State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER

MOTION FOR EMERGENT RELIEF

OAL DKT. NO. EDS 10123-19

AGENCY DKT. NO. 2019 30251

S.F. AND J.B. ON BEHALF OF E.B.,

Petitioners,

v.

PLAINFIELD CITY BOARD OF EDUCATION,

Respondent.

Staci Greenwald, Esq., for petitioners (Sussan, Greenwald and Wesler, attorneys)

Philip Stern, Esq., for respondent (DiFrancesco Bateman, attorneys)

Record Closed: August 5, 2019 Decided: August 5, 2019

BEFORE **ELLEN S. BASS,** ALJ:

This matter arises under the Individuals with Disabilities Education Act, 20 U.S.C. § 1415 et seq. On June 26, 2019, petitioners filed a request for due process challenging the determination by the Plainfield Board of Education (the Board), through its Child Study Team (CST), to terminate the Special Education placement for their son, E.B., who is nine-years-old and classified under the category of Other Health Impaired (OHI). Petitioners seek to continue E.B. at the You and Me School, an out-of-district Special

Education program. The hearing request was transmitted to the Office of Administrative Law on July 26, 2019. Following transmittal, an application for Emergent Relief was filed on July 31, 2019, through which petitioners seek an order directing that You and Me School is the "stay put" placement pending a full adjudication of the matter on its merits.

No one disagrees that You and Me School was and is an appropriate setting for E.B., who has been placed there since November 2017. Prior placements had proved unsuccessful for this very involved youngster, who engages in aggressive and self-injurious behaviors. E.B.'s most recent IEP meeting was in January 2019; at that time it was determined that his placement at You and Me School was appropriate and should continue, to include an extended school year program during the summer of 2019. You and Me School is a highly specialized program that is housed in a hospital setting and provides academic, social, emotional and behavioral supports to its students.

But, via letter dated July 2, 2019, E.B.'s parents were informed that his placement at You and Me would have to terminate, because "[o]n June 13, 2019, Plainfield received a letter from the You and Me School notifying Plainfield that it was losing its approval from the New Jersey Department of Education, effective June 30, 2019." The letter indicates that E.B.'s placement "must take place" at an approved school and that accordingly, the District would take all the needed steps to secure an alternative appropriate placement. The next day Acting Superintendent of Schools Elizabeth Filippatos wrote to You and Me and alerted its Director that the Plainfield Board would not be financially responsible for 2019 extended school year payments. The Board stopped transporting E.B. to You and Me effective July 1, 2019. I asked counsel why You and Me lost its approval; both agreed that the issue revolved around enrollment minimums, and not around the quality of the services provided there.

Petitioners contend that they are entitled to continued placement at You and Me pending plenary hearing under the "stay put" provisions of Federal law. I agree. My determination is controlled by 20 U.S.C. 1415(j). The statute states in pertinent part:

> …during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child…

When a school district proposes a change in the placement of a student it must provide notice to the parent or guardian, who may in turn request mediation or a due process hearing to resolve any resulting disagreements. N.J.A.C. 6A:14-2.3, 2.6 and 2.7. Once a parent timely requests mediation or due process, the proposed action by the school district cannot be implemented pending the outcome. The "stay put" provision of the IDEA, 20 U.S.C. 1415(j), and its New Jersey counterparts, N.J.A.C. 6A:14-2.6(d) and 2.7(u), are invoked, and unless the parties agree no change shall be made to the student's placement.

The "stay put" provisions of law operate as an automatic preliminary injunction. IDEA's "stay put" requirement evinces Congress' policy choice that handicapped children stay in their current educational placement until the dispute over their placement is resolved, and that once a court determines the current placement, petitioners are entitled to an order "without satisfaction of the usual prerequisites to injunctive relief". Drinker by Drinker v. Colonial School Dist., 78 F.3d 859, 864-65 (3d Cir. 1996). The Supreme Court "has described the language of section 1415(e)(3) as 'unequivocal,' in that it states plainly that 'the child shall remain in the then current educational placement.'" R.S. and M.S. v Somerville Bd. of Educ., 2011 U.S. Dist. LEXIS 748, *17 (U.S. Dist. Ct., 2011), citing Drinker by Drinker v. Colonial School Dist., 78 F 3d 859 at 864.

I **CONCLUDE** that the IDEA requires that E.B. remain at You and Me School at school district's expense, and with transportation provided, pending the adjudication of the underlying due process petition. You and Me School's loss of State approval does not alter or diminish E.B.'s rights under Federal law. In R.S. and M.S. v Somerville Bd. of Educ. at issue was the continued placement of a child at a sectarian school at public expense. Although the school district there offered facts to demonstrate that the

placement there was a "mistake," and urged that supporting it with public funds would violate the Establishment Clause of the First Amendment, the court determined that these arguments were "unavailing under IDEA's stay put provision." R.S. and M.S. v Somerville Bd. of Educ., 2011 U.S. Dist. LEXIS 748 at *37. See also: N.W. and R.W. o/b/o M.W. v Lakewood Bd. of Educ., OAL Dkt. No. EDS 9524-1300489-13, (June 19, 2013), https://www.nj.gov/education/legal/, where the administrative law judge invoked "stay put," notwithstanding the fact that the placement at issue was unapproved, unaccredited and could not satisfy "Naples" requirements. N.J.A.C. 6A:14-6.5. The school district there had moreover asserted that removal of the child had been directed by the Department of Education. Citing Somerville, the judge held that "Naples" approval is not a prerequisite to enforcement of "stay put."

The Board cites Dima v. Macchiarola, 513 F. Supp. 570 (E.D.N.Y. 1981), in support of its contention that where a school loses approval, it does not violate "stay put" to place a child elsewhere. But Dima is readily distinguishable. There, the private school at issue had mismanaged its funds; offered an educationally deficient program; and ceased to operate. Here, You and Me continues to function, and did not lose its approval due to programmatic shortcomings. The Board correctly urges that "stay put" is a nuanced concept that centers on program and not the bricks and mortar school building. But where, as here, the program continues to exist, and no one questions its appropriateness, I **CONCLUDE** that "stay put" can and must be applied quite literally, and requires that E.B. remain at You and Me pending full adjudication of this case on its merits. See: M.K. v. Roselle Park Bd. of Educ., 2006 U.S. Dist. LEXIS 79726, *27-28 (D.N.J. 2006) where the court held that "stay put" requires only a comparable program, but made that ruling where the prior program was no longer available, as the child had aged-out.

In determining that "stay put" applies to protect E.B.'s placement pending plenary hearing, I am cognizant of the provisions of N.J.A.C. 6A: 14-7.5 (c), which provides relative to approved out-of-districts programs that "[i]f the approval of a private school for students with disabilities is removed, a district board of education having a student with a disability placed therein shall immediately begin seeking an alternative, appropriate placement for that student." The Board here appears to read this provision as requiring

the abrupt withdrawal of a child from the placement that no longer is State approved. I do not read the provision quite so harshly; it does not require immediate removal of the child, only immediate attention to that child's possible need for alternative placement. But to the extent that our administrative code can be read to require the immediate removal of E.B. from You and Me School, I **CONCLUDE** that its requirements offend the provisions of Federal law, and that the "stay put" requirements of the IDEA govern the rights and obligations of these parties.

ORDER

Based on the foregoing, it is **ORDERED** that E.B. remain in the You and Me School at school district expense retroactive to July 1, 2019, pending plenary hearing, and that he receive all related services required by his IEP, to include transportation.

This order on application for emergency relief shall remain in effect until issuance of the decision in the matter. At the request of the parties, the hearing has been scheduled for **January 13, 2020, at 9:00 a.m**. 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 5, 2019

DATE

ELLEN S. BASS, ALJ

Date Received at Agency August 5, 2019

Date Mailed to Parties:

sej