State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

DECISION ON

EMERGENT RELIEF

OAL DKT. NO. EDS 09338-15

AGENCY DKT. NO. 2015-23050 ER

J.W. AND T.W. O/B/O J.W.,

Petitioners,

v.

BELLEVILLE BOARD OF EDUCATION,

Respondent.

T.W., appearing on behalf of **J.W.**

Marc G. Mucciolo, Esq., (Schwartz, Simon, Edelsein & Celso, LLC) for respondent

Record Closed: June 30, 2015 Decided: July 1, 2015

BEFORE **LAURA SANDERS**, Acting Director and Chief ALJ:

This matter arises out of an application for emergent relief filed by petitioners J.W. and T.W. on behalf of their son, J.W. They filed this petition on June 22, 2015, seeking placement for J.W.'s freshman year in high school at a private school with a behavioral disabilities program. The Belleville Board of Education (the Board) contends that it has offered placement at a public school with a behavioral disabilities program, and that the standards for emergent relief are not met.

It is not disputed that J.W. is entitled to special education and related services under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §1400 et seq. The sole issue is emergent relief.

The Office of Special Education Programs (OSEP) transmitted the emergency petition to the Office of Administrative Law (OAL), which filed it on June 24, 2015. On June 30, 2015, oral argument was heard and the record closed. After due consideration of the papers and oral argument received, I **CONCLUDE** that petitioner's request for emergent relief must be **DENIED**.

The standard for the granting of emergent relief is set forth in N.J.A.C. 6A:3-1.6(b). But here, as a preliminary matter, the petitioner essentially seeks placement at a private school specializing in behavioral disability programming as a form of "stay-put." A parent may invoke the stay-put provision when a school district proposes "a fundamental change in, or elimination of, a basis element of "the current educational placement." Lunceford v. D.C. Bd. Of Educ., 745 F. 1577, 1582 (D.C. 1984). The basic language of Section 1415(j) 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 shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

N.J.A.C. 6A:14-2.7(u) provides that:

> Pending the outcome of a due process hearing, including an expedited due process hearing, or any administrative of judicial proceeding, no change shall be made to the student's classification, program or placement unless both parties agree.

In Cronin v. Bd. of Educ., 689 F.Supp. 197, 203 (S.D.N.Y. 1988), the Southern District of New York held that a school district's decision to graduate a student with an

Individualized Educational Plan constituted "a change in placement" that violated the "stay-put" provisions of the IDEA. Cronin was cited approvingly in a recent, unpublished Third Circuit decision, R.B. v. Mastery Charter Sch. 532 Fed. Appx. 136 (3d Cir. 2013).

The difficulty with the "stay-put" argument here is that petitioners are seeking a change in placement, not an order requiring their son to stay in his current placement. The parties agree that he made enough educational progress this year to be ready to start high school this fall. The school district offered a placement at a public school with a behavioral development program. At hearing, T.W. acknowledged that she does not have a proposed alternative placement to the one at Bloomfield High School proposed by the district, and has not taken any steps to independently evaluate whether the Bloomfield High School placement is appropriate or not. Rather, she seeks an order directing the district to provide her with a list of private school programs from which she can choose the most appropriate one for her son. Since this is an entirely new placement, it does not fall within the scope of the caselaw governing stay-put, and the claim under those provisions must be denied.

This leaves evaluation under the general standards governing emergency relief. The standards that must be met by the moving party in an application for emergent relief are embodied in N.J.A.C. 6A:14-2.7(r)–(s), N.J.A.C. 1:6A-12.1, and Crowe v. DeGioia, 90 N.J. 126, 132–34 (1982). Emergency relief may be granted if the judge determines:

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

[N.J.A.C. 6A:14-2.7(s)(1).]

"Each of these factors must be clearly and convincingly demonstrated" by the moving party. Waste Mgmt. of N.J. v. Union County. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

Considering the above factors for emergent relief, I **CONCLUDE** that petitioners have not satisfied the four criteria. Specifically, petitioners do not satisfy the first prong required for relief because they did not clearly and convincingly demonstrate that their son will suffer irreparable harm. Here, the evidence indicates that J.W. made progress this year in a behavioral disabilities program, and the Board has proposed a behavioral disabilities program for his freshman year. He is currently receiving services through an extended school year program. No concrete evidence demonstrates that the proposed placement for his freshman year is inappropriate.

Second, with regard to the likelihood of success on the merits, the petitioners suggest that the Board has a duty to provide them with a list of private school placements for their son because they feel he did better in a private elementary school, and they now want him in a private school setting for high school. This is an incorrect statement of the threshold law. The Board has a duty to provide their son with a Free Appropriate Public Education (FAPE) [20 U.S.C.A. § 1400(c)] through an individualized educational plan (IEP). The Third Circuit Court of Appeals has indicated that the appropriate standard for evaluating FAPE is whether the IEP offers the opportunity for "significant learning" and "meaningful educational benefit." Ridgewood Bd. Of Educ. v. N.E., 172 F.3d 238 (3d. Cir., 1999). At this juncture, the evidence in the record shows meaningful education benefit in eighth grade, and no evidence indicates that the behavioral disabilities program at Bloomfield High School will not similarly provide the opportunity for significant learning. While this does not preclude the parents from presenting additional evidence challenging FAPE in a full due-process hearing, for purposes of emergency relief, I **CONCLUDE** that the second criterion has not been met.

Based upon all of the foregoing, I **CONCLUDE** that the facts do not support emergent relief, as petitioners have not sufficiently demonstrated that J.W. will suffer irreparable harm, or that the legal right underlying the claim is settled, or a likelihood of prevailing on the merits. Therefore, petitioners have not established the necessary criteria for emergent relief.

ORDER

Accordingly, the petitioners' request for emergent relief is **DENIED,** and the petition for emergent relief is hereby **DISMISSED**.

I further **ORDER** that this decision on application for Emergent Relief shall remain in effect until the issuance of the decision on the merits in this matter.

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.

July 1, 2015
DATE

LAURA SANDERS
Acting Director and Chief
Administrative Law Judge

Date Mailed to Parties: July 1, 2015

/caa

Witnesses

For petitioners

T.W.

For respondent

No witnesses

Exhibits

Joint Exhibits

J-1 Individualized Educational Plan for J.W. dated June 11, 2015