



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**FINAL DECISION**

**EMERGENT RELIEF**

OAL DKT. NO. EDS 08231-2021

AGENCY DKT. NO. 2022-33438

**J.B. AND H.B. ON BEHALF OF V.B.**

Petitioners,

v.

**BLACK HORSE PIKE REGIONAL  
BOARD OF EDUCATION**

Respondent.

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**Seth N. Broder**, Esq., for petitioners (Broder Law Firm, P.C., attorneys)

**John Comegno**, Esq., for respondent, Andrew Li, Esq. argued motion (Comegno Law Group, P.C., attorneys)

Record Closed: October 14, 2021

Decided: October 15, 2021

BEFORE **CATHERINE A. TUOHY**, ALJ:

**STATEMENT OF THE CASE**

Petitioners J.B. and H.B., on behalf of their daughter, V.B., filed a petition for emergent relief against the respondent, Black Horse Pike Regional Board of Education

seeking immediate placement at the American School for the Deaf. Respondent opposes this petition as improper as it is the subject of the underlying due process petition requiring a plenary hearing as to Free Appropriate Public Education (FAPE) and therefore not proper for an emergent relief application. Respondent further argues that petitioners have not demonstrated they are entitled to emergent relief.

### **PROCEDURAL HISTORY**

At the September 9, 2021 Individualized Education Program (IEP) meeting, respondent proposed an IEP that V.B. would receive FAPE through a residential program of special education and related services at the Walden School at the Learning Center for the Deaf (Walden School) in Farmingham, Massachusetts. (Petition for Emergent Relief, Exhibit 10.) Petitioners filed both a due process petition and a petition for emergent relief with the Office of Special Education Policy and Procedure (OSEP) on September 27, 2021, the emergent petition seeking immediate placement at the American School for the Deaf. The due process petition sought an appropriate program in the American School for the Deaf, revision to the IEP reflecting same, compensatory education and reimbursement of all costs. The emergent petition alone was transmitted to the Office of Administrative Law (OAL) on October 5, 2021, as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13, while the underlying due process petition remained at OSEP.

The matter was scheduled for oral argument on the emergent application on October 8, 2021, at which time the case was conferenced and the emergent hearing was continued on the consent of both parties until October 14, 2021, to allow the parties to discuss a possible resolution.

The parties presented oral argument on the emergent relief application on October 14, 2021, and the record closed.

## **FACTUAL DISCUSSION**

### **For Petitioner**

V.B., age fifteen years old, is deaf and autistic. Her educational history can best be described as one foot forward and two steps back. When placed in an educational setting, if V.B. experiences trauma, whether it be based on therapy or a life event, she immediately goes into a severe aggressive mode requiring hospitalization. Unfortunately, this has been the pattern. Petitioners argue that what cannot be denied is that since 2017, the only way to teach V.B. is through Applied Behavior Analysis (ABA). April Douglas-Bright, M.D. of Cooper Hospital and her developmental pediatrician, Dr. Ziskind at CHOP both recommended ABA therapy. Dr. Douglas-Bright stated “V.B. requires intensive therapy to help with her behavioral difficulties. In my opinion, a program based in ABA is best suited to fully meet her therapeutic and academic needs. She has always demonstrated success with ABA therapy and school support. When those supports are removed, she deteriorates rapidly.” (Petition for Emergent Relief, Exhibit 13)

V.B. has no current placement and she is languishing at home. Furthermore, placement at the Walden School in Boston would cause V.B. irreparable harm. Although the District’s expert, Supervisor of Special Education Jessica Caffrey says the Walden school incorporates ABA therapy in their teaching, this is not true.

The Walden School uses a trauma-focused program with Attachment, Regulation and Competency (ARC) as their framework. This approach would only exacerbate V.B.’s aggressive behaviors. This approach merely deals with consequences and interventions, which has not worked for V.B. in the past. Ms. McCaffrey has never evaluated V.B. and has no certifications for teaching the deaf. Although the Walden program has concepts and resources related to ABA, they are not an ABA treatment program and V.B. will deteriorate. Petitioners seek V.B. to be placed at the American School for the Deaf in Connecticut. That program is based on Positive Behavior Intervention and Support (PBIS) which has its roots in ABA, the only program that has ever worked for V.B. That

program focuses on positive behavior, prevention and creation of replacement behaviors. Petitioners argue that it is not a question of the appropriateness of the program, but the question of the irreparable harm V.B. would suffer if she was to attend the Walden School.

Petitioners further argue emergent relief is necessary since V.B. is getting zero services since school has started. Only after receiving the emergent application did respondent reach out to petitioners to make arrangements for homebound services. However, the problem is respondents do not have a certified teacher qualified to teach a student with disabilities or certified or qualified to teach a deaf student. This is required by the code and the Deaf Student's Bill of Rights.

Petitioners argue that V.B. will suffer irreparable harm if she attends the Walden School since that school does not provide the intense ABA therapy V.B. requires. V.B.'s mother, J.B., although she is a teacher but not an expert, has provided a certification of petitioner in support of petitioners' request for emergent relief. Based on her in-person tour and conversations with personnel at Walden, she states in her certification that they use ARC as a primary intervention framework rather than ABA which is what V.B. requires. (Certification of J.B., paragraph 35.)

The last agreed upon IEP of June 1, 2021, placed V.B. on remote home instruction. (Petition for emergent relief, Exhibit 1.)

If V.B. attends the Walden school, her treating physicians have said she will significantly deteriorate if she does not have ABA therapy. It is not that the petitioners want a better, closer placement, it is that she will sustain irreparable harm. Petitioners argue that much is clear.

#### For Respondent

An emergent application is not a full plenary hearing on the issues. Petitioners argue they have experts and the District argues they also have educational experts who

have carefully considered the student and have offered a proposed appropriate placement at the Walden School. Petitioners argue that the Walden School uses ARC as opposed to ABA therapy, whereas the American School offers ABA therapy, but that is not set forth in their papers and petitioners offer no support for this except for the certification of the parent. The District submits that it has also supplied a certification saying that is not correct. The issue regarding placement is an issue to be determined by a due process hearing. It is not the place of the parent to seek emergent relief to place the child someplace entirely different from that proposed by respondent in the IEP.

Respondent argues that issues regarding appropriate placement are decided in due process proceedings and not on applications for emergent relief.

Jessica Caffrey is employed by respondent as a supervisor of Special Education since 2012. Ms. Caffrey has a Bachelors' Degree in Linguistics and Psychology from Rutgers University in 2000, a Masters' in Special Education from Rutgers University in 2006 and her Board Certification in Behavioral Analysis from the Rutgers University Graduate School of Applied Professional Psychology in 2006. Ms. Caffrey has provided a certification in opposition to petitioners' emergent application and in support of the District's proposed placement at the Walden School. In Ms. Caffrey's expert opinion, the Walden School is appropriate to meet all of V.B.'s needs and incorporates the requisite techniques to best assist V.B. in progressing towards her goals. The Walden School provides V.B. with FAPE in the least restrictive environment. Petitioners' contention that the Walden School's use of ARC intervention would lead to an exacerbation of V.B.'s aggressive behaviors is incorrect and not supported by the data. The Walden School does use ABA focused techniques. The Walden School promotes on-going communication, long -distance, with students' families. The Walden School has several behavioral analysts on staff which would meet V.B.'s needs and provide an ABA-informed approach, enabling her to learn. The Walden School has indicated that it will accept V.B. and she may begin attendance immediately. (Caffrey certification, paragraphs 15 – 18.)

There is no expert providing testimony on behalf of the petitioners that Walden cannot provide what is needed and that the American School for the Deaf can. Although petitioners argue that it is clear that Walden does not offer ABA, respondent submits that it is certainly not clear at all. If this was a motion for summary judgement it would have to be denied as there are questions of material vital facts which cannot be determined in this emergent application.

Respondent admits that the District does not have the capability to provide in district instruction to V.B and that is why they have offered the out of district placement at Walden which would be appropriate for V.B. Petitioners have chosen not to avail themselves of this program.

### **LEGAL ANALYSIS AND CONCLUSION**

N.J.A.C. 1:6A-12.1(a) provides that the affected parent(s), guardian, board or public agency may apply in writing for emergency relief. An emergency relief application is required to set forth the specific relief sought and the specific circumstances that the applicant contends justify the relief sought. Each application is required to be supported by an affidavit prepared by an affiant with personal knowledge of the facts contained therein and, if an expert's opinion is included, the affidavit shall specify the expert's qualifications.

Emergent relief shall only be requested for the following issues pursuant to N.J.A.C. 6A:14-2.7(r):

- 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.

In this case, petitioners assert that there is an issue concerning placement pending the outcome of the due process proceedings. Petitioner contends that V.B. should be immediately placed at the American School for the Deaf to prevent her from suffering irreparable damage because the Walden program does not offer an ABA treatment approach which V.B. requires. Respondent contends that V.B.'s proposed placement set forth in the September 9, 2021, IEP at the Walden School offered FAPE and that a due process proceeding is required to determine the issue of placement and FAPE and that this issue is not appropriate for emergent relief.

The last agreed upon placement for V.B. was on remote home Instruction set forth in the IEP of June 1, 2021. That becomes her "stay put" placement. 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 remain in the then-current educational placement of the child 20 U.S.C.A. § 1415(j). The relevant IDEA regulation and its counterpart in the New Jersey Administrative Code reinforce that a child remain in his or her current educational placement "during the pendency of any administrative or judicial proceeding regarding a due process complaint." 34 C.F.R. § 300.518(a) (2016); N.J.A.C. 6A:14-2.7(u).

The standards for emergent relief are set forth in Crowe v. DeGoia, 90 N.J. 126 (1982), and codified at N.J.A.C. 6A:3-1.6. These standards for emergent relief require irreparable harm if the relief is not granted; a settled legal right underlying a petitioner's claim; a likelihood that petitioner will prevail on the merits of the underlying claim; and a balancing of the equities and interests that petitioner will suffer greater harm than respondent.

Petitioners bear the burden of satisfying all four prongs of this test. Crowe, 90 N.J. at 132–34. Petitioners cannot establish that irreparable harm will be sustained if the relief requested is not granted. Issues regarding whether the district provided a FAPE and the allowance of compensatory damages require a plenary hearing and cannot be decided on an application for emergent relief. Petitioners cannot demonstrate that their legal right to relief is well settled. Petitioners do not have the right to decide placement. The District has to prove they offered FAPE to petitioners and it is only after it is determined that FAPE has not been provided following a due process hearing, would the appropriateness of a unilateral placement by petitioners be considered or an award of compensatory education be granted. Petitioners' challenge to the District's recently proposed IEP of September 9, 2021, placing V.B. at the Walden School at the Learning Center for the Deaf failed to offer FAPE requires a due process hearing. Petitioners cannot demonstrate a likelihood of prevailing on the merits since they do not have the right to decide placement. The issue of whether the District failed to offer FAPE can only be made following a plenary due process hearing with fact and expert witnesses.

The final Crowe factor requires a balancing of the equities in determining who would sustain the greater harm should emergent relief be granted. In this case, it is clear the district would sustain the greater harm if emergent relief were granted and it was forced to pay for a unilateral placement, without the benefit of a due process hearing, when the district had offered FAPE by offering an IEP placing V.B. in the Walden School. By denying emergent relief to petitioners, V.B. still has the underlying due process petition pending before this tribunal which would allow for a plenary hearing on all the facts to determine if V.B. was provided with FAPE. If following a full hearing with fact and expert testimony it is determined that V.B. was not provided with FAPE, she would be entitled to an award of compensatory education to make up for any deprivation suffered.

Therefore, for all of the foregoing reasons, I **CONCLUDE** that petitioners have not demonstrated entitlement to the emergent relief requested, since they have not satisfied all four prongs of the test and that the stay put placement for V.B. pending the due process hearing remains home instruction unless the parties both agree to a change in placement.



**ORDER**

It is **ORDERED** that the petitioners' application 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 Policy and Dispute Resolution.



October 15, 2021 \_\_\_\_\_

DATE

\_\_\_\_\_  
**CATHERINE A. TUOHY, ALJ**

Date Received at Agency \_\_\_\_\_

Date Mailed to Parties: \_\_\_\_\_

CAT/tat

**APPENDIX**

**WITNESSES**

**For Petitioners:**

None

**For Respondent:**

None

**EXHIBITS**

**For Petitioners:**

September 24, 2021, petitioners' request for emergent relief

Brief in support of petitioners' request for emergent relief

Petition for hearing

Certification of counsel in support of petitioners' request for emergent relief with attached Exhibits 1 – 13

Certification of petitioner J.B.in support of petitioners' request for emergent relief

**For Respondent:**

October 6, 2021, letter brief of respondent in opposition to petitioners' emergent relief petition

Certification of Jessica Caffrey in opposition to petitioners' emergent relief petition with attached Exhibits A – C