



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

EMERGENT RELIEF

OAL DKT. NO. EDS 13697-18

AGENCY DKT. NO. 2018-28821

R.A. AND B.A. ON BEHALF OF J.A.,

Petitioners,

v.

BASS RIVER TOWNSHIP BOARD

OF EDUCATION,

Respondent.

R.A. and **B.A.**, petitioners, pro se

Paul C. Kalac, Esq., for respondent, Bass River Twp. Board of Education
(Weiner Law Group, LLC, attorneys)

Record Closed: September 26, 2018

Decided: September 28, 2018

BEFORE **MARY ANN BOGAN**, ALJ:

On September 17, 2018, petitioners R.A. and B.A., on behalf of their grandson, J.A., applied for emergent relief asserting that J.A. is not currently receiving educational services. Petitioners seek an order for interim placement of J.A. at Bass River Township Elementary School (District School) with general education students and in class supports, or home bound educational services until this matter is resolved. Along

with the request for emergent relief, petitioners also filed a due process hearing with the Department of Education, Office of Special Education (OSE).

The respondent, Board, maintains that petitioners' last individualized educational program (IEP) on record, dated August 27, 2018, developed and offered, appropriately places J.A. at Pinelands Regional School Behavior Disabilities (BD) program (Pinelands). OSE transmitted the matter to the Office of Administrative Law, where it was filed on September 21, 2018, and scheduled for oral argument on September 25, 2018 at 9:30 a.m. The petitioners did not arrive to the scheduled oral argument at 9:30 a.m. on September 25, 2018. The OAL contacted the petitioners via telephone. Petitioners stated they did not receive the hearing notice sent via email on September 21, 2018. Our file reflects that the hearing notice sent on September 21, 2018 was verified as delivered. The OAL provided the petitioners with the opportunity to reschedule oral argument. Accordingly, the hearing was rescheduled for September 26, 2018 at 1:30 p.m., on which day oral argument was conducted and the record closed.

FACTUAL DISCUSSION

J.A. is currently a 6th grade student enrolled in the District School. J.A. is eligible for special education services under the classification Other Health Impaired (OHI). At the August 27, 2018 IEP meeting, the District identified and proposed that J.A. attend the Behavioral Disabilities program at Pinelands as the appropriate placement designed to provide J.A. with a free and appropriate public education (FAPE) in the least restrictive environment (LRE). The recommended program/placement has a small student to teacher ratio, and 1:1 aide. R.A. and B.A. attended the IEP meeting and received a copy of the IEP at the meeting.

In support of their emergent relief, petitioners argue that J.A. is currently not receiving educational services. Petitioners submit that Pinelands is an inappropriate placement especially because J.A. would be poorly influenced in the smaller class by older students in the class. J.A. was previously unsuccessful in small classes with older

children because he mimicked the older student's poor behavior. In addition, Pinelands is currently experiencing mold problems which has caused many younger students that J.A. would have the opportunity to interact with while at school to be displaced to a different location. Petitioners urge, placing J.A. at the District School would provide J.A. with a fresh start. At the District School, he would be attending school with his peers, and be taught by teachers who know J.A. best and know how to best educate him, and the District School has services in place and also shares services with Pinelands.

The petitioners filed for emergent relief objecting to the current placement set forth in the August 27, 2018 IEP, on September 17, 2018, six days after the expiration of the 15-day period to consider the IEP expired. Petitioners acknowledged that they did not file the petition in a timely manner because at that time they were still in communication with the District about their objections to the IEP. J.A. has not attended school for the 2018-2019 school year.

The Board asserts that emergent relief as set forth in N.J.A.C. 6A:14-2.7(r) does not provide petitioners with the opportunity to temporarily place J.A. at a different school, and J.A. had not experienced a break in the delivery of services. The Board recommended, and the August 27, 2018 IEP is designed to provide J.A. with FAPE at the BD program in Pinelands "based upon all current data available to them." In addition, since Pinelands would be J.A.'s junior high school, the placement has the added benefit of providing J.A. with the opportunity to get to know the students and teachers ahead of entering junior high in 7th grade.

The Board submits that J.A. has a history of unsuccessful school placements. For the 2017-2018 school year, J.A. was a fifth grader at Little Egg Harbor School District BD program. There he exhibited dangerous behaviors resulting in three out of school suspensions in and around May 15, 2018. In May 2018, J.A. was removed from Little Egg Harbor program and received home instruction services for the remainder of the 2017-2018 school year. After being placed at Galloway Township School District for the 2016-2017 school year, J.A. was terminated in and around October 20, 2016, due to the nature of his physical outbursts. He was then placed at the Stafford

Township School District as a result of his termination, where he was terminated at the conclusion of the 2016-2017 school year.

I **FIND** that petitioners did not file for mediation or due process within fifteen days of the August 27, 2018 IEP to prevent implementation of the IEP under N.J.A.C. 6A:14-2.3(h)(3)(ii).

LEGAL ARGUMENT AND CONCLUSION

N.J.A.C. 6A:14-2.7(r), provides in pertinent part that a party may apply in writing for a temporary order of emergent relief as part of a request for a due process hearing under very limited circumstance.

1. Emergent relief shall only be requested for the following issues:
 - i. Issues involving a break in the delivery of services;
 - ii. Issues involving disciplinary action, including manifestation determinations and determinations of interim alternate educational settings;
 - iii. Issues concerning placement pending the outcome of due process proceedings;
 - iv. Issues involving graduation and participation in graduation ceremonies.

Petitioners contends that emergent relief may be requested in this situation pursuant to N.J.A.C. 6A:14-2.7(r)(1)(i) because there is a break in the delivery of services to J.A. Under the circumstances, petitioners may not seek emergent relief pursuant to N.J.A.C. 6A:14-2.7(r)(1)(i) because the District has provided a placement for J.A. for the 2018-2019 school year.

Petitioners also contend that emergent relief may be requested in this situation pursuant to N.J.A.C. 6A:14-2.7(r)(1)(iii) because there are issues concerning placement

pending the outcome of due process proceedings. Here, petitioners dispute the placement of J.A. at Pinelands for the 2018-2019 school year and seek in-home placement or return to the in-district elementary school with general education students and in-class supports pending the due process proceedings. Accordingly, I **CONCLUDE** the petitioners request for emergent relief shall be reviewed in this manner.

Notwithstanding the conclusion above, the petitioners' final assertion is that there are issues involving graduation and participation in 6th grade graduation in accordance with N.J.A.C. 6A:14-2.7(r)(1)(iv). Petitioners may not seek emergent relief under N.J.A.C. 6A:14-2.7(r)(1)(iv) because graduation ceremonies are not scheduled or planned for the immediate future, and any possible later planned graduation for 6th grade ceremonies are not protected herein.

As set forth in N.J.A.C. 1:6A-12.1(e), N.J.A.C. 6A:3-1.6(b) and N.J.A.C. 6A:14-2.7(s), an application for emergent relief will be granted only if it meets the following four requirements:

1. The petitioners will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying the petitioners' claim is settled;
3. The petitioners have a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioners will suffer greater harm than the respondent will suffer if the requested relief is not granted.

See also N.J.A.C. 1:1-12.6, and Crowe v. DeGioia, 102 N.J. 50 (1986), which echoes the regulatory standard for this extraordinary relief. It is well established that a moving party must satisfy all four prongs of the regulatory standard to establish an entitlement to emergent relief. See also Crowe at 132-35.

Turning to the first criteria, it is well settled that relief should not be granted except “when necessary to prevent irreparable harm.” Crowe 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. Moreover, the harm must be substantial and immediate. Judice’s Sunshine Pontiac, Inc. v. Gen. Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976) (citation omitted). More than a risk of irreparable harm must be demonstrated. Continental Group, Inc. v. Amoco Chems. 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.) Irreparable harm in special education classes has been demonstrated when there is a substantial risk of physical injury to the child, or others, or when there is a significant interruption or termination of educational services. M.H. o/b/o N.H. v. Milltown Board of Education, 2003 WL 21721069, OAL Dkt. No. EDS 4166-03.

In the instant matter, there has been no showing of “substantial risk of physical injury” to J.A. nor has there been a “significant interruption or termination of his educational services.” The Board is ready and willing to educate J.A. in accordance with the placement in the August 27, 2018 IEP. In addition, under the facts herein, J.A. has behavioral issues that have precluded him from returning to the District School. Moreover, the petitioners have not provided any testimony or evidence to demonstrate that J.A. should be immediately placed, upon an emergent application, in-district or home instruction during the pendency of a due process application.

For the foregoing reasons, I **CONCLUDE** that petitioners have not demonstrated that J.A. will suffer irreparable harm if the requested relief is not granted.

Although all four standards for emergent relief must be met, the three remaining prongs of the standards for emergent relief will be addressed.

The second criteria, emergent relief “should be withheld when the legal right underlying petitioners’ claim is unsettled.” Crowe, 90 N.J. at 133 (citing Citizens Coach Co., 29 N.J. Eq. at 304-305. Here the legal right underlying J.A.’s claim is settled. The primary purpose of the Individuals with Disabilities Education Act (IDEA) is to ensure that all disabled children will be provided a Free and Appropriate Education (FAPE). The Board offered an IEP on August 27, 2018, placing J.A. at Pinelands. Here, even if petitioners could show that the placement does not provide FAPE, J.A. remains enrolled at Pinelands as required by law when the enrollment dispute arises. Moreover, J.A. has not attended school since the start of the 2018-2019 school year, and according to the Board he is currently truant.

However, the third requirement seeks to determine whether or not petitioners have demonstrated a likelihood of success on the merits. Here, petitioners did not file for mediation or due process within fifteen days of the August 27, 2018 IEP to prevent the implementation of the IEP under N.J.A.C 6A:14-2.3 (h)(3)(ii). Therefore, no change can be made to J.A.’s placement at Pinelands pending the outcome of the due process hearing without an agreement of the parties. N.J.A.C. 6A:14-2.7(u). Here, petitioners acknowledged that they did not prevent the August 27, 2018 IEP from being implemented by filing for mediation or due process within fifteen days of the proposed IEP. Moreover, in-home instruction is not an appropriate placement when there are issues concerning placement pending the outcome of due process proceedings. In-home placement is specifically reserved for students who are temporarily ill or injured and it is not a default placement if the student’s parents disagree with a proposed and offered IEP. N.J.A.C. 6A:16-10.1. Moreover, home instruction is available under limited circumstances where all other restrictive program options have been considered and have been determined inappropriate.

For the foregoing reasons, I **CONCLUDE** that petitioners have not demonstrated a likelihood of success on the merits.

The final requirement relates to the equities and interests of the parties. N.J.A.C. 6A:14-2.7(r)(1)(iv). Petitioners claim that J.A. will mimic negative behavior if

he is placed at Pinelands. Here, since J.A. has not attended school this year, the extent of the potential negative behavior at Pinelands is unclear and cannot be determined.

I **CONCLUDE**, that J.A. would not suffer greater harm than the District would if the requested relief is not granted. Accordingly, I **CONCLUDE** that petitioners did not satisfy all four requirements for emergent relief.

Therefore, I **CONCLUDE** that petitioners' request for emergent relief be **DENIED**.

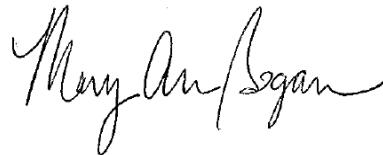
ORDER

For the foregoing reasons set forth above, it is hereby **ORDERED** that petitioners' request for emergent relief in the form of an order directing J.A.'s attendance at Bass River Township Elementary School or in-home instruction 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.

September 28, 2018

DATE



MARY ANN BOGAN, ALJ

Date Received at Agency:

Date Mailed to Parties:

MAB/cb

APPENDIX

EXHIBITS

For petitioners:

None

For respondent:

Brief