the school day, as both parents work outside the home.

Respondent contends that the December 9, 2019 IEP provides A.L. with educational instruction and related services to A.L. through home instruction. Any harm to A.L. due to an alleged loss of instruction time can be remedied through the provision of compensatory education. Ltr. Br. of Resp't, at 9.

As there was no testimony, a comparison of the program summaries found on the first pages of the May 30, 2019 and December 9, 2019 IEPs is the best evidence of the program being offered to A.L. through home instruction. See, Petition for Due Process, Exhibits A and V. Both IEPs provide A.L. with "all developmental instruction," the earlier for one time/day for 360 minutes, and the latter for one time/day for 120 minutes. The reduced instruction time in the December 9, 2019 IEP is arguably appropriate given that A.L. receives this instruction in a one-on-one setting with the teacher. But the May 30, 2019 IEP also specifically provides A.L. with ST in group and individual settings at least once/day and with OT in an individual setting twice/week. In contrast, the December 9, 2019 IEP does not provide for either ST or OT. It appears that A.L. is not receiving the related services called for in his May 30, 2019 IEP and the Board has not explained the basis for removing these services from the December 9, 2019 IEP.

Even so, should petitioners prevail in the due process proceedings and prove that the December 9, 2019 IEP does not provide A.L. with a free and appropriate public education (FAPE) in the least restrictive environment, appropriate relief, including compensatory education and services and a change in placement, will be available.

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

The Legal Right is Settled and
Likelihood of Prevailing on the Merits

The second consideration is whether the legal right underlying petitioners' claim is settled, N.J.A.C. 6A:3-1.6(b)(2), and then third, petitioners must make a preliminary showing of a reasonable probability of success on the merits. Crowe, 90 N.J. at 133. It is well-settled that the IDEA requires a school district to provide a FAPE to all children with disabilities and determined to be eligible for special education. 20 U.S.C. §1412(a)(1)(A). According to N.J.A.C. 6A:14-3.3(a), a district board of education has an obligation to locate, refer, and identify students who may have disabilities due to physical, sensory, emotional, cognitive, or social difficulties. This obligation is often referred to as a school district's "child find" obligation. Thereafter, a student may be referred to a CST for evaluation to determine eligibility for special education programs and services. N.J.A.C. 6A:14-3.3(e). In this case, the Board argues that it acted consistent with its child find obligations to determine whether A.L. was eligible for additional programs and services.[2]

Petitioners claim that respondent's actions between mid-November 2019 and December 9, 2019, violated petitioners' right to procedural due process. See, Br. in Support of Petition for Emergent Relief (January 14, 2020), at 3. At oral argument, petitioners more specifically stated that they had insufficient notice of the December 9, 2019 IEP meeting, a violation of N.J.A.C. 6A: 14-2.3(k)(3) and (5). Further, petitioners claim that the exclusion of A.L. from Claremont from November 25, 2019, to February 11, 2020, is a violation of N.J.A.C. 6A:14-2.8(e).

With respect to petitioners' due process claim, the regulations provide that parents must "be given written notice of [an IEP] meeting early enough to ensure that they will have an opportunity to attend," N.J.A.C. 6A:14-2.3(k)(7)(3), and this notice "shall indicate the purpose, time, location and participants." N.J.A.C. 6A:14-2.3(k)(7)(5). While there is some dispute as to the various communications that passed between the parties between November 13 and December 9, 2019, there is no dispute that the parents made multiple requests for meetings with the CST including on December 6, 2019, at 4:25 p.m. by electronic mail to Orvyl Wilson. Petition

[2] As Board counsel stated at hearing, the results of the psychiatric evaluation may result in the recommendation of an out-of-district therapeutic placement, as requested by petitioners in their due process petition.

for Due Process, Exhibit N. Within thirty minutes, petitioners received a response to their request for a meeting on December 9, 2019, which included a list of participants and the specific purposes of the meeting. Id., Exhibit O. Despite petitioners' claims otherwise, I **CONCLUDE** that petitioners are not likely to prove that the action of respondents regarding the notice for the December 9, 2019 IEP meeting violated N.J.A.C. 6A:14-2.3(k)(7)(3) and (5).

Petitioners also claim that the exclusion of A.L. from Claremont from November 25, 2019, to February 11, 2020, is a violation of N.J.A.C. 6A:14-2.8(e)(2), which provides:

> (e) In the case of a student with a disability who has been removed from his or her current placement for more than 10 cumulative or consecutive school days in the school year, the district board of education shall provide services to the extent necessary to enable the student to progress appropriately in the general education curriculum and advance appropriately toward achieving the goals set out in the student's IEP.
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> * * *
>
> (2.) When a removal constitutes a change of placement, and it is determined that the behavior is not a manifestation of the student's disability, the student's IEP team shall determine the extent to which services are necessary to enable the student to progress appropriately in the general curriculum and advance appropriately toward achieving the goals set out in the student's IEP.
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> [N.J.A.C. 6A:14-2.8(e)(2).]

Here, petitioners correctly argue that the December 9, 2019 IEP removes related services without explanation.[3] Br. in Support of Petition for Due Process, at 9. The IEP team apparently failed to provide services required for A.L. to continue to advance toward the goals for ST and OT found in the May 30, 2019 IEP. However, they are not as likely to prevail on their related claim that "the procedures employed by the District in [determining that A.L.'s disruptive and aggressive behavior is not a manifestation of his disability] violated the parent's right to be

[3] A related argument, that the December 9, 2019 IEP removes a statement of A.L.'s eligibility for the Extended School Year (ESY) without explanation is without merit as this IEP will only be in effect until February 11, 2020, long before the ESY program would begin.

present." Ibid. As respondent argued, "[a] meeting may be conducted without the parent in attendance if the district board of education can document that it is unable to secure the participation of the parent." N.J.A.C. 6A:14-2.3(k)(7). While petitioners claim that their absence from the meeting on December 9, 2019, was justified by respondent's decision to include Board counsel for the first time, petitioners were still absent despite receiving the requisite notice. A review of the correspondence presented by both parties indicates that the Board made many attempts to accommodate petitioners' requests for an IEP meeting and tried to expedite the process of having A.L. evaluated so that he may either return to the classroom at Claremont or be placed in an appropriate out-of-district setting.

Finally, petitioners claim that the underlying issue is the failure of the Board to offer the proper supports to A.L. by which he could remain at Claremont; the December 9, 2019 IEP is therefore inappropriate and fails to provide FAPE to A.L. As respondent argued, until the results of the psychiatric evaluation are available, there is an open question as to whether the December 9, 2019 IEP is appropriate and/or whether A.L. may return to Claremont with or without additional supports. Further, petitioners have yet to submit educational expert support for either "proper supports" or an out-of-district placement. Prior to a full hearing, petitioners have not yet demonstrated a likelihood of prevailing on the merits of their claims.

For the above reasons, I **CONCLUDE** petitioners do not meet the second and third prongs of the emergent relief standard.

Balance of Equities and Interests

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.L. Petitioners argue that A.L. will suffer greater harm if emergent relief is not granted, such harm being that he is not in school, the absence of related services as provided for in the May 30, 2019 IEP, and the inability to socialize with his peers.

Respondent argues that granting emergent relief here would raises the "possibility that A.L. or another young child with special needs winds up injured because [A.L.] with severely

aggressive behaviors was ordered back to school." Ltr. Br. of Resp't, at 13. At hearing and without objection, petitioners introduced a letter from a psychiatrist they retained to evaluate A.L. in December 2019. In his letter, Dr. Lawrence DeMilio states in pertinent part:

> [A.L.] has ongoing very significant difficulties in maintaining behavioral calm and cooperation, periodically. . . . These are very significant areas of ongoing problems in managing him at home and in school[.] For the school personnel, all I can state is that I do not see any acute intention/plan/or desire to harm from [sic] the other students, himself or the staff.
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> [Ltr. of Lawrence DeMilio, M.D. (January 6, 2020).]

While Dr. DeMilio does not believe A.L. has the current intention to harm himself or others, there is evidence (anecdotal though it may be) that A.L. acts out impulsively and without warning. Other than with respect to related services, respondent is meeting its obligation to continue A.L.'s education through home instruction which, though inconvenient for petitioners, should only continue for three more weeks, after which the parties should be equipped to meet again and revise A.L.'s IEP in light of the results of the psychiatric evaluation. It appears unreasonable to risk harm to A.L. or to his classmates in the meantime.

I **CONCLUDE** that the Board would suffer greater harm if the requested relief was granted. I **CONCLUDE** that petitioners' request for emergent relief does not satisfy the applicable requirements.

ORDER

For the reasons stated above, I hereby **ORDER** that petitioners' application for emergent relief seeking the immediate return of A.L. to his placement at Claremont while the due process proceeding is pending is hereby **DENIED.**

As explained above, however, though the Board represented that A.L. is currently receiving related services as described in the May 30, 2019 IEP, there is no evidence that that

is the case. Therefore, I further **ORDER** respondent to immediately take action to provide individual speech therapy and occupational therapy to A.L. through home instruction, making accommodations in the time and frequency of these services consistent with the change in placement in the December 9, 2019 IEP.

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.

January 23, 2020
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

TMC/nd