State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
EMERGENT RELIEF
OAL DKT. NO. EDS 05956-23
AGENCY DKT.NO. 2023-36089

K.C. ON BEHALF OF K.C.,
Petitioner,
v.
TRENTON PUBLIC SCHOOL DISTRICT BOARD OF EDUCATION,
Respondent.

Andrew Morgan, Parent Advocate, for petitioner, pursuant to N.J.A.C. 1:1-5.4(a)(7)

Elesia L. James, Assistant General Counsel, for respondent (James Rolle, General Counsel, Trenton Board of Education/Trenton Public Schools, attorney)

Record Closed: June 12, 2023 Decided: July 13, 2023

BEFORE **DEAN J. BUONO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner brings this emergency relief-only action seeking an order compelling respondent to immediately place the minor child K.C. in the Extended School Year (ESY) at the Honor Ridge School (Honor Ridge) and provide transportation. On July 7, 2023,

the Office of Special Education Programs transmitted the matter to the Office of Administrative Law (OAL).

FACTUAL DISCUSSION

Petitioner argue that student K.C. was in the first grade at Foundation Academy Charter School (Foundation) who has ADHD-Combined presentation, severe behavioral disabilities, obsessive-compulsive disorder, and executive functioning deficits as well as autism. Student K.C. has oppositional tendencies due to his diagnosis. Student K.C. resides in Trenton School District, and he is enrolled at Foundation. The Foundation's Child Study Team (CST) placed student K.C. at Honor Ridge, an approved, private school for the disabled. They claim that Trenton is ignoring their obligation to fund tuition and provide transportation until there is a ruling on a challenge to the placement at Honor Ridge, which was filed by the Trenton Board of Education (Trenton BOE).

Foundation's CST claims that this action places burdens on Foundation and threatens student K.C.'s stay-put rights. They allege that Trenton BOE's actions undermine well settled stay-put principles under 20 U.S.C 514150 and contradicts the plain meaning of the Act's fiscal responsibility mandates about private school costs. Parent K.C. obtained acceptance at Honor Ridge to begin Extended School Year 2023 on June 8, 2023, through their IEP. Trenton BOE has filed a challenge to the agreed upon placement for student K.C. at Honor Ridge, a private accredited and approved school. Foundation's CST placed student K.C. at Honor Ridge, therefore creating a stay-put placement as of June 8, 2023. The new IEP was the last agreed upon IEP. Student K.C. began Honor Ridge on July 6, 2023. Trenton BOE failed to refer the petitioner to observe what Trenton BOE felt was an appropriate program for student K.C. throughout the process. The request to observe a Trenton BOE program was made on or about April 5, 2023, with the supervisor of special education participating in the IEP meeting, who remained silent until the very day a placement was secured. They claim that Trenton BOE is delinquent in providing transportation as well as paying Honor Ridge's tuition until Trenton BOE prevails on their challenge to the placement and IEP. N.J.S.A. 18A:36A-11(b) places unconditional "fiscal responsibility" for a charter school student's private school costs on the resident district, except that the resident district may "challenge" the

placement. All parties agree that, during the pendency of Trenton BOE's challenge, the Honor Ridge is student K.C.'s stay-put placement. Based upon the IDEA's stay-put mandate, petitioner is entitled to an "automatic injunction" pursuant to 20 U.S.C. 51415(j).

They claim that notwithstanding the Court's authority to enter an automatic injunction, the elements for the entry of a preliminary injunction in the petitioner's favor are also met. Petitioner and Foundation are threatened with having to pay private school costs for which the New Jersey Legislature specifically exempted charter schools. As a matter of law, a school district cannot recover stay-put costs if it ultimately prevails in an underlying due process matter.

Beyond that, Trenton BOE's failure to meet their legal obligations upsets the funding scheme and creates a situation whereby student K.C. is unable to attend school creating a lapse in educational services, as well as get transported from home to Honor Ridge on a daily basis. The petitioner and Foundation have a substantial likelihood of prevailing on the merits. Petitioner and Foundation have closely followed N.J.S.A. 18A:36A-11(b), and its implementing regulation at N.J.A.C. 6A:23A-15.4. Both place exclusive fiscal responsibility for a charter school student's private school costs on his or her resident district. If a preliminary injunction is entered, all that will happen is that the Legislature's decision on private school funding for charter school students will be carried out; the stay-put principles of never putting a school district's fiscal interests ahead of a student's stay-put rights will be preserved. Trenton BOE will bear costs for which it is funded to absorb.

They claim that if a preliminary injunction is not entered, petitioner will suffer irreparable harm because it cannot recover stay-put costs as a matter of law, and an interruption of special education and related services will be allowed. Student K.C. is threatened with disenrollment from Honor Ridge, if this tactic of not complying with law and regulations as Trenton BOE is now doing, to skirt fiscal responsibility will be rewarded. All New Jersey resident school districts will then challenge private school placements of charter school students, irrespective of their merits, to avoid or forestall stay-put costs for several academic years. So, either a parent and charter school will confront debilitating fiscal obligations they are not funded to absorb, or a student will have delayed a move to

an appropriate program and remain in an inappropriate one to accommodate a stay-put waiting requirement. Accordingly, the Court should enter a preliminary injunction compelling Trenton BOE to pay for all stay-put costs at Honor Ridge during the pendency of this matter.

Foundation provides student K.C. services as the federally designated local education agency ("LEA"). Student K.C. has been diagnosed with autism, obsessive-compulsive disorder, attention deficit hyperactivity disorder-combined presentation, severe behavioral disabilities, and executive functioning deficits. Student K.C. has oppositional tendencies and developmental delays.

In or about June 8, 2023, parent K.C. and Foundation accepted placement at Honor Ridge. Counsel and administration for both Foundation and the Trenton BOE had the new, updated IEP indicating placement at Honor Ridge.

On June 8, 2023, Foundation convened an IEP meeting and placed student K.C. at Honor Ridge. Foundation proposed a placement for student K.C.'s program at Honor Ridge, a private state-approved school. Foundation served the Trenton BOE representatives a copy/notice of the new (Honor Ridge) IEP the same day. That IEP would "result in a private day or residential placement" as described in N.J.S.A. 18A:36A-11(b).

They allege that Honor Ridge requested the July ESY monthly tuition. Since Foundation placed student K.C. at Honor Ridge via their IEP, the petitioner no longer could consider unilateral placement of student K.C., since all costs of this 'stay-put' placement were legally that of the Trenton BOE. Honor Ridge threatened student K.C.'s disenrollment unless it was paid for student K.C.'s attendance there.

Respondent argues that pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982), N.J.A.C. 6A:14-2.7(m), and N.J.A.C. 1:6A-12.1, the petitioner must, in order to have the relief requested granted, demonstrate that: (a) they will suffer irreparable harm if the requested relief is not granted; (b) the legal right underlying their claim is well settled; (c) they have a likelihood of prevailing on the merits of the underlying claim; and (d) when

the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent if the relief requested is not granted. As a result, petitioner fails to meet their burden of proof. However, more importantly, the specific "stay put" requested was already previously challenged and therefore this application is moot. I agree.

It is important to note that Trenton BOE filed a petition for due process on June 26, 2023, explicitly putting parent K.C., Advocate A. Morgan, and Foundation on notice that stay-put was invoked at the "then-current educational placement of student K.C. as required by law, 20 USC 1415(j) and N.J.A.C. 6A:14-2.7(u) which was at Foundation as set forth by student K.C.'s then-effective IEP which maintained him at Foundation through June 30, 2023 (see Parent's Exhibit B, K.C.'s IEP dated 6.13.23 p. 3); and pursuant to N.J.A.C. 6A:14-2.6(d)(10), during the pendency of due process, no change shall be made to the student's placement unless both parties agree (emphasis added). Parent's actions indicate an intent to deprive Trenton BOE of its legal right to challenge the proposed private placement for this seven-year-old student who has yet to be exposed to a special education environment. This maneuver cannot be sanctioned by the court as the law is settled in favor of Trenton BOE for the reasons stated herein. Additionally, by copy of this filing, the Court is put on notice and the undersigned seeks judicial notice that Trenton BOE has advised parent K.C. that she has placed student K.C. at Honor Ridge, an approved private school placement, at her own financial expense/as a unilateral placement since she was explicitly notified that Trenton BOE invoked stay-put on June 26, 2023, and that Trenton BOE had a thirty-day period to challenge any private school placement of a charter school student which it did on June 26, 2023. A parent placing a student in the proposed private placement before the thirty-day period for which local school districts have to challenge a charter school's proposed private placement would render this legal right to schools an illusory benefit. Further, since petitioner initiated its filing for Emergent Relief on June 20, 2023, which was subsequently withdrawn and TPS initiated its due process on June 26, 2023, against parent K.C. and Foundation, there was to be no change to student K.C.'s placement until the underlying due process concluded.

Additionally, now that student K.C. began at Honor Ridge on July 6, 2023 (Parent's Brief, p.3), parent's application for emergent relief provides an even weaker basis to

prevail on the threshold standard to qualify for bringing their "dispute" as an emergent relief since there is most certainly no "break in the delivery of services" since K.C. is not presently a student of the Trenton BOE and thus Trenton BOE has no obligation to provide him any services, and parent's conduct has unequivocally removed this dispute from the possible realm of "issues concerning placement pending the outcome of due process proceedings" since petitioner has unilaterally placed K.C. at Honor Ridge despite Trenton BOE's express invocation of stay-put on June 26, 2023, at Foundation pending the resolution of that due process petition. See N.J.A.C. 1:6A-12.1 and N.J.A.C. 6A:14-2.7(r) (standards for emergent relief: 1) issues involving a break in the delivery of services; 2) issues involving disciplinary action, including manifestation determinations and determinations of interim alternate educational settings; 3) issues concerning placement pending the outcome of due process proceedings; and 4) issues involving graduation or participation in graduation ceremonies).

Critically then, this application for emergent relief must be denied for a multitude of reasons. First, Trenton BOE no longer has any obligation or duty to student K.C. Prior to student K.C.'s enrollment in the approved private school on July 6, 2023, student K.C. was a Trenton resident who attended a charter school located in the City of Trenton, Foundation. In that context, Trenton's obligation to student K.C. was limited to N.J.A.C. 6A:11-4.11 which provided that "in accordance with N.J.S.A. 18A:36A-13 and N.J.A.C. 6A:27-3.1, a district board of education shall provide **transportation or aid in lieu of transportation** to a student in kindergarten through grade 12 who attends a charter school." Id. (**emphasis added**). Since student K.C. no longer attends Foundation, this duty to transport or provide aid in lieu has ceased. When a charter school places a student in an approved private school, the charter school becomes the local educational agency in relationship with that student and the district of residence, Trenton BOE in that instance may only bear financial responsibility for tuition and extraordinary services, if required, ***if*** Trenton BOE failed to challenge the proposed private placement within the thirty-day time frame or if Trenton BOE was unsuccessful in its filing. N.J.S.A. 18A:36A-11(b) and N.J.A.C. 6A:23A-15.4, and see NJDOE Mandated Tuition Contract for a Pupil Placed by a Charter School.

Secondly, this application for emergent relief must also be denied as it is improperly filed. An application for emergent relief must accompany an underlying petition for due process or an expedited application pursuant to N.J.A.C. 1:6A-12.1 and N.J.A.C. 6A:14-2.7(r). Emergency relief applications which fail to comply with the procedural requirements of the regulation, or which do not comply with the standards set forth in N.J.A.C. 6A:14-2.7(r) shall be processed by the Department in accordance with [N.J.A.C. 1:6A-9.1]. Accordingly, the ER application is insufficient under N.J.A.C. 6A:14-2.7(f). Third, the application fails to join an indispensable party, Foundation, which necessitates the swift dismissal of this matter. Notably, parent K.C. makes numerous allegations against Foundation in her Certification regarding the program provided to student K.C. while he was a student at Foundation, those allegations and the merits of this Emergent Relief, if to be heard despite its procedural defects, require the joinder of Foundation, for which parent K.C. was put on notice that they were an indispensable party in its June 26, 2023, opposition to the withdrawn application for emergent relief. Still, upon re-filing, parent K.C. failed to correct this fatal defect. Finally, and for the reasons established herein, this application must also be denied for failing to meet the threshold standard for emergent relief as set forth by N.J.A.C. 6A:14-2.7(r) and moreover, parent K.C. also fails to meet any and all of the four prongs required under N.J.A.C. 1:6A-12.1 and Crowe v. De Gioia, 90N.J. 126 (1982). The law is well-settled in favor of Trenton BOE that "the child shall remain in the **then-current** educational placement of the child" during the pendency of any proceedings which was Foundation at the time parent K.C. filed her initial application for emergent relief and at the time Trenton BOE filed its petition for due process. Notably, the thirty-day period for which Trenton BOE was afforded to challenge the proposed private placement pursuant to N.J.S.A. 18A:36A-11(b) and N.J.A.C. 6A:23A-15.4 would not expire until **July 14, 2023**, and Trenton BOE's petition for due process was filed on June 26, 2023, prior to that expiration and prior to the proposed start date for student K.C.'s new private program, July 3, 2023 (though this is of no moment to the thirty-day challenge window). Thus stay-put was unequivocally invoked at the "then-current educational placement" which is Foundation under the explicit authority of 20 USC 1415(j) and N.J.A.C. 6A:14-2.7(u).

FINDINGS OF FACT

Based upon the documents in evidence and review of the testimony, **I FIND** the following facts undisputed:

K.C. is a special education student who resides in the District. Student K.C.'s current IEP was developed as a result of the prior school year. **I FURTHER FIND** as **FACT** that the IEP, provided for ESY. **I FURTHER FIND** as **FACT** that the Foundation's CST placed student K.C. at Honor Ridge.

LEGAL ANALYSIS

Pursuant to N.J.A.C. 1:6A-12.1(e) and N.J.A.C. 6A:14-2.7(s)(1), emergency relief may be granted if the judge determines from the proofs that:

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.

Furthermore, a parent or school district may request emergent relief for the following reasons, in accordance with *N.J.A.C*. 6A:14-2.7(r)1:

i. Issues involving a break in the delivery of services;

ii. Issues involving disciplinary action, including manifestation determinations and determinations of interim alternate education settings;

iii. Issues concerning placement pending outcome of due process proceedings; and

iv. Issues involving graduation or participation in graduation ceremonies.

Here, in this case, it is unnecessary for me to consider whether the criteria set forth in Crowe v. Di Gioa, 90 N.J. 126 (1982) have been satisfied in granting emergent relief. When the emergent-relief request effectively seeks a "stay put" preventing the school district from making a change in placement from an agreed-upon IEP, the proper standard for relief is the "stay put" provision under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C.A. § 1400, et seq. Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 (3d Cir. 1996) (citing Zvi D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982)) (stay put "functions, in essence, as an automatic preliminary injunction"). The stay put provision 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." 20 U.S.C.A. § 1415(j).

The relevant IDEA regulation and its counterpart in the New Jersey Administrative Code reinforce that a child remain in his or her current educational placement "during the pendency of any administrative or judicial proceeding regarding a due process complaint." 34 C.F.R. § 300.518(a) (2016); N.J.A.C. 6A:14-2.7(u). The stay put provision functions as an automatic preliminary injunction which dispenses with the need for a court to weigh the factors for emergent relief such as irreparable harm and likelihood of success on the merits and removes the court's discretion regarding whether an injunction should be ordered. Drinker, 78 F.3d 859. Its purpose is to maintain the status quo for the child while the dispute over the IEP remains unresolved. Ringwood Bd. of Educ. v. K.H.J., 469 F.Supp.2d 267, 270–71 (D.N.J. 2006).

In the present matter, the petitioner filed an emergent petition regarding the District's placement of student K.C. and by way of the emergent application, invoked "stay put." The petitioner contends that the current educational placement is the last agreed-upon placement of student K.C. as set forth in the IEP. However, there seems to be some confusion by the parties about the rules and the law.

The term "current educational placement" is not defined within the IDEA, the Third Circuit standard is that "the dispositive factor in deciding a child's 'current educational placement' should be the [IEP] . . . actually functioning when the 'stay put' is invoked." Drinker, 78 F.3d at 867 (citing the unpublished Woods ex rel. T.W. v. N.J. Dep't of Educ., No. 93-5123, 20 IDELR 439, 440 (3d Cir. Sept. 17, 1993)); see also Susquenita Sch. Dist. v. Raelee S. by Heidi S. & Byron S., 96 F.3d 78, 83 (3d Cir. 1996) (restating the standard that the terms of the IEP are dispositive of the student's "current educational placement"). The Third Circuit stressed that the stay put provision of the IDEA assures stability and consistency in the student's education by preserving the status quo of the student's current educational placement until the proceedings under the IDEA are finalized. Drinker, 78 F.3d 859.

Furthermore, the Third Circuit explained that the stay put provision reflects Congress' clear intention to "strip schools of the unilateral authority that they had traditionally employed to exclude [classified] students, particularly emotionally disturbed students, from school." Id. at 864 (citing Honig v. Doe, 484 U.S. 305, 323, 108 S. Ct. 592, 604, 98 L. Ed. 2d 686, 707 (1988)); School Comm. v. Dep't of Educ., 471 U.S. 359, 373, 105 S. Ct. 1996, 2004, 85 L. Ed. 2d 385, 397 (1985). Therefore, once a court determines the current educational placement, the petitioner is entitled to a stay put order without having to satisfy the four prongs for emergent relief. Drinker, 78 F.3d at 864 ("Once a court ascertains the student's current educational placement, the movants are entitled to an order without satisfaction of the usual prerequisites to injunctive relief").

The placement in effect when the request for due process was made—the last uncontroverted placement—is dispositive for the status quo or stay put. Here, it is uncontroverted that the "then-current" educational placement for student K.C. at the time of this emergent action is IEP. Respondent is correct in that petitioner erroneously claims that stay-put is invoked at the proposed placement that student K.C. did not yet attend at the time this dispute arose. As set forth herein, stay-put is invoked at student K.C.'s "then-current educational placement" at the time the dispute arose, Foundation, while Trenton BOE avails itself of its legal right to challenge Foundation's proposed private school placement for student K.C. under N.J.S.A. 18A:36A-11(b) and N.J.A.C. 6A:23A-15.4. Under the IDEA, a child is entitled to remain in his or her "then-current educational

placement" during the pendency of IDEA due process proceedings. 20 U.S.C. § 1415(j). "This provision, known as the IDEA's 'stay-put rule,' serves 'in essence, as an automatic preliminary injunction,'. . . reflecting Congress' conclusion that a child with a disability is best served by maintaining her educational status quo until the disagreement over her IEP is resolved." M.R. v. Ridley Sch. Dist., 744 F.3d 112, 118 (3d Cir. 2014) (quoting Pardini v. Allegheny Intermediate Unit, 420 F.3d 181, 190 (3d Cir. 2005); Drinker ex rel. Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 (3d Cir. 1996)), cert. denied, 135 S. Ct. 2309, 191 L. Ed. 2d 977 (2015). Parties moving for an order to maintain a child's educational placement while an IEP dispute is pending "are entitled to an order without satisfaction of the usual prerequisites to injunctive relief." Drinker, 78 F.3d at 864.

Respondent incorrectly argues emergent relief should be denied due to a procedural defect pursuant to N.J.A.C. 6A:14-2.7(r). In as much, "either party may apply, in writing, for a temporary order of emergent relief as a part of a request for a due process hearing or an expedited hearing for disciplinary action, or at any time after a due process or expedited hearing is requested pending a settlement or decision on the matter." (emphasis added.) Here, despite the parent only submitting a brief in support of parent's request for emergent relief without an underlying action like a petition for due process or petition for an expedited hearing does not automatically mean the parent's application should be rejected by the Court. The undersigned hears many cases without an underlying due process case.

However, additionally, respondent argues correctly that a dispute exists between Trenton BOE, parent K.C., and Foundation, however, parent K.C. fails to join Foundation as an indispensable party to this action. This failure to join an indispensable party in a contested case is grounds for dismissal under NJ Court Rules 4:6-2 which provides that a failure to join a party without whom the action cannot proceed is grounds for dismissal. It is well-settled that in the absence of a rule in the administrative law code, a judge may proceed in accordance with the New Jersey Court Rules, provided the rules are compatible with these purposes. N.J.A.C. 1:1-1.3. I agree.

Furthermore, respondent argues that this application for emergent relief must also be denied for failing to meet the threshold standard required to obtain emergent relief.

Parent K.C. undermines this falsehood as stay put was to be invoked at the **then-current placement** of K.C., Foundation, at the time the dispute arose and during the pendency of the matter. 20 USC 1415(j); N.J.A.C. 6A:14-2.7(u); N.J.A.C. 6A:14-2.6(d)(10).

More specifically, by and through its June 13, 2023, IEP for student K.C., Foundation proposed a private school placement for student K.C. commencing on **July 3, 2023**. N.J.S.A. 18A:36A-11(b) and N.J.A.C. 6A:23A-15.4 requires that a charter school shall provide notice to the resident district of an IEP which would result in a private day placement within fifteen days of the parent signing the proposed IEP. N.J.S.A. 18A:36A-11. The District may challenge the placement within thirty days in accordance with the procedures established by law. Id. Additionally, the mirroring regulations at N.J.A.C. 6A:23A-15.4 provides that, "if the school district of residence determines to challenge the placement, the school district of residence may file, within 30 days of receiving notice of the placement, for a due process hearing against the charter school and the student's parent(s)."

Petitioner erroneously claims that stay put is invoked at the proposed placement that student K.C. did not yet attend at the time this dispute arose. As set forth herein, stay put is invoked at student K.C.'s "then-current educational placement" at the time the dispute arose, Foundation, while Trenton BOE avails itself of its legal right to challenge Foundation's proposed private school placement for student K.C. under N.J.S.A. 18A:36A-11(b) and N.J.A.C. 6A:23A-15.4. Under the IDEA, a child is entitled to remain in his or her "then-current educational placement" during the pendency of IDEA due process proceedings. 20 U.S.C. § 1415(j). "This provision, known as the IDEA's 'stay-put rule,' serves 'in essence, as an automatic preliminary injunction,'. . . reflecting Congress' conclusion that a child with a disability is best served by maintaining her educational status quo until the disagreement over her IEP is resolved." M.R. v. Ridley Sch. Dist., 744 F.3d 112, 118 (3dCir. 2014) (quoting Pardini v. Allegheny Intermediate Unit, 420 F.3d 181, 190 (3d Cir. 2005); Drinker ex rel. Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 (3d Cir. 1996)), cert. denied, 135 S. Ct. 2309, 191 L. Ed. 2d 977 (2015). Parties moving for an order to maintain a child's educational placement while an IEP dispute is pending "are entitled to an order without satisfaction of the usual prerequisites to injunctive relief." Drinker, 78 F.3d at 864. Thus, there could not be a break in the

delivery of services as the status quo was to be maintained during the pendency of Trenton BOE's underlying petition for due process.

Parent K.C. claims that there could be a break in the delivery of services as it relates to student K.C.'s ability to be transported to this private placement, however parent K.C. is again mistaken on the law as N.J.S.A. 18A:36A-11(b) demands that a charter school shall comply with the provisions of chapter 46 [N.J.S.18A:46-1 et seq.] of Title 18A of the New Jersey Statutes concerning the provision of services to students with disabilities. Foundation proposed this IEP for its student, K.C. on June 13, 2023, which proposed that K.C. would be placed in an approved private school for students with disabilities beginning on July 3, 2023. Assuming Trenton BOE had not challenged this proposed private placement via its June 26, 2023, petition for due process (and its opposition to the then-filed application for emergent relief), within the thirty-day timeframe, Foundation and parent K.C. *could* begin student K.C. at the approved private school placement and Trenton BOE would be responsible for the tuition and extraordinary services only, however, under N.J.S.A. 18A:46-23 to which Foundation is similarly governed (*see* N.J. Stat. § 18A:36A-11), Foundation shall furnish transportation to all children being sent by local boards of education (the charter school becomes the LEA in relation to its private school placed students and Trenton BOE would be the "district of residence") to any approved program. See also NJDOE's mandated Tuition Contracts which provide that the local school district is the District of Residence only responsible for providing tuition payments, if that is determined appropriate at the conclusion of Trenton BOE's filing against parent K.C. and Foundation, but transportation responsibilities remain with Foundation as it acts as the "LEA" in relation to the student for the duration of the time the student is placed via IEPs at the approved private placement. Thus, parent's failure to join Foundation in this matter is fatal as transportation would be provided by Foundation.

When presented with an application for relief under the stay put provision of the IDEA, a court must determine the child's current educational placement and enter an order maintaining the status quo. Drinker, 78 F.3d at 864–65. Along with maintaining the status quo, respondent is responsible for funding the placement as contemplated in the IEP. Id. at 865 (citing Zvi D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982) ("Implicit in the

maintenance of the status quo is the requirement that a school district continue to finance an educational placement made by the agency and consented to by the parent before the parent requested a due process hearing. To cut off public funds would amount to a unilateral change in placement, prohibited by the Act.")

For example, under K.C. & M.S. v. Somerville Bd. of Educ., No. 10-4215 (MLC), 2011 U.S. Dist. LEXIS 748, *34 (D.N.J. Jan. 4, 2011), a school district was even required to maintain a disabled child's placement in a sectarian school, despite possibly violating N.J.S.A. 18A:46-14, because the school was the child's "current educational placement" when litigation over the child's placement began. The Somerville court explained:

> We find that under the undisputed facts in the record, [Timothy Christian School ("TCS")] is the stay put placement of the student. We will call it the Stay Put Placement for purposes of this ruling. It was the approved placement in the 2008–2009 IEP signed by the parties. . . .
>
> This dispute arose in the Fall of 2008, when D.S. was actually attending TCS as a high school ninth grader under that placement. It is clear and we so find, that TCS was "the operative placement actually functioning at the time the dispute first [arose]." Drinker, 78 F.3d at 867. We therefore conclude that it must remain the Stay Put Placement until the entire case is resolved either by agreement or further litigation.
>
> The IDEA stay put law and regulations admit of only two exceptions where it is the Board, rather than the parents, seeking to change the operative placement during the litigation. The first is where the parents agree with the change of placement. 20 U.S.C. § 1415(j). The second exception arises under the disciplinary provisions of IDEA, 20 U.S.C. § 1415(k). Clearly, neither exception applies here, and no party argued otherwise.
>
> Where, as here, neither exception applies, the language of the stay put provision is "unequivocal." Honig, 484 U.S. at 323. It functions as an "automatic preliminary injunction," substituting "an absolute rule in favor of the status quo for the court's discretionary consideration of the factors of irreparable harm and either a likelihood of success on the merits or a fair

> ground for litigation and a balance of hardships." Drinker, 78 F.3d at 864 (quoting Zvi D., 694 F.2d at 906).
>
> [Id. at *32–33 (citations omitted) (emphasis added).]

Neither of the two exceptions to the stay put law is applicable here because the petitioner has not agreed to the change in placement and the disciplinary provisions are not an issue in this matter.

As demonstrated in Somerville, the fact that a current educational placement for a child may even violate N.J.S.A. 18A:46-14 has no bearing on a request for stay put. Somerville, 2011 U.S. Dist. LEXIS 748 at *34 ("the protestations by the Somerville Board, true as they seem to be—that at the time D.S. was originally placed at TCS . . . it was a mistake . . . and . . . that even when both the Branchburg and Somerville Boards apparently approved the 2008–2009 IEP, they only later found out that they had made a mistake—are unavailing under IDEA's stay put provision") (emphasis added). It remains the law in the Third Circuit that when a petition for due process is filed, deciding stay put requires only a determination of the child's current educational placement and then, simply, an order maintaining the status quo.

Notwithstanding the petitioners' artful contentions here, the stay put provisions must apply to this special education student, and they should remain at the current educational plan (Foundation) as set forth in the IEP which did not include an ESY component, nor does it include an independent out-of-district placement at Honor Ridge. To rule otherwise would obfuscate the District's ability to implement an IEP or educational plan without parent approval. That would be contrary to the spirit and purpose of the law to not disrupt the educational process for these students.

In Drinker v. Colonial School District, 78 F.3d 859 (3d Cir. 1996), the Third Circuit held that a judge should not look at the irreparable harm and likelihood of success factors when analyzing a request for a stay put order. 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 current educational placement refers to the type of

programming and services provided rather than the physical location of the student's services. J.F., et al. v. Byram Township Board of Education, need proper cite. The stay put provision represents Congress' policy choice that all handicapped children, regardless of whether their case is meritorious or not, are to remain in their current educational placement until the dispute with regard to their placements is ultimately resolved. Drinker at 859. The Third Circuit declared that the language of the stay put provision is "unequivocal" and "mandated." Drinker at 864. This is the case here.

Respondent correctly argues that the IDEA's "stay put" provision provides:

> (j) Maintenance of current educational placement Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local education 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.

20 U.S.C. § 1415(j). (emphasis added.) See also, N.J.A.C. 6A:14-2.7(u) (Pending the outcome of a due process hearing, including an expedited due process hearing, or any administrative or judicial proceeding, no change shall be made to the student's classification, program, or placement unless both parties agree . . .) In other words, the IDEA, and corresponding State regulations, expressly require the local educational agency to maintain the status quo for the child while the dispute over the IEP remains unresolved. See Ringwood Bd. of Educ. v. K.H.J., 469 F.Supp.2d 267, 270–71 (D.N.J. 2006). (emphasis added.)

Furthermore, assuming arguendo, the petitioner fails to meet any of the criteria outlined at N.J.A.C. 1:6A-12.1 and in Crowe v. De Gioia, 90 N.J. 126, 132-33 (1982). By their own admission the irreparable harm is purely financial, and the petitioner does not have a likelihood of prevailing on the merits without an indispensable party as part of the request for relief.

A review of the four factors is in order.

Factor One. The petitioner will suffer irreparable harm if the requested relief is not granted. Here, petitioner admits that the irreparable harm is purely financial. Honor Ridge is threatening student K.C.'s removal for nonpayment of tuition. Also, the school district's fiscal responsibility for costs once stay-put is determined is unconditional.

Factor Two. The legal right underlying petitioner's claim is settled. Petitioner erroneously maintains that stay-put could be invoked at the proposed placement that student K.C. did not yet attend at the time the dispute arose on June 20, 2023, and June 26, 2023. Stay-put is invoked at student K.C.'s "then-current educational placement," Foundation while Trenton BOE avails itself of its legal right to challenge Foundation's proposed private school placement for student K.C. under N.J.S.A. 18A:36A-11(b) and N.J.A.C. 6A:23A-15.4.

Factor Three. Petitioner has a likelihood of prevailing on the merits of the underlying claim. In this regard, petitioner is not likely to prevail on the merits.

Factor Four. When the equities and interests of the parties are balanced, the respondent is correct in that the scales tip in favor of the District and weigh against granting the relief sought by applicant. This test measures the "relative hardship to the parties in granting or denying relief." Crowe, supra, 90 N.J. at 134. The District would suffer greater harm than the applicants if the relief is granted. The District's legal right afforded to it under 20 USC 1415(j) and N.J.A.C. 6A:14-2.7(u) which demand that student K.C. remain in his "then-current educational placement" which is presently at Foundation must be maintained while Trenton BOE avails itself of the right afforded to it by the Legislature and the New Jersey Department of Education under N.J.S.A. 18A:36A-11(b) and N.J.A.C. 6A:23A-15.4. Therefore, until the pendency of the matter filed by Trenton BOE challenging Foundation's proposed private placement of student K.C. is concluded/resolved, Trenton BOE has no obligation to remit any payment during the pendency of that dispute as stay-put was expressly invoked on June 26, 2023. Parent K.C.'s decision to place student K.C. at Honor Ridge despite notice of stay-put renders her actions a parental placement to which she is fiscally responsible for the tuition of

student K.C. The District has a duty to educate its students in the least restrictive environment and has taken the position that the proposed IEP placing student K.C. at an approved private school which is fifty-five minutes away from student K.C.'s home where student K.C. has never been in a special education setting skips critical stages in the continuum of special education placements and would be too restrictive for student K.C.

ORDER

As such, after hearing the arguments of petitioner and respondent and considering all documents submitted, **I CONCLUDE**, in accordance with the standards set forth in Drinker v. Colonial School District, that the petitioner's motion for emergent relief is **DENIED**. It is **ORDERED** that the request for emergent relief be **DISMISSED**.

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 13, 2023 _____

DATE

DEAN J. BUONO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

DJB/cb