State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
EMERGENT RELIEF
OAL DKT. NO. EDS 02364-23
AGENCY DKT. NO. 2023-35598

K.Q. ON BEHALF OF N.Q.,
Petitioner,
v.
DEPTFORD TOWNSHIP BOARD OF EDUCATION
Respondent.

Bradley R. Flynn, Esq., for petitioner (Montgomery Law, PLLC, attorneys)

Albert K. Marmero, Esq., for respondent (Long, Marmero & Associates, LLP, attorneys)

Record Closed: March 22, 2023 Decided: March 23, 2023

BEFORE **JUDITH LIEBERMAN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

By a request for emergent relief pursuant to the Individuals with Disabilities Education Act (IDEA), petitioner K.Q., on behalf of her minor son N.Q., seeks an order finding that N.Q. was disciplined and improperly removed from school for more than ten days, without a manifestation determination, by respondent, Deptford Township Board

of Education. Petitioner contends that N.Q.'s current placement at Deptford High School (DHS) is the appropriate stay-put placement and thus seeks an order directing respondent to return N.Q. to DHS; resume his instruction pursuant to his individualized education plan (IEP) and conduct behavioral assessments including a threat assessment and psychiatric evaluation. She also asserts that the texts that were the subject of part of N.Q.'s suspension were written outside the school campus and were not directed to school personnel. Thus, they should not have been the subject of disciplinary action. She further asserts that the offending texts are evidence that N.Q. is regressing while suspended at home and not receiving behavioral supports.

Respondent did not file an answer or certification in response to the petition. It nonetheless asserts that N.Q. was not suspended after he treated a teacher disrespectfully and yelled at him. Rather, he was placed on an approved administrative leave that was extended for two additional days so that the parties could explore an out-of-district placement. Respondent further contends that N.Q. was suspended for only eight days, after it learned that he sent inappropriate, threatening text messages. Respondent argues, in the alternative, that, because K.Q. consented to the first "cool down" day, if the other two "administrative leave" days are considered to be suspensions, N.Q. was suspended for only ten days. It was thus not required to conduct a manifestation determination.

Respondent also asserts that it did not change N.Q.'s placement and that any discussions about a change were informal. It concedes that N.Q. is entitled to return to school at the end of his suspension and that it is not pursuing an out-of-district placement at this time. Consequently, it agrees that his-stay put placement is DHS. Further, it asserts that District policy permits discipline for student speech that occurs outside the school campus.

The Request for Emergent Relief was transmitted by the Department of Education, Office of Special Education to the Office of Administrative Law, (OAL) where it was filed on March 16, 2023, as a contested case. N.J.S.A. 52:14B-1 to N.J.S.A. 52:14B-15; N.J.S.A. 52:14F-1 to N.J.S.A. 52:14F-13. The parties presented oral

argument on March 22, 2023, by way of Zoom video technology. Additional exhibits were submitted after the hearing, and the record closed on March 22, 2023.

FACTUAL DISCUSSION

The following, which is derived from the petition and its supporting documents, oral argument and exhibits in the record, is undisputed[1] and, therefore, I **FIND** the following as **FACT**:

N.Q. is an eleventh-grade student who is eligible for special education and related services under the classification of Emotional Regulation Impairment (ERI). He has been diagnosed with attention deficit hyperactivity disorder (ADHD), anxiety disorder and oppositional defiant disorder. P-H. His IEP places him in the ERI classroom and provides for counseling services. He is currently suspended from school, and remains at home, due to disciplinary action taken by respondent.

On March 13, 2023, a Monday, respondent learned that N.Q. used inappropriate and/or threatening language toward a teacher, Mr. C.[2] K.Q. was asked to pick him up from school. She reluctantly picked him up and, later that day, sent an email to school personnel in which she wrote that N.Q. wanted to stay in Mr. C.'s class and did not want to attend another school. She added, "We discussed how he can stay calm in class. So I do not want him moved to another school. What do we do about Tuesday, especially with testing?" P-G at 2.[3] The following morning, March 14, 2023, the school social worker, Joann Jones, replied, telling K.Q. to "[k]eep him at home right now." Id. at 1-2. She advised that she needed to consult with other staff members, including Mr. C., and that they would address the pending testing. Ibid. K.Q. asked if N.Q. was suspended. Jones replied, "At this time, he is marked administratively excused." Id. at 1. K.Q. was not told when N.Q. could return to school. Between March 13 and March 15, respondent independently explored potential out-of-district placements for N.Q., who remained home during this time.

[1] Respondent did not file an Answer in response to the Petition for Emergent Relief or a brief, certification or exhibits in support of its position. I permitted Michael Nicely, its Director of Special Services, to testify so that he could answer specific questions. I also permitted K.Q. to testify for the same reason.
[2] The teacher's full name is not used here to protect his privacy.
[3] This and all of the following exchanges were by email.

On Wednesday, March 15, 2023, Jones advised K.Q. that there was "information" that N.Q. was "involve[d] with threat [sic] to a staff member. Based on this information we are looking at out-of-district placement where more appropriate supports can be offered." P-F at 4. K.Q. asked if "out-of-district" meant "Gateway or somewhere else[.]" Ibid. Michael Nicely, Director of Special Services and Special Programs, asked K.Q. if she could attend an in-person meeting the following day, March 16, 2023, so that they could "provide this information to" her and "have a conversation on the next steps regarding [N.Q.'s] education." Id. at 3.

On Thursday, March 16, 2023, K.Q. advised that she was available for a meeting, by Zoom, that day or the following day. She asked about the purpose of the meeting and who would be in attendance. P-E at 1. Later that day, K.Q. wrote, "I will bring [N.Q.] to school tomorrow to take the 11th grade test. As far as I've been told, he is not suspended and can come in tomorrow for the test. Correct?" Ibid. She also asked if the meeting the following day could be conducted via Zoom. Nicely replied, "After discussion with the high school administration, [N.Q.] should not report to school tomorrow for testing until we finish our investigation with the text messages. Our attorney sent your attorney these text messages as well and we are awaiting his reply. We will discuss how [N.Q.] can test during make-ups." Id. at 2.

On Friday, March 17, 2023, K.Q. replied, "I have been trying to schedule this meeting with you, but I have not heard back from you about actually getting this scheduled. Can we schedule the meeting for today via Zoom? My lawyer will be attending with me. It is imperative that we have this meeting to discuss the alleged threat, so [N.Q.] can return to school. He is falling behind and I am worried that he is now regressing. Can we please get this scheduled for today?" Id. at 1-2. Later that day, Nicely responded that further communication about "next steps" would be sent directly to K.Q.'s attorney. Id. at 1.

The "information" that Jones referenced on March 15, 2023, is text messages sent by N.Q. that were understood to include threats against Mr. C. Another student shared the text messages with respondent. P-D at 2. N.Q. wrote, "[C.] is a bitch. If I

catch his ass outside school all tires gonna [sic] be slashy [laughing/crying emoji]. . . . My mom [on the phone] with a lawyer rn [sic] she tryna [sic] get me back in[.]" P-C at 1. N.Q. also wrote, "[C.] got scared." Id. at 2. A person with whom N.Q. was texting asked why [C.] would be scared of him. N.Q. replied, "That's what he told [the] school [laughing/crying emoji]." Id. at 3. He added three more "laughing/crying emojis" and wrote, "He was afraid a mf [sic] was gon [sic] hit him he said." Ibid.

In a March 17, 2023, letter, respondent's counsel advised petitioner's counsel, "Given the actions of N.Q., the District is issuing disciplinary action for the threatening text messages sent on March 15, 2023. N.Q. is to receive an eight (8) day external suspension beginning on Thursday, March 16, 2023, through Monday, March 27, 2023." P-B at 2. The letter also advised that the "District is actively working to provide home-instruction to N.Q. while serving the suspension. And finally, the District is actively working to conduct a manifestation determination." Ibid.

Respondent has not proposed to K.Q. a revised IEP to change N.Q.'s placement to home instruction; invited K.Q. to or convened an IEP meeting; provided her with written notice of its intention to change his placement; invited her to or scheduled a manifestation determination meeting[4] or offered to reevaluate N.Q. or conduct a functional behavior assessment or threat assessment. N.Q. is permitted to return to school after March 27, 2023.

A November 30, 2022, functional behavior assessment (FBA) reported that N.Q. was referred for the assessment "due to his ongoing concerns regarding lack of willingness to complete classwork and disrespect toward authority figures." P-H at 1. The FBA established a behavior intervention plan (BIP), which provides in relevant part:

> 1. When feelings of frustration or anger begin to rise, [N.Q.] will move to a cool down area in the classroom where he can have some time to de-escalate himself.
>
> 2. . . .

[4] Although there was an assertion that, the morning of the hearing, an email was sent to K.Q. about a manifestation determination, the email was not offered into evidence.

> 3. [N.Q.] will ask to speak with a trusted adult in the school when he is feeling a loss of control over his emotions.
>
> [P-B at 4.]

The FBA also recommended the following responses by teachers and staff:

> - Teacher will remind [N.Q.] to remove himself to a quiet part of the room if his verbal disrespect begins to escalate.
>
> - If [N.Q.] becomes verbally aggressive, the teacher will disengage from the altercation by making a statement similar to, 'I can see that you're becoming upset. We can talk about that at a later time.' The teacher will then physically move away from [N.Q.]. The teacher should address this at a later time when both parties are in a calm state.
>
> . . .
>
> - When [N.Q.] engages in a target behavior, that behavior should be ignored if safe to do so.
>
> [Id. at 5.]

N.Q.'s IEP and BIP do not provide for "cooling off" or "administrative leave" days. As of the time of the hearing, N.Q. has not received emotional regulation or behavioral supports since March 13, 2023. He also has not received evaluations or counseling since March 13, 2023. There is no evidence in the record demonstrating that academic instruction was arranged the day prior to the hearing. District Policy 5610 required that educational services shall be provided within five days of the suspension for "short-term" suspensions of "not more than ten consecutive school days[.]" P-J.

LEGAL ANALYSIS AND CONCLUSIONS

Emergent Relief

N.J.A.C. 1:6A-12.1(a) provides that a parent, guardian, board or public agency may apply in writing for emergency relief. An applicant for emergency relief must set forth in the application the specific relief sought and the specific circumstances they

contend justify the relief sought. Emergent relief shall only be requested 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.
>
> [N.J.A.C. 6A:14-2.7(r)1]

Here, N.Q. has been removed from school and has been home since March 13, 2023. Putting aside whether he was, in fact, suspended from March 13, through March 15, he has been out of school, without instruction or behavioral supports, since March 13. Although respondent asserted that it began to offer instruction on March 21, there is no evidence in the record concerning the nature and extent of any such instruction. There is no evidence that respondent provided behavioral services required by the IEP. For these reasons, I **CONCLUDE** that petitioner has established that the issue in this matter concerns a break in the delivery of services as well as disciplinary action and, thus, emergent relief may be sought.

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

> 1. that the party seeking emergent relief will suffer irreparable harm if the requested relief is not granted;
>
> 2. the existence of a settled legal right underlying the petitioner's claim;
>
> 3. that the party seeking emergent relief has a likelihood of prevailing on the merits of the underlying claim; and

> 4. when the equities and the interests of the parties are balanced, the party seeking emergent relief will suffer greater harm than the respondent.
>
> [Crowe, 90 N.J. at 132-34.]

Petitioner must make a "clear showing of immediate irreparable injury," or a "presently existing actual threat; (an injunction) may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by common law." Cont'l. Group, Inc. v. Amoco Chems. Corp., 614 F. 2d 351, 359 (D.N.J. 1980). In an educational setting, "irreparable harm may be shown when there is a substantial risk of physical injury to the child or others, or when there is a significant interruption or termination of educational services." Ocean Twp. Bd. of Educ. v. J.E. and T.B. obo J.E., OAL Dkt. No. EDS 00592-04, 2004 NJ AGEN LEXIS 115, at *8 (February 23, 2004).

Petitioner contends that irreparable harm is established because N.Q. has been out of school since March 13, 2023, when he was sent home, and has since received no behavioral supports or instruction. Further, petitioner contends that home suspension has had a detrimental emotional impact on N.Q. and that this has caused him to regress. Respondent argues that it initiated instruction and is planning to conduct behavioral and other assessments; however, as noted, there is no evidence of either.

That N.Q. has not received academic instruction for a period of days can be remedied by way of compensatory education. Thus, this does not support a finding of irreparable harm. As noted, petitioner argues that N.Q. has regressed emotionally and cites to the text messages as evidence of this. She suggests that N.Q. would not have written the messages had he not been removed from school. This is not supported by the evidence in the record and is, possibly, contradicted by the FBA that references "ongoing concerns" about his "disrespect toward authority figures[.]" P-H. Without more, I am unable to make findings concerning the emotional impact of the home placement upon N.Q.

Petitioner appears to argue that respondent's failure to conduct a manifestation determination caused irreparable harm. Pursuant to 20 U.S.C. § 1415(k)(1)(B) and N.J.A.C. § 6A:14-2.8(a), a school may remove a child with disabilities for up to ten days without providing any educational services, as long as it would not provide services to a student without disabilities. However, when, as here, a special education student is subject to discipline for violation of a code of student conduct, the district cannot remove the student from his placement for more than ten days unless a manifestation determination is performed. 20 U.S.C. §1415(k)(1)(E); N.J.A.C. 6A:16-7.3(a)(7). The goal of a manifestation hearing is to determine whether the conduct for which the child is being disciplined was a result of or affected by the student's disability or a failure to implement the student's IEP. In making a manifestation determination, the IEP team must consider all relevant information in the student's file, including the child's IEP, any teacher observations and any relevant information provided by the parent 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.
>
> [34 C.F.R. 300.530(e); 20 U.S.C. § 1415(k)(1)(E)(i), (ii).]

If the IEP team, which typically includes the parent, finds that the behavior was a manifestation of the student's disability, the IEP team must either conduct a functional behavioral assessment and implement a behavioral intervention plan or review and modify any existing plan as necessary, and return the child to the placement from which he was removed, unless there is agreement that a change in placement is appropriate. 34 C.F.R. 300.530(f). If the manifestation determination review does not find one of the above criteria are met, then the school may continue with the student discipline (including expulsion) just as it would for any pupil without an IEP. However, the student, while suspended, must continue to receive the educational services enabling him to continue to participate in the general education curriculum in another setting, and to progress toward meeting the goals established in his IEP. 20 U.S.C. §1415(k)(D)(1). When the parent of a child with a disability disagrees with the manifestation determination, they may appeal the decision by requesting a hearing. 34 C.F.R. 300.532.

Although respondent asserts that N.Q. was suspended for eight days because he was on an excused administrative absence from March 13 through March 15, there is no evidence in the record that an administrative absence is permissible. N.Q.'s IEP does not authorize such absences and his BIP provided for in-school "cooling down" periods or responses to misbehavior. It did not authorize an involuntary leave of absence. It is unreasonable to treat the first three days as anything other than a suspension. Indeed, respondent initially considered pivoting to an out-of-district placement, suggesting that it did not intend to return N.Q. to school after March 13. Regardless of respondent's choice of words, the first three days that N.Q. was home amounted to a suspension. See Christine C. v. Hope Twp. Bd. of Educ., 2021 U.S. Dist. LEXIS 20132 (D. N.J. 2021)(finding that school district's actions amounted to a change of placement notwithstanding its description of its actions as a "mere suspension"). I therefore **CONCLUDE** that respondent imposed an eleven-day suspension that commenced on March 13, and is scheduled to end on March 27, 2023.

Respondent is required to conduct a manifestation determination by the tenth day. As of the date of the hearing, respondent still had time to do this. Emergent relief is inappropriate when the harm has not yet occurred. I therefore **CONCLUDE** that petitioner has not met her burden with respect to the first Crowe prong and, thus, emergent relief cannot be granted.

Nonetheless, I underscore respondent's obligation to conduct a manifestation determination immediately, in accordance with the controlling law and regulations, and immediately implement any remedial measures that are required as a result of the manifestation determination. It must also provide full instruction to N.Q. during the remainder of his suspension.[5]

[5] Petitioner also asserted that N.Q.'s text messages could not be the subject of discipline because they were sent while he was not on school property. Petitioner cites to J.S. v. Manheim Twp. Sch. Dist., 231 A.2d 1044, 2020 Pa. Commw. LEXIS 397 (May 13, 2020), as support for this. The Pennsylvania Supreme Court heard the appeal of this matter and did not so rule. Rather, its findings were based upon a factual record that was developed during a full hearing concerning the student's communications. J.S. v. Manheim Twp. Sch. Dist., 263 A.3d 295, 2021 Pa. LEXIS 3998 (November 17, 2921). Here. the record has not been fully developed such that this analysis could be properly conducted. Petitioner has offered no other support for her assertion. Accordingly, she has not met her burden with respect to this claim.

Petitioner also asserted that respondent is obligated to conduct a threat assessment. NJ.S.A. 18A:17-43.4 provides for the establishment of threat assessment teams in public schools and requires each school district to develop and implement a policy "concerning the assessment and intervention of students whose behavior poses a threat to the safety of the school community, and appropriate actions to be taken, including available social, developmental, and

ORDER

Based on the foregoing, petitioner's request for emergent relief is **DENIED** without prejudice. If petitioner determines that respondent has not complied with its obligations under the IDEA and its regulations, she may renew her application for emergent relief.

This decision on application for emergency relief shall remain in effect until the issuance of the decision on the merits in this matter. The hearing having been requested by the parents, this matter is hereby returned to the Department of Education for a local resolution session, pursuant to 20 U.S.C. § 1415(f)(1)(B)(i). If the parents or adult student feel 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.

March 23, 2023 _____
DATE

JUDITH LIEBERMAN, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

law enforcement resources, for students whose behavior is identified as posing a threat to the safety of the school community." N.J.S.A. 18A:17-43.4. Further, "[w]hen assessing a student whose behavior may pose a threat to the safety of the school community, in the case of a student with an Individualized Education Program (IEP) or 504 plan, the threat assessment team shall consult with the IEP team or 504 team to determine whether the aberrant behavior is a threat to school safety and is being properly addressed in a manner that is required by N.J.A.C. 6A:14 and all federal and State special education laws." N.J.S.A. 18A:17-43.5(b).

However, while the Governor signed the law on August 1, 2022, it "shall take effect immediately and shall first apply to the first full school year next following the date of enactment." In the August 1, 2022, press release announcing his signing of the new law, Governor Murphy clarified that this means "[t]his law will take effect immediately for the 2023–2024 school year." See Governor Murphy Signs Legislation Requiring NJ Public Schools to Develop Threat Assessment Teams (August 1, 2022), available at nj.gov/governor/news. Thus, the law does not apply, and school districts need not comply with the requirements of N.J.S.A. 18A:43.4 to N.J.S.A. 18A:43.6, until the start of the 2023–2024 school year, or July 1, 2023. See N.J.S.A. 18A:36-1 (providing that "[t]he school year for all schools in the public school system shall begin on July 1 and end on June 30").

JL/jm

APPENDIX

WITNESSES

For petitioner

K.Q.

For respondent

Michael Nicely

EXHIBITS

For petitioner

P-A None
P-B Marmero letter, March 17, 2023
P-C Screenshots of text messages
P-D Email exchanges
P-E Email exchanges
P-F Email exchanges
P-G Email exchanges
P-H Functional Behavior Assessment, November 30, 2022
P-I Photographs
P-J Suspension Procedures and Pupil Discipline/Code of Conduct

For respondent

None