State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

EMERGENT RELIEF

OAL DKT. NO. EDS 11383-16

AGENCY DKT.NO. 2017-24975

M.F. AND J.F. O/B/O MINOR CHILD J.F.,

Petitioners,

v.

MORRIS BOARD OF EDUCATION,

Respondent.

Thomas A. Cataldo, Esq. for Petitioners (Thomas A. Cataldo, attorneys)

Janelle Edwards-Stewart, Esq., for Respondent (Porzio Bromberg & Newman, P.C., attorneys)

Record Closed: August 24, 2016 Decided: September 1, 2016

BEFORE **LELAND S. McGEE,** ALJ:

Petitioners bring this emergency relief action before the Commissioner of Education (Commissioner) seeking an order compelling Respondent to pay for tuition and provide transportation to the Somerset County Vocational Technical School. On July 29, 2016, the Office of Special Education Programs transmitted the matter to the Office of Administrative Law (OAL). The Bureau of Controversies and Disputes transmitted a companion case that was filed under OAL DKT. NO. EDU-11392-16, to the OAL on the same date.

On August 19, 2016, Respondent filed an Answer to the Petition, a Brief in Opposition to the Motion for Emergent Relief and supplemental Certifications. On August 22, 2016, Petitioner filed a Response to Petitioner's Opposition to the Motion for Emergent Relief together with supporting Certification. On August 24, 2016, Respondent filed a response to the Certification together with supporting Certification and exhibits. Oral Argument was heard on August 24, 2016, at which time the record closed.

STATEMENT OF FACTS

J.F. is a fourteen-year-old student within the Morris School District (“”MSD”), eligible for services and protection against discrimination under Section 504 of the Rehabilitation Act of 1973 (“the Plan”). He was diagnosed with Attention Deficit Disorder and Auditory Processing deficits, which impact his organizational abilities, ability to complete assignments, and short term memory. The Plan describes J.F. as a “well behaved” young man and does not address any necessary behavioral support or placement needs due to his condition. It focuses on classroom and homework support. Petitioners had fifteen (15) days to express any disagreements with the contents of the Plan however they gave written consent to implementation of the Plan.

J.F. attended Frelinghuysen Middle School through the 5th grade. Petitioners unilaterally placed J.F. in the Unity Charter School for grades 6 through 8 before reenrolling him in the MSD for the 2016-17 school year. Following reenrollment, Petitioner advised MDS that they secured admission for J.F. at an automotive program at Somerset County Vocational and Technical Schools (“SCVTS”) for the 9th grade. Petitioners requested that MSD pay the tuition and transportation to SCVTS, beginning in September 2016, and continuing through grade twelve.

DISCUSSION

N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief. The regulation instructs in salient part:

> A motion for emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards be met for granting such relief pursuant to Crowe v. Degioia, 90 N.J. 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
> 2. The legal right underlying petitioner's claim is settled;
> 3. The petitioner has the 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.
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> [N.J.A.C. 6A:3-1.6(b).]

Petitioners have the burden of establishing each of the above requirements in order to warrant relief in their favor.

Turning to the first criteria, it is well settled that relief should not be granted except "when necessary to prevent irreparable harm." Crowe, supra 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. In other words, it has been described as "'substantial injury to a material degree coupled with the inadequacy of money damages.'" Judice's Sunshine Pontiac, Inc. v. General Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976) (citation omitted). See New Jersey Dep't of Environmental Protection v. Circle Carting, Inc., 2004 N.J. AGEN LEXIS 968 (April 2, 2004) (finding no irreparable harm in connection with the revocation of respondent's solid waste license in that financial loss is generally insufficient to demonstrate this requirement). The moving

party bears the burden of proving irreparable harm. More than a risk of irreparable harm must be demonstrated. Continental Group, Inc. v. Amoco Chemicals 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.)

In the instant matter, Petitioners have not shown an "immediate irreparable injury." Petitioners assert that if the relief requested is not granted, J.F. will be "behind" in his automotive skills development. Petitioner acknowledges that the Morris County Vocational School District ("MCVSD") and SCVTS programs have "substantially the same curricular offerings." However, the SCVTS program is a 3-year program beginning in the 9th grade with an option for an advanced program in the 12th grade. The MCVSD program is a 2-year program beginning in the 11th grade with no advanced program offering. Petitioners assert that if J.F. attends the MCVSD program, he will be behind in his automotive training because he will attend "regular" academic courses in the 9th and 10th grades at Morris High School ("MHS"), and will not receive specific automotive training until the 11th and 12th grades at MCVSD without the option of advanced training. Further, Petitioners assert that the transition between MHS and MCVSD would not meet J.F.'s educational needs in light of his disabilities; however, a 4-year program on a consolidated campus would meet his needs. Petitioner acknowledges that there is no medical, psychological or legal support for what amounts to this "intuitive" conclusion.

Petitioners assert that the 4-year program "will also serve to accommodate another aspect of J.F.'s 504 Plan, that is, the use of visual cues in order to deal with J.G.'s auditory disability." They further argue that J.F.'s auditory disability will not be properly addressed in a 2-year program as it would be in a 4-year program like the one offered at SCVTS. Petitioners do not offer any medical, psychological or legal support for these assertions and rely solely on supposition. There is nothing in the 504 Plan regarding placement of academic programing.

Petitioner asserts that N.J.S.A. 18A:54-20.1(c) authorizes a student to attend a county vocational school outside of the county of residence with permission of that county. Petitioners secured admission for J.F. to enroll in SCVTS's Automotive Technology Program, CIP #470604. Respondent argues that it should not be obligated to pay for J.F. to attend this program because, pursuant to N.J.A.C. 6A:19-2.3(a)2, the resident district is not obligated to pay for an out-of-county program if it offers a vocational school pursuant to N.J.S.A. 18A:54-5 et seq. or if it is the same program as the out-of-county program. Further, "[a] program shall be deemed the same, for purposes of this section, if it is approved by the Department in accordance with N.J.A.C. 6A:19-3.1 and 3.2, is assigned the same Classification of Instructional Programs (CIP) code, and meets or exceeds all applicable program performance standards." N.J.A.C. 6A:19-2.3(a)2

Petitioner also argues that, although the SCVTS and the MCVSD programs have the same CIP code, they are not the same. Specifically, the SCVTS program is three years beginning in the 9th grade with a possible 4th year of advanced training. The MCVSD program is two years beginning in the 3rd year and students attend Morris High School for the 9th and 10th grades. Further, "other factors" such as this (length of the program) should be considered when determining whether two programs are the "same."

Finally, Petitioner argues that there is a conflict between N.J.S.A. 18A:54-20.1(c) and N.J.A.C. 6A:19-2.3(a)2. They assert that the statute establishes the right of a student to attend a county vocational technical school in another county so long as the receiving county permits such attendance. Further, the statute mandates the resident district pay the out-of-county tuition and transportation costs. In contrast, Petitioner asserts that the regulation exceeds the statutory authority given by N.J.S.A. 18A:54-20.1(c) because it imposes a limitation on the obligation of a resident district to pay – to wit, there is no obligation to pay if the resident county offers a program that is "the same" as the one offered by the receiving county.

The undersigned is not persuaded that N.J.A.C. 6A:19-2.3(a)2 is in conflict with N.J.S.A. 18A:54-20.1(c). The statute states that a ***receiving county*** vocational

program ***is entitled*** to collect and receive per pupil costs from a sending district. It addresses the rights of a receiving district. The regulation addresses the ***obligation*** of ***the sending district*** to pay tuition and transportation costs and under what circumstances. The receiving county vocational program has the ***option*** to impose and collect fees; whereas a sending district ***must*** pay under certain circumstances, if the receiving district seeks reimbursement.

Petitioner does not offer any legal basis to consider the definition of "same" as anything other than the assignment of the CIP code. While the undersigned recognizes that the SCVTS program may train J.F. in the specific are of auto technology for up to 4 years as opposed to a maximum of 2 years in the Morris County program, there is no evidence that the latter will not provide F.A.P.E. There is no evidence that the 504 plan requires any specific type of training for J.F. much less for any specific time period. There isn't any evidence that the 4-year program actually will "also serve to accommodate another aspect of J.F.'s 504 Plan, that is, the use of visual cues in order to deal with J.G.'s auditory disability." Petitioner's assertions are based upon "intuition" and supposition. Finally, there is no evidence that the MCVSD ***will*** fail to meet or exceed all applicable program performance standards pursuant to N.J.A.C. 6A:19-2.3(a)2.

Petitioner's suggestion that additional factors be considered when determining if two vocational programs are the "same" is more in the purview of a rule making. It is not within the authority of this tribunal to decide that the regulation is not broad enough in its scope.

CONCLUSION

For the foregoing reasons, I **CONCLUDE** that Petitioner has not demonstrated that J.F. will suffer irreparable harm if the requested relief is not granted.

I **CONCLUDE** that Petitioners are not entitled to emergent relief because the proofs submitted fail to establish all of the elements necessary to grant emergency relief under N.J.A.C. 6A:3-1.6(b). Petitioner acknowledges that all of the elements must be

met and based upon my determination that the first prong has not been met, it is not necessary to reach a conclusion as to the remaining elements.

However, this matter was also docketed with the Bureau of Controversies and Disputes. The parties' briefs and Oral Argument in this matter addressed the legal right underlying Petitioners' claim and the likelihood of prevailing on the merits of the underlying claim pursuant to N.J.S.A. 18A:54-5 et seq., N.J.S.A. 18A:54-20.1(c), and N.J.A.C. 6A:19-2.3(a)2. I **CONCLUDE** that Petitioners have not sustained their burden of proving that J.F. is entitled to the relief sought as a matter of law because the plain language of the regulations exempts a sending district from an obligation to pay a receiving out-of-county vocational program when it offers the "same" program. The regulation is clear that "same" means they have been assigned the same CIP code. There is no dispute that, notwithstanding the respective durations of the programs, each has the same CIP code.

For the foregoing reasons I **CONCLUDE** that the matter before the Bureau of Controversies and Disputes also fails on the merits.

ORDER

For the foregoing reasons, Petitioners' request for emergent relief 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 1, 2016
DATE

LELAND S. McGEE, ALJ

Date Received at Agency: September 1, 2016

Date Mailed to Parties:

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