



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON
EMERGENT RELIEF¹

OAL DKT. NO. EDS 10184-22

AGENCY DKT. NO. 2023-35017

P.B.,

Petitioner,

v.

**SOMERVILLE BOROUGH BOARD
OF EDUCATION,**

Respondent.

David R. Giles, Esq., for petitioner

Robin Ballard, Esq., for respondent (Schenck, Price, Smith & King, attorneys)

BEFORE **MARY ANN BOGAN, ALJ:**

Petitioner P.B., seeks emergent relief to enforce stay-put pending his due process petition pursuant to the Individuals with Disability Education Act (IDEA) “stay-put” provisions. Petitioner maintains that his current educational placement is the Center for Educational Advancement, and he was dually enrolled at Raritan Valley Community College. Petitioner finds such an order to be necessary because the District terminated his educational placement on November 23, 2022, after a final decision was

¹ Since the due process petition has the same docket number, this emergent relief application is an Order, and not a final decision.

issued by the Honorable Kim Belin.² The Somerville Board of Education (District) in opposition maintains that at the time the petition for the due process associated with this emergent petition was filed on September 29, 2022, P.B. had already graduated, at the conclusion of the 2021–2022 school year. Therefore, petitioner is no longer eligible for special education and has no current educational placement.

This matter was filed with the Office of Special Education (OSE) and transmitted to the Office of Administrative Law (OAL) on November 15, 2022.³ The emergent petition was filed directly with the OAL on January 13, 2023, and scheduled for oral argument on January 25, 2023, at 4:00 p.m.

FACTUAL DISCUSSION

P.B. is twenty years old and was enrolled in high school for five years. According to his last Individualized Education Program (IEP) P.B. attended Center for Educational Advancement at South Hunterdon High School (CEA). During that time, P.B. was classified as eligible for special education and related services pursuant to the IDEA under the classification of Autism. P.B. is also diagnosed with attention deficit hyperactivity disorder.

According to the records, while at CEA, P.B. earned 184 credits by June 2021. According to his IEP, P.B. required just 120 credits to meet graduation requirements. At the end of the 2021–2022 school year, P.B. had 215.25 credits. (District Exhibit 1.) P.B. also passed the testing required by the State of New Jersey to be awarded a high school diploma, even though his IEP exempted him from passing the State testing requirements.

² Petitioner noted that the denial of P.B.'s request for a reevaluation was challenged in a due process hearing petitioner filed on October 22, 2021. The petitioner also challenged the District's "predetermination" that P.B. should be graduated and that his eligibility for special education should be terminated. The decision was issued on November 23, 2022, denying petitioner's due process petition. P.B. v. Somerville Borough Board of Education, OAL Docket No.: EDS 09317-21.

³ In the current petition for due process received at the OAL on November 15, 2022, petitioner seeks compensatory education, reevaluations to determine current levels, and an IEP team meeting to develop an IEP to determine an appropriate placement.

It is undisputed that P.B. exceeded all graduation requirements of the State of New Jersey and those set forth in his IEP, consistent with N.J.A.C. 6A:14-4.11(a). During the March 11, 2021, IEP meeting the IEP memorialized that P.B. was anticipated to fulfill his academic requirements by June 2021, and that he was being offered one additional year of educational services at CEA for transition purposes. (Exhibit A attached to David R. Giles certification.) The services consisted of CEA for the 2021–2022 school year. Petitioner also attended Raritan Valley Community College (RVCC). P.B. participated in College and Career Readiness, Create your Own Business and Job Club with related services for speech therapy and counseling. The IEP did not include supports such as a 1:1 aide or instructional aide. The IEP provided notification that P.B. would be graduated in June 2022. The District pointed to documentation from the reevaluation planning meeting on October 12, 2021, the most recent IEP meeting on May 3, 2022, and an exit conference on June 8, 2022. (Exhibit H Giles cert. Exhibit 2 McDonald cert. Exhibit P Giles cert.) P.B. was also provided with a Summary of Performance that specifically informed P.B. that specifically notified him of his anticipated graduation date of June 16, 2022.

During his last year of high school, petitioner filed a petition for due process. The District continued to provide P.B. with educational services through stay-put until the final decision was issued by the Honorable Kim C. Belin, on November 23, 2022, dismissing the petition. The District ceased educational services that day and P.B. appealed that decision to the United States District Court. On December 6, 2022, a request for an Order to Show Cause with Temporary Restraints to return to educational programming seeking an entitlement to same through stay-put was filed. On December 8, 2022, United States District Judge Michael Shipp denied the petitioner's request to be returned to educational programming, finding he had no entitlement to same, since he has been graduated from high school. The District alleges that this ruling renders the issue of stay-put for P.B. *res judicata*. This instant petition for due process was filed at the Office of Education, Office of Special Education on September 29, 2022. The District points out that pursuant to N.J.A.C. 6A:14-4.11(b)2, petitioner was obligated to file any challenge to continued educational programming prior to graduation. The only reason he received services through November 23, 2022, was under the stay-put provisions for the earlier case decided by Judge Belin.

Petitioner urges that the stay-put standard and not the standard set forth in N.J.A.C. 1:6A-12.1(e) emergency relief pending settlement or decision and Crowe v. De Gioia, 90 N.J. 126 (1982), is the applicable law as it is an automatic injunction. The respondent counters that since P.B.'s emergent request to the United States District Court was denied by United States District Judge Michael Shipp on December 8, 2022, the issue of stay-put for P.B. is *res judicata*.

LEGAL ANALYSIS AND CONCLUSION

As previously stated, petitioner urges that the proper standard for relief is the "stay-put" provision under the Individuals with Disabilities Education Act ("ADEA"), 20 U.S.C. 1400 et seq. Drinker v. Colonial Sch. Dist., 78 F. 3d 859, 864 (3rd 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 education placement of the child." 20 U.S.C. 1415(j). Its counterpart is set forth in N.J.A.C. 6A:14-2.6(d) and 2.7(u).

Petitioner contends that for this emergent relief it is unnecessary to consider the criteria set forth in Crowe v. DeGioia, 90 N.J. 126 (1982). As previously stated, petitioner urges that the proper standard for relief is the "stay-put" provision under the Individuals with Disabilities Education Act ("ADEA"), 20 U.S.C. 1400 et seq. Drinker v. Colonial Sch. Dist., 78 F. 3d 859, 864 (3rd 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 education placement of the child." 20 U.S.C. 1415(j).

However here, since the petitioner has been graduated, there is no valid stay-put IEP and therefore I **CONCLUDE** the petitioner's request for emergent relief shall be

viewed in accordance with the standard set forth in N.J.A.C. 1:6A-12.1(e) emergency relief pending settlement or decision and Crowe v. De Gioia, 90 N.J. 126 (1982).

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), a petitioner is entitled to emergency relief only if it is determined that the following four requirements are met:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying the petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. 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.

See also N.J.A.C. 1:1-12.6(b), citing Crowe v. DeGioia, 90 N.J. 126 (1982), 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.

Petitioner carries the burden of proving all of the criteria "clearly and convincingly." Waste Mgmt. of N.J. v. Union Cnty Utils. Auth., 399 N.J. Super 508, 520 (App. Div. 2008).

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 126. 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 cases 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. Emergent relief applications have been denied when the claim can be or is most appropriately addressed by a legal or equitable remedy following a due process hearing. R.S. and V.S. o/b/o A.S. v. Fair Lawn Bd. Of Educ., OAL Dkt. No.: EDS 3224-10 (2010).

In the instant matter, there has been no showing of irreparable harm if P.B. cannot return to educational programing, nor has there been a “significant interruption or termination of his educational services.” P.B. had graduated and he did not enunciate how he would be irreparably harmed, and he did not demonstrate that stay-put services that ceased once his former due process petition was dismissed can be continued under this petition. Even more, this petition for emergent relief was filed almost six weeks after services ceased.

For the foregoing reasons, I **CONCLUDE** that petitioner has not demonstrated that P.B. 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. Under the third emergent relief prong, “a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits.” Crowe, 90 N.J. at 133 (citing, Ideal Laundry Co. v. Gugliemone, 107 N.J. Eq. 108, 115-16 (E&A 1930).

Here the legal right underlying P.B.s claim is not settled and there is no showing of a likelihood of success. 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). Here, P.B. seeks to be returned to the educational program that concluded. Furthermore, under N.J.A.C. 6A:14-4.11(b)2 maintains that challenges to graduation must be asserted prior to graduation. Here, petitioner did not make that claim in a timely manner and he cannot now claim a right to stay-put just because he was receiving services through stay-put through an underlying due process petition at the time he filed this petition. Therefore, I **CONCLUDE** petitioner has not demonstrated that his legal right to the requested relief is well settled nor has petitioner demonstrated he is likely to succeed on the merits of his underlying claim.

The final requirement relates to the equities and interests of the parties. Crowe, 90 N.J. at 134. Again, petitioner did not set forth any harm that he experienced during, the extended time that services were ceased and the date this emergent application was filed. The Board asserts that it would be substantially harmed if petitioner were to be granted the relief it requested. The Board specifies that such relief would bypass the requirement of the regulations regarding graduation challenges and would continue public funding of educational services for P.B. who has successfully attained the credits and surpassed the requirements set forth in his IEP even passing State testing that was not required in his IEP.

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

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

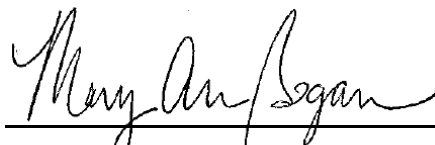
ORDER

For the foregoing reasons set forth above, it is hereby **ORDERED** that petitioner's request for emergent relief in the form of an order granting stay-put services is **DENIED**.

This order on application for emergency relief shall remain in effect until the issuance of the decision in the matter. The parties have been notified of the scheduled hearing dates. If the parent or adult student feels that this order 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.

January 26, 2023

DATE



MARY ANN BOGAN, ALJ

Date Received at Agency:

Date Mailed to Parties:

MAB/cb

APPENDIX

EXHIBITS

For petitioner

Brief

For respondent

Brief