

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION

OAL DKT. NO. EDS 13665-14

AGENCY DKT. NO. 2015 21764

C.F. AND L.F. ON BEHALF OF C.F.,

Petitioners,

v.

LAKEWOOD TOWNSHIP

BOARD OF EDUCATION,

Respondent.

Michael I. Inzelbuch, Esq., for petitioners

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

Record Closed: December 11, 2015

Decided: April 28, 2016

BEFORE **JOHN SCHUSTER III**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter C.F. and L.F. (petitioners), the parents of C.F., appeal their daughter's proposed change of placement from Bais Rivka Rochel (BRR) a private primary religious school in Lakewood, New Jersey to home instruction.

The matter was transmitted to the Office of Administrative Law (OAL) on October

22, 2014 as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was heard on March 13 and 23, April 29, and June 5, 2015. Giving the parties an opportunity to make post-hearing submissions the record closed on December 11, 2015 upon the last being received.

FINDINGS OF FACT

In its opening statement the District acknowledged C.F. has multiple diagnoses which qualify her as being described as a “medically fragile” student. As a result, among other accommodations, it is necessary for C.F. to be in a totally controlled temperature environment and she can’t travel more than twenty (20) minutes. The District also acknowledged C.F. is receiving an appropriate education at BRR and furthermore neither Lakewood Board of Education nor any other local public education districts can accommodate C.F.’s educational and medical needs. The District stated it wants C.F. to remain at BRR for the 2014-15 school year but since the State Department of Education issued a directive that a child is not allowed to be placed in an unapproved secular school it must deny petitioner’s request to keep C.F. at BRR and defend its proposal to educate C.F. via home instruction as the least restrictive placement.

C.F.’s treating physician describes her as “an extremely sick little girl” and unstable, in chronic pain and having multiple complex needs. (R-2.) Specifically, she has been diagnosed as having a brain glioma, adrenal insufficiency, inability to regulate water, sodium imbalance, diabetes insipidus, hypothalamic obesity and multiple kidney stones. She requires hourly g-tube feedings with sodium monitoring. A nurse must be present to manage her delicate fluid balance as she does not drink by mouth. Her fluid output must also be monitored. C.F. also has episodic diarrhea which affects her sodium balance. She has fluctuating central fevers ranging from 88 to 104 degrees requiring warming or cooling her down as needed. She suffers from chronic pain which is treated with opiates and physical distractions. C.F. is treated with hydrocortisone for adrenal insufficiency but this requires vigilant monitoring to avoid harm. Because her

conditions and needs are frequently changing she must be continuously monitored.

The District prepared an IEP for the 2013-14 school year which was accepted by the petitioners. (R-1.) The document recognized C.F.'s medical fragility. Based on the testimony of her case manager, Shayna Shifrin, I **FIND** the District had no program or the resources to accommodate C.F.'s needs. In addition, the District contacted surrounding school districts to locate a public education setting for C.F. but no positive responses were received. Therefore, it was decided to place C.F. in Bais Rivka Rochel (BRR), an unapproved secular school which could provide the physical assistance for activity of daily living skills, a temperature controlled environment, monitoring and a smaller school setting with easy access to a private room to meet her multiple needs. In addition BRR is close to home so she will be able to travel to school without complications and she can attend a general education classroom with Resource Room pull out to meet her social and learning needs. Her program also included weekly speech, occupational and physical therapies.

I also **FIND** prior to developing the October 1, 2013 IEP (R-1) Ms. Shifrin became familiar with C.F.'s medical and educational needs. She visited BRR to observe the educational program C.F. would be attending and concluded it would be appropriate for C.F. At or about the same time the County Supervisor of Child Study of The New Jersey Department of Education advised the District there were not any in-district special class programs in Ocean County with openings that could accommodate C.F.'s needs. (P-1.) As a result the IEP for the 2013-14 school year placed C.F. at BRR with supports and therapies. Ms. Shifrin again visited BRR on October 23, 2013 to observe C.F. in an educational setting. She found C.F. to be happy, engaged in academics and expressively participating in the classwork. Ms. Shifrin also observed C.F.'s aide skillfully redirecting her focus from the pain she endures to social and academic interests. Ms. Shifrin continued to monitor C.F.'s progress at BRR in the 2013-14 school year in her position as Case Manager. She determined C.F.'s IEP was being implemented and her educational, physical and emotional needs were being met at BRR. The respondent agreed to place C.F. at BRR and fund tuition and charges for

therapies, related services and transportation in the 2013-14 school year.

As a result of a State Department of Education directive to respondent, an annual IEP was proposed by Lakewood for the 2014-15 school year. That IEP called for the removal of C.F. from BRR and placed her on home instruction. (R-3.) Petitioners did not consent to the change of placement. This IEP was ineffective since prior to its implementation petitioner was successful in securing a “stay-put” order continuing C.F.’s placement at BRR with the same services being provided at District’s expense. Ms. Shifrin, in her capacity as Case Manager spoke to Mr. Freund, the Director of Special Services for Lakewood. She testified they both agreed that C.F.’s placement at BRR and the program developed for her there was appropriate and providing C.F. with FAPE, something the District could not do in-house, in another public school or through home instruction. They also both agreed that removing C.F. from BRR would be harmful as C.F. was making educational and social progress and the program was meeting all C.F.’s needs. I also **FIND** C.F.’s progress at BRR was to a great extent caused by her peer interaction which motivated her desire to learn and fostered her ability to learn by distracting her from her constant pain and physical inefficiencies.

Mr. **Eli Freund** testified as a certified school psychologist and supervisor of the District’s Child Study Teams. He testified it was his understanding the Department of Education was directing Lakewood to cease developing placements for special needs students at unaccredited sectarian schools. He also stated he was familiar with C.F.’s educational needs and there were no public or private non-sectarian schools available for C.F. that could satisfy the state’s directive. Mr. Freund concluded home instruction was the only location that would satisfy the state directive even though such placement would not provide FAPE in the least restrictive environment because there would be no peer interaction or needed emotional support for C.F. to deal with her medical fragility. He also testified that the BRR program was appropriate for C.F., was providing her FAPE and saw evidence she was making progress. He also concluded BRR was 100% better than home instruction for C.F. Mr. Freund testified he made his opinion known to the State Monitor overseeing the Lakewood Board of Education and the State Monitor

agreed C.F. should remain at BRR. He also testified it was his understanding a Department of Education employee at Office of Special Education (OSE) directed the State Monitor to resolve C.F.'s placement and program issues through litigation and not by way of a resolution or settlement. Mr. Freund also testified about the procedure implemented by Lakewood staff when considering an out of district placement. He stated this procedure was followed for C.F. Mr. Freund referred to P-16 at pages 44 through 50 which pages are part of the Lakewood Board of Education operating manual. He stated forms were prepared and sent to the Department of Education Ocean County office for approval of C.F.'s intended placement at BRR in October, 2013. The forms included general information about C.F. and the reasons why an out of district placement was necessary for the student. The County Department of Education office confirmed there were no public school district special class programs in Ocean County to accommodate C.F. and Lakewood was never advised by that office that it could not use BRR as C.F.'s education placement. See P-1. As a result, C.F. attended BRR under the authority of the October 1, 2013 IEP and Lakewood paid the tuition and costs for related services except for any sectarian instruction.

Rosemarie Frazer testified she was an Executive Secretary working for the Lakewood Board of Education. Her job was to process the requests by case managers for out of district placements when Lakewood did not have a program to meet a student's special needs. She stated she assembled the package for C.F. requesting the state Department of Education County Office of Child Study approve her out of district placement at BRR. When she received a positive response she prepared a final package consisting of the IEP, rationale for placement statement and a Naples application saying when and where the child was placed at BRR. The State Office of Special Education directed the Naples application form be used even though this was not a Naples Act placement. She sent that entire package to the County Supervisor of the Department of Education. The package was reviewed and signed off by one of her supervisors, either Ms. Tobia, the Director of Special Services or Ms. Winters, the District Superintendent of Schools prior to being sent. Ms. Frazer stated the purpose of this exercise was to keep the Department of Education and its County office advised of

each out of district placement so special education students could be tracked. Ms. Frazer also testified her supervisor, Helen Tobia, had reviewed C.F.'s out of district package and approved of the student's placement at BRR and did not direct placement elsewhere as she had done against the decision of child study teams for other children.

I **FIND** no one working for the state Department of Education ever advised the Lakewood District of an objection to C.F.'s placement at BRR or that FAPE could be provided at another placement.

I **FIND** based on the testimony of Michael Azzara, the State Monitor assigned to oversee the actions of the Lakewood Board of Education, that his primarily responsibilities dealt with financial and personnel oversight. He also worked on class size and construction issues. With respect to matters dealing with special education he relied on the expertise of the district's child study teams and Ms. Helen Tobia, the Supervisor of Student Personnel Services for guidance. He later discovered Ms. Tobia was not performing her duties correctly and may have been acting contrary to law.

I **FIND** Mr. Azzara became aware at some point in time that the Office of Special Education (OSE) had issued a directive that Lakewood students could no longer be placed in unapproved or unaccredited or sectarian schools. The directive stated if the district could not offer a free and appropriate public education (FAPE) in-district for a student and no approved, accredited non-sectarian school could be located the student would have to have home instruction. Home instruction could only be avoided by an order of a court or with Commissioner of Education approval. I further **FIND** Mr. Azzara subsequently learned he had some discretion to disregard that OSE directive in unique situations where it was warranted to provide FAPE when no other options were available.

I **FIND** C.F.'s date of birth is October 11, 2006. She is being educated at BRR pursuant to an IEP of October, 2013 and continues under a "stay put" Order. The

district proposed an IEP in November, 2014 for the 2014-2015 school year which called for unspecified home instruction. The child study team and case manager disagreed with that placement as it would not only be inappropriate for C.F. but in fact would be harmful and cause regression. In spite of her young age C.F. has undergone two brain surgeries and had almost four years of chemotherapy. Peer interaction in a classroom setting serves as an academic motivator and distraction from constant pain. She has made academic successes which amplify her self-esteem and thereby encourage her to work harder to overcome her physical handicaps as she wants to be like the others in her class. She would lose that motivation in a home instruction setting and regress from depression and pain. I also **FIND** the progress C.F. has made since attending BRR is measurable and significant. For example C.F. was wheelchair bound prior to attending BRR and now is motivated to exert substantial energies into becoming ambulatory despite the pain endurance in reaching that goal. C.F. now ambulates frequently with the assistance of leg braces. The classroom environment has given her the will and strong desire to be like her peers. This has also fostered socialization skills with peers and adults which would not exist in home instruction.

I **FIND** the undisputed testimony of Gloria Bland Katz to be compelling. Ms. Katz has and is recognized as an expert in special education. She is a speech and language pathologist as well as a Learning Disability Teacher Consultant (LDTC). She has many years of experience doing special education evaluations for districts and parents. She has been employed as a staff member in New York City and for multiple districts in New Jersey. She has also been a member of the New Jersey State Training Team in performing preschool assessments. Ms. Katz reviewed records and observed C.F. at BRR.

Ms. Katz agreed with the October, 2013 IEP which concluded BRR was the only appropriate option for C.F. to receive educational benefit in the least restrictive environment because of her impacting medical conditions and there being no public or other private school that could meet her unique needs. Ms. Katz stated she had serious “concerns” about the November, 2014 IEP offered C.F. She testified this was the first

time she ever saw a district being directed by the State Department of Education where to place a child. The Department's directive did not consider the individualized needs of C.F. and amounted to denying C.F. access to education. The requirement of educating a child in the least restrictive environment means a child is to have access to education with typical peers as close to that child's home community as possible with no harmful impact to that child. Ms. Katz further testified it was her expert opinion that a home instruction program would not be the least restrictive environment for C.F., would be inappropriate and potentially harmful by denying her the needed personal and academic development.

Ms. Katz also gave her expert opinion regarding the IEP of November, 2014 which provided home instruction for C.F. Ms. Katz testified C.F.'s IEP was deficient in a number of ways beginning with the fact it did not specify the amount of hours home instruction would be provided nor when instruction would start and terminate. In addition the IEP doesn't identify the instructional areas being taught nor when the instruction will commence, terminate or how frequently instruction will occur. Ms. Katz also testified the IEP calls for the related services of speech, occupational therapy and physical therapy to be administered in an unidentified "therapy room" and that is a location rarely found outside of a school building. Ms. Katz also took exception with the IEP statement that "home instruction is being offered at this time to provide for C.F.'s educational and therapeutic needs." She testified this is not true because of C.F.'s medical condition show she is fragile, challenged and fights for her survival on a daily basis. C.F. told her she likes school because when she's in school she's a "regular kid" and not sick but when she's home she's sick. Ms. Katz testified her teachers report she fights constant pain by taking an active role in classroom activities and finds relief in the social atmosphere of being with her classmates. Ms. Katz indicated C.F.'s work samples at BRR demonstrate academic and functional progress and her therapists have confirmed she is thriving socially and emotionally in her current school setting.

Ms. Katz opined there are no benefits for C.F. to be on home instruction and removed from the healthy BRR environment. Taking C.F. away from her peers and

removing her from a program where she is making measurable progress will have an adverse effect because she will no longer identify herself as a regular kid but as a sick child suffering with pain and depression. Ms. Katz testified home instruction is intended to be a temporary placement because it is restrictive and is generally limited in duration for that reason. Consequently, removing C.F. from BRR and placing her on home instruction should only be a short-term change because of its deleterious effects and C.F. will probably have to be returned to BRR because there are no other options for this child. The result will be a child who will be sicker and regress academically, socially and emotionally.

I **FIND** C.F.'s October, 2013 IEP provides for her to receive physical, occupational and speech therapies. C.F. has received those services while attending BRR. C.F. has progressed from being wheelchair bound to being ambulatory which has allowed her to participate in more school activities. She has also developed a writing skill. When C.F. started at BRR she didn't have the ability to form letters and now writes in complete sentences. C.F.'s speech therapy has likewise been successful. When she first started at BRR she would only repeat the same few things as her language was severely limited. Due to the speech therapy she received C.F. can now hold meaningful conversation which has greatly increased her social skills. I **FIND** C.F. has overwhelming fortitude demonstrated by her drive to be like her classmates. She pushes herself to overcome her physical handicaps by mimicking the actions of her non-handicapped peers and her current program's progress reports confirm she has been successful in doing so.

I **FIND** the program offered at BRR provides FAPE for C.F. The program of academics and related services has been successful as C.F. has made meaningful and measurable progress. I also **FIND** home instruction would not provide FAPE and would result in academic regression.

LEGAL ANALYSIS AND DISCUSSION

The Individuals with Disabilities Education Act (IDEA) requires school districts to provide students with disabilities a free and appropriate public education (FAPE), like their non-disabled peers. 20 U.S.C. §§ 1400-87. The purpose of the IDEA generally is to ensure that “all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living . . .” 20 U.S.C. § 1400(d)(1)(A). In order for a participating State to receive federal funds it must have in effect a policy complying with the IDEA’s purpose. 20 U.S.C. § 1412(a)(1). New Jersey is a participating State and has legislation and regulations adopting the language, purpose and goals of the IDEA. N.J.S.A. 18A:46-2, et. seq.; N.J.A.C. 6A:14-1.1, et. seq. The United States Supreme Court has developed a two part inquiry to determine whether a school district has provided FAPE: “(1) whether the school district complied with the procedures set forth in the Act; (2) whether the individualized education program (IEP) was reasonably calculated to enable the child to receive educational benefit in the least restrictive environment (LRE).” Bd. of Educ. of Hendrick Hudson Central School District v. Rowley, 458 U.S. 175, 206-207 (1982). The requirement for FAPE to be provided in the least restrictive environment is codified in 20 U.S.C. § 1412(a)(5) and N.J.A.C. 6A:14-4.2. N.J.A.C. 6A:14-4.2 states:

- (a) students with disabilities shall be educated in the least restrictive environment. Each district board of Education shall ensure that
 - 1. To the maximum extent appropriate a student with a disability is educated with children who are not disabled; . . .
 - 6. Placement is provided in appropriate educational settings as close to home as possible; . . .
 - 10. Placement in a program option is based on the individual needs of the student; . . .

In addition, when determining whether a placement meets the requirement of being the least restricted environment the code directs that consideration is to be given to whether

the student can be educated satisfactorily in a regular classroom with supplementary aids and services. Federal law requires that to the maximum extent appropriate children with disabilities including children in public and private institutions or other care facilities are educated with children who are not disabled in special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of the child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1412(a)(5)(A). Greer v. Rome City School District, 950 F.2d 688, 695(11th Cir. 1991), citing Daniel R.R. v. State Board of Ed., 874 F.2d 1036, 1045(5th Cir. 1989). Along the continuum of alternative placements, from least restrictive to most restrictive, home instruction is one of the most restrictive. 34 C.F.R. § 300.115. It should only be the designated placement “when it can be documented that all other less restrictive options have been considered and have been determined inappropriate.” N.J.A.C. 6A:14-4.8(a).

A student’s IEP establishes the rationale for the pupil’s educational placement. N.J.A.C. 6A:14-1.3. It must demonstrate the education offered the student is sufficient to confer some educational benefit upon the pupil. Lascari v. Ramapo Indian Hills Reg. School Dist., 116 N.J. 30, 47-48 (1989). And the benefit offered must be more than trivial or de minimis. Oberti v. Bd. of Ed. of Boro of Clementon Sch. Dist., 995 F.2d 1204, 1213 (3d Cir. 1993). In addition, the IDEA clearly favors reintegrating children into a school setting where they can socially interact with other children. A.K. v. Gwinnett County School Dist., 556 Fed. Appx. 790 (11th Cir. 2014).

I have found in this case respondent’s decision to comply with the State’s directive to remove all students from sectarian schools violates N.J.A.C. 6A:14.2(a)10 as it applies to C.F. That decision does not ensure, as is required by the cited regulation, the individual needs of C.F. The overwhelming testimony and evidence presented in this matter confirms C.F. is thriving beyond expectation at BRR. It also confirms that C.F. will not only not receive FAPE if home instructed but will regress in multiple areas.

The issue now before this Court has to do with how C.F. can receive FAPE when no approved, accredited or non-sectarian school can provide same because of C.F.'s unique medical conditions and FAPE can only be provided in a particular sectarian placement.

The placement of a student in a sectarian school by a local educational agency and the accompanying payment of tuition is prohibited by the Establishment Clause of the First Amendment of the United States Constitution (citations omitted). In an effort to provide FAPE, Lakewood placed C.F. at BRR, a sectarian institution of learning, until directed by the State to remove her to the restrictive and regressive placement of home instruction. This directive, while in conformity with 34 C.F.R. § 76.532 banning the use of federal funds to pay for religious worship, instruction or proselytization is inopposite with the Individuals with Disabilities Education Act (IDEA) mandating FAPE for all disabled students. While a public school district may only place disabled students in private schools that meet state standards no such restriction is placed on parental unilateral placements. Consequently tuition reimbursement to a parent is permitted if a school district is unable to provide the student FAPE. T.R. v. Kingwood Twp. Bd. of Ed., 205 F.3d 572, 581 (3d Cir. 2000) and Warren G. v. Cumberland Cty. School Dist., 190 F.3d 80, 83 (3d Cir. 1999). When a parent disagrees with a proposed IEP, as was done here concerning the home instruction placement, it may be awarded tuition and related services reimbursement by an administrative law judge upon the finding the district did not offer FAPE and the private placement was appropriate. N.J.A.C. 6A:14-2.10.

Simply stated, the IEP of November 2014 offered by the district calling for home instruction did not offer C.F. FAPE. Petitioners were granted a "stay put" order maintaining C.F.'s placement at BRR. This I **FIND** akin to a unilateral placement in this context as it was in contravention of the district's proposal. I have found the program at BRR did provide C.F. with FAPE. As such the petitioners are entitled to reimbursement for all non-sectarian academic instruction and related services in accordance with the ruling in L.M. ex. rel. H.M. v. Evesham Twp. Bd. of Educ., 256 F.Supp.2d. 290 (D.N.J.

2003).

CONCLUSION

I **CONCLUDE** the IEP offered by respondent in November 2014 did not offer C.F. a free and appropriate public education. I further **CONCLUDE** as a result of C.F.'s unique condition the only educational placement which could provide her with a free appropriate public education is the program and related services developed for her at Bais Rivka Rochel. I further **CONCLUDE** petitioners are the prevailing party in this matter.

ORDER

I **ORDER** petitioners unilaterally place C.F. at Bais Rivka Rochel as soon as possible and pay for her tuition and the cost of her related services. I further **ORDER** respondent reimburse petitioners for non-sectarian tuition costs and related services expenses within thirty (30) days of submitting proof of payment.

DECISION

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.

April 28, 2016 _____

DATE

JOHN SCHUSTER, III, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

/cb

APPENDIX

WITNESSES

For petitioner:

Rosemarie Frazer
Michael Azzara
Helen Tobia
Janina Zak-Krusucki
C.F. (parent)
Tobree Mostel
Gloria Bland Katz
Adina Weisz
Rena Lederer
Eli Freund

For respondent:

Shayna Shifrin
Eli Freund

EXHIBITS

For petitioner:

- P-1 E-mail to Lakewood BOE from Dep't of education County Office advising no public schools have placements for C.F., dated October 8, 2013
- P-2 Summary of Child Study Team Actions
- P-3 Support reasons for C.F.'s placement at BRR, dated October 11, 2013
- P-4 Request and denial for shared services
- P-5 Out of District contract review form
- P-6 Psychological evaluation, dated June 20, 2013

- P-7 Educational evaluation, dated June 18, 2013
- P-8 Letter from Children's Hospital of Philadelphia, dated November 25, 2014
- P-9 Tuition voucher, dated February 1, 2014
- P-10 Letter from BRR, dated March 3, 2015
- P-11 OSEP Complaint form
- P-12 Affidavit of E. Freund, Supervisor of Special Services
- P-13 Tuition voucher, dated August 1, 2014
- P-14 Tuition voucher, dated February 1, 2014
- P-15 Review of Correction Action, dated March 16, 2015
- P-16 Petitioners' request for document production, dated March 15, 2015
- P-17 Not admitted
- P-18 Affidavit of Helen Tobia
- P-19 Decision on Emergent Relief in the matter of N.W. et als vs. Lakewood BOE, dated July 16, 2013
- P-20 Decision Approving Settlement in the matter of N.W. et als vs. Lakewood BOE, dated May 2, 2014
- P-21 Certification of Joanne Butler, Esq., dated March 12, 2015
- P-22 (same as P-1)
- P-23 Not admitted
- P-24 Subpoena to testify served on Janina Zak Krasucki, Ocean County Office of Department of Education, dated March 16, 2015
- P-25 Gloria B. Katz curriculum vitae
- P-26 E-mail communications between Lakewood school personnel Helen Tobia and Adina Weisz
- P-27 E-mail communications between Helen Tobia and Adina Weisz
- P-28 Purchase orders issued against BRR
- P-29 E-mails regarding tuition payment
- P-30 Approval of parent transportation contract
- P-31 Resume of C.F.'s therapists
- P-32 Writing sample
- P-33 Progress reports

P-34 Session notes

P-35 Lakewood School District audit

For respondent:

R-1 IEP, dated October 1, 2013

R-2 Letter from Pediatric Affiliates, P.A., dated November 25, 2014

R-3 IEP, dated November 25, 2014

R-4 Complaint investigation report and cover letter to Laura Winters, dated
March 17, 2014

R-5 Summary of findings and necessary documentation re: corrective action
and cover letter to Laura Winters, dated August 13, 2014