State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
GRANTING EMERGENT RELIEF
OAL DKT. NO. EDS 10402-22
AGENCY DKT. NO. 2023-35175

S.R. ON BEHALF OF Z.R.,
Petitioner,
v.
NEWARK CITY BOARD OF EDUCATION,
Respondent.

S.R., petitioner, appearing pro se

Brenda Liss, Esq., for respondent, Newark Public Schools (General Counsel, Office of General Counsel, attorney)

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

Record closed: November 28, 2022 Decided: November 29, 2022

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On November 11, 2022, petitioner S.R., submitted a request for emergent relief with the Office of Special Education (OSE) seeking an order to return her minor child, Z.R., to high school after being unable to attend since the first day of school. OSE filed that application on November 14, 2022.

In her petition, S.R. highlights that the Newark City Board of Education (Newark or District) failed to create a new IEP since 2019. S.R. asserts that the 2019 IEP for Z.R. required in-person instruction with a 1:1 aide, which Z.R is not receiving. Further, S.R. highlights that Newark did not discipline, suspend, or expel Z.R. Thus, S.R. asserts that Z.R. is being kept out of school with no legal basis and maintains he should return to his regular high school program at Weequahic High School (Weequahic).

Newark opposes this application asserting that S.R. fails to meet the criteria for emergent relief under N.J.A.C. 1:6A-12.1(e). Newark alleges serious safety concerns regarding Z.R.'s presence at Weequahic. See, Certification of Kyle Thomas.

On November 18, 2022, OSE transmitted the emergent application to the Office of Administrative Law (OAL) for a determination as a contested matter. On November 28, 2022, Newark submitted opposition to the request for emergent relief, and I conducted oral argument via Zoom due to continuing COVID-19 restrictions.

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 S.R.'s credibility, I **FIND** the following as **FACT** for purposes of this application only:

Z.R. resides in the Newark School District with his mother, S.R. Z.R. 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.R. is an eleventh grader enrolled at Weequahic and attended Weequahic last year.

On the first day of the 2022-23 school year, Z.R. attempted to go to Weequahic but was not permitted to enter because he arrived with at least one teenager not enrolled at Weequahic. Z.R. has a juvenile record, including car theft and prior incarceration. Based upon the belief that Z.R.'s companion had gang affiliation, Kyle Thomas, Weequahic' s principal, contacted S.R. Thomas certified that during this

conversation, S.R. agreed that Z.R. should leave that day, but S.R. denied that agreement.

Thomas highlights that Z.R. was present during several fights between rival gang members in the school in the spring and summer of 2022. Newark maintains that Z.R. cannot return to Weequahic for his safety and others at the school. Newark asserts that S.R. knows of its safety concerns, but S.R. denies discussing safety or Z.R.'s alleged gang involvement. Weequahic agrees that it did not discipline Z.R. regarding the events on the first day of school and that Z.R. is not under suspension or expulsion now or on that day.

Afterward, Weequahic offered home instruction to Z.R. Yet, S.R. declined this form of education asserting her son does poorly with home instruction and isolation. Indeed, Z.R. received no educational services since school began in September 2022.

On October 7, 2022, Weequahic' s Child Study Team (CST) conducted an IEP meeting resulting in recommendations that Z.R. either attends an alternative high school setting, including Newark Night School or Lead Academy, a charter school in the District or undergoes re-evaluations to determine other possible placements. Regardless, the CST determined Weequahic was no longer appropriate. Under the IEP, Z.R. would receive home instruction pending the re-evaluations. See, Certification of Marilyn Mitchell.

S.R. does not oppose evaluations but disagrees that home instruction or another school setting is appropriate because Z.R. does not do well with change because of his ADHD diagnosis. The CST advised S.R. that home instruction could take place at a location other than the family's residence, but S.R. maintains that this will not work for Z.R. and refused.

On October 14, 2022, the CST proposed an IEP with home instruction pending completion of educational, psychological, and social evaluations. The CST maintains the essential elements of Z.R.'s IEP are possible through home instruction. S.R. denies

receiving the IEP but does not consent to home instruction or an alternative placement as proposed. Since then, Z.R. underwent psychological and "cognitive" assessments.[1]

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.

[1] The parties were unclear if the "cognitive" evaluation was part of the psychological evaluation or another. Regardless, Newark seeks to complete the evaluations this month.

Undeniably, the case involves a break in the delivery of services. Further, the case also addresses placement pending the outcome of S.R.'s due process application.

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). Here, there is no agreement.

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). This section is also inapplicable.

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 under limited circumstances. (Emphasis added.) 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. While Newark asserts that it imposed no discipline, Newark did not allow Z.R. in school because of perceived safety risks to Z.R. and others, effectively changing his placement. Weequahic asserts that Z.R. is a gang member. Yet, S.R. denies this assertion. Significantly, Weequahic points to no prior discipline of Z.R. for disruptive or violent behavior at school. Still, safety is a valid concern for any school.

Regardless, due process protections apply to student suspensions or expulsions. 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); 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. Undeniably, more than ten days elapsed since school started

and Newark began no disciplinary action. Regardless, Newark opposes Z.R.'s return to Weequahic, citing safety concerns.

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).

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). Home instruction is one means of providing educational services during a suspension.

Notwithstanding, 20 § U.S.C. 1415(k)(1)(G) also 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 carries or possesses a weapon to or at school . . . possesses or uses illegal drugs . . . or 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 other words, although Newark characterizes its actions as non-disciplinary, other due process protections remain when precluding a

student with disabilities from attending their IEP-designated program for dangerous behavior, potential or otherwise.

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). S.R. did not accept an alternate in-person placement or home instruction, 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.
>
> [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.

Here, no manifestation meeting occurred because Weequahic contends it did not discipline Z.R. Regardless, Weequahic will not allow Z.R. to return to school. Yet,

Newark filed no expedited due process petition to remove Z.R. for any of the circumstances under 20 U.S.C. § 1415(k).

Indeed, I **CONCLUDE** that Newark unilaterally changed Z.R.'s placement without S.R.'s consent by removing Z.R. from Weequahic, his last agreed upon placement, offering only home instruction in disregard of his IEP.

I further **CONCLUDE** that Newark has not afforded S.R. and Z.R. due process necessary to remove or keep Z.R. out of Weequahic as required by 20 U.S.C. § 1415(k).

Therefore, I **CONCLUDE** Newark must return Z.R. to Weequahic, his last agreed-upon placement, and I **GRANT** S.R.'s request for emergent relief. In other words, Newark did not take the required steps for Z.R.'s "stay put" at Weequahic 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 complete the agreed-upon evaluations. Notably, 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 S.R., but S.R. disputes Newark's proposed IEP. Still, S.R. must cooperate with Newark in scheduling any remaining evaluations and attend any IEP meeting Newark schedules. Further, Z.R. is reminded that individuals not enrolled at Weequahic are not allowed on school grounds.

ORDER

Based on the foregoing, I **ORDER** that Newark return Z.R. to Weequahic and S.R.'s request for emergent relief be **GRANTED.**

I further **ORDER** that Weequahic promptly conduct the remaining agreed-upon evaluations and re-convene an IEP team meeting with S.R. to address any recommendations.

This decision on application for emergency relief shall remain in effect until the issuance of the decision on the merits in this matter. The hearing having been requested by the parents, this matter is hereby returned to the Department of Education for a local resolution session, pursuant to 20 U.S.C.A. § 1415 (f)(1)(B)(i). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education.

November 29, 2022

DATE

NANCI G. STOKES, ALJ

Date Received at Agency November 29, 2022

Date Mailed to Parties: November 29, 2022

ljb