

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION ON

EMERGENT RELIEF

OAL DKT. NO. EDS 08459-17

AGENCY DKT. NO. 2017 26435

C.D. ON BEHALF OF S.C.,

Petitioner,

v.

MAINLAND REGIONAL BOARD

OF EDUCATION,

Respondent.

C.D., Guardian, on behalf of S.C., pro se

Brett Gorman, Esq., for respondent (Parker McCay, P.A., attorneys)

Record Closed: June 16, 2017

Decided: June 16, 2017

BEFORE **DOROTHY INCARVITO-GARRABRANT**, ALJ:

STATEMENT OF THE CASE

On June 15, 2017, petitioner C.D. on behalf of S.C. filed a request for emergent relief with the Department of Education, Office of Special Education Programs (OSEP). Specifically, C.D., who is S.C.'s aunt and legal guardian, seeks emergent relief to allow S.C. to participate in the Mainland Regional School District's (MRSD) graduation ceremony on June 15, 2017.

PROCEDURAL HISTORY

Petitioner filed this Emergent Petition with OSEP on June 15, 2017. OSEP transmitted the matter to the Office of Administrative Law, where it was filed on June 15, 2017, and scheduled for oral argument on June 16, 2017. Oral argument was conducted on that date, at the OAL offices in Atlantic City, and I also permitted limited testimony by C.D. and S.C.¹ MRSD submitted a Certification with supporting documentation, of Mark C. Marrone, Superintendent, and written legal argument in opposition to the requested relief.

FACTUAL DISCUSSION

For purposes of deciding this application for emergent relief, the following facts are undisputed and **I FIND** them as **FACT**.

S.C, who is eighteen and one-half years old, is a senior at the MRHS and has been enrolled in MRHS for four years. C.D. is S.C.'s maternal aunt and legal guardian. C.D. has been S.C.'s legal guardian for four years. S.C.'s father passed away in 2010. S.C.'s mother passed away in 2013, at which time, despite S.C. having siblings of the age of majority, C.D. became S.C.'s legal guardian.

S.C. has been classified for approximately four years and has an Individual Education Program (IEP) in place. (R-G). The IEP was reviewed on February 8, 2017, and amended on June 12, 2017. (R-G). The IEP on page 3 of 13 specifically states as follows:

Annual Review 2/8/2017: [S.C.] has shown improvement in his attendance record since the implementation of the PM rotation schedule and meeting with administration. In order to graduate in June, [S.C.] will still need to complete the assigned E20/20 coursework and will need to pass Reading Flex 1 and Art 1. When [S.C.] attends school he is pleasant, participates, and is very conscientious about making up any work he has missed."

¹ S.C. is eighteen and one-half years old.

During the 2016-2017 school year, S.C. was absent seventy-nine and one-half days. (R-D). The MRHS Administration has throughout this school year attempted to work with S.C. to improve his attendance by adjusting his schedule and workload. In this regard, the MRHS Administration held two “Attendance Improvement Plan Meetings” (AIPM) with S.C. on October 18, 2016, and January 4, 2017. (R-A, R-B).

At the time of the first AIPM on October 18, 2016, S.C. had missed nineteen days of school. At that meeting, S.C. was informed that he would lose his “Senior Privilege” until he completed his missing assignments. (R-A). In the “Principal’s Recommended Actions.” The MRHS principal wrote “[r]evoking graduation is on the table if attendance doesn’t improve.” (R-A).

At the time of the second AIPM on January 4, 2017, S.C. had “46.5 absences ... which equates to him missing 62.8% of school so far.” (R-B). At that meeting S.C. was informed that if he “accrues 10+ absences (verified or unverified) between now and the end of (sic) school year, he will NOT be eligible [for] Graduation.” If [S.C.] accrues 15+ absences (verified or unverified) between now and end of (sic) school year, her (sic) will NOT be eligible [for] Graduation ceremony in June AND will not be eligible for a June graduation.” (R-B).

On February 14, 2017, S.C.’s guardian was informed that he had “exceeded the unverified absence limits in one or more courses and that this credit was being suspended as per policy. S.C. appealed that determination to the Attendance Committee (R-C). The Attendance Committee determined that S.C.’s credit would be reinstated when he completed online classwork and passed all of his classes. (R-C).

The Attendance Committee noted that “[a]ny/[a]ll conditions for senior students must be completed to the satisfaction of the administration by June 5th in order to walk in the graduation ceremony.” (R-C). Accordingly, in order to be eligible to walk in graduation, S.C. had to finish all of his online coursework by June 5, 2017.

As of June 12, 2017, S.C. had missed 79.5 days of school, and since his second AIPM had missed over ten days of school. (R-D). Additionally, S.C. did not complete his classwork by June 5, 2017. (R-E). S.C. completed his classwork on June 9, 2017. Based in part on these facts, MEHS Board of Education (BOE) determined S.C. has not satisfactorily completed his conditions in order to be eligible to walk in graduation. (R-E)

MHRS BOE Policy 5113, Attendance, Absences and Excuses , provides that “A pupil must be in attendance for 162 or more days in order to be considered to have successfully completed the instructional program requirement to which he/she is assigned. (R-F). It further provides, that “Students may be denied participating in co-curricular activities, including but not limited [to] prom, graduation, senior privilege, etc., if their attendance fails to meet the standards set forth herein.” (R-F) Additionally, “Students who do not cooperate with the Attendance Improvement Plan...may be denied privileges including but not limited to participation in activities/sports, senior privilege, prom, graduation ceremony, or any other school related function.” (R-F)

“Students and parent/guardians may request a hearing with the Superintendent of Schools, and through the Superintendent, a hearing before the Board of Education.” (R-F) S.C. had a hearing before the BOE which denied his appeal on the basis that S.C. had no excuse for missing seventy-nine and one-half days of school. (R-E).

Arguments and Testimony

For petitioner

C.D. asserted that S.C. will suffer irreparable harm if he is excluded from the graduation ceremony, since he will forever lose his ability to participate in a high school graduation ceremony. C.D. argued that S.C. has suffered several traumatic incidents including the deaths of his parents, and his grandmother’s recent illness, which began within the last six weeks. C.D. argued that those losses and events coupled with his Attention Deficit Hyperactivity Disorder (ADHD) diagnosis, makes the loss of his ability to

participate in the graduation ceremony more harmful to S.C., than it would be to other individuals. C.D. argued that each student's circumstances should be used to determine if a student may participate in graduation, as opposed to a blanket policy providing for exclusion when certain requirements are not met.

C.D. acknowledged that S.C. has had difficulty attending school regularly. C.D. admitted that S.C. participated in the AIPM's and understood that he had to attend school. C.D. admitted that the IEP provided that the goal was for S.C. to have a 90% school attendance rate and that C.D. knew he might lose his graduation ceremony if he did not attend school. C.D. admitted to appealing the actions taken by the administration relative to S.C.'s failure to comply with the attendance policy and appealing the administration's determination that he could not participate in the graduation ceremony.

C.D. stated that she met with the Principal, Guidance Counselor and Child Study Team Case Manager in April, relative to getting S.C. back on track to graduate in June. C.D. believed that if S.C. completed his coursework, he would be able to walk in the ceremony and graduate. C.D. stated that S.C. was attending school regularly after this meeting.

C.D. acknowledged that it is S.C.'s poor choices and actions which led to him having seventy-nine and one-half absences this year. However, she argues he should be given the opportunity to participate in the ceremony because he did complete his classwork, albeit late and after the deadline provided by MRHS. C.D. understands that walking is a privilege. However, she argued S.C. should be awarded that privilege because of the events he has had to endure in his life and because he completed his course work. Finally, C.D. argued that S.C.'s inability to attend school is a direct result of his ADHD. S.C. has been different and excluded from many things in his life because of his ADHD, which hampers his ability to meet the requirements of school and thus causes him not to want to attend. C.D. is concerned that S.C. will be irreparably harmed if he cannot participate in the ceremony and the impact on him will be tremendous.

S.C. admitted that he was irresponsible.

For respondent

MHRS BOE incorporated the certification of Superintendent Mark Marrone and the arguments made in their brief.

LEGAL DISCUSSION AND CONCLUSIONS

An emergent relief application may be entertained if it concerns issues regarding a break in the delivery of services, disciplinary action, placement pending the outcome of due process proceedings, or graduation or participation in graduation ceremonies. N.J.A.C. 6A:14-2.7(r)(1)(i)-(iv). N.J.A.C. 6A:14-2.7(s) sets forth the standards governing motions for emergent relief and instructs in pertinent part:

Emergent relief may be granted if the administrative law judge determines from the proofs that:

- i. The petitioner will suffer irreparable harm if the requested relief is not granted;
- ii. The legal right underlying the petitioner's claim is settled;
- iii. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
- iv. 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.

See also Crowe v. DeGioia, 90 N.J. 126 (1982). Petitioner must satisfy all four prongs in order to establish entitlement to emergent relief.

Harm is irreparable when there can be no adequate after-the-fact remedy in law or in equity; or where monetary damages cannot adequately restore a lost experience.

Nabel v. Bd. of Educ. of Hazlet, EDU 8026-09, Final Decision on Application for Emergent Relief, (June 24, 2009) <<http://njlaw.rutgers.edu/collections/oal/>>. In short, the opportunity to participate in the graduation ceremony is an event that, once missed, cannot be regained since it is a once in a lifetime event. See K.H. o/b/o M.G. v. Kingsway Regional Bd. of Educ., EDS 6903-11, Decision on Emergent Relief, (June 17, 2011) <http://njlaw.rutgers.edu/collections/oal/html/initial/eds06903-20_1.html>. R.C. o/b/o M.C. v. Pemberton Twp. Bd. of Educ., EDS 4212-02, Decision on Emergent Relief, (June 17, 2002) <<http://njlaw.rutgers.edu/collections/oal/>>. I **CONCLUDE** that petitioner has met the burden of demonstrating that S.C will suffer irreparable harm.

However, the real issue in a case such as this is whether the petitioner is entitled to participate in the graduation ceremony. In fact, the law is well-settled in favor of respondent, which has broad discretion to take the actions needed to effectively operate its public school and to protect the health, safety and welfare of its students. Local school boards have been expressly charged with the orderly conduct of the academic process and must establish policies for student attendance, which include the consequences for failure to comply with that policy. N.J.A.C. 6A:16-7.6. It has been consistently held that participation in a graduation ceremony is a privilege and not a right. See R.C., supra; Nabel, supra; Buonasorte v. Bd. of Educ. of Mainland Regional High School District, EDU 8012-09, Order on Application for Emergent Relief, (June 19, 2009), adopted, Comm'r (June 19, 2009) <<http://njlaw.rutgers.edu/collections/oal/>>. It is equally settled that actions within a school board's authority, including establishing policies for student attendance, are entitled to a presumption of validity and will not be overturned in the absence of an affirmative showing that the decision was arbitrary, capricious or unreasonable. Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581 (1966). Further, the exercise of a school board's discretionary powers may not be disturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motives." Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). Our courts have held that "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Env'tl.

Prot., 122 N.J. Super. 184, 199–200 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App Div. 1974).

I have carefully reviewed the documents submitted by the parties and have considered the testimony offered and the arguments made. Simply put, petitioner has failed to demonstrate that S.C. possesses a right to attend the promotion ceremony and that the decision disallowing his participation is arbitrary, capricious or unreasonable. Further, there has been no demonstration that the decision lacks a rational basis or was induced by improper motives.

In this matter, S.C. has a history of absenteeism, which is unrelated to his classification.² MRHS accommodated S.C. by modifying his school day to a PM schedule because S.C. alleged that he could not wake up in the morning. MRHS counselled S.C. about his absences. On notice to his guardian, MRHS had two AIPMs, on October 18, 2016 and January 4, 2017 and conducted an appeal requested by his guardian relative to his excessive absences.

During the 2016-2017 school year, S.C. again exceeded the number of allowable absences. S.C. was specifically advised during the AIPMs that if he had ten more absences, then he would be excluded from graduation. S.C. complied during the months immediately following this meeting resulting in S.C. only missing six days of school during the third quarter. (R-D). However, in March 2017, S.C.'s historical pattern of absenteeism returned. Despite the notice that he would be prohibited from participating in the graduation ceremony if he was absent more than ten days, S.C. missed twenty-six days of school. Other than irresponsible actions or poor choices the record is devoid of any evidence explaining S.C. continued violations of the MRHS's attendance policy. Nothing in S.C.'s IEP exempted him from compliance with respondent's attendance policy or student code of conduct.

Based on the foregoing, I **CONCLUDE** that petitioner has failed to demonstrate a likelihood of success on the merits.

² See S.C.'s IEP, Annual Review 4/7/2016 notes on R-G, page 4 of 13.

As to the requirement that the right underlying the claim of a requesting party must be settled, it is clear that each school district is obligated to provide a thorough and efficient system of education to all children residing in its school district. N.J. Const. (1947), art. VIII, ¶ 1; N.J.S.A. 18A:33-1. To carry out this policy, local boards of education have been granted discretionary authority at N.J.S.A. 18A:11-1(c) and (d) to adopt rules for the management of the public schools of the district, and to perform all acts and do all things necessary for the lawful and proper conduct of the public schools of the district.

Petitioner has failed to demonstrate that respondent's attendance policy is arbitrary, capricious or unreasonable. Further, there has been no demonstration that the respondent's decision lacks a rational basis or was induced by improper motives.

Finally, in balancing the equities and interests of the parties, the scales tip in favor of the District and militate against granting the relief sought. The right of petitioner is less weighty than those of the respondent because participating in the graduation ceremony is a privilege. I appreciate the personal significance of the ceremony in terms of its acknowledgment of academic achievement, S.C.'s struggle to obtain his high school diploma, and the opportunity for family members to express their pride. However, S.C.'s inability to participate in such an event does not rise to the severity of harm, when weighing the interests involved, to warrant the extraordinary relief requested. On the other hand, the respondent has a substantial and valid interest in ensuring the orderly operation of the activities of its schools. The balance weighs in favor of the respondent over the graduating student because such a ruling would amount to an "undermining of authority" that "would have a far reaching effect on the school district in its dealings with its student." T.J. o/b/o R.D. v. Pennsauken Township Board of Education, OAL DKT. No. EDU 8838-15. On balance, this interest significantly outweighs the harm SC. will suffer from not participating in the event.³

³ Prior to this application, respondent accepted and approved S.C.'s late classwork submissions. As a result, S.C. will graduate from MRHS and receive his High School Diploma.

Based on the foregoing, petitioner has failed to satisfy three of the four prongs required to be entitled to the emergent relief sought. Therefore, I **CONCLUDE** that petitioner is not entitled to the emergency relief sought and the request for emergent relief pursuant to N.J.A.C. 6A:14-2.7(s) must be denied.

ORDER

Having concluded that the petitioner has not satisfied three of the four requirements for emergent relief, the petitioner's request for emergent relief is **DENIED**.

This decision on application for emergency relief resolves all of the issues raised in the due process complaint; therefore, no further proceedings in this matter are necessary. This decision on application for emergency relief is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C.A. § 1415(i)(2). 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 Programs.

June 16, 2017

DATE

DOROTHY INCARVITO-GARRABRANT, ALJ

Date Received at Agency: _____

Date Sent to Parties: _____

DIG/lam

LIST OF EXHIBITS

For petitioner:

None

For respondent:

1. R-A - Attendance Improvement Plan Meeting 10/18/16
2. R-B – Attendance Improvement Plan Meeting 1/4/17
3. R-C – Attendance Credit Appeal 3/29/17
4. R-D – Student Daily Attendance Detail 6/12/17
5. R-E – Respondent’s June 12, 2017 Executive Session Minutes
6. R-F -Respondent’s Board Policy # 5113.