State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
ON EMERGENT RELIEF
OAL DKT. NO. EDS 15820-16
AGENCY DKT. NO. 2017-25266

D.H. AND J.H. ON BEHALF OF L.H.,
Petitioners

v.

MOUNT OLIVE
BOARD OF EDUCATION
Respondent

Beth A. Callahan, Esq., for petitioner (Callahan & Fusco, attorneys)

Marc G. Mucciolo, Esq. for respondent (Methfessel & Werbel, attorneys)

Record Closed: October 25, 2016 Decided: October 26, 2016

BEFORE **DANIELLE PASQUALE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner ("LH") is a six (6) year old girl who has auditory impairment. She was diagnosed with moderate/moderately severe hearing loss and has a significant medical history identified as bilateral aural atresia/microtia. L.H. received Early Intervention Services in the Ivy Nursery at the Lake Drive School in Mountain Lakes, New Jersey, starting in September 2010. This is the only school she has ever attended. She was

first evaluated by the New Jersey Specialized Child Study Team in January 0f 2013. L.H. was born February 2, 2010 and lives with her parents in Flanders, New Jersey.

In 2013 the parents filed a due process petition after L.H.'s diagnosis of Auditory Impairment in regards to her March 13, 2013 IEP. That matter was subsequently heard before the Honorable Caridad F. Rigo, A.L.J. wherein she ordered a decision in favor of L.H. placing her at the Lake Drive School.

On September 22, 2014, Petitioners filed a Request for Enforcement of Decision with the OSEP, wherein the OSEP ordered on October 8, 2014 to place L.H. at the Lake Drive Program at Mountain Lakes School District. The District asked for reconsideration of OSEP's decision and was denied said relief.

L.H. finally began the Lake Drive program in the Mountain Lakes School District on October 27, 2014. Since then she has received two surgeries to treat her hearing problem. Now her recent audiological reports show that she presents with a bilateral sensorineural hearing loss due to noise from her surgery. Her last surgery took place on August 26, 2015 which was described at hearing as "surgically creating ears" since she was born without them. She is waiting on new hearing aids to determine what placement would be most appropriate for her according to her attorney.

On June 15, 2016, L.H.'s mother attended an IEP meeting with the Lake Drive School and the Mount Olive School District. Through counsel, Petitioner voiced objection with the transition plan and IEP on June 28, 2016. According to Petitioner, the District ignored said concerns. Specifically, Petitioner contends that in order to determine her current levels of functioning in her academic environment, there needs to be an independent expert to evaluate L.H. in her current educational program. Again, she has yet to receive her new hearing aids and has yet to have an audiological evaluation and thus Petitioner argues quite convincingly that no program could be deemed appropriate without determining her new levels.

As a result, Petitioners filed a due process complaint on July 1, 2016 in order to attempt to invoke the automatic stay-put in accordance with N.J.A.C. 6A:14-2.3(h)

(3)(ii). In short, they missed the deadline to file for an automatic stay-put by one day as was confirmed at the hearing.

Petitioners further contend that there were conversations with prior counsel at a settlement conference on September 8, 2016 which caused them to withdraw in good faith their due process to discuss a proper transition for L.H. When discussions regarding a proper transition on September 27, 2016 fell short, Petitioner refiled for due process on October 4, 2016 and amended their petitioner on October 7, 2016 within the 15 day window. Petitioner's counsel who was present at the most-recent, September 27, 2016 IEP transition meeting noted that the team was in agreement that the audiological evaluation with the new hearing aids were critical to planning.

Petitioners further argue that this matter became emergent on October 13, 2016 because Lake Drive told the parents that Mr. Olive School District had unenrolled L.H. from the school. To that end, Petitioners argue that L.H.'s stay-put is properly the Lake Drive Program in the Mountain Lakes School District because her home district started her there in September of 2016 in keeping with her IEP. In short, Petitioners argue that L.H.'s stay-put is clearly Lake Drive School and that the District is in violation of same because they illegally and unilaterally cancelled her transportation and withdrew her from the Lake Drive School. At hearing, it was argued that L.H. was waiting for the bus on the first day of school and only learned she was not enrolled when the bus never arrived.

This tribunal and both parties agree that in the first instance my determination is controlled by 20 U.S.C. 1415(j), otherwise known as the "stay put" provision of the IDEA. The statute states in pertinent part:

> . . . 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 . . .

When a school district proposes a change in the placement of a student it must provide

notice to the parent or guardian, who may in turn request mediation or a due process hearing to resolve any resulting disagreements. N.J.A.C. 6A:14-2.3, 2.6 and 2.7. Once a parent timely requests mediation or due process, the proposed action by the school district cannot be implemented pending the outcome. The "stay put" provision of the IDEA, 20 U.S.C. 1415(j), and its New Jersey counterparts, N.J.A.C. 6A:14-2.6(d) and 2.7(u), are invoked, and unless the parties agree no change shall be made to the student's placement.

The "stay put" provisions of law operate as an automatic preliminary injunction. IDEA's "stay put" requirement evinces Congress' policy choice that handicapped children stay in their current educational placement until the dispute over their placement is resolved, and that once a court determines the current placement, petitioners are entitled to an order "without satisfaction of the usual prerequisites to injunctive relief." Drinker by Drinker v. Colonial School Dist., 78 F.3d 859, 864-65 (3d Cir. 1996). In accordance with 20 U.S.C. 1415(j), I **CONCLUDE** that L.H.'s stay put would be the Lake Drive School but that there is no automatic stay as respondent correctly argues that the filing was not within the fifteen-day window for the automatic preliminary injunction.

As no automatic stay-put is appropriate for the instant case, this Tribunal must be governed by a balancing of the equities as noted in Crowe v. DeGioia, 102 N.J. 50 (1986). In accordance with N.J.A.C. 1:1-12.6, emergency relief may be granted "where authorized by law and where irreparable harm will result without an expedited decision granting or prohibiting some action or relief connected with a contested case . . . ." My determination in this matter is governed by the standard for emergent relief set forth by our Supreme Court in Crowe v. DeGioia, 102 N.J. 50 (1986), as follows:

> The judge may order emergency relief ….if the judge determines from the proofs that:
>
> > 1. The petitioner will suffer irreparable harm if the requested relief is not granted.
> >
> > 2. The legal right underlying the petitioner's claim is settled.

> 3. The petitioner has a likelihood of success on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the relief is not granted.

The moving party must satisfy all four prongs of the Crowe v. DeGioia standard to establish an entitlement to emergent relief. Id. at 132-35. I **CONCLUDE** that petitioner meets their burden under the Crowe v. DeGioia standard. If petitioner does not continue in the Lake Drive School prior to determining her new abilities and disabilities as a result of the new ear construction surgery, she will suffer irreparable harm in that she will likely not be able to overcome the hurdles the break in proper learning based upon her condition and the bi-products of her most recent surgery. The legal right to FAPE is settled and the petitioner has a likelihood of success on the merits of the underlying claim and upon balancing the equities here. The petitioner will definitely suffer greater harm by not receiving necessary services for a significant auditory problem than the District will by having to provide same. In fact, at hearing the District could not persuasively argue that it would suffer irreparable harm and noted it would not suffer any financial harm if the case was not decided in their favor. It should be noted that Respondent argues that the stay-put should be the home district in that the “bricks and mortar” do not necessarily constitute the stay-put. This Tribunal expressly rejects the notion that the Lake Drive School is not the appropriate Stay-put and notes that the “brick and mortar” argument would carry some weight if the Lake Drive School were closed. In contrast, it is undisputed that the Lake Drive School is open for business and is specifically for hearing-impaired students. The issues of what the new evaluation with the new hearing aids will reveal as to proper placement and ultimately whether the home district can provide FAPE are issues more appropriately decided at a full plenary hearing. As for related services going forward, such as transportation, those should also be litigated and determined at a full hearing pursuant to 20 U.S.C.A. Section 1401(26)(A). See 34 C.F.R. Section 300.34(a); N.J.A.C. 6A:14-3.9

Accordingly, I **ORDER** that the relief sought by L.H. is **GRANTED**. The Board is directed to re-enroll her in the Lake Drive School in the Mountain Lakes School District with transportation as was previously provided in keeping with stay-put for the 2016-2017 School Year.

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.

October 26, 2016
DATE

DANIELLE PASQUALE, ALJ

Date Received at Agency October 26, 2016

Date Mailed to Parties: October 26, 2016

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