State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING

EMERGENCY RELIEF

OAL DKT. NO. EDS 16805-19

AGENCY DKT. NO. 2020-30962

EAST BRUNSWICK TOWNSHIP

BOARD OF EDUCATION,

Petitioner,

v.

A.K. AND R.K. ON BEHALF OF H.K.

AND HATIKVAH INTERNATIONAL CS,

Respondents.

_____

Jodi S. Howlett, Esq., for petitioner, East Brunswick Township Board of Education (Cleary, Giacobbe, Alfiere and Jacobs, LLC, attorneys)

Michael I. Inzelbuch, Esq., for respondent, A.K. and R.K. on behalf of H.K.

Thomas O. Johnston, Esq., for respondent, Hatikvah International Cs (Johnston Law Firm, LLC, attorneys)

BEFORE **SUSAN L. OLGIATI**, ALJ:

STATEMENT OF THE CASE

This matter arises out of a request by petitioner, East Brunswick Board of Education (East Brunswick or the District) for a due process hearing challenging

respondent Hatikvah International Academy Charter School's (Hatikvah) placement of H.K. at the Laurel School of Princeton (Laurel School).

A.K. and R.K., (the parents) on behalf of H.K., are respondents to East Brunswick's due process petition. They filed the present request for emergent relief seeking to enforce "stay put" at the Laurel School and directing the District to make immediate payment to the Laurel School. Hatikvah supports the parents' request, arguing that the District is responsible for funding the placement pending resolution of the due process complaint. The District opposes the parents' request, arguing that Hatikvah is obligated to fund the placement pending resolution of the due process complaint.

PROCEDURAL HISTORY

On November 27, 2020, East Brunswick filed with the Office of Special Education Programs (OSEP) a due process petition challenging H.K.'s private placement, at the Laurel School, pursuant to an October 28, 2019, Individualized Educational Program (IEP).

The petition was timely filed and transmitted to the Office of Administrative Law (OAL) on December 2, 2019, for a due process hearing.

On January 21, 2020, the parents directly filed the current request for emergent relief with the undersigned. Teleconferences, held on the record, were scheduled for January 21, and 22, 2020. The parties were directed to submit legal briefing on the issues by January 28, 2020. A follow-up teleconference was scheduled for January 30, 2020, during which oral argument on the request for emergent relief was scheduled for February 4, 2020.[1]

On February 3, 2020, in response to questions raised by the undersigned, petitioner provided a supplemental filing outlining the terms of the October 28, 2019,

[1] To accommodate the schedules of all three counsel, oral argument on the request for emergent relief was scheduled for 2:00 p.m.

settlement agreement between Hatikvah and the parents in the related matter, A.K .and R.K. o/b/o H.K. v. East Brunswick and Hatikvah, OAL Dkt. No. EDS 16374-18.

Oral argument in this matter was heard on February 4, 2020, at the OAL and, upon further review of the parties' submissions, the record closed on February 5, 2020.

BACKGROUND AND FACTUAL SUMMARY

H.K., is a nine-year-old boy who is deemed eligible for special education and related services under the classification of "multiply disabled." He lives with his parents, A.K. and R.K., in East Brunswick. Since at least the 2018-2019 school year, H.K. has been enrolled in Hatikvah, a charter school located in East Brunswick.

For the 2018-2019 school year, Hatikvah proposed an IEP placing H.K. at the Bridge Academy in Lawrenceville. In September 2018, H.K.'s parents rejected the proposed IEP and unilaterally placed him at the Laurel School, an accredited private school not specifically approved by the Commissioner of Education for the education of students with disabilities.

On or about October 2, 2018, the parents filed a due process petition against Hatikvah and the District seeking, among other remedies, tuition reimbursement for H.K.'s unilateral placement at the Laurel School for the 2018-2019 school year. (A.K. and R.K. o/b/o H.K. v. East Brunswick and Hatikvah, OAL Dkt. EDS 16374-18.)

On October 28, 2019, while that matter was pending at the OAL, Hatikvah and the parents entered an on-the-record settlement in which Hatikvah agreed to reimburse the parents for the costs of H.K.'s placement at the Laurel School through the date of the agreement and to implement an IEP placing H.K. at the Laurel School from October 2019 through October 2020.[2] Administrative Law Judge Jeffrey Rabin, who presided over that

[2] At oral argument on February 4, 2020, the parties agreed that the October 28, 2019, IEP placing H.K. at the Laurel School remains in effect.

prior due process matter, approved the settlement. East Brunswick, who was also a party in that matter, did not participate in the proceedings and was not a party to the settlement.[3]

On November 27, 2019, East Brunswick filed with OSEP a due process petition challenging H.K.'s placement at the Laurel School.

In response, the parents filed the present request for emergent relief. In connection with their request for relief, the parents produced two letters from the Laurel School demanding tuition payment for the 2019-2020 school year and threatening to remove H.K. if payment is not made.[4]

On December 31, 2019, the parents filed with OSEP a Parental Request for Enforcement of Decision Issued by the OAL, seeking payment of tuition and related services, including transportation services from the District, for H.K's attendance at the Laurel School.[5]

LEGAL ANALYSIS

Pursuant to N.J.A.C. 1:6A-12.1(e) and N.J.A.C. 6A:14-2.7(s)(1), emergency relief may be granted if the judge determines from the proofs that:

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

[3] While East Brunswick did not participate in the proceedings, counsel for East Brunswick was at the OAL on October 28, 2019, (on another matter) and was present when the settlement agreement between the parents and Hatikvah was placed on the record.

[4] The first letter is dated January 16, 2020. The second letter, dated January 30, 2020, advised that if payment is not received by February 7, 2020, H.K. will not be able to continue at Laurel.

[5] At the February 4, 2020, oral argument, petitioners' counsel confirmed that the request for enforcement was still pending at OSEP.

> iv. 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.

However, when the emergent relief request effectively seeks a "stay-put" preventing the school district from making a change in placement from an agreed-upon IEP, the proper standard for relief is the "stay-put" provision under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, et seq. Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 (3d Cir. 1996) (citing Zvi D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982)). The stay-put provision provides in relevant part that "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." 20 U.S.C. § 1415(j).

The relevant IDEA regulation and its counterpart in the New Jersey Administrative Code reinforce 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) (2016); N.J.A.C. 6A:14-2.7(u). The stay-put provision functions as an automatic preliminary injunction which dispenses with the need for a court to weigh the factors for emergent relief such as irreparable harm and likelihood of success on the merits, and removes the court's discretion regarding whether an injunction should be ordered. Drinker, 78 F.3d 859. Its purpose is to maintain the status quo for the child while the dispute over the IEP remains unresolved. Ringwood Bd. of Educ. v. K.H.J., 469 F.Supp.2d 267, 270–71 (D.N.J. 2006).

As the term "current educational placement" is not defined within the IDEA, the Third Circuit standard is that "the dispositive factor in deciding a child's 'current educational placement' should be the [IEP] . . . actually functioning when the 'stay put' is invoked." Drinker, 78 F.3d at 867 (citing the unpublished Woods ex rel. T.W. v. N.J. Dep't of Educ., No. 93-5123, 20 IDELR 439, 440 (3d Cir. Sept. 17, 1993)); see also, Susquenita Sch. Dist. v. Raelee S. by Heidi S. & Byron S., 96 F.3d 78, 83 (3d Cir. 1996) (restating the standard that the terms of the IEP are dispositive of the student's "current educational placement").

Here, the parties agree that, consistent with the October 28, 2019, IEP, H.K.'s current educational placement is the Laurel School. Thus, the issue in dispute in this matter is who must pay for H.K.'s stay-put placement at the Laurel School: Hatikvah or the District.[6]

The parents contend that unless the District is ordered to make immediate payment to the Laurel School, H.K's IEP-driven placement at the Laurel School will be rendered meaningless as his continued placement is jeopardized due to non-payment.

East Brunswick argues that it cannot be required to fund the costs of H.K.'s stay-put placement pending its timely exercise of its right to challenge the placement pursuant to N.J.S.A. 18A:36A-11(b). It further argues that Hatikvah is legally obligated to maintain placement pending adjudication of the due process petition.

Hatikvah supports the parents' request for emergent relief, and argues, among other things, that the District's obligation to fund the placement pending resolution of the due process petition is supported by statute, regulation, and case law.

This matter involves the intersection of charter school law and special education law at N.J.S.A. 18A:36A-11(b), which provides that a charter school is generally responsible for "the provision of services to students with disabilities; except that the fiscal responsibility for any student currently enrolled in or determined to require a private day or residential school shall remain with the district of residence." However, N.J.S.A. 18A:36A-11(b) further provides that:

> Within 15 days of the signing of the individualized education plan, a charter school shall provide notice to the resident district of any individualized education plan which results in a private day or residential placement. The resident district may challenge the placement within 30 days in accordance with the procedures established by law.

[6] The parties agree that the parents are not obligated to pay H.K's placement at the Laurel School.

In accordance with N.J.A.C. 6A:23A-15.4, the implementing regulation to N.J.S.A. 18A:36A-11(b), the school district may file for a due process hearing against the charter school and the parents, and the "hearing shall be limited in scope to a determination by an administrative law judge as to whether there is a less-restrictive placement that will meet the student's educational needs and, if so, whether the charter school must place the student in the program." Thus, a school district's financial responsibility for a charter school's private placement is not absolute.

Unfortunately, neither N.J.S.A. 18A:36A-11(b) nor N.J.A.C. 6A:23A-15.4 nor any special education regulation, squarely resolves the question as to which party – the school district or the charter school – should bear the costs of a stay-put placement where, as here, the private school placement was agreed to by the parents and the charter school and implemented before the school district exercised its rights under N.J.S.A. 18A:36A-11(b) and N.J.A.C. 6A:23A-15.4.

There is also an absence of case law squarely addressing this issue. However, the Third Circuit case of L.Y. v. Bayonne Bd. of Educ., 384 Fed. Appx. 58 (3d Cir. 2010), appears to be the most instructive. In that matter, the mother of a special education student enrolled in a charter school sought a stay-put order placing the child at a private school after the Bayonne Board of Education filed for due process pursuant to N.J.S.A. 18A:36A-11(b). The Board challenged a June 2009 IEP in which the mother and the charter school agreed to place the child at a private school during the 2009-2010 school year. The court held that the stay-put placement was the charter school, where the child attended for the previous seven years, and not the private school, at which the child had been placed but never attended.

The Third Circuit rejected the mother's argument that the June 2009 IEP was implemented upon her signature, reasoning that, "[i]f an IEP were considered 'implemented' as soon as it was signed by the student's parent, the school district's right to object in advance would be illusory." Id. at 62 [Emphasis added.] Instead, the court concluded that the charter school and the mother cannot dictate placement at the private school over the Board's objections and reasoned that the "IDEA's stay-put provision

should be read in harmony with N.J. Stat. Ann. § 18A:36A-11(b), which permits a school district to object to a placement before a child is moved[.]" Id. at 63 [Emphasis added.]

While in L.Y., the court did not have to reach the issue of financial responsibility for a stay-put private placement, its emphasis on a school district's right under N.J.S.A. 18A:36A-11(b) "to object to a placement before a child is moved" supports a conclusion that in situations where, like here, a district does not have an opportunity to object before the child is moved, a charter school must pay for the placement it implemented pending resolution of the due process petition.

Here, H.K. began attending the Laurel School in September 2018, as a result of his parent's unilateral placement. Thereafter, in October 2019, Hatikvah and the parents entered into a settlement agreement for Hatikvah to reimburse the parents for the 2018-2019 school year (and a portion of the 2019-2020 school year) and to implement an IEP continuing H.K.'s placement at Laurel in the 2019-2020 school year. Thus, Hatikvah and the parents effectively dictated H.K.'s placement without affording the District the opportunity to exercise its right under N.J.S.A. 18A:36A-11(b), to object to the placement before H.K. was moved. For these reasons, Hatikvah must bear the costs of H.K.'s stay-put placement at the Laurel School pending resolution of the due process petition.

Hatikvah unpersuasively argues that the federal district court's unpublished decision in E. Orange Bd. of Educ. v. E.M., 2011 U.S. Dist. LEXIS 16502 (D.N.J. Feb. 17, 2011) is "instructive" on the issue of financial responsibility for the stay-put placement in this matter. That case is both factually and legally distinguishable.

As an initial matter, in E.M., it was the parent, rather the district, who, in 2007, filed a due process petition seeking payment from the district for the costs of the charter school's private placement. Moreover, at the time of the due process petition, the parent and child had already moved out of state. Thus, the issue there was retroactive reimbursement for transportation costs and unlike here, the parent was not seeking prospective payment for costs associated with continued private school placement.

In E.M., the court ultimately awarded the parent reimbursement for transportation costs for the 2007-2008 school year and the 2008-2009 school year until April 2009 when the child moved out of state. In so doing, the court reasoned that "it is equitable and appropriate to reward transportation costs in this case" because "[a]s the Board was the resident district of a disabled child subject to the stay-put provision, the Board was responsible for these expenses." Although the court undertook a detailed analysis of a school district's right to challenge a charter school's private placement under N.J.S.A. 18A:36A-11(b), that statutory right did not become effective until January 13, 2008 (L. 2007, c. 260), after the dispute arose between the parents and the school district.

Thus, unlike in the present matter, the school district in E.M., did not yet have legal recourse for challenging a private school placement under N.J.S.A. 18A:36A-11(b), and could not dispute that it was financially responsible for funding the placement, including the stay-put. School districts now have the right to challenge a charter school's private placement under N.J.S.A. 18A:36A-11(b), and when the facts warrant, as they do here, a district should not be held responsible for the costs of a stay-put placement dictated by the parents and the charter school before it has an opportunity to challenge the placement.

Hatikvah also argues that East Brunswick waived its right to challenge the Laurel School placement for the 2019-2020 school year by declining, for whatever reason, to participate in the parents' prior due process hearing or the discussions that lead to settlement in that matter. Under N.J.S.A. 18A:36A-11(b), East Brunswick properly exercised its right to challenge the IEP placement at the Laurel School by filing for due process on November 27, 2019, which was within thirty days of receiving notice of the October 28, 2019, IEP. Thus, these arguments are unpersuasive.

Hatikvah also unpersuasively argues that the District's challenge to the October 28, 2019, IEP is time barred because it did not challenge a proposed September 2018 IEP which sought to place H.K. at a different private school during the 2018-2019 school year. Clearly, the District's decision not to challenge a prior proposed IEP which was never implemented, does not bar its right to timely challenge the current IEP and placement.

Similarly, Hatikvah argues that because the District opted not to participate in the parents' prior due process petition, and chose not to challenge the proposed 2018 IEP, it is barred by the doctrines of estoppel and laches from challenging its obligation to fund the costs of H.K.'s stay-put placement. For the reasons set forth above, these arguments are without merit and equally unpersuasive.

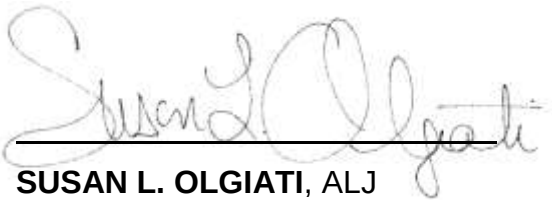
Finally, Hatikvah argues that it is a school district's responsibility to provide disabled students with transportation services and that there is no mechanism for the charter school to provide such services. Thus, aside from the obligation to fund the tuition costs associated with H.K.'s placement, the District must provide the transportation services referenced in the October 28, 2019, IEP. This argument however, ignores that by entering into a settlement implementing the October 28, 2019 IEP, continuing the Laurel School placement, and requiring East Brunswick to provide H.K. with transportation services, the parents and Hatikvah dictated the terms of the placement without affording the District the opportunity to exercise its right under N.J.S.A. 18A:36A-11(b), to object to the placement before H.K. was moved.

That Hatikvah must now fund the costs of H.K.'s stay-put placement, including transportation costs does not mean that East Brunswick may not ultimately be responsible for those costs. If East Brunswick is unsuccessful in its due process challenge, Hatikvah may seek reimbursement from East Brunswick for the stay-put costs incurred.

Accordingly, after hearing the arguments of the parties and considering all documents submitted, respondents A.K. and R.K.'s motion for emergent relief is **GRANTED**. It is therefore **ORDERED** that H.K.'s stay-put placement is the Laurel School pending resolution of East Brunswick's due process complaint. It is further **ORDERED** that pending resolution of the due process complaint, Hatikvah shall be responsible for funding the costs of such placement, including the costs of transportation to be provided by East Brunswick.[7]

[7] Hatikvah represented at oral argument that it does not provide transportation services to its students and therefore does not have a mechanism for transporting H.K. to and from school. Thus, East Brunswick, which has its own fleet of vehicles and/or third-party contracts for transportation services shall transport H.K. to and from the Laurel School at Hatikvah's expense.

This order on application for emergency relief shall remain in effect until issuance of the decision on the merits in the matter. The due process hearing is scheduled to go forward on April 20, 2020. If the parents feel 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.



February 6, 2020
DATE

SUSAN L. OLGIATI, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

SLO/vj