State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION
EMERGENT RELIEF

M.S. AND H.S. ON BEHALF OF A.S.,
Petitioners,
v.
HARRISON TOWNSHIP
BOARD OF EDUCATION,
Respondent.

OAL DKT. NO. EDS 14807-13
AGENCY DKT. NO. 2014 20401

Jamie Epstein, Esq., for petitioners

Brett Gorman, Esq., for respondent (Parker McCay, attorneys)

Record Closed: October 21, 2013 Decided: October 23, 2013

BEFORE **ROBERT BINGHAM II**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners H.S. and M.S., on behalf of their son, A.S., apply for emergent relief, seeking a "stay-put" order to maintain and support his attendance at out-of-district Cherrywood Academy and Private Preschool (Cherrywood), where he was unilaterally placed by petitioners. On October 11, 2013, Administrative Law Judge (ALJ) Susan M. Scarola issued a decision ordering that A.S. be classified and provided special

education and that respondent, Harrison Township Board of Education (Harrison), reimburse petitioners the cost of tuition and transportation expense for attendance at Cherrywood during the 2012–13 school year. On October 15, 2013, petitioners filed with the Office of Special Education Programs, New Jersey Department of Education, a petition for due process for the 2013–14 school year, and the instant petition for emergent relief. On October 17, 2013, the petition for emergent relief was filed with the Office of Administrative Law (OAL) for oral argument, which was held on October 21, 2013.

FACTUAL DISCUSSION

A.S. is a six-year-old student residing within respondent's school district (the District) who had been initially identified as a child requiring the Early Intervention Program (EIP) and subsequently classified as a preschool child with a disability. Thus, at age three, he attended school in the District for the 2010–11 school year. He was declassified in June 2011, and attended preschool at Holding Hands Day Care in the 2011–12 school year. In June 2012 he again was found ineligible for special-education services, and was unilaterally placed by his parents at Cherrywood for kindergarten in the 2012–13 school year.

On November 1, 2012, petitioners filed for a due-process hearing to have respondent find A.S. eligible for special education, reimburse them for unilateral placement at Cherrywood, continue his placement at Cherrywood, and provide him with compensatory education. Respondent, in turn, filed a due-process petition seeking a pediatric neurological evaluation of A.S. after the parents declined to give consent. The matters were consolidated and heard by Administrative Law Judge Susan M. Scarola (ALJ Scarola) between March and September 2013. On October 11, 2013, ALJ Scarola issued a Final Decision, H.S. and M.S. on behalf of A.S. v. Harrison Township Board of Education, OAL Dkt. Nos. EDS 15976-12 and EDS 580-13, Decision (October 11, 2013) (R-1). In pertinent part, she found as follows:

> A.S. was identified as a child requiring early intervention. In May 2010, social, speech/language and vision or auditory

assessments were needed as he exited early intervention. At the eligibility conference in August 2010, A.S. was identified as a preschool child with a disability. The IEP of August 19, 2010, noted delays in receptive and expressive language and oral motor skills. The IEP was modified in October 2010 to provide goals and objectives for A.S.

In April 2011, the IEP was reviewed, and it was noted that A.S. was going for a hearing evaluation on June 8, 2011. A.S. also had tubes in his ears. A speech/language assessment was required. On June 1, 2011, Piperno performed a speech/language evaluation of A.S. and found that he had no delay and his auditory and expressive language skills were above average. On June 14, 2011, the eligibility conference found no disability. As a result, A.S. was declassified as of June 17, 2011. He then attended [Holding Hands] preschool, where he spent the year with typical-peer students.

The parents again requested a CST evaluation in the late winter-early spring of 2012 because the troublesome behaviors that had been observed in the school setting continued. A.S. had an audiometric evaluation in February 2012 at Nemours and was diagnosed with a left-sided mild to moderate conductive hearing loss. Recommendations were made to assist A.S. with learning, including an OT assessment, FM system, reverberation, preferred seating, pre-teaching, cueing and other supports. An evaluation at Cooper Hospital in February 2012 resulted in a medical diagnosis of autism spectrum disorder (ASD), transient alteration, and abnormal EEG suggestive of epileptiform activity. A report from Dr. Gonzalez at Cooper Hospital stated that A.S. had an abnormal EEG, complex partial epilepsy, and ASD.

At the evaluation conference on April 12, 2012, the CST stated that it required data including assessments in OT, social, psychological, speech/learning, vision, and neurology. The audiological evaluation from Nemours was accepted. An evaluation of A.S. at the CNNH by Dr. Woldoff found PDD-NOS (pervasive developmental disorder not otherwise specified), not ASD, and ADHD. She made recommendations for further evaluations, as well as supports for the classroom setting, such as inclusion kindergarten with support and a 1:1 aide.

The OT assessment of July 2, 2012, showed some difficulty processing sensory input. The psychological evaluation of Dr. Press showed an average to above-average ability to

> express himself. The speech and language evaluation of July 9, 2012, showed average expressive/receptive language.
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> At the eligibility meeting on August 1, 2012, it was determined that A.S. was not eligible for special education. The auditory deficit was not noted on his evaluation. No referral was made for a 504 plan, even though emails from Heil suggested that A.S. may need one. The child was withdrawn from the District on September 2, 2012, and placed at Cherrywood Academy, which provided A.S. with ABA techniques.
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> The real concern that did not appear to be addressed by any evaluation meeting in 2011 or 2012 was the lack of learning assessments to gauge how A.S.'s disabilities affected his ability to learn in the classroom setting. He did well when he received the supports in the District's class for four-year-olds. Without the supports, he regressed and his behaviors became more apparent. Dr. Gonzalez's and Dr. Woldoff's recommendations should have been taken seriously, but were not. The medical diagnoses of autism, epilepsy and hearing loss were given short shrift.
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> [R-1 at 31–32.]

ALJ Scarola concluded that A.S. had not been offered FAPE within the District.[1] She further determined that "[t]he fact that Cherrywood is neither accredited nor approved by the Department of Education for the education of disabled children does not bar authorizing reimbursement if a determination is made that A.S. received an 'appropriate' education that conferred a meaningful educational benefit while at

[1] ALJ Scarola wrote:

> This conclusion is based on the following: the inability of the child to communicate well consistently when not in a testing situation and the failure to address that issue; the disparity between the test results and his performance in school; the lack of reasonable accommodations to his hearing loss; the lack of a 504 plan to accommodate A.S.'s hearing loss and behavior issues; the medical diagnoses of autism/ASD and epilepsy which were not addressed in the evaluations; the need for further evaluations which were not performed; and the failure to address the behaviors that were observed but not considered in the evaluations. The education provided to A.S. at the District was not specifically designed to meet his unique needs and did not provide sufficient support to permit the child to benefit from the instruction.
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> [Id. at 37.]

Cherrywood." (Id. at 38.) ALJ Scarola further determined that Cherrywood had in fact conferred an educational benefit on A.S. and was appropriate. However, ALJ Scarola noted that "this reimbursement is for school year 2012–13 only, and is not for any future placement at Cherrywood, which would not be authorized. Because unaccredited schools do not meet the standards of the State educational agency, such facilities are unavailable as a placement option for school districts." (Id. at 39, citation omitted.[2])

For reimbursement, she concluded that petitioners were entitled to a $15.00 per-day co-pay,[3] and that "transportation expenses of $1,321.84 for mileage reimbursement is permitted." (Ibid.) The mileage reimbursement was based upon the rate of 31 cents per mile, the parties' agreement to the use of Google maps to calculate distance, and the fact that they stipulated as to the following distances: house (19 C. Lane) to Cherrywood (8 Cherrywood Drive, Clementon), 17.8 miles; house to work (1200 C. Road, Camden), 14.6 miles; house to school to work, 27.6 miles. The total difference per day is 26 miles. (Id. at 29, n.4). Thus, ALJ Scarola multiplied 26 miles by the rate of 31 cents per mile, multiplied by 164 days, to calculate a per-diem mileage reimbursement of $1,321.84.[4]

As to the District's petition for a pediatric neurological evaluation, the ALJ accepted the medical conclusion that A.S. is autistic, but noted that more specific medical information is necessary "to determine and confirm the nature of A.S.'s disabilities and their effect on his ability to learn and communicate," particularly given the substantial lapse of time since the last medical evaluation. (Ibid.) She thus concluded that a current pediatric neurological evaluation was warranted.

[2] According to the decision, "The parents did not reveal the plans for A.S.'s school attendance for the 2013–14 school year, although it was represented at the hearing that Cherrywood's curriculum ended at kindergarten." (Id. at 3, n.1.)

[3] A portion of the cost of tuition at Cherrywood was paid by A.S.'s medical insurance carrier.

[4] Petitioners' request for reimbursement of travel and "drop-off" time at the minimum wage of $7.25 per hour was denied.

Finally, ALJ Scarola wrote:

> Based on the foregoing, I **CONCLUDE** by a preponderance of the credible evidence that A.S. was denied a free and appropriate public education reasonably calculated to provide a meaningful educational benefit to him in the least restrictive environment during the 2011–12 and 2012–13 school years. I further **CONCLUDE** that his placement at Cherrywood for the 2012–13 school year was reasonable and appropriate under all the circumstances and provided A.S. with a meaningful educational benefit and significant learning. Accordingly, the parents' due-process petition for reimbursement by the District for the daily co-pays and mileage expenses is appropriate and reasonable, and is granted. The petition for compensatory education is denied, as A.S. has made satisfactory progress at Cherrywood and is on track with the assistance provided to him by the school.
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> I also **CONCLUDE** that the District has demonstrated by a preponderance of the credible evidence that a pediatric neurological evaluation is appropriate and reasonable under the circumstances presented herein, and should provide substantial information with which to make the correct educational placement decisions for A.S.
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> . . . .
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> It is **ORDERED** that the petition of parents H.S. and M.S. on behalf of A.S. is **GRANTED**. A.S. shall be classified and provided special education. The District shall compensate the parents and reimburse them the co-pays for tuition for the 2012–13 school year in the amount of $2,460.00. I also **ORDER** that the transportation expense of $1,321.84 for mileage reimbursement shall be paid to the parents by the District.
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> I further **ORDER** that the petition of the District to conduct a pediatric neurological evaluation of A.S. in order to determine the present state of his disability is **GRANTED**.
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> Pending completion of that evaluation, A.S. shall be classified as other health impaired and shall be provided with an IEP and special-education services designed to accommodate his particular needs. A 504 plan shall also be formulated to maximize his access to education in the least restrictive environment.
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> [Id. at 40–41.]

Though not part of the record at the due-process hearing, by email dated August 30, 2013, petitioners advised respondent, through counsel, that A.S. would repeat kindergarten at Cherrywood for the 2013–14 school year, and that they were reserving their right to seek tuition and related costs from the District. (P-1.) In that regard, by letter dated October 18, 2013 (P-4), Kathleen McCabe-Odri, Ed., BCBA-D, explained her recommendation that A.S. be retained in kindergarten, citing, among other things, his continued struggles with "foundation skills" relative to "reading, letter identification and sound associations, math in the area of number identification and fine motor tasks involving writing letter [sic] and numbers." (Ibid.)

Petitioners submit that the current tuition cost at Cherrywood is at the rate of $15.00 per day co-pay, as it was for the 2012–13 year, for which reimbursement was ordered. (P-7.) Petitioners submit that the current travel reimbursement cost, however, is actually $27.60 per day because petitioners travel 55.2 miles round-trip (P-5), not merely 27.6 miles (one-way) as determined by ALJ Scarola, at a mileage rate of 50 cents per mile.[5] Respondent contends that the actual mileage rate, if at all applicable, would be the State mileage rate of 31 cents per mile, as was used by ALJ Scarola.

On October 15, 2013, petitioners filed a petition for due process for the 2013–14 school year and the instant petition for emergent relief. On October 16, 2013, respondent sent petitioners a letter (R-2) arranging a meeting on October 25, 2013, for purposes of identification, eligibility/classification, and development of an IEP. Also, on October 17, 2013, respondents filed a sufficiency challenge with the Office of Special Education Programs, seeking dismissal of the due-process petition on the basis of its alleged insufficiency. (R-3.)

LEGAL ANALYSIS AND CONCLUSION

Petitioners contend that a "stay-put" preliminary injunction under 20 U.S.C.A. 1415(j) is determined by simply identifying the current educational placement rather

[5] Petitioners requested 50 cents per mile, though the IRS Standard Mileage Rates for 2013 (P-6) indicate 56.5 cents per mile.

than by the usual standards for injunctive relief under Crowe v. DeGioia, 90 N.J. 126 (1982), and N.J.A.C. 1:6A-12.1(e)(1–4). They argue that the current educational placement is "the operative placement actually functioning when the dispute first arises." Drinker v. Colonial Sch. Dist., 78 F.3d 859, 867 (3d Cir. 1996). Thus, since Cherrywood is indisputably where A.S. received instruction on October 12, 2013, it is the current educational placement. Therefore, they claim entitlement to reimbursement for tuition and travel expenses.

Respondent contends that a preliminary injunction for "stay put" must be assessed under the four-prong Crowe criteria, specified in N.J.A.C. 6A:14-2.7(s), which petitioners do not satisfy.[6] Respondent also contends that Cherrywood is not an appropriate placement since it is unaccredited and that, as stated by ALJ Scarola, "because unaccredited schools do not meet the standards of the State educational agency, such facilities are unavailable as a placement option for school districts."

Although the present motion is captioned as seeking emergent relief, petitioners are more specifically seeking to invoke the "stay-put" provision under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C.A. § 1400, et seq. Requests for emergent relief under the IDEA's stay-put provision are subject to a different standard than requests made pursuant to N.J.A.C. 6A:14-2.7(s). 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 shall remain in his or her current educational

[6] Typically, a party seeking emergent relief during a due process hearing must show: (1) that it will suffer irreparable harm if the requested relief is denied; (2) that the legal right underlying its claim is settled; (3) a likelihood of success on the merits; and (4) that granting emergency relief will not result in even greater harm to the nonmoving party. N.J.A.C. 6A:14-2.7(s). Respondent contends that A.S. will not suffer irreparable harm because "Judge Scarola ruled that Cherrywood is not appropriate for A.S. for the 2013–2014 school year." Further, the legal right underlying petitioners' claim is not well settled, petitioners do not have a strong likelihood of prevailing on the merits because the relief sought "would violate judge Scarola's order," and petitioners "failed to show that after weighing the equities . . . they will prevail on their claim." (Respondent's brief at 4.)

placement "during the pendency of any administrative or judicial proceeding regarding a due process complaint." 34 C.F.R. § 300.518(a) (2013); 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 such factors as irreparable harm and likelihood of success on the merits and removes the court's discretion regarding whether an injunction should be ordered. Drinker, supra, 78 F.3d at 864. "The Supreme Court has described the language of [stay put] as 'unequivocal,' in that it states plainly that 'the child shall remain in the then current educational placement.'" Ibid. (quoting Honig v. Doe, 484 U.S. 305, 323, 108 S. Ct. 592, 604, 98 L. Ed. 2d 686, 706 (1988)). 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).

Current Educational Placement

In the Third Circuit it is clear that "[o]nce 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." Drinker, supra, 78 F.3d at 864. As 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"). Further, where the dispute arises before implementation of any IEP, "the 'current educational placement' will be the operative placement under which the child is actually receiving instruction at the time the dispute arises." Drinker, supra, 78 F.3d at 867 (citing Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 625–26 (6th Cir. 1990)).

In the present matter, there was no IEP functioning between petitioners and respondent when due process was sought on October 15, 2013. There is no dispute that Cherrywood is the physical location where A.S. actually receives educational

services and that it has been his school since fall 2012. It is also undisputed that A.S. was enrolled at Cherrywood by the unilateral action of his parents without the consent or approval of the District, and that action has now been legitimized by ALJ Scarola's decision that the District did not provide FAPE. In light of such a void preceding implementation of a functional IEP, Cherrywood constructively constitutes A.S.'s operative, hence current, placement.

Respondent argues that, as a matter of law, the IDEA does not enable such action by the parents to establish a unilateral placement as the subject of "stay put" in subsequent litigation where there was no prior agreement between the school district and the parents. However, respondent's position is fundamentally flawed because it ignores the effect of a prior adjudication of the unilateral placement on a future stay-put application.

Instead, in circumstances where, as here, the parents have unilaterally placed the child and a subsequent administrative or judicial decision confirms that the parental placement is appropriate, the decision "constitute[s] an agreement by the State to the change of placement" and the placement becomes the "current educational placement" for the purposes of the stay-put provision. Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 372, 105 S. Ct. 1996, 2003, 85 L. Ed. 2d 385, 396 (1985); see also Susquenita, supra, 96 F.3d at 83 (holding that a new stay-put placement was created when a state education appeals panel ruled in favor of the parents' unilateral decision to enroll the student in private school because the administrative ruling effectively constitutes an agreement by the state and the parents to change the educational placement of the student); Montgomery Twp. Bd. of Educ. v. S.C. ex rel. D.C., Civ. No. 06-398, 2007 U.S. Dist. LEXIS 6071 (D.N.J. Jan. 29, 2007) (the ALJ's decision that the unilateral placement of D.C. at the Solebury School was appropriate created a new pendent placement for D.C., for which the district was financially responsible); 34 C.F.R. § 300.518(d) (2013) ("If the hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parents for purposes of [stay put].")

The New Jersey regulations similarly state that "[i]f the decision of the administrative law judge agrees with the student's parents that a change of placement is appropriate, that placement shall be treated as an agreement between the district board of education and the parents for the remainder of any court proceedings." N.J.A.C. 6A:14-2.7(u)(1). In summary, an administrative or judicial decision must first confirm that the parental placement is appropriate because the decision will effectively constitute an agreement by the local educational agency and become the pendent placement for stay put. Sch. Comm. of Burlington, supra, 471 U.S. at 372, 105 S. Ct. at 2003–04, 85 L. Ed. 2d at 396, see also Susquenita, supra, 96 F.3d at 84, 86. Thus, ALJ Scarola's agreement with the petitioners' decision to unilaterally place A.S. in Cherrywood has made Cherrywood A.S.'s "current educational placement" for purposes of the proceedings arising from the October 15, 2013, due-process petition. That decision constitutes an "agreement between the State and the parents" unless and until it is reversed. Therefore, under the stay-put provision, A.S. should remain in that placement at respondent's expense pending the outcome of the underlying due-process petition. To conclude otherwise would give respondent unilateral power to undo A.S.'s "current educational placement," which is proscribed by stay put. See Honig v. Doe, supra, 484 U.S. at 323, 108 S. Ct. at 604, 98 L. Ed. 2d at 706–07 ("Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school."). The stay-put provision preserves the status quo as established by ALJ Scarola's decision until petitioners' due process petition is resolved.

As indicated above, the District also contends that Cherrywood is not an appropriate placement since it is unaccredited, and that, because "unaccredited schools do not meet the standards of the State educational agency, such facilities are unavailable as a placement option for school districts." Again, respondent's argument is fundamentally flawed, because it fails to acknowledge that parents who make a unilateral placement are not bound by the same regulations applicable to school districts. The Supreme Court has made clear that the standard a parental placement must meet in order to be "proper" is less strict than the standard used to evaluate whether a school district's IEP and placement is appropriate. See Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 12–13, 114 S. Ct. 361, 364, 126 L. Ed. 2d 284, 291.

The Court in Florence County specifically rejected arguments similar to those that respondent presses here when the Court stated that IDEA requirements—"including the requirement that the [private] school meet the standards of the state educational agency —do not apply to private parental placements." Id., 510 U.S. at 14, 114 S. Ct. at 365, 126 L. Ed. 2d at 293 (citation omitted). As the Court noted from the underlying appeals court decision, "'it hardly seems consistent with the [IDEA's] goals to forbid parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place.'" Ibid. (citation omitted); see also Lauren W. v. DeFlaminis, 480 F.3d 259, 276 (3d Cir. 2007) (citation omitted) (even if the private school is not state approved, it may be appropriate for private placement as long as it "provides 'significant learning' and confers 'meaningful benefit.'").

Simply put, H.S. and M.S. are not limited to placements at State-approved schools. This standard is illustrated in ALJ Scarola's decision by her recognition that Cherrywood was appropriate for A.S. as a unilateral parental placement, but because the school is unaccredited, the respondent may not place him there when it eventually makes an offer of FAPE. ALJ Scarola has already concluded that the services provided to A.S. at Cherrywood were appropriate, thus the parents have satisfied the standards for a parental placement. The fact that the respondent is precluded from placing A.S. at Cherrywood has no relevance in this stage of the litigation, where it has already been determined that Cherrywood is A.S.'s "current educational placement" and only stay put is being enforced. Respondent can remedy any concern it has as to the appropriateness of the placement by expeditiously either making an offer of FAPE in a public setting or placing A.S. in an appropriate private setting of the respondent's choice. However, until that occurs, stay put shall remain in effect for A.S. to attend Cherrywood at respondent's expense.

Tuition and Costs

Having established A.S.'s current educational placement, the only remaining question is respondent's liability for costs associated with A.S.'s ongoing attendance at Cherrywood. In the Third Circuit, it is settled law that respondent is liable for costs

associated with A.S.'s current educational placement beginning with the date of the "agreement" established by ALJ Scarola's decision and lasting for the duration of the proceedings arising from the pending due-process petition. As the Third Circuit has noted, "[w]hile parents who reject a proposed IEP bear the initial expenses of a unilateral placement, the school district's financial responsibility should begin when there is an administrative or judicial decision vindicating the parents' position." Susquenita, supra, 96 F.3d at 86–87. "The purpose of the Act, which is to ensure that every child receive a 'free and appropriate education' is not advanced by requiring parents, who have succeeded in obtaining a ruling that [their child was denied FAPE], to front the funds for continued private education." Ibid.

Petitioners request tuition and costs from the start of the 2013–14 school year, which commenced on July 1, 2013. As Susquenita and other cases make clear, however, a school district's liability for a student's placement begins at the time of an administrative decision establishing that placement. In the present matter, A.S.'s current educational placement was established by ALJ Scarola's decision on October 11, 2013. Because A.S. must remain in his current educational placement, respondent is liable for the costs associated with that continued placement from the date of the decision. "In concluding that the school district cannot avoid interim responsibility for funding what the state has agreed is an appropriate pendent placement, [the Third Circuit was] mindful of the financial burden which will, in some instances, be borne by local school districts." Id. at 87. In response to this concern, the Third Circuit quoted the Supreme Court's decision in Florence County:

> There is no doubt that Congress has imposed a significant financial burden on States and school districts that participate in IDEA. Yet public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims.
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> [Ibid. (quoting Florence Cnty., supra, 510 U.S. at 15, 114 S. Ct. at 366, 126 L. Ed. 2d at 293–94.]

Finally, in addition to the tuition charges, respondent is also responsible for providing transportation costs. ALJ Scarola ordered reimbursement at a mileage rate of 31 cents per mile at 26 miles per day. Petitioners disagree with these figures, assert that a mathematical error was made, and request a new calculation for stay put. Recalculation of transportation costs would essentially serve to now collaterally attack a prior final decision, which would not be proper in this forum. Thus, ALJ Scarola's conclusions shall remain in place to preserve the status quo pursuant to stay put unless and until such time as her decision is reversed.

In summary, pursuant to ALJ Scarola's October 11, 2013, decision, A.S.'s "current educational placement" is at Cherrywood. The IDEA's stay-put provision entitles A.S. to remain in that placement pending the outcome of his due-process petition. When stay put entitles a student to remain in his "current educational placement," the school board shall be liable for the associated costs. Therefore, I **CONCLUDE** that the stay-put placement for A.S. is Cherrywood and respondent is responsible for tuition and transportation costs, retroactive to October 11, 2013, during the pendency of the current due-process proceeding.[7]

ORDER

Accordingly, the petitioner's request for emergent relief is **GRANTED**. It is hereby **ORDERED** that the "stay-put" placement of A.S. is the Cherrywood Academy. It is further **ORDERED** that respondent shall pay tuition and transportation costs, retroactive to October 11, 2013, and lasting for the duration of the proceedings arising from the October 15, 2013, due-process petition, "unless the State or local educational agency and the parents otherwise agree," 20 U.S.C.A. § 1415(j). Tuition costs shall be paid at a rate of $15.00 per day, and transportation costs shall be paid at a mileage rate of 31 cents per mile at 26 miles per day, pursuant to the order of ALJ Scarola. Respondent shall pay such tuition and transportation costs within ten days of receipt of an invoice for same.

[7] Petitioners' claim for reimbursement prior to ALJ Scarola's decision, specifically between July 1, 2013, and October 11, 2013, remains an issue to be decided during the due-process hearing.

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 parent, 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 feels that this decision is not being fully implemented with respect to the program or services, this concern should be communicated in writing to the Director, Office of Special Education.

October 23, 2013

DATE **ROBERT BINGHAM II**, ALJ

Date eMailed to Parties:

October 23, 2013

/bdt

APPENDIX

EXHIBITS

For Petitioner:

P-1 Email from Jamie Epstein, Esq., to Brett Gorman, Esq., dated August 30, 2013

P-2 Harrison Township School District invoice, dated August 27, 2009

P-3 Excerpt from petitioners' written summation relative to travel reimbursement (EDS 15976-12)

P-4 Letter dated October 18, 2013, from Kathleen McCabe-Odri, Ed., BCBA-D

P-5 Google maps mileage calculations

P-6 IRS Standard Mileage Rates for 2013

P-7 Cherrywood Academy invoices, July 8 through October 4, 2013

For Respondent:

R-1 Final Decision, EDS 15976-12 and EDS 580-13, consolidated, dated October 11, 2013

R-2 Letter from Harrison Township School District to petitioners, dated October 16, 2013

R-3 Sufficiency Challenge filed by respondent on October 17, 2013