State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
OAL DKT. NO. EDS 01352-23
AGENCY DKT. NO. 2023-35441

C.C. AND L.K. ON BEHALF OF C.C.,
Petitioners,
v.
KINNELON BORO BOARD OF EDUCATION,
Respondent.

Matthew C. Moench, Esq., for petitioners (King, Moench & Collins LLP, attorneys)

Kyle Trent, Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy, P.C., attorneys)

Record Closed: February 28, 2023 Decided: March 6, 2023

BEFORE **JUDE-ANTHONY TISCORNIA**, ALJ:

STATEMENT OF THE CASE

C.C. and L.K. on behalf of their minor child C.C. (petitioners) filed an expedited due-process petition challenging 1) a ten-day out-of-school suspension and 2) a change in placement from in-district to home school, pending out-of-district placement. The child

has an individualized education program (IEP) and the "stay put" provides for in-district instruction.

PROCEDURAL HISTORY

Petitioners filed a Request for a Due-Process Hearing, disputing the Kinnelon school district's (respondent or district) proposed out-of-district placement of their minor child C.C., with the Office of Special Education Policy and Procedures on February 1, 2023. Petitioners also filed a Request for Expedited Due-Process Hearing, challenging the district's ten day out-of-district suspension of C.C. Both petitions were transmitted to the Office of Administrative Law (OAL) on February 14, 2023, as expedited matters, with a hearing to be conducted and completed no later than March 7, 2023.

Along with the above-referenced expedited matters, a petition for emergent relief was also transmitted to the OAL. Both the expedited and the emergent issues were transmitted under the same docket number. The emergent petition sought a temporary order allowing C.C. to remain in-district pending the resolution of the underlying expedited matters, and was heard by the honorable Kelly Kirk, ALJ, on or about February 16, 2023. Judge Kirk ordered that the stay-put provision of C.C.'s current IEP required C.C. to remain in-district pending the resolution of any outstanding disputes between the parties. Thus, C.C. currently remains in-district.

The district filed a motion to dismiss the remaining petitions, and the petitioners' opposition to the motion was received on February 24, 2023. Oral argument was heard regarding the motion on February 27, 2023, after which I reserved decision on the motion. The underlying matter was heard, with testimony taken, immediately following the oral argument on the motion to dismiss. The record remained open until February 28, 2023, for submission of exhibits.

FACTUAL DISCUSSION

I **FIND** the following to be the facts of the case:

1. C.C. is a minor child, currently enrolled (third grade) in the Kinnelon Borough Board of Education school district. C.C. receives special-education services and has an IEP.

2. On January 27, 2023, an incident occurred while C.C. was at school. This incident involved C.C. and a district employee (paraprofessional) during a class session. The incident was reported up the chain of command as a disciplinary issue.

3. On January 30, 2023, petitioners received an e-mail correspondence from principal Dawn Uttel advising them that C.C. was being disciplined in response to the January 27, 2023, incident, and would receive a twenty-minute lunch detention in response to the behavior. See P-1.

4. On January 31, 2023, the district's director of Special Services, Hilary M. Beirne, sent e-mail correspondence advising petitioners that the district was unilaterally removing C.C. from in-person instruction effective February 1, 2023. See P-2. This correspondence advised the parents/petitioners that: 1) C.C. would be placed on home instruction effective February 1, 2023; 2) the district did not have a program in-district that could support C.C., and so the district would seek an out-of-district placement for him; and 3) it was the district's hope that C.C. would be able to return in-district "sometime in the future." See P-2; R-7.

5. On February 1, 2023, the petitioners received an e-mail correspondence from Principal Uttel advising them that C.C. was being suspended (out-of-school suspension) for ten days, due to the January 27, 2023, incident.

6. On February 10, 2023, an IEP meeting was held, and a resulting IEP was drafted. This February 10, 2023, IEP provides for an out-of-district placement for C.C.

Motion to Dismiss

The district filed a motion to dismiss the expedited due-process petitions on February 24, 2023. The motion essentially argues that 1) petitioners' dispute regarding the ten-day suspension should be dismissed, as the ten-day suspension period has passed, and the claim is, thus, moot. Next, the district argues that 2) the underlying claim regarding the ten-day suspension asserts a violation of the procedural requirements of N.J.A.C. 6A:16-7.2, and, thus, should be before the Commissioner of Education as a dispute arising out of school law and not before the Office of Special Education (OSE). Since, the district argues, the matter was wrongfully transmitted from OSE as a special-education matter, the undersigned does not have proper jurisdiction. Finally, the district argues that 3) petitioners' challenge to the change in placement proposed via the January 31, 2023, correspondence is moot, as a collaborative IEP meeting has since been held and a proposed IEP offered.

Regarding the motion to dismiss, I hereby **DENY** same, as I **CONCLUDE** that 1) the matter regarding the ten-day suspension is not moot, as there remains a record of the child having served said suspension; 2) the matter regarding the ten-day suspension is properly before me, as I **CONCLUDE** that this disciplinary issue is subsumed with the superseding change-in-placement dispute, and 3) the change-in-placement dispute is not moot because the alleged improper means by which the district attempted to change placement, i.e., the January 31, 2023, letter, remains unaddressed by the district.

LEGAL DISCUSSION

Ten-Day Suspension

The district argues that, considering that the discipline imposed was a short-term suspension of no more than ten days, the Board of Education had discretion under the law to impose such a suspension utilizing the same procedures applicable to non-disabled students. While I agree that boards of education generally have wide discretion when imposing minor discipline, it is well settled that any such discipline imposed, if

challenged, must still be considered under the arbitrary-and-capricious standard when considering the board's action.

In order for the undersigned to disturb the discipline imposed here, I must conclude that the Board's actions were arbitrary, capricious, or unreasonable. "Arbitrary and capricious action . . . means willful and unreasoning action, without consideration and in disregard of circumstances." Worthington v. Fauver, 88 N.J. 183, 204–05 (1982) (quoting Bayshore Sewage Co. v. Dep't of Envt'l Prot., 122 N.J. Super. 184, 199 (Ch. Div. 1973)). "'Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.'" P.S. on Behalf of Minor Child, T.S., 2019 N.J. AGEN LEXIS 562 at *16 (August 28, 2019) (quoting Bayshore, 122 N.J. Super. at 199–200), adopted, 2019 N.J. AGEN LEXIS 999 (October 15, 2019). "To satisfy the arbitrary and capricious standard, petitioner must prove that respondent acted in either bad faith or in disregard to the circumstances." Ibid. In making such a determination, I must review and analyze the facts presented.

In the present matter, the facts show that on January 27, 2023, an incident occurred involving C.C. that prompted the district to impose discipline. On January 30, 2023, petitioners received an e-mail from Principal Uttel advising them that C.C. was being disciplined in response to the January 27, 2023, incident in the form of a twenty-minute lunch detention. On February 1, 2023, the petitioners received a subsequent e-mail from Principal Uttel advising them that a ten-day suspension was being imposed effective immediately, resulting from the same January 27, 2023, incident.

Based on the foregoing, I **CONCLUDE** that, while the decision to impose discipline was not, in itself, arbitrary and capricious, the form of the discipline imposed, i.e., the ten-day suspension, was arbitrary and capricious, because the district had already imposed discipline in the form of the lunch detention. Thus, the district seems to have been made aware of the incident, analyzed and investigated it, determined that a certain degree of discipline was warranted, imposed said degree of discipline, only to then, unilaterally and inexplicably, raise the degree of discipline, and impose a second, more severe round of discipline for the same underlying offense. This conclusion is bolstered by the fact that

when the petitioners were contacted on January 30, 2023, regarding C.C.'s receiving the lunch suspension, there was no indication given that this was any sort of a preliminary discipline and that further, more severe discipline may be imposed. If, for example, new facts emerged sometime after the initial lunch suspension was imposed, facts that tended to show that C.C.'s conduct was more egregious than originally thought, then the imposition of a second round of more severe discipline may have been warranted. I **FIND** that no such facts arose. Thus, I **CONCLUDE** that the board's action of imposing a second, elevated round of discipline, in the form of a ten-day suspension, was arbitrary, capricious, and, therefore, unwarranted. The ten-day suspension should, thus, be rescinded.

Change in Placement

The petitioners received an email on January 31, 2023, from the district's director of Special Services advising them that the district was unilaterally removing C.C. from in-person instruction, effective the following day (February 1, 2023). As noted above, C.C. has been identified as a child with a disability and, therefore, has an IEP in place that is tailored to his individual needs. State and federal laws require local public school districts to identify, classify and provide a free and appropriate public education (FAPE) to children with disabilities. 20 U.S.C. § 1412; N.J.S.A. 18A:46-8, -9. FAPE is an education that is specially designed to meet the unique needs of the handicapped child, supported by "'such services as are necessary to permit the child "to benefit" from the instruction.'" G.B. v. Bridgewater-Raritan Reg'l Bd. of Educ., 2009 U.S. Dist. LEXIS 15671 at *5 (D.N.J. Feb. 27, 2009) (citing Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 189 (1982)).

In order to provide FAPE, a school district must develop and implement an individualized education program. The IEP is "the centerpiece of the statute's education delivery system" and serves as the "vehicle" or "means" of providing a FAPE. Honig v. Doe, 484 U.S. 305, 311 (1988); Rowley, 458 U.S. at 181. 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 (1985).

In the case at bar, the petitioners assert that the district attempted to unilaterally alter C.C.'s IEP by making a change in placement from in-district to at home, and ultimately out-of-district, all without consultation with the parents and without first implementing the procedural safeguard of conducting a collaborative IEP meeting. While the district contended that the February 1, 2023, correspondence was simply a precursor to the IEP meeting that would eventually take place, I find no indication of such. It appears that the district attempted to unilaterally make a permanent change to C.C.'s placement via an e-mail communication and without going through the proper protocols.

In order for procedural violations of the IDEA to be actionable, the violations must amount to a substantive deprivation of a free appropriate public education. 20 U.S.C. § 1415(f)(3)(E)(i). The procedural deficiencies must have (1) impeded the child's right to a free appropriate public education; (2) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to the parents' child; or (3) caused a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2) (2022); N.J.A.C. 6A:14-2.7(k). A claim based on a violation of the IDEA's procedural requirements is thus not valid unless it alleges that the flaw affected the student's or the parents' substantive rights. Kingsmore v. Dist. of Columbia, 466 F.3d 118, 119 (D.C. Cir. 2006). In the case at bar, I **CONCLUDE** that the district's attempt to change C.C.'s placement without first conducting an IEP meeting did affect the parents' substantive rights under the law.

Notwithstanding the above determination, the district, perhaps realizing that a change in C.C.'s placement cannot be achieved via an informal communication, did, in fact, conduct a collaborative IEP meeting on February 10, 2023. The product of that meeting is a proposed IEP that provides for an out-of-district placement. While the substance of this February 10, 2023, IEP is not before me, it would now appear that the underlying dispute regarding the January 31, 2023, correspondence and any change in placement proposed therein is moot, as a collaborative IEP meeting has now been conducted. Any dispute arising out of that meeting or the corresponding IEP that resulted from that meeting should be addressed via a separate due-process petition.

ORDER

Based upon the foregoing, it is **ORDERED** that the ten-day suspension imposed by respondent is, hereby, **RESCINDED**.

It is further **ORDERED** that the change in placement imposed by the February 1, 2023, correspondence is, hereby, **RESCINDED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2022) 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 (2022). 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 6, 2023

DATE

JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency 3/6/23

Date Mailed to Parties: 3/6/23

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APPENDIX

WITNESSES

For Petitioners:

Lori Foster
Dawn Uttel

For Respondent:

L.K. (petitioner)

LIST OF EXHIBITS IN EVIDENCE

For Petitioners:

P-1 E-mail between school and parents from 1/27/23 to 1/30/23
P-2 E-mail from H. Beirne to petitioners, et al. dated 1/31/23
P-3 E-mail from M. Moench to school district, dated 1/31/23
P-4 Letter from M. Moench to school district, dated 1/31/23
P-5 E-mail from District to petitioners, dated 2/1/23
P-6 District Policy 5600—Pupil Discipline/Code of Conduct
P-7 District Policy 5610—Suspension
P-8 District Regulation 5610—Suspension Procedures

For Respondent:

R-1 IEP, dated 11/8/22
R-2 Emails between case manager and parents, dated 11/9/22
R-3 Incident Log Notes for 2022–23 school year
R-4 Handle with Care Interventions Report for 1/27/23 incident
R-5 Risk Assessment Checklist for 1/27/23 incident with parent-objection e-mails
R-6 Principal's timeline for 1/27/23 incident

R-7 Letter from director of Special Services and principal to parents, dated 1/31/23

R-8 Notice of 10-day suspension, dated 2/1/23

R-9 Proposed IEP with attendance sheet and transmittal emails, dated 2/10/23

R-10 Due-Process Petition filed by petitioners, dated 2/20/23

R-11 Lori Foster resume

R-12 Board attorney letter to parent's attorney, dated 12/8/22