State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDS 06752-23

AGENCY DKT.NO. 2023-36089

K.C. ON BEHALF OF K.C.,

Petitioner,

v.

TRENTON PUBLIC SCHOOL DISTRICT BOARD OF EDUCATION,

Respondent.

Michael I. Inzelbuch, Esq., for petitioner

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

Stefani C. Schwartz, for other participant, Foundation Academy (Hatfield Schwartz Law Group, L.L.C., attorneys)

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner brings this second emergency relief action seeking an order compelling respondent to immediately place the student K.C. in the Extended School Year (ESY) at

the Honor Ridge School (Honor Ridge) and provide transportation. On July 28, 2023, the Office of Special Education Programs transmitted the matter to the Office of Administrative Law (OAL) and a settlement conference was held on July 31, 2023. This application for emergent relief was filed with the OAL on July 28, 2023. Oral argument was held on August 8, 2023, and the record closed. The undersigned Ordered in a previous Decision issued on OAL Dkt. No. 05956-23, that the emergent application was denied because the petitioner failed to articulate that any of the criteria in Crowe v. De Gioia were met and in fact an indispensable party was not present for the hearing.

FACTUAL DISCUSSION

The basic underlying facts of the case will be recited as they were in my previous decision issued on OAL Dkt. No. 05956-23 as they have not changed in the month that has transpired since the last application. However, some facts are added as they have been brought forth in the new application.

K.C. a first-grade student 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 did not 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.

One key here is that Foundation does not offer a program that is appropriate for student K.C.'s needs, a fact that Foundation confirms in its latest letter, which notes "Foundation simultaneously concedes that it is not the proper placement for the student as Foundation is not equipped to provide this student with a Free Appropriate Public Education ("FAPE") based on this child's unique and individualized needs." (*See* Foundation Letter, dated August 4, 2023.) Foundation, therefore, issued an IEP in June 2023 for student K.C. that called for his placement at the New Jersey Department of Education approved Honor Ridge Academy ("Honor Ridge"). Student K.C. was enrolled in Honor Ridge for Extended School Year ("ESY") 2023 in accordance with the last agreed upon IEP dated June 13, 2023, which was developed by Foundation's own Child Study Team ("CST"). Petitioner claims student K.C. is at home significantly regressing and receiving no educational services nor related services, Foundation opposes petitioner's efforts to ensure implementation of the IEP that it developed and deemed necessary to provide student K.C. with a free appropriate public education ("FAPE").

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 on 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.

Petitioner argues 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 of the break in service, and an interruption of special education and related services will be detrimental. 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.

On 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.

Foundation argues the legal principles of collateral estoppel and res judicata.

Respondent Trenton argues that the undersigned's Final Decision concluding that "stay-put" was at Foundation Academy which was the then-current placement of the student K.C. at the time the above-referenced disputes arose. Petitioner then removed student K.C. from Foundation Academy despite the underlying matter filed by TPS on June 26, 2023, which had and has not been resolved. Notwithstanding this, despite petitioner's disagreement with student K.C. remaining at Foundation Academy and despite Foundation Academy's assertion in their Opposition brief filed on August 4, 2023, that it cannot provide a setting for this student, the law requires that Foundation

Academy continue to provide educational instruction and services as status quo for this student as it had done for the two years that this student attended Foundation Academy and as it is required to do under its legal obligation to provide a free, appropriate public education for student K.C. in the least restrictive environment 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.

They further argue that the "then-current educational placement" of student K.C. as required by law is clearly established under N.J.A.C. 1:6A-18.4 (unless the parties agree or the Judge orders pursuant to NJAC 1:6A-12.1 or 14.2, the educational placement of the student shall not be changed prior to issuance of the decision in the case); NJAC 6A:14-2.6(d)(10) (pending outcome no change shall be made to classification, program or placement unless both parties agree or as ordered by emergent relief); NJAC 6A:14-2.7(u) (pending outcome, no change shall be made to the student's placement); 20 USC 1415(j) (a child is entitled to remain in his or her "then-current educational placement" during the pendency of IDEA due process proceedings); and 34 CFR 300.518 (during the pendency of any administrative or judicial proceeding regarding a due process complaint [. . .] the child involved in the company must remain in his or her current educational placement. There is no exception to the numerous legal authorities set forth on stay-put other than with agreement from the parties. There is no agreement from Trenton Public Schools as doing so would alter / waive its legal right as the matter proceeds. As such, the undersigned maintains that the July 13, 2023, order for which no exceptions were taken remains final and reflects the law of the case and should be upheld under theories of issue preclusion/collateral estoppel.

However, while many of the party's arguments are legally lucid, there seems to be a lack of focus on the educational placement of this child today, (the end of ESY and at the precipice of the pending 2023–2024 school year). That concerns the undersigned because I will not permit a child to be lost in litigation while a nebulous due process is decided.

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 Foundation respectfully and admirably admitted that they were unable to provide for this student. **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. Once again, 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 the 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 collateral estoppel or res judicata. Here, despite the petitioner once again petitioning for an expedited hearing does not automatically mean the petitioner's application should be rejected by the Court. The undersigned hears many cases with multiple applications for emergent relief due to the nature and complexity of special education. That argument is rejected.

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).
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> [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 petitioner's artful contentions here, the stay put provisions must apply to this special education student, and they should remain at the current educational plan (Honor Ridge) as set forth in the IEP. To its credit, Foundation ascertained that it was not able to educate this individual in accordance with the IEP which did not include an ESY component, nor does it include an independent out-of-district placement at Honor Ridge. However, the placement at Honor Ridge is appropriate. To rule otherwise would obfuscate the District's ability to implement an IEP or educational plan without parent approval and would be contrary to the spirit and purpose of the law to not disrupt the educational process for these students. Any placement outside of Honor Ridge has not been presented by Trenton nor offered. Therefore, the only logical placement for this student is to remain where he is at Honor Ridge until the conclusion of any purported due process filed in this case. I will not disrupt the student's education.

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.

Petitioner 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 argues that they meet 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 in the prior application the irreparable harm was 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. However, as more articulately presented today, there clearly is a break in service and a risk that there is irreparable harm by failing to educate this student.

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 is correct that it is undisputed that since being excluded from

Honor Ridge on July 14, 2023, student K.C. received no educational or other services despite all agreeing that same are required. Instead, he has been sitting at home experiencing significant regression in both his behavior and academic skills. As he is not receiving any of the instruction or services to which he is entitled under the IDEA, student K.C. is and will continue to suffer irreparable harm if not reenrolled in Honor Ridge immediately.

Petitioner also argues that the decision in *Hope Twp. Board of Education v. S.B. o/b/o S.I. and Ridge and Valley Charter School,* OAL DKT. NO. EDS 03726-20 (June 12, 2020), the court considered similar circumstances noting that:

> the Charter School drafted an IEP dated November 14, 2019, recommending an out of District Placement for S.I.; the Charter School notified the District of its inability to provide FAPE to S.I., and that subsequent to the November 14, 2019 notification, a District employee and case manager, notified the Charter School that it did not have a placement to meet S.I.'s unique needs. Thus, the issue involved in this case is 1) a determination as to whether there is a less-restrictive placement that will meet the student's educational needs and, 2) if so, whether the charter school must place the student in the program and that such placement be funded by the District.

Id. at 9-10. Concluding that the application for emergent relief concerns issues involving a break in the delivery of services and issues concerning placement pending the outcome of the due process petition, S.B. was permitted to seek emergent relief.

The *Hope* court further noted that:

> When presented with the November 14, 2019, IEP, the District did not contest the Charter School's decision to seek out-of-district placement for S.I. due to her behavioral issues affecting her ability to receive FAPE . . . The District's one hundred eighty degree reversal from its initial decision resulting in the filing of the Due Process Petition on March 10, 2020, is self-serving as it is evident that the same was filed because the District does not want to bear the financial responsibility to pay for S.I.'s placement at Celebrate the Children.

> Moreover, the testimony of Ms. Bigelli did not convince me that the District can provide S.I. with FAPE. Under cross-examination, Ms. Bigelli's responses revealed that the services the District claimed it could provide S.I. were either shared services, part-time or would be provided in the future.
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> [*Id.* at 14.]

Here, student K.C. is entitled to emergent relief that would permit him to remain at Honor Ridge during the pendency of the Due Process Petition. As was the case in *Hope,* the District has made a reversal from its initial opinion regarding out-of-district placement at Honor Ridge. Indeed, the District was present for the April 2023 IEP meeting in which petitioner and the Charter School discussed the Charter School's ability to provide FAPE and the need to contact out-of-district institutions that could provide student K.C. with FAPE. The District did not contest this discussion. The Charter School subsequently met with petitioner at the June 2023 IEP meeting, after which the June IEP indicated that Honor Ridge was the recommended placement for student K.C., and included ESY services. The District was apparently present for the June IEP meeting, yet failed to raise any objections. This failure to voice any concerns demonstrates the fact that the District's reversal is purely financial based, and as was the case in *Hope.* Given the irreparable harm and current regression of K.C., emergent relief through placement at Honor Ridge during the pendency of the Due Process Petition is necessary. Accordingly, this prong is satisfied.

Factor Two. The legal right underlying petitioner's claim is settled. Petitioner is correct that stay-put could be invoked at the proposed placement for student K.C. Stay-put is invoked at student K.C.'s "then-current educational placement," Honor Ridge. IDEA requires a school district to provide a FAPE to all children with disabilities who are determined to be eligible for special education. 20 U.S.C. § 1412(a)(l)(A). Similarly, compliance with N.J.S.18A:46-l requires that a charter school provide a FAPE for K.C. through IEPs delivered in K.C.'s least restrictive environment ("LRE"). In other words, the charter school steps into the shoes of the local school district for providing FAPE to the student with the district bearing the financial responsibility for out-of-district placement. Accordingly, this prong is satisfied.

Factor Three. Petitioner has a likelihood of prevailing on the merits of the underlying claim. Here, after the recent presentation by petitioner's counsel, my determination that KC's stay put was at Foundation was incorrect. To its credit, Foundation articulated that they were not able to provide FAPE to student K.C. However, Honor Ridge can. In this regard, petitioner is likely to prevail on the merits. Accordingly, this prong is satisfied.

Factor Four. When the equities and interests of the parties are balanced, the respondent is incorrect 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 petitioner would suffer greater harm than the respondent if the relief is not granted. Student K.C. is currently receiving no services and is imaginatively regressing behaviorally and academically due to TPS's refusal to meet its obligation to fund the FAPE put in place by Foundation. In addition to the fact that he is currently being denied the rights guaranteed to him by the IDEA, the losses that student K.C. is experiencing may not be able to be made up resulting in permanent deficits. The harm to student K.C. is clearly far greater than any harm that the TPS might experience by virtue of the court granting the emergent relief requested. Accordingly, this prong is satisfied.

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 **GRANTED**. It is **ORDERED** that K.C. continue education at Honor Ridge including transportation until the outcome of any Due Process petition.

This order on application for emergency relief shall remain in effect until issuance of the decision in the matter. The parties will be notified of the scheduled hearing dates. 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.

August 9, 2023
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

DJB/cab

APPENDIX

EXHIBITS

For petitioner

- Application for Emergent Relief, dated July 28, 2023
- Petitioner's response to respondent's objection to petitioner's application for Emergent Relief, dated August 3, 2023
- Petitioner's response to other participant, Foundation's objection to petitioner's application for emergent relief, dated August 7, 2023

For respondent

- Respondent's objection to application for emergent relief, dated August 4, 2023

For other participant

- Respondent's brief in opposition to application for emergent relief and due process, dated August 3, 2023