State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
EMERGENT RELIEF
OAL DKT. NO. EDS 08033-20
AGENCY DKT.NO. 2021-32025

L.T. ON BEHALF OF R.T.,
Petitioner,
v.
VERONA BORO BOARD OF EDUCATION,
Respondent.

L.T., petitioner, pro se

Gabrielle A. Pettineo, Esq., for respondent (Kenny, Gross, Kovats & Parton, attorneys)

Record Closed: September 8, 2020 Decided: September 9, 2020

BEFORE **SUSANA E. GUERRERO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or around August 27, 2020, petitioner, L.T. on behalf of R.T., filed a Due Process Petition with the New Jersey Department of Education, Office of Special Education Policy and Procedure (OSEPP), under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400 to 1482, seeking an appropriate program for

R.T. in the least restrictive environment, and specifically in the Verona school district. The petitioner also filed a Request for Emergent Relief seeking a determination that the stay-put program and placement pending resolution of the Due Process matter is half-day at Verona High School and half-day at Mount Carmel Guild Academy (Mt. Carmel Guild). The Request for Emergent Relief was forwarded by OSEPP to the Office of Administrative Law (OAL), where it was filed on September 1, 2020. Oral argument for the Request for Emergent Relief was heard by telephone on September 8, 2020.

STATEMENT OF FACTS

R.T. is a fourteen-year-old ninth grader who is classified as eligible for special education and related services under the category of "Emotionally Disturbed." R.T. resides in Verona and pursuant to the Individualized Education Programs (IEPs) developed by the District, he has attended Mt. Carmel Guild for the past several years.

The most recent IEP in effect is dated December 2, 2019, and lists an IEP Start Date of December 2, 2019, and End Date of December 1, 2020[1]. The IEP, therefore, affords R.T. a special education program and related services for most of eighth grade and part of ninth grade. The Placement Category listed on the IEP is "Private Day School for Students with Disabilities," and the school identified in the IEP is Mt. Carmel Guild. Some of the programs and related services provided for in the IEP include: Special Class Behavioral Disabilities, Speech-Language Therapy, Individual Counseling Services, Occupational Therapy Consultation, and Group Counseling Services. Pursuant to the IEP, these programs or services were also to be provided from September 3, 2020 through December 1, 2020 (ninth grade). At the December 2, 2019 Annual Review meeting, the parties discussed R.T.'s progress at Mt. Carmel Guild, and planning for appropriate placement for ninth grade. According to the IEP, L.T. requested re-evaluation to inform transition planning for ninth grade, and she informed

[1] During oral argument, the parties confirmed that the December 2019 IEP was the most recent IEP. The day following oral argument, petitioner sent an email to the OAL stating that she actually did not know if the December IEP was ever in effect. Based on the representations made by the parties in their papers and during oral argument, the fact that R.T. continued in his placement at Mt. Carmel Guild and received services after December 2019, and the fact that petitioner is only challenging the IEP now, eight months after the December Annual Review meeting, I recognize the December 2019 IEP to be the most current IEP agreed on by the parties.

the District that R.T. had applied for the half-day program at Vo-Tech, and that she was interested in exploring other options for high school. According to the IEP, the District proposed that additional information was warranted to develop an IEP and appropriate transition planning for high school, but that "at this time, [R.T.'s] needs can be appropriately and best addressed via placement at the Mount Carmel Guild Academy."

After L.T. learned that R.T. was not accepted into the Vo-Tech program, she and the District discussed having R.T. attend Verona High School on either a part-time or full-time basis. The District was informed that R.T. had made progress at Mt. Carmel Guild and over the summer of 2020, the parties discussed transitioning R.T. to Verona High School, where he would attend classes for half a day, and the other half at Mt. Carmel Guild. At the time of these discussions, the District had planned to return to in-person learning in a hybrid model for September 2020 due to the COVID-19 pandemic. On or around August 26, 2020, however, the respondent decided to place its students on full-remote learning until later in the fall. Consequently, the District informed petitioner that R.T. could not return to the District at the start of the 2020-2021 school year because, with the change to a full-remote schedule, the District would not be able to afford him an appropriate transition into the high school in a manner consistent with that recommended in a psychiatric evaluation report addressing in part R.T.'s transition, and because the new fully-remote schedule conflicted with the schedule of classes offered at Mt. Carmel Guild. The District informed petitioner that for the start of the school year, R.T. should remain at Mt. Carmel Guild full-time.

According to petitioner, Mt. Carmel Guild, which has a high school program, has adopted a hybrid-learning model beginning in September 2020. The school plans to alternate between four days of in-person instruction and four days of remote learning.

Petitioner argues in her application for Emergent Relief that the parties had agreed that in light of R.T.'s progress, his placement for ninth grade would change from a full-day program at Mt. Carmel Guild to half-day at either the Vo-Tech school or Verona High School, and the other half at Mt. Carmel Guild. Over the summer, L.T. and the District worked on a schedule for R.T. wherein he would take Algebra, English, History and Study Hall at Verona High School at the start of the 2020-2021 school year,

and Physical Education, Financial Literacy, and Social Studies, and receive Speech and Counseling services, at Mt. Carmel Guild. Petitioner maintains that a full-time program at Mt. Carmel Guild is no longer appropriate and was never planned for R.T. Petitioner argues that the "stay put" is the plan of attending half-day at Verona High School and half-day at Mt. Carmel Guild. In the alternative, petitioner maintains that transitioning R.T. to full-time is more appropriate than reverting him back full-time at Mt. Carmel Guild. Petitioner also argues that since R.T. was never in Mt. Carmel Guild's high school program, just the middle school program, it is not appropriate for him to "stay put" in the new (high school) program.

The District argues that petitioner's application must be denied because petitioner fails to meet the criteria for Emergent Relief set forth in N.J.A.C. 6A:14-2.7(s)(1), and that petitioner is improperly attempting to change R.T.'s program without a plenary hearing. The District also asserts that while the petitioner is attempting to argue that R.T.'s "stay put" placement is half-day at Verona High School and half-day at Mt. Carmel Guild, the "stay put" provision does not apply here because the District is not attempting to change R.T.'s placement, but arguing to maintain the current placement. Also, despite petitioner's contention that there is no current IEP for the 2020-2021 school year as the December 2019 IEP does not address R.T.'s placement for the start of ninth grade, the District maintains that R.T.'s high school program (which does not mention Verona High School) is set forth therein.

While petitioner raises several issues concerning R.T.'s appropriate placement and program, the Request for Emergent Relief is limited to determining R.T.'s placement pending resolution of the underlying due process petition.

LEGAL ANALYSIS

When a Request for Emergent Relief seeks a "stay-put," typically 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. § 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. § 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). 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"). 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.

Here, petitioner asserts that R.T.'s "stay put" is a half-day program at Verona High School and half-day at Mt. Carmel Guild. While the parties discussed transitioning R.T. to Verona High School, and even started to develop a schedule for him, these discussions did not result in a change to R.T.'s IEP. R.T.'s most current educational placement is Mt. Carmel Guild, where he attended school full-time in the 2019-2020 school year, consistent with the December 2019 IEP which is still in effect. The current IEP does not include placement at the District school. Consistent with the stay put provision, R.T. should remain in his then-current educational placement during the pendency of the due process proceeding—Mt. Carmel Guild. Consequently, I **CONCLUDE** that R.T.'s "stay put" placement, pending resolution of the due process matter, is Mt. Carmel Guild. As petitioner is essentially seeking a change in placement from a full-day program at Mt. Carmel Guild, as provided in the most current IEP, a legal

analysis of petitioner's application for emergent relief to change R.T.'s placement to include Verona High School is addressed below.

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;
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> ii. The legal right underlying the petitioner's claim is settled;
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> 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.

With regard to the first required prong in resolving an emergent relief request, "irreparable harm" is defined as the type of harm "that cannot be redressed adequately by monetary damages." Crowe v. DeGoia, 90 N.J. 126, 132-334 (1982). The irreparable harm standard contemplates that the harm be both substantial and immediate. Subcarrier Communications v. Day, 229 N.J. Super. 634, 638 (App. Div. 1977). However, pecuniary damages may sometimes be inadequate because of the nature of the injury or the right affected. Crowe, 90 N.J. at 133. For example, in Crowe the Court determined neither an unwarranted eviction nor reduction to poverty could be compensated adequately by monetary damages awarded after a distant hearing. Ibid.

In the present matter, petitioner has failed to establish irreparable harm if R.T. does not attend Verona High School for at least half of the school day beginning in September 2020. R.T.'s IEP provides for placement at Mt. Carmel Guild at the start of the 2020-2021 school year. While he will no longer be attending their middle school program, Mt. Carmel Guild has a high school program that would allow R.T. to continue to receive the programs, services and accommodations provided for in his IEP. Mt. Carmel Guild is the only school identified as a placement in R.T.'s IEP, and despite petitioner's contention, R.T.'s transition from middle to high school at Mt. Carmel Guild does not constitute an inappropriate change in program by

the District, nor is it inconsistent with his IEP. While petitioner is concerned that the curriculum at Mt. Carmel Guild is not as rigorous as that available at Verona High School, and that R.T. will fall behind his peers, this does not constitute irreparable harm. If petitioner succeeds in the underlying due process petition, and demonstrates that R.T. did in fact fall behind, R.T. could be placed at Verona High School and the appropriate compensatory education may be awarded. Accordingly, I **CONCLUDE** that petitioner has not sufficiently demonstrated that R.T. will suffer irreparable harm if emergent relief is not granted.

Moreover, I also **CONCLUDE** that the legal right underlying petitioner's claim is not well-settled. The issues here include the appropriateness of the programs, including consideration of the least restrictive environment, and the details of a transition to meet R.T.'s needs. This cannot be determined without a plenary hearing, where testimony, including expert testimony, and the relevant documentary evidence is presented and considered.

As petitioner is unable to satisfy the first two prongs of the Crowe test, further analysis of the other criteria for emergent relief is not required. Based upon my review of the record before me, as well as the arguments made, I **CONCLUDE** that petitioner has not satisfied all four criteria required for emergent relief. As petitioner has failed to satisfy all four prongs of the Crowe test for emergent relief, and for the foregoing reasons, it is hereby **ORDERED** that petitioner's request for emergent relief 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.A. § 1415 (f)(1)(B)(i). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education Policy and Dispute Resolution.

September 9, 2020 _____

DATE

SUSANA E. GUERRERO, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

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