# *State of New Jersey*
OFFICE OF ADMINISTRATIVE LAW

**DECISION ON EMERGENT RELIEF**
OAL DKT. NO. EDS 12026-14
AGENCY DKT. NO. 2015 21753 ER

**J.J. and F.J. on behalf of R.J.,**
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: September 24, 2014 Decided: September 25, 2014

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

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was initiated by J.J. and F.J. on behalf of their daughter R.J. ("petitioners"), through an application for emergent relief filed on September 17, 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 R.J. to continue to attend the out-of-district school with all the specified services in her

Individualized Education Program ("IEP") of June 9, 2014. The Office of Special Education Programs transmitted the request for emergent relief to the Office of Administrative Law ("OAL") where it was filed on September 22, 2014. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Mr. Inzelbuch filed a Supplemental Certification with attachments on September 24, 2014. Ms. Butler asked that I consider her client's certification as well, although I had not received it as of the oral argument. I received it on September 24, 2014, and considered it as well.

Oral argument was scheduled and heard on the application for emergent relief by telephone on September 24, 2014.

## FACTUAL SUMMARY

According to the IEP dated June 14, 2014, and the briefs submitted, R.J. is an eight-year-old girl who is eligible for special education and related services from Lakewood. She is classified as Orthopedically Impaired.

R.J.'s most recent IEP, dated June 9, 2014, placed R.J. at Bais Faiga, a private religious school in Lakewood that is not approved by the New Jersey Department of Education for the provision of special education and related services. The IEP provides that for the 2014-2015 school year, R.J.'s program included speech-language therapy twice per month, occupational therapy twice per week, individual and small group physical therapy once each per week, individual counseling once per week, individual supplemental instruction once per day, and a one-to-one paraprofessional or aide.

The petition for emergent relief vaguely set forth that Lakewood is failing to provide the IEP mandated services R.J. requires and therefore she is regressing. (Petition at 33.) However, in oral argument, which Lakewood had opportunity to refute, counsel specified that petitioners are paying for the one-to-one aide that Lakewood is supposed to be providing. (IEP at p. 30.) Petitioners certified that Lakewood is not agreeing to pay for counseling and supplemental instruction as mandated in R.J.'s IEP

(IEP at p. 30). Thus, they are forced to pay for the services, which they cannot afford. Petitioners further certified that they are transporting the child per the IEP, but are not receiving payment for same as the IEP indicates, they should have contracted to do.

With regard to the services set forth above, Elchanan Freund, Supervisor of Child Study Team in Lakewood certifies that 1) R.J. is accompanied by the one-to-one paraprofessional, according to R.J.'s case manager, Jennifer Kaznowski; and 2) Adina Weisz, the District's Supervisor of Related Services, confirms that related service therapies are being provided to R.J. consistent with the private school schedule for such services, which usually begin on September 15. Respondent submitted records indicating that R.J. received speech/language therapy on September 17, 2014, physical therapy on September 17 and 19, 2014, and occupational therapy on September 17 and 19, 2014. Freund's certification further indicates that supplemental instruction is to be provided by Tree of Knowledge. Although Freund's certification contains double and triple hearsay regarding the status of Lakewood's agreement with Tree of Knowledge, it appears that Tree of Knowledge agreed to provide instruction to R.J. prior to approval of its contract with Lakewood that is being considered at the October 30, 2014, Board meeting. Last, regarding transportation, Freund agrees that the IEP provides that R.J.'s parents will transport her to and from school pursuant to a "parental contract" for transportation. He then certifies that Lakewood has received a directive from the State that it cannot enter into "parent contracts" for transportation of students in unapproved, unaccredited schools, which contracts exceed the statutory amount. No such directive was attached to the certification.

In oral argument, Ms. Butler stated that the District did not have notice through the petitioners or otherwise that the parents were paying for services for R.J.

## 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.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 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 J.J. and F.J. filed an emergent due-process petition alleging Lakewood is failing to provide services as set forth in their daughter's IEP, and by way of the emergent application effectively invoked the "stay-put." The petitioners do not allege specifically in this emergent relief application that Lakewood has changed the current educational placement of Bais Faiga as set forth in the June 9, 2014, IEP. Indeed, Lakewood does not dispute that the only IEP applicable to R.J. is the plan devised on June 9, 2014, which contemplated placement at the private school she was then attending, Bais Faiga. However, petitioners allege through their certification that they are paying for services that Lakewood should be providing as set forth in the IEP. Since the services to be provided in that IEP indicate that as of September 1, 2014, R.J. is to receive speech-language therapy twice per month; occupational therapy twice per week; individual and small group physical therapy once each per week; individual counseling once per week; individual supplemental instruction once per day; and a one-to-one paraprofessional or aide, then application of the stay-put provision of the IDEA requires that Lakewood continue to pay for such services beginning on September 1, 2014, and continuing after the filing of the September 17, 2014, due process hearing request. 20 U.S.C.A. § 1415(j); N.J.A.C. 6A:14-2.7(u). Mr. Freund's certification does not refute the petitioners' certification in that Mr. Freund says that members of his staff tell him that the services are being provided, but Mr. Freund does not say that Lakewood is paying for them. Petitioners certify that they are paying

for such services when stay-put requires that Lakewood pay for such services pursuant to the IEP.

The program and placement in effect when the request for due process was made is dispositive for the status quo or stay-put. Here, the request for due process was filed on September 17, 2014; thus, the "then-current" educational program and placement for R.J. at the time of the petition is the IEP that was developed for her on June 9, 2014. Pursuant to that IEP, R.J. was to continue the program that Lakewood said that she required at Bais Faiga. There is no dispute that, subsequent to the filing for due process, there has been no agreement between the parties to change R.J.'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."). Regarding transportation, if Lakewood has been issued a directive to not enter into a parental contract that is already contemplated in the student's IEP, then Lakewood could have filed an emergent relief application to be relieved of the requirement. Until it files such application, or the parties agree to have Lakewood transport R.J., stay-put applies to require Lakewood to contract with the parents to pay them to transport R.J. to Bais Faiga.

The petitioner's application for emergent relief is **GRANTED**. It is **ORDERED** that R.J. shall continue her program and placement at Bais Faiga with all supports and services as specified in her June 9, 2014, IEP. It is further **ORDERED** that if services

were missed from their start date of September 1, 2014, as set forth in the IEP, then compensatory services, specifically speech-language, physical therapy and occupational therapy, should be provided for those that were missed. It is further **ORDERED** that if petitioners paid for services that Lakewood agreed to provide in the IEP, Lakewood will reimburse petitioners for their expenses, including transportation.

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.

September 25, 2014 _____

DATE

**LISA JAMES-BEAVERS**, ALJ

Date Mailed to Agency: September 25, 2014

Date Mailed to Parties: September 25, 2014

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