

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION

ON EMERGENT RELIEF

OAL DKT. NO. EDS 17625-15

AGENCY DKT. NO. 2016 23634

C.C. AND P.C. ON BEHALF OF P.C.,

Petitioners,

v.

**SOMERVILLE BOROUGH BOARD OF
EDUCATION, BRANCHBURG TOWNSHIP
BOARD OF EDUCATION, AND RIDGEFIELD
PARK BOARD OF EDUCATION.**

Respondents.

Hillary D. Freeman, Esq., for petitioners

Marc H. Zitomer, Esq., for Somerville Borough Board of Education (Schenck,
Price, Smith & King, attorneys)

Jeffrey R. Merlino, Esq., for Ridgefield Park Board of Education (Sciarrillo,
Cornell, Merlino, McKeever & Osborne, attorneys)

Record Closed: November 16, 2015

Decided: November 20, 2015

BEFORE **RICHARD McGILL, ALJ:**

C.C. and P.C. (“petitioners”) filed a request for emergent relief on behalf of their son, P.C., who is eligible for special education and related services based on the criteria

for multiply disabled. Petitioners seek an order to compel the Somerville Board of Education (“Somerville BOE”) or the Ridgefield Park Board of Education (“Ridgefield Park BOE”) to provide transportation to the day program at Somerset Hills School.

PROCEDURAL HISTORY

On November 2, 2015, petitioners filed a Petition for Due Process along with an Application for Emergent Relief with the Office of Special Education. The application for emergent relief was transferred to the Office of Administrative Law on November 4, 2015. By letter dated November 11, 2015, petitioners dismissed the Branchburg Board of Education without prejudice. The Somerville BOE and the Ridgefield Park BOE submitted responsive papers, and an oral argument was conducted on November 16, 2015, at the Office of Administrative Law in Newark, New Jersey.

FACTS

Petitioners, P.C. and C.C., reside in Staten Island, New York, and Branchburg, New Jersey, respectively. P.C. is a sixteen-year-old student, who prior to August 2015 resided within the geographical area served by the Branchburg and Somerville boards of education. Branchburg is a pre-kindergarten through eighth grade school district. Somerville is a pre-kindergarten through twelfth grade public school district. Branchburg has entered into a send/receive relationship with Somerville such that Branchburg sends its residents to Somerville High School upon entering the ninth grade.

P.C. has been diagnosed with Mobius Syndrome, Asbergers Syndrome, oppositional defiant disorder, attention deficit disorder and bipolar disorder. P.C. was determined to be eligible for special education and related services based on the criteria for multiply disabled, and he was given a residential placement at Somerset Hills School. The residential component of Somerset Hills closed in February 2014. P.C. was moved to NJ Mentor’s Dogwood Group Home (“NJ Mentor”) in Hackettstown, New

Jersey, by the Department of Children and Families, but he continued to attend the day program at Somerset Hills.

In August 2015, the staff at NJ Mentor decided that P.C. was ready to be discharged from the group home. Since the parties could not agree as to where P.C. should be discharged, petitioners entered into a Consent Order in September 2015 in family court whereby it was agreed that P.C. would be placed with his aunt and uncle, who reside in Ridgefield Park, pending the outcome of the family law dispute. Petitioners continue to support P.C. financially during his stay with his aunt and uncle.

Upon entering the Consent Order, petitioners immediately forwarded it to the Somerville BOE to put it on notice of the new development and make arrangements to continue his placement at Somerset Hills with transportation. The Somerville BOE never commenced disenrollment proceedings, but it denied responsibility and argued that the Ridgefield Park BOE was responsible. Petitioners also forwarded a copy of the Consent Order to the Ridgefield Park BOE, which also denied responsibility and maintained that the Somerville BOE continued to be responsible for P.C.'s education.

In the meantime, P.C.'s aunt and uncle have been transporting P.C. to Somerset Hills rather than receive transportation from a school district. The aunt and uncle have advised C.C. that they can no longer transport P.C. to Somerset Hills. Both school districts have denied petitioners' request to maintain P.C.'s placement and provide transportation.

ANALYSIS

One applicable regulation is N.J.A.C. 6A:14-2.7(r), which provides in pertinent part as follows:

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; and
- iv. Issues involving graduation or participation in graduation ceremonies.

Here, P.C. is not receiving transportation to Somerset Hills as a related service. It follows that petitioners seek emergent relief based upon a break in the delivery of services.

As set forth in N.J.A.C. 1:6A-12.1(e) 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 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.

Petitioners addressed each factor but did not analyze the situations separately with respect to the two school districts. Nonetheless, with the exception of the first requirement, the situations are quite different with respect to the two school districts and therefore will be considered separately.

The first requirement is that P.C. will suffer irreparable harm if the requested relief is not granted. Harm is considered to be irreparable if it cannot be remedied by money damages. Here, P.C. is not receiving transportation services, and he may not be able to attend school. Moreover, money damages are not available in this proceeding. These circumstances amount to irreparable harm to C.P.

With respect to the other requirements, the situation in regard to Somerville will be considered first. The second consideration is whether the legal right underlying petitioner's claim is settled. In effect, petitioners claim that P.C. has been denied a free appropriate public education. The right of a student who is eligible for special education and related services to receive a free appropriate public education is well settled.

Petitioners do not take their argument beyond this point, but the Ridgefield Park BOE contends that the Somerville BOE is responsible for P.C.'s education and transportation based upon N.J.S.A. 18A:38-1.1, known as New Jersey's "Family Crisis" Law, which provides in pertinent part as follows:

Notwithstanding the provisions of N.J.S. 18A:38-1 or any other law, rule, or regulation to the contrary, a child who moves out of a school district as a result of domestic violence, sexual abuse or other family crises shall be permitted to remain enrolled in that district for the remainder of the school year. If the child remains enrolled in the district the remainder of the school year, the school district shall provide transportation services to the child, provided the child lives remote from school, and the State shall reimburse the school district for the cost of the transportation services.

Further, N.J.A.C. 6A:22-3.2(h)1 provides a non-exhaustive definition of "family crisis" as follows:

For purposes of this subsection, "family crisis" shall include, but not be limited to:

- i. An instance of abuse such as domestic violence or sexual abuse;
- ii. A disruption to the family unit caused by death of a parent or guardian; or
- iii. An unplanned displacement from the original residence such as fire, flood, hurricane, or other circumstances that render the residence uninhabitable.

Upon notification of the move by the parent or guardian, the original school district of residence shall allow the student to continue attendance and shall provide transportation services to and from the student's new domicile in accordance with N.J.A.C. 6A:22-3.2(h)2. Further, the original school district of residence may request from the parent or guardian supporting documentation about the reasons for the move. N.J.A.C. 6A:22-3.2(h)2.

In the event that the original school district of residence determines that the situation does not meet the criteria for a "family crisis," the applicable procedures are set forth in N.J.A.C. 6A:22-3.2(h)4, which states as follows:

If the original school district of residence determines the situation does not meet the family crisis criteria at (h)1i through iii above, the superintendent or designee shall notify the parent or guardian in writing. The notification shall inform the parent or guardian of his or her right to appeal the decision within 21 calendar days of his or her receipt of the notification, and shall state that if such appeal is denied, he or she may be assessed the costs for transportation provided to the new residence during the period of ineligible attendance. It shall also state whether the parent or guardian is required to withdraw the student by the end of the 21-day appeal period in the absence of an appeal.

i. The parent or guardian may appeal by submitting the request in writing with supporting documentation to the executive county superintendent of the county in which the original school district of residence is situated.

ii. Within 30 calendar days of receiving the request and documentation, the executive county superintendent shall issue a determination whether the situation meets the family crisis criteria at (h)1i through iii above. The original school district of residence shall continue to enroll the student and provide transportation to the current school of attendance in accordance with N.J.S.A. 18A:39-1 until the determination is issued.

iii. If the executive county superintendent determines the situation does not constitute a family crisis, the school district may submit to the executive county superintendent for approval the cost of transportation to the ineligible student's

new domicile. The executive county superintendent shall certify the transportation costs to be assessed to the parent or guardian for the period of ineligible attendance.

Here, petitioners through counsel informed the Somerville BOE of the Consent Order and the move on October 19, 2015. The Somerville BOE responded by letter dated October 22, 2015. The letter states that P.C.'s guardians should enroll him in Ridgefield Park but does not mention any of the procedures set forth in N.J.A.C. 6A:22-3.2(h)4.

The procedures under N.J.A.C. 6A:22-3.2(h) are similar to those pertaining to general residency requirements under N.J.S.A. 18:A:38-1(b)(2), which provides in pertinent part as follows:

If the superintendent or administrative principal of a school district finds that the parent or guardian of a child who is attending the schools of the district is not domiciled within the district and the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, the superintendent or administrative principal may apply to the board of education for the removal of the child. The parent or guardian shall be entitled to a hearing before the board and if in the judgment of the board the parent or guardian is not domiciled within the district or the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, the board may order the transfer or removal of the child from school. The parent or guardian may contest the board's decision before the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. The board of education shall, at the time of its decision, notify the parent or guardian in writing of his right to contest the decision within 21 days. No child shall be removed from school during the 21-day period in which the parent may contest the board's decision or during the pendency of the proceeding before the commissioner. If in the judgment of the commissioner the evidence does not

support the claim of the parent or guardian, the commissioner shall assess the parent or guardian tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district.

In other words, the parents or guardian of a student who is attending school in a district are entitled to notice and a hearing prior to cessation of educational services. This is settled law. In this matter, the Somerville BOE did not provide the required notice and hearing.

The next consideration is petitioner's likelihood of prevailing on the merits of the underlying claim. To the extent that the underlying claim is viewed as the denial of a free appropriate public education for some period of time, petitioners have a likelihood of prevailing on the merits.

The final consideration involves the equities of the situation and the interests of the parties. While the petitioners created this situation by their voluntary actions in entering into the Consent Order, there is no indication that they had a better option. On the other hand, the Somerville BOE completely disregarded P.C.'s rights under N.J.A.C. 6A:22-3.2(h). Under the circumstances, the equities of the situation and the interests of the parties favor petitioners.

With respect to the Ridgefield Park BOE, the second consideration is whether the legal right underlying petitioners' claim is settled. Petitioners did not offer a legal argument specifically addressing P.C.'s right to attend public school in Ridgefield Park, but the Somerville BOE has done so, relying on N.J.S.A. 18A:38-2, which provides in pertinent part as follows: "Public schools shall be free to any person over five and under 20 years of age nonresident in a school district who is placed in the home of another person, who is a resident in the district, by order of a court of competent jurisdiction of this state" Additionally, N.J.S.A. 18A:38-1 provides that any person between the ages of five and twenty is entitled to a public education when domiciled within the school district. The Somerville BOE argues that P.C. is currently residing in Ridgefield Park and thus is domiciled there. It would follow that Ridgefield Park BOE is responsible for educating P.C.

Citing Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6,12, aff'd 167 N.J. 55 (2001), the Ridgefield Park BOE argues that a child's domicile is typically that of his or her parents. Further, the regulations implementing N.J.S.A. 18A:38-1 are found at N.J.A.C. 6A:22-3.1(a), but there is no clear guidance with respect to P.C.'s situation. The Ridgefield Park BOE concludes that the law is not well settled and a residency proceeding is necessary to address the question of financial responsibility for P.C.'s education. With respect to N.J.S.A. 18A:38-2, the Ridgefield Park BOE cites B.C. o/b/o M.W. v. Bd. of Educ. of City of Atlantic City, OAL Dkt. No. EDU 2623-08, Final Decision (Nov. 18, 2009) for the proposition that the court orders referenced in N.J.S.A. 18A:38-2 are actually orders of placement in resource family (foster) homes.

In view of the case cited by the Ridgefield Park BOE, it is not clear that N.J.S.A. 18A:38-2 will be interpreted as proposed by the Somerville BOE. It follows that the law in regard to N.J.S.A. 18A:38-2 is not settled.

The next consideration is whether petitioners have a likelihood of prevailing on the merits of the underlying claim. In view of the state of the law, it cannot be said that petitioners have demonstrated a likelihood of success on the merits against the Ridgefield Park BOE. Additionally, the temporary living arrangement for P.C. with his aunt and uncle is likely to end before a determination could be made in a residency case. Under the circumstances, it is not established that petitioners are likely to prevail on the merits.

The final consideration concerns the equities and interests of the parties. Here, transportation is a related service which P.C. needs to get to school. On the other hand, the Ridgefield Park BOE does not appear to be responsible for provision of this service. These circumstances do not warrant emergency relief against the Ridgefield Park BOE.

In order to prevail on a motion for emergent relief, the movant must meet all four requirements under N.J.A.C. 1:6A-12.1(e) and N.J.A.C. 6A:14-2.7(s). Here, P.C. meets

only one requirement as to the Ridgefield Park BOE, but he satisfies all four with respect to the Somerville BOE. Therefore, I **CONCLUDE** that the motion for emergent relief should be denied as to the Ridgefield Park BOE and granted as to Somerville BOE.

Accordingly, it is **ORDERED** that:

1. Petitioners' request for emergent relief as to the Ridgefield Park BOE is denied.
2. Petitioners' request for emergent relief as to the Somerville BOE is granted.
3. The Somerville BOE shall provide P.C. with transportation to and from his temporary residence in Ridgefield Park and Somerset Hills School.

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.

November 20, 2015

DATE

RICHARD McGILL, ALJ

Date Received at Agency

November 20, 2015

Date Mailed to Parties:

ljb