State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 00964-24

AGENCY DKT. NO. 2024-36968

BELLEVILLE TOWN BOARD
OF EDUCATION,
Petitioner,
v.
X.M. ON BEHALF OF J.R.,
Respondent.

Alyssa K. Weinstein, Esq., for petitioner (The Busch Law Group, attorneys)

Ruby Kish, Esq., for respondent (Disability Rights New Jersey, attorneys)

Record Closed: February 27, 2024 Decided: March 5, 2024

BEFORE **R. TALI EPSTEIN**, ALJ:

STATEMENT OF THE CASE

In this expedited due process proceeding, petitioner Belleville Town Board of Education (the "District") seeks an order permitting the District to extend its unilateral, interim placement of J.R. on home instruction following his suspension on December 1, 2023, until such indeterminate time as J.R. is enrolled in an out-of-district therapeutic

placement, as yet to be identified. The District further seeks an order compelling respondent X.M., J.R.'s mother, ("respondent" or "X.M.") to consent to release J.R.'s school records to out-of-district entities in connection with the District's effort to secure therapeutic placement.

PROCEDURAL HISTORY

On January 23, 2024, the New Jersey Department of Education received the District's petition for expedited due process, dated January 22, 2024, and the contested case was immediately transmitted to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, and the Special Education Program, N.J.A.C. 1:6A-1.1 to -18.4. The first prehearing conference took place on January 30, 2024. An expedited hearing was scheduled and conducted on February 20, 2024. The parties submitted their written summations on February 27, 2024, and I closed the record on that date.

FINDINGS OF FACT

Based on the testimony presented at the hearing, and my assessment of its credibility and weight; the documents admitted in evidence, and my assessment of their sufficiency; and the parties' Joint Stipulation of Facts, I **FIND** the following **FACTS** solely for the purpose of adjudicating this expedited petition for relief:[1]

J.R. resides with his mother, X.M., within the area served by the District. (Joint Stipulation of Facts, ¶ 1.) J.R. is enrolled at Belleville High School as a ninth-grade student. (Joint Stipulation of Facts, ¶ 3.) J.R. is eligible for special education and related services under the classification of "specific learning disability." He exhibits difficulties retaining information, demonstrates a weakness in mathematics, and has issues with

[1] To the extent the parties' witnesses testified concerning facts that extend beyond the limited issues presented by the District's request for expedited relief, they are not addressed herein. Specifically, the tribunal makes no findings of fact regarding the appropriateness of an out-of-district placement for J.R., including whether the District can provide J.R. with the necessary supports and services at Belleville High School, or if J.R. has been denied a free appropriate public education (FAPE).

"impulsiveness" as reflected in his individualized education program (IEP). (Hearing Transcript of February 20, 2024 (Tr.) at 192:12, 194:23.) J.R.'s most recent IEP from October 26, 2023—a little more than a month before his suspension commenced—does not provide for a behavior intervention plan (BIP) because the IEP team determined that J.R.'s behaviors were "manageable" and did not rise to a level to warrant behavior intervention supports. (Tr. at 195:1.)

On November 16, 2023, J.R. was arrested by the Belleville Police Department (BPD). (Joint Stipulation of Facts, ¶ 4.) The arrest stemmed from an investigation commenced by the BPD after receiving information from the Essex Fells Police Department (EFPD) concerning a communication data warrant (CDW) search of J.R.'s private Instagram account. Detective Sergeant Michael Agosta ("Detective Agosta"), commander of the Juvenile Aid Bureau within the Detective Bureau of the BPD, personally reviewed the results of the EFPD CDW. Among thousands of pages of content, he identified two photographs featuring J.R. and an unidentified individual. In those photographs, J.R. is holding what "appears to be" a "handgun" and/or "looks to be a Glock firearm." (Tr. at 38:11–12, 39:3.) Detective Agosta also viewed videos in J.R.'s Instagram archives that similarly depicted J.R. with firearms.[2] Detective Agosta shared this information with the District, and the BPD arrested J.R. at Belleville High School. J.R. was led out of Belleville High School by the police while school was in session, which resulted in an unfortunate and needless disruption in the educational process and caused staff to be concerned. The fanfare and notoriety surrounding J.R.'s arrest also caused the superintendent of Belleville Public Schools, Dr. Richard Tomko ("Dr. Tomko"), to question whether J.R. could ever be "successful in that building right now" if returned to Belleville High School. (Tr. at 87:23–24.) Dr. Tomko expressed concern that allowing J.R. back in school would be disruptive because of the notorious reputation J.R. has acquired. A "bigger concern" for Dr. Tomko was that "students or juveniles or adults outside of Belleville" might think J.R. is pretending to be in a gang or "stacking those

[2] In connection with the BPD investigation, a search warrant was also executed at X.M.'s apartment in November 2023. (Tr. at 238:7–11.) Detective Agosta testified that a "weapon" was recovered during that search. (Tr. at 59:15.) X.M. clarified that, after the search, she was told by the police that the confiscated "weapon" was a "BB gun," not a handgun, and it was never returned. (Tr. at 239:8, 239:15–16.) X.M. also confirmed that she does not have any firearms in her home and no one in her home, including J.R., has access to any weapons. (Tr. at 234:6–14.)

signs," which could present a potential safety issue for J.R. and/or the Belleville student body at dismissal time. (Tr. at 86:18–21, 96:13–24.) Dr. Tomko speculated that "it's not beyond belief" that a "car that [sic] maybe rolls up" causes a dangerous situation to unfold. (Tr. at 96:23–24.) In notable contrast to Dr. Tomko's concerns, the day before J.R.'s suspension commenced, Jenna Taffuri, the District's psychologist and therapeutic case manager assigned to J.R., expressed to X.M. that she "very much hope[d]" J.R. would return to Belleville High School so they could "continue working towards his success." (J-14.) The District did not call Ms. Taffuri to testify at the hearing.

Upon his arrest, J.R. was placed in the custody of the BPD until his release from the youth detention center on November 30, 2023. (Joint Stipulation of Facts, ¶ 4.) The following day, December 1, 2023, J.R.'s suspension from Belleville High School began. (Joint Stipulation of Facts, ¶ 5.) By letter dated December 11, 2023 (the "Notice of Suspension"), Dr. Tomko advised X.M. that J.R. was "suspended and placed on home instruction for an infraction to [sic] the school district's code of conduct and New Jersey law." (J-11.) The Notice of Suspension cited N.J.S.A. 18A:37-2 (providing for the suspension or expulsion of a student who is guilty of continued and willful disobedience or open defiance of authority, etc.) and J.R.'s alleged violations of N.J.S.A. 2C:39-5 (unlawful possession of weapons) and Board Policy 8467 (prohibiting the "possession, use, or exchange of any weapon in any school building, on school grounds, at any school-sponsored event, and on school sanctioned transportation").

Specifically, the Notice of Suspension accused J.R. of violating the law and board policy "by putting students in harm's way when he was charged with a firearms offense in November 2023." The Notice of Suspension further stated that J.R. "disrupted the educational process" because staff and students had viewed social media posts depicting J.R. "in possession of a weapon" and "expressed grave safety concerns with [J.R.]'s continued presence in school." Other violations cited included Board Regulation 5600 H (1), "Disruption," and #3 and #10 of the Belleville High School Discipline Code (providing for the suspension or expulsion of a student guilty of conduct constituting a "continuing danger to the physical well-being of other pupils" and violation of the school's weapons policy, respectively). (Ibid.)

The Notice of Suspension advised that J.R.'s suspension and home instruction would continue "until further action is taken after a hearing by the [District]." (Ibid.) In light of the pending criminal charges—which were ultimately dismissed and expunged—X.M. was presented with the option of agreeing to adjourn the long-term disciplinary hearing beyond the required thirty calendar days from the student's removal from school. Absent her agreement, as expressly stated in the Notice of Suspension, a hearing date would be set. While Dr. Tomko believes that, in a phone call with X.M., she agreed to hold the hearing in abeyance, he concedes there is no writing to support his assertion.[3] And, in any event, the District plan was to hold the hearing for "possible expulsion" after J.R. was released from BPD's custody. (Tr. at 123:22–124:2.) The District plan was that "the hearing would have justified a long-term suspension while the manifestation meeting was happening." (Tr. 124:16–18.) J.R. was released from custody on November 30, 2023, but the District failed to schedule or conduct the board hearing. The District also concedes that it failed to conduct a manifestation determination meeting within ten days of J.R.'s suspension. (Tr. at 202:11–13.) Nor did the District require that J.R. receive psychiatric testing to determine if he was a danger to himself or others. (Tr. at 233:16–19.) The District simply decided that J.R. should not return to Belleville High School and should be suspended on home instruction until such time as he could be enrolled in a therapeutic out-of-district facility. The District sent X.M. six consent forms for the release of J.R.'s school records to out-of-district schools with therapeutic programs. (J-19.) X.M. has not agreed to sign those forms.

When asked by the District's counsel if he believed that the return of J.R. to Belleville High School is "substantially likely to cause injury to J.R. or others," the District's director of Special Services, Ryan Kline ("Kline"), answered "yes" but qualified his response that the "potential" for harm to J.R. or others is his concern. (Tr. at 207:3–15.) Mr. Kline's response was based on his experience as a school psychologist and special education administrator.

[3] Dr. Tomko acknowledges that he asked X.M. to "follow up with [him] in an email" to authorize the postponement of the hearing, "she didn't," and he "never followed up back [sic] with her" which was "completely [his] fault." (Tr. at 103:9–12.)

J.R.'s last day on the school register is November 16, 2023—the day he was arrested. Since December 8, 2023, the District has been providing J.R. with home instruction. (Joint Stipulation of Facts, ¶ 6.) On January 23, 2024, after J.R. had been removed from Belleville High School for more than seven weeks, the District filed an expedited due process petition ("Expedited Petition"). The Expedited Petition seeks to continue the District's unilateral removal of J.R. from Belleville High School on the ground of "dangerousness," i.e., that it would be dangerous or substantially likely to result in injury to J.R. or others if J.R. returned to school. (Expedited Petition, ¶ 17.) Notably, the District did not file for expedited (or emergent) relief on the ground of "dangerousness" when J.R. was released from BPD custody, or in the days after his December 1 suspension began, or in the weeks after the District issued the Notice of Suspension. Indeed, at no time during the initial forty-five-calendar-day period that J.R. was suspended did the District seek expedited relief on the ground that it is dangerous for J.R. to be in Belleville High School.[4]

The District's decision to remove J.R. from Belleville High School was made by Dr. Tomko based on two incidents, neither of which occurred in the school, at a school event, or on school property. The first incident occurred in or about December 2021/January 2022, when J.R. was attending Belleville Middle School (the "2021 incident"). Dr. Tomko effected an "opportunity transfer" for a "young lady who J.R. was allegedly dating" because she and her mother complained of threats that J.R. made to the girl. (Tr. at 77:8–9, 77:23–25.) Dr. Tomko was aware that the BPD was investigating the 2021 incident, but he did not know the specifics of the threats. His understanding, based on discussions with the girl's mother, was that that they included "weapons and the threat of some kind of harm to [the girl]." (Tr. at 79:8–12.) Dr. Tomko also learned from his administrative team that the alleged threats were not oral but appeared as a caption to a picture posted on social media depicting J.R. holding a gun. There is no record of this incident in J.R.'s disciplinary history or his school records.[5]

[4] The Expedited Petition also seeks to compel X.M. to agree that the District can release J.R.'s school records to out-of-district schools as part of the District's effort to change J.R.'s educational placement. (Expedited Petition, ¶ 18.)

[5] Detective Agosta provided additional details regarding the incident with J.R.'s "ex-girlfriend," which Dr. Tomko did not recount as a basis for his decision to remove J.R. Accordingly, only those facts that Dr. Tomko considered in his decision-making are addressed herein.

As a result of the middle-school incident, J.R. was unilaterally removed from school and received home instruction for the remainder of that school year. The District did not hold a hearing to issue a long-term suspension. Nor did it conduct a manifestation determination. It did, however, require that J.R. receive clearance from a District mental-health professional before returning to school. J.R. was examined by the District's mental-health professional, received clearance, and was permitted to return to school for the 2022–2023 academic year.

The second incident that Dr. Tomko relied on in making the determination to suspend J.R. occurred nearly two years later based on the findings of the BPD investigation resulting in the November 2023 arrest (the "2023 incident"). Dr. Tomko confirmed that no in-school disciplinary infractions factored into his decision to suspend J.R. in December 2023. (Tr. at 141:16–22, 143:5–12.) Dr. Tomko characterized the District's decision to suspend J.R. and place him on home instruction as a safety measure because "[t]he pictures [depicting J.R. in possession of what appeared to be a real gun] were enough" for him. While Dr. Tomko testified that he "knows" that J.R. "had a gun twice," the pictures from the 2021 and 2023 incidents are the source of his alleged knowledge. (Tr. at 136:23–25,137:1–6.) Dr. Tomko believes he saw the 2021 picture near the time of the 2021 incident but was unable to recall if he saw the pictures relating to the 2023 incident before he made his decision to suspend J.R. (Tr. at 106:1–13, 114:11–12.) Dr. Tomko was also aware of an "incident with water guns" that involved several students, including J.R., but that was not a consideration in his decision to suspend J.R.[6] (Tr. at 85:22–23.)

Subsequent to the decision to remove J.R. from school, a Civil Action Order, dated January 31, 2024, resulted in the dismissal and automatic expungement of the November 2023 charges cited in the Expedited Petition. (Joint Stipulation of Facts, ¶ 7.)

As of the date of the expedited hearing, J.R. had been suspended from school for eighty-two calendar days, and more than forty-five school days. The District refuses to

[6] J.R.'s in-school disciplinary record over the last three years includes only minor infractions, none of which factored into the decision to suspend J.R. or rose to the level that the District sought to implement a BIP.

allow J.R. to return to Belleville High School and continues to provide J.R. with home instruction. X.M. never consented to home instruction. X.M. works outside the home forty hours per week and wants J.R. back in school where "he needs to be." (Tr. at 263:6.)

LEGAL ANALYSIS AND CONCLUSIONS

This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 to 1482. The Act ensures that students with disabilities are provided 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). In New Jersey, the State Board of Education promulgated regulations implementing 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.

As relevant here, those rules provide for expedited due process hearings to be conducted at the OAL in the case of "disciplinary issues." N.J.A.C. 6A:14-2.7(e). If a student with a disability violates school rules and/or policies the IDEA provides detailed procedures that the local educational agency (LEA) must follow to suspend or expel the student. If the discipline results in the student being kept out of school for more than ten consecutive days, a "change of placement" has occurred. 20 U.S.C. § 1415(k)(4)(A)(i); N.J.A.C. 6A:14-2.8(c). This triggers certain procedural protections for the student. The LEA must provide notice to the student's parent(s) the day the decision is made to change placement, i.e., issue a long-term suspension, and advise them of their procedural rights. 20 U.S.C. § 1415(k)(1)(H). The IDEA also mandates a "manifestation determination review" (MDR) where the LEA representatives, parent(s), and relevant members of the student's IEP team convene within ten school days of a change in placement to determine if the behavior that gave rise to the violation of school rules and/or policies was a manifestation of the student's disability. 20 U.S.C. § 1415(k)(1)(E). If the outcome of the MDR is that the behavior was a manifestation of the student's disability, then the student must be returned to the current placement, the IEP team must conduct a functional behavioral assessment and implement a BIP.[7] 20 U.S.C. § 1415(k)(1)(F). A finding that

[7] If a BIP is already in place, it must be reviewed and modified, if necessary, to address the behavior. 20 U.S.C. § 1415(k)(1)(f).

the behavior was not a manifestation clears the way for the school to discipline the student pursuant to school rules. In other words, the disabled student would be subject to the same disciplinary sanction the school would impose on a non-disabled student. 20 U.S.C. § 1415(k)(5)(A).

The IDEA provides three exceptions to this scheme. School authorities are permitted to remove a classified student "to an interim alternative educational setting" for not more than forty-five calendar days "without regard to whether the behavior is determined to be a manifestation of the child's disability" if the conduct involved drugs, weapons, or serious bodily harm upon another and such conduct occurred "at school, on school premises, or at a school function." 20 U.S.C. § 1415(k)(1)(g); N.J.A.C. 6A:14-2.8(f).[8] The District does not maintain, nor has it established, that the conduct at issue occurred at school, on school premises, or at a school function. Accordingly, neither 20 U.S.C. § 1415(k)(1) nor N.J.A.C. 6A:14-2.8(f) applies here.

Instead, the District's position is that this tribunal should sanction the unilateral removal decision the District made weeks ago that first placed J.R. on home instruction and further order that J.R. continue on home instruction because it would be dangerous if he returned to Belleville High School.

Within the IDEA framework, an LEA can request a hearing if it "believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others." 20 U.S.C. § 1415(k)(3)(A). Under N.J.A.C. 6A:14-2.7(n), a district board of education "shall request an expedited hearing" to remove a student with a disability when it maintains that it is dangerous for the student to be in the current placement, and the parent and district board of education cannot agree to an appropriate placement. At the expedited hearing, the burden is on the district to meet the standard set forth in 20 U.S.C. § 1415(k)(3)(A), i.e., that maintaining the current placement is "substantially likely to result in injury to the child or to others." **Pending the outcome of the expedited hearing, no change shall be made to the student's placement unless both parties agree that a change of placement is appropriate.** N.J.A.C. 6A:14-2.7(u)

[8] 20 U.S.C. § 1415(k)(1)(g) does not remove the requirement of conducting an MDR, but the outcome is irrelevant to the school's authority to suspend a student for up to 45 calendar days under this section.

(emphasis added). After the expedited hearing is concluded, the administrative law judge (ALJ) may order that the student be placed in an interim alternative educational setting for up to forty-five calendar days. N.J.A.C. 6A:14-27(n).[9]

In this case, the District skipped the critical procedural step of requesting an expedited hearing before it removed J.R. If the District believed that J.R.'s conduct met the "dangerousness" standard, it was incumbent on the District to request an expedited hearing *before* making a unilateral change of placement decision. The District's request for expedited relief weeks *after* removing J.R. from his current placement belies the District's claim of "dangerousness." It is also procedurally flawed. N.J.A.C. 6A:14-2.7(u) clearly states that pending the outcome of an expedited hearing, no change shall be made to the student's placement unless both parties agree. There was no such agreement. In effect, the District improperly seeks to use N.J.A.C. 6A:14-2.7(n) to have this tribunal retroactively sanction J.R.'s long-term suspension. I, therefore, **CONCLUDE** that the District failed to timely file a petition for an expedited hearing before it improperly removed J.R. from his original educational placement.[10]

Having already disciplined J.R. for more than forty-five calendar days, the District now asks this tribunal to adopt the District's determination of "dangerousness" and order that J.R. "continue on home instruction" for an indefinite period, "pending the identification and commencement of an appropriate out-of-district therapeutic placement." (Expedited Petition, ¶ 17.[11]) The District is not entitled to the relief it seeks.

As discussed above, the District failed to timely request an expedited hearing before effecting a unilateral change in J.R.'s educational placement. The District's procedural blunder was further compounded by its failures to convene an MDR and

[9] After the forty-five calendar days expire, the school district may repeat this process. N.J.A.C. 6A:14-2.7(n).

[10] Failing to file an expedited application before removal can be considered a denial of FAPE to the extent the decision deprived a disabled student of his then-current placement. See Christine C. v. Hope Twp. Bd. of Educ., 2021 U.S. Dist. LEXIS 20132 (February 2, 2021).

[11] While N.J.A.C. 6A:14-2.7(n)(1) allows for the possibility of repeating the forty-five-day removal, the District failed to pursue the proper procedural steps for effecting the first forty-five-day removal and, instead, has effected a long-term suspension that violated the student's due process.

conduct a long-term suspension hearing, the effect of which was to treat J.R. less favorably than non-disabled students.

The District concedes that no MDR or long-term suspension hearing occurred[12] but claims that its decision to remove J.R. followed a determination by its professionals that "J.R.'s presence at school would pose an unacceptable risk to the safety of the District's staff and students." (J-22.) That, however, is not the standard for determining a removal based on "dangerousness." Nor was the school empowered to make that decision without requesting an expedited hearing. Further, at the hearing, Mr. Kline added that the conduct for which J.R. was suspended was not, in his opinion, disability related. (Tr. at 200:20–201:1.) However, Mr. Kline's de facto statement does not absolve the District from its failure to conduct a timely MDR that complies with IDEA requirements. Z.M. had a right to be present at a manifestation determination, and the District had an obligation to convene an MDR that thoroughly and meaningfully examined all relevant information to determine whether J.R.'s conduct was a manifestation of his disability.

Apart from the foregoing procedural deficiencies, the District also has not established that it would be dangerous for J.R., or others, if J.R. returned to Belleville High School.

Removal of a disabled student on the grounds of "dangerousness" requires a showing that maintaining the student in the current placement is "substantially likely to result in injury to the child or to others." 20 U.S.C. § 1415(k)(3)(A). In those cases where the standard has been met, the disabled student engaged in physical acts of violence and/or exhibited a continuing pattern of dangerous behaviors in school. See, e.g., Lawrence Twp. Bd. of Educ. v. D.F. ex rel. D.F., 2007 N.J. AGEN LEXIS 26 (Jan. 9, 2007) (multiple incidents of violent, in-school, physical assaults against fellow students established clear danger to others). In contrast, in the absence of—or minimal—physical violence, even if a student has threatened staff members or classmates it "is unlikely to result in a finding that maintaining the student in [the] current placement is substantially

[12] All students are entitled to a formal board hearing no later than thirty days after a suspension begins. N.J.A.C. 6A:16-7.3(a)(10). At the hearing, the student must be provided the opportunity to confront and cross-examine witnesses and present a defense. N.J.A.C. 6A:16-7.3(a)(10)(i).

likely to result in injury." Washington Twp. Bd. of Educ. v. R.M. & V.M. ex rel. J.M., 2015 N.J. AGEN LEXIS 18 (Jan. 13, 2015) (looking up photos of school shootings on a school computer, threatening to shoot up the school, and directly threatening students on social media is insufficient to demonstrate a substantial likelihood of harm absent physical aggression); C.H. ex rel. M.H. v. Salem Bd. of Educ. v. C.G., OAL Dkt. No. EDS 01492-23 (Mar. 3, 2023) (writing explicit and violent rap lyrics about guns and shooting did not demonstrate a substantial likelihood of harm absent any indication that the student was physically violent).

Contrary to the District's claim, pictures and videos of J.R. holding what appears to be a gun saved to his private Instagram account are not enough under the exacting standard established by case law. On its face, the standard requires that the District demonstrate that it is "substantially likely" that J.R.'s return to Belleville High School would result in injury to him or to others. The District cannot meet this standard with unspecific and speculative concerns that "students or juveniles or adults outside of Belleville" might think J.R. is "stacking" (posing or pretending to be in a gang) and could try to harm him, or drive by the school at dismissal to target him and possibly harm others. The District's claim—that "it's not beyond belief" that a "car that [sic] maybe rolls up" causes a dangerous situation to unfold—hardly comes close to demonstrating a harm that is "substantially likely" to occur due to J.R.'s presence at Belleville High School. (Tr. at 96:13–24.) Nor is the District's unsubstantiated concern that "there might even be a [teacher] walk out" relevant to the determination. (Tr. at 87:11.)

The cases relied on by the District are plainly distinguishable and do not support its claim. E.B. ex rel. E.A. v. Lower Cape May Reg'l BOE, 2007 N.J. AGEN LEXIS 743 (Nov. 20, 2007), involved an emergent petition decided under a different standard.[13] Unlike here, in that case, the parent and the LEA agreed that the disabled student need immediate (psychiatric) intervention following discovery of a graphic suicide note and a photo of the bullied student posing with a gun, dressed in gang-like clothing, emulating the Virginia Tech shooter. Under those "unique" circumstances, including the fact that

[13] Accordingly, the District's suggestion that the tribunal should apply a "balance of equities" approach "favoring the District" is inapposite.

the parent had admittedly agreed to a change of placement, the ALJ denied the parent's emergent stay-put request pending the hearing.

In Stillwater Township v. BOE v. M.P.J., 1999 N.J. AGEN LEXIS 52 (Feb. 23, 1999), also decided on an emergent basis, the ALJ determined that in addition to threatening to kill another student's parents with a gun, the "record reflects ample evidence of a history of aggression," including altercations and attacks on others, one of which resulted in the student's hospitalization. Compounding the danger in that case, two days prior to the threat the student disclosed to his case manager that life was not worth living and he soon would "be dead anyway."[14]

Here, the District concedes that its "dangerousness" claim is not based on a history of aggressive or violent behaviors but only on two incidents, both of which occurred off school grounds and nearly two years apart. Neither incident involved altercations or physical violence. Neither incident involved suicidal ideation. Neither incident involved oral threats, much less targeted verbal threats. And the District's perceived "threat to others in [the school] building" is not established by private social media posts of J.R. "posturing" with what appears to be an authentic gun.[15] (Tr. at 83:18.) In fact, the day before J.R.'s suspension commenced, the District's psychologist and therapeutic case manager assigned to J.R. appeared to perceive no such threat. Instead, she expressed to X.M. that she "very much hope[s] [J.R.] returns" so that they "can continue working towards his success." (J-14.)

I am also unpersuaded by Detective Agosta's opinion that returning J.R. to Belleville High School would be "dangerous." The basis for Detective Agosta's conclusion is entirely speculative. When probed by the District's counsel to support his opinion he

[14] The only other case cited by the District concerned a due process petition for the denial of FAPE. J.M. ex rel. J.M. v. Deptford Twp. BOE, OAL Dkt. No. EDS 02998-99 and EDS 04308-99 (consolidated) (July 23, 1999). In dicta, the ALJ noted that the LEA had **not filed an expedited petition** for removal based on dangerousness and mused that had it done so a judge would have granted its application primarily because the student's threats to shoot people in school were made to classmates, and in the presence of teachers, the morning after the Columbine school shooting. To the extent the decision is at all instructive here, it supports respondent's position that unlike J.M.'s conduct, J.R.'s conduct did not demonstrate that his presence in school would cause "a substantial likelihood of injury."

[15] The District did not present any competent evidence that the pictures and/or videos caused potential victims to believe the immediacy of any "threat" or the likelihood that it would be carried out.

qualified his response and admitted only that "there's a potential for danger." (Tr. at 52:14–15.) Put simply, the District has not met its burden of proof.

For the foregoing reasons, I **CONCLUDE** that the District did not have the authority to unilaterally remove J.R. to an alternative educational setting. Further, I **CONCLUDE** that based on the evidence presented at the expedited hearing, the District has failed to demonstrate by a preponderance of the credible evidence that maintaining J.R. at Belleville High School is substantially likely to result in injury to J.R. or others.

As this matter has been decided for the foregoing reasons, I make no determination regarding the District's claim that other school discipline statutes and regulations, outside the IDEA framework, permit the District to remove J.R. from Belleville High School. Specifically, the District points to N.J.S.A. 18A:37-2 (removal for "willful disobedience" or "open defiance of authority") and/or N.J.A.C. 6A:16-7.5(a) (authorizing discipline for certain conduct away from school and/or that interferes with school operations). Whether or not the District may pursue discipline against J.R. under those or other New Jersey school discipline laws or regulations depends on the outcome of an MDR. If a properly conducted manifestation hearing results in a determination that J.R.'s conduct is not a manifestation of his disability, then he would be subject to the District's normal disciplinary procedures applicable to all students. Accordingly, whether J.R.'s removal is appropriate under N.J.S.A. 18A:37-2 and/or N.J.A.C. 6A:16-7.5(a) cannot be adjudicated at this time.

Regarding its request for an order under N.J.A.C. 6A:14-2.7(b) compelling X.M. to consent to the release of J.R.'s school records, the District fares no better. N.J.A.C. 6A:14-2.7(e) expressly limits the matters to be decided on an expedited appeal to "disciplinary issues." See also N.J.A.C. 6A:14-2.7(o)(1) ("The request for a due process hearing shall specify that an expedited hearing is requested due to disciplinary action."). Compelling parental consent for the release of school records is not properly the subject of an expedited hearing petition. Nor has the correctness of the District's determination that J.R. requires an out-of-district therapeutic placement been adjudicated. As such, the District's request to compel the release of J.R.'s school records to "out-of-district entities in an effort to secure [a change of] placement is premature." As a preliminary matter, J.R.

must be returned to Belleville High School and an MDR must be completed. Depending on the outcome, J.R. may be subject to expulsion. There is also the possibility that, following the MDR, X.M. will consent to a therapeutic out-of-district placement for J.R., thus obviating the need for further judicial intervention. Accordingly, I **CONCLUDE** that the District is not presently entitled to the order it seeks. The District may later request such relief at a regular due process hearing, if necessary.

ORDER

Based on the foregoing, I hereby **ORDER** that the District's petition for expedited relief is **DENIED** in its entirety. It is **FURTHER ORDERED** that J.R. be immediately returned to his educational placement at Belleville High School. It is **FURTHER ORDERED** that the District conduct a manifestation determination hearing, with all required notices and opportunities to participate to X.M., within ten (10) days of receipt hereof.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2023) 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); 34 C.F.R. § 300.516 (2023). 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.

March 5, 2024
DATE

R. TALI EPSTEIN, ALJ

Date Received at Agency: March 5, 2024

Date Mailed to Parties: March 5, 2024

lsr

APPENDIX

WITNESSES

For Petitioner:

Detective Sergeant Michael Agosta, Belleville Police Department
Dr. Richard D. Tomko, Superintendent of Schools, Belleville Public Schools
Ryan Kline, Director of Special Services, Belleville Public Schools

For Respondent:

X.M., mother of J.R.

EXHIBITS[16]

Joint:

J-4 Belleville Public Schools Home Instruction Register, dated December 7, 2023
J-5 Unsigned Consent Forms to release student records to six NJDOE-approved private schools
J-6 IEP, dated October 27, 2022
J-11 Letter from Dr. Tomko to X.M., dated December 11, 2023
J-12 Emails between Ms. Taffuri and X.M., dated November 22, 2023
J-14 Email from Ms. Taffuri to X.M., dated November 29, 2023
J-15 Emails between Ms. Taffuri and X.M., dated November 30, 2023
J-18 Email from Ms. Taffuri to X.M., dated December 18, 2023
J-19 Emails between Ms. Taffuri and X.M., dated January 5, 2024 through January 8, 2024

[16] The parties' pre-marked exhibits sequentially from 1 to 30 with the following designations: "J" for joint, "P" for petitioner, and "R" for respondent. Exhibits P-1 and P-2 were excluded, there was no Exhibit 3, and neither party sought to move the following exhibits into evidence: Exhibits J-7 through J-10, J-13, R-20, J-21, and P-23 through P-30.

Petitioner:

P-22 Certification of Richard D. Tomko, Ph.D., M.B.A., M.J., dated January, 22, 2024

Respondent:

None