State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

DECISION

EMERGENT RELIEF

OAL DKT. NO. EDS 09803-14

AGENCY DKT. NO. 2015 21539

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

Petitioner,

v.

BYRAM TOWNSHIP BOARD OF EDUCATION,

Respondent.

George M. Holland, Esq. for J.F and J.F. on behalf of J.F., petitioners
(Wanderpolo and Siegel, LLC, attorneys)

Robin Ballard, Esq. for Byram Township Board of Education, respondent
(Schenck, Price, Smith & King, attorneys)

Record Closed: August 8, 2014 Decided: August 15, 2014

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE

Petitioners J.F. and J.F. filed a petition for emergent relief hearing with the Office of Special Educations Programs of the New Jersey Department of Education on July 14, 2014 seeking that their son, J.F. be placed at the Craig School and for the Byram Township Board of Education (District) to immediately begin funding his placement there. The matter was filed at the Office of Administrative Law (OAL) on August 1, 2014

and in accordance with 20 U.S.C.A. §1415 and 34 C.F.R. §300.500 to 300.587, the Commissioner of the Department of Education requested that an administrative law judge (ALJ) be assigned to conduct a hearing in this matter. The undersigned conducted an emergent hearing and the matter was heard and concluded on August 8, 2014.

FACTS

Based on the record, I **FIND** the following **FACTS**:

J.F. ("J") was born on October 23, 2011, and will begin seventh grade in September 2014. During the 2010-11 school year, the Westwood School District (Westwood) determined that J. was eligible for special education services. J. was initially placed in a self contained classroom. During the 2011-12 school year J. was removed from the self contained classroom, and placed in a mainstream classroom with a one-to-one aid.

In the petition for mediation, J.'s parents concede that during the summer of 2012, they decided to unilaterally place him in the Craig School, a private school. J.'s parents assert that they paid for an independent evaluation in the winter or fall of 2012 and decided to send J. to the Craig School in the fall of 2012, but simultaneously assert that J. actually attended Westwood during the 2012-13 school year, and failed to make progress.

The Westwood School District placed J. at the Craig School pursuant to a Settlement Agreement, dated August 13, 2013. (Pet'r.s Ex. A, 2014-15 IEP (hereinafter "IEP".). Pursuant to that Settlement Agreement, J. attended the Craig School for the duration of the 2013-14 school year.

On March 2, 2014, J.'s parents, Mr. and Mrs. J.F. entered into a lease agreement for a residential property in Byram, New Jersey. (Resp't.'s Ex. A). The lease term commenced on March 15, 2014. Utility bills for the property indicate that the property was occupied by April, 2014. (Resp't's. Ex. B.).

In May 2014, Mr. and Mrs. J.F. met with the Westwood Child Study Team to develop an IEP for the 2014-15 school year, despite the fact that the family had moved from Westwood to Byram sometime during March or April 2014. Indisputably, when the 2014-15 IEP was developed by Westwood CST, the family had already moved to Byram. Indeed, at the very outset the IEP explains why the Westwood Child Study Team placed J. at the Craig School. The IEP's first page requires that Child Study Team to "[d]escribe the present levels of academic achievement and functional performance including how the student's disability affects his or her involvement and progress in the general education curriculum." (IEP). In response to this prompt, the Westwood Child Study Team wrote

> [i]n a Settlement Agreement (8/13/13), the District agreed to enter into a contract with the Craig School in Mountain Lakes, N.J., an out of district placement to place J. in the ESY {Extended School Year Program] for 2013 as well as the 2013-14 school year through June 2014. In accordance with the Settlement Agreement, the District will provide transportation for J. to and from the Craig School throughout the regular 2013-14 school year, beginning September 2013 through June 2014. Following the stipulations of the Settlement Agreement, the IEP Team met at the end of the 2013-14 school year to conduct an annual review and to develop an IEP for the 2014-15 school year, from July 1, 2014 going forward, specifying an appropriate program and placement for J.
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> [Westwood] will agree to an additional year at the Craig School 2014-15, including ESY-academic program, morning only for July 2014 and transportation for the 2014-15 school year. At the annual review meeting in May 2015, IEP Team will meet and specify an appropriate program and placement for J. for 2015-16.

[IEP.]

Accordingly, as per the IEP, it appears that the only reason for J. to attend the Craig School as per his IEP was Westwood's need to avoid further litigation with the parents. Indeed, the Settlement Agreement is referenced throughout the IEP, as the impetus for placement at the Craig School. Strikingly, in the section that addressed "Least Restrictive Environment and Rationale for Removal from General Education," the Westwood Child Study Team referenced the Settlement Agreement but fails to articulate a cogent rationale for an out of district placement, or placement at the Craig School, specifically. Rather, the IEP merely indicates that Westwood concluded "that due to J.'s severe academic deficits in reading and writing, he needs an adapted curriculum and specialized instruction with extended practice and review in order to learn new skills." (IEP). The IEP then reiterates the requirements of the Settlement Agreement. Finally, the IEP summarily concludes that Westwood determined to place J. at the Craig School for the 2014-15 school due to his individual needs and supports offered at the Craig School. (IEP). Finally, the IEP states that "while the general education setting would provide instruction in the general education curriculum, this factor does not outweigh the opportunity for the specialized, individual instruction possible in a special education setting." (IEP).

Importantly, the IEP contains a list of modifications that would allow J. to participate in the general education curriculum. The list includes many general modifications, such as "[p]rovide preferential seating" and "[g]ive specific, immediate feedback." (IEP). None of the modifications specifically relate to the Craig School. Nevertheless, a note at the bottom of the list directs the reader to "see additional modifications offered by Craig School – attached." (IEP). Significally, the "Goals and Objectives" section of the IEP is entirely blank. (IEP). Apparently, Westwood developed no goals or objectives for J. for the 2014-15 school year.

The Extended School Year (hereinafter ESY) section merely states that an ESY "is recommended if a student is not expected to recoup lost skills in a reasonable period

of time after school breaks. Due to J. significant delays in reading and writing an ESY academic program at the Craig School for July 2014 is recommended to prevent regression over the summer." (IEP).

Finally, evaluations which were concluded prior to his placement at the Craig indicate that he has been diagnosed with a significant learning disability, affecting reading and spelling, consistent with dyslexia. He has also been diagnosed with ADHD. His IEP indicates that he has an IQ of 109, which indicates average intelligence.

In sum, I **FIND** the IEP was developed subsequent to the Settlement Agreement between Westwood and J.s parents, pursuant to which J. was placed at the Craig School for the 213-14 school year. When the IEP was developed by Westwood in May 2014, the parties had already moved to Byram. The IEP is completely devoid of any rationale for J. to attend the Craig School, besides the Settlement Agreement. Rather, the evidence strongly indicates that the petitioners and Westwood were fully aware that J was no longer residing in Westwood, when they developed the IEP. Further, it is apparent that the parents were fully aware that Westwood would not be responsible for J.'s tuition.

Accordingly, I **CONCLUDE** that Westwood agreed to place J. at the Craig School simply to accede to the Petitioners demands, with full knowledge that the family had left Westwood. I **FIND** and **CONCLUDE** that Westwood's decision to place J. at the Craig School was entirely unrelated to his educational needs.

Although Westwood failed to develop any goals or objectives for J., Westwood did include modifications for J. to participate in the general education curriculum. The IEP indicates that J. needs special education services, but does not specify why those special education services must be provided by the Craig School. Accordingly, I **FIND** J's educational placement requires special education services, including the modification specified.

As previously noted, the family moved to Byram between March and April of 2014, they fully concede that they did not register John in the District until June 19, 2014. On that date, the mother provided the District with the IEP. Her words "[w]e wanted to be sure that the May 5, 2014 IEP would be followed by the Byram Township School District so that our son could remain at the Craig School for the 2014-15 school year." (J.W. Cert ¶10).

On July 2, 2014, J.'s parents met with Monteleone to discuss J.'s placement for the 2014-15 school year. The parties agreed that he required special education services, including an extended school year. Monteleone asserted that Byram could provide all the services required by the IEP in the district, including the extended school year. Monteleone certified that she fully reviewed the IEP, and

> Determined that the District has comparable programming to what was set forth in that IEP . . . available in-district. The program in the IEP written for J. {Westwood] can be implemented in-district through programming which also runs during the Extended School Year ('ESY'). Through the ESY program, J. also would have been offered participati9on in a summer reading clinic. This clinic was operated through a shared partnership with Centenary College, who provided Wilson trained special education teachers enrolled in their Reading Specialist program to work with students in Byram in groups of 2 or 3.
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> [Monteleone Cert. ¶ 7.]

She further certified that she is familiar with the programming offered by the Craig School, and "Byram offers programming comparable to that which is offered at the Craig School for students like J. who have learning disabilities in reading and writing. This includes multisensory reading instruction that is scientifically based." (Monteleone Cert. ¶ 8.) Moreover, she certified that the District's ESY program was designed to prevent regression of students with learning disabilities, such as J.

Accordingly, I **FIND** that the District offers services comparable to the Craig School's program, including the Craig School's ESY.

The parties agree that on July 2, 2014, Monteleone explained why the District's program was comparable to the Craig School's program, contemplated by the IEP. The parties agree she offered immediate enrollment in the District's ESY, and an opportunity for the petitioners to observe the District's ESY, and I so **FIND**. The petitioners declined to enroll J in the District's ESY, and declined to observe the District's ESY. The parties agree that the District did not develop a new IEP for J., as the District believed the current IEP could be implemented in the District. In any event, petitioners insisted that the IEP required that J. attend the Craig School, and only the Craig School. The parties agree that the petitioners refused to consider any program, besides the Craig School and I so **FIND**.

Finally, it is important to note that it was on July 10, a mere week after the parties' first and only meeting, and less than a month after Petitioners enrolled John in the District, that petitioners filed the Petition for Mediation.

ARGUMENTS

Petitioners contend that pursuant to the "stay put" provision of IDEA, 20 U.S.C.A. § 1415(j), the District must fund J.'s tuition at the Craig School, including the 2014 ESY, pending the outcome of the Petition for Mediation. Accordingly, petitioners contend that the standard of a typical petition for emergent relief is superseded by the federal requirements of "stay put."

The District contends that this petition is governed by the typical standard for emergent relief, and that petitioners have not established irreparable harm, a settled legal right, likelihood to prevail on the merits, or a balancing of interests. Additionally, the District contends that pursuant to N.J.A.C. 6A:14-4.1(g), the District must provide a transfer student entitled to special education services a comparable program to the

program contemplated by the transfer student's last IEP, and the District has offered such a comparable program.

DISCUSSION AND CONCLUSION

This matter is governed by 20 U.S.C.A. §1415(j) which supersedes the administrative standard for emergent relief. See Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 (3d Cir. 1996). The regulation provides that "during the pendency of any proceedings conducted pursuant to [the procedural requirements of IDEA], 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). As the Third Circuit explained "the statute substitutes 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, supra, 78 F.3d at 864 (quoting Zvi D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982). Therefore, the operative inquiry becomes identification of "the then current educational placement." Id. at 865. The Third Circuit has noted that, "the dispositive factor in deciding a child's 'current educational placement' should be the Individualized Education Program ('IEP') . . . actually functioning when the 'stay put' is invoked." Id. at 867.

However, "'[e]ducational placement', as used in the IDEA, means educational program -- not the particular institution where that program is implemented." White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 (5th Cir. 2003). Accordingly, "the question of whether a change in a child's educational routine is a 'change in placement' is a fact-specific one." J.S. v. Lenape Regional High Sch. Dist. Bd. of Educ., 102 F. Supp. 2d 540, 543-544 (D.N.J. 2000). The focus of the inquiry must be "whether the decision is likely to affect in some significant way the child's learning experience." Id. at 544 (quoting DeLeon v. Susquehanna Comm. Sch. Dist., 747 F.2d 149, 153 (3d Cir. 1984).) Therefore, "only matters that will significantly impact the child's learning should be considered a change in educational placement for the purposes of the IDEA." Ibid.

This issue was addressed by the Court in In J.S. v. Lenape matter, supra. There the parents of a student with mental retardation argued that the student's transfer from one high school to another constituted a change in educational placement.[1] Id. at 541. The court concluded that "[t]here is no curricular difference between the Lenape and Cherokee settings . . . the two class settings at issue are virtually identical, and the main difference between the schools is the functioning level of the students." Id. at 544. To the contrary "[o]ther facts in evidence tend to show that Cherokee is an entirely appropriate placement for J.S.: the class size is smaller, and the school is a shorter bus ride from J.S.'s home." Ibid. The court concluded that the parents failed to establish that the student's learning was significantly affected, and accordingly, failed to establish a "change in educational placement" pursuant to IDEA. Ibid. The court noted that to establish the transfer was a "change in educational placement," the parents would have to present "evidence that the Cherokee program is of poorer quality than Lenape High School's, or that the Lenape program was tailored to J.S.'s particular needs . . ." Id. at 544 n.3. Moreover, the court emphasized that the conclusion that a physical transfer does not necessarily constitute a "change in educational placement" pursuant to IDEA "is consistent with the decisions of the federal courts of appeals to have considered similar transfers." Id. at 544 n.4 (citing cases).

New Jersey's regulatory transfer requirements are set forth in. N.J.A.C. 6A:14-4.1(g)(1) which provides:

> [w]hen a student with a disability transfers from one New Jersey school district to another . . . the child study team of the district into which the student has transferred shall conduct an immediate review of the evaluation information and the IEP and, without delay, in consultation with the

[1] Due to the procedural posture of J.S., the ultimate issue of the case was attorney's fees pursuant to IDEA, not the application of "stay put." See Id. at 542. Nevertheless, the court applied case law that addressed "change of placement" for purposes of stay put. See id. at 544 (quoting DeLeon, supra, 747 F.2d at 153 (minor changes in transportation arrangements did not constitute a "change of placement" for purposes of "stay put," though the student was severely disabled.)

> student's parents, provide a program comparable to that set forth in the student's current IEP until a new IEP is implemented . . .
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> [N.J.A.C. 6A:14-4.1(g)(1).]

Thereafter, "if the parents and the district agree, the IEP shall be implemented as written." Ibid. "However, "[i]f the appropriate school district staff do not agree to implement the current IEP, the district shall conduct all necessary assessments and, within 30 days of the date the student enrolls in the district, develop and implement a new IEP for the student." Ibid. Thus, the New Jersey regulation materially mirrors the federal statute and regulation. See 20 U.S.C.A. § 1414(d)(2)(c)(i)(I); 34 C.F.R. § 300.323(e) (providing that a district must immediately provide "services comparable" to the services set forth in a transfer student's last IEP).

Therefore, the inquiry herein is whether the program is "comparable to that set forth in the student's current IEP," or conversely, whether the program will "significantly impact the child's learning" and accordingly constitutes "a change in educational placement." N.J.A.C. 6A:14-4.1(g)(1); 20 U.S.C.A. § 1414(d)(2)(c)(i)(I); 34 C.F.R. § 300.323(e); J.S., supra, 102 F. Supp. 2d at 543-544; DeLeon, supra, 747 F.2d at 153.

Petitioners rely entirely on the fact that the IEP places J. at the Craig School. However, J.'s IEP entitles him to a specific educational program, not a specific private school. I am not persuaded that the IEP requires J. to attend the Craig School, and only the Craig School. The evidence herein conclusively establishes that the District promptly met with petitioners and immediately offered J. a comparable educational placement. Specifically, Monteleone immediately and repeatedly offered J. an ESY program, including participation in a summer reading clinic provided by Wilson trained special education teachers in small groups of two to three students. (Monteleone Cert. ¶ 7.) She certified that she is familiar with the Craig School's program, and can offer John a comparable program designed for students with learning disabilities in reading and writing, including multisensory reading instruction that is scientifically based.

(Monteleone Cert. ¶ 8.) She certified that the ESY program is designed to prevent regression in student with learning disabilities, such as J.

Moreover, the District program is comparable to the program outlined in J.'s IEP. The IEP does identify J.'s learning disability in reading and writing, his need for modifications to the general curriculum, and the potential for summer regression absent an ESY. Moreover, the District established that J.'s educational program, as outlined in the IEP, can be implemented in District. Accordingly, I **CONCLUDE** that the District offered J. a comparable educational program to the program set forth in his IEP, and the District's offer did not constitute a "change in educational placement" triggering the provisions of "stay put."

Petitioners rely on a Seventh Circuit case, which is factually distinguishable. See Casey K. v. St. Anne Cmty. High Sch. Dist. No. 302, 400 F.3d 508 (7th Cir. 2005). There, as here, the parents of a student entitled to special education services unilaterally placed the student in a private school and demanded reimbursement. Id. at 509. The parties reached a settlement agreement, pursuant to which the public elementary school agreed to fund the private placement until the student graduated from elementary school and commenced high school, a period of about three months. Id. at 510. Critically, the court emphasized that "although the elementary school and the high school [were] only three blocks apart, they are each their own, separate school districts . . . and thus each is a distinct 'legal entity,' with its own school board." Ibid. Pursuant to "the settlement agreement, the IEP that the elementary school district had devised for Casey was to expire when he became the responsibility of the high school district." Ibid. A few days after the student became the responsibility of the high school district, the high school devised a new IEP that did not provide tuition for the private placement. Ibid.

The parents filed a due process petition, and asserted that the private placement was the "stay put" placement. Ibid. The court noted that "[i]t is an open question whether, even if the parents lose their challenge, they must reimburse the public entity

for the expense of the private-school placement to which the child, it turns out, was not entitled." Ibid. The school district conceded that "if both the elementary school and the high school were in the same school district, Casey would be entitled to 'stay put' in Acacia Academy, the placement designated in the elementary school's IEP for him." Id. at 511. The court reasoned that the result is unchanged

> if a state decides that the elementary school and the high school serving the same pool of kids shall be deemed to constitute separate school districts. Whatever motivates such decisions (probably they are relics of a time when kids were required to attend school only through the eighth grade) has nothing to do with the purpose behind the stay-put provision.
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> [Ibid.]

Notably, "[t]he high school district's entire legal argument for reversal . . . pivots on the fact that the state has placed the elementary school and the high school in separate districts. If they constituted a single district, the high school would be a party to the settlement agreement." Id. at 512. Finally, the court noted that "the automatic ["stay put"] injunction can be dissolved for a compelling reason." Id. at 513 (citing Johnson v. Special Educ. Hearing Office, 287 F.3d 1176 (9th Cir. 2002).) The court speculated that

> [i]f the schools were in different states (perhaps even if they were in different areas of the same state, though that we needn't try to decide), and if as a result the refusal to lift the automatic injunction would impose an unreasonable burden on the transferee school, the district court could exercise its equitable discretion to modify or dissolve the injunction.
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> [Ibid.]

In the instant matter, Westwood and Byram are completely different districts, in completely different towns, in different, non-adjacent counties. The Casey court focused on the fact that the elementary school and high school were technically different legal entities, but actually served the same population, and were mere blocks

apart. See ibid. Accordingly, this case is factually distinguishable. Moreover, the "stay put" IEP was drafted by the petitioners and Westwood months after petitioners had physically moved to Byram.

Moreover, the Casey dissent noted that the opinion "sidesteps a determination of [the student's] 'then-current educational placement' and overlooks certain core requirements of the IDEA and some important facts underlying [the student's] present attendance at [the private placement]." Id. at 515 (Sykes, dissenting). She emphasized that the opinion recognized "the elementary district made a prudent litigation decision: it agreed to pay [the student's] tuition and transportation costs at [the private placement] from February 19, 2004, to May 12, 2004, his fifteenth birthday, when responsibility for his education would transfer to the [high school district]." Id. at 516. The judge concluded that:

> Therefore, "[t]he short-term IEP put in place pursuant to the settlement agreement was hardly the result of a bona fide IEP process of the deliberative sort contemplated by the statute and regulations. It was a financial expedient, not a reasoned educational placement decision." Id. at 517. In other words, "[t]he temporary IEP now invoked by [the student's] parents for purposes of the stay-put obligation was put in place not by a collaborative educational evaluation but pursuant to a limited financial settlement." Ibid.

The dissent concluded that "[i]t is unclear to me why such a stop-gap financial compromise should be considered an 'educational placement' at all, much less the child's 'then current educational placement' for purposes of stay-put; the agreement and the interim IEP expired on May 12, 2004 [prior to the school year at issue]." Ibid. Finally, the dissent indicated that the opinion rejected this argument, because the high school district failed properly to raise the argument. Ibid.

Notably, in New Jersey, at least ALJ agreed with the reasoning of the dissent and concluded that a settlement agreement that provides a temporary placement is no longer the "current educational placement" after that temporary placement has expired.

See C.T. v. Cherry Hill Bd. of Educ., EDS 10598-09, Final Decision (November 9, 2009) <http://njlaw.rutgers.edu/collections/oal/>. Notably, the ALJ therein agreed that in light of the transfer provisions of N.J.A.C. 6A:14-4.1(g), and the "stay put" provisions of 20 U.S.C.A. §1415(j), "[i]t appears that 'stay put' for a transfer student is the 'comparable' program provided by the sending district." Id. at 5.

Here, I **FIND** the Casey dissent's reasoning even more compelling. See Casey, supra, 400 F.3d 515-17 (Sykes, dissenting). Pursuant to a Settlement Agreement, J. was reimbursed for placement at the Craig School for the 2013-14 school year. The mere fact that Westwood chose to settle, rather than litigate petitioners unilateral placement claim does not evidence the underlying merit of such claim. Westwood may have opted to settle in August 2013 for many reasons, such as financial expediency, or the knowledge that petitioners intended to move out of Westwood by March 2014. After petitioners moved to an entirely new district, in a new, non-adjacent county, they negotiated the IEP with the former district, which they had already subjected to litigation. Westwood had an incentive to settle – they would not be liable for any tuition for the 2014 ESY or the 2014-15 school year.

Moreover, petitioners did not register J. with the District until the end of June 2014, though they actually moved to Byram months earlier. They met with Monteleone only once, rejected any program that was not provided by the Craig School, and promptly filed a petition for mediation to force the District to fund the Craig School. They refused to consider or even observe any alternatives the District could offer. At all times, they were represented by counsel.

I am satisfied that the District's actions were more than appropriate. Though petitioner waited until the close of the school year to notify the District of John's enrollment, the District managed to meet with petitioner promptly, well within the regulatory timeframe. See N.J.A.C. 6A:14-4.1(g). Rather than contest J.'s proper placement or needs, the District agreed to the IEP and immediately offered J. an ESY.

Though petitioners emphatically and repeatedly rejected anything other than the Craig School, the District repeatedly offered to allow them to observe the District's programs.

Petitioners actions herein clearly constituted a litigation tactic to force the District to finance J.'s placement at the Craig School, regardless of the services that the District could offer. The IDEA does to require the District, and the taxpayers, to fund the private school of Petitioners choice. See Doe v. Board of Educ. of Tullahoma City Schs., 9 F.3d 455, 459-460 (6th Cir. 1993) (noting that IDEA requires the educational equivalent of a Chevrolet, not a Cadillac).

CONCLUSION

I therefore **CONCLUDE** that the District offered J. a comparable educational program to the program set forth in his IEP, and the District's offer did not constitute a "change in educational placement".

Based upon the foregoing it is **ORDERED** that petitioners request for emergent relief, seeking an interim placement at the Craig School is hereby **DENIED**.

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.

August 15, 2014

DATE **IRENE JONES**, ALJ

Date Mailed to Agency August 15, 2014

Date Mailed to Parties: August 15, 2014

sej