State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

DECISION ON EMERGENT RELIEF

OAL DKT. NO. EDS 11532-14

AGENCY DKT. NO. 2015 21714 E

E.H. ON BEHALF ON C.H.,

Petitioners,

v.

LAKEWOOD TOWNSHIP BOARD OF EDUCATION,

Respondent.

_____

Michael I. Inzelbuch, Esq., for petitioners

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

Record Closed: September 16, 2014 Decided: September 17, 2014

BEFORE **SUSAN M. SCAROLA**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was initiated by E.H. on behalf of his daughter C.H. ("petitioners"), through a motion for emergent relief filed on September 9, 2014, with the New Jersey Department of Education ("DOE"), 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 C.H. to attend the out-of-district school specified in her Individualized Education Program ("IEP") of March 18, 2014. The

motion for emergent relief was transmitted to the Office of Administrative Law ("OAL") on September 11, 2014. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.[1]

On September 15, 2014, the respondent filed a motion to disqualify petitioner's counsel due to a "conflict of interest." The petitioner's counsel responded to this motion on September 16, 2014.

Oral argument was scheduled and heard on the motions on September 16, 2014.

FACTUAL SUMMARY

According to the IEP dated March 18, 2014, C.H. is a thirteen- year-old girl (now fourteen) eligible for special education and related services from Lakewood. She is classified as multiply disabled (orthopedically impaired, traumatic brain injury), as the result of a serious motor vehicle accident that occurred in 2002, and as measured by appropriate diagnostic instruments and procedures, in five specified areas: physical, including gross motor, fine motor and sensory (vision and hearing); cognitive; communication; social and emotional; and adaptive. C.H. is quadriplegic, is ventilator dependent, and has a tracheotomy and gastronomy tube, as well as a customized wheelchair. She requires specialized transportation and a nurse at all times. She has begun to use assistive technology, including voice-recognition software, to assist in communication. She struggles with all aspects of her academic program, suffers from emotional difficulty, lack of motivation, memory weakness and short-term-memory loss. C.H. also requires speech therapy, occupational therapy and physical therapy, as well as a personal aide and a nurse.

For school year 2013–2014, C.H. was enrolled in a general education program at Bais Rivka Rochel, a private primary school in Lakewood. Her program included speech therapy, occupational therapy and physical therapy. For school year 2014–2015, it was anticipated that the child would continue in the high school division of this

[1] Respondent filed a motion to remove petitioner's counsel because of an alleged conflict. See decision denying that motion filed contemporaneously with this decision.

school program, known as Bais Shaindel, which encompasses grades nine through twelve.[2]

As the result of an investigation by the New Jersey DOE about placements, the Board was ordered to remove all students placed in private unapproved and unaccredited schools, and place them in public or approved educational settings.

Another IEP meeting regarding C.H. was held on August 26, 2014. The Child Study Team developed a plan for placement of C.H. at Hawkswood School, a private school approved by the DOE for the provision of special education and related services to the disabled. The recommendation was for C.H. to be placed in a self-contained class, with appropriate supports and services, allegedly a more restrictive placement. Petitioner E.H. was not in agreement with this placement and filed for due process. He requested continuation of C.H.'s school program at Bais Shaindel for school year 2014–2015, pending the outcome of the due-process hearing.

MOTION TO REMOVE COUNSEL

The respondent seeks to disqualify Michael Inzelbuch, Esq., from representing the petitioner on the basis that he previously represented the BOE for ten years as general counsel and special education consultant, and was involved in every aspect of special education programming and in defending the BOE in special education proceedings. However he has not represented the Board since April 2012, almost two and one half years ago. The respondent also alleges that Mr. Inzelbuch was involved as Board attorney with C.H. and her parents in 2005 and 2007 as the district searched for schools which might be appropriate for the child, including Bais Rivka Rochel, the school which C.H. attended through eighth grade.

N.J.A.C. 1:1-5.3 provides the following:

> In any case where the issue of an attorney's ethical or professional conduct is raised, the judge before whom the

[2] Bais Shaindel is a private, unapproved and unaccredited religious high school for girls.

> issue has been presented shall consider the merits of the issue raised and make a ruling as to whether the attorney may appear or continue representation in the matter. The judge may disqualify an attorney from participating in a particular case when disqualification is required by the Rules of Professional Conduct or the New Jersey Conflict of Interest Law. If disciplinary action against the attorney is indicated, the matter shall be referred to the appropriate disciplinary body.

The Rules of Professional Conduct provide as follows with regard to former representation of a party:

> **RPC 1.9. Duties to Former Clients**
>
> (a) A lawyer who has represented a client in a matter shall not thereafter represent another client in the same or a substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing.
>
> . . . .
>
> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> > (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
> >
> > (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.
>
> (d) A public entity cannot consent to a representation otherwise prohibited by this Rule.
>
> **RPC 1.11. Successive Government and Private Employment**
>
> (a) Except as law may otherwise expressly permit, and subject to RPC 1.9, a lawyer who formerly has served as a government lawyer or public officer or employee of the

government shall not represent a private client in connection with a matter:

(1) in which the lawyer participated personally and substantially as a public officer or employee, or

(2) for which the lawyer had substantial responsibility as a public officer or employee; or

(3) when the interests of the private party are materially adverse to the appropriate government agency, provided, however, that the application of this provision shall be limited to a period of six months immediately following the termination of the attorney's service as a government lawyer or public officer.

(b) Except as law may otherwise expressly permit, a lawyer who formerly has served as a government lawyer or public officer or employee of the government:

(1) shall be subject to RPC 1.9(c)(2) in respect of information relating to a private party or information that the lawyer knows is confidential government information about a person acquired by the lawyer while serving as a government lawyer or public officer or employee of the government, and

(2) shall not represent a private person whose interests are adverse to that private party in a matter in which the information could be used to the material disadvantage of that party.

. . . .

(e) As used in this Rule, the term:

(1) "matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and any other matter covered by the conflict of interest rules of the appropriate government agency;

(2) "confidential government information" means information that has been obtained under governmental authority and that, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to

> disclose, and that is not otherwise available to the public.

The Board relies on City of Atlantic City v. Trupos, 201 N.J. 447, 462 (2010), holding that two factors are paramount in determining whether to order the disqualification of an attorney: whether the matters between the present and former clients are the same or substantially related; and whether the interests of the present and former clients are "materially adverse." Matters are considered to be "substantially related" if (1) the attorney for whom disqualification is sought received confidential information from the former client that can be used against that client in the subsequent representation of parties adverse to the former client, or (2) if the facts relevant to the prior representation are both relevant and material to the subsequent representation. Trupos, supra, 201 N.J. at 467.

In this matter, the issue is whether the former representation of the Board by Mr. Inzelbuch, which concluded two and one half years ago, precludes him from representing the petitioner, particularly since he was involved in the child's placement seven years ago. Substantial time has elapsed since Mr. Inzelbuch last represented the Board. There has been no showing that his previous representation provided him with such confidential knowledge as to preclude him from presently handling special education cases within the district. As to his involvement with the placement of C.H. seven years ago, that involvement appears to be confined to meetings and finalizing placement in a primary school which the child will no longer be attending. Any information regarding her next placement would be limited to her past two years of academic achievement and performance, as well as evaluations which are certainly more current than seven years ago. The matters are not the same, or substantially related. Under these specific circumstances, I conclude that Mr. Inzelbuch may continue representing C.H.

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

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.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). 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 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, petitioner E.H. filed a due-process petition regarding Lakewood's proposed change in his daughter's placement, and by way of the emergent application effectively invoked the "stay put." The petitioner contends that the current educational placement is Bais Shaindel as set forth in the March 18, 2014, IEP. Respondent, however, contends that Bais Shaindel is not a legally permissible placement 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 C.H. is the plan devised on March 18, 2014, which contemplated placement at the private school she was then attending, Bais Rivka Rochel, and its continuing program at Bais Shaindel. If the Bais Shaindel is C.H.'s "current educational placement," then application of the stay-put provision of the IDEA requires that she remain at Bais Shaindel after the filing of the September 9, 2014, due-process hearing request. 20 U.S.C.A. § 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, supra, 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"). 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, 78 F.3d 859.

Furthermore, the Third Circuit explained that the stay-put provision reflects Congress's 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, 108 S. Ct. 592, 604, 98 L. Ed. 2d 686, 707 (1988)); School Comm. v. Dep't of Educ., 471 U.S. 359, 373, 105 S. Ct. 1996, 2004, 85 L. Ed. 2d 385, 397 (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, supra, 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 September 9, 2014; thus, the "then-current" educational placement for C.H. at the time of the petition is the IEP that was developed for her on March 18, 2014. Pursuant to that IEP, C.H. was to continue at Bais Shaindel, the continuation of the program she attended at Bais Rivka Rochel. Subsequent to the filing for due process, there has been no agreement between the parties to change C.H.'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 free and appropriate public education, 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 (2014); 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. . . .
>
> 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.
>
> 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).
>
> [Id. at *32–33 (citations omitted) (emphasis added).]

It should be noted that respondent has raised an issue that Bais Shaindel is sectarian. However, stay put requires that C.H. remain at her "current educational placement," Bais Shaindel, as the approved placement in the March 18, 2014, IEP signed by both parties. Bais Shaindel, as the continuation of the Bais Rivka Rochel program, is the operative placement actually functioning at the time the petition was filed.

Neither of the two exceptions to the stay-put law is applicable because the parents have not agreed to the change in placement and the disciplinary provisions are not an issue in this matter.

As demonstrated in Somerville, the fact 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 Bais Shaindel is an eligible placement under N.J.S.A. 18A:46-14 remains to be litigated in the due-process proceeding.

The petitioner's motion for emergent relief is **GRANTED**. It is **ORDERED** that C.H. shall be enrolled and shall continue her program at Bais Shaindel with all supports and services as specified in her March 14, 2014, IEP.[3]

[3] The parties agree that the child shall continue to receive the actual services provided to her during through June 2014, while she attends Bais Shaindel: a specialized bus with an aide; nursing services

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 parent, 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).

September 17, 2014
DATE

SUSAN M. SCAROLA, ALJ

Date Mailed to Parties:

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currently provided by Bayada; a one-to-one aide on the bus and in school; related services of one-to-one occupational therapy (two times per week for forty-five minutes), physical therapy (two times per week for thirty minutes), and speech therapy (three times per week for twenty-five minutes); and supplemental instruction (one hour per week).