

EDU #10080-96
C # 544-96E
SB # 98-96

I.D. AND M.D., on behalf of C.D., :
PETITIONER-APPELLANT, :
V. : STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWN- : DECISION
SHIP OF HAZLET, MONMOUTH COUNTY, :
RESPONDENT-RESPONDENT. :
_____ :

Decided by the Commissioner of Education, November 27, 1996

For the Petitioner-Appellant, New Jersey Protection & Advocacy, Inc.
(Joseph M. Ciccone, Esq., of Counsel)

For the Respondent-Respondent, Kenney & Gross (Michael J. Gross, Esq., of
Counsel)

This matter was initiated on November 1, 1996 when petitioners, the parents of a 6-year-old who is classified and has an individualized educational program ("IEP"), filed an application for emergent relief with the Department of Education's Office of Special Education Programs ("OSEP"), alleging that the Board of Education of the Township of Hazlet (hereinafter "Board" or "Hazlet Board") had violated the Individuals with Disabilities Act ("IDEA"), 20 U.S.C. Sec. 1415 et seq., and other special education laws. Specifically, petitioners sought emergent relief pursuant to N.J.A.C. 1:6A-12.1, including transportation for their son from their care provider's home to school pursuant to his IEP, an IEP meeting to develop a compensatory education plan, and the

reimbursement for costs incurred as the result of the district's failure to provide appropriate transportation, as well as attorney's fees pursuant to 20 U.S.C. Sec. 1415(e)(4)(B).

As set forth in N.J.A.C. 6:28-2.7, the Office of Special Education Programs transmits applications such as the one involved here to the Office of Administrative Law ("OAL") for an impartial hearing pursuant to N.J.A.C. 1:6A-1.1 et seq. However, in this instance, the Office of Special Education Programs transferred the application instead to the Bureau of Controversies and Disputes for determination by the Commissioner. The matter was then transmitted to OAL as a contested case pursuant to N.J.S.A. 52:14B-2 et seq.

On November 21, 1996, the Administrative Law Judge ("ALJ") issued a determination under the standard established in N.J.A.C. 1:6A-12.1(e), granting the application for emergent relief pending full disposition of the matter through an IDEA due process hearing to be conducted pursuant to N.J.A.C. 1:6A-1 et seq. However, because the matter had been transmitted to OAL by the Bureau of Controversies and Disputes, the ALJ's decision was transmitted to the Commissioner as a recommendation pursuant to N.J.A.C. 1:1-18.1 et seq. for his decision, rather than becoming the final determination as codified in N.J.A.C. 1:6A-1 et seq. and N.J.A.C. 6:28-1 et seq.

The Commissioner rejected the determination which the ALJ had made under the standard articulated in N.J.A.C. 1:6A-12.1(e). Instead, the Commissioner determined that petitioners were not entitled to emergent relief because the application did not meet the standards of Crowe v. De Gioia, 90 N.J. 126 (1982). In doing so, the

Commissioner found that he had jurisdiction over the matter to the extent that petitioners alleged that the Board had acted improperly in not providing transportation for their son from a locale other than that designated in the IEP. At the same time, the Commissioner concluded that he did not have the jurisdiction to decide the merits of the case because the matter involved an IDEA dispute.

Petitioners filed the instant appeal to the State Board. While they have also refiled their substantive claim with OSEP, and it has been transmitted to OAL for decision on the merits pursuant to N.J.A.C. 1:6A-1 et seq., petitioners seek a determination by the State Board that the Commissioner should not have taken jurisdiction over any aspect of this case, but, rather, that OSEP should have transmitted the case to OAL for decision as a special education matter.

The Hazlet Board contends that the appeal is moot since the Commissioner's decision on the emergent relief application did not foreclose them from refiled for relief with OSEP and the underlying matter is being heard at OAL as a special education case.

Petitioners counter that the due process hearing cannot correct the error that was made in this case and that such error is capable of repetition and evading review. Moreover, they stress that their son has not obtained the interim relief they sought since the Commissioner improperly took jurisdiction over the application.

We agree with petitioners that this appeal raises an issue of public interest which may well reoccur but escape review. Hence, we find it falls within an exception to the mootness doctrine. See Zirger v. General Accounting Insurance Company, 144 N.J. 327, 330 (1996).

Review of the substance of appellant's application leaves no question that it should have been transmitted by the Office of Special Education Programs to OAL when it was filed for consideration as a special education matter. Quite simply, because the application facially argues violations of the IDEA and other special education statutes, and specifically requests relief under N.J.A.C. 1:6A-12.1, the application should have been transmitted to OAL pursuant to N.J.A.C. 1:6A-12.1 et seq. for determination under the standard set forth in N.J.A.C. 1:6A-12.1(e), which is applicable to matters such as this.¹ See also 20 U.S.C. Sec. 1415.

Hence, we reverse the Commissioner's determination that he had jurisdiction to review the application for emergent relief in this case, and we set aside his decision denying such relief. However, in that neither the Commissioner nor the State Board of Education has the jurisdiction to review the ALJ's determination that petitioners were entitled to emergent relief under the standards of N.J.A.C. 1:6A-12.1, we dismiss the appeal.

April 2, 1997

Date of mailing _____

¹ Under N.J.A.C. 1:6A-12.1(e), an ALJ may order emergency relief in special education matters if he determines that: 1) the applicant has a reasonable probability of ultimately prevailing on the merits, 2) either serious harm will result to a student if relief is not granted or the student's education program will be terminated or interrupted, and 3) the relief requested is narrowly defined to prevent the specific harm and will not cause unreasonable expense and substantial inconvenience. In contrast, the standard under Crowe v. De Gioia, supra, requires an applicant for emergency relief to show 1) irreparable harm, 2) that the legal right underlying the claim is unsettled, 3) a reasonable probability of ultimate success on the merits, and 4) that the harm to the applicant if the relief is not granted outweighs any harm to the other parties.