State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
FOR EMERGENT RELIEF
OAL DKT. NO. EDS 08980-22
AGENCY DKT. NO. 2023-35037

L.J. ON BEHALF OF Z.W.,
Petitioner,
v.
NEWARK CITY BOARD OF EDUCATION,
Respondent.

L.J., petitioner, appearing pro se

Sabrina Styza, Esq., for respondent, Newark Public Schools

BEFORE **NANCI G. STOKES**, ALJ:

Record closed: October 21, 2022 Decided: October 24, 2022

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On October 6, 2022, petitioner L.J., filed a request for emergent relief with the Office of Special Education (OSE) seeking an order to return her minor child, Z.W., to high school after being suspended for a fight, having been out of school for fourteen days.

In her petition, L.J. highlights that Newark failed to conduct a required manifestation meeting and that Z.W. has not received services since the fight on September 16, 2022. L.J. also desires an IEP meeting to discuss Z.W.'s return to a regular program high school.

Newark opposes this application asserting that L.J. fails to meet the criteria for emergent relief under N.J.A.C. 1:6A-12.1(e).

On October 7, 2022, OSE transmitted the emergent application to the Office of Administrative Law (OAL) for a determination as a contested matter. Newark submitted opposition to the request for emergent relief on October 17, 2022, and I conducted oral argument on October 21, 2022, via Zoom due to continuing COVID-19 restrictions.[1]

FINDINGS OF FACT

Based on the documentary evidence presented by the parties in support of and in opposition to the motion, and based on the arguments presented during oral argument and my assessment of L.J.'s credibility, I **FIND** the following as **FACT** for purposes of this application only:

Z.W. resides in the Newark School District with his mother, L.J. Z.W. is eligible to receive special education and related services with the classification of other health impaired with a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD). Z.W. attended several Newark high schools before attending Central High School ("Central") this school year and is in twelfth grade. The last placement the parties agreed upon is Central.

Specifically, Z.W. was enrolled at Weequahic High School from September 7, 2021, to September 15, 2022. Z.W. transferred to Central on September 15, 2022. Previously, Newark enrolled Z.W. at Malcolm X. Shabazz High School and North Star Academy. Although L.J. does not dispute problems at Z.W.'s high schools before

[1] The OAL scheduled oral argument on the emergent application for October 18, 2022. The parties agreed to attempt a resolution and reschedule the argument for October 21, 2022.

Central, L.J. disputes Newark's characterization of those events and whether Z.W. could return to those schools. Currently, Z.W. has insufficient credits to earn his diploma at the end of this school year.

On September 16, 2022, Z.W. was involved in a fight with another student, and the Incident Report identifies that a "minor injury" occurred. Newark suspended both students from September 19, 2022, until September 22, 2022, or four days. Central's Principal, Terry Mitchell, issued a Notice of Suspension dated September 16, 2022, noting an attack on students as its basis. See, Mitchell Certification, Exhibit B.[2] After the fight, Mitchell spoke to Z.W., who did not dispute the incident captured by video. Mitchell contacted L.J. immediately after the fight to obtain her consent to release Z.W. from school, which she gave. Mitchell also requested that L.J. come to school to discuss the incident, but L.J. was out of town.

Yet, Newark did not permit Z.W. back to Central after his suspension. Instead, on September 20, 2022, Mitchell called L.J. to discuss Z.W.'s need for additional intervention to address his conduct. Mitchell offered alternative high school environments, including Newark Night School and Lead Academy, a charter school in the District, and Leaders for Life, a private placement. L.J. did not agree with those alternatives and believes night school for a student with Z.W.'s disability is inappropriate, leaving him at home alone during the day. During that phone conversation, Mitchell advised L.J. that Z.W. would not be able to return to Central because she believed Z.W. needed additional supports, and his misconduct was unacceptable.

On September 27, 2022, Mitchell again called L.J. to advise her that Z.W. would be enrolled at Newark Night School beginning on October 3, 2022. Newark attempted to provide Z.W. with a Chromebook to facilitate that placement, but L.J. refused.

L.J. filed her petition and request for emergent relief because she believes Central did not follow the correct procedures, and her son was not allowed to return to

[2] While Newark supplies a copy of the letter, the attachments referenced, including an appeal form, are absent from the record.

school, leaving him without services under his IEP. Specifically, Central removed Z.W. without a manifestation meeting.

After L.J. filed her petition and emergent relief application, Central advised L.J. of a meeting on October 14, 2022. L.J. then accepted the Chromebook, declaring that her acceptance was only for attendance at the meeting.

Central conducted a manifestation meeting on October 14, 2022. Newark's director of special education, supervisors of special education from Central High School and Newark Evening High School, the case manager, and L.J. attended the meeting. After discussions of Z.W.'s disruptive conduct leading to the suspension, his educational status, his need for academic and behavioral supports, his IEP, and his educational record, the team concluded that Z.W.'s acts were not a manifestation of his disability. At this meeting, L.J. did not agree to placement outside a regular high school program or even home instruction. Newark maintains that holding a manifestation meeting moots L.J.'s request for one.

Despite efforts to do so, an IEP meeting to discuss necessary educational services and an alternate placement did not occur after L.J. filed with OSE. L.J. expresses concern that Central's Child Study Team does not know her son after only two days in school and urges that his prior case manager be involved. Newark facilitated a conversation between Z.W.'s case manager at Central and his last case manager.

Still, L.J.'s refusal to meet or consider alternative placements has frustrated Newark's attempts to move forward from the suspension and provide Z.W. with educational services under his IEP.

LEGAL ANALYSIS AND CONCLUSIONS

This case arises under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 to 1482. One purpose of the Act is to ensure that all children with disabilities have available to them a "free appropriate public education that emphasizes special

education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). This "Free Appropriate Public Education" is known as FAPE.

In New Jersey, the State Board of Education has promulgated rules following the standards outlined in the Act. N.J.A.C. 6A:14-1.1(b)(1); N.J.A.C. 6A:14-1.1 to -10.2.

Under those rules, a parent or adult student may request a due process hearing before an administrative law judge (ALJ) to resolve disputes "regarding identification, evaluation, reevaluation, classification, educational placement, the provision of a free, appropriate public education, or disciplinary action." N.J.A.C. 6A:14-2.6(a); N.J.A.C. 6A:14-2.7(a).

Further, under N.J.A.C. 6A:14-2.7(r), a party may request emergent relief 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.

Undeniably, the case involves Newark's disciplinary action and a break in the delivery of services.

Under N.J.A.C. 1:6A-12.1(e), an ALJ may order emergency relief pending decision in the case, if the judge determines from the proofs that:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying the petitioner's claim is settled;

> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
> 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.
>
> [Ibid.]

To be successful, an applicant must satisfy all four requirements. Crowe v. DiGioia, 90 N.J. 26 (1982).

However, a school district can make no changes to the student's program or placement pending a due process hearing. N.J.A.C. 6A:14-2.6(d)(10); N.J.A.C. 6A:14-2.7(u); see also, 20 U.S.C. § 1415(j). Indeed, 20 U.S.C. § 1415(j) sets forth one of the most significant safeguards in the Act, often called the "stay-put" provision. Id. This section provides that a child is to remain in their "then-current educational placement" during the "pendency of any proceedings conducted pursuant to [IDEA]." Id.; N.J.A.C. 6A:14-2.6(d)(10); N.J.A.C. 6A:14-2.7(u). The purpose of “stay put” is to maintain the status quo for the child while the dispute over the placement or program remains unresolved. Ringwood Bd. of Educ. v. K.H.J., 469 F.Supp.2d 267, 270–71. (D.N.J. 2006.)

Notably, the "stay-put" provision "acts as an automatic preliminary injunction" and "protects the status quo of a child's educational placement while a parent challenges a proposed change to, or elimination of, services." Drinker by Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 (3d Cir. 1996) (discussing 20 U.S.C. § 1415(j), the federal analog to New Jersey's stay-put provision N.J.A.C 6A:14-2.7(u)). C.H. v. Cape Henlopen Sch. Dist., 606 F.3d 59, 71-72 (3d Cir. 2010). In essence, the petitioner need not demonstrate that she meets the requirements of Crowe v. DiGioia, 90 N.J. 26 (1982), if the stay-put is appropriately invoked. Drinker, 78 F.3d at 864.

Yet, exceptions exist to stay-put. First, although “the child shall remain in the then-current educational placement of the child,” the parties can agree to a different placement. 20 U.S.C.S. § 1415(j). Second, stay-put considerations yield to the intra-state school district transfer provisions of N.J.A.C. 6A-14-4.1(g), requiring only

"comparable" services to the prior program. See, J.F. v Byram Twp. Bd. of Educ., 629 F. App'x 235 (3rd Cir. 2015). Third, relevant here, 20 U.S.C. § 1415(k) allows a school to suspend, expel, or otherwise alter the educational placement of children with disabilities. Indeed, 20 U.S.C. § 1415(k) and N.J.A.C. 6A:14-2.8 set forth the procedures for disciplining students with disabilities.

Notably, a student with disabilities suspended for ten days or fewer consecutive or cumulative school days is subject to the same district board of education procedures as nondisabled students. 20 U.S.C. § 1415(k)(1)(B). At the time of removal, the principal shall forward written notification and a description of the reasons for such action to the case manager and the student's parents. N.J.A.C. 6A:14-2.8.

Under N.J.A.C. 6A:14-2.8(c)(1), if a school district suspends a student for more than ten consecutive school days, the suspension is removal, and the removal is a change in placement. If Central suspended Z.W. for only four days, as argued, the September 16, 2022, letter to L.J. would show Newark complied with this requirement. However, because Newark did not allow Z.W. back to Central, the suspension continued well beyond ten days. Indeed, I **CONCLUDE** that Newark unilaterally changed Z.W.'s placement without L.J.'s consent by removing Z.W. from Central.

When there is a change in placement caused by a suspension greater than ten consecutive days, the district must conduct a manifestation determination by the tenth day of removal, to determine if the "conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or . . . if the conduct in question was the direct result of the district's failure to implement the IEP." 20 U.S.C. § 1415(k)(1)(E)(i).

If the conduct is determined to be manifestation of the student's disability, the district cannot suspend and must return the student to his or her placement, unless the parent and district agree to change the student's placement. 20 U.S.C.A. § 1415(k)(1)(F)(iii).

Here, there is no dispute that the manifestation meeting did not occur within ten days. The October 14, 2022, meeting led to Central's conclusion that Z.W.'s actions on September 16, 2022, were not a manifestation of his disability. That determination occurred after L.J. filed her petition and nearly a month after removing Z.W. from Central. Newark presents no written decision concerning the manifestation meeting. See, 20 U.S.C.A. § 1415(k)(1)(H).

Even if the conduct is not a manifestation of the student's disability, discipline procedures applicable to children without disabilities still apply. 20 § U.S.C. 1415(k)(1)(C). Further, although suspended, the student must continue to receive the educational services enabling the student to progress toward meeting the goals set out in the student's IEP. 20 U.S.C. § 1415(k)(D)(i). Given that the removal from school was more than ten days, N.J.A.C. 6A:16-7.3, addressing long-term suspensions, would apply, including an explanation of the student's due process rights under N.J.A.C. 6A:16-7.1(c)3. Central's September 16, 2022, suspension letter does not apprise L.J. of her rights concerning long-term suspensions, and Central provided no additional notice. While L.J. may not have challenged a four-day suspension concerning the fight she acknowledges, she disputes that her son was appropriately kept out of school for an extended period because of that fight.

Notwithstanding, 20 § U.S.C. 1415(k)(1)(G) permits school districts to remove a disabled student from their educational placement to an interim alternate education setting for up to forty-five days in specific circumstances, "without regard to whether the behavior is determined to be a manifestation of the child's disability," including cases "where a child . . . has inflicted serious bodily injury" while at school. Id.; See also, 20 § U.S.C. 1415(k)(3)(b)(ii)(II) (allowing such change if the hearing officer concludes "that maintaining the current placement" of the child is "substantially likely to result in injury to the child or others").

In such a situation, under N.J.A.C. 6A:14-2.7(n), a district must request an "expedited hearing" if it seeks "to remove" a student with disabilities from school because the district believes that "it is dangerous for the student to be in the current placement," but "cannot agree to an appropriate placement" with the parent. Id. 20 §

U.S.C. 1415(k)(3). L.J. did not accept an alternate placement, but Newark did not file an expedited due process petition. Failing to file an expedited application before removal can be considered a denial of FAPE. See, Christine C. v. Hope Twp. Bd. of Educ., 2021 U.S. Dist. LEXIS 20132. The Christine C. Court relied upon the holding in Honing v Doe, 484 U.S. 305, 327, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988), addressing whether school districts can change the placement of a student with a disability contrary to "stay put" protections when it feels that student is "dangerous":

> Congress attacked [ ] exclusionary practices [particularly regarding students with emotional disabilities, 82 percent of whom had unmet needs prior to the IDEA] . . . . and barred schools, through the stay-put provision, from changing [ ] placement over the parent's objection until all review proceedings were completed . . . . and allowed for interim placements [only] where parents and school officials are able to agree on one . . . . Conspicuously absent . . . is any emergency exception for dangerous students.
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> [Ibid.]

Notably, Honig highlighted the Department of Education's observation that, "[w]hile the [child's] placement may not be changed . . ., this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others." 484 U.S. at 325. Indeed, the 2004 amendments to the IDEA after Honig, including 20 § U.S.C. 1415(k), identify those mechanisms available to school districts. See also, N.J.A.C. 6A:14-2.8, -2.7.

As such, I **CONCLUDE** that Newark failed to follow procedures required under 20 U.S.C. § 1415(k), N.J.A.C. 6A:14-2.8, and -2.7, to remove Z.W. from Central for the incident on September 16, 2022. Therefore, I **CONCLUDE** Newark must return Z.W. to Central, his last agreed-upon placement. In other words, Newark did not take the required steps for Z.W.'s "stay put" at Central to yield. Indeed, I base this determination on violations of the IDEA and stay-put protections rather than a showing of emergent relief factors. Drinker, 78 F.3d at 864. See, K.R. & J.W. obo L.W. v. Franklin Twp. BOE and Y.A.L.E. School Southeast, OAL Dkt. No., EDS 1346-22, Final Decision on Emergent Relief (February 25, 2022).

I further **CONCLUDE** that the parties must promptly conduct an IEP meeting to discuss appropriate placement and whether Z.W. needs additional supports and services. Still, the IDEA does not require that a school district place a student at a specific school chosen by his or her parents. W. Windsor-Plainsboro Reg'l Sch. Dist. Bd. of Educ. v. J.S., 2005 U.S. Dist. LEXIS 25855 (Oct. 31, 2005).

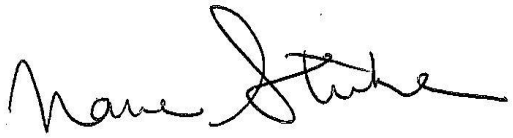
This decision grants the relief requested by L.J., and nothing remains in this action, even though the parties are still in disagreement. As noted, a manifestation meeting occurred, and I am directing the parties to conduct the requested IEP meeting. Regardless, Newark can follow the correct due process procedures concerning its manifestation determination, including notification, the now long-term suspension, and an expedited application for due process. Should L.J. dispute those actions, determinations, or a proposed IEP, she can challenge the outcome. Yet, from the record, those are future events. I am mindful that Newark attempted to address an appropriate placement given Z.W.'s disruptive behavior and problems at other area high schools. In other words, Newark commendably shifted its focus from discipline to addressing supports that it believed Z.W. needs for success and graduation, given the problems occurring in multiple schools. Notably, Newark tried to address L.J.'s concerns by ensuring Z.W.'s current case manager had an opportunity to speak with his prior case manager to foster a better understanding of Z.W. given his short time at Central. L.J. has been unwilling to participate, given her belief that Central did not act appropriately or have her son's interests in mind. Ultimately, however, the parties must cooperate and rebuild trust for Z.W.'s sake.

ORDER

Based on the foregoing, I **ORDER** that Newark return Z.W. to Central.

I further **ORDER** that Central convene an IEP team meeting with L.J. within one week of this decision and that Newark immediately share information with L.J. concerning the alternative placements it recommends.

This decision on application for emergency relief resolves all the issues raised in the due process complaint; therefore, no further proceedings in this matter are necessary. This decision on application for emergency relief is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. § 1415(i)(2). 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.



October 24, 2022

DATE

NANCI G. STOKES, ALJ

Date Received at Agency October 24, 2022

Date Mailed to Parties: October 24, 2022

sej