

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION ON EMERGENT RELIEF

OAL DKT. NO. EDS 11722-18

AGENCY DKT.NO. 2019 28548

T.V. and E.V. ON BEHALF OF K.V.,

Petitioner,

v.

MORRIS BOARD OF EDUCATION,

Respondent.

Denise Dimson Rekem, Esq. for petitioners (Parles Rekem, attorneys)

Alison Kenny, Esq. for respondent (Schenck, Price, Smith & King, attorneys)

Record Closed: August 17, 2018

Decided: August 17, 2018

BEFORE **KIMBERLY A. MOSS, ALJ:**

Petitioners, T.V. and E.V. on behalf of K.V. brings this action seeking an order to compel Morris Board of Education (Morris) to comply with the stay-put. On August 10, 2018, the Office of Special Education Programs transmitted the matter to the Office of Administrative Law (OAL) under Docket No. EDS 11722-18. Oral arguments were held on August 20, 2018, on which date the record closed.

FACTUAL DISCUSSION

After carefully considering the documentary evidence presented, and having had the opportunity to hear oral arguments, I **FIND** the following **FACTS**:

T.V. and E.V. are the parents of K.V. They reside in the Morris school district. K.V. is presently receiving special education and related services. On or about June 23, 2017, petitioners unilaterally placed K.V. at Winston Prep. On November 27, 2017, a settlement agreement was reached by the parties regarding the unilateral placement. As part of that settlement, although the Board denied that Winston Prep was an appropriate placement for K.V., it agreed to reimburse the tuition of Winston Prep to the petitioners. The stay-put was addressed in the settlement as follows:

The parties agree that Winston Prep shall not automatically serve as K.V.'s "stay-put" placement. Prior to the end of the 2017-2018 school year, the District shall schedule an IEP meeting to develop a program for K.V. and determine his placement for the following school year. In the event of a formal dispute between the parties regarding K.V.'s 2018-2019 program and/or placement, Winston Prep shall be K.V.'s "stay-put" placement if an educational evaluation by a mutually agreed upon evaluator affirms that K.V. has made at least one year's progress (i.e. one grade level) in reading, fluency reading comprehension and broad reading.

Petitioner's received the 2018-2019 IEP electronically on July 12, 2018. The case manager stated would be finalized in the next three days, if they did not hear from petitioners. Petitioners received the final 2018-2019 IEP on July 24, 2018. Petitioners opposed the IEP and filed for due process on July 26, 2018. Petitioner suggested that the District hire Dr. Nancy Ziebert, who had done an evaluation on K.V. in 2017, to do the independent evaluation in accordance with the stay-put provision of the settlement agreement. The District proposed another independent evaluator. The petitioners sent a list of proposed independent evaluators to respondent. Respondent has not yet responded to petitioners regarding if evaluators from the list is acceptable.

LEGAL ANALYSIS AND CONCLUSION

The standards for the granting of emergent relief are set forth in N.J.A.C. 6A:3-1.6(b). Emergent relief may be granted if the judge determines from the proofs that:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying the 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.

In this matter at no time did the district agree that Winston Prep was the appropriate placement or the automatic stay-put. K.V. was unilaterally placed at Winston Academy by his parents. The settlement agreement states that the Board does not believe that Winston Prep is an appropriate placement for K.V. but it agreed to reimburse petitioners the amount of the tuition. K.V. was not placed at Winston Prep by the Board as a result of an IEP or by virtue of a Court Order.

"Stay- put only applies when the current educational placement was made by a state agency and consented to by the parent." Drinker v. Colonial School District 78 F.3d 859, 864 (3rd Cir. 1996). In K.L. o/b/o/ R.L. v. Berlin 2013 U.S. Dist LEXIX 111047 The Court stated the case law is clear that once a parent unilaterally removes a child from an existing state program governed by an IEP, the protections of stay-put provision cease until the parent and school district agree to a new placement. In that case the parent unilaterally placed the student. A settlement was reached with the parent and

the district whereby the District would reimburse the parents for the tuition at the unilateral placement and that stay put was not being determined. Id.

In this matter it is not clear that petitioner has a likelihood of prevailing on the merits of the underlying claim or that the legal right underlying petitioners' case is settled. K.V. was unilaterally placed at Winston Prep and the settlement agreement was for the Board to reimburse petitioners for tuition with conditions on the stay put clause. Further, the Board specifically stated that it did not consider Winston Prep an appropriate placement.

In this case, after hearing the arguments of petitioner and respondent and considering the documentation submitted, I **CONCLUDE** that petitioner has not met the requirement of N.J.A.C. 6A:3-1.6(b).

Accordingly, It is **ORDERED** that the petition for emergent relief be **DENIED**.

This decision on application for emergency relief resolves all of the issues raised in the due process complaint; therefore, no further proceedings in this matter are necessary. This decision on application for emergency relief is final pursuant to 20 U.S.C. § 1415(i)(1)(A) 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). 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 17, 2018

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency

August 17, 2018

Date Mailed to Parties:

August 17, 2018

ljb