*State of New Jersey*
OFFICE OF ADMINISTRATIVE LAW

**FINAL DECISION**
**EMERGENT RELIEF AND**
**DUE PROCESS**
OAL DKT. NO. EDS 11268-24
AGENCY DKT. NO. 2025-38036

**ELIZABETH CITY BOARD OF EDUCATION,**

Petitioner,

v.

**D.F. ON BEHALF OF N.F.,**

Respondent.

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**Basmah E. Raja,** Esq., (Difrancesco, Bateman, Kunzman, Davis, Kehrer and Flaum, attorneys) for petitioner

**No Appearance,** for **D.F.** o/b/o **N.F**. respondent

Record Closed: August 21, 2024 Decided: August 22, 2024

BEFORE **ERNEST M. BONGIOVANNI, ALJ**

## STATEMENT OF THE CASE

Petitioner, the Elizabeth City Board of Education (the District/petitioner), has filed a Verified Petition for Due Process and Request for Emergent Relief seeking an Order to:

1. Permit the District to release any of N.F.'s records to locate an out-of-district placement without parental consent;
2. Permit the District to release any records to Newmark School, Westbridge Academy, Benway School, Collier School, Green Brooke Academy, Windsor Learning Center, and Shepard School, and/or other appropriate facility with programming that includes an Emotional Regulation Impairment (EIR) program to effectuate an appropriate out-of-district placement for N.F., pursuant to his IEP, without parental consent;
3. Permit the District to determine an out-of-district placement for N.F. and immediately place him upon N.F.'s acceptance at an appropriate placement, pursuant to his IEP, without parental consent;
4. Compel D.F. to fully cooperate with the District in determining an out-of-district placement for N.F., including the application and intake process;
5. Compel D.F. to fully cooperate with the immediate placement pursuant to N.F.'s IEP upon acceptance of his application at an appropriate placement.

The petition was filed with the Office of Special Education Programs (OSEP) of the New Jersey Department of Education on August 13, 2024. The Emergent Relief claim, as well as the underlying Due Process claim, seek to avoid a brake in service due to the out-of-district placement for 2023-2024 discontinuing its Emotional Regulation Impairment (ERI) program, seeks full cooperation of D.F, to compel the release of N.F.'s records, without parental consent to other out-of-district placements that provide ERI programming, pursuant to N.F.'s current Individualized Education Program (IEP) dated March 8, 2024 and, upon acceptance at an appropriate placement, to compel the immediate placement of N.F. in such an out- of- district placement without parental consent.

Both matters were transmitted to the Office of Administrative Law, (OAL) where they were filed on August 14. 2024, as a contested case. N.J.S.A. 52:14B-1 to B-15; N.J.S.A. 52:14F-1 to F-13. The parties were notified by the OAL that a hearing on the would be held on August 19, 2024, at 1:30 p.m. at the offices of the OAL located at 33 Washington Street, 7th Floor, Newark, New Jersey. Petitioner's counsel appeared, but there was no appearance by respondent. After the August 19, 2024, proceeding, an

email was sent to D.F. to advise him that he failed to appear and that he would have another, final, chance to appear on these proceedings on August 21, 2024, at 9:30 a.m., again at the offices of the OAL at 33 Washington Street, 7th Floor Newark. Once again, on August 21, 2024, D.F. failed to appear, and the record was closed.

## PRIOR LITIGATION HISTORY AND FACTUAL DISCUSSION

For purposes of deciding this application for emergent relief, the following is a summary of the relevant facts derived from the contents of the petition, numerous exhibits and recent certifications and oral argument. Based on same, I **FIND** the following as **FACTS**:

The essential facts concerning this controversy and its background up until May 15, 2024, just three months ago, are set forth thoroughly and accurately in a Final Decision on Emergent Relief issued by Matthew J. Miller, ALJ in Elizabeth City Board of Education v. D.F. on Behalf of N.F., OAL Docket No. EDS 06258-24 (hereinafter Elizabeth v. D.F.). (Petitioner's Exhibit E). The Procedural Litigation History, and the Fact Findings contained in the aforesaid Final Decision are hereby incorporated by reference,

As set forth in detail in the June 14, 2024, Certifications of N.F.'s Case Manager Christine Ribaudo, and of Maria Garcia, Supervisor of Special Services as parts of this application for Emergent Relief, during the relevant time frames, after the issuance of Judge Miller's Order, D.F. has continued his history of unresponsiveness, noncooperation and obstructionism, as set forth in detail in the June 14, 2024, Certifications of N.F.'s Case Manager Christine Ribaudo, and of Maria Garcia, Supervisor of Special Services as parts of this application for Emergent Relief. The most critical factor causing the application for Emergent Relief and the Petition for Due Process is N.F.'s educational program facing an imminent crisis and a brake in services owing to N.F.'s current placement at the Developmental Learning Center (DLC) in Warren, having to discontinue its Emotional Regulation Impairment (ERI) Program at the conclusion of the regular 2023-2024 school year, making that facility no longer appropriate for N.F. However, despite this crisis, and during the relevant time frames

and since the issuance of Judge Miller's Order in May 2024, D.F. has continued his pattern of unresponsiveness, noncooperation and obstructionism, as set forth in detail in the aforesaid certifications. As a small sample of such conduct: D.F. refused to advise if he would attend virtually or in person a Child Study Team (CST) meeting January 4, 2024, did not respond to that meeting's findings that there be additional evaluations, Psychological, Educational nor to the plan for an updated Social Assessment. of and for N.F. The following month, D.F. failed to respond to the Social Worker to schedule or participate in an updated Social Assessment, resulting in the update being removed from the evaluation plan. D.F. failed to respond to a proposed Child Study Team meeting for March 8, 2024, and thereafter failed to appear for the meeting. Despite not filing any objection to the IEP developed by the CST on March 8, 2024 (Exhibit O, # 5), and despite being advised by N.F.'s Case Manager, that D.F. should consent to release N.F.'s records to Westbridge Academy and Newmark schools, as those places were better suited to N.F.'s, needs, D.F. completely ignored the request. Furthermore, although the CST determined that for the 2024-2025 school year, N.F. could not continue at the DLC, owing to his need to continue in ERI programing with behaviorist supports for his emotional and behavioral needs, and that no in district placement could provide such needed specialized instruction, pacing and support, and despite D.F. being advised of same, D.F. has completely failed to consent to the reasonable and necessary requests to release N.F.'s records to other appropriate schools for now immediately needed placement, and despite Judge Miller's Court Order that he fully cooperate.

I specifically **FIND** this noncooperation, failure to participate, failure to respond and obstructionism by D.F. are **FACTS.** Further I **FIND** as a **FACT**, that this continued refusal to cooperate has completely thwarted the District from finding appropriate placement for the 2024-2025 school year, despite D.F. knowing since January 12, 2024, that N.F.'s current placement would not be viable in 2024-2025.

Earlier this month, after advising D.F. by certified mail that without his cooperation the District would move to enforce Judge Miller's Order in an application to the Superior Court, and having again received no response, the petitioner received, on August 2, 2024 an Order of Enforcement in Superior Court, the Honorable Robert J.

Mega, PJ., Chancery; however the Order did not authorize the District to send N.F.'s records to schools without the parent's written permission, nor did it allow, as requested by it, the District to, without parental consent, choose an appropriate placement, because the initial Order by Judge Miller did not specifically so authorize the District and accordingly, such "authority" could not be enforced in the Superior Court.

I **FIND** that since the implementation of the March 8, 2024, IEP, D.F. has not communicated with the District and did not object to or file for due process concerning it. I now further **FIND** that since the filing of this new Application for emergent relief and for Due Process sought by the District, there has been no communication by D.F. to the Board, no communication with the OAL, no reasonable explanation for his conduct can be understood, and D.F. has made no effort to object to nor to participate in these new proceedings.

## 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 applicant for emergency relief must set forth in their application the specific relief sought and the specific circumstances they contend justify the relief sought. N.J.A.C. 1:6A-12.1(a).

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.

As of today, there is less than three weeks before the start of the school year for Elizabth's 8th grade students. As per the case history, "(d)espite a multitude of efforts, D.F. remains resistant to cooperating with the District in assisting it to place N.F. in an appropriate academic setting where he would also receive recommended therapeutic/counseling services." Elizabeth v D.F, supra.

Having read the unrefuted and convincing certifications and Exhibits in the latest application and petition for Due Process and this case history as set forth in Elizabeth v. D.F. which includes but is not limited to, descriptions of three prior decisions by other ALJS, and two prior enforcement applications to Superior Court, I am convinced by overwhelming proof that this continued parental non-cooperation will cause a break in services, and, given the change in the educational program at N.F.'s current placement, that, without the Order and the remedy requested, N.F. will not be receiving the services required by his current IEP and, consequently, would not be receiving FAPE in school year 2024-2025. Based on the above, I **CONCLUDE** that this matter involves the issue of a break in services, which requires emergent relief pursuant to N.J.A.C. 6A:14-2.7(r)1.

Emergent relief may be granted pursuant to N.J.A.C. 1:6A-12.1(e) and N.J.A.C. 6A:14-2.7(s)(1), if the judge determines from the proofs that the following conditions have been established:

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.

N.J.S.A. 6A:14-2.7(s). See also, Crowe v. DeGioia, 90 N.J. 126 (1982), codified at N.J.A.C. 6A:3-1.6(b).

The petitioner bears the burden of satisfying all four prongs of this test. Crowe, 90 N.J. at 132-34.

Here, I **FIND** the (in)actions of D.F. will cause N.F. irreparable harm because without his assistance and cooperation, N.F. will, without question, not receive the educational services that his IEP has found to be necessary for the District to meet its requirement under the IDEA to provide him FAPE for the 2024-2025 school year. There is no other remedy in law or equity, or monetary damages, to compensate either the student or the District. As noted in Pemberton Township Bd. of Educ. v. C.M. and J.M. obo B.M., 2019 N.J. Agen. LEXIS 200 (April 11, 2019), "(t)he impasse…places the District in the untenable (position) of being prevented from meeting its clear obligations under State and Federal law to provide…FAPE." Id. at *11. See also, Haddonfield Borough Bd. of Educ. v. S.J.B. obo J.B., 2004 N.J. Agen. LEXIS 645 (May 20, 2004).

Further there is no doubt that the District's well-founded concern that it will be without power to provide for FAPE without greater relief than has been previously requested is now granted, I must agree that the District must be given the authority to send N.F. 's records as soon as possible to appropriate schools and facilities without any parental consent. Without such authority, I **CONCLUDE** N.F will suffer a brake in services, and will be in continued peril of again suffering irreparable harm owing to the parent's continued and unbroken pattern of noncooperation and obstructionism.

I therefore **CONCLUDE** that irreparable harm will occur if D.F. unless there is a release of N.F.'s school records without parental consent.

is not compelled to cooperate with the District in the determination and implementation of N.F.'s out-of-district placement.

Respondent had the legal right to reject the March 8, 2024, IEP within fifteen days of the notice of the change. N.J.A.C. 6A:14-2.3(h)(3)(i)(ii). The respondent did not submit a written objection or otherwise file for a due process hearing. The District is mandated to implement the proposed action after the opportunity for the parent to contemplate same has expired unless the parent disagrees with the proposed action

and the district attempts to resolve the disagreement; or the parent requests mediation or a due process hearing prior to the expiration of the fifteenth calendar day. N.J.A.C. 6A:14-2.3(h)(3)(i)(ii).

Second, per Crowe the District must demonstrate that it has a settled legal right to the relief requested. As noted only three months ago by Judge Miller, the "District has every right to implement an IEP, particularly one that is legally unopposed, it shall provide written notice to the parent at least fifteen calendar days prior to the implementation of the proposed action to allow the parent to consider the proposal. N.J.A.C. 6A:14-2.3(h) 2." Elizabeth v D.F., supra, at p. 13. Now, and since May, 2024, D.F. not only ignored the IEP and its process, then ignored Judge Miller's Order, And Judge Mega's Enforcement Order, but has ignored this new application for Emergent Relief and application for Due Process.

It should further be noted that D.F. has been aware of the need for a change in placement well before the implementation of the March 8, 2024, IEP. In fact, he was aware of the cessation of DLC's ERI program on January 12, 2024, and has literally done nothing, per the evidence, to assist the District in finding an appropriate placement for the 2024-25 school year. Worse, he has obstructed such efforts.

As did Judge Miller, I **CONCLUDE** that the March 8, 2024, IEP is the controlling IEP for placement and that the District is mandated to implement it to the best of its ability. As D.F. has shown that not only will he not assist in the implementation of the IEP but will obstruct it, I **CONCLUDE** the District has a settled legal right to send N.F.'s school records without parental consent to other appropriate schools

To satisfy the third prong of the Crowe test, the District must prove that it is likely to prevail on the merits of the underlying claim. Since the underlying relief sought by the District is to send records that will result in ultimate placement of N.F. in a learning environment that allows petitioner to deliver FAPE and D.F. is obstructing that pathway and has effectively abandoned his parental role in this school selection necessitated by the imminent break in services, there is a great likelihood that the District will prevail on the merits of the claim.

This is particularly true given that there has been no challenge to the applicability of the IEP, no opposition to this Application for Emergent relief, nor to the Due Process Petition, the continuation of N.F.'s current placement is impossible, N.F. was unable to participate in summer sessions as recommended by the IEP for the 2024-25 academic year. Furthermore, clearly it is now established that a more serious remedy of compelling "full cooperation" by D.F. is required.

Little discussion is needed on discussion of the fourth prong of Crowe. That part requires the petitioner District to demonstrate it will suffer greater harm than the respondent student if the relief is not granted. This is shown by a balancing of the equities and interests of the parties. Here again, I agree with the prior assessment of Judge Miller, which is still applicable to the facts now. As stated by him, This is, frankly, not realistically in question.

> [F]rankly [balancing the equities and interest]is not realistically in question. Simply, there are no negatives to granting the District's petition. In fact, not granting it would cause both N.F. and the District irreparable harm, with next to no upside for anyone if the emergent relief was not granted. D.F. does not "benefit" if the relief is not granted and, as noted, the impact on his son would be irreparable and potentially catastrophic if he continues his obstructive behaviors. This is a particularly pivotal year as N.F. prepares to transition not only from middle school to high school, but from childhood to his teen years. His father's non-cooperation and obstructionism not only fails to benefit him personally, but also actively impedes his son's future.

Elizabeth v. D.F. supra.

I **CONCLUDE** that the petitioner has demonstrated it will suffer greater harm than the respondent if the emergent relief is not granted. Therefore, I **FIND** that the District has demonstrated all four conditions set forth in Crowe and as codified in N.J.A.C. 6A:3-1.6(b). and I **CONCLUDE** that the petitioner is entitled to the emergent relief as requested.

Given the above, I **CONCLUDE** that the District's request to authorize it to send N.F.'s records to appropriate out of district schools which will implement the IEP and provide the necessary ERI program, with behavioral supports, and then once N.F. is accepted by one such school, to permit the District to enroll N.F. without parental authority is not only appropriate but probably the only effective remedy available to protect N.F.'s rights and the District's responsibilities. I **CONCLUDE** that the District will prevail on the underlying due process claim, which satisfies its requirement to demonstrate a likelihood of prevailing on the merits

Further I **CONCLUDE** that authorizing the school to release N.F.'s records to find an appropriate out of district placement, locating such a facility that will accept N.F. there and placing N.F. as such a school, all without parental consent will advance the IEP and is the only effective remedy to protect N.F.'s rights to appropriate special education services and to prevent a denial of FAPE while protecting the District's legitimate interest in carrying out its duties per the law.

Furthermore, I **CONCLUDE** that since the relief sought in the Due Process Claim is the same as what is sought in the application for emergent relief the Due Process Claim is also decided, and for the same reasons, in favor of petitioner and is otherwise moot.

## ORDER

It is **ORDERED** that:

1. Petitioner's motion for Emergent Relief I and Petition for Due Process as described aforesaid is **GRANTED;** and
2. The District may release any of N.F.'s records without parental consent to determine an appropriate out-of-district placement, pursuant to N.F.'s IEP to Newmark School, West Bridge Academy, Benway School, Collier School, Green Brook Academy, Windsor Learning Center and Shepard School other as yet unidentified schools all of which shall which include an Emotional Regulation Impairment (ERI) program with behavioral supports; and

3. The District may determine an appropriate out-of-district placement for N.F. and immediately place N.F. upon his acceptance at an appropriate placement without parental consent.
4. D.F. must fully cooperate in determining an out-of-district placement for N.F., including the application and in-take process.
5. D.F. must fully cooperate with the with the District in immediately placing N.F. at an out-of-district placement pursuant to his IEP upon approval of his application at an appropriate placement.
6. Petitioner shall serve a copy of the within order on all parties within five (5) days of the date hereof

Since this decision on the application for Emergent Relief resolves all of the issues raised in the due process complaint, no further proceedings in this matter are necessary.

This decision on application for emergency relief resolves all the issues in the due process complaint. No further proceedings are necessary, and this case is now closed. If the parent or adult student believes that this decision is not being fully implemented, then the parent or adult student is directed to communicate that belief in writing to the Director of the Office of Special Education. This decision is final under 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 and is appealable by bringing a civil action in the Law Division of the Superior Court of New Jersey or in the United States District Court for the District of New Jersey under U.S.C. § 1415(i)(2) and 34 C.F.R. § 300.516..

August 22, 2024 — Ernest M. Bongiovanni

DATE — **ERNEST M. BONGIOVANNI**, ALJ

Date Received at Agency: August 22. 2024

Date Mailed to Parties: August 22, 2024

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## APPENDIX

## LIST OF EXHIBITS IN EVIDENCE

For Petitioner:

A) 1-Letter to OSEP filing application, 2-Due Process Petition Emergent Relief, 3-Brief, 4-Certification of RPF, 5-Certification of Ribaudo, 6-Certification of Garcia, 7-Proposed Order
B) Proof of Certified Mail to D.F. and "Return to Sender"
C) Transmittal record, OSEP
D) Notice of 5-14-24 hearing before ALJ Miller
E) Decision of Judge Miller, dated May 16, 2024
F) Certified letter to D.F., dated May 21, 2024, re Judge Miller's May 16, 2024, Order and possible enforcement
G) 1) - Letter of May 21, 2024, re Emergent Relief,2)-Release to Westbridge, 3)-Release to Newmark. 4)-Elizabeth v D.F. EDS 06258-24, 5 2024-2025 IEP
H) Cert Mail Proof of Delivery to D.F., May 22, 2024
I) Certification of Maria Garcia dated June 14, 2024, including email attempts at communications, "Exhibits 8-10"
J) Order to Show Cause (OTC), Judge Mega, filed June 8, 2024
K) Email re OTC Notice for Argument for August 2, 2024
L) July 30, 2024, Letter to D.F., re Argument on OTC for August 2, 2024,
M) Signed Order of J. Mega, on OTC August 2, 2024
N) Proof of Delivery to D.F. OTC
O) Certification of Christine Ribaudo with attachments 1-Sept 13, 2023, letter to D.F., 2-Contact logs by Ms. Ribaudo, 3-Educational Revaluation Report of N.F, dated February 12, 2024, 4-Re-Evaluation Cognitive Assessment of N.F., dated February 26, 2024, 5-IEP of N.F. March 8, 2024, 6- Release of N.F.'s records to Westbridge Academy, unsigned by D.F. 7-Email to D.F. to schedule a Social History for N.F.

P) E Mail with Attachments by Attorneys for Petitioner to D.F. enclosing documents re this Application for Emergent Relief and Dur Process, 1-Letter re: Order, 2-Order Enforcing OAL Order, 30 Release to Newmark, 4-Release to Westbridge, 5-Order in Elizabeth v D.F. Final Decision EDS 06258-24

Q) Email to D.F. seeking consent to release records, dated August 6, 2024

R) Verified Complaint to Superior Court, dated July 1, 2024

S) Email re schools, academy, center, all including ERI program, dated August 5, 2024

T) IEP for N.F. dated March 8, 2024

U) Final Decision on Emergent Relief, by ALJ Leslie Z. Celentano, decided January 18, 2023

For Respondent:

None