State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

DECISION

EMERGENT RELIEF

OAL DKT. NO. EDS 00985-15

AGENCY DKT. NO. 2015 22213 E

P.V. AND S.F. ON BEHALF OF K.F.,

Petitioners,

v.

WATCHUNG HILLS REGIONAL BOARD OF EDUCATION,

Respondent.

James A. Vigliotti, Esq., for petitioners (Ventura, Miesowitz, Keough & Warner, attorneys)

Katherine A. Gilfillan, Esq., respondent (Schenck, Price, Smith & King, attorneys)

Record Closed: January 29, 2015 Decided: January 30, 2015

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

STATEMENT OF THE CASE

Petitioners P.V. and S.F. filed a petition for emergent relief with the Office of Special Educations Programs, New Jersey Department of Education on January 12, 2015, seeking that their daughter, K.F., be placed at E.C.L.C. and for the Watchung Hills Regional Board of Education (District) to immediately begin funding her placement at E.C.L.C. pursuant to the last IEP created by Berkeley Hills School District. The

matter was transmitted to and filed with the Office of Administrative Law (OAL) on January 20, 2015, and in accordance with 20 U.S.C.A. §1415 and 34 C.F.R. §300.500 to 300.587. The Commissioner of the Department of Education requested that an Administrative Law Judge (ALJ) be assigned to conduct a hearing in this matter. The undersigned conducted an emergent hearing and the matter was heard and concluded on January 29, 2015.

FACTS

Based on the record, I **FIND** the following **FACTS**:

K.F. was born on September 13, 1995, and will begin tenth grade in September 2015. During the 2013–2014 school year, the Berkeley Heights School District (Berkeley Heights) determined that K.F. was eligible for special education services (as has been done in the past). K.F. is classified as Moderate Cognitive Impairment. K.F. was so classified since she was three years old. K.F. is diagnosed with Down's Syndrome and as a result has cognitive, communication and academic deficits.

K.F. was initially placed in E.C.L.C. in Chatham by the Berkeley Heights Board of Education via an IEP prepared on March 11, 2014. A copy of that IEP was provided to the Watchung Hills Regional School District and was reviewed by same. On November 19, 2014 a meeting was held between P.V. and Sarah Bilotti (Bilotti), Director of Special Services, whereby P.V. was informed that the Watchung Hills Regional School District operates a program which was comparable to that set forth in K.P.'s IEP from Berkeley Heights. Petitioners enrolled K.F. in-district with the Watchung Hills Regional High School District on December 23, 2014. In addition, on December 23, 2014, Bilotti had K.F. meet her teachers and classmates, as well as the District's transition coordinator. Bilotti also reviewed all available data regarding K.F., including the last IEP from Berkeley Heights. Bilotti then assured P.V. that the District offered programming comparable to what K.F. had been receiving at E.C.L.C. in its LLD program. (See Bilotti Certification #8, dated January 14, 2015.)

K.F. attended the Watchung Hills Regional School in-district on January 5, 2015. In addition, on January 5, 2015, in a letter to P.V., Bilotti affirmed that the District was offering K.F. immediate participation in its LLD program in-district which would provide her with a program comparable to that contained in her IEP from Berkeley Heights. Bilotti also provided P.V. with a schedule for K.F. and information about upcoming class activities. Thereafter (on an unknown date), petitioners decided that they wanted K.F. to attend E.C.L.C. instead of the Watchung Hills Regional School, as it had an adult program that they had been informed K.F. could attend.

The Berkeley Heights School District placed K.F. at the E.C.L.C. pursuant to an IEP prepared on March 11, 2014. K.F. attended the E.C.L.C school for over the past ten years.

On March 11, 2014, P.V. met with the Berkeley Heights Child Study Team to develop an IEP based on its Annual Review. Thereafter, K.F.'s family decided that they would move from Berkeley Heights to Gillette sometime during November/December 2014. Indisputably, when the 2013–2014 and 2014–2015 IEP was developed by Berkeley Heights CST, K.F.'s family was still living in Berkeley Heights.

It was Bilotti's opinion that Watchung Hills School District offered comparable programming for K.F. in-district in the LLD program which was expressed to P.V. and placed in writing. Bilotti is also familiar with the program at E.C.L.C. that K.F. attended. Bilotti also states that Watchung Hills offers programming comparable to that which is offered at E.C.L.C. for students like K.F. who have cognitive, communication and academic deficits. Petitioner has not presented any evidence to the contrary.

The Extended School Year (ESY) section merely states that an ESY is recommended for K.F. based on the following factors: Recoupment and Regression, Severity of Disability, Observations, Progress Reports, Input from Teachers and Speech Therapist. (See IEP).

There is no dispute that K.F. has been diagnosed with Down's Syndrome and as a result has cognitive, communication and academic deficits. K.F. is eligible for special education and related services under the category of Moderate Cognitive Impairment.

LEGAL DISCUSSIONS AND CONCLUSIONS

"'[E]ducational placement', as used in the IDEA, means educational program -- not the particular institution where that program is implemented." White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 (5th Cir. 2003). Accordingly, "the question of whether a change in a child's educational routine is a 'change in placement' is a fact-specific one." J.S. v. Lenape Regional High Sch. Dist. Bd. of Educ., 102 F. Supp. 2d 540, 543-544 (D.N.J. 2000). The focus of the inquiry must be "whether the decision is likely to affect in some significant way the child's learning experience." Id. at 544 (quoting DeLeon v. Susquehanna Comm. Sch. Dist., 747 F.2d 149, 153 (3d Cir. 1984).) Therefore, "only matters that will significantly impact the child's learning should be considered a change in educational placement for the purposes of the IDEA." Ibid.

This issue was addressed by the Court in J.S. v. Lenape matter, supra. There the parents of a student with mental retardation argued that the student's transfer from one high school to another constituted a change in educational placement. Id. at 541. The court concluded that "[t]here is no curricular difference between the Lenape and Cherokee settings . . . the two class settings at issue are virtually identical, and the main difference between the schools is the functioning level of the students." Id. at 544. To the contrary "[o]ther facts in evidence tend to show that Cherokee is an entirely appropriate placement for J.S.: the class size is smaller, and the school is a shorter bus ride from J.S.'s home." Ibid. The court concluded that the parents failed to establish that the student's learning was significantly affected, and accordingly, failed to establish a "change in educational placement" pursuant to IDEA. Ibid. The court noted that to establish the transfer was a "change in educational placement," the parents would have to present "evidence that the Cherokee program is of poorer quality than Lenape High School's, or that the Lenape program was tailored to J.S.'s particular needs . . ." Id. at 544 n.3. Moreover, the court emphasized that the conclusion that a physical transfer does not necessarily constitute a "change in educational placement" pursuant to IDEA

"is consistent with the decisions of the federal courts of appeals to have considered similar transfers." Id. at 544 n.4 (citing cases).

New Jersey's regulatory transfer requirements are set forth in. N.J.A.C. 6A:14-4.1(g)(1) which provides:

> [w]hen a student with a disability transfers from one New Jersey school district to another . . . the child study team of the district into which the student has transferred shall conduct an immediate review of the evaluation information and the IEP and, without delay, in consultation with the student's parents, provide a program comparable to that set forth in the student's current IEP until a new IEP is implemented . . .
>
> [N.J.A.C. 6A:14-4.1(g)(1).]

Thereafter, "if the parents and the district agree, the IEP shall be implemented as written." Ibid. "However, "[i]f the appropriate school district staff do not agree to implement the current IEP, the district shall conduct all necessary assessments and, within 30 days of the date the student enrolls in the district, develop and implement a new IEP for the student." Ibid. Thus, the New Jersey regulation materially mirrors the federal statute and regulation. See 20 U.S.C.A. § 1414(d)(2)(c)(i)(I); 34 C.F.R. § 300.323(e) (providing that a district must immediately provide "services comparable" to the services set forth in a transfer student's last IEP).

Therefore, the inquiry herein is whether the program is "comparable to that set forth in the student's current IEP," or conversely, whether the program will "significantly impact the child's learning" and accordingly constitutes "a change in educational placement." N.J.A.C. 6A:14-4.1(g)(1); 20 U.S.C.A. § 1414(d)(2)(c)(i)(I); 34 C.F.R. § 300.323(e); J.S., supra, 102 F. Supp.2d at 543-544; DeLeon, supra, 747 F.2d at 153.

Petitioners rely entirely on the fact that the IEP places K.F. at E.C.L.C. During oral argument there were a number of issues raised by the petitioner which are pointed to which she cites as reflecting that the two educational programs are not comparable. P.V. states that Watchung would place her daughter on the mainstream bus in order to

get to school and that she would be placed in only one store in order to receive real life experiences and education. Both of these allegations were denied by the respondent as they stated that K.F. would have special education buses to provide transportation and that there were a much greater number of store experiences available to K.F. The dispute on these issues appears to be the product, at least in part, to miscommunication between the parties. It was the respondent's position, based on their knowledge of both programs that the program at Watchung was in many ways "better" than the program at E.C.L.C. P.V.'s opinion regarding the Watchung program was based on one day's attendance and limited conversations with the respondent's representatives.

K.F.'s IEP entitles her to a specific educational program, not a specific private school. I am not persuaded that the IEP requires K.F. to attend E.C.L.C., and only E.C.L.C. The evidence herein conclusively establishes that the District promptly met with petitioners and immediately offered K.F. a comparable educational placement.

I am sympathetic that P.V., who is a loving and caring mother, is genuinely concerned about K.F.'s transition from E.C.L.C. to Watchung, as would any good mother. However, I do not believe that P.V. has sufficient experience and knowledge regarding the new program to warrant the issuance of the emergent relief she has requested in her application herein. Bilotti certified that she is familiar with E.C.L.C.'s program and the Watchung School District can offer K.F. a comparable program designed for students with K.F.'s disabilities and which was provided to K.F. at E.C.L.C. in its LLD program. (Bilotti Cert. ¶ 8.) Bilotti has extensive educational background and experience in the special education area which makes her opinion somewhat compelling.

Accordingly, I **CONCLUDE** that the District offered K.F. a comparable educational program to the program set forth in her IEP, and the District's offer did not constitute a "change in educational placement" triggering the provisions of "stay put."

EMERGENT RELIEF STANDARD

N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief. The regulation instructs in salient part:

> A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards be met for granting such relief pursuant to Crowe v. Degioia, 90 N.J. 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
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> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has the likelihood of prevailing 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 requested relief is not granted.
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> [N.J.A.C. 6A:3-1.6(b).]

The Petitioners have the burden of establishing each of the above requirements in order to warrant relief in his/her favor. Each of the requirements shall be analyzed herein below in order to determine whether the petitioners have met that burden.

IRREPARABLE HARM

Turning to the first requirement, it is well settled that relief should not be granted except "when necessary to prevent irreparable harm." Crowe, supra 90 N.J. at 132. In this regard, harm is generally considered irreparable if it cannot be adequately redressed by monetary damages. Id. at 132-33. In other words, it has been described as "'substantial injury to a material degree coupled with the inadequacy of money damages.'" Judice's Sunshine Pontiac, Inc. v. General Motors Corp., 418 F. Supp.

1212, 1218 (D.N.J. 1976) (citation omitted). See New Jersey Dep't of Environmental Protection v. Circle Carting, Inc., 2004 N.J. AGEN LEXIS 968 (April 2, 2004) (finding no irreparable harm in connection with the revocation of respondent's solid waste license in that financial loss is generally insufficient to demonstrate this requirement). The moving party bears the burden of proving irreparable harm. More than a risk of irreparable harm must be demonstrated. Continental Group, Inc. v. Amoco Chemicals Corp., 614 F.2d 351, 359 (D.N.J. 1980). The requisite for injunctive relief is a "clear showing of immediate irreparable injury," or a "'presently existing actual threat; (an injunction) may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by common law.'" Ibid. (citation omitted.)

In the instant matter, there has not been a showing of "immediate irreparable injury." Petitioners did argue that there is a risk of irreparable harm in the event that K.F. is not placed in E.C.L.C. because of the transition factors on K.F. which should be taken into account. The petitioners' counsel in oral argument spoke in terms of speculative expert evidence which they did not have at this point, but which could have addressed this issue. The petitioners' written submission (admittedly created by a pro se petitioner) merely states that the parents "want her to continue her education at E.C.L.C." . . . "which we feel offers a better program." The petitioners do not say why they feel this way in their written submission. In argument, there was much emphasis on K.F.'s transition, however, K.F. was given only one day to transition and the respondent reported no difficulties for K.F. in her one day of attendance. I understand that any child moving from a school she attended for ten years and being uprooted to a new city as well as a new school will experience some difficulties in their transition, however, with assistance and time there is no reason to think that this cannot be overcome and K.F. can thrive in the Watchung School District. I have no reason to question the good intentions and skills of the Watchung School District special education staff and teachers at this point.

None of the petitioners' broad and vague assertions support a conclusion that K.F. will suffer irreparable harm, and no other facts have been offered to support a claim that K.F. will suffer substantial, immediate, and irreparable harm if she does not receive

continued placement at E.C.L.C. pending the outcome of the due process hearing. For the foregoing reasons, I **CONCLUDE** that petitioners have not demonstrated that K.F. will suffer irreparable harm if the requested relief is not granted.

LEGAL RIGHT IS SETTLED/LIKELIHOOD OF PREVAILING ON THE MERITS

Petitioners have failed to demonstrate that they have a likelihood of prevailing on the merits on the underlying claim nor that their legal right to their claim is settled. The petitioners ask for the District to be required to allow K.F. to "continue and finish up her schooling at E.C.L.C." However there is no legal entitlement for K.F. to continue her education at E.C.L.C. as set forth in the IEP of March 11, 2014, prepared by Berkeley Heights. As a newly transferred student into the Watchung Hills Regional School District, it is settled that K.F. is entitled to receive from the Watchung Hills Regional School District a comparable program as the one set forth in the Berkeley Heights IEP. There is no requirement that K.F. receive a continuation of her prior placement. See J.F. and J.F. o/b/o J.F. v. Byram Twp. Bd. of Education, OAL Dkt. No. EDS 9803-14 (2014), where a request for emergent relief was denied based on the fact that the new school district offered comparable programming to what was required in the last IEP from the previous school district; aff'd in unpublished U.S. District Court, Civil Case No. 14-5156.

When a student transfers from one district in New Jersey to another, N.J.A.C. 6A:14-4.1(g) sets forth the responsibilities of the new school District into which the student has moved. That Code section requires that the receiving District's Child Study Team (CST) immediately review the student's IEP and evaluate the information contained therein and "without delay, in consultation with the student's parents, provide a program comparable to that set forth in the student's current IEP until a new IEP is implemented . . . ." Id. Comparable services are defined as "similar" or "equivalent" services, as established by the student's new IEP team in the new public school district. M.H. and D.H. o/b/o S.H. v. Northern Burlington Co. Reg. Bd. of Educ., OAL Dkt. No. EDS 303-09 (2009). That is exactly what transpired in this case. Once a student leaves one school district and moves into another school district, "stay put" does not

apply to the placement contained in the last IEP. C.R. o/b/o P.B. v. Winslow Twp. Bd. of Educ., OAL Dkt. No. EDS 894-11 (2011). In this case, it is clear, based on the evidence supported by Bilotti's certification that the petitioners were offered immediate participation in programming in-district (Watchung Hills Regional School District) that was comparable to the programming contained in the IEP written by Berkeley Heights.

Accordingly, I must **CONCLUDE** that petitioners have failed to demonstrate a likelihood of success on the merits of the case. For the same reasons, I **CONCLUDE** that petitioners have failed to demonstrate that K.F. will suffer greater harm than respondent will suffer if the requested relief is not granted.

Based on the foregoing, I **CONCLUDE** that petitioners have failed to meet the requirements set forth in N.J.A.C. 6A:3-1.6(b) warranting a stay or emergent relief in this matter.

CONCLUSION

I **CONCLUDE** that petitioners are not entitled to emergent relief because the proofs submitted fail to establish all of the necessary elements to grant emergency relief under N.J.A.C. 6A:3-1.6(b). Specifically, there has been no showing of irreparable harm by petitioners, no showing that the petitioners have a legal right to their claim which is settled, no showing of the likelihood of prevailing on the merits, and no showing that petitioners will suffer greater harm than respondent if the requested relief is not granted.

ORDER

For the foregoing reasons, petitioners' request for relief is **DENIED**. 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.

January 30, 2015 _____

DATE

MICHAEL ANTONIEWICZ, ALJ

Date Mailed to Parties: January 30, 2015

jb