State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION ON EMERGENT RELIEF

OAL DKT. NO. EDS 9524-13

AGENCY DKT. NO. 2014-200007

N.W. AND R.W. O/B/O M.W.,

Petitioners,

v.

LAKEWOOD TOWNSHIP BOARD OF EDUCATION,

Respondent.

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Michael I. Inzelbuch, Esq., for petitioners

Joanne Butler, Esq., for respondent (Schenck, Price, Smith & King, attorneys)

Record Closed: July 15, 2013 Decided: July 16, 2013

BEFORE **PATRICIA M. KERINS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was initiated by N.W. and R.W. o/b/o M.W. ("petitioners"), through a motion for emergent relief filed on or about July 5, 2013, with the New Jersey Department of Education, Office of Special Education Programs ("OSEP"). Petitioners seek relief from Lakewood Township Board of Education ("respondent" or "Lakewood") in the form of an emergent order for M.W. to attend the out of district school specified in his Individualized Education Program ("IEP") of April 3, 2013. The request for emergent

relief was transmitted to the Office of Administrative Law ("OAL") on July 12, 2013. Oral argument was scheduled and heard on the request on July 15, 2013.

Summary of Facts

According to the IEP dated April 3, 2013, M.W. is a three-year-old boy eligible for special education and related services from Lakewood. He is classified as a preschool child with a disability, which applies to a child between the ages of three and five experiencing developmental delay, as measured by appropriate diagnostic instruments and procedures, in one of five specified areas: physical, including gross motor, fine motor and sensory (vision and hearing); cognitive; communication; social and emotional; and adaptive. M.W. was born with Symptomatic Congenital CMV and is diagnosed with Microcephaly, which is associated with a variety of potential sequelae, including hearing loss, vision loss, motor issues, speech issues, poor tone, learning delays, and lack of coordination, among others. M.W. presents with low tone, weakness and limited balance, and immature skills for walking, running, and jumping. He navigates stairs non-reciprocally with support from the wall or railing that limits his ability to maintain pace with his class as they move in and out of school. He demonstrates delays in play skills with minimal problem solving abilities that can negatively impact preschool skill acquisition in the areas of graphomotor skills, tool use, and play skills. He also has difficulty responding to Wh questions, weakness in oral musculature, and has feeding ability issues.

M.W. received intensive therapies through Early Intervention Services that enabled him to make developmental progress. As he was aging out of eligibility for Early Intervention, he was referred to respondent's Child Study Team ("CST") who conducted the following initial evaluations for special education eligibility:

1. January 29, 2013, Social Assessment conducted by Marisol Garcia Blackwell
2. February 13, 2013, Speech and Language Evaluation conducted by Chaya Kramer

3. March 11, 2013, Occupational Therapy Evaluation conducted by Liz Mullen

4. March 20, 2013, Physical Therapy Evaluation conducted by Kyna Darrow-Barr

5. March 22, 2013, Developmental Inventory conducted by Shayna Shifrin

An IEP meeting was held on April 3, 2013, and the parties agreed that M.W. was eligible for special education and related services. The team then developed an educational plan for the period of April 30, 2013, through April 3, 2014, recommending an out of district, private school program as the least restrictive environment that could provide M.W. with a small class setting and multi-sensory approach to learning. This determination was made, in part, due to M.W.'s intensive need for close supervision during feeding, and when navigating the classroom, school grounds, and among peers, due to his balance issues and delayed gross motor skills. Additionally, M.W.'s requirement for Feeding Therapy, Speech Therapy, Occupational Therapy, and Physical Therapy contributed to the IEP team's decision to reject placement at the Lakewood Early Childhood Center in favor of the proposed program at the Special Children's Center ("SCC"). As noted by the IEP team, the benefits provided M.W. by the SCC include the high degree of support and structure required to meet his individual needs. N.W. and R.W., agreed to the respondent's proposed IEP as indicated by their signatures consenting to the IEP's implementation before the normal fifteen-day notice period expired.

Subsequent to the IEP meeting, on April 9, 2013, the Supervisor of Pupil Personnel Services for respondent, Helen Tobia, was contacted via phone by Janina Zak-Krasucki, Supervisor of Child Study of the Ocean County Office of Education of the New Jersey Department of Education (Department). According to her affidavit, she was told by Ms. Zak-Krasucki that respondent could not place any students at the SCC, and to immediately remove any students placed there no later than the following day because SCC was an unapproved and unaccredited school that could not satisfy the Naples requirements for private placement by the respondent. Ms. Tobia advised Ms. Zak-Krasucki that the SCC was licensed as a childcare center by the New Jersey Department of Child and Family Services, but Ms. Zak-Krasucki responded that such

licensure was not sufficient to place a student with an IEP. As represented in oral argument, no written or official directive has been received by respondent from the Department verifying Zak-Krasucki's comments.

Some time thereafter, Ms. Tobia advised petitioners that the Department would not allow the respondent to implement M.W.'s placement at SCC. Ms. Tobia offered other placements, specifically Lakewood Early Childhood Center or the School for Children with Hidden Intelligence ("SCHI"). Ms. Tobia also offered home instruction. Petitioners rejected Ms. Tobia's offers due to the respondent's failure to develop a new IEP, and their belief that SCHI is not appropriate and because the existing IEP specifically finds that the Lakewood Early Childhood Center is not appropriate. As of the hearing date, respondent had not convened a new IEP team meeting.

As the dispute between the parties continued, respondent provided M.W. with transportation to SCC for his related services. M.W. has been receiving the related services at SCC since on or about May 2, 2013.

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;
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> ii. The legal right underlying the petitioner's claim is settled;
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> iii. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
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> 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)) (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. § 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); 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, supra. 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 a due process petition regarding Lakewood's proposed change in their son's placement, and by way of the emergent application effectively invoked the "stay put". Petitioners contend that the current educational placement is SCC as set forth in the April 3, 2013, IEP. Respondent, however, contends that SCC is not a legally permissible placement put because the school is unapproved and unaccredited and therefore does not satisfy the standards for an out of district placement by a school district under the "Naples Act". It is undisputed by the parties that the only IEP applicable to M.W. is the plan devised on April 3, 2013. If the SCC is M.W.'s "current educational placement", then application of the stay put provision of the IDEA requires that he remain at SCC after the filing of the July 5, 2013, due process hearing request. 20 U.S.C. § 1415(j).

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 o/b/o T.W. v. New Jersey 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"). The Third Circuit stressed that the stay-put provision of the IDEA assures stability and consistency in the student's education by preserving the status quo of the student's current educational placement until the proceedings under the IDEA are finalized. Drinker, supra.

Furthermore, the Third Circuit explained that the stay-put provision reflects Congress' clear intention to "strip schools of the unilateral authority that they had traditionally employed to exclude [classified] students, particularly emotionally disturbed students, from school." Id. at 864 (citing Honig v. Doe, 484 U.S. 305, 323 (1988)); School Comm. v. Dep't of Educ., 471 U.S. 359, 373 (1985). Therefore, once a court determines the current educational placement, the petitioners are entitled to a stay-put order without having to satisfy the four prongs for emergent relief. Drinker, 78 F.3d at 864 ("Once a court ascertains the student's current educational placement, the movants are entitled to an order without satisfaction of the usual prerequisites to injunctive relief.").

The placement in effect when the request for due process was made – the last uncontroverted placement – is dispositive for the status quo or stay-put. Here, the request for due process was filed on July 5, 2013, thus the "then-current" educational placement for M.V. at the time of the petition is the IEP that was developed for him on April 3, 2013. Pursuant to that IEP, M.V. is to be placed at SCC. Subsequent to the filing for due process, there has been no agreement between the parties to change M.V.'s current placement. 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.").

When necessary to provide special education and related services because the public schools available do not meet the criteria of least restrictive environment and cannot provide a FAPE, the local district board of education may place a pupil with educational disabilities in a private program at no cost to the parents. 34 C.F.R. §§ 300.145 and 300.146; N.J.S.A. 18A:46-14. Under certain circumstances, a student may be placed in an accredited non-public school that is not specifically approved for the education of students with disabilities. N.J.A.C. 6A:14-4.3(b)(10); N.J.A.C. 6A:14-6.5. These placements are approved pursuant to the "Naples Act", L. 1989, c. 152, effective August 9, 1989. See L.M. v. Evesham Twp. Bd. of Educ., 256 F.Supp.2d 290, 294 (D.N.J. 2003).

Determining that respondent has satisfied the Naples Act is not a prerequisite to enforce stay put. R.S. & M.S. v. Somerville Bd. of Educ., No. 10-4215 (MLC), 2011 U.S. Dist. LEXIS 748, *34 (D.N.J. Jan. 4, 2011) (a school district was required to maintain a disabled child's placement in a sectarian school, despite possibly violating N.J.S.A. 18A:46-14, because the school was the child's "current educational placement" when litigation over the child's placement began). The Somerville Court explained:

> We find that under the undisputed facts in the record, [Timothy Christian School] TCS is the stay put placement of the student. We will call it the Stay Put Placement for purposes of this ruling. It was the approved placement in the 2008-2009 IEP signed by the parties. ….
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> This dispute arose in the Fall of 2008, when D.S. was actually attending TCS as a high school ninth grader under that placement. … It is clear and we so find, that TCS was "the operative placement actually functioning at the time the dispute first [arose]." Drinker, 78 F.3d at 867. We therefore conclude that it must remain the Stay Put Placement until the entire case is resolved either by agreement or further litigation. ….

> The IDEA stay put law and regulations admit of only two exceptions where it is the Board, rather than the parents, seeking to change the operative placement during the litigation. The first is where the parents agree with the change of placement. 20 U.S.C. § 1415(j). The second exception arises under the disciplinary provisions of IDEA, 20 U.S.C. § 1415(k). … Clearly, neither exception applies here, and no party argued otherwise.
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> Where, as here, neither exception applies, the language of the stay put provision is "unequivocal." Honig, 484 U.S. at 323. It functions as an "automatic preliminary injunction," substituting "an absolute rule in favor of the status quo for the court's discretionary consideration of the factors of irreparable harm and either a likelihood of success on the merits or a fair ground for litigation and a balance of hardships." Drinker, 78 F.3d at 864 (quoting Zvi D., 694 F.2d at 906).
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> [Id. at *32-33 (emphasis added).]

It should be noted that respondent has raised an issue whether SCC is sectarian. However, it provided no evidence in that regard and petitioners dispute any such assertion. In this matter stay put requires that M.W. remain at his "current educational placement", SCC, as the approved placement in the April 3, 2013, IEP signed by both parties. SCC is the operative placement actually functioning at the time the petition was filed. The April 3, 2013, IEP may not have been fully implemented by respondent, but M.W. did begin receiving related services at SCC on or about May 2, 2013, with transportation provided by respondent. A fully implemented IEP is not a prerequisite for enforcing stay put. See Drinker, 78 F.3d at 867 (when the "dispute arises before any IEP has been implemented, the current educational placement will be the operative placement under which the child is actually receiving instruction at the time the dispute arises.") (citing Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 625-26 (6th Cir. 1990) (finding that although no IEP was implemented, child was receiving five hours of home instruction per week and determining that was the current educational placement)) (emphasis added). Finally, neither of the two exceptions to the stay put law are applicable because the parents have not agreed to the change in placement and the disciplinary provisions are clearly not an issue.

As demonstrated in Somerville, that a current educational placement for a child may violate N.J.S.A. 18A:46-14 has no bearing on a request for stay put. Somerville, supra, 2011 U.S. Dist. LEXIS 748 at *34 ("the protestations by the Somerville Board, true as they seem to be — that at the time D.S. was originally placed at TCS … it was a mistake … and … that even when both the Branchburg and Somerville Boards apparently approved the 2008-2009 IEP, they only later found out that they had made a mistake — are unavailing under IDEA's stay put provision.") (emphasis added). It remains the law in the Third Circuit that when a petition for due process is filed, deciding stay put requires only a determination of the child's current educational placement and then, simply, an order maintaining the status-quo. The substantive issue of whether SCC is an eligible placement under N.J.S.A. 18A:46-14 remains to be litigated in the due process proceeding.

Petitioners' motion for emergent relief is **GRANTED** and it is ORDERED that M.W. shall be enrolled at the Special Children's Center with all supports and services as specified in his April 3, 2013, 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.A. § 1415 (f)(1)(B)(i).

Patricia M. Kerins

July 16, 2013
DATE

PATRICIA M. KERINS, ALJ

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