

EDU # 7381-00
C # 304-00
C # 219-01
SB # 60-00 and # 27-01 (consolidated)
App. Div.# A-006566-01T3

P.H. and P.H., on behalf of minor child, M.C., :
PETITIONERS-APPELLANTS, : STATE BOARD OF EDUCATION

V. : DECISION

BOARD OF EDUCATION OF THE BOROUGH :
OF BERGENFIELD, BERGEN COUNTY,
DAVID C. HESPE, COMMISSIONER, AND :
NEW JERSEY STATE BOARD OF
EDUCATION, :

RESPONDENTS-RESPONDENTS, :

AND :

P.H. and P.H., on behalf of minor child, M.C., :

PETITIONERS-APPELLANTS, :

V. :

BOARD OF EDUCATION OF THE BOROUGH :
OF BERGENFIELD, BERGEN COUNTY, :

RESPONDENT-RESPONDENT. :

Decided by the Commissioner of Education, September 15, 2000

Decision on motion by the Commissioner of Education, January 22, 2001

Decision on motion by the Commissioner of Education, January 26, 2001

Decided by the Commissioner of Education, July 16, 2001

Decision on motion by the State Board of Education, September 5, 2001

Decision on motions by the State Board of Education, October 3, 2001

Decided by the State Board of Education, July 2, 2002

Remanded by the Appellate Division, September 16, 2003

For the Petitioners-Appellants, Education Law Center (Elizabeth Athos, Esq., of Counsel)

For the Respondent-Respondent Board of Education of the Borough of Bergenfield, Schenck, Price, Smith & King, L.L.P. (Joanne Butler, Esq., of Counsel)

For the Respondent-Respondent David C. Hesper, Commissioner, and New Jersey State Board of Education, Michael C. Walters, Deputy Attorney General (Peter C. Harvey, Attorney General of New Jersey)

On July 2, 2002, the State Board of Education rendered its decision in this matter, holding that petitioners' son, who had been permanently expelled from the school district's regular education program by the Bergenfield Board of Education, was required to be provided with an alternative education program until he either graduated from high school or reached his nineteenth birthday, whichever came first. Our decision was grounded in the New Jersey State Constitution's mandate for a thorough and efficient system of free public education "for the instruction of all children in the State between the age of five and eighteen years," New Jersey Constitution, Art. 8, §4, par. 1, and the educational policy embodied in the statutory and regulatory framework implementing the constitutional mandate.

On August 15, 2002, the Bergenfield Board filed a notice of appeal with the Appellate Division seeking reversal of our decision.

On August 29, 2002, petitioners filed a cross-appeal. Petitioners urged the Appellate Division to affirm the State Board's determination that their son was entitled to an alternative education program under the New Jersey State Constitution until he graduated from high school or turned nineteen. They contended, however, that the State Board had erred in dismissing the State respondents from the case, arguing that the State respondents had violated their son's rights by failing to adopt regulations to require district boards to provide alternative education programs when they expel students from the regular education program.

In a brief filed on behalf of the State Board of Education, a deputy attorney general argued that it was unnecessary for the Court to decide the appeal before it on constitutional grounds. While recognizing that the State Board's decision had constitutional underpinnings, the deputy attorney general contended that the issue before the Court should be resolved instead under N.J.S.A. 18A:38-1, as well as under educational policy.

In their reply brief, the petitioners acknowledged that a court should not reach constitutional questions unless necessary. However, they pointed out that they had understood the State Board's decision to be grounded in constitutional interpretation and had only become aware that the State Board had interpreted the education statutes as supporting the right to an alternative education program for expelled students upon the filing of the deputy attorney general's brief. Reply Brief, at 13-14. That being the case, the petitioners argued that if the Court affirmed the State Board's decision on statutory grounds, the decision must be modified to entitle such students to an alternative education program until graduation or age twenty-one because the

entitlement to a free public education under N.J.S.A. 18A:38-1 extended beyond the age limit set forth in the New Jersey State Constitution. Reply Brief, at 20.

In response, the Bergenfield Board contended that petitioners' request for an amendment to the State Board's decision should be disregarded by the Court because the statutory issue had not been raised previously and had not been addressed in the State Board's decision.

In his response, the deputy attorney general argued that a remand was unnecessary because the age requirement of N.J.S.A. 18A:38-1 was non-discretionary.

On September 16, 2003, the Appellate Division remanded the matter to the State Board for "additional submissions by the parties and supplemental findings by the Board."

Pursuant to the Appellate Division's remand, the State Board afforded petitioners and the Bergenfield Board the opportunity to submit briefs on the question of whether N.J.S.A. 18A:38-1 applies to this case so as to entitle petitioners' son to a free public school education within the Bergenfield school district until his twenty-first birthday. Both parties filed briefs on November 6, 2003, and on November 13, 2003, petitioners filed a supplemental letter brief. On November 24, 2003, the Bergenfield Board filed a response objecting to consideration of the petitioners supplemental brief, along with a motion to supplement the record in the event that the State Board determined to consider the petitioners supplemental brief.

On remand, the Bergenfield Board continues to argue that it is not legally obligated to provide an alternative education program to a student whom it permanently expels from its regular education program. However, it contends that even if petitioners'

son was entitled to relief, the Bergenfield Board should only be required to provide him with an alternative education program until he graduates from high school or reaches his nineteenth birthday because the State Board's decision was based on constitutional grounds and petitioners at no point in the proceedings claimed that their son was entitled to an alternative education pursuant to the statutory age requirement of N.J.S.A. 18A:38-1. The Board further argues that N.J.S.A. 18A:38-1 does not apply to this case because that statute merely provides the basis upon which a school district determines a student's domicile in order to determine whether the student is entitled to a free public education in that particular district and establishes the procedural mechanism for contesting a district board's determination to deny admission because of a student's failure to establish that he is domiciled in the district. The Board also points out that the express terms of the statute require that a free public education be provided only to children over five and under twenty, and not twenty-one.

Petitioners contend that their son is entitled to an alternative education program until his twenty-first birthday because the overall purposes of the relevant education laws that must be effectuated by the State Board's decision are to afford a free public education to all students from the age of five until they turn twenty-one. To support this proposition, petitioners point to N.J.S.A. 18A:37-1 et seq., N.J.S.A. 18A:7A-14.1(a), and N.J.S.A. 18A:38-4, as well as N.J.S.A. 18A:38-1. Petitioners argue that the entitlement conferred by N.J.S.A. 18A:38-1 extends to a student's twenty-first birthday because the Legislature made no distinction in the types of services to be provided to students over the age of eighteen and because it expressly provided that students in State facilities are entitled to educational programs and services until their twenty-first birthdays when

it enacted N.J.S.A. 18A:7B-7. Petitioners also assert that since a student's entitlement to a free public education between the ages of five and eighteen under the New Jersey State Constitution does not end until the student's nineteenth birthday, N.J.S.A. 18A:38-1 should be interpreted as inclusive of the outer age specified in the statute so that a student's entitlement under that statute should end only when he turns twenty-one.

Initially, we stress that when we first considered this matter we viewed it from both a legal and educational policy perspective. Hence, while representing sound educational policy, our decision of July 2, 2002, was grounded in the education clause of the New Jersey State Constitution. Since none of the parties raised the question, we did not examine the impact of N.J.S.A. 18A:38-1.

Consideration of the application of N.J.S.A. 18A:38-1 to this case has reinforced the view expressed in our July 2 decision that a student's substantive right to continue his education following his removal from the regular education program for disciplinary reasons is derived from the New Jersey State Constitution. As follows, it is for this reason that we conclude that N.J.S.A. 18A:38-1 obligates the Bergenfield Board to provide petitioners' son with a free public education until his twentieth birthday.

N.J.S.A. 18A:38-1 defines which children are entitled to a free public education in a given school district on the basis of their domicile. It does not address whether a student who is entitled to a free public education in a particular school district pursuant to N.J.S.A. 18A:38-1 but who has been properly excluded from that district's regular education program under N.J.S.A. 18A:37-1 et. seq., which authorizes district boards to suspend and expel students for certain specified conduct, is entitled to receive

continued educational services from that district. Moreover, while some of the statutory provisions included in N.J.S.A. 18A:37-1 et seq. require the provision of an alternative education program following disciplinary action, none of them require the continuation of educational services once the disciplinary action has been sustained.

However, nothing in the terms of N.J.S.A. 18A:38-1 authorizes a district board to stop providing a free public education to a student who meets the statutory criteria entitling him to such an education in that district. Nor in the face of the constitutional mandate can we interpret any of the provisions of N.J.S.A. 18A:37-1 et seq. to authorize a district to terminate the provision of all educational services to a child who has met the criteria of N.J.S.A. 18A:38-1. To interpret these statutory provisions in this way would be inconsistent with the clear constitutional mandate that the Legislature provide a system of free public education for the instruction of all children in the State between the ages of five and eighteen years.

Accordingly, we conclude that N.J.S.A. 18A:38-1 requires the Bergenfield Board to provide petitioners' son with a free public education until his twentieth birthday. In this respect, we stress that the express language of the statute provides that the public schools of a school district shall be free to those individuals who meet the domicile requirements of the statute and are "over five and under 20 years of age." Hence, a school district must provide educational services to students whose entitlement is governed by this statute only until their twentieth birthday, at which point they are no longer "under twenty."

We reject petitioners' arguments that the entitlement conferred by this statute extends to a student's twenty-first birthday. Nothing in the statutes to which petitioners

refer supports the proposition that N.J.S.A. 18A:38-1 obligates a district board to provide a free public education to an individual until he reaches his twenty-first birthday. N.J.S.A. 18A:37-1 et seq., which governs student discipline, does not in any way suggest that students who are the subject of discipline should be afforded a free public education until their twenty-first birthday. N.J.S.A. 18A:7A-14.1(a) merely states that it is the constitutional obligation of the Legislature to provide all children in New Jersey with a thorough and efficient system of free public schools and does not specify the age to which the entitlement to such an education extends. N.J.S.A. 18A:38-4 permits, but does not mandate, a district board to provide a free public education to individuals over twenty. N.J.S.A. 18A:7B-7 entitles the parent or guardian of a pupil in a State facility who is between eighteen and twenty to request an administrative review on matters of educational classification or educational program, but it does not include a mandate for the provision of an educational program to any classification of students. While students who are classified as being entitled to special education programs and services under N.J.S.A. 18A:46-1 et seq. are entitled to the continuation of such programs and services until their twenty-second birthday, petitioners' son does not fall within this classification. Moreover, petitioners have not shown any instance where, in drawing a distinction with respect to the age at which the entitlement to receive free educational services ends for a specific category of students, the Legislature has drawn an unreasonable distinction between students in such category and those whose entitlement is based on meeting the domicile requirements of N.J.S.A. 18A:38-1.

We also reject the Board's assertion that any entitlement that petitioners' son may have to the continuation of educational services should be limited by the fact that

petitioners did not seek relief under N.J.S.A. 18A:38-1 during the pendency of the matter before this agency. By virtue of our July 2, 2002 decision, the Bergenfield Board was required to fulfill its constitutionally imposed obligation to petitioners' son. We find that it will not suffer any undue prejudice by satisfying the statutory requirement extending its obligation to provide educational services to him for an additional year.

Finally, we deny the motion to supplement the record which the Bergenfield Board filed on November 24, 2003. By this motion, the Bergenfield Board seeks to supplement the record with information relating to the academic performance of petitioners' son during the 2002-03 school year. Quite simply, this information has no bearing on the Bergenfield Board's legal obligation under N.J.S.A. 18A:38-1 to provide petitioners' son with a free public education until his twentieth birthday.

December 3, 2003

Date of mailing _____