

300-24E
OAL Dkt. No. 08675-24
Agency Dkt. No. 98-4/24

New Jersey Commissioner of Education
Final Decision on Emergent Relief

Board of Trustees of the College Achieve Greater
Asbury Park Charter School, Monmouth County,

Petitioner,

v.

Board of Education of the City of Asbury Park,
Monmouth County,

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the Initial Decision on Emergent Relief of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has demonstrated entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia*, 90 N.J. 126 (1982), and codified at N.J.A.C. 6A:3-1.6. Accordingly, the recommended Initial Decision of the OAL granting petitioner's application for emergent relief is adopted.

For purposes of procedural clarification, the Office of Controversies and Disputes transmitted the petition of appeal and petitioner's first motion for emergent relief to the OAL on April 15, 2024, under Agency Dkt. No. 98-4/24; these were docketed by the OAL under OAL Dkt. No. EDU 04777-24. Petitioner's second motion for emergent relief – the motion at issue in this decision – was transmitted to the OAL on June 26, 2024, again under Agency Dkt. No. 98-4/24; the OAL docketed the second motion as OAL Dkt. No. EDU 08675-25, as captioned above. In the Initial

Decision, the ALJ indicated that the parties advised that no other issues remained in OAL Dkt No. EDU 08675-24 once the motion for emergent relief was resolved. Accordingly, following the decision herein, OAL Dkt No. EDU 08675-24 is no longer pending. However, Agency Dkt. No. 98-4/24 remains pending, with the proceedings at the OAL to occur under OAL Dkt. No. EDU 04777-24.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 6, 2024
Date of Mailing: August 7, 2024



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING

EMERGENT RELIEF

OAL DKT. NO. EDU 08675-24

AGENCY DKT. NO. 98-4/24

**BOARD OF TRUSTEES OF THE
COLLEGE ACHIEVE GREATER
ASBURY PARK CHARTER SCHOOL,
MONMOUTH COUNTY,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE CITY
OF ASBURY PARK, MONMOUTH
COUNTY,**

Respondent.

Thomas O. Johnston, Esq. and Jaryda A. Gonzalez, Esq., for petitioner
(Johnston Law Firm, LLC, attorneys)

Eric L. Harrison, Esq., for respondent (Methfessel & Werbel, P.C., attorneys)

Record Closed: July 15, 2024

Decided: July 16, 2024

BEFORE **KIMBERLEY M. WILSON, ALJ:**

STATEMENT OF THE CASE

Petitioner Board of Trustees of the College Achieve Greater Asbury Park Charter School, Monmouth County (Charter School) brings this second motion for emergent relief against respondent Board of Education of the City of Asbury Park, Monmouth County (Board or District), seeking an order requiring the Board to immediately remit payments owed to the Charter School pursuant to New Jersey Department of Education (DOE) payment schedules.

PROCEDURAL HISTORY

On or around March 20, 2024, the Charter School filed a petition with the Commissioner of the DOE, requesting the Commissioner to direct the State Treasurer to remit payments that the District owed the Charter School to it and deduct those amounts from the District's state aid. On or around April 12, 2024, the Charter School filed its first motion for emergent relief, letter brief, and certifications with exhibits (first motion) with the Commissioner of the DOE, Office of Controversies and Disputes, seeking an order directing the Board to remit payment to the Charter School immediately pursuant to the DOE's payment schedule. On or around April 15, 2024, the DOE transmitted the first motion to the Office of Administrative Law (OAL) as a contested case seeking emergent relief.

On or around April 16, 2024, the Board submitted a written response to the first motion, including a certification and a letter brief. After a status conference on April 17, 2024, to determine whether the parties could resolve their differences amicably, on April 18, 2024, the parties presented oral argument on the first motion. The parties were permitted to provide supplemental information to the Administrative Law Judge (ALJ) by April 19, 2024.

On April 19, 2024, counsel for the Charter School advised that on or around April 18, 2024, the Board had remitted payment to the Charter School for the funds the Board owed the Charter School. Pursuant to an Order Denying Emergent Relief dated April 19, 2024, the Charter School's motion was dismissed as moot.

On or around June 20, 2024, the Charter School filed a second motion for emergent relief, again seeking an order directing the Board to remit payment to the Charter School immediately pursuant to the DOE payment schedule (second motion).¹ On or around June 26, 2024, the DOE transmitted the second motion to OAL as a contested case seeking emergent relief. On June 28, 2024, OAL scheduled oral argument on the second motion for July 15, 2024.²

On or around July 1, 2024, the Board submitted written opposition to the second motion, which included updated exhibits to a certification and a letter brief. On or around July 11, 2024, the Charter School filed its reply papers, including a letter brief and updated certification. After July 11, 2024, counsel continued to exchange documents with the ALJ regarding the status of any payments to the Charter School.

Oral argument was held on July 15, 2024, and the record remained open to allow the Charter School to provide supplemental submissions. The record closed on July 15, 2024.

The request for emergent relief is now ripe for adjudication.

FACTUAL DISCUSSION AND FINDINGS

I **FIND** the following as **FACT**, as it is undisputed:

1. Pursuant to a DOE Division of Finance and Business Services Office of School Finance FY 2023–24 District Payment Schedule dated December 20, 2023, the Board was scheduled to make the following payments to the Charter School based on the Charter School's October 15, 2023, enrollment:

¹ For the second motion, the Charter School relied upon certifications and other information presented to OAL for the first motion.

² July 15, 2024, was the first date that the ALJ had available on her calendar after the second motion was filed to address both oral argument and the disposition of the second motion.

<u>Scheduled payment date</u>	<u>Payment amount</u>
July 15, 2023	\$208,813
August 15, 2023	\$208,813
September 8, 2023	\$169,796
September 15, 2023	\$208,813
September 22, 2023	\$169,796
October 8, 2023	\$169,796
October 15, 2023	\$208,813
October 22, 2023	\$169,796
November 8, 2023	\$169,796
November 15, 2023	\$208,813
November 22, 2023	\$169,796
December 8, 2023	\$169,796
December 15, 2023	\$208,813
December 22, 2023	\$169,796
January 8, 2024	\$136,973
January 15, 2024	\$159,272
January 22, 2024	\$136,973
February 8, 2024	\$136,973
February 15, 2024	\$159,272
February 22, 2024	\$136,973
March 8, 2024	\$136,973
March 15, 2024	\$159,272
March 22, 2024	\$136,973
April 8, 2024	\$136,973
April 15, 2024	\$159,272
April 22, 2024	\$136,973
May 8, 2024	\$136,973
May 15, 2024	\$159,272
May 22, 2024	\$136,973
June 8, 2024	\$136,973

June 15, 2024	\$159,272
June 22, 2024	\$136,971

[Nicholas Puleio Cert. Ex. A.]

2. As of June 20, 2024, the Board failed to submit payment to the Charter School beginning with the May 2024 payments. Supp. Nicholas Puleio Cert. ¶ 2. The Board owed the Charter School \$751,247. Ibid. If the Board did not submit payment to the Charter School by June 30, 2024, the Charter School would end its school year with a deficit of \$273,509 and would not have funds to satisfy its financial obligations. Id. ¶ 4, 5.
3. As discussed in a letter dated June 28, 2024, from David Shafter (Shafter), State Monitor for the District, to Kenneth E. Saunders, President of the Board, Shafter overrode the Board's failure to approve payments to the Charter School at its April 25, 2024, meeting and directed the District to pay the Charter School \$709,772. Thomas O. Johnston Cert. dated July 11, 2024, Ex. D.
4. Pursuant to an email from Shafter dated July 12, 2024, to counsel for the Board, Shafter indicated that the District paid the Charter School the total amount due for the 2023–2024 school year.
5. During oral argument, counsel for the Charter School indicated that if it did not receive payment from the Board for the students in the District attending the Charter School, the Charter School would not be able to satisfy its debts, potentially leading the Charter School to lose teachers and students. If this were allowed to occur, the Board would succeed in shutting down the Charter School.
6. In a DOE Office of School Finance FY 2024–25 District Payment Schedule dated June 28, 2024, the Board is to remit payments of \$277,996 to the

Charter School on July 15, 2024, and August 15, 2024. Micah Bender Cert. Ex. A.

LEGAL ANALYSIS AND CONCLUSION

The regulations governing controversies and disputes before the Commissioner of Education provide that “[w]here the subject matter of the controversy is a particular course of action by a district board of education . . . , the petitioner may include with the petition of appeal, a separate motion for emergent relief or a stay of that action pending the Commissioner’s final decision in the contested case.” N.J.A.C. 6A:3-1.6(a). The regulations further provide that the Commissioner may “[t]ransmit the motion to the OAL for immediate hearing on the motion.” N.J.A.C. 6A:3-1.6(c)(3).

At a hearing for emergent relief, the petitioner must show that it satisfies the following four standards:

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 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.

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

The petitioner must prove each of these standards by clear and convincing evidence. Garden State Equal. v. Dow, 216 N.J. 314, 320 (2013). Arguably, these standards are a high threshold to meet, and I will address each one separately.

1. Irreparable Harm

As the New Jersey Supreme Court explained in Crowe, “[o]ne principle is that a preliminary injunction should not issue except when necessary to prevent irreparable harm.” 90 N.J. at 132 (citing Citizens Coach Co. v. Camden Horse R.R. Co., 29 N.J. Eq. 299, 303 (E. & A. 1878)). Indeed, the purpose of emergent relief is to “prevent some threatening, irreparable mischief, which should be averted until opportunity is afforded for a full and deliberate investigation of the case.” Ibid. (quoting Thompson ex rel. Bd. of Chosen Freeholders v. Paterson, 9 N.J. Eq. 624, 625 (Sup. Ct. 1854)).

The threshold standard for irreparable harm in education is showing that once something is lost, it cannot be regained. M.L. ex rel. S.L. v. Bd. of Educ. of Ewing, EDU 04949-09, Initial Decision (June 15, 2009), modified, Acting Comm’r (June 15, 2009), <http://njlaw.rutgers.edu/collections/oal/>. While the Board has remitted payment to the Charter School for the 2023–2024 fiscal year, the Board is required to make payments to the Charter School beginning on July 15, 2024, the first payment which is presently due and owed. For the reasons discussed below, the Charter School has shown that it will be irreparably harmed if emergent relief were not granted.

The Board has remitted payment to the Charter School for the remainder of the 2023–2024 fiscal year, which, at first blush, appears as though the relief that the Charter School seeks is moot. Courts may decide cases that are otherwise moot when they present issues of “significant public importance or . . . stem from a controversy ‘capable of repetition, yet evading review’ because of the short duration of any single plaintiff’s interest.” Finkel v. Twp. Cmte. of Twp. of Hopewell, 434 N.J.Super. 303, 315–316 (App. Div. 2013) (citing In re Conroy, 190 N.J. Super. 453, 459 (App. Div.), rev. on other grounds, 98 N.J. 321 (1983)).

The Charter School has had to file two emergent motions within the past three months for the Board to remit payments owed under the payment schedule for the 2023–2024 fiscal year; based on past pattern and practice, it is likely that the Board will continue to refuse to remit payments to the Charter School for the 2024–2025 fiscal year pursuant to the June 28, 2024 payment schedule, and the Board will still owe the Charter School

that money, creating a future fiscal crisis for the Charter School. For these reasons, a determination on the second motion is not moot and is appropriate.

The Charter School has presented sufficient, uncontroverted evidence that the viability of the Charter School is at stake when it does not receive the State-mandated funding from the Board. The Charter School relies on funding from the Board so that the Charter School remains solvent. From the evidence presented, whether the Charter School remains a going concern depends on whether the Board makes the required payments. When the Board fails to remit payment under the relevant payment schedule, the Charter School is unable to pay its bills and is at risk of closing. This is irreparable harm, and I **CONCLUDE** that the Charter School has sufficiently proven this prong.

2. Settled Legal Right

Next, emergent relief “should be withheld when the legal right underlying plaintiff’s claim is unsettled.” Crowe, 90 N.J. at 133 (citing Citizens Coach Co., 29 N.J. Eq. at 304–05).

The legal right for the Board to remit payment to the Charter School is clearly established. A district board of education’s obligation is discussed in N.J.A.C. 6A:23A-15.3(g) as follows:

A district board of education shall process payment(s) and payment adjustments to a charter school during the school year as follows:

1. The district of residence and non-resident school district(s) shall initiate payments to the charter school based on projected enrollment, as set forth in this section.
2. The school district of residence and non-resident school district(s) shall pay directly to a charter school the local share per pupil at the charter school rate, pursuant to N.J.S.A. 18A:36A-12b, in 12 equal installments starting July 15 and thereafter on the 15th of each month.

[Emphasis added.]

From the plain language of the regulation, the Board is required to make payments to the Charter School on the fifteenth day each month beginning in July. This is a mandatory, rather than optional, obligation. See Quereshi v. Cintas Corp., 413 N.J. Super. 492, 498 (App. Div. 2010) (stating, “[t]he use of the word ‘shall’ ordinarily denotes action that is mandatory, unless the context suggests otherwise.”); see also A.B. v. Div. of Med. Assistance and Health Servs., 407 N.J. Super. 330, 340 (App. Div. 2009) (stating, “[a] rule of an administrative agency is subject to the same canons of construction as a statute.”)

Based on the foregoing, **I CONCLUDE** that the Board’s obligation to make payments to the Charter School is a clearly-established legal right, and therefore, the Charter School has shown a legal right underlying the second motion.

3. Likelihood of Success on the Merits

The Charter School has demonstrated that it is likely to succeed on the merits of the underlying claim. Under this 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)). This typically “involves a prediction of the probable outcome of the case based on each party’s initial proofs, usually limited to documents.” Brown v. City of Paterson, 424 N.J. Super. 176, 182–83 (App. Div. 2012) (quoting Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 397 (App. Div. 2006)).

As discussed further in Section 2, above, the Board must remit payment to the Charter School based on projected enrollment on the fifteenth of each month, beginning in July. N.J.A.C. 6A:23A-15.3(g)(1), (2). This is the Board’s obligation. It is not a discretionary action, and the Board has presented no evidence or information to the contrary. The Board’s argument pertains to verifying the residences of certain Charter School students so that the Board is certain that its payments to the Charter School are accurate. This issue, however, is the basis of two other matters pending before the OAL, and importantly, only pertains to the amount to be paid, rather than the requirement to make payment to the Charter School. In other words, the accuracy of the payments can

be determined; the Charter School, however, must receive payment from the Board as required by N.J.A.C. 6A:23A-15.3(g).

Accordingly, I **CONCLUDE** that the Charter School has shown a reasonable probability of ultimate success on the merits.

4. **Balancing the Equities**

The fourth and final emergent relief standard involves “the relative hardship to the parties in granting or denying relief.” Crowe, 90 N.J. at 134 (citing Isolantite Inc. v. United Elect. Radio & Mach. Workers, 130 N.J. Eq. 506, 515 (Ch. 1941), mod. on other grounds, 132 N.J. Eq. 613 (E. & A. 1942)).

The Charter School has repeatedly affirmed its need for funding from the Board, indicating that without these funds, the Charter School would not be able to satisfy its debts, causing financial instability that could lead to the loss of teachers and students. On its face, this is a great hardship, as the financial instability could mean that the Charter School would be shut down. I also note that this is the second time in three months that the Charter School has had to seek emergent relief from OAL for the Board’s failure to remit payments to it.

The applicable law here is clear, and I **CONCLUDE** that the Charter School will suffer greater harm should emergent relief not be granted than the Board if the requested relief is not granted.

Based upon the foregoing, I **CONCLUDE** that the Charter School has met all of the requirements set forth in N.J.A.C. 6A:3-1.6(b) warranting an order for emergent relief in this matter.

While the Board’s argument about its need to verify the residency of certain Charter School students is not determinative here, it is an ongoing issue, and the parties have repeatedly requested DOE assistance in resolving it. I would request that the DOE intercede so this financial issue does not continue into future fiscal years. The Board has

an interest in ensuring that its funds are paid and distributed correctly just as the Charter School has a right to receive payment from the Board as mandated by State regulation.

ORDER

Accordingly, I **ORDER** that the Charter School's second motion for emergent relief be and hereby is **GRANTED**. The Board shall remit all payments due to the Charter School in the amounts and by the dates set forth on the FY 2024–25 District Payment Schedule dated June 28, 2024, as the DOE may subsequently amend.

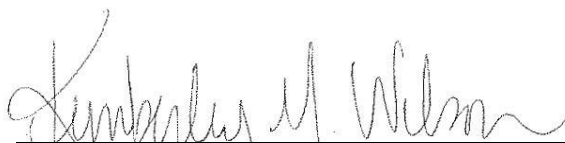
I also request that the DOE intercede and assist the parties with the Charter School students' residency issue so that the Board can receive the necessary assurances that the payments it will be remitting to the Charter School are a more accurate reflection of Asbury Park domiciled students who are attending the Charter School.

Finally, counsel has advised that no other issues remain after this emergent relief matter is resolved.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

July 16, 2024

DATE



KIMBERLEY M. WILSON, ALJ

Date Received at Agency:

Date Mailed to Parties:

KMW/dw