

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

MARPLE NEWTOWN SCHOOL	:	CIVIL ACTION
DISTRICT,	:	
Plaintiff,	:	
	:	
v.	:	NO. 07-0558
	:	
RAFAEL N., PARENT AND	:	
NATURAL GUARDIAN OF R.N.,	:	
Defendant.	:	

MEMORANDUM

STENGEL, J.

March 8, 2007

Defendant Rafael N., the parent and natural guardian of R.N., a disabled student, filed this motion for a preliminary injunction to compel plaintiff Marple Newtown School District to implement a December 20, 2006 Opinion and Order of the Special Education Appeals Panel¹ (“Opinion and Order”). For the reasons stated below, I will grant the preliminary injunction.

I. BACKGROUND

R.N. is a Spanish speaking seventeen-year old boy with mild to moderate mental retardation and intractable epilepsy. R.N. became a resident of Marple Newtown School

¹ The Individuals with Disabilities Education Act (“IDEA”) ensures that children with disabilities have access to a free appropriate public education. 20 U.S.C. § 1400(c)(3). If parents disagree with the school district’s evaluation, placement, or provision of a free and appropriate education to their child, they may request a due process hearing conducted by a hearing officer. 22 PA. CODE § 14.162(b). The parent or the school district can then appeal the hearing officer’s decision to the Special Education Appeals Panel. *Id.* at § 14.162(o). After the Appeals Panel renders a final administrative decision, either party has the right to bring a civil action in federal or state court. 20 U.S.C. § 1415(i)(2). This court therefore has jurisdiction to review the decision of the Appeals Panel.

District (the “District”) in November 2001 when he was placed at a residential facility, the Don Guanella School, within the district. Initially, R.N. attended the Francis Harvey Green School where he received life skills instruction and two hours of ESL² per week. In 2002, the District transferred R.N. to the Delaware County Intermediate Unit, which is on the same premises as his residence, and all ESL services ceased. This placement was not meeting R.N.’s needs because he received no ESL services; his epileptic condition was not accommodated; and there was no transition planning to prepare R.N. for adulthood.

On June 27, 2006, Rafael N. filed a due process complaint with the Office of Dispute Resolution challenging the educational program. The Hearing Officer held a due process hearing and incorrectly concluded that the District had not denied R.N. a free and appropriate education. On December 20, 2006, an Appeals Panel of the Office of Dispute Resolution partially affirmed and reversed the decision of the Hearing Officer and found that the District had denied R.N. a free and appropriate education. The Appeals Panel ordered the District to create and implement an appropriate Individualized Educational Plan (“IEP”) for R.N.

The District exercised its right to judicial review of the final administrative decision by filing a civil action in the Commonwealth Court of Pennsylvania on January 23, 2007.³ On January 26, 2007, the District filed an Application for Stay with the state

² English as a Second Language.

³ See nt. 1 *supra*.

court. On February 9, 2007, Rafael N. filed a Notice of Removal and on March 5, 2007, he moved this court to deny the District's application for a stay and moved for a preliminary injunction to compel the implementation of the Appeals Court's order.

II. DISCUSSION

Rafael N. bases his request for a preliminary injunction on the "stay put" provision of IDEA. This provides 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, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed." 20 U.S.C. § 1415(j).

It is well established that the IDEA's "stay put" provision, if it applies, may allow for a preliminary injunction requiring that the child remain in his then current educational placement until the dispute is resolved. Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 (3d Cir. 1996). "Stay put" requires that the status quo be maintained while the dispute regarding the child's placement is litigated. To apply the "stay put" provision, the court need not consider the typical preliminary injunction factors but instead must identify the child's "then current educational placement." Id. at 864-65; see also Matthew K. v. Parkland Sch. Dist., No. 97-6636, 1999 U.S. Dist. LEXIS 2024, at *10 (E.D. Pa. Feb. 26, 1998) (noting that movants are not required to satisfy the ordinary prerequisites for

injunctive relief under the IDEA’s “stay put” provision). This is determined by the child’s IEP that is actually functioning when the “stay put” provision is invoked. Id. at 867.

To determine his “current placement,” Rafael N. invokes the breach of an agreement theory established by the Supreme Court in School Comm. of the Town of Burlington v. Dept. of Educ., 471 U.S. 359, 371-72 (1985). This rule is used when a parent desires a change in placement. The rule is derived from the language of the “stay put” provision and provides that the child should remain in the then-current educational placement during the proceedings “unless the State or local educational agency and the parents otherwise agree.” 20 U.S.C. § 1415(j). In Burlington, the Court held that a ruling by the education appeals panel in favor of the parents’ position constitutes an agreement for purposes of the IDEA’s “stay put” provision. Id. at 372. The Third Circuit has approved of the breach of the agreement theory, noting that this provision “was drafted to guard the interests of parents and their children.” Susquenita Sch. Dist. v. Raelee S., 96 F.3d 78, 84 (3d Cir. 1996) (“We cannot agree that this same section should be used here as a weapon by [a school district] to force parents to maintain a child in a public school placement which the state appeals panel has held inappropriate.”).

Precedent from the Supreme Court and the Third Circuit dictates that I find that the District’s failure to comply with the Opinion and Order is a violation of R.N’s right to a free and appropriate education under the IDEA. R.N. will continue to suffer irreparable

harm until the District implements the Opinion and Order.

III. CONCLUSION

Based on the analysis above, this Court will order the District to fully implement⁴ the Appeals Panel's Opinion and Order while the District's Petition for Review is considered. An appropriate order follows.

⁴ While the District has complied with some portions of the Opinion and Order, they must fully comply with all aspect of the Appeals Panel's order. See Def's Mot. Prelim. Inj. pp. 7-9.

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Defendant.	:	

ORDER

AND NOW, this 8th day of March, 2007, upon consideration of Defendant’s Motion for Preliminary Injunction and Opposition to Plaintiff’s Application for Stay of the Order of the Appeals Panel Decision No. 1785 (Document No. 7) and after a telephone conference with Counsel, it is hereby **ORDERED** that the Motion for Preliminary Injunction is **GRANTED**.

It is **FURTHER ORDERED** that

- (1) The Opinion and Order of the Special Education Appeals Panel dated December 20, 2006 (“Opinion and Order”) is R.N.’s appropriate “current educational placement” that must be implemented during the pendency of any judicial or administrative proceedings between R.N. and the District;
- (2) The District must immediately comply with and implement all provisions of the Opinion and Order and develop an individual education plan (“IEP”)

consistent with the findings of the Opinion and Order within fifteen days of the Court's Order; and

- (3) A hearing on plaintiff's Petition for Review will be held on **Monday, May 21, 2007 at 2 p.m.** at the U.S. Courthouse, 601 Market Street, Philadelphia, Pa. in Courtroom 3B.

- (4) Plaintiff is order to submit a brief in support of its Petition for Review by **April 30, 2007.** Defendant is ordered to file a responsive brief by **May 7, 2007.**

BY THE COURT:

/s/ Lawrence F. Stengel

LAWRENCE F. STENGEL, J.