

#326-07 (OAL Decision: Not yet available on-line)

Y.E.S. ACADEMY, :  
PETITIONER, :  
V. : COMMISSIONER OF EDUCATION  
NEW JERSEY STATE DEPARTMENT OF : DECISION  
EDUCATION, OFFICE OF :  
SPECIAL EDUCATION PROGRAMS, :  
RESPONDENT. :

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SYNOPSIS

Petitioner applied to respondent for approval as a private school for the disabled, pursuant to *N.J.A.C. 6A:14-7.1*, beginning in January 2006. Petitioner successfully completed Section I of three sections of the application process – qualification of the program – but was rejected in Section II based upon the results of the required needs assessment survey, in which only 16 of the necessary minimum of 24 potential public school district referrals were identified as viable by the Ocean County Review Panel (OCRCP). Petitioner sought emergent relief to continue development of the proposed school based on survey results submitted subsequent to the Department’s determination to deny Y.E.S. Academy’s application.

The ALJ granted the motion for emergent relief, concluding that the matter meets the four standards for granting relief pursuant to *Crowe v. DeGioia*, 90 N.J. 126 (1982). The ALJ found respondent’s interpretation of governing regulations to be excessively demanding and burdensome to the petitioner, and recommended that the Office of Special Education Programs be directed to accept petitioner’s additional potential placements for resubmission to the OCRCP. The ALJ concluded that no further proceedings in this matter are necessary.

Upon careful and independent review, the Commissioner rejected the ALJ’s recommended order, finding that petitioner cannot prevail on the merits of its underlying claim, thereby necessitating the dismissal of the petition. The Commissioner concluded that petitioner is seeking an exception to the requisites of the process which is not granted to other applicants; to compel the OSEP to accord preferential treatment to one applicant over others serves to compromise the integrity of the application process. The petition was dismissed.

<p>This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.</p>
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August 15, 2007

OAL DKT. NO. EDU 4665-07  
AGENCY DKT. NO. 169-6/07

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The record of this matter, including an audiotape of the hearing conducted at the Office of Administrative Law (OAL) on July 12, 2007, and the Order Granting Emergent Relief issued by the OAL have been reviewed. The Department advised the parties – by letter dated July 18, 2007 – that it was proposing to consider the OAL Order as an Initial Decision since it appears to resolve this matter in its entirety and, therefore, offered the parties an opportunity to submit exceptions and replies in accordance with *N.J.A.C.* 1:1-18.4. The Office of Special Education Programs (OSEP) submitted exceptions to which the petitioner duly replied.

Upon careful review of the record and full consideration of the parties' exception submissions, the Commissioner determines to reject the Administrative Law Judge's (ALJ) recommended order. In her Order, which in essence was an Initial Decision, the ALJ concludes, for purposes of emergent analysis, that petitioner has satisfied the requirements of *Crowe v. DeGioia*, 90 *N.J.* 126 (1982),<sup>1</sup> entitling it to the grant of its emergent application; she, therefore,

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<sup>1</sup> In order to prevail on emergent relief, a petitioner must clearly demonstrate: 1) That it will suffer irreparable harm if the requested relief is not granted; 2) That the legal right underlying its claim is settled; 3) That it has a likelihood of prevailing on the merits of the underlying claim; and 4) That when the equities and interests of the parties are balanced, petitioner will suffer the greater harm if the requested relief is not granted. (*N.J.A.C.* 6A:3-1.6(b))

recommends that OSEP be directed to accept petitioner's additional potential placements for resubmission to the County Review Panel, thereby effectively deciding the contested issue between the parties. In determining to reject the ALJ's recommended decision, the Commissioner concludes that it is clear that petitioner cannot prevail on the merits of its underlying claim, necessitating dismissal of its petition.

The instant record evidences the following:

- Phase Two of the application process to establish an approved private school for the disabled requires that the applicant mail a Needs Assessment Survey form to chief school administrators in public school districts. The applicant must then complete and submit to OSEP a Needs Assessment Survey Summary, which indicates the districts it has contacted. Districts are instructed to mail completed surveys directly to OSEP.
- Petitioner's survey results from Barneget and Brick were received by OSEP in January and February, 2007. As these results, a total of 26, satisfied the *minimum* number of potential placements to proceed – i.e., 24 – the information was subsequently forwarded to the Ocean County Review Panel (OCRCP) to verify the potential placements and to ensure that there are no other appropriate programs currently available to serve these students.
- Upon its review in April 2007, the OCRCP determined that there were only a total of 16 viable potential public school district referrals, far short of the minimum 24 potential public school district referrals necessary to proceed. Additionally, OCRCP documented the availability of existing programs that could accommodate the 16 students identified.
- As a consequence of these review results, OSEP – by written communication dated May 10, 2007 – informed petitioner that there was no need for its program and denied petitioner approval to move on to Phase Three of the application process.
- Prior to the May 10, 2007 formal denial letter, but subsequent to OSEP's informal notification to petitioner that its potential placements did not meet the minimum requisite number to proceed, OSEP received Assessment Survey Results from Upper Township in Cape May County, dated May 1, 2007, identifying 7 potential placements. OSEP refused to forward these 7 additional potential placements to the OCRCP for its review.<sup>2</sup>

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<sup>2</sup> It is noted that OSEP's acceptance of these 7 additional potential placements would have brought petitioner's total potential placement number to 23, still short of the requisite *minimum* number which would allow its application to proceed.

- On June 12, 2007, over a month after OSEP's official denial letter to petitioner, Atlantic City in Atlantic County sent survey results identifying 7 potential placements, which the OSEP refused to forward to the OCRP for review.<sup>3</sup>

Initially, the Commissioner is fully cognizant that OSEP's Application to Establish an Approved Private School for the Disabled packet (Exhibit R-2) unequivocally advises applicants that if they receive a denial at any point during the application process, they are permitted only *one* opportunity to re-apply, following a minimum of twelve months from the date of the original submission. (Exhibit R-2 at 5). Consequently, the Commissioner appreciates that any additional denials to the one here would be fatal to petitioner's application to be a service provider. Notwithstanding this, the Commissioner concludes that petitioner acted at its own peril when it submitted only 26, two more than the required minimum number of acceptable prospective participants, for the OCRP's review. It was entirely foreseeable that at least a few of these prospects could be eliminated for any number of reasons, leaving petitioner's application short of the minimum requirement for potential participants. Subsequent to the panel review – when it was determined that petitioner's application was 8 students short of the minimum requisite number, thereby necessitating rejection – petitioner sought to compel OSEP to “alter” the rules of the process for them by overlooking the denial of their application and allowing the continued submission of documentation to shore up their deficient submission.<sup>4</sup> As such, petitioner is seeking an exception to the requisites of the process for itself not granted to other applicants, which is blatantly unfair to those who have “played by the rules.” Moreover, to compel the OSEP to accord such preferential treatment to one applicant over others serves to compromise the integrity of the whole application process, and this cannot be permitted.

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<sup>3</sup> OSEP claims it did not actually receive these results until after Judge Wauters' Order of July 12, 2007, although Atlantic City states they were sent in June 12, 2007. (OSEP's Exceptions at 8)

<sup>4</sup> As pointed out by OSEP in its exceptions, this could conceivably allow the Phase Two process to go on indefinitely until 24 potential placements are ultimately verified, a result not only lacking fairness but justification.

Accordingly, the Initial Decision Order of the OAL is rejected for the reasons expressed above, and the instant Petition of Appeal is hereby dismissed. Because the Commissioner's decision resolves this matter without need for further proceedings, the Clerk of the OAL is requested to return the file to the agency pursuant to *N.J.A.C. 1:1-3.3(a)*.

IT IS SO ORDERED.<sup>5</sup>

COMMISSIONER OF EDUCATION

Date of Decision: August 15, 2007

Date of Mailing: August 15, 2007

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<sup>5</sup> This decision may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C 6A:4-1.1 et seq.*