State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION GRANTING
INTERIM EMERGENT RELIEF
OAL DKT. NO. EDS 03277-21
AGENCY DKT. NO. 2021-32579

ELIZABETH BOARD OF EDUCATION
Petitioner,
v.
S.E. AND D.B. ON BEHALF OF J.E.,
Respondents.

OAL DKT. NO. EDS 02871-21
AGENCY DKT. NO. 2021-32637

S.E. AND D.B. ON BEHALF OF J.E.
Petitioners,
v.
ELIZABETH BOARD OF EDUCATION,
Respondent.

OAL DKT. NO. EDS 03706-21
AGENCY DKT. NO. 2021-32637

S.E. AND D.B. ON BEHALF OF J.E.
Petitioners,
v.
ELIZABETH BOARD OF EDUCATION,
Respondent.

Richard Flaum, Esq., for Elizabeth Board Education (DiFrancesco, Bateman, Kunzman, Davis, Lehrer & Flaum, attorneys)

Michael I. Inzelbuch, Esq., for S.E. and D.B.

Record Closed: August 17, 2021 Decided: August 20, 2021

BEFORE **ANDREW M. BARON**, ALJ:

I incorporate by reference herein, my prior Emergent decision dated April 16, 2021, which is attached to petitioners' letter application as Exhibit A.

For purposes of brevity, will not lay out all the facts again, as they are set forth in my prior decision, which is part of this letter Order.

Petitioners seek a third application Order seeking Interim Emergent Relief directing the Elizabeth School District to be responsible, and pay for all fees, costs and tuition related to an out-of-District placement with a program known as "Celebrate the Children" for the 2021-2022 school year, as well as round trip transportation to the program.

Set forth below by way of background is the prior history of the case leading up to the present Emergent application:

Petitioner filed an initial application for Emergent relief in early April of this year. Following submissions and argument, the application was granted in part and denied in part. Shortly thereafter, that case was consolidated with a second related case, which was filed on behalf of the District.

In a prior conference which took place on or about April 30, 2021, following the decision that was issued, issued in connection with petitioners' first Emergent application, it was determined and agreed that two independent evaluations should

immediately take place, to be conducted by an educational consultant and behavioral consultant. Among other things, these experts were to provide independent opinions from an educational and behavioral standpoint on whether J.E. could thrive within the District, or if a placement outside the District was better suited to meet his educational and behavioral needs. (J.E.'s treating psychiatrist and psychologist were already on record that only an outside placement was the most appropriate educational alternative for J.E. (It is not disputed that neither of the two private placements petitioner selected for J.E. had a behaviorist or a behavioral component that would have benefited J.E.).

After some searching, Kathleen Carne was selected to conduct the educational evaluation, and Vivian Attanasio, BCBA was selected to conduct the behavioral evaluation. The District agreed to the selection of both of these professionals. (The District later sought to discredit Ms. Attanasio's findings.)

Ms. Carne filed her report on May 14, 2021, and some time thereafter, Ms. Attanasio filed her report. These reports are incorporated by reference as Exhibits B and C respectively with the petitioners' letter application. Both reports indicate that an out-of-District placement is warranted, to address J.E.'s behavioral and educational needs.

In a second Emergent application seeking a summer educational placement, (ESY) for J.E., the District continued to maintain that it could service his needs in District, though it later turned out that the District in fact had no such ESY program at all. Over strong objection from the District, the relief sought in the second Emergent application was granted, and the District was ordered to pay for J.E. to attend "Celebrate the Children' a six week out of District program for the summer.

It is undisputed that the District waited until at least May 25, 2021 to send "intake" packages out to three out of District schools, for the new school year, without prejudice their position that they still could meet all of J.E.'s needs.

While I do not believe it is the fault of District counsel who is a dedicated and zealous advocate for his client, even as late as oral argument on the Emergent

application before me, we still do not know the outcome of the three intake packages for potential out of District placements without prejudice that were supposedly sent out by the District before the end of the 2021 school year. The representation made during argument that the case manager was off for the entire month of July is not an acceptable excuse for being unable to provide answers on this subject, as the District has known throughout that placement for the 2021 school year would have to be re-visited.

It is not disputed that due to certain behavioral issues, J.E. failed to complete two prior day placements at Kushner and Sinai, and he has not been in any school setting, virtual or otherwise, since February 2021.

In opposing this newest application for Emergent relief, brought less than three weeks before the start of a new school year, with J.E.'s status still in limbo, the District makes multiple arguments as to why petitioners are not entitled at this juncture to Emergent relief.

The District still contends, as it has throughout that it can handle and take care of all of J.E.'s needs, but there still is nothing before me now that indicates how and why this would be possible.

First, the District argues that its obligations to J.E. are limited, since petitioners rejected the IEP which was proposed in December 2020 and elected to place him at their own expense in a private school. Once this decision was made, the District argues that there is no IEP for J.E., and its educational obligations to him, while not disputing he is entitled to special education services, are minimized.

It should be noted here, that unlike in other cases, one of which is the Howell Township case, cited as YB v. Howell, (3rd Cir. Jan. 2021), J.E. should be treated by the District as a transfer student, since he left the District in January 2021 for a private placement after the IEP was rejected. That case is clearly distinguished from this one in at least two ways, unlike in Howell, J.E. remained a resident of Elizabeth at all times relevant herein, and Howell, was a "stay put" case, which J.E.'s case is not.

In further opposition to the within third Emergent application, the District suggests that J.E.'s parents have been completely uncooperative throughout this process, dating back to their initial rejection of the proposed IEP in January 2021. By offering an IEP which was ultimately rejected by J.E.'s parents, the District argues in opposition to the third Emergent application, that it has fulfilled its responsibilities to J.E., it is not an emergent situation, and that his parents should either present him at School 21 on the first day of school in September, without a specific program in place, or they can place him themselves at Celebrate the Children, pay for it themselves and seek reimbursement through normal due process channels in a hearing before the Office of Administrative Law.

While I recognize and respect the role of the District's counsel as a zealous advocate, this argument advanced on behalf of the District is to say the least disingenuous is not in accordance with the rights of families of children with general education needs, let alone special education needs. Despite J.E. and his family's continued residency in Elizabeth, it is almost as if the District is abandoning its educational duties and responsibilities to J.E.

Some of the other arguments advanced by the District in opposition to the third Emergent application do not rise to the level of deserving attention. But two final arguments made, that the summer program J.E. attended was nothing more than "summer camp" and that his parents failed to request another IEP meeting, also fail on both substance and procedure.

Attached to this relief sought, is a copy of a communication, signed on letterhead of "Limitless" a division of Celebrate the Children, attesting to the behavioral progress J.E. made under its auspices during his twenty-three (23) days of attendance in its program. Though not classified as an ESY program with traditional educational components, the letter is signed by professionals with occupational and physical therapy credentials, and the managing member of Limitless, is the same individual who runs Celebrate the Children. Thus, it sems clear, even without testimony but on the documents themselves, that Limitless is affiliated with Celebrate the Children.

Though a District case worker acknowledged in writing that he was happy to see J.E.'s progress, the District, that still has not reported back on the results of any of the three packages it sent out with J.E.'s background, belittles Limitless as nothing more than "summer camp." The fact that the report from Limitless, even if there are some educational shortcomings, was the first completely favorable report about J.E. in months, is a sign that he may be successful at Celebrate the Children in the upcoming school year.

Lastly, the District argues that J.E.'s parents failed to cooperate with the District because they did not request another IEP meeting after J.E. completed the Limitless program. This too, is at best disingenuous, as the most common practice for IEP meetings is initiated by the District, the case manager was admittedly unavailable for the entire month of July, with no one designated to handle J.E.'s case in her place, and the District maintains the position that because the December 2020 IEP was rejected, it fulfilled its obligations to J.E..[1]

J.E., who though bright, has evidenced certain concerning behavioral issues, including but not limited to attacking the principal of one school within the last few months. Having reviewed the two independent evaluations, in addition to the reports of Dr. Bartky and Dr. Dykman previously submitted, **I AGAIN FIND**, this issue is paramount, and must be given appropriate consideration in any learning setting for J.E. moving forward. J.E. has been accepted for admission to Celebrate the Children, and the District has failed to present any comparable alternative other than to say "we can meet his needs, while at the same time saying there is no IEP in place."

In bringing an application for interim emergent relief, the moving party must demonstrate by "clear and convincing evidence" that they will prevail on the merits. and

[1] - In another sign of the district's indifference to addressing J.E.'s needs, subsequent to the closing of argument, it was reported by district counsel that a district representative reported to him that J.E. was accepted on July 17, 2021 to Calais and Honor Ridge, the two other programs discussed several weeks ago in connection with the prior emergent applications. Counsel, a respected, experienced, and zealous advocate is not faulted here for the shortcomings of his client who for reasons unknown, has not seen fit to devote the necessary time to J.E. and his family. This is in addition to learning during oral argument that the district ended up not offering a Summer ESY program which was not previously disclosed, again through no fault of counsel.

under Crowe v. DeGioia, 90 N.J. 128, N.J.A.C 1:6A-12.1 and N.J.A.C. 6A14-2.7 et seq., a moving party must demonstrate they will suffer "immediate and irreparable harm", that they will be prejudiced unless the relief is granted, and that the equities are balanced in their favor.

After reviewing my prior decisions in this matter, together with the reports of Ms. Carne, and Ms. Attanasio, together and the additional documentation from Dr. Dykman, and Dr. Bartky previously reviewed,

I FIND:

1) Petitioners have met their obligation to demonstrate by "clear and convincing evidence" that an out-of-District ESY placement is warranted for 2021-2022 school year.

2) J.E. remains a resident of the City of Elizabeth, and as such, it is the responsibility of the Elizabeth school District, either within the District, or through an out-of-District placement, to offer FAPE to J.E..

3) J.E. is a student who has established the need for special education services.

4) Presently, all schools, including Celebrate the Children, are subject to a State directive that they return to in person learning.

5) A new school year is starting on or about September 1, 2021, and currently the District has no plan in place for J.E.

6) J.E. would be prejudiced by not having the ability to attend a recognized out-of-District school program, as recommended by his psychiatrist, psychologist, and two independent experts Ms. Carne and Ms. Attanasio program for the 2021.-2022 school year. Petitioners have demonstrated a likelihood of success on the merits, and the equities are balanced in their favor.

7) The District, who still has not reported back on the results of the packages it sent out for JE to the three outside programs, has not called for a new IEP meeting, and has no program in place for J.E.

8) The District **SHALL** be responsible for paying all fees, tuition and costs for J.E. to attend the Celebrate the Children effective September 1, 2021, for the 2021-2022 school year, and supply round trip transportation with a bus aid for JE.

This Interim Emergent Order is limited to the request for emergent relief for placement at Celebrate the Children for the 2021-2022 school year. The balance of the case will be scheduled for hearing some time during the Fall of 2021.

LEGAL DISCUSSION

Education has long been fundamental to the workings of democracy. In the historic decision of Brown v. Board of Education, Chief Justice Earl Warren announced that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." 347 US 483,493, (1954). The fact that the education of youth "is essential to the workings of democracy and the future well-being of society is widely appreciated," Abbot ex rel. Abbot v. Burke, 199 N.J. 140, 144 (2009).

In New Jersey, one of the fundamental responsibilities of the State is to provide a public education for its children. In this State, for the most part, this is achieved through local or regional school Districts that are charged with the responsibility of providing the education to children of its residents. The New Jersey Constitution, article VIII, Par. 4, P.1 mandates that the "Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years. In addition to this mandate, the New Jersey legislature, in passing the New Jersey School Funding Reform Act of 2008, declared that the State, "in addition to any constitutional mandates, has a moral obligation to ensure that New Jersey's, children wherever they reside, are provided the skills and knowledge necessary to succeed. N.J.S.A. 18A-7F-44.

For children like J.E, the Individuals with Disabilities Education Act, (IDEA), 20 U.S.C. Sect. 1400-1482, ensures that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet the unique needs and prepare them for further education, employment and independent living, and ensures that the rights of children with disabilities and parents of such children are protected. See also: N.J.A.C. 6A;14-1.1 et seq.

States qualifying for federal funds under the IDEA must assure all children with disabilities receive the right to a "free appropriate public education." Hendrick Hudson Cent. Sch. District Bd. of Educ. v. Rowley, 458 U.S. 176 (1982). Subject to certain limitations, FAPE is available to all children with disabilities residing in the State between the ages of three and twenty-one, inclusive. 20 U.S.C. Sect. 1412 (a1A,B).

In order to facilitate the implementation of FAPE for eligible students, an Individualized Education Program, (IEP) is prepared, developed and reviewed for each child that is eligible to receive special services. 20 U.S.C. Sect. 1412,1414 respectively. The IEP establishes the rationale for the student's educational placement and serves as a basis for the implementation of certain programs to meet that student's unique educational and sometimes behavioral special needs. N.J.A.C. 6A: 14-1.3-3.7. Annually or more often if necessary. The IEP team shall meet to review and revise the IEP to determine an appropriate placement for the student.

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
>
> 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). In such cases, petitioner has the burden of demonstrating that the relief sought is of an emergent nature that it should be granted to prevent the applicant from suffering irreparable harm.

Considering the above factors for emergent relief, I **CONCLUDE** that petitioners have satisfied the four criteria. Specifically, given the opinions of Dr. Bartky, Dr. Dykman, Ms. Carne and, Ms. Attanasio and the accompanying documents presented by both sides, petitioners **have satisfied the first prong required for relief because she did clearly and convincingly demonstrate J.E.** will suffer irreparable harm, unless an out-of-District placement to **Celebrate the Children** is facilitated effective September 1, 2021.

As to the other criteria, petitioners are **likely to prevail on the merits**, and having considered all the documents certifications and independent expert reports by two other professionals agreed upon by the District, **after balancing the equities**, it is more likely that J.E. will be prejudiced, unless the requested relief seeking an out-of-District placement at Celebrate the children is granted.

Under the facts and circumstances presented, petitioners have again met all four criteria required for emergent relief.

ORDER

It is hereby **ORDERED** that the request for Interim Emergent relief seeking out of District placement at Celebrate the Children for the 2021-2022 school year, together with transportation sought by petitioners is **GRANTED.**

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2020) 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. § 1415(i)(2); 34 C.F.R. § 300.516 (2020).

August 20, 2021

Date

ANDREW M. BARON, ALJ

Date Received at Agency August 20, 2021

Date Mailed to Parties: August 20, 2021

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APPENDIX

Witnesses

For Petitioners:

None

For Respondent:

None

Exhibits

For Petitioners:

P-1 (A)- 12/23/20 IEP mtg.

P-2 (B)- 8/2/20 Enforcement. Request from final decision

P-3 (C)-7/1/21 Letter order

P-4 (D)-4/16/21 Decision

P-5 (E)-4/6/21 Dyckman report

P-6 (F)-6/20/21 Attanasio Behavioral Analysis

P-7 (G)- 7/7/21 notice of no contract

P-8 (H)-Pinto-Gomez communication

P-9 (I)-7/15/21 Denial of District Emergent appeal by U.S. District Court

P-10 (J)- 7/1/21 Inzelbuch email to McColligan

P-11 (K)-7/2 Flaum email to Inzelbuch

P-12 (L)-7/2/21 Inzelbuch to Pinto-Gomez re: tuition contract

P-13 (M)-7/7/21 Flaum email no contract

P-14 (N)-7/8/21 Flaum email to McColligan

P-15 (O)-8/4/21 Flaum letter to Baron

P-16 (P)-8/4/21 Report from Limitless about JE progress

P-17 (Q)-8/4/21 Inzelbuch email to Flaum

P-18 (R)-8/4/21 Inzebuch email to Baron

P-19 (S)- 7/6/21 McColligan email to Pinto Gomez

P-20 (T) Misc. email threads

P-21 (U)- 8/10/21 Letter from Celebrate the Children

P-22 (V)-8/10/21 Elizabeth case manager acknowledgment of JE progress

P-23 (W)-7/1/21 Inzelbuch to Baron Acceptance by Celebrate the Children ESY

P-24 (X) State registration documentation showing affiliation between Celebrate the Children and Limitless (post hearing add-on)

For Respondent:

R-1 (A)- 12/23/20 Eligibility mtg and Sina acknowledgment

R-2 (B)- 3/4/21 Evaluation request

R-3 (C)- District petition

R-4 (D)- Parents cross-petition

R-5 (E)- Affidavit of Mallory Ulrich, Esq.

R-6 (F) Pinto-Gomez affidavit

R-7 (G) 4/22/21 Letter offer in District program

R-8 (H)- Pinto Gomez affidavit correction

R-9 (I)- Dr. Lerman affidavit

R-10 (J)- End of Limitless program summary

R-11 (K)-9/24/20 Email to schedule meeting

R-12 (L)- Parents consent to evaluations

R-13 (M)-Invite to meeting

R-14 (O)- Signed meeting documents

R-15 (P)- IEP

R-16 (Q)- email to director

R-17 (R)- YB v. Howell (#rd Circuit case decided 1/21/21