State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 05282-19

AGENCY DKT. NO. 2019-29733

T.D. ON BEHALF OF J.D.,

Petitioner,

v.

GLOUCESTER COUNTY VOCATIONAL BOARD OF EDUCATION,

Respondent.

Jessica Limbacher, Esq., for petitioner (Volunteer Lawyers for Justice, attorneys)

Jay D. Branderbit, Esq., for respondent (Kent/McBride, attorneys)

Record Closed: April 26, 2019 Decided: May 13, 2019

BEFORE **JEFFREY N. RABIN**, ALJ:

STATEMENT OF THE CASE

Petitioner, T.D., on behalf of her child J.D., filed an expedited due process petition alleging that the respondent, Gloucester County Vocational Board of Education (Board), changed the special education program set out in the current Individualized Education Program (IEP), by offering only homebound schooling to J.D. subsequent to a disciplinary suspension, despite a manifestation determination that J.D.'s behavior was a manifestation of his disability. Petitioner seeks an order returning J.D. to his

educational program at Gloucester County Institute of Technology (GCIT), the county vocational school, and convening a meeting to review and update J.D.'s IEP and Behavioral Intervention Plan (BIP).

PROCEDURAL HISTORY

On April 15, 2019, the petitioner filed a petition for due process on an expedited basis with the Office of Special Education Policy and Procedure (OSEPP), Department of Education (DOE). The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on April 18, 2019, to be heard as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14 F-1 to -13. A telephone prehearing conference took place on April 22, 2019. A hearing was held on April 26, 2019. The record remained open for post-hearing briefs and additional documentation. Briefs were received on April 30, 2019, and the record closed on that date.

FACTUAL DISCUSSION

Based on the testimony and evidence at the hearing, and the post-hearing briefs, I **FIND** the following to be the undisputed facts:

1. Petitioner, T.D., is the mother of J.D., a sixteen-year-old student currently eligible for special education under the classification of "Other Health Impaired." J.D. had been diagnosed with attention deficit hyperactivity disorder (ADHD), oppositional defiant disorder (ODD) and disruptive mood dysregulation disorder.

2. J.D. was referred by his home district, Deptford Township, New Jersey, to respondent Gloucester County Vocational Board of Education, and began attending GCIT in September 2017. Deptford did not supply J.D.'s files to the Board in a timely manner, resulting in GCIT being unaware at the time of J.D.'s enrollment that he required an IEP.

3. By October 23, 2017, J.D. had been charged with four disciplinary violations. Assistant Principal Joyann Ford met with T.D. and J.D.'s teachers on

October 24, 2017, to address the disciplinary issues. On October 30, 2017, J.D. entered into a "Behavioral Contract," agreeing that violations of the Behavioral Contract could result in dismissal from GCIT. (Exhibit R-2.)

4. On October 31, 2017, J.D. failed to report to his lunch detention. On November 1, 2017, J.D. was removed from class for discharging a fire extinguisher. Through April 26, 2019, J.D. had been charged with seventeen disciplinary violations, covering incidences such as physical and verbal altercations; damage to school property; damage to the property of other students; a fight in a restroom with another student; spitting in a student's face; and inappropriate threats and gestures towards students and staff. (Exhibit R-8.)

4. An IEP was put in place by the Board on November 1, 2017. (Exhibit P-7.)

5. On March 23, 2018, J.D. was suspended from GCIT and placed on home instruction through the end of the 2017-2018 school year. Petitioner filed an expedited due process petition on April 12, 2018, resulting in a decision dated May 8, 2018, from the Hon. Jeffrey R. Wilson, ALJ, upholding the Board's determination that home schooling was proper. Because T.D. was not present when this determination was made, the Board subsequently invited J.D. to return to GCIT for the 2018-2019 school year.

6. In July 2018, the IEP team met to discuss conducting a functional behavioral assessment (FBA) and creating a BIP. A BIP was put in place at the beginning of the 2018-2019 school year.

7. J.D. was suspended again in December 2018. As a result, the IEP team met again in January 2019, and amended J.D.'s BIP. (Exhibits R-3 and R-7.)

8. The Board convened another IEP team meeting on March 4, 2019, for an annual review of J.D.'s IEP. No disciplinary issues were discussed that day, nor were any BIP or IEP amendments proposed.

9. On March 13, 2019, J.D. had been sending messages to a fellow student, A.B., intimating that they could end up in a physical fight later that day. On the school bus ride home, J.D. issued verbal threats, and then J.D. and A.B. engaged in a fight, ending with J.D. stomping on A.B.'s head. A Harassment, Intimidation and Bullying (HIB) report conducted by the Board concluded that A.B. had not bullied J.D. (Exhibit R-9.)

10. As a result of the fight on March 13, 2019, J.D. was suspended for ten school days (from March 14 through March 27, 2019).

11. On March 18, 2019, T.D. was invited to attend a "manifestation determination" hearing on March 28, 2019. At the manifestation determination hearing, Kimberly White, GCIT School Psychologist and Child Study Team (CST) Case Manager, determined that J.D.'s behavior was a manifestation of his disability. (Exhibits R-4, R-10, P-3 and P-4.)

12. By letter dated March 29, 2019, T.D. was provided a draft IEP by Kimberly White dated March 28, 2019, calling for a change in placement from GCIT to homebound instruction. T.D. did not sign the draft IEP. (Exhibit P-6.)

13. The parties attended an IEP meeting on April 24, 2019, two days before the within hearing, but failed to reach a mutual agreement as to the proper educational program for J.D.

Testimony

For the respondent Gloucester County Vocational Board of Education

Kimberly Townsend White (White) is the school psychologist at GCIT. She had a master's degree and specialist degree in school psychology. She had been with GCIT for seven years. She had been J.D.'s case manager since the beginning of the 2018-19

school year. In addition to the numerous disciplinary violations committed by J.D. since the beginning of the 2017-18 school year (listed in Exhibit R-1), J.D. had thrown a square metal object at student R.D. on September 28, 2017. A manifestation determination from April 13, 2018, found that J.D.'s behavior was not the result of his disability; a manifestation determination on March 28, 2019, found that J.D.'s behavior was the result of his disabilities.

Additions were made to J.D.'s BIP on January 11, 2019, to address J.D.'s behavior outside of the classroom settings. GCIT employees entitled "transitional aides" were required, so that, for example, J.D.'s shop teacher would walk J.D. from one class to his next class. But J.D. circumvented the transitional aides multiple times. The BIP also was amended so that J.D. could only use "single use" bathrooms, and not "multiple use" bathrooms. However, J.D. did not want to walk with the transitional aides and continued to use the multiple bathrooms so that he could go to the bathroom with his friends.

White met with J.D. twice a month, pursuant to the terms of the IEP. At first, J.D. was resistant to counseling and attended counseling reluctantly. J.D. never discussed having specific issues any other people. GCIT also offered other school-based youth services, but J.D. refused to attend when such counseling was made available to him.

While investigating the school bus fight incident of March 13, 2019, T.D. insisted that an HIB investigation be conducted. White opened an HIB file, and sent forms to T.D. to complete, but T.D. did not complete the forms, even though White received back the green postal card indicating that T.D. had received the forms from White.

Ms. Ford, the assistant principal, spoke with J.D., who claimed that there had been no past or underlying issues between him and any other students. However, A.B. said that during the incident on March 13, 2019, J.D. called him a "little bitch", had threatened to "rape my mom", "kill my little sister" and "snap my dad's neck." White concluded that the statements, in addition to the fight itself, constituted violations of the school's code of conduct.

Homebound instruction would be the most appropriate educational program for J.D., not just because of the bus incident, but because of the numerous violations prior to that incident. White testified that at the IEP meeting of April 24, 2019, T.D. indicated that she wanted J.D. to no longer attend GCIT.

White discussed the various IEP's that had been in place. She spoke of the IEP for the 2018-19 school year, where the goals and objectives were for J.D. to be prepared for his classes.

At the manifestation determination hearing on March 28, 2019, White recommended that J.D. receive additional counseling outside of the school because J.D. was refusing in-school counseling. Amendments to the current BIP were discussed, but were not finalized, because the Board was recommending home schooling for J.D. Deptford Township would have to be part of the BIP process because home instruction would mean that J.D. was being moved to a more restrictive learning environment. Jim McVey, special education supervisor, spoke with the GCIT superintendent, and then recommended changing the IEP to home schooling. This was the draft IEP that was sent to T.D. on March 29, 2019.

Outside of the recommendation of homeschooling, White had no other suggestions for what GCIT could do to deal with J.D. and his issues.

Jamie Dundee (Dundee) was the principal of GCIT. He has been in education for twenty-four years. He had a supervisory certificate and a master's degree in school psychology. At GCIT he formerly served as school psychologist, 504 program coordinator, member of various Child Study Teams, and currently as principal. His background was in special education. Dundee was the principal when J.D. matriculated at GCIT for the 2017-18 school year. He was familiar with J.D.'s records and attended the IEP meeting on April 24, 2019.

Deptford Township had not attended any of the IEP meetings regarding J.D. and did not attend the IEP meeting of April 24, 2019.

Dundee issued the letter dated March 15, 2019, suspending J.D. from GCIT. (Exhibit R-10.) Dundee was aware of the numerous disciplinary incidences, detentions and suspensions of J.D. dating from September 29, 2017, through March 15, 2019. Aside from in-school incidence reports, numerous outside complaints had been filed against J.D., such as a juvenile delinquency. Dundee was especially concerned with these disciplinary complaints because of the access J.D. had to power tools.

Since J.D. returned to GCIT in September 2018, Dundee has had many safety and security concerns. There were two incidences this year that involved physical contact, plus one such incident from last year, where criminal charges had to be filed against J.D., for pushing and spitting at a fellow student, in addition to the fight incident on the school bus from 2019.

Deptford Township was the local education agency (LEA), and paid J.D.'s tuition and transportation. Any changes to J.D.'s transportation would have to go through Deptford Township. For example, adding an aide to the bus or changing the bus route would require Deptford Township's approval. However, Deptford opted not to attend the IEP meeting of April 24, 2019.

J.D. had not been involved in any incidences with power tools but had been disciplined for throwing metal objects and dumping food.

At the IEP meeting of April 24, 2019, GCIT opted not to suggest an amended BIP, because they felt GCIT was no longer able to fulfill J.D.'s needs.

For the petitioner T.D. o/b/o J.D.

T.D. is the mother of student J.D., currently a sixteen-year-old child. To address J.D.'s list of diagnoses (Exhibit P-1), J.D. took Adderall for ADHD and Zoloft for depression. His oppositional defiant disorder resulted in J.D. causing problems at school.

At the IEP meeting of March 4, 2019, which T.D. attended by telephone, her impression was that J.D. had not been in trouble for the last thirty days. There were no negative comments about J.D.'s behavior during that meeting. Nobody at the meeting proposed any amendments to the IEP or BIP.

On March 13, 2019, Joyann Ford, assistant principal, called T.D. to say that somebody had attacked J.D. on his school bus. T.D. did not receive written notice of this incident until March 20, 2019, when she received the letter dated March 15, 2019, suspending J.D. for ten days.

T.D. was invited to a "manifestation determination" hearing on March 28, 2019. She attended the meeting, at which White determined that J.D.'s actions were a manifestation of his disabilities. T.D. still expected that J.D. would be returned to GCIT, but Dundee stated that GCIT could no longer handle J.D.'s educational needs.

The day after the meeting of March 28, 2019, which was not an IEP meeting, White sent a new draft IEP to T.D., changing the educational program to homebound instruction. T.D. did not sign that draft IEP. T.D. requested that Kim White open an HIB file, because she believed J.D. was being called names by other students, which instigated the incident on March 13, 2019.

T.D. never received any forms to be filled out regarding the HIB file, despite the Board claiming they had a green postal card showing the packet was delivered to T.D.

J.D.'s BIP has not been amended since January 2019, and currently J.D. was not being taught any strategies on how to deal with difficult situations or "cool off." T.D. had no idea what J.D. was learning in counseling because she never received any reports from the school. T.D. was never given the opportunity to discuss her ideas regarding amendments to J.D.'s IEP. She wanted J.D. to remain at GCIT.

T.D. did exclaim at the meeting on April 24, 2019, that she no longer wanted J.D. to attend GCIT, but that was not her real interest; she was merely speaking out of frustration.

T.D. acknowledged that J.D.'s math teacher indicated that J.D. had tried to sleep in class, but this was an issue with medication and not a behavioral issue. J.D. had successfully completed individual and family therapy in October 2017. Since that time, J.D. had not been receiving any out-of-school counseling.

Regarding the bus incident of March 13, 2019, a sheriff's officer named Shaw told T.D. that A.B. told Shaw that A.B. had hit J.D. first. After the fight, both J.D. and A.B. were put back on the bus together, with no further incident. The HIB investigation found that J.D. was not being bullied.

J.D. told T.D. that he had been arguing with A.B. earlier that day, and that later on the school bus, A.B. came to J.D.'s bus seat and hit him. J.D. only began kicking A.B. as the two boys were being separated.

Credibility:

In evaluating evidence, it is necessary to assess the credibility of the witnesses. Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality or internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950).

A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521–22; See D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may also reject testimony as "inherently incredible" when "it is inconsistent with other testimony or with

common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

After having the opportunity to observe their testimony, I accept all the witnesses' testimony as truthful and credible. There was a great deal of testimony that was second-hand and third-hand hearsay, offered without any supporting evidence; such testimony was given the appropriate weight for purposes of the within final decision.

Accordingly, I **FIND** the following to be relevant and credible **FACTS** in addition to the above-referenced undisputed facts: J.D. threw a square metal object at student R.D. on September 28, 2017; J.D. circumvented the transitional aides called for in his BIP on many occasions, and he continued to use the multiple bathrooms so that he could go to the bathroom with his friends, in violation of his BIP; on the school bus on March 13, 2019, J.D. called A.B. a "little bitch", threatened to rape A.B.'s mother, kill his sister and break A.B.'s father's neck, which threats constituted violations of the school's code of conduct; T.D. received but never completed the HIB forms required for an HIB investigation, despite being the party requesting the HIB investigation; both criminal and juvenile delinquency complaints had been filed against J.D.; J.D. had access to power tools; J.D. had issues staying awake in class due to issues with his medication; the hearing on March 28, 2019, was a manifestation determination hearing and not an IEP meeting; Mr. Jim McVey, special education supervisor, made the recommendation that J.D.'s educational program be changed to homeschooling.

LEGAL ANALYSIS

The first issue is whether the respondent Board acted properly in changing student J.D.'s educational program to homebound instruction, due to disciplinary issues, without having convened a formal IEP meeting. The second issue is, if the Board acted

properly, whether that new educational program provided J.D. a free and appropriate public education (FAPE).

Petitioner filed the within appeal on an expedited basis, and not as an emergent matter. Accordingly, the prerequisites and conditions of N.J.A.C. 6A:14-2.7(r), N.J.A.C. 1:6A-12.1(e) and N.J.A.C. 6A:14-2.7(s)(1) do not apply. But by requesting that student J.D. remain at GCIT, the county vocational school, petitioner has in effect invoked "stay-put."

The "stay-put" provision is set out in the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. § 1400, et seq. See 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)). 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.A. § 1415(j).

The relevant IDEA regulation and its counterpart in the New Jersey Administrative Code further 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). The stay-put provision functions as an automatic preliminary injunction which dispenses with the need for a court to weigh the factors for emergent relief such as irreparable harm, and likelihood of success on the merits, and removes the court's discretion regarding whether an injunction should be ordered. Drinker, 78 F.3d at 859. Its purpose is to maintain the status quo for the child while the dispute over the IEP remains unresolved. Ringwood Bd. of Educ. v. K.H.J., 469 F.Supp.2d 267, 270–71 (D.N.J. 2006).

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 assured 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 at 859. Furthermore, the Third Circuit explained that the stay-put provision reflected Congress's clear intention to "strip schools of the unilateral authority that they had traditionally employed to exclude [classified] students, particularly emotionally disturbed students, from school." Id. at 864 (citing Honig v. Doe, 484 U.S. 305, 323, 108 S. Ct. 592, 604, 98 L. Ed. 2d 686, 707 (1988)); School Comm. v. Dep't of Educ., 471 U.S. 359, 373, 105 S. Ct. 1996, 2004, 85 L. Ed. 2d 385, 397 (1985).

Accordingly, when presented with an application for relief under the stay-put provision of the IDEA, a court must determine the child's current educational placement and enter an order maintaining the status quo. Drinker, 78 F.3d at 864–65. Along with maintaining the status quo, the school district would be responsible for funding the placement as contemplated in the IEP. Id. at 865 (citing Zvi D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982) ("Implicit in the maintenance of the status quo is the requirement that a school district continue to finance an educational placement made by the agency and consented to by the parent before the parent requested a due process hearing. To cut off public funds would amount to a unilateral change in placement, prohibited by the Act")).

The IEP placement in effect when the request for due process was made—the last uncontroverted placement—is dispositive for the status quo or stay-put. Here, the request for due process was filed on April 15, 2019, after petitioner rejected the Board's purported IEP of March 28, 2019; therefore, the "then-current" educational placement for J.D. would be the placement called for in the IEP dated March 4, 2019, which called for J.D. to attend GCIT. Subsequent to the filing for due process, T.D. had not signed off on a new IEP for J.D.

The IDEA stay-put law and regulations admit only two exceptions when it is the Board, rather than the parents, seeking to change the operative placement during the litigation. The first is where the parents agree with the change of placement. 20 U.S.C. § 1415(j). The second exception arises under the disciplinary provisions of IDEA, 20 U.S.C. § 1415(k).

Regarding the first exception, the Board has not yet proposed a new school placement for J.D. by way of an IEP, merely stating that he may no longer attend GCIT. They have directed that J.D. receive home instruction, and therefore the new proposed "placement" was for J.D. to remain at home. T.D. did not agree to any change in placement, and therefore this exception does not apply.

As to the second exception, the IDEA disciplinary provisions had been raised by respondent as an issue in this matter. The Board asserted that, pursuant to C.F.R. §300.530(g), a school may remove a student for up to forty-five school days without regard to whether the child's behavior is determined to be a manifestation of the child's disability, where the child has "inflicted serious bodily injury upon another person while at school, on school premises, or at a school function" or carried a weapon to or possesses a weapon at school, on school premises, or to or at a school function.

The Board argued that J.D. caused bodily harm by using a shoe to kick A.B. during the fight on the school bus, and argued that possession of a shoe or foot could be considered possession of a dangerous weapon when that defendant struck a victim with their shoe or foot, or acted to kick or stomp the victims, citing United States v. Black Lance, 454 F.3d 922, 923 (8th Cir. 2006); United States v. Schmidt, 403 F.3d 1009, 1012 (8th Cir. 2015).

However, there has been no evidence presented that A.B. suffered serious bodily injury as a result of the fight on March 13, 2019. In fact, it was made clear at the hearing that after the fight was settled, both J.D. and A.B. sat on the same bus for the remainder of the ride home, without incident. Petitioner argued that "dangerous weapon" is defined as "a weapon, device, instrument, material, or substance animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that

such term does not include a pocket knife with a blade of less than 2½ inches in length." 18 U. S. C. §930(g)(2). Petitioner argued that if a foot or sneaker were to automatically be counted as a "dangerous weapon," then any child who possesses feet and sneakers would be considered in possession of a dangerous weapon and could therefore be removed from school regardless of the results of a manifestation determination.

Petitioner also set forth a definition of "serious bodily injury" as involving "(A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty." 18 U.S.C. §1365(h)(3). Respondent failed to show that any of these conditions existed as a result of the school bus fight on March 13, 2019.

Accordingly, I **FIND** that student J.D. did not possess a weapon, nor did he cause serious bodily injury to A.B. on March 13, 2019, and that, therefore, neither of the stay-put exceptions apply in the within matter.

When considering whether a child is receiving FAPE, the starting point is the IDEA. IDEA was enacted to assist states in educating disabled children. It requires states receiving federal funding under the Act, such as New Jersey, to have a policy in place that ensures that local school districts provide disabled students with FAPE designed to meet their unique needs. See 20 U.S.C.A. §1412; N.J. Const. art. VIII, IV, 1; N.J.S.A. 18A:46-8; N.J.A.C. 6A:14-1.1 et seq., Hendrick Hudson Cent. Dist. Bd. of Educ. v. l., 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). State regulations set out the requirement that a local school district must provide FAPE as that standard is set under the IDEA. N.J.A.C. 6A:14-1.1. A FAPE and related services must be provided to all students with disabilities from age three through twenty-one. N.J.A.C. 6A:14-1.1(d). FAPE means special education and related services that: a) have been provided at public expense, under public supervision and direction, and without charge; b) meet the standards of the State educational agency; c) include an appropriate preschool, elementary, or secondary school education in the State involved; and d) are provided in conformity with the IEP required under §614(d). 20 U.S.C.A. §1401(9).

In accordance with N.J.S.A. 18A:46-1.1, the burden of proving that FAPE has been offered likewise rests with school personnel. The Board would have satisfied the requirements of law by showing that it offered to provide J.D. with personalized instruction and sufficient support services "as are necessary to permit [her] 'to benefit' from the instruction." G.B. v. Bridgewater-Raritan Reg'l Bd. of Educ., 2009 U.S. Dist. LEXIS 15671, *5 (D.N.J. Feb. 27, 2009)

In order to provide a FAPE, a school district must develop and implement an IEP. N.J.A.C. 6A:14-3.7. An IEP is "a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs." Sch. Comm. of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 368, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385, 394 (1985). The IEP is the agreement between the parties that specifies how special education and related services will be delivered. 20 U.S.C.A. §1414(d)(1)(A). It is the vehicle through which a child receives FAPE. D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 557 (3d Cir. 2010); Lascari v. Bd. of Educ. of the Ramapo-Indian Hills Reg'l Sch. Dist., 116 N.J. 30 (1989).

The Board argued that it had no responsibility to devise a new IEP for J.D. because the local educational agency (LEA) was Deptford Township, as the sending district. However, pursuant to N.J.A.C. 6A:14-4.7(h)(1)(i), when a student is placed in a full-time county vocational school outside of the local district, all responsibility for programs and services rests with the receiving district Board of Education. In this situation, those responsibilities lie with respondent Gloucester County Vocational Board of Education.[1]

It is disingenuous of respondent to argue that they do not have the responsibility to provide an IEP and necessary programs and services for J.D. IEPs promulgated by the Board were already in place prior to the incident which resulted in J.D.'s most recent suspension. Further, it is undisputed that respondent sent a draft IEP to petitioner on

[1] The issue of who is responsible to pay for a new educational program set forth in an IEP is not before this tribunal, and it is possible that respondent Board will have to negotiate that issue with Deptford Township, if a new IEP calls for J.D. to be educated in a school in Deptford or elsewhere "out-of-district," or if there are changes to issues such as J.D.'s school transportation.

March 29, 2019, indicating the change of placement to homebound instruction. It is that draft IEP which petitioner argued did not provide FAPE.

When scrutinizing a FAPE claim there is a two-part inquiry. A court must first ask whether the state or school district has complied with the procedures of IDEA when developing the IEP, and second, whether the IEP developed through the IDEA procedures is "reasonably calculated to enable the child to receive educational benefits." Rowley, 458 U.S. at 207, 102 S. Ct. at 3051, 73 L. Ed. 2d at 712. While IDEA does not require a school district to provide an IEP that maximizes "the potential of a disabled student, it must provide 'meaningful' access to education and confer 'some educational benefit' upon the child for whom it is designed." Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999) (citations omitted). In "[e]xamining the quantum of benefit necessary for an IEP to satisfy IDEA," the Third Circuit held "that IDEA 'calls for more than a trivial educational benefit' and requires a satisfactory IEP to provide 'significant learning,' and confer 'meaningful benefit.'" Ibid. (citations omitted).

Following amendments to the State regulations, in 1989 the New Jersey Supreme Court enunciated the standard to be applied in determining the adequacy or the appropriateness of an IEP. The Court in Lascari v. Ramapo Indian Hills Regional School District, 116 N.J. 30, 47-48 (1989), held that the education offered to a disabled child must be sufficient to confer some educational benefit upon the pupil. The Court went on to state that the current standard in New Jersey parallels the federal standard enunciated in Rowley. Lascari, 116 N.J. at 48. This standard provides the foundation upon which the pupil's IEP is built. Moreover, the IEP establishes "the rationale for the pupil's educational placement." N.J.A.C. 6A:14-1.3.

Other Third Circuit decisions have further refined that standard to clarify that such educational benefit must be "meaningful," "achieve significant learning," and confer "more than merely trivial benefit." T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572 (3d Cir. 2000); Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238 (3d Cir. 1999); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 183-184 (3d Cir. 1988), cert. den. sub. nom., Central Columbia Sch. Dist. v. Polk, 488 U.S. 1030, 109 S. Ct. 838, 102 L. Ed. 2d 970 (1989). The Third Circuit has re-emphasized the importance of the

inquiry into whether the placement proposed by the district will provide the student with "meaningful educational benefit." I.H. v. State-Operated Sch. Dist. of Newark, 336 F.3d 260 (3d Cir. 2003).

Additionally, the IDEA includes a mainstreaming requirement requiring education in the "least restrictive environment." 20 U.S.C.A. §1412(a)(5)(A). Courts in this Circuit have interpreted this mainstreaming requirement as mandating education in the least restrictive environment that will provide meaningful educational benefit. "The least restrictive environment is the one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled." Carlisle Area Sch. v. Scott P., 62 F.3d 520, 535 (3d Cir. 1995), cert. den. sub. nom., Scott P. v. Carlisle Area Sch. Dist., 517 U.S. 1135, 116 S. Ct. 1419, 134 L. Ed. 2d 544 (1996). Federal courts have adopted a two-part test for determining whether a school district complies with the statutory preference for the least restrictive environment. The first step is to determine whether the local school can educate the child in a regular classroom with the use of supplementary aids and services. Only if it is determined that the child cannot be educated in the regular classroom with supplementary aids and services does it then become necessary to consider out-of-district placements. Oberti v. Bd. of Educ. of Clementon Sch. Dist., 995 F.2d 1204, 1215 (3d Cir. 1993). A school district is deemed to have satisfied its requirement to provide a FAPE to a disabled child "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Rowley, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690.

"Mainstreaming" and "least restrictive environment" are issues in the within matter because the Board had proposed homebound instruction for an unlimited period of time.

In examining the Rowley two-part inquiry into whether FAPE was being provided, there were serious concerns as to the procedures followed by the respondent Board in making its determination that home instruction was the best course of action.

There was an annual review of J.D.'s IEP on March 4, 2019, a date prior to the school bus fight incident on March 13, 2019. At that annual review, the Board did not discuss any safety or disciplinary concerns, and did not recommend any changes to J.D.'s BIP or IEP.

The Board's decision of March 28, 2019, to recommend homebound instruction, was not made by the IEP team as part of the IEP process, as required by 20 U.S.C. §1414(d)(1)(A)(i)(VII) and N.J.A.C. 6A:14-3.7(i). The written results of the March 28, 2019, manifestation determination hearing clearly stated, by the Board having checked the first box on page 2, item 6, that: the student's behavior was a manifestation of his disability; the student could not be removed from his current placement for more than 10 days; and, "the student's placement may be changed through the regular IEP process." (Exhibit P-6.) Checking box 6 was an acknowledgement by the Board that its manifestation findings of March 28, 2019, were not part of the IEP process.

Further, Jim McVey, Special Education Supervisor, was the party who made the recommendation that J.D.'s educational program be changed to home instruction. However, no evidence was provided that Mr. McVey was a member of J.D.'s IEP team. McVey was not listed on the March 28, 2019, draft IEP as a member of the IEP team. Nothing was offered to show that McVey had any working knowledge of J.D.'s case, or that he had participated in any of J.D.'s prior IEP meetings.

It is irrelevant that the Board's draft IEP dated March 28, 2019, contained a list of "IEP Meeting Participants" including J.D., T.D., the general education teacher, special education teacher, etc. As a member of the IEP team, a parent must be a member of the group that makes the decision about educational placement. 20 U.S.C. §1414(e); 34 C.F.R. §§300.327 and 300.501(c). Yet while T.D. was present on March 28, 2019, she had not been invited to an "IEP meeting," but rather to a "manifestation determination" hearing. Therefore, without having received notice of an IEP meeting and without the ability to prepare for an IEP meeting, it cannot be considered that T.D. was a participant in the IEP process as required by 20 U.S.C. §1414(d)(1)(B), 34 C.F.R. §300.321, and N.J.A.C. 6A:14-2.3(k)(2).

Further, nothing was offered to show that the "IEP meeting" of April 24, 2019, had all necessary IEP personnel or that petitioner had received proper notice of an IEP meeting. It appeared that the meeting of April 24, 2019, had been scheduled at the last minute merely as a way to attempt reaching a settlement prior to the within hearing.

Accordingly, I **FIND** that the Board's decision to issue a draft IEP placing J.D. on home instruction was not made pursuant to statutory and regulatory requirements.

Regarding the second prong of the Rowley FAPE inquiry, petitioner argued that prolonged home instruction would be inappropriate. Before getting to whether the Board's educational program provided "meaningful educational benefit," petitioner asserted that home instruction should merely be a stop-gap measure, to be used "in limited circumstances and for a limited time." B.K. v. Princeton Regional Bd. Of Educ., OAL Dkt. No. EDS 4813-13 (April 15, 2013).

In J.D.'s case, the Board created and mailed a draft IEP calling for home instruction with no time frame or end date for said home instruction. In fact, the Board had asserted several times at the hearing that it did not have any ideas or suggestions for J.D.'s educational program other than homeschooling.

Also of concern is that it appeared that the Board had failed to provide J.D. with appropriate behavioral supports and positive behavioral interventions, and had taken insufficient steps to address the continuing litany of disciplinary violations by J.D. (in addition to failing to provide adequate academic and functional goals and objectives.)

It is understandable that a school board would seek to remove a student with seventeen disciplinary violations during an approximately eighteen-month time period. Home instruction would be an expeditious solution to a situation where a student possibly posed a threat to himself and other students. Home instruction, however, is merely a temporary solution; J.D. must be provided with an IEP setting out an educational program that provides FAPE in a less restrictive environment than

homebound instruction, if possible.[2] All options must be considered, even out-of-district placement. Specifically, N.J.A.C.6A:14-4.8(a) only allows home instruction "when it can be documented that all other less restrictive program options have been considered and have been determined inappropriate." The Board provided no such documentation or proof that they considered all other less restrictive program options.

I **FIND** that the Board is responsible to create an IEP for J.D. which provides FAPE. Based on the Board offering only home instruction without an end date and the Board's failure to consider and recommend an educational program for J.D. other than home instruction, I **FIND** that the Board has failed to provide FAPE.

CONCLUSION

I **CONCLUDE** that no exceptions to the "stay-put" provisions of IDEA apply to the within matter. I **CONCLUDE** that the respondent Board is responsible to provide J.D. with an IEP. I **CONCLUDE** that the Board failed to comply with the IEP protocols set out in state and federal statutes and regulations when it offered a draft IEP for J.D. on March 28, 2019, and that the Board failed to meet its burden of proving that its proposed IEP of March 28, 2019, would have provided J.D. with FAPE.

ORDER

I hereby **ORDER** that petitioner's request that student J.D. be returned to GCIT is **GRANTED**. I further **ORDER** that petitioner and respondent meet with all required IEP participants, within forty-five (45) calendar days of the date of this Final Decision, in

[2] Without an IEP and BIP that address J.D.'s particular behavioral issues, it is wholly possible that J.D.'s behavioral and disciplinary issues would continue, that he could be suspended again and that all of the within issues would have to be litigated again. However, the fact that a future disciplinary issue could once again result in J.D. being suspended from GCIT, and offered only home instruction, cannot be a consideration in the within matter so as to uphold the Board's determination that the only proper educational program for J.D. is homeschooling. One can only hope that J.D.'s behavioral issues do not result in physical harm to himself or others during any return to GCIT.

order to create a new IEP and BIP for J.D. that comport with all requirements of state and federal statutes and regulations.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2017) 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 (2017). 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 Programs.

May 13, 2019 _____

DATE **JEFFREY N. RABIN**, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

JNR/dw

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

Kimberly Townsend White, GCIT psychologist
Jamie Dundee, GCIT principal

EXHIBITS

For petitioner:

Brief dated April 30, 2019

For respondent:

Brief dated April 30, 2019