UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JEFFREY WINKELMAN, *et al.*,	)	Case No.: 1:08 CV 2398
	)	
Plaintiffs	)	
	)	
v.	)	JUDGE SOLOMON OLIVER, JR.
	)	
PARMA CITY SCHOOL DISTRICT BOARD OF EDUCATION, *et al.*,	)	
	)	
Defendants	)	ORDER

Pending before the court are the following motions: (1) Plaintiff Jeffrey and Sandee Winkelman's ("Plaintiffs") Motion for Expedited Injunctive Relief, which Plaintiffs filed individually and on behalf of their son, J.W., on October 9, 2008, against Defendants: Parma City School District Board of Education ("Parma"); Ohio Department of Education ("ODE"); and Susan Zelman, Superintendent of the Ohio Department of Education (collectively, "Defendants") (ECF No. 3); (2) Plaintiffs' Motion for Permanent Injunction and Declaratory Judgment Regarding Pendency Placement (ECF No. 6); and (3) Defendant ODE's Motion to Dismiss (ECF No. 8).[1] On October 14, 2008, the court held a hearing on the Motion by telephone, and counsel for the parties were in attendance. For the foregoing reasons, the court grants Plaintiffs' Motion for Expedited Injunctive

[1] The court held a conference call with counsel for the parties on October 23, 2008, at 2:30 p.m. The parties indicated that the court should consider briefing complete on all issues. Consequently, the court will rule on all three pending motions based on this understanding.

Relief (ECF No. 3), and Plaintiffs' Motion for Permanent Injunction and Declaratory Judgment Regarding Pendency Placement (ECF No. 6). The court denies Defendant ODE's Motion to Dismiss (ECF No. 8).

I. BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs and their son, J.W., reside in the City of Parma. J.W. has been diagnosed with moderate to severe autism and is therefore entitled to receive special education and related services pursuant to the Individuals with Disabilities Education Act ("IDEA"). These services require that J.W. receive an Individualized Education Plan ("IEP"), which is developed by the parents, educators, and representatives of the school district concerning the proper educational plan for the disabled student. Also, under the IDEA, disabled students are entitled to a free appropriate public education ("FAPE"). 20 U.S.C. § 1400(d)(1)(A). Parents, however, have the right to dispute an IEP through a due process hearing and while doing so may place the child in private school and seek reimbursement for such placement if their claim is ultimately successful.

Plaintiffs disputed the IEP developed for J.W. for the 2007-2008 school year, and they unilaterally placed J.W. at Bellefaire JCB Monarch School ("Monarch School"), a private institution in Shaker Heights, Ohio, for that year. On August 13, 2007, Plaintiffs initiated a due process proceeding, arguing that the Parma City School District denied J.W. his right to FAPE as mandated by the IDEA. In this proceeding, Plaintiffs requested reimbursement for J.W.'s tuition for the 2007-2008 school year at Monarch School as the IDEA allows under 20 U.S.C. § 1412(a)(10)(C)(ii). Independent Hearing Officer ("IHO") Ronald Alexander found that J.W.'s 2007-2008 IEP was inappropriate because it failed to provide transition services for J.W. between his private school placement and his return to a Parma public school. (IHO Decision and Order at 205, ECF No. 3-6.)

The IHO then concluded that J.W. did not receive FAPE and required Parma to reimburse Plaintiffs for tuition for the 2007-2008 school year. Both parties appealed portions of the IHO decision to a state level review officer ("SLRO"), Robert L. Mues, for the Ohio Department of Education.[2] The SLRO affirmed the IHO's decision that the IEP denied J.W. FAPE and upheld the tuition reimbursement award.

On September 19, 2008, Parma City School District informed Plaintiffs that it would not appeal the SLRO's decision and that it would pay the tuition amount for 2007-2008 as well as "its pendency obligations . . . for [J.W.'s] education at Monarch School from August 25, 2008 through September 19, 2008." (ECF No. 3-9.) Parma also stated that it considered its obligations pursuant to the SLRO's opinion and its pendency obligation fulfilled and that no further tuition payments would be made for J.W. to Monarch School. On the same date, Plaintiffs filed a due process complaint against Parma, alleging that the 2008-2009 proposed IEP again denied J.W. FAPE. Plaintiffs then sent letters to the Parma City School District and the Ohio Department of Education, requesting that they continue to pay J.W.'s tuition at Monarch during the pendency of the due process hearings.

As a result of Defendants failure to pay, Plaintiffs filed the instant action and a Motion for Expedited Injunctive Relief, requesting that the court order Defendants to pay J.W.'s tuition at

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[2] Prior to the parties' appeal to the SLRO, Plaintiffs filed an action in this court requesting that the court determine that J.W.'s current educational placement for purposes of the IDEA's stay-put provision was Monarch School. The court, in *Winkelman v. Ohio Dep't of Educ.*, No. 1:08:CV:919, 2008 U.S. Dist. LEXIS 64381 (N.D. Ohio 2008), found that the stay-put provision was inapplicable because the case was heard only by an IHO. To invoke the stay-put provision, the case needed to have been heard by a state level review officer. Because the case had not reached that stage, the court denied Plaintiff's claim that Monarch School was Plaintiffs' current educational placement for stay-put provision purposes.

Monarch from September 20, 2008, through the pendency of the administrative proceedings set in motion by Plaintiffs' due process hearing request.

II. LEGAL STANDARD

Generally, when considering whether to grant an injunction, a court considers the typical factors such as success on the merits, irreparable harm to the plaintiffs, harm to the defendants and others, and harm to the public. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987); *Performance Unlimited v. Questar Publishers, Inc.*, 52 F.3d 1373, 1381 (6th Cir. 1995). However, the Court in *Honig v. Doe*, 484 U.S. 305, 323 (1988), noted that the stay-put provision that mandates that a child remain in his or her current educational placement is "unequivocal." Courts have construed this provision to be, in effect, an automatic injunction in favor of the child's current educational placement, once such determination has been made. *Zvi D. v. Ambach*, 694 F.2d 904, 906 (2d Cir. 1982); *Christoper P. v. Marcus*, 915 F.2d 794, 805 (2d Cir. 1990); *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 864 (3d Cir. 1996); *Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ.*, No. 02 C 0687, 2002 U.S. Dist. LEXIS 7716 at *10 (N.D. Ill. April 30, 2002); *J.Y. v. Seattle Sch. Dist. No. 1*, No. C07-1226-JCC, 2007 U.S. Dist LEXIS 84894 at *12 (W.D. Wash. Nov. 16, 2007). Because this court need only determine J.W.'s current educational placement, the court will not reach Defendants' arguments regarding Plaintiffs' irreparable harm and harm to Defendants and will instead determine J.W.'s current educational placement.

III. LAW AND ANALYSIS

Under the IDEA, a parent is entitled to "an impartial due process hearing" regarding the adequacy of the child's IEP and its implementation. 20 U.S.C. § 1415(f)(1)(A). During the pendency of these proceedings, the IDEA mandates that "the child shall remain in the then-*current*

educational placement of such child" unless the State agency and the parents agree otherwise. 20 U.S.C. § 1415(j) (emphasis added). This provision, which has been codified in federal regulation 34 C.F.R. § 300.518(a), is known as the stay-put provision. Section 300.518(d) further defines a child's current educational placement, stating that:

> If the hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parents for purposes of paragraph (a) of this section [the child's current educational placement].

34 C.F.R. 300.518(d).

Plaintiffs argue that based on these statutory and regulatory provisions as well as relevant case law, the SLRO opinion finding the IEP to be inappropriate and granting Plaintiffs' reimbursement for the 2007-2008 school year at Monarch School constituted an agreement between the State of Ohio and Plaintiffs that a change of placement to Monarch was appropriate. Therefore, because of the agreed change of placement to Monarch, that school became J.W.'s current educational placement for the purpose of the stay-put provision, and Plaintiffs must receive reimbursement for the school's tuition until the administrative proceedings that were initiated on September 19th have ended.

Defendants Parma and ODE together argue that injunctive relief is inappropriate in the instant case because Plaintiffs are unsuccessful on the merits of their claim. Both Defendants argue that the SLRO decision was not an agreement on a placement, any decision by the SLRO for Monarch to be J.W.'s placement was expressly limited to the 2007-2008 school year, and an injunction would provide Plaintiffs with an improper incentive to continue litigation in order to maintain J.W.'s placement at Monarch, a private school. Additionally, Defendant ODE argues, apart

from Defendant Parma, that Parma is the primary obligor and that any relief awarded to Plaintiffs should be against Parma alone and not ODE. This court will address each of Defendants' arguments in turn.

A. No Agreement on Placement

Defendants Parma and ODE both argue that the SLRO's decision did not constitute an agreement with Plaintiffs on their choice of placement at Monarch School as is required under 34 C.F.R. § 300.518(d). The court, however, finds no basis for this argument. The SLRO agreed that Plaintiffs were entitled to remove J.W. from Parma to Monarch because the IEP was inappropriate and Monarch was able to provide J.W. with educational benefits. As discussed above, once a state review officer agrees with the parents on a change of placement, the parties' consent to the private placement is implied and is enforced during the pendency of proceedings that follow. It seems clear that the SLRO agreed with Plaintiffs that their change of placement from Parma to Monarch was appropriate, making Monarch the child's current educational placement.

Defendants argue, in the alternative, that even if Plaintiffs had requested placement at Monarch, the IHO and the SLRO explicitly found that the placement in Parma was appropriate, and that the only problem with the IEP was the transition services. The fact that the IHO and SLRO found that the IEP was inappropriate without finding that J.W.'s placement in Parma schools was inappropriate is irrelevant in determining his current educational placement. There is no requirement in the statutes or case law that the SLRO needs to first find that the public school placement is inappropriate; instead, the SLRO simply needs to find that the IEP was inappropriate and that the private school placement was appropriate. *See Bd. Of Educ. of the Pawling Cent. Sch. Dist. v. Schutz*, 290 F.3d 476, 484 (2d Cir. 2002); *Saleh v. District of Columbia*, 660 F. Supp. 212

(D.D.C. 1987) (finding that both a public school and private school placement was appropriate, but the private school, which the district was required to pay at the time, remained the child's current educational placement.) The IHO and SLRO, in this case, made this exact finding.

Furthermore, Defendants, in emphasizing that the only issue with the IEP was its provision on transition services, also fails to convince this court that J.W.'s current educational placement is not Monarch. While it is true that there are instances where reimbursement for private placement because of an inappropriate IEP will not result in the private placement becoming the current educational placement of the child, that is not the case here. In *Leonard v. McKenzie*, 869 F.2d 1558 (D.C. Cir. 1989), for example, the court found that the parents were entitled to reimbursement for private placement because the school district committed various procedural violations, including issuing a defective Notice of Placement, surrounding the IEP. *Id.* at 1560. The court held that although the parents were entitled to reimbursement for the private school the previous year, the private school did not become the child's current educational placement for purposes of the stay-put provision. *Id.* at 1564.

The instant case is clearly distinguishable from *Leonard*. The IEP and the facts surrounding it were more than procedurally defective as occurred in *Leonard*. Instead, the IHO and SLRO found that a substantive provision of the IEP, the transition services, were inappropriate. Defendants emphasize the fact that the IHO and the SLRO found the IEP to be inappropriate only because of the insufficient transition service provision; however, this inadequacy was more than a mere procedural concern and was sufficient enough for the SLRO to find that this IEP was inappropriate for J.W. and to grant tuition reimbursement.

Defendants also argue that no agreement to change J.W.'s placement occurred between the

State and Plaintiffs because Plaintiffs did not ask the IHO or the SLRO for a change of placement; instead, they simply requested reimbursement for J.W.'s tuition at Monarch for the 2007-2008 school year. There is no requirement in the statute to support this position that reimbursement does not constitute a change of placement. Furthermore, the court in *Schutz* flatly rejected the proposition that reimbursement does not constitute a change of placement, finding that "an [SLRO's] order for reimbursement predicated on a finding that a proposed IEP is inappropriate for a child constitutes a change in the child's current educational placement . . ." *Schutz*, 290 F.3d at 484; *see also*, *Murphy*, 297 F.3d at 200-01. Therefore, the court finds that an agreement to change J.W.'s placement to Monarch School did result from the SLRO's opinion that the IEP was inappropriate.

B. Any Agreement Limited to 2007-2008 School Year

Defendant Parma argues that Monarch School is not J.W.'s current educational placement because the IHO and SLRO expressly limited its decision to the 2007-2008 school year. The court, however, finds no such express limitation. Although the IHO and SLRO found reimbursement proper for J.W.'s tuition during the 2007-2008 school year, they did not make any express limitation as to the future of J.W.'s placement.

The instant case is analogous to *Murphy v. Arlington Central School District Bd. of Educ.*, 297 F.3d 195 (2d Cir. 2002) (rev'd in part on other grounds). The court found that the private school constituted the child's current educational placement after an SLRO found that the private school was the child's appropriate placement and ordered reimbursement. The court found that the SLRO's opinion constituted an agreement by the state that the child's current educational placement was the private school. Thus, pursuant to the stay-put provision, the court upheld the district court's order requiring the school district to finance the child's education at the private school during the

pendency of the proceedings. As determined by the court in *Murphy*, limiting the award to reimbursement for one year does not effect the current educational placement of the child. *See also Jacobsen v. District of Columbia Bd. of Educ.*, 564 F. Supp. 166 (D.D.C. 1983) (finding that an agreement to fund private school tuition may be made for a certain time period, but absent an express time limitation, the court will continue to bind the agreement until the hearings have settled.)

Defendant Parma also argues that even if the SLRO decision was found to be an agreement with Plaintiffs that Monarch was an appropriate placement, the decision would only apply while the judicial proceedings arising from the case in which the SLRO took part were pending. In *Schutz*, 290 F.3d at 484, the court rejected the district court's holding that the school district's act of proposing a new IEP for a new school year abrogates the stay-put provision for the academic year covered by the proposed IEP. The court recognized that both the statute and relevant case law support the notion that the stay-put provision is a mechanism to maintain the *last* proper placement during review of the next IEP. *Id.* Thus, the last proper placement in the instant case is Monarch School, making it the appropriate placement for J.W. to remain there during the pendency of the September 19th proceedings.

C. An Injunction Would Provide an Improper Incentive to Continue Litigation

Defendant Parma also argues that, as noted in *Mayo v. Baltimore City Pub. Schs.*, 40 F. Supp. 2d 331, 334 (D. Md. 1999), granting an injunction would encourage parents who successfully obtained reimbursement for a single school year to continue further litigation in order to obtain free private school tuition for their child. This policy concern, however, has been rejected by other courts. In *Schutz*, 290 F.3d at 484 and *Murphy v. Arlington Cent. Sch. Dist Bd. of Educ.*, 86 F. Supp. 2d 354, 366 (S.D.N.Y. 2000), the court noted that requiring reimbursement for private education for

stay-put provision purposes does not mean that the school district must fund the child's private school tuition for the remainder of his education. Instead, the reimbursement is required only until a new placement is established by agreement or by an administrative decision. *Id.* This court agrees with the rationale in these cases that Defendants' concern is unwarranted and Plaintiffs will only receive reimbursement until a placement is determined.

Based on the stay-put provision and applicable case law governing a child's current educational placement, this court finds that J.W.'s current educational placement is Monarch School. Therefore, Defendants must continue to reimburse Plaintiffs during the pendency of the upcoming due process proceedings.

D. Defendant ODE's Liability

Defendant ODE, in its Motion to Dismiss, argues that Parma, as the local educational agency ("LEA"), is the primary obligor in this case. However, public agencies are potentially liable in actions seeking injunctive relief under 20 U.S.C. §§ 1400 et seq. The regulations accompanying this statute include in the definition of a "public agency" any state educational agencies, which would include a state board or department of education. *See* 34 C.F.R. § 300.33; 34 C.F.R. § 300.41. Therefore, as the state department of education, Defendant ODE would also be liable in the instant case.

Plaintiffs' counsel must file is fee application within 14 days of the date of this Order. Defendants shall file their response within 14 days thereafter.

IV. CONCLUSION

For the reasons stated above, this court grants Plaintiffs' Motion for Expedited Injunctive Relief (ECF No. 3); and Plaintiffs' Motion for Permanent Injunction and Declaratory Judgment Regarding Pendency Placement (ECF No. 6). The court denies Defendant ODE's Motion to Dismiss (ECF No. 8).

IT IS SO ORDERED.

/s/ *SOLOMON OLIVER, JR.*
UNITED STATES DISTRICT JUDGE

October 24, 2008