

**EMERGENCY RELIEF IS AVAILABLE TO  
PETITIONER IN THIS MATTER.**

Emergency Relief may be requested by Petitioner consistent with *N.J.A.C. 6A:14-2.7* and *N.J.A.C. 1:6A-12.1*. Petitioner is entitled to the grant of an order for emergency relief if the Court determines that:

"(1) The applicant has a reasonable probability of ultimately prevailing on the merits; (2) the student's education program will be terminated or interrupted to the extent that irreparable harm will occur; and (3) the relief requested is narrowly defined to prevent a specific harm from occurring and will not cause unreasonable expense and substantial inconvenience."

The above-referenced Administrative Code citation must be read in conjunction with other parts of the Administrative Code dealing with special education. Specifically, *N.J.A.C. 6A:14-4.2 (a) 8*, which mandates that consideration must be given to "the potentially beneficial or harmful effects which a placement may have on the student with disabilities or the other students in the class." The Board can legally exclude A.D. from his current placement only if it complies with the requirements of *Subsection (k)*, and proves by substantial evidence that maintaining the current placement is substantially likely to result in injury to the child or others under the circumstances and facts of this matter. The Board will be unable to meet its burden, particularly in light of the fact that it has the burden of proof and production in this case. *Lascari v. Board of Education of Ramapo Indian Hills Regional High School District*, 116 N.J. 30 (1988)

Subparagraph 2 of the Emergency Relief section requires a showing that A.D.'s education program will be terminated or interrupted to the extent that irreparable harm will occur. There should be no hesitation in this Court's finding that A.D. is and will in the future continue to suffer irreparable harm. The right to a thorough and efficient public education is a right guaranteed under the New Jersey Constitution, Article VIII, Section IV, Paragraph 1. Indefinite suspension and minimal home instruction violate this fundamental right. There can be no question that continued exclusion from school

constitutes irreparable harm for this student. Everyday out of school results in another day of irreparable harm. The Commissioner of Education has determined in other cases that placement on home instruction indefinitely constitutes irreparable harm. *C.F. v. City of Wildwood Board of Education*, 96 N.J.A.R. 2d (EDU) 619, 621

It is well settled that a student denied basic due process in a school suspension proceeding is entitled to the remedy of immediate reinstatement to school. *R.R. v. Board of Education Shore Regional High School*, 109 N.J. Super 337; *L.T. v. Long Branch City Board of Education*, 96 N.J.A.R. 2d (EDU) 125

A student's due process rights are grounded in the 14th Amendment to the United States Constitution. The United States Supreme Court has ruled that public education is "a property interest which is protected by the due process clause" of the 14th Amendment of the United States Constitution. *Goss v. Lopez*, 419 U.S. 565, 574 (1975); *Abbott v. Burke*, 119 N.J. 287 (1990), which concluded that the education clause of the New Jersey Constitution requires a thorough and efficient education for every child; and *State v. Conk*, 180 N.J. Super 140, 145 (App. Div. 1985), which concluded that a public school student has a "fundamental right to education". Based upon this reasoning, the United States Supreme Court ruled that the due process clause of the 14th Amendment applies when a school district seeks to remove a student from school for violation of a school discipline code, including suspensions from school for periods of ten days or less:

"Education is perhaps the most important function of state and local government, (quoting *Brown v. Board of Education*, 347 U.S. 483, 493 (1994)), and the total exclusion from the educational process for more than a trivial period, and certainly if his suspension is for ten days, is a serious event in the life of the suspended child. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may Constitutionally be imposed by any procedure the school chooses, no matter how arbitrary."

*Goss*, 419 U.S. at 576

The precise elements of due process due a student facing suspension and expulsion, separate and apart from classified students, have been delineated by statute *N.J.S.A. 18A:37-1 to 5*.

Respondent has not undertaken the required acts in order to even minimally afford A.D. the protection that he is entitled to under the law. Petitioner is entitled to the procedural protection of both the due process clause and the law governing special education. In *C.F. v. City of Wildwood Board of Education*, the Commissioner affirmed the Administrative Law Judge's ruling, which stated:

"The school administration did suspend the student. The fact that the school system's Child Study Team may have also undertaken evaluation for possible special education services does not negate the suspension. The student's mother's consent to the special education process did not waive the student's rights to due process under *N.J.S.A. 18A: 37-1 to 5*."

Respondent's lack of compliance in this regard is even more egregious given the fact that A.D. at all times was and is a classified student and entitled to the benefits pursuant to IDEA.

As a result of the above, A.D.'s education will continue to be interrupted as it has been since June 1, 2000. Therefore, Section 2 of the Emergency Relief requirement has been met.

Petitioner has taken the position that A.D. should not be excluded from his placement that was last agreed to prior to the unilateral suspension. Should this be ordered, the harm that now exists would no longer occur. Therefore Section 3 of the Emergency Relief requirement has also been met.

**C.J. WILL SUFFER IRREPARABLE HARM IF HIS  
PLACEMENT AT THE BANCROFT SCHOOL IS  
NOT CONTINUED UNTIL AN OTHERWISE  
APPROPRIATE PLACEMENT CAN BE LOCATED  
AND AGREED TO.**

C.J. will be irreparably harmed if Defendants do not provide for his continued placement at the Bancroft School, because in such case he will be rendered without an appropriate placement and his health and safety will be endangered without the intensive medical and habilitation services he requires.

It has taken years to find an appropriate placement to meet C.J.'s extensive needs. Without appropriate services, C.J. will be in physical jeopardy. C.J.'s psychiatric disabilities make him extremely susceptible to aggressive and out-of-control behaviors which are well documented in his records. C.J. has also been known not to take his medication if not properly motivated. Without an appropriate placement, C.J.'s well-being and, more importantly, his life is in jeopardy.

Experts who know C.J. and have worked with him closely all agree that he cannot return home. The Bancroft School has indicated that C.J. needs constant supervision.

Without the intensive services and medication C.J. needs to be safe, his regression is certain. C.J. is aggressive, oppositional, is unaware of environmental dangers, and needs constant supervision. It is clear that his behaviors would further deteriorate without appropriate habilitation and medical services, resulting in extreme peril to his safety and welfare.

**PLAINTIFFS WILL LIKELY PREVAIL ON THE MERITS.**

At a minimum, Defendants, having admitted C.J. for functional services, must provide him with appropriate residential services which include treatment, education, training, rehabilitation, care and protection, *N.J.S.A. 30:4-165.2 (2)*. See *N.J. Assn. for Retarded Citizens v. Human Services*, 89 N.J. 234 (1982) Such residential placement may be made at "approved residential facilities other than state schools," such as the Bancroft School, for "short or long term duration as required". *Id.* Most importantly, the Developmentally Disabled Rights Act, *N.J.S.A. 30:6D-1 et seq.*, requires Defendants to provide C.J. with services to "maximize" his developmental potential. Insofar as the Bancroft School can satisfy C.J.'s entitlement to appropriate residential services and the Defendants are unable to offer him any other placement that would satisfy his needs,

Plaintiffs are likely to prevail on the merits in showing that the Defendants must continue his placement at the Bancroft School.

C.J. was determined eligible for functional services pursuant to *N.J.S.A. 30:4-25.2* in 1998, and continues to remain eligible. Having been so determined, C.J. is entitled to services that are "most appropriate for [his] training, habilitation, care and protection ..." *N.J.S.A. 30:4-25.4*

The services that DDD is required to provide to eligible clients like C.J. include "specialized services ... provided by public or private agency ... directed towards the alleviation of a developmental disability or towards the social, person, or economic habilitation ... and includes ... day care ... specialized living arrangements, training, education, vocational training, [and] recreation ..." *N.J.S.A. 30:6D-25* (emphasis added) Further, "[e]very service ... shall be designed to maximize ... developmental potential ... in a setting and manner which is least restrictive of ... personal liberty." *N.J.S.A. 30:6D-9* Services must also be sufficient to protect the client from harm. *N.J.S.A. 30:6D-23*

The only leeway that DDD has is to provide "alternative" services if the "most appropriate services" are not immediately available. *N.J.S.A. 30:4-25.6* However, even alternative services must still protect the client from harm, "maximize developmental potential, and be least restrictive of ... personal liberty." *N.J.S.A. 30:6D-9* and 23 The law does not excuse the failure to provide appropriate services, only the failure to provide the most appropriate services if they are not immediately available. The operative premise is the "legislature's strong moral and legal commitment to care for the mentally retarded." *Rosen by Rosen v. N.J. DDD*, 256 N.J. Super 629, (N.J. Super. Ct. App. Div. 1992)

In *New Jersey Assn. for Retarded Citizens v. Human Services*, 89 N.J. 234 (1982), the Supreme Court interpreted the aforementioned statutes. The court found "an enforceable right to treatment, education, training, habilitation, care and protection," which in turn imposes "a duty on the State to provide a spectrum of possible settings"

within which to fulfill these rights. *Id.* at 251-52 (emphasis added) The Supreme Court reaffirmed its holding in *New Jersey Assn. for Retarded Citizens*, adding further that the aforementioned rights are "constitutionally protected," and imposing upon DDD the burden of proving that the services offered are appropriate for the client. *J.E. v. State of New Jersey*, 131 N.J. 552 (1993) In doing so, the J.E. court underscored the importance of placement decisions:

"In placement appeals, the interests at stake are clear, and their magnitude self-evident. The choice of placement affects each aspect of a handicapped person's life. The quality of care received, the kinds of activities offered, and the types of habilitative goals pursued are all intimately affected by the placement decision. The significance of the private interest is further magnified by the length and finality of that decision. Once a facility is chosen, a developmentally disabled adult could remain for 30, 40 or 50 years."

In sum, even if DDD may be excused from providing C.J. with the "most appropriate services," it still must provide alternative services, and those services must be sufficient to "maximize developmental potential" in a "setting and manner which is least restrictive ... of personal liberty." *N.J.S.A. 30:6D-9* Those services must be sufficient to care for C.J. and to protect him from harm. *Id.*; *N.J.S.A. 30:6D-23* Since DDD has offered no alternative services, it has not discharged its statutory obligation.

Precedent has also been established for granting injunctive relief in this type of matter (*See Order to Show Cause* in the case of *Peter M. et al. v. New Jersey Department of Human Services et al.*, Docket No. W-015459-89, (Law Div.-Burlington County, decided June 1, 1989) wherein Judge Hanes granted Plaintiffs' request for injunctive relief by enjoining, *inter alia*, the Department of Human Services from terminating the provision of community residential and appropriate functional services of Maryann A., and ordering said Defendants to immediately arrange for an emergency respite residential placement.

Based upon the above, as a matter of law, Plaintiffs are likely to succeed on the merits.

**HARM TO C.J. FAR OUTWEIGHS ANY  
POTENTIAL HARM TO DEFENDANTS.**

The final factor that the court must consider is the relative hardship that the parties will face if an interlocutory injunction is granted or denied. In the instant case, the balance of hardship tips sharply in the Plaintiffs' favor.

Defendants have refused to offer an appropriate program for C.J. Unless the court issues the interlocutory injunction requested requiring Defendants to continue C.J.'s placement at the Bancroft School commencing July 1, 2000, he will suffer irreparable harm to his physical and mental well-being.

It is undisputed that C.J. is developmentally disabled and is diagnosed with severe disabilities that include static encephalitis, left cerebral dysfunction bi-laterally, an Identity Disorder of Childhood, an Organic Personality Disorder, Psychotic Reaction NOS, learning disabilities, Seizure Disorder, and an Attention Deficit Disorder. Without appropriate residential services he will no doubt deteriorate emotionally and physically, resulting in injury to himself and possibly others. These harms are irremediable and cannot be tolerated in a just and equitable society, especially when C.J.'s severe disability and the obligations of Defendants to C.J. are considered.

By contrast, the only conceivable impact on Defendants from the issuance of the interlocutory injunction is the expenditure of a limited amount of financial and personnel resources to prepare a plan in conformity with the requirements of *N.J.S.A. 30:6D-10 et seq.*, and make payment for a residential placement. The court is simply asked to preserve the *status quo* by requiring Defendants to do what it must so that C.J. can continue his placement at the Bancroft School until the parties can seek out, find and agree to an appropriate permanent placement for C.J. Such injunctive relief is not only

consistent with the compassionate and humane administration of justice, but is in keeping with the sound judicial consideration that this matter so richly deserves.