

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION

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

Petitioners,

v.

**LAKEWOOD TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 13659-14

AGENCY REF. NO. 2015 21769

And

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

Petitioners,

v.

**LAKEWOOD TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 5730-15

AGENCY REF. NO. 2015 22467

CONSOLIDATED

B.L. ON BEHALF OF R.L.,

Petitioner,

v.

**LAKEWOOD TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 1316-15

AGENCY REF. NO. 2015 22156

R.K. ON BEHALF OF S.K.,

Petitioner,

v.

OAL DKT. NO. EDS 1930-15

AGENCY REF. NO. 2015 22151

**LAKESWOOD TOWNSHIP BOARD
OF EDUCATION,**
Respondent.

C.K. ON BEHALF OF T.K.,
Petitioner,
v.

**LAKESWOOD TOWNSHIP BOARD
OF EDUCATION,**
Respondent.

OAL DKT. NO. EDS 1932-15
AGENCY REF. NO. 2015 22152

S.H. AND C.H. ON BEHALF OF E.H.,
Petitioners,
v.

**LAKESWOOD TOWNSHIP BOARD
OF EDUCATION,**
Respondent.

OAL DKT. NO. EDS 2383-15
AGENCY REF. NO. 2015 22227

E.S. AND E.S. ON BEHALF OF Y.S.,
Petitioners,
v.

**LAKESWOOD TOWNSHIP BOARD
OF EDUCATION,**
Respondent.

OAL DKT. NO. EDS 3141-15
AGENCY REF. NO. 2015 22258

F.F. ON BEHALF OF S.F.,

Petitioners,

v.

**LAKEWOOD TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 3696-15

AGENCY REF. NO. 2015 22318

C.W. ON BEHALF OF M.W.,

Petitioner,

v.

**LAKEWOOD TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 3697-15

AGENCY REF. NO. 2015 22317

B.G. AND R.G. ON BEHALF OF Y.G.,

Petitioners,

v.

**LAKEWOOD TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 3698-15

AGENCY REF. NO. 2015 22290

B.E. ON BEHALF OF D.R.,

Petitioner,

v.

**LAKEWOOD TOWNSHIP BOARD
OF EDUCATION,**

Respondent,

OAL DKT. NO. EDS 3725-15

AGENCY REF. NO. 2015 22313

I.A. ON BEHALF OF C.A.,

Petitioner,

v.

**LAKESIDE TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 3949-15

AGENCY REF. NO. 2015 22316

S.G. ON BEHALF OF S.G.,

Petitioner,

v.

**LAKESIDE TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 3951-15

AGENCY REF. NO. 2015 22314

L.G. AND M.G. ON BEHALF OF K.G.,

Petitioners,

v.

**LAKESIDE TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 5734-15

AGENCY REF. NO. 2015 22466

Z.P. AND F.P. ON BEHALF OF R.P.,

Petitioners,

v.

**LAKESIDE TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 5737-15

AGENCY REF. NO. 2015 22464

J.F. AND C.F. ON BEHALF OF B.F.,

Petitioners,

v.

**LAKEWOOD TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 5742-15

AGENCY REF. NO. 2015 22462

A.E. AND S.E. ON BEHALF OF M.E.,

Petitioners,

v.

**LAKEWOOD TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 5758-15

AGENCY DKT. NO. 2015 22417

S.P. AND E.P. ON BEHALF OF A.P.,

Petitioners,

v.

**LAKEWOOD TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 5759-15

AGENCY REF. NO. 2015 22415

Y.N. AND E.P. ON BEHALF OF S.N.,

Petitioners,

v.

**LAKEWOOD TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 5760-15

AGENCY REF. NO. 2015 22414

T.H. AND Y.H. ON BEHALF OF S.H.,

Petitioners,

v.

**LAKEWOOD TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 5761-15

AGENCY REF. NO. 2015 22413

M.B. AND S.B. ON BEHALF OF Y.B.,

Petitioners,

v.

**LAKEWOOD TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 5762-15

AGENCY REF. NO. 2015 22412

I.R. AND L.R. ON BEHALF OF H.R.,

Petitioners,

v.

**LAKEWOOD TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 5825-15

AGENCY REF. NO. 2015 22522

M.G. AND S.G. ON BEHALF OF E.G.,

Petitioners,

v.

**LAKEWOOD TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 5829-15

AGENCY REF. NO. 2015 22521

E.M. AND E.M. ON BEHALF OF A.M.,

Petitioners,

v.

**LAKEWOOD TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 5830-15

AGENCY REF. NO. 2015 22520

N.W. AND R.W. ON BEHALF OF M.W.,

Petitioners,

v.

**LAKEWOOD TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 5831-15

AGENCY REF. NO. 2015 22519

Y.R. AND B.E. ON BEHALF OF M.R.,

Petitioners,

v.

**LAKEWOOD TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 5832-15

AGENCY REF. NO. 2015 22518

Y.R. AND F.L. ON BEHALF OF E.R.,

Petitioners,

v.

**LAKEWOOD TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 5833-15

AGENCY DKT. NO. 2015 22517

D.B. AND C.B. ON BEHALF OF E.B.,

Petitioners,

v.

**LAKEWOOD TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 5834-15

AGENCY REF. NO. 2015 22516

A.E. AND S.E. ON BEHALF OF O.E.,

Petitioners,

v.

**LAKEWOOD TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 5837-15

AGENCY REF. NO. 2015 22515

J.K. AND S.K. ON BEHALF OF M.K.,

Petitioners,

v.

**LAKEWOOD TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 5841-15

AGENCY REF. NO. 2015 22514

Y.Z. AND J.Z. ON BEHALF OF C.Z.,

Petitioners,

v.

**LAKEWOOD TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 5843-15

AGENCY REF. NO. 2015 22513

M.B. AND J.B. ON BEHALF OF M.B.,

Petitioners,

v.

**LAKEWOOD TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 5848-15

AGENCY REF. NO. 2015 22512

Z.F. AND R.F. ON BEHALF OF E.F.,

Petitioners,

v.

**LAKEWOOD TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 5851-15

AGENCY REF. NO. 2015 22416

J.S. ON BEHALF OF I.S.,

Petitioner,

v.

**LAKEWOOD TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 5859-15

AGENCY REF. NO. 2015 22463

N.J. AND R.T. ON BEHALF OF Y.J.,

Petitioners,

v.

**LAKEWOOD TOWNSHIP BOARD
OF EDUCATION,**

Respondent.

OAL DKT. NO. EDS 5867-15

AGENCY REF. NO. 2015 22465

Michael I. Inzelbuch, Esq., for petitioners

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

Alison L. Kenny, Esq., for respondent (Schenk, Price, Smith & King, attorneys)

Record Closed: August 23, 2016

Decided: August 24, 2016

BEFORE **JOHN SCHUSTER III**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

These matters are a result of cross motions filed by the parties to these actions. I find it is appropriate to consolidate these matters for the purpose of deciding these motions. The identity of the respondent is the same in each one, that being the Lakewood Township Board of Education. The nature of all the questions of fact and law are the same, that being whether or not the actions of the respondent was appropriate in light of the respondent's obligation to provide a free and appropriate public education (FAPE). The facts are similar, if not identical, in all of these matters as they pertain to children of similar age, who are classified preschool disabled attending an out-of-district placement the Special Children's Center (SCC) and the proposed removal of those children from that school. It is also clear from a review of all these files that each of the motions is virtually the same except for the identity of the petitioners, however the action of the District is identical. Any dissimilar facts are insignificant as they relate to issues not pertinent to these motions. I have found that the common questions far outweigh the dissimilar questions of fact and law and it is advisable to dispose of all aspects of the controversy in a single proceeding. As a result, I hereby **ORDER** that these matters be consolidated for the purpose of deciding these motions.

Petitioner filed a notice of motion seeking a determination that the District's actions were improper in proposing removing the student's from the Special Children's Center since the proposed placements by the District were either non-existent, filled to capacity or did not offer FAPE. Petitioner also asked for a directed verdict as a result of

respondent not filing answers to the original petition being filed. That issue I am not addressing in detail as the decision in this motion makes that procedural defect inconsequential. Subsequent to petitioner's motion, respondent filed motions for each case seeking dismissal of the petition on the grounds respondent has reversed its position and continued placement at SCC. The result of which is that the petitioner is now getting what they asked for by way of relief in their original petition.

These matters are intertwined with a case entitled The Center for Education v. State of New Jersey Dept. of Education which bears OAL Dkt. No. EDU 14525-14. That was an appeal on a licensing matter in which The Center for Education which trades as the Special Children's Center filed a petition against the State of New Jersey Department of Education seeking to be classified as an approved school for the preschool disabled. During the course of multiple days of hearing in 2015 a substantial amount of facts were revealed which formed the background for these matters.

FINDINGS OF FACT

Based on the proofs submitted in these motions I make the following findings of fact:

- Respondent was advised by two law firms representing it (Schwartz, Simon, Edelstein & Celso and Schenk, Price, Smith & King) that SCC was a legal placement for preschool disabled children because it was a non-sectarian governmental approved early childhood program with the ability to implement a child's IEP by certified or licensed staff.
- Respondent placed the children which are the subject of these motions at the SCC by way of individual educational plans (IEPs) with the specific finding by the child study team that there were no other options available to meet the individual needs of those children. The options reviewed were the District's Lakewood Early Childhood Center (LECC) which was at full capacity and had no room for even one additional child, other public school districts in the

general area none of which had openings for any of these children, or other private schools which could not provide the services needed and thereby did not meet the requirements of the respective IEPs.

- In the Fall 2014 the State Department of Education, Office of Special Education Programs (OSEP) advised the District that it had to remove all the children placed at SCC. This decision was based in part upon misinformation supplied by the District that the Department knew was incorrect. It was also based on an interpretation of the regulations that was in contradiction to the legal opinion given by counsel for the District that SCC was a legal placement as it was licensed by the Department of Children and Families and therefore met the requirement for placement set forth in N.J.A.C. 6A:13A-9.1(a) and (b).
- The District then on or about December 2014 revised all the IEPs for the students attending SCC to place them at a program at the LECC, that was at full capacity and could not accommodate any of the students; a school that was sectarian and not considered appropriate in the previous IEPs that placed the children at SCC, or some unidentified program that as of yet does not exist. As a result of proposing those IEPs which would have removed the children from SCC the petitioners all filed a petition claiming the denial of FAPE and seeking a stay-put order which was granted.
- I further **FIND** that but for that filing the children that were being removed from SCC would be left with no program, placement or education and the granting of the stay-put orders changed the action of the District and prevented the children from being removed from a program that provided FAPE to a non-existent or inappropriate program that was previously rejected by the child study teams.
- While this was going on SCC was in litigation before this court seeking to receive “approved status” from the Department of Education.
- Halfway through that litigation the DOE acknowledged that the SCC was qualified to be an approved educational facility and formerly approved the

school for students with disabilities affective July 2015. At or about the same time petitioner filed the within notice of motion seeking a determination that the District's actions were improper in removing the students from the SCC and putting them in proposed placements that were non-existent, full to capacity or did not offer FAPE.

- Thereafter respondent agreed to amend the student's IEPs to reflect replacing the student at the SCC.
- Respondent then filed this notice of motion seeking a dismissal of the petition based on mootness because it changed its position by developing now a third IEP placing the children back at the SCC.

DISCUSSION

On June 30, 2014 respondent submitted to the Department of Education a Needs Assessment Survey Response Form which was an attachment to the application for SCC's approval for preschool disabled children. It incorrectly listed twenty-one students the District claimed attended the SCC and the document specifies that other programs and options were considered for the respective students but that SCC was the only appropriate one. Those options were the LECC which was at capacity, and the SCHI School which was previously determined to be inappropriate for these students. On February 13, 2015 a second Needs Assessment Survey Response Form was submitted now listing thirty-three students at SCC, not twenty-one as previously stated, and the same options were considered as well as other surrounding public school districts as options that were considered by not available prior to the placement at the SCC. The difference between the thirty-three students in the second submission and the twenty-one students in the first submission is significant because the student population was a consideration for approval and having only twenty-one students would disqualify a school for approval while thirty-three students would be sufficient so the State could give approval.

The issue of whether the original placements of these children at SCC was legal has been an undercurrent in these matters. In 2013 when respondent was represented by the Schwartz, Simon, Edelstein & Celso law firm an opinion was written that SCC was a legal placement for preschool disabled students pursuant to N.J.A.C. 6A:13A-9.1(a) and (b). It was also indicated as legal by Schenk, Price, Smith & King wherein they write in a settlement agreement in a matter bearing OAL Dkt. No. EDS 10958-13 “Whereas the Department of Education has since advised the Board that placement of preschool students at SCC is permitted provided SCC was otherwise licensed as a preschool provider”. SCC was licensed as a childcare center by the Department of Children and Families. In addition a statement was given by Eric Harrison, Esq. of Methfessel & Werbel in the Center for Education matter referring to Dep’t of Education representative Mr. John Worthington’s letter of December 3, 2013 citing the permissible placement regulation N.J.A.C. 6A:14-4.3(b) “in an early childhood program operated by an Agency other than a Board of Education so long as the program is licensed or approved by a governmental agency, is non-sectarian, is able to fully implement the student’s IEP and services are provided appropriately by certified and/or licensed personnel. SCC fits all of those qualifications.”

The proposal for the LECC does not appear to be a sincere option since anyone familiar with the LECC’s physical location was aware the program was at full capacity and there was no available space to accommodate any additional classrooms or students for that program. This was confirmed by individuals who had visited the placement, the State Monitor and the supervisor of Special Services for respondent who was clearly familiar with the capacity for his programs.

LEGAL DISCUSSION

The District’s obligation is to provide children with disabilities a free and appropriate public education pursuant to the Individuals’ with Disabilities Education Act (IDEA) 20 U.S.C.A. § 1401 to 1485. In doing so the law expresses a strong preference that the educational opportunity be provided in the least restrictive environment commensurate with the child’s disability and educational needs. Oberti v. Board of Educ., 992 F. 2d 1204 (3rd Cir. 1993); N.J.A.C. 6A:14-4.2. While the facts and

circumstances regarding one child are not generally of consequence in regards to another child's case nor are the propriety of the District's action in respect to that other student however in the present case the dynamics here are a bit different. All the students had one thing in common, they were students at SCC and based on the directive given for some unknown reason, the Department of Education that previously approved SCC pursuant to N.J.A.C. 6A:14-4.3(d) changed its position the following year and ordered all the students placed there under valid IEPs be removed from the school. The options that Lakewood chose were either a school that had no room for additional students, out-of-district public schools which already denied acceptance of these students, a sectarian school which was previously considered and which could not offer FAPE, or an unspecified program which was non-existent. It is not disputed that the students that were placed by the respondent at SCC were placed there because there was no other options available to provide those students with FAPE in the least restrictive environment. In other words SCC was the only option available. For some reason then on or about November 2014 the Department of Education issued an order reversing their prior position and in essence took the children from SCC and put them nowhere. In fact they eliminated their educational program. This directive by the State to the respondent left the respondent with two choices, they could either challenge the State's directive which they chose not to do, or they can comply with the directive and deny any education to the students that were attending SCC. Because they chose the latter petitions were filed demanding FAPE and stay-put orders were entered so that the children had an appropriate education during the pendency of these proceedings. During the course of litigation regarding the approval of SCC by the Department of Education, the Department modified its position and advised the parties that they would be approving SCC as an educational facility for preschool disabled thereby opening the door to end all this litigation. Consequently, respondent reissued IEPs for these children placing them back at SCC even though they never physically left because of the efforts of their counsel successfully securing stay-put orders during the litigation.

CONCLUSION

I **CONCLUDE** that when these students were originally placed at SCC they were being offered FAPE.

I further **CONCLUDE** that when the District proposed IEPs in non-existent, sectarian or over capacity placements, the students were being denied FAPE.

I further **CONCLUDE** that petitioners demand that each student remain at SCC and continue to receive an appropriate education under the conditions established in the student's individual IEP was achieved through court order.

I further **CONCLUDE** petitioners' are prevailing parties in this litigation since they were successful in securing stay-put and thereby receiving the benefit of remaining in an appropriate program and not removed to a proposed placement that was either non-existent or not appropriate.

ORDER

For the reasons set forth I **ORDER** respondent to maintain each student at SCC so long as it remains appropriate and provides the student with meaningful educational benefit in the least restrictive environment.

I further **ORDER** that when and if another program becomes available that will provide FAPE to the student an IEP can be presented for consideration of a change in placement.

I further **ORDER** Summary Decision be granted in favor of petitioners because the IEPs issued by respondent placing the students at SCC were legal and appropriate while the IEPs issued removing said students en masse failed to offer FAPE.

Having achieved all the relief requested in these proceedings I **ORDER** this controversy be concluded and all pleadings be **DISMISSED**.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2012) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C.A. § 1415(i)(2); 34 C.F.R. § 300.516 (2012). 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 24, 2016 _____

DATE

JOHN SCHUSTER III, ALJ

Date Received at Agency:

Date Sent to Parties:

/cb