



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION DENYING

EMERGENT RELIEF

OAL DKT. NO. EDS 05401-20

AGENCY DKT. NO. 2020-31721

K.K. ON BEHALF OF A.W.

Petitioner,

v.

BLACK HORSE PIKE REGIONAL

BOARD OF EDUCATION,

Respondent.

Robert A. Robinson, Esq., for petitioners (Disability Rights New Jersey)

Alexandra Stulpin, Esq., for respondent (Comegno Law Group, P.C. attorneys)

Record Closed: June 16, 2020

Decided: June 17, 2020

BEFORE **TAMA B. HUGHES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, K.K. – A.W.’s Kinship Legal Guardian, seeks emergent relief in the form of “stay-put” to prevent A.W.’s graduation from high school. Petitioner seeks to keep A.W. at the Highland Regional High School, asserting that A.W. is illiterate and that the District has failed to provide A.W. a Free Appropriate Public Education (FAPE). Petitioner seeks to keep A.W. in school so that she can receive vocation and life skill

assessments and additional services/tutoring which would bring her up to a twelfth-grade academic level.

Respondent, Black Horse Pike Regional Board of Education (“Board” or “District”), opposes the application, arguing that the matter is moot as A.W. graduated on June 12, 2020 - having met all credit hours and excelling in her educational classes; petitioner is not A.W.’s “Legal Guardian” and therefore lacks standing to bring the application; petitioner cannot satisfy any of the standards for emergent relief; the emergent application was untimely filed; and A.W. is no longer domiciled in the District.

The matter was transmitted to the Office of Administrative Law (OAL) on June 12, 2020, for an emergent relief hearing and a final determination in accordance with 20 U.S.C.A. §1415 and 34 C.F.R. §§300.500 to 300.587.¹ The hearing took place on June 16, 2020, after which the record closed.

FACTUAL DISCUSSION

For purposes of deciding this request for emergent relief, I **FIND** that the following facts which form the basis for the determination herein, are not in dispute.

A.W. is a nineteen-year-old senior at Highland Regional High School. She receives special education and related services under the category of “Other Health Impaired”. (Petitioner’s Certification - Exhibit A.)

In May 2017, petitioner obtained a Judgment for Kinship Legal Guardianship through the Camden County Superior Court of New Jersey, Chancery Division under Docket No. FL-04-165-17. (Petitioner’s Certification – Exhibit B.) Through this Order, petitioner was given authority to, among other things, arrange and consent to educational plans. Petitioner has been involved in A.W.’s educational program and included in IEP meetings – even after petitioner turned eighteen years old. Petitioner

¹ The underlying Due Process Complaint seeking transitional assessments to develop goals for transitional services and living skills remained at SPDR. It was subsequently dismissed on June 12, 2020, by the Honorable Barry E. Moscovitz, Administrative Law Judge (ALJ) for insufficiency.

participated in the 2019/2020 IEP and was the individual who signed the Consent to Implement Initial IEP form. (Petitioner's Certification – Exhibit A.) This involvement in A.W.'s educational program continued when A.W. turned nineteen in January 2020.

Throughout high school, A.W. maintained an above average grade point average and acquired all of the required educational credits required to graduate. In her senior year, she obtained and maintained a part time job. (Petitioner's Certification – Exhibit D; Alexandra Stulpin, Esq., Certification – Exhibit C.)

On May 21, 2020, all graduating seniors and their parents were sent a graduation packet. (Respondent's Brief, Exhibit F.)² The packet contained graduation ceremony information and advised that commencement recordings would be held Monday, June 8 through Friday June 12, 2020, and that students would be assigned a date and time. It also provided dates that students could pick up their diplomas after June 12, 2020.

Thereafter, on May 27, 2020, petitioner was advised that A.W.'s graduation was to occur on June 12, 2020, at one o'clock in the afternoon at the school. (Respondent's Brief – Exhibit G.)

On June 5, 2020, petitioner received A.W.'s "Notice of Graduation or Age 21 – Proposed Action", and a "Summary of Performance". (Petitioner's Certification - Exhibits C and D.) Both documents were dated June 2, 2020.

On June 11, 2020, petitioner filed the instant emergent application seeking "stay put". On June 12, 2020, the matter was transmitted to the OAL.

On June 12, 2020, A.W. did not participate in the graduation ceremonies.

LEGAL DISCUSSION

² On the date of the hearing, additional exhibits (Exhibit F and Exhibit G) were received by respondent's counsel and included as part of their motion briefs.

Citing to N.J.A.C. 6A:14-2.3(m), the Board asserts that petitioner, as the Kinship Legal Guardian, lacks standing to bring the instant application as she is not A.W.'s "Legal Guardian".

N.J.A.C. 6A:14.2.3(m) states in pertinent part:

Except when a parent has obtained legal guardianship, all rights under this chapter shall transfer to the student upon attainment of the 18th birthday. The district board of education shall provide the adult student and the parent with written notice that the rights under this chapter have transferred to the adult student.

In support of this position, the Board relies upon the Honorable Barry E. Moscovitz, ALJ recent dismissal of the underlying Due Process Petition for among other things, lack of standing.

Given the fact that the sufficiency challenge was not before me, it is unknown what documentation was presented to Judge Moscovitz's for his consideration on the issue of standing. As such, his determination, as it relates to the issue of standing, while considered, is not dispositive.

What is dispositive, however, is the fact that a Superior Court Order was entered in May 2017, granting the petitioner Kinship Legal Guardianship of A.W. Through this Order, petitioner was given full rights and authority to arrange and consent to educational plans for A.W. The last paragraph of the Order was very clear that the guardianship remained in place until A.W. reached eighteen-years-old or when she was no longer continuously enrolled in High School – whichever event occurred later. No evidence was presented that the Order was terminated by the Court. At the time this application was filed, A.W. had not yet graduated. Therefore, the Order is presumed to be valid and gives petitioner, as A.W.'s guardian, standing to bring this application.

Respondent further argues that petitioners' application was filed out of time – citing to the May 21, 2020, e-mail which provided the graduation packet, and the May 27, 2020, e-mail which informed A.W. and the petitioner of the June 12, 2020, graduation date. While there is no question that the petitioner and A.W. were placed on

notice of the upcoming graduation date, it was not the formal notice required under N.J.A.C. 6A:14-4.11 which states in relevant part:

(b) Graduation with a State endorsed diploma is a change of placement that requires written notice according to N.J.A.C. 6A:14-2.3(f) and (g).

1. As part of the written notice, the parent shall be provided with a copy of the procedural safeguards statement published by the Department of Education.
2. As with any proposal to change the educational program or placement of a student with a disability, the parent may resolve a disagreement with the proposal to graduate the student by requesting mediation or a due process hearing prior to graduation.
3. In accordance with N.J.A.C. 6A:14-3.8(d), a reevaluation shall not be required.
4. When a student graduates or exceeds the age of eligibility, the student shall be provided a written summary of his or her academic achievement and functional performance prior to the date of the student's graduation or the conclusion of the school year in which he or she exceeds the age of eligibility. The summary shall include recommendations to assist the child in meeting his or her postsecondary goals.

Here, written notice was not provided until sometime after June 2, 2020. Given this timetable, I FIND that the instant application was timely filed.

Respondent further urges the Tribunal to find that the issue is moot because A.W. technically graduated on June 12, 2020, is nineteen years-old, has a job and has moved out of the District. While the matter may be moot, it is not for the reasons raised by the respondent rather for the reasons discussed more fully below.

The controlling issue in this application is the emergent relief sought by the petitioner which is "stay put". When an emergent-relief request effectively seeks a

“stay-put” preventing the school district from making a change in placement from an agreed-upon IEP, the proper standard for relief is the “stay-put” provision under the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C.A. § 1400, et seq. Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 (3d Cir. 1996) (citing Zvi D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982)) (stay-put “functions, in essence, as an automatic preliminary injunction”). The stay-put provision provides in relevant part 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.” 20 U.S.C.A. § 1415(j).

The relevant IDEA regulation and its counterpart in the New Jersey Administrative Code reinforce that a child remain in his or her current educational placement “during the pendency of any administrative or judicial proceeding regarding a due process complaint.” 34 C.F.R. § 300.518(a) (2016); N.J.A.C. 6A:14-2.7(u). The stay-put provision functions as an automatic preliminary injunction which dispenses with the need for a court to weigh the factors for emergent relief such as irreparable harm and likelihood of success on the merits, and removes the court’s discretion regarding whether an injunction should be ordered. Drinker, 78 F.3d 859. Its purpose is to maintain the status quo for the child while the dispute over the IEP remains unresolved. Ringwood Bd. of Educ. v. K.H.J., 469 F.Supp.2d 267, 270–71 (D.N.J. 2006).

In the present matter, however, there is no pending administrative or judicial proceeding regarding a due process complaint. The underlying complaint was dismissed for lack of sufficiency on June 12, 2020. As such, the instant application must be analyzed in accordance with N.J.A.C. 1:6A-12.1(e) and N.J.A.C. 6A:14-2.7(s)(1). Notably, petitioner presented no argument under Crowe, relying solely on the imposition of an automatic stay-put under Drinker.

In most cases, pursuant to N.J.A.C. 1:6A-12.1(e) and N.J.A.C. 6A:14-2.7(s)(1), emergency relief may be granted if the judge determines from the proofs that:

- i. The petitioner will suffer irreparable harm if the requested relief is not granted;

- ii. The legal right underlying the petitioner's claim is settled;
- iii. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
- iv. 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.

Crowe v. DeGioia, 90 N.J. 126 (1982), codified at N.J.A.C. 6A:3-1.6(b).

The petitioner bears the burden of satisfying all four prongs of this test. Crowe, 90 N.J. at 132-34. Harm is irreparable when there can be no adequate after-the-fact remedy in law or in equity; or where monetary damages cannot adequately restore a lost experience. Crowe, at 132-133; Nabel v Board of Education of Hazlet, EDU 8026-09, Final Decision on Application for Emergent Relief (June 24, 2009).

In this case, petitioner asserts that A.W. is not ready for graduation because A.W. was illiterate and required further assessments such as vocational and life skills assessments and additional tutoring and transitional services. If A.W. graduated, she would no longer be eligible to receive such services.

Based upon the foregoing, I **FIND** that irreparable harm would occur if the A.W. graduates because she would be foreclosed from contesting whether she has a right to additional services from the District.

The second prong to be considered is whether petitioner has a settled legal right to the relief requested. Here, petitioner seeks a stay-put to prevent A.W. from graduating. As noted above, there is no pending administrative or judicial proceeding regarding a due process complaint, therefore there is no settled legal right to the relief requested. Even assuming *arguendo* there was, petitioner has failed to meet her burden on this prong.

Other than asserting that A.W. was not ready to graduate and requires more transition services and or assessments, petitioner failed to demonstrate the right to the relief requested. A.W. met all of the graduation requirements, credit hours and had an IEP that was projected to cease special education and related services on June 30, 2020.

For all of the reasons cited above I **FIND** that the petitioner has not demonstrated that she has a settled legal right to the relief requested.

Under the third prong, petitioner must establish that “all material facts are uncontroverted” and a “likelihood of prevailing on the merits of the underlying claim”. Crowe at 133.

As noted above, the underlying claim has been dismissed. However, even if it was still pending, based upon my review of the certifications and evidence presented in this matter - which clearly shows A.W.'s strong academic performance and progress throughout her High School tenure, there appeared to be no impediment or rationale to prevent A.W. from graduating.

For the foregoing reasons, I **FIND** that petitioner has not demonstrated the likelihood of success on the merits.

The fourth and last prong of the test is that the petitioner must demonstrate that when the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent if the requested relief is not granted.

Petitioner has not met this burden. While petitioner believes that additional transition services are necessary, she failed to articulate why they were necessary, what hardship A.W. would experience if the application was denied or the likelihood of success on the merits of the underlying claim.

On the other hand, if the requested relief was granted, the Board would be required to bear the financial cost associated with providing A.W. an additional year of

special education and related services as well as the costs of litigation which would be incurred to litigate the underlying claim.

Given the above and in balancing the equities and interests of the parties, I **FIND** that the burden to the District is a greater.

It is petitioner's burden to satisfy all four conditions set forth in Crowe as codified in N.J.A.C. 6A:3-1.6(b) to be granted the emergent relief requested. I **CONCLUDE** that petitioner has failed to do so.

For all of the foregoing reasons, I **CONCLUDE** that petitioner is not entitled to the emergent relief requested and that her application is **DENIED**.

ORDER

For the reasons stated above, I hereby **ORDER** that petitioner's application for emergent relief to preclude A.W. from graduating and implementing stay-put is hereby **DENIED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2019) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.516 (2019). 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 Policy and Dispute Resolution.



June 17, 2020

DATE

TAMA B. HUGHES, ALJ

Date Received at Agency

Date Mailed to Parties:

APPENDIX
WITNESSES

For petitioner:

None

For respondent:

None

EXHIBITS

For petitioner:

Petitioner's Brief, K.K. Certification and attached Exhibits

Petitioner's Response Brief, K.K. Certification and attached Exhibits

For respondent:

Respondent's Brief, Alexandra Stulpin, Esq. Certification and attached Exhibits