

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION ON EMERGENT RELIEF

OAL DKT. NO. EDS 12198-14

AGENCY DKT. NO. 2015 21769

J.N. and F.N. ON BEHALF OF E.N,

Petitioners,

v.

LAKEWOOD TOWNSHIP BOARD

OF EDUCATION,

Respondent.

Michael I. Inzelbuch, Esq., for petitioners

Eric Harrison, Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: October 1, 2014

Decided: October 3, 2014

BEFORE **LISA JAMES-BEAVERS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was initiated by J.N. and F.N. (“petitioners”), on behalf of their daughter, E.N., through an application for emergent relief filed on September 19, 2014, with the New Jersey Department of Education (“DOE”), Office of Special Education Programs (“OSEP”). Petitioners seek relief in the form of an emergent order for Lakewood Township Board of Education (“respondent” or “Lakewood”) to provide

transportation and implementation of the IEP pursuant to E.N.'s June 3, 2014, Individualized Education Program ("IEP") and pay for the services that E.N. requires.¹ The motion for emergent relief was transmitted to the Office of Administrative Law ("OAL") where it was filed on September 26, 2014. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. E.N.'s mother, F.N., filed a certification on October 1, 2014, accompanied by cases argued to apply to this case.

Oral argument was scheduled and heard on the application on October 1, 2014. The record closed at the conclusion of oral argument.

FACTUAL SUMMARY

According to the IEP dated June 3, 2014, E.N. is a three-year-old (D/B 6/3/11) eligible for special education and related services from Lakewood. She is classified as Preschool Disabled, as a result of being deaf in her left ear, which was diagnosed in June 2013, resulting in concerns with receptive and expressive language development.

For school year 2013-2014, E.N. was placed at The Special Children's Center PSD in Lakewood. E.N. attended the Center's extended school year program in July and August 2014, at the Center and currently attends the Center. The IEP provides that she is to receive speech therapy twice per week beginning September 1, 2014. The IEP further provides that Lakewood will provide specialized transportation. However, from the start of school until the date of the certification, Lakewood has not provided such transportation. When F.N. called Lakewood, someone there informed her that E.N. would receive bussing, but she never has. F.N. also certified that the Center informed her that it has not received payment from the Board for E.N. since June 2014 and E.N.'s placement there is in jeopardy.

¹ OSEP's case information statement set forth that it did not accept any issue of payment to the out-of-district school; however, if the services are provided by the school pursuant to the IEP in question and the school has not been paid, the issue has to be addressed.

Petitioners argue that Lakewood has failed to pay speech and has failed to provide transportation. Further, Lakewood did not provide tuition for the ESY program or tuition for the 2014-2015 school year. As a result, petitioners face the prospect of their child being dismissed from the school. Petitioners filed the present emergent relief application fearing that their daughter will be without a school. Petitioners seek an order for payment by the same terms and in the same manner as has been abided by since the implementation date of the IEP, reimbursement for transportation the petitioners had to provide and transportation as mandated in the IEP going forward.

Respondent does not dispute that it owes petitioners the services it is required to implement in E.N.'s IEP. It has not and does not propose another program or placement. It argues that it does not need an emergent "stay-put" order. Further, Lakewood understands that it has a duty to work collaboratively with the petitioners in this case.

LEGAL ANALYSIS

New Jersey Regulations N.J.A.C. 1:6A-12.1(e) and N.J.A.C. 6A:14-2.7(s)(1), set forth the four-prong standard for granting emergency relief. However, when the emergent relief request effectively seeks a "stay-put" preventing the school district from making a change in program or 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.A. § 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)) (stay-put "functions, in essence, as an automatic preliminary injunction"). 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.A. § 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)(2014). N.J.A.C. 6A:14-2.7(u) further provides:

(u) Pending the outcome of a due process hearing, including an expedited due process hearing, or any administrative or judicial proceeding, no change shall be made to the student's classification, program or placement unless both parties agree, or emergency relief as part of a request for a due process hearing is granted by the Office of Administrative Law according to (m) above or as provided in 20 U.S.C. § 1415(k)4 as amended and supplemented.

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, supra, 78 F.3d at 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).

In the present matter, petitioners filed an application for emergent relief for an Order for Lakewood to provide transportation and implement the IEP and by way of the emergent application effectively invoked the “stay-put.” It is undisputed by the parties that the only IEP applicable to E.N. is the plan with an implementation date of June 3, 2014, which contemplated placement at the private school she is attending, The Special Children's Center and thus, that is the “current educational placement,” and the services in the June 3, 2014, IEP are the current program. 20 U.S.C.A. § 1415(j). Pursuant to that IEP, E.N. was to continue the program she attended at the Special Children's Center. The parties do not dispute that there was no change to E.N.'s current program or placement subsequent to the filing for due process.

When presented with an application for relief under the stay-put provision of the IDEA, a court must determine the child's current educational placement and enter an order maintaining the status quo. Drinker, supra, 78 F.3d at 864–65. Along with maintaining the status quo, respondent is responsible for funding the placement as contemplated in the IEP. Id. at 865 (citing Zvi D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982) (“Implicit in the maintenance of the status quo is the requirement that a school district continue to finance an educational placement made by the agency and consented to by the parent before the parent requested a due process hearing. To cut off public funds would amount to a unilateral change in placement, prohibited by the Act.”)).

Petitioners cite N.W. & R.W. obo M.W. v. Lakewood Twp. Bd. of Educ., EDS 9524-13 (July 16, 2013) and E.H. obo C.H. v. Lakewood Twp. Bd. of Educ., EDS 11532-14 (September 17, 2014) for their holding that, even if the Department of Education has issued a directive that the board can no longer place special education students at unapproved secular schools, the board cannot change the placement in contravention of the existing IEP. Lakewood is in agreement with petitioners that it is required to comply with the existing IEP until such time as the parents and child study team agree to a new IEP.

In the present case, Lakewood has not proposed a new placement or program to petitioners. However, Lakewood has been dilatory in paying for the services that E.N. requires such that petitioners are faced with the very real threat that their daughter may not be able to continue her education at The Special Children's Center. The failure to finance the educational program is the same as failing to implement the program. Drinker, supra, 78 F.3d at 865. Although Lakewood does not dispute its obligation, petitioners' certification indicates that the obligation has not been fulfilled. Therefore, in order to make the petitioner whole and ensure that E.N.'s program remains in place as set forth in her IEP, I **CONCLUDE** that petitioners' application for emergent relief in the form of a “stay-put” order must be granted to maintain the status quo until such time as

the parties reach agreement on another IEP or one of the parties seeks due process in the event there is no agreement.

The petitioner's application for emergent relief is **GRANTED**. It is **ORDERED** that: 1) Lakewood shall pay The Special Children's Center tuition for ESY 2014; 2) Lakewood shall pay The Special Children's Center tuition for the 2014-2015 school year with the same terms and conditions and by the same method that applied when the IEP was signed in June 2014; 3) Lakewood shall pay The Special Children's Center for speech services; 4) Lakewood shall provide E.N. with compensatory education for any speech services that she missed in the ESY program as well as since September 1, 2014 for any length of time she was denied such services; 5) Lakewood shall reimburse petitioners at the State rate for the cost of transporting E.N. to The Special Children's Center when Lakewood failed to do so; and 6) Lakewood shall immediately begin providing transportation to E.N. as mandated in her IEP. It is further **ORDERED** that Lakewood continue E.N.'s program and placement at The Special Children's Center with all supports and services as specified in her June 3, 2014, IEP. Petitioners shall provide Lakewood with the documentation necessary to facilitate the above payments.

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.A. § 1415 (f)(1)(B)(i). 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.

October 3, 2014

DATE

LISA JAMES-BEAVERS, ALJ

Date Mailed to Agency:

October 3, 2014

Date Mailed to Parties:

October 3, 2014

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