State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION DENYING EMERGENT RELIEF
OAL DKT. NO. EDS 10895-19
AGENCY DKT. NO. 2020-30504

V.T. AND D.T. ON BEHALF OF Z.T.,
Petitioners,
v.
CHERRY HILL TOWNSHIP BOARD OF EDUCATION, CAMDEN COUNTY,
Respondent.

V.T. and **D.T.,** petitioners, pro se

Robin S. Ballard, Esq., for respondent (Schenck Price Smith & King, LLP, attorneys)

Record Closed: August 16, 2019 Decided: August 19, 2019

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

STATEMENT OF THE CASE

By a request for emergent relief, petitioners, V.T. and D.T. on behalf of Z.T., seek an out-of-district placement for Z.T. at either the Lewis School, Princeton, New Jersey, or the Centreville Layton School, Wilmington, Delaware, pending the outcome of due process proceedings. Respondent Cherry Hill Township Board of Education, Camden County (Cherry

Hill or the District) opposes this request on the grounds that petitioners have not satisfied the requirements for obtaining emergent relief.

PROCEDURAL HISTORY

On August 2, 2019, petitioners filed a complaint for due process under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 to 1482, with the Office of Special Education Programs. On August 7, 2019, petitioners filed a request for emergent relief with the Office of Special Education Policy and Dispute Resolution. This matter was transmitted to the Office of Administrative Law (OAL) on August 9, 2019, for an emergent relief hearing. Oral argument on emergent relief was held on August 16, 2019, and the record closed.

FACTUAL DISCUSSION AND FINDINGS

The following facts are not in dispute and form the basis for the below decision. Accordingly, I **FIND** the following as **FACTS:**

Z.T. is a fourteen-year--old male who is eligible for special education and related services in the Other Health Impaired[1] classification category. Z.T. was initially found eligible for special education and related services in 2011, at the end of kindergarten, and has since continually received such services.

During the 2018-2019 school year, Z.T. attended eighth grade at Rosa International Middle School in the District, where he was placed in general education classes for eighty percent of the school day with special education support and related services, pursuant to an Individual Education Program (IEP) adopted on August 9, 2018. Despite these supports, Z.T. struggled in eighth grade.

[1] V.T., Z.T.'s mother, describes him as having high cognitive ability with a language-based learning disability, slow processing speed, weak working memory, severe attention deficit hyperactivity disorder (ADHD), and extremely low self-esteem with built-up resistance. Certification of Pet'r V.T. in Support of Request for Mediation/Due Process Hearing (August 2, 2019), at 2. A similar diagnosis is found in the July 8, 2019, IEP prepared by respondent. Ltr. Br. of Resp't in Opposition to Pet'rs' Request for Emergent Relief (August 14, 2019), Ex. 1, at 2.

In January and March 2019, petitioners met with Z.T.'s child study team (CST). As a result of the January 31, 2019, IEP meeting, the District proposed that Z.T.'s IEP be revised once additional assessments in the area of written expression and assistive technology were completed. Ltr. Br. of Resp't, Ex. 3, at 17. Petitioners state that at this meeting, the CST "recommended an out-of-district placement for children with language-based learning disabilities and strong cognitive abilities." Cert. of Pet'r V.T., at 1. According to petitioners, to address Z.T.'s then-immediate needs, including frustration, withdrawal and signs of depression, they agreed with the CST to an interim plan by which the demands on Z.T. would be dramatically reduced, including with respect to homework assignments, in-class performance, and grading. In the meantime, an appropriate out-of-district placement would be explored with the intention of moving Z.T. by the fourth marking period of the 2018-19 school year (approx. April 2019). Petitioners stated that they "agreed because this plan was predicated on the fact that [Z.T.] would be placed in an out-of-district program as early as the fourth marking period . . . and we were under the impression that [he] was going to have at least [the] fourth marking period and the summer to cover the skills and material he would be missing due to this plan." Cert. of Pet'r V.T., at 2-3. The January 31, 2019, IEP does not reflect this interim plan.

As a result of the March 7, 2019, IEP meeting, the IEP team determined that Z.T. would continue to be placed with general education students for 80 percent or more of the school day and:

> [A]n educational placement which provides extensive, specialized, individualized literacy instruction (related to writing), along with supports to address social skill weaknesses and ongoing challenges with maintaining on task behavior and productivity is recommended. An out of district placement will be pursued at this time. A psychiatric assessment is recommended to help provide additional information regarding behaviors related to perseveration present with writing and social skills.
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> [Ltr. Br. of Resp't, Ex. 4, at 17, 19.]

Petitioners stated that the process of reviewing potential out-of-district placements was delayed because the District-approved psychiatrist was unable to promptly see Z.T.

for the prerequisite assessment. Four potential out-of-district placements within a fifty-mile radius of the District were considered; one school had no openings for new students and the other three were deemed unsatisfactory by the CST and petitioners. At this point, petitioners claim that the District directed the CST to "develop an IEP with an in-district placement." Cert. of Pet'r V.T., at 3.

On July 8, 2019, an Annual Review IEP meeting was held for Z.T.; petitioners attended. As a result of this meeting, the District "determined that a more supported in-district program could appropriately address Z.T.'s educational needs." Lt. Br. of Resp't, at 2. Under the IEP issued after this meeting (the July 2019 IEP), Z.T. would attend high school classes in the District, but in the presence of general education students for less than 40 percent of the school day.[2] Id., Ex. 1, at 16. The July 2019 IEP contains no reference to out-of-district placement. On or about July 8, 2019, respondent transmitted the July 2019 IEP to petitioners. Petitioners objected to the July 2019 IEP, so notified the District, including at a meeting on July 30, 2019, and then filed a petition for due process.[3]

The parties are in complete disagreement whether the District intends to place Z.T. in an appropriate educational setting, and whether the July 2019 IEP offers Z.T. a free and appropriate public education (FAPE) in the least restrictive environment (LRE). As stated above, respondent claims that the CST "determined that a more supported in-district program could appropriately address Z.T.'s educational needs and was therefore, the [LRE] for him." Id., at 2.

Petitioners contend that the CST concluded by January 2019 that the District had "tried everything and would not be able to accommodate [Z.T.'s] needs through an in-district placement and that he would be better served by a program that works specifically with students with language-based learning disabilities and strong cognitive abilities[.]" Cert. of Pet'r V.T., at 2. Petitioners argue that the District approved an out-of-district placement

[2] At hearing, counsel for respondent clarified that the July 2019 IEP proposes for Z.T. to be placed in a general education class for between 40 and 80 percent of the school day (contrary to what is written in the IEP).

[3] At hearing, counsel for respondent stated that petitioners' petition was not timely filed but presented no evidence or testimony to support this claim.

recommended by the CST, only to renege once it became clear that a school on the State-approved list within fifty miles of the District was not available. V.T. stated that she discussed the Lewis School, Princeton, New Jersey, and the Centreville Layton School, Wilmington, Delaware, with Z.T.'s case manager but conceded that she alone met with staff at those schools. Petitioners contend that both schools would be appropriate for Z.T. but respondent refuses to consider either as they are not on the State-approved list. Ibid.

Petitioners further contend that Z.T. does not have a current placement or a valid IEP and, therefore, they cannot invoke the "stay-put" provision under the IDEA. Respondent disagrees, stating that at all relevant times, Z.T. has attended District schools and although the CST agreed to pursue an out-of-district placement for Z.T., none was identified that could meet his needs and no change to his current placement was proposed or agreed upon.

Despite the apparent attempts by the CST to address Z.T.'s lack of academic progress and other social issues, neither the January nor March 2019 IEPs changed the placement adopted in August 2018, that Z.T. would be placed in-district in a general education class for more than 80 percent of the day. Petitioners are understandably frustrated by what appears to be inconsistent messaging from the CST.[4] Everyone allowed Z.T. to essentially tread water academically for most of the second half of the school year; it is hard to imagine that petitioners agreed without good reason, such as that their son would soon transition out-of-district. Even so, I **FIND** that the placement described in the March 2019 IEP (which confirms the August 2018 placement) is the last agreed-upon placement for the purposes of stay-put.

LEGAL ANALYSIS AND CONCLUSIONS

N.J.A.C. 1:6A-12.1(a) provides that the affected parent may apply in writing for emergent relief. An emergent relief application is required to set forth the specific relief sought and the specific circumstances that the applicant contends justify the relief sought. Each application is required to be supported by an affidavit prepared by an affiant with personal knowledge of the facts contained therein. Emergent relief shall only be requested for specific issues, including a

[4] As was noted during the emergent hearing, none of the members of the CST gave testimony and/or signed affidavits supporting petitioners' version of the IEP meetings or of communications following the meetings.

break in the delivery of services and/or placement pending the outcome of due process proceedings. N.J.A.C. 6A:14-2.7(r). Here, petitioners have initiated due process proceedings to challenge Z.T.'s placement for the 2019-20 school year and have requested emergent relief to obtain a specific out-of-district placement pending the outcome of those proceedings. Therefore, I **CONCLUDE** that petitioners have established that the issue in this matter concerns placement of Z.T. pending the outcome of due process proceedings.

The standards for emergent relief are set forth in Crowe v. DeGoia, 90 N.J. 126 (1982), and are codified at N.J.A.C. 6A:3-1.6. The petitioner bears the burden of proving:

> 1. that the party seeking emergent relief will suffer irreparable harm if the requested relief is not granted;
>
> 2. the existence of a settled legal right underlying the petitioner's claim;
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> 3. that the party seeking emergent relief has a likelihood of prevailing on the merits of the underlying claim; and
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> 4. when the equities and the interests of the parties are balanced, the party seeking emergent relief will suffer greater harm than the respondent.
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> [Crowe, 90 N.J. at 132-34.]

Irreparable Harm

To obtain emergent relief, petitioners must demonstrate more than a risk of irreparable harm to Z.T. Petitioners must make a "clear showing of immediate irreparable injury," or a "presently existing actual threat; (an injunction) may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by common law." Cont'l. Group, Inc. v. Amoco Chems. Corp., 614 F. 2d 351, 359 (D.N.J. 1980).

Petitioners contend that irreparable harm is established because Z.T. has already lost much of the last half of the 2018-19 school year waiting to be reassigned to an out-of-district

school; he has not finished eighth grade and needs instruction time back,[5] he has continued to regress, and will not be able to make up the additional time that he will lose during the pendency of the due process proceedings.

The harm that petitioners describe is that which Z.T. already suffered in the latter half of eighth grade while he waited for a new placement and the harm that Z.T. may suffer should he be forced to begin high school in the District. The CST has developed a new IEP for Z.T., which respondent claims includes special education services and supports to appropriately address Z.T.'s educational needs in the LRE. Should petitioners prevail in the due process proceedings and prove that the District IEP does not provide FAPE in the LRE, appropriate relief, including compensatory education and a change in placement, will be available.

In light of the above, I **CONCLUDE** that the petitioners have not met the burden of establishing that Z.T. will experience irreparable harm.

The Legal Right Is Settled

The second consideration is whether the legal right underlying petitioners' claim is settled. N.J.A.C. 6A:3-1.6(b)(2). Even though petitioners claim that Z.T. has no current placement and no current IEP, he in fact has both. The stay-put provision in the federal Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1515(j), and its counterpart in the New Jersey Administrative Code, N.J.A.C. 6A:14-2.7(u), provide that no change shall be made to a student's educational placement "pending the outcome of a due process hearing," and function as an automatic preliminary injunction. Drinker v. Colonial Sch. Dist., 78 F.2d 859, 864 (3d Cir. 1996).

The District is obligated to educate Z.T. in the LRE with a program that is individually tailored to his unique educational needs. Endrew F. v. Douglas County School Dist. RE-1, 137 S.Ct. 968, 999 (2017). There is no well-defined legal right to obtain an out-of-district placement through an emergent application when a district program is available and asserted

[5] In making the claim of irreparable harm, petitioners essentially allege that respondent has not provided FAPE to Z.T. during the 2018-19 school year, and that Z.T. is owed compensatory education. As was discussed at the emergent hearing, these issues may be explored during the due process proceedings.

as providing a FAPE. The last agreed-upon placement for Z.T. is that found in the March 2019 IEP, in the District schools. To change this placement to one selected by the parents, on an emergent basis pending a full hearing on the adequacy of the July 2019 IEP to meet Z.T.'s educational needs, runs counter to the purpose of stay-put. I **CONCLUDE** that petitioners do not have the legal right to change Z.T.'s placement on an emergent basis.

Likelihood of Prevailing on the Merits

Petitioners claim that the July 2019 IEP fails to provide Z.T. with FAPE, and he must therefore be placed in an appropriate out-of-district setting, even if that school is not on the State-approved list because:

1. The IEP lacks clarity as to the details of curriculum and implementation, and the District conceded the same.

2. Each service and accommodation will be delivered separately and in isolation of the others; no integration and/or reinforcement of various concepts/skills.

3. The IEP lacks consistency.

4. The IEP cannot be effectively implemented in a large high school setting.

5. Tools critical to create the learning environment appropriate for Z.T. are not available in this setting.

6. The IEP does not address Z.T.'s most significant educational issue, his inability to write above the second-grade level.

[Cert. of Pet'r V.T., at 3-4.]

The local district satisfies the requirement that a child with disabilities receive FAPE by providing personalized instruction with sufficient support services to permit that child to benefit educationally from instruction. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 203, 102 S. Ct. 3034, 3049, 73 L. Ed. 2d 690, 710 (1982). The IDEA does not require that the District maximize Z.T.'s potential or provide him the best education

possible. Rather, the IDEA requires a school district to provide a basic floor of opportunity. Carlisle Area Sch. v. Scott P., 62 F.3d 520, 533-34 (3rd Cir. 1995).

The law describes a continuum of placement options, ranging from mainstreaming in a regular public school as least restrictive to enrollment in a non-approved residential private school as most restrictive. 34 C.F.R. § 300.115 (2012); N.J.A.C. 6A:14-4.3. Further, New Jersey law requires that "students with disabilities shall be educated in the [LRE]." N.J.A.C. 6A:14-4.2(a). Significantly, the July 2019 IEP does represent LRE.

As described above, there are material facts in dispute and the petitioners have yet to submit educational expert support for an out-of-district placement. Prior to a full hearing, petitioners have not yet demonstrated a likelihood of prevailing on the merits of their claim.

Therefore, I **CONCLUDE** petitioners do not meet the third prong of the emergent relief standard.

The Petitioner Will Suffer Greater Harm Than the Respondent

The final prong of the above test is whether the equities and interests of the parties weigh in favor of granting the requested relief to Z.T. Petitioners argue that Z.T. will suffer greater harm if emergent relief is not granted, such harm being his unwillingness to go to school, the lack of stability to which Z.T. would be exposed as the July 2019 IEP is implemented, and continuing ridicule from classmates. At hearing, they questioned respondent's concern that a decision in Z.T.'s favor would "open the floodgates" of parents looking to send their children to private schools on the District's dime. "Most parents don't want their children in special ed.," said V.T.

Though V.T.'s point is well taken, so too is respondent's argument that granting emergent relief here would "disrupt the required and well-established practice that program and placement decisions must be made by the IEP team," not unilaterally by parents. Ltr. Br. of Resp't, at 6. Respondent has met its obligation to develop a new IEP that it contends addresses Z.T.'s unique disabilities in the LRE. It appears unreasonable to expect

respondent to pay for an out-of-district placement pending resolution of the underlying dispute.

I **CONCLUDE** that the District would suffer greater harm if the requested relief was granted. Petitioners have not satisfied the four requirements for emergent relief.

ORDER

I **CONCLUDE** that petitioners' request for emergent relief does not satisfy the applicable requirements. For the reasons stated above, I hereby **ORDER** that petitioners' application for emergent relief for Z.T. to attend either the Lewis School in Princeton, New Jersey or the Centreville Layton School in Wilmington, Delaware, for the 2019-20 school year while the due process proceeding is pending is hereby **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 Programs.

August 19, 2019
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency:

Date Mailed to Parties:

TMC/nd//mph