State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
DENYING EMERGENT RELIEF
OAL DKT. NO. EDS 01270-24
AGENCY DKT. NO. 2024-37008

C.S. ON BEHALF OF K.S.,
Petitioner,
v.
PALMYRA BORO
BOARD OF EDUCATION,
Respondent.

Samuel M. Watson, Esquire, for petitioner (South Jersey Legal Services, attorneys)

Joseph F. Betley, Esquire, for respondent (Capehart Scatchard, P.A., attorneys)

Record Closed: February 2, 2024 Decided: February 5, 2024

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

STATEMENT OF THE CASE

Petitioner, C.S., on behalf of her daughter K.S. filed a request for emergent relief seeking an Order directing the respondent, Palmyra Boro Board of Education (hereinafter referred to as the "District") to continue education at the temporarily agreed

upon placement at First Children Services and to provide placement there until the end of the school year.

PROCEDURAL HISTORY

On or about January 30, 2024, the petitioner filed a request for emergent relief with the New Jersey Department of Education, Office of Special Education (OSE). The OSE transmitted the emergent request to the Office of Administrative Law (OAL), for hearing as an emergent contested matter. N.J.S.A. 52:14B-1 to B-15; N.J.S.A. 52:14F-1 to F-23. An oral argument on the emergent request was heard on February 2, 2024, via Zoom remote video platform and the record closed on that date.

FACTUAL DISCUSSION AND FINDINGS

Based on the record before me including the parties' written submissions in support of and in opposition to the request for emergent relief.

Petitioner is the parent of K.S., a seventeen-year-old senior in the District. (Sabo Cert. at Para. 2.) K.S. is a general education student and is not classified as eligible for special education and related services under the Individuals with Disabilities Education Act. (Sabo Cert. at Para 3.) She does not have an individual educational program ("IEP"). (Sabo Cert. at Para 3.) K.S. was referred to the Palmyra Child Study Team in December 2022 by C.S. for possible eligibility for special education. (Sabo Cert. at Para 3.) The CST determined in January 2023 that an evaluation was not warranted. (Sabo Cert. at Para 3.) There has been no challenge to the determination. (Sabo Cert. at Para 2.) K.S. is eligible under Section 504 of the Rehabilitation Act of 1973 as an individual with a disability, specifically with diagnoses of anxiety and recurrent depressive disorder. (Sabo Cert. at Para 4; Sabo Cert. at Exhibit A.)

After the COVID-19 pandemic, K.S. presented with generalized anxiety. (Sabo Cert. at Para 5.) She received counseling services from Creative Change Counseling in Delran, New Jersey, since September 30, 2022. (Sabo Cert. at Para 5.) The

underlying triggers of K.S.'s anxiety are unknown to the District. (Sabo Cert. at Para 6.) There have been no reports brought to the administration's attention regarding K.S.'s anxiety.

There has not been any notable traumatic event at the high school, no conflicts with peers or staff members and no evidence that she is a victim of harassment, intimidation or bullying. (Sabo Cert. at Para 6.) No health care provider has indicated that anything within Palmyra High School is the cause of K.S.'s anxiety. (Sabo Cert. at Para 6.) In fact, K.S. attended a two-week long Europe trip with her peers in Summer 2023 and attend her junior prom without issue. (Sabo Cert. at Para 7.)

On September 14, 2023, C.S. requested a meeting to discuss homebound instruction as a potential alternative placement because K.S., according to her mother, was experiencing high levels of anxiety at the start of the school year. (Sabo Cert. at Para 8.)

On September 20, 2023, the support team for K.S., including Ms. Sabo and her guidance counselor, Lauren Schmidt, met with K.S. and C.S. to discuss alternative educational opportunities for K.S. (Sabo Cert. at Para 9.) The parties agreed that K.S. would attend school on a modified schedule (7:50am to 10:44am). (Sabo Cert. at Para 9.) However, K.S. only attended one day of school in the month of September. (Sabo Cert. at Para 9.)

On September 27, 2023, Dr. Melissa Chase, DO, from South Jersey Pediatrics, authored a letter to C.S. recommending that K.S. receive homebound instruction for the remainder of the school year. (Sabo Cert. at Para 10; Sabo Cert. at Exhibit B.) Ms. Sabo had significant concerns with the recommendation for home instruction for the remainder of K.S.'s senior year. (Sabo Cert. at Para 11.) Ms. Sabo brought these concerns to the attention of the Interim Superintendent of Schools, Mr. Mark Pease. (Sabo Cert. at Para 11.) Mr. Pease shared Ms. Sabo's concerns. (Sabo Cert. at Para 11.)

On October 9, 2023, Mr. Pease requested a meeting with C.S. and K.S. to discuss the request for homebound instruction and other alternative options. (Sabo Cert. at Para 11.) In good faith and looking out for the best educational interests of K.S., Mr. Pease presented the possibility of K.S. attending a new program called First Children Services (FCS) in Cherry Hill, New Jersey, as an alternative to the very restrictive home instruction setting recommended by Dr. Chase. (Sabo Cert. at Para 11.) FCS was offered due to its advertised specialty in school anxiety and adolescent depression, as well as its transitional program that is designed to temporarily educate students in an alternative, therapeutic environment with the goal of the return to the general education setting. (Sabo Cert. at Para 11.) According to the FCS's website, the temporary nature of its Transitions Program is highlighted as a way to return students to their home district:

> Students who are not attending school due to underlying anxiety disorders, depressive disorders, fears, bullying, social skills challenges, and/or family related difficulties present a considerable challenge for school personnel and families. Traditional home instruction may provide an immediate educational solution, but it will only mask the problem and can socially isolate the child leading to further issues.
>
> Time is of the essence for these students as the longer a child remains out of school the more difficult it becomes for the child to return to school. First Children's Transitions Program for students with anxiety and school refusal offers a solution that allows these students to comfortably return to a group learning environment among their peers.
>
> The goals of the Transitions Program are to help students with anxiety and/or depression, who are not attending or thriving in a typical school setting, to return to a classroom-like setting, learn coping skills, and ultimately transition back to school.
>
> The program includes group and individual counseling for each student in addition to their academic curriculum. As students progress through the program, our professional staff will assist students, their families, and school district staff with a re-entry plan to transition them back to school. (Sabo Cert. at Para 12; FCS Website.)

Mr. Pease offered C.S. and K.S. the opportunity to tour the campus and see the program firsthand. (Sabo Cert. at Para 13.) C.S. was informed that the goal was to get K.S. the help she needed to successfully transition her back to the District to finish her senior year with her friends and peers. (Sabo Cert. at Para 13.) C.S. vocalized her reservations about the program, but ultimately, she agreed for K.S. to attend FCS. (Sabo Cert. at Para 13.) The decision to temporarily place K.S. at FCS was not driven by any IEP or Section 504 Plan. (Sabo Cert. at Para 14.) The placement was a general education, therapeutic placement in lieu of homebound instruction and the other alternative general educational settings offered to the family. (Sabo Cert. at Para 14.)

On October 12, 2023, the contract was signed and sent from Palmyra Business Administrator, Mr. Jay Toscano, to FCS for services to begin on October 16, 2023. (Sabo Cert. at Para 15; Sabo Cert. at Exhibit C.) Because it was always the intention for K.S. to return to Palmyra High School to complete her senior year, on November 27, 2023, Mr. Toscano sent an email to FCS confirming the contract termination effective December 22, 2023, to Ms. Caitlin Summers-Motta, Director of Mental Health Services. (Sabo Cert. at Para 16; Sabo Cert. at Exhibit D.)

On December 12, 2023, a meeting was held to discuss K.S.'s transition back to Palmyra High School. (Sabo Cert. at Para 17.) The meeting attendees were K.S., C.S., Ms. Sabo, Ms. Schmidt, Ms. Summers-Motta, Margaret Chaput, Supervisor of Transitions, and Lauren (K.S.'s therapist at FCS). (Sabo Cert. at Para 17.) During the December 12, 2023, planning meeting, the support team discussed the most successful approach to transitioning K.S. back to Palmyra High School. (Sabo Cert. at Para 18.) At that time, the District offered K.S. several alternatives: 1) Palmyra Learning Academy ("PLA") which is an alternative high school program within the Palmyra High School that is primarily designed for credit completion for general education students who need an accelerated program to graduate on time; 2) a modified schedule at the High School; or 3) revisit the initial homebound instruction request. (Sabo Cert. at Para 18.)

On December 13, 2023, Ms. Summers-Motta requested that Ms. Sabo give her a phone call to speak at greater length about focusing K.S.'s therapy on transitioning back

to Palmyra High School. (Sabo Cert. at Para 19.) After speaking with Ms. Summers-Motta about K.S.'s courses/credits, Ms. Sabo recommended to Mr. Pease to extend services to January 31, 2024, to be able to award partial credit for the classes that K.S. completed at FCS during her first semester. (Sabo Cert. at Para 19.) On December 18, 2023, Mr. Toscano sent a letter to Ms. Summers-Motta extending the date of termination to January 31, 2024. (Sabo Cert. at Para 20; Sabo Cert. at Exhibit E.)

On January 3, 2024, C.S. sent an email to members of our Board of Education and school administration summarizing her disappointment with the termination of services. (Sabo Cert. at Para 21; Sabo Cert at Exhibit F.) (Thus, C.S. knew as of January 2024 that the FCS placement would expire by January 31, 2024.) On January 5, 2024, Mr. Pease replied to C.S. indicating that he was in receipt of her letter and requested a meeting the following day to discuss the plan for K.S. moving forward. (Sabo Cert. at Para 21; Sabo Cert at Exhibit F.)

On January 9, 2024, C. S. sent an email informing the administration that she did not want to meet until she had reviewed all the communication that she requested from Mr. Toscano and until she met with K.S.'s doctor on January 10, 2024, and not until she could secure an advocate to be there for the meeting to represent K.S. and make sure her rights are protected. (Sabo Cert. at Para 22; Sabo Cert at Exhibit F.)

The District received a letter from Dr. Chase dated January 11, 2024, advocating that K.S. stay at FCS. (Sabo Cert. at Para 23; Sabo Cert Exhibit G.) However, the letter fails to identify any specifics regarding the education setting at Palmyra High School which triggers K.S.'s anxiety. (Sabo Cert. at Para 23; Sabo Cert Exhibit G.) The District is not aware of any efforts by Dr. Chase to investigate the programs offered by the District or to reach out to any staff member at Palmyra to determine the educational needs of K.S. (Sabo Cert. at Para 23; Sabo Cert Exhibit G.) There is no indication of treatment dates or any other documentation or medical facts that Dr. Chase relied upon other than the subjective wishes of the family for K.S. to stay at FCS. (Sabo Cert. at Para 23; Sabo Cert Exhibit G.) There is no indication as to the factors considered by Dr. Chase as to why she believes K.S. would regress, or the specific causes of this alleged regression within the four walls of Palmyra High School. (Sabo Cert. at Para

23; Sabo Cert Exhibit G.) Nor is there any explanation as to the contradictory recommendations from Dr. Chase of advocating for home instruction in September 2023 for the remainder of K.S.'s high school career and then later indicating that home instruction would be too restrictive.

On January 25, 2024, a meeting took place among Mr. Pease, Ms. Sabo, Ms. Schmidt, Mr. Devlin, C.S., K.S., and K.S.'s aunt/advocate. (Sabo Cert. at Para 24.) Mr. Pease began the meeting by reiterating the importance of appropriately transitioning K.S. back to the District. (Sabo Cert. at Para 24.) The District once again reviewed her options: PLA, modified schedule or homebound instruction. (Sabo Cert. at Para 24.) The meeting concluded with the agreement among parties that Ms. Schmidt would begin the process for homebound instruction with K.S. on February 1, 2024. (Sabo Cert. at Para 24.) Contrary to this agreement, C.S. filed this Emergent Relief application. (Sabo Cert. at Para 24.)

Accounting for the credits she will earn at FCS, K.S. only needs 8.75 credits to graduate. (Sabo Cert. at Para 25.) These credits can be acquired from an English class (5) credits and PE (3.75). (Sabo Cert. at Para 25.) K.S. can potentially graduate in three (3) weeks with home instruction or within the PLA. (Sabo Cert. at Para 25.)

On January 30, 2024, the OSE accepted the instant petition for filing, and transmitted the matter to the Office of Administrative Law (OAL) for an emergent hearing. The District now files this opposition to petitioner's Request for Emergent Relief.

Petitioner argues that this matter involves a seventeen-year-old, general education student, K.S., who was placed by the Palmyra Board of Education (Board or District) on a temporary basis and in lieu of a medical home instruction in October 2023 at First Children Services (FCS) in Cherry Hill, New Jersey. K.S. has a 504 plan for classroom modifications for her anxiety and the District offered FCS to K.S. in good faith as a transitional, general education therapeutic placement due to alleged generalized anxiety, with the goal of returning K.S. to Palmyra High School to complete her senior year. The temporary placement was not through any Individual Educational Program

(IEP) since K.S. is not a classified student, nor pursuant to any Section 504 Plan. The Petition for Emergent Relief requests that K.S. remain at FCS, presumably for the remainder of her high school career. There is an accompanying Due Process Petition that requests that the District evaluate K.S. to determine if she is eligible for special education and related services. However, since this is an emergent hearing, C.S. has to satisfy the four *Crowe* factors in order for relief to be granted. See Crowe v. DeGioia, 90 N.J. 126 (1982). As a threshold matter, however, the District is claiming that OAL has no jurisdiction to hear this case because it does not arise from a special education issue. The District claims, despite their admission that K.S. has a 504 plan, that this was a “general education” placement not done within the auspices of the 504. See District Opposition. This is a “nonsensical statement,” as any placement made for a 504 student is necessarily within the auspices of the 504 plan by the very language of 34 CFR § 104.35, the enabling regulations for Section 504 in the education realm. That regulation lays out the way placement decisions must be made for students with 504s by local education agencies receiving federal funding, including, among other requirements, the fact that evaluations are to be done and considered, testing is to be done and considered, and opinions of the student’s teachers as well as student’s physical condition are to be taken into consideration. See 34 CFR § 104.35. This placement, which is for anxiety and depression, is within the scope of K.S.’s 504 plan, which is also for anxiety and depression. See District Opposition, Petitioner Exhibit A. The fact that the District failed to follow these regulations as they were supposed to the first time K.S. was placed does not mean that the student should lose the protections afforded to her as a disabled student with a 504 plan when subsequent placement decisions like this one are being made. This would allow the District to circumvent the due process protections of a 504 plan or even an IEP at any time by simply claiming a placement decision was made “as a general education” placement. Turning to the Crowe factors, the first factor is that the petitioner must show irreparable harm will occur if the Order is not granted. They claim that here, it is clear from K.S.’s statement as well as the statements of her providers that irreparable harm is occurring in the form of detrimental effects to K.S.’s mental health and overall wellbeing being caused by her being pulled from this placement where she has social contacts, can participate fully in her education and is receiving the wrap around supports she needs to succeed instead of being put into home instruction where she will be stuck in a room alone all day. See

Petitioner Exhibits D, E and F. There is no amount of damages that could make up for depriving this student of her ability to access the education to which she is entitled by pulling her out of a placement against the advice of all of her providers and offering no coherent reason for doing so. As a senior, this is her last chance to make progress in areas well-established to be necessary for success post-graduation, including social skills, life skills and her education which she has finally been able to truly access at First Children's.

They also claim that the second and third *Crowe* factors are demonstrating that the underlying law is settled, and that the petitioner has a likelihood of success on the merits. Here, 34 CFR § 104.35, the enabling regulations for Section 504 in the education realm, is clearly settled law. As described above, there are detailed procedures laid out in this regulation for how placement decisions must be made when the student has a 504 plan. Part (a) states that a preplacement evaluation is to be conducted before any "significant change in placement." This was not done here. Part (c) states that "In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with 104.34. See 34 CFR § 104.35. Most if not all of this was not done in this case. As such, the placement decision was invalid.

In addition, 34 CFR § 104.33 and 104.34 talk about FAPE and the appropriate educational setting for 504 students. Part of the consideration of appropriateness is the restrictiveness of each placement. See 34 CFR § 104.33 and 104.34. Here, rather than allow K.S. to remain in the in-person placement that has been successful for her and where her providers believe she should remain, the District has approved home instruction, the most restrictive placement. Although the District presented it to C.S. as a choice between four options, home instruction was the only real option when the

student's medical providers and the staff at First Children all were stating that having her go back to Palmyra High was a bad idea. See Petitioner Exhibits D and F.

They claim the District cannot approve home instruction, as they have done here for the remainder of the 2023–24 year per Mr. Pease's January 29, 2024, letter, if they and their school physician have not approved it based on their assessment that K.S. cannot attend the regular high school due to her mental health condition. See Petitioner's Exhibit C; N.J.A.C.6A:16-10.1. As such, the District must believe there is a valid medical reason for K.S. not to return to the regular high school, despite what they are implying in their brief. This leaves the choice here between home instruction and keeping K.S. at First Children's. Ms. Sabo in her own certification expressed concerns about home instruction being such a restrictive placement, it is unclear then why the District would not allow K.S. to remain in the less-restrictive, in-person school setting that has been successful for her as this would be far more appropriate under the spirit of the 504 regulations. Indeed, the District's response characterized the original offer to attend First Children's a "good faith offering a therapeutic program as an alternative to a year of the more restrictive home instruction as advocated by K.S.'s doctor" and is unclear why that same alternative does not make sense now. See Sabo Certification Para. 8, District Opposition Pg. 14.

As such, the underlying law regarding placement and 504s is settled and it is clear it was not followed in this instance. The petitioner therefore stands a high chance of success of succeeding on the merits of her underlying case that the proper procedures must be followed before any placement change is made. If these procedures had been followed here and the District took the opinions of the student's teachers and providers into consideration it seems highly unlikely the decision to pull her from First Children's would have been made.

The fourth and final Crowe factor is a balancing of the equities. Here, the balancing of the equities weighs strongly in favor of K.S. As detailed earlier, all of K.S.'s providers believe she could suffer serious regression and mental health issues if she is removed from this placement. On the other hand, it will not cost the District anything

except the money they had already been paying to keep K.S. at First Children's while the underlying due process plays out.

In response to respondent's point in their brief about the language from First Children's website stating it is a program to transition students back into their regular schools, the website also states that "In 2020, five seniors graduated from Transitions in June 2020. Four of the seniors were accepted to college. The fifth senior has been accepted to a post-high school vocational training program." It is clear, then, that the "transition" in the program's name does not always mean a transition back to regular high school — it may mean a transition into college, vocational school, or adult life, as per the student's individual needs.

In response to respondent's claims in their brief that the January 11, 2024, doctor's note is somehow insufficient, the letter contains the needed information: a diagnosis (anxiety), a recommendation (keep her at First Children's) and the reason (First Children's has drastically reduced student's symptoms and it would be detrimental to her progress and cause her to regress if she had to go back to Palmyra High or on home instruction). See Petitioner Exhibit D. If the District had wanted more information, they could have had their school physician conduct a peer-to-peer call with the provider or asked C.S. to request a more in-depth note from the doctor.

Respondent, however, argues that petitioner has not satisfied any of the factors which govern entitlement to emergent relief pursuant to N.J.A.C. 6A:3-1.6. Further, the District disputes the underlying jurisdiction of the Office of Administrative Law to hear the emergent relief aspect in the special education/504 arena since the fountainhead issue raised by the petitioner involves the placement of a general education student, and not a student with an IEP or a student who is claiming a violation of a 504 Plan. Petitioner conveniently omits from her submission that K.S.'s placement at FCS was a temporary placement for a general education student and not pursuant to an IEP. In addition, the District has offered several alternatives for K.S. to continue her education and hopefully graduate in the next few weeks, which petitioner refused.

In particular, the Petition for Emergent Relief fails to satisfy the basic requirements set forth in N.J.A.C. 6A:14-2.7(c) for due process petitions. The petitioner has made no clear demonstration that the legal right underlying her claim is settled, nor is there a significant likelihood of success on the merits of the claim.

Moreover, at the heart of this dispute is the appropriateness of K.S.'s general educational placement, which is by no means appropriate for an emergent relief hearing in the context of a special education proceeding through the Office of Special Education Programs. Petitioner has not established irreparable harm because there has been no interruption in educational services. The keys to K.S.'s continued education are in the hands of the District.[1]

Finally, the equities and interests are in favor of the Board, which has been diligently attempting to transition K.S. back to the general educational setting at Palmyra High School with her peers, despite petitioner's lack of cooperation. For these reasons petitioner's request for emergent relief must be denied.

They claim the Office of Administrative Law does not have jurisdiction to hear an emergent relief application as an "EDS" filing from the Office of Special Education over non-special education/non-Section 504 matters. The transmission of this matter to the OAL by the Office of Special Education to hear the case on an emergent basis was in error. B.C. and J.S. o/b/o/ C.S. v. West Orange Board of Education, No.: EDS 02920-18, 2018 N.J. AGEN LEXIS 354* (June 11, 2018) (petitioner's due process petition was dismissed since it asserted a dispute relating exclusively to a non-special education matter, and as such their petition fails to satisfy the criteria of N.J.A.C. 6A:14-2.7(a)). A controversy or dispute arising under the school laws which does not meet the threshold requirements of N.J.A.C. 6A-14-2.7(a) cannot be asserted in a due process petition, as such disputes fall within the exclusive jurisdiction of the Commissioner of Education. Id. Here, there is no special education or 504 issue relevant to the emergent relief

[1] The District acknowledges that K.S. does have a 504 plan for classroom modifications and accommodations, however, petitioner's Emergent Application regarding continued placement at FCS does not arise out of that 504 plan. Nor is there any allegation that the Section 504 Plan has been violated or is in need of modification.

application.[2] Rather, the petitioner requests that K.S. remain at FCS as a general education student where she was placed as an alternative to home instruction or a modified day, and not as a classified student eligible for special education and related services.

The District agreed to allow K.S. to attend FCS in good faith and on a temporary basis to allow her to receive therapeutic services with the goal of returning to Palmyra. K.S. attended FCS with the intent that she would eventually transition back to Palmyra High School. Further, although K.S. has a 504 plan, the 504 plan provides K.S. with classroom modifications and accommodations. The issue regarding K.S.'s placement is outside the guidance of her 504 plan. The 504 plan does not call for placement at FCS, and the emergent relief application does not challenge anything regarding the 504 plan.

Therefore, the Office of Administrative Law does not have jurisdiction over petitioner's EDS emergent application because K.S. is a general education student and petitioner's emergent relief application does not address a special education issue.

However, in the event the Office of Administrative Law decides to consider petitioner's emergent relief application, this matter must be denied as petitioner has not satisfied the factors in Crowe v. DeGioia. Petitions for emergent relief are reviewed according to the familiar standard set forth in N.J.A.C. 6A:3-1.6, which requires that a motion for such relief demonstrate that:

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;
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> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
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> 4. 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.

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[2] The request for the evaluation of K.S. is not part of the emergent relief.

> [N.J.A.C. 6A:3-1.6(b); see also Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982).]

A petitioner must establish all of the factors above "clearly and convincingly," in order to justify emergent relief. See C.A. o/b/o M.A. v. Holmdel Twp. Bd. of Educ., No.: EDS 04497-23, 2023 N.J. AGEN LEXIS 520 at *18-20 (July 26, 2023) (quoting Waste Mgmt. of N.J. v. Union Cnty. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008)). See also D.I. & S.I. o/b/o T.I. v. Monroe Twp. Bd. of Educ., No.: EDS 10186-17, 2017 N.J. AGEN LEXIS 814 at *7 (Oct. 25, 2017); Crowe, 90 N.J. at 132-34. As set forth in detail below, petitioner's request for emergent relief does not satisfy this standard and should therefore be denied.

First, petitioner cannot establish that K.S. will experience any irreparable harm. Irreparable harm is defined as harm "'that cannot be redressed adequately by monetary damages.'" C.A., 2023 N.J. AGEN LEXIS 520 at *21 (quoting Crowe, 90 N.J. at 132-33). "The threshold standard for irreparable harm in the area of education is showing that once something is lost, it cannot be regained." Ibid. (citing M.L. o/b/o S.L. v. Bd. of Educ. of the Twp. of Ewing, No.: EDU 4949-09, Emergent Relief (June 15, 2009)).

Because monetary damages are not available in educational cases, courts have determined that, "if compensatory education provided at a later date cannot remedy the situation, then the harm is irreparable." Ibid. (citing Howell Twp. Bd. of Educ. v. A.I. & J.I. o/b/o S.I., No.: EDU 5433-12, Emergent Relief (May 2, 2012)).

Here, the court should deny emergent relief. There will not be a lapse in education services provided to K.S. by the District. K.S.'s placement at FCS was a temporary placement due to her unique needs, however the District is prepared to provide an educational program in Palmyra High School on a modified schedule, placement in the PLA, or home instruction after the FCS termination date. It was always the intention of the District for K.S. to return to Palmyra. The District has provided three options to the petitioner: (1) home instruction; (2) the PLA program; and (3) a generalized modified schedule to accommodate her anxiety. These alternatives are available to K.S. at any time — the petitioner holds the key to those services. It is

not irreparable harm for the petitioner to be denied the educational services in a general education setting that she prefers for her daughter. Further, in the event that it is later determined that K.S. lost any educational services, the court could award compensatory education to petitioner for K.S.'s benefit. This fact obviates any finding of irreparable harm because, "[b]y definition compensatory education is a method of making up lost ground." B.R. o/b/o R.R. v. Egg Harbor Twp. Bd. of Educ., No.: EDS 2091-02, 2002 N.J. AGEN LEXIS1256, *10 (Apr. 5, 2002).

The B.R. case dealt, in relevant part, with a request for emergent relief due to the loss of services due to a reading specialist's vacation in advance of spring break, and certain half-days in the school calendar. Id. at *2. The District acknowledged that compensatory education was due to the student and committed to provide it in advance of the emergent hearing. Id. at *3-4. The court found no basis to award emergent relief because the issue of whether compensatory education was due had already been determined, when the district conceded that it was warranted. Id. at *10.

Similarly, the District here voluntarily offered K.S. a temporary placement at FCS for her anxiety with the intention that K. S. would transition back to Palmyra High School for her senior year. There is no need for compensatory education because there will be no break in educational services. The District offered K.S. educational services at Palmyra High School in the general education setting, or in the alternative, (1) the PLA program; (2) a generalized modified schedule; or (3) home instruction. There is no irreparable harm as K.S. does not have an IEP and the District has provided petitioner with several options subsequent to her placement at FCS so that educational services are not interrupted.

The next Crowe factor requires consideration of whether the legal right underlying the claim is settled. See N.J.A.C. 6A:3-1.6(b)(2); Crowe, 90 N.J. at 132-34. This factor goes hand-in-hand with the third factor: whether petitioner has a likelihood of success on the merits of their claim. There is no settled right to recovery — there is simply no right for K.S. to continue to attend FCS. Further, the well-recognized tenet of "stay put" does not apply since there is no IEP nor any special education proceedings that challenge a program or placement issue under special education jurisprudence.

See 20 USC Section 1415 (e)(3). The purpose of "stay-put" is to maintain stability and continuity for the special education student. K.T. o/b/o/ B.T. v. Washington Township Board of Education, No. EDS 16366-17, 2017 N.J. AGEN LEXIS 816* November 28, 2017. K.S.'s placement at FCS was only a temporary, general education placement driven by the District in good faith offering a therapeutic program as an alternative to a year of the more restrictive home instruction as advocated by K.S.'s doctor.

Petitioner argues that K.S. must stay in her current placement at FCS or she will suffer some unspecified, speculative degree of "regression." In fact, K.S. is a general education student and does not have an IEP that would determine her placement. K.S. was offered FCS on a temporary basis for her anxiety. However, it is unclear what exactly at Palmyra High School would contribute to her anxiety or cause regression. Instead, petitioner merely makes a request for K.S. to stay at FCS with no reliable and admissible supporting evidence other than that is the preferred choice of the seventeen-year-old student submitted with no affidavit and no certification.

Speaking of the lack of reliable evidence, the January 11, 2024, uncertified letter from Dr. Chase that pushes for K.S. to remain at FCS should be disregarded with no weight attached. This is the same physician who less than four months ago advocated for K.S. to be on home instruction for the rest of the 2023–2024 school year. The letter is hearsay, and we surmise it was written solely at the request of the petitioner because that is what the petitioner wanted the doctor to say. The physician has not indicated any area of expertise as to the treatment of adolescents with anxiety or school phobia or depression, and certainly no expertise in educational placements for general education students. Nor is there any evidence that Dr. Chase knows anything about Palmyra High School, the services that it offers, or what specifically is about Palmyra High School that triggers K.S.'s anxiety. Moreover, the letter is a net opinion at its core and should be excluded from consideration under N.J.R. E. 703.

N.J.R.E. 703 requires that an expert opinion be based on "facts or data . . . perceived by or made known to the expert at or before the hearing." Moreover, pursuant to N.J.R.E. 703, experts may testify about an opinion based on inadmissible facts or date "[i]f of a type reasonably relied upon by experts in the particular field in

forming their opinions or inferences upon the subject." Biunno, Current New Jersey Rules of Evidence, cmt. 3 on N.J.R.E. 703; Rubaneck v. Witco Chemical Corp. 125 N.J. 421 (1991).

The corollary of N.J.R.E. 703 is the net opinion rule. An expert's conclusion is an inadmissible "net opinion" when it is a "bare conclusion unsupported by factual evidence." Creanga v. Jardal, 185 N.J. 345, 360 (2005) (citing Buckelew v. Grossbard, 87 N.J. 512, 524 (1981)). An expert must "give the why and wherefore' of his or her opinion, rather than a mere conclusion." Rosenberg v. Tavorath, 352 N.J. Super. 385, 401 (App. Div. 2002) (citations omitted).

The net opinion rule has been succinctly defined as 'a prohibition against speculative testimony'. Koruba v. American Honda Motor Co., Inc., 396 N.J. Super. 517, 525 (App. Div. 2007) (quoting Grzanka v. Pfeifer, 301 N.J. Super. 563, 580 (App. Div.), certif. denied, 154 N.J. 607 (1997). Under the "net opinion" rule, an opinion lacking foundation and consisting of bare conclusions unsupported by factual evidence is inadmissible. Johnson v. Salem Corp., 97 N.J. 78, 91 (1984). Expert testimony that is "based on mere speculation or possibility [,]" Vuocolo v. Diamond Shamrock Chems. Co., 240 N.J. Super. 289, 299 (App. Div), certif. denied, 122 N.J. 333 (1990), or is unsupported by factual evidence or other data, is an admissible net opinion. Pomerantz Paper v. new Comm. Corp., 186 N.J. 473, 494-95 (2006). Therefore, "experts generally . . . must be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are scientifically reliable." Landrigna v. Celotex Corp., 127 N.J. 404, 417 (1992). An expert's opinion must rely on "a generally accepted, objective standard of practice and 'not merely to standards personal to the witness." Koruba, 396 N.J. Super at 526 (quoting Fernandez v. Baruch, 52 N.J. 127, 131 (1968). If not, "[a]n opinion lacking in foundation is worthless [,]" State v. One Marlin Rifle, 319 N.J. Super. 359, 370 (App. Div. 1999), and fails to assist "the trier of fact to understand the evidence or determine a fact in issue." Landrigan, 127 N.J. at 417.

The January 11, 2024, letter from Dr. Chase is pure speculation, possibility and supposition. It lacks any factual foundation. She does not give the "whys" and the "wherefores." Thus, it must be given no weight.

The fourth Crowe factor, which involves the balancing of interests, and a determination of which party would suffer the greatest harm should emergent relief be granted, this factor also militates in the Board's favor. Petitioner has set forth no irreparable harm that will occur should emergent relief be denied. Not being able to continue in the general educational setting of your choice is not irreparable harm. Despite working with petitioner in good faith and offering a novel therapeutic program that it was under no legal obligation to offer, the District should not be bound to a placement that was meant to be temporary with a goal of returning K.S. to Palmyra. The equities and interests are in favor of the Board, which has been diligently trying to transition K.S.'s placement in a formal school setting where she can likely graduate early, in contrast to petitioner's lack of cooperation. It cannot be overstated that the only impediment to starting K.S. in a school setting is the petitioner — the District has been ready, willing, and able to continue to provide educational services. Accordingly, emergent relief must be denied.

Petitioner's claim that the concept of "stay put" requires placement at FCS is far from well-settled. Rather the claim is contrary to law. As explained above, K.S. is not classified under special education and does not have an IEP. Although K.S. has a 504 plan, the 504 plan does not address placement. Therefore, "stay-put" does not apply to a general education student who does not have an IEP.

LEGAL ANALYSIS

In special education matters, emergent relief shall only be requested for the following issues:

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

> ii. Issues involving disciplinary action, including manifestation determinations and determinations of interim alternate educational settings;
>
> iii. Issues concerning placement pending the outcome of due process proceedings; and
>
> iv. Issues involving graduation or participation in graduation ceremonies.
>
> [N.J.A.C. 6A:14-2.7(r)(1).]

Here, the petitioner seeks emergent relief relating to placement pending the outcome of the underlying due process proceeding.

Under Crowe v. De Gioia, 90 N.J. 126, 132–35 (1982), and N.J.A.C. 1:6A-12.1(e), emergency relief may be granted if the judge determines from the proofs that each of the following elements have been established:

> i. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> ii. The legal right underlying the petitioner's claim is settled;
>
> iii. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> iv. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The moving party must satisfy all four prongs of this standard to establish an entitlement to emergent relief.

As to the first prong of the standard, petitioner must show that irreparable harm will result if emergent relief is not granted. "Irreparable harm" is defined as the type of harm "that cannot be redressed adequately by monetary damages." Crowe, 90 N.J. at 132-33. In addition, the irreparable harm standard contemplates that the harm be both

substantial and immediate. Subcarrier Communications v. Day, 299 N.J. Super. 634, 638 (App. Div. 1977).

Petitioner contends that K.S. will suffer irreparable harm if the requested relief is not granted because her current program is not appropriate to address her unique needs. As a result, petitioner contends that K.S. will regress if her current temporary placement is not maintained. In support of her position, petitioner appears to generally rely on the treating doctor. Petitioner further contends that First Children Services has provided the education necessary for K.S. At oral argument, petitioner, through counsel, further argued that First Children Services has appropriate programming for which K.S. would not be successful if she loses it and should not be put in a position where she is at risk of losing it.

Petitioner additionally argues that the District's refusal to provide evaluations with First Children Services is not in compliance with the educational 504. Finally, petitioner urges that it would be impossible to compensate K.S. for the educational time she "stands to lose" and for the social, emotional, behavioral, and academic impact the deprivation of an appropriate program will continue to have on K.S.

The District argues that it fulfilled its obligations under the temporary placement, and that there is nothing preventing the petitioner continuing her final months of education at the District. Finally, the District argues there is no legal authority for the requested relief.

Here, despite petitioner's contentions, she presented no evidence of regression or of the other harm alleged. In fact, K.S. went to the junior prom and participated in the class trip last year without incident. Although there may have been some event on the class trip but there was never a Harassment, Intimidation, and Bullying (HIB) claim filed. Even further, the opinion proffered by Dr. Chase is essentially without merit because at no time did she ever visit the District nor have conversations with any staff or have knowledge of the programming and placement that the District provides. Essentially, her opinion is without the full facts involved. Accordingly, I **CONCLUDE** that petitioner has failed to demonstrate irreparable harm.

As to the second and third prongs of the standard for emergent relief, the parties are in agreement that petitioner has a settled legal right to a free and appropriate public education (FAPE). However, the question of whether K.S.'s current program and temporary placement provide her with FAPE and, if not, whether she is entitled to permanent placement at First Children Services can only be determined through a full evidentiary plenary hearing.

Petitioner also argues that the District previously agreed to amend K.S.'s 504 and contends that the District's prior agreement indicates its belief that First Children Services was an appropriate placement. These arguments are however unpersuasive as they are unsupported by any legal authority and appear to be in conflict with, or an expansion of, the express terms of the fact that it was a temporary placement. Accordingly, **I CONCLUDE** the petitioner has failed to demonstrate that the legal right of the underlying claim is settled. **I** also **CONCLUDE** that petitioner has failed to demonstrate a reasonable probability of success on the merits.

As to the fourth prong of the standard, petitioner argues that a balancing of the hardships favors K.S. Petitioner contends there is no dispute as to K.S.'s need for the specialized programing and supports currently offered at First Children Services. She argues that K.S. will continue to decline and suffer academically, behaviorally, socially, and emotionally if she were to remain in her current placement. The District argues it will suffer the greater harm because the requested relief will force it to participate in a placement it does not support and only provided on a temporary basis. The fact the District can provide ample supports to support the student.

While the District previously agreed to a placement of K.S. at First Children Services on a temporary basis, it contends that the placement was appropriate and therefore does not support the current possible placement at First Children Services. Thus, contrary to petitioner's arguments there is a dispute as to K.S.'s need for the programing and supports at First Children Services. Having considered the equities and interests of the parties and for the reasons previously set forth herein, **I CONCLUDE** that petitioner has failed to demonstrate that K.S. will suffer greater harm if

the requested emergent relief is not granted pending the outcome of the underlying due process proceeding.

Based on the above, **I FURTHER CONCLUDE** that the petitioner has not satisfied the standard for emergent relief and that her request should therefore be **DENIED**.

ORDER

I hereby **ORDER** that the petitioner's request for emergent relief seeking an Order directing the District to participate in an intake and provide placement at First Children Services pending resolution of the due process proceeding, is **DENIED**.

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. § 1415(f)(1)(B)(i). If the parents 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 Policy and Dispute Resolution.

February 5, 2024
DATE

DEAN J. BUONO, ALJ

Date Received at Agency ______________________

Date Mailed to Parties: ______________________

DJB/cb