194-17

C.H., on behalf of minor child, M.H.,	:	
PETITIONER,	:	
V.		COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY OF SALEM, SALEM COUNTY	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the respondent Board's disciplinary determination with respect to his son, M.H. Petitioner contended that the Board's determination that M.H. had made "terroristic threats" – and the subsequent imposition of a four-day out-of-school suspension, forty-five demerits, and placement in an alternative education program – was improper because the District failed to conduct a manifestation determination in accordance with its policy and applicable law. Concurrent appeals challenging the Board's determination were filed before the Commissioner and the Office of Special Education Programs (OSEP). Based on the ALJ's determinations in the OSEP matter – wherein the ALJ found that M.H.'s behavior did not meet the definition of "terroristic threats" and the District failed to conduct a manifestation determination, as well as establish the existence of any special circumstances for removing M.H. from school – petitioner sought expungement of the four-day suspension and the forty-five demerits. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: the District's own policy with respect to classified students requires that "prior to disciplining a classified student, it must be determined that the student's behavior is not primarily caused by his disability and the program provided meets the student's needs"; while the Individuals with Disabilities Education Act requires a manifestation determination before a student is removed from his/her current placement, the District's policy requires such a determination prior to any discipline being imposed upon a classified student; in this case, the District made no determination as to whether M.H.'s behavior was a manifestation of his disability; the District's assertion that the suspension was warranted, based on M.H.'s actions in writing a rap song that makes reference to guns while at school, was determined to be baseless in the OSEP matter; and the forty-five demerits assessed upon M.H. were never reported in his record, and therefore render that issue moot. The ALJ concluded that the imposition of the four-day suspension was improper, but since it has already been served, the only remedy is to remove the suspension from his disciplinary record. Accordingly, the ALJ ordered that any reference to the suspension in M.H.'s disciplinary record, or other school record, be expunged.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

July 13, 2017

OAL DKT. NO. EDU 01733-16
AGENCY DKT. NO. 7-1/16

C.H., on behalf of minor child, M.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF SALEM, SALEM COUNTY	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by respondent, and petitioner's reply thereto. In this matter, petitioner challenges the Board's disciplinary determination pertaining to M.H. Specifically, petitioner contends that the Board's determination that that M.H. made "terroristic threats against staff; students; and/or faculty" and its subsequent imposition of forty-five demerits and a four-day out-of-school suspension on M.H., followed by placement in an alternative education program, were improper because the District failed to conduct a manifest determination in accordance with its policy and applicable law; and therefore, M.H.'s permanent record should be expunged.[1]

Petitioner had filed concurrent appeals before the Commissioner and the Office of Special Education Programs (OSEP) challenging the Board's determination. In the OSEP matter, the Administrative Law Judge (ALJ) determined that the Board improperly placed M.H. in an alternative education program because the District failed to conduct a manifest determination and establish the existence of any special circumstances for removing M.H. from school. The ALJ also found that

[1] This particular disciplinary action was triggered by a staff member's discovery of rap lyrics referencing guns in M.H.'s journal. The parties agree that M.H. was previously advised not to discuss guns in school.

M.H.'s behavior did not meet the definition of "terroristic threats."[2] Based on the ALJ's findings in the OSEP matter, petitioner now seeks expungement of the four-day suspension and the forty-five demerits from M.H.'s records.

In the matter before the Commissioner, the ALJ found that M.H. did not receive the forty-five demerits, thereby rendering the issue moot. The ALJ also found that the District – in violation of its own policy – failed to conduct a manifestation determination before imposing disciplinary action on M.H. The ALJ concluded that imposition of the four-day suspension was improper because the tribunal had already determined that M.H.'s behavior did not rise to the level of "terroristic threats" – which was the Board's sole basis for its disciplinary action in this matter – and as such, any reference to the four-day suspension in M.H.'s records should be removed.

The Board takes exception to the ALJ's determination that the suspension was unmerited and that any reference to same must be expunged from M.H.'s records. The Board argues that irrespective of whether the behavior rose to the level of "terroristic threat," the behavior nonetheless occurred – notably, M.H. defied previous warnings about such behavior. The Board contends that the four-day suspension was, therefore, imposed for good cause, and should be upheld. In reply, petitioner argues that the Board violated its own policy by failing to perform a manifestation determination before imposing the four-day suspension, and therefore, it should not be allowed to maintain a record of the suspension for "terroristic threats," especially when the ALJ found that M.H. did not make terroristic threats.

Upon consideration and review, the Commissioner is in accord with the ALJ's determination that pursuant to *N.J.A.C.* 6A:32-7.7, expungement of the four-day suspension from M.H.'s permanent record is proper because the specific misconduct – terroristic threats – did not occur. The Commissioner also agrees with the ALJ's determination that the District failed to adhere

[2] The ALJ did not make a determination on the appropriateness of the four-day suspension or the demerits, nor did the ALJ decide whether M.H.'s behavior was a manifestation of his disability.

to its own policy when it did not conduct a manifestation determination prior to imposing disciplinary action on M.H.

Board Policy No. 5131 provides, in pertinent part, "before disciplining a classified pupil, it must be determined that: A. The pupil's behavior is not primarily caused by his/her educational disability"; and "B. The program that is being provided meets the pupil's needs." In other words, in accordance with its policy, the Board must conduct a manifestation determination before imposing any form of discipline on a classified student. Here, the Board admittedly did not conduct a manifestation determination before suspending M.H. for four days. The Board now seeks to bypass its policy requirements and maintain the disciplinary action in M.H.'s records, which is improper. More importantly, when the sole basis for the four-day suspension – terroristic threats – is found not to have occurred, there is no justification for upholding such discipline.[3] Therefore, expungement of any reference to the four-day suspension – pursuant to *N.J.A.C.* 6A:32-7.7 – is proper.

Accordingly, the recommended decision of the ALJ is adopted as the final decision in this matter. Petitioner's motion for summary decision is granted in part and denied in part. The Board is hereby directed to expunge the record as to M.H.'s four-day suspension in December 2015; however, expungement is moot as regards the demerits, since they were never recorded. The Board's cross-motion for summary decision is denied.

IT IS SO ORDERED.[4]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 13, 2017
Date of Mailing: July 13, 2017

[3] In its exceptions, the Board attempts to argue that the suspension was imposed as a result of M.H.'s defiance of authority and pattern of behavior, which clearly contradicts the substance of the Board's notice of suspension – which was issued in relation to a specific incident that the Board considered to be an act of "terroristic threat."

[4] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 01733-16

AGENCY DKT. NO. 7-1/16

C.H. ON BEHALF OF M.H.,

Petitioner,

v.

SALEM CITY BOARD

OF EDUCATION,

Respondent.

_____

Gerald J. Neski, Esq., for petitioner (Garofala & Neski, P.C., attorneys)

Corey E. Ahart, Esq., for respondent

Record Closed: May 19, 2017 Decided: May 31, 2017

BEFORE **JOHN S. KENNEDY**, ALJ:

STATEMENT OF THE CASE

Petitioner, C.H. on behalf of his minor son, M.H. challenges the Board of Education of the City of Salem's (Board) disciplinary determination and suspension of M.H. from school. The Board disciplined M.H. for allegedly making terroristic threats.

PROCEDURAL HISTORY

On January 15, 2016, petitioner, C.H., filed with the Office of Special Education Programs (OSEP), New Jersey Department of Education, an expedited petition for due process, seeking an order overturning Board's decision to place his son, M.H., in an alternative interim placement due to terroristic threats alleged to have been made by M.H. On January 20, 2016, the matter was filed with the Office of Administrative Law (OAL) for expedited hearing, which was held before this tribunal on February 9, 2016. A decision was rendered in the special education matter on March 1, 2016. Petitioner simultaneously filed this matter seeking the removal of Board's disciplinary determination from M.H.'s record. This matter was filed with the OAL on February 3, 2016. On August 11, 2016, petitioner filed a motion for Summary Decision. Due to the passing of the District's solicitor, a response and Cross Motion for Summary Decision was not filed until December 15, 2016. Oral argument was originally scheduled for January 20, 2017, but on January 17, 2017, both parties agreed to have the matter decided on the papers.

FACTUAL DISCUSSION

M.H. is a fifteen-year-old student who resides within the Salem City School District (District). He is eligible for special education and related services under the classification of Specific Learning Disability (SLD) and the district has prepared an Individualized Education Plan (IEP) to assist him with disabilities in basic reading skills, mathematical problem solving and written expression. He is a Junior at Salem City High School.

On December 12, 2015, M.H. was subjected to discipline by the District for alleged terroristic threats when district employees discovered lyrics to a rap song written in M.H.'s school journal. The Board conducted a hearing on January 6, 2016, and affirmed the recommendations of the Superintendent that M.H. be suspended for four-days, receive forty-five demerits and be placed in an alternative school program at Salem Middle School. As the aforementioned statements are not in dispute, I hereby **FIND** them as **FACT**.

After having had an opportunity to observe the appearance and demeanor of the witnesses, and consider the testimonial and documentary evidence presented at the hearing on February 9, 2016, I made the following additional **FINDINGS** of **FACT**:

1. M.H. wrote in a class journal a rap song that had the following lyrics: "U better dip like a chip because I got a new gun with 2 clips I can't wait to use it better yet shoot it roll up in your club like a blunt we smoke it can't comprehend no more we baking like hot cakes."

2. At the hearing conducted by the Board, the Board affirmed this action after hearing testimony and M.H.'s attorney was given an opportunity to cross-examine witnesses.

3. The term "terroristic threats" is not defined in the District student handbook.

4. M.H. had been warned in November 2015, that this is not appropriate when his father was called in to school after M.H. was taking about shooting a gun at a gun range. M.H. was advised at that time that he cannot talk about guns in school. Both M.H. and his father understood and agreed.

5. District staff secured M.H., checked his bags and locker and found no weapons of any kind. The rap lyrics were not given to anyone or performed in school by M.H. They were discovered by a teacher that was reviewing M.H.'s journal to check his work as required by his IEP.

6. The District's Child Study Team was not consulted as part of the discipline process. In December 2014, the Child Study Team had recommended a psychiatric evaluation be conducted upon M.H., but his father refused the evaluation. The Child Study Team wanted him evaluated because his last psychiatric evaluation was conducted when M.H. was in second grade. At

that time, M.H. drew pictures of guns and stated that he was mad at another child and would shoot him if he had a gun.

7. M.H. does not own a gun, has never shot a gun or even touched a gun in his life.

8. The District recommended a change in placement, primarily based upon a perceived threat to the safety and welfare of the District's staff and students.

I concluded in my March 1, 2016, decision, that the Board cannot remove M.H. to an alternative educational setting because the Board has failed to prove any special circumstance for removal of a child whose conduct has not been determined to be a result of his disability or that maintaining M.H.'s current placement is substantially likely to result in injury to himself or others. 20 U.S.C.A. § 1415(k)(3)(B)(ii); 34 C.F.R. § 300.532(b)(2) (2014); see also N.J.A.C. 1:6A-14.2(e). No determination regarding petitioner's claim that M.H.'s due-process rights were violated at the Board's hearing on January 6, 2016, was rendered in the special education matter. I further made no determination whether the four-day suspension or the demerits imposed upon M.H. were appropriate. It is clear and I **FIND** as **FACT** that M.H. was suspended for four-days for making terroristic threats. I further **FIND** as **FACT** that the District made no determination that M.H.'s behavior was a manifestation of his disability.

In his response and Cross Motion for Summary Decision the District for the first time advises that the forty-five demerits assessed upon M.H. were never recorded and are, therefore not on his permanent record. I therefore **FIND** as **FACT** that M.H. did not receive forty-five demerits and thereby render that issue moot.

LEGAL ANALYSIS AND CONCLUSION

Under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C.A. §§ 1400–1482, and its implementing regulations, a school district "may remove a student to an interim alternative educational setting for not more than forty-five school days without

regard to whether the behavior is determined to be a manifestation of the child's disability", if the child brings a weapon to school, inflicts serious bodily injury on another person at school, or "knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function." 20 U.S.C.A. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g) (2014); see also N.J.A.C. 6A:14-2.8(d), (f). If the school district believes that maintaining the child's current placement is substantially likely to result in injury to the child or others, the school district may request an expedited due-process hearing. 20 U.S.C.A. § 1415(k)(3), (k)(4)(B); 34 C.F.R. § 300.532(a) and (c) (2014); see also N.J.A.C. 6A:14-2.7(n); N.J.A.C. 1:6A-14.2(a). In such a case, a hearing officer may "return a child with a disability to the placement from which the child was removed" under certain circumstances or "order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than forty-five school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others."[5] 20 U.S.C.A. § 1415(k)(3)(B)(ii); 34 C.F.R. § 300.532(b)(2) (2014); see also N.J.A.C. 1:6A-14.2(e).

Under State Law, the school district bears the burden of proof and the burden of production in any due-process hearing held in accordance with the IDEA with respect to "the identification, evaluation, reevaluation, classification, educational placement, the provision of a free, appropriate public education, or disciplinary action, of a child with a disability." N.J.S.A. 18A:46-1.1. In a due-process hearing before the OAL, "[t]he judge's decision shall be based on the preponderance of the credible evidence, and the proposed action of the Board of Education or public agency shall not be accorded any presumption of correctness." N.J.A.C. 1:6A-14.1(d).

The District's own policy with respect to classified students requires that "prior to disciplining a classified student, it must be determined that the student's behavior is not primarily caused by his or her disability and the program provided meets the student's needs. (See, J-1 attached to petitioners Brief in Support of Summary Decision at page

[5] The child shall remain in the interim alternative educational setting until an administrative law judge (ALJ) renders a decision or until the expiration of the forty-five-day removal period, whichever occurs first. 20 U.S.C.A. § 1415(k)(4)(A); 34 C.F.R. § 300.533 (2014); see also N.J.A.C. 6A:14-2.7(u); N.J.A.C. 6A:14-2.8(f).

44.) While the IDEA requires a manifestation determination before a student is removed from his/her current placement, District policy requires such a determination prior to any discipline being imposed upon a classified student. Here the District made no determination if M.H.'s behavior was a manifestation of his disability.

The District asserts that the suspension is warranted based on M.H's actions of writing a rap song making reference to guns while in school. The District also concedes that since my March 1, 2016, decision concluded that M.H. did not make "terroristic threats" pursuant to neither District policy nor N.J.S.A. 2C:2-3, any reference to "terroristic threats" will be removed from his Disciplinary Record. In a letter, dated December 11, 2015, the District advised petitioner that the reason for the suspension is "Terroristic threats against staff; students; and or faculty." (See, P-1 attached to petitioner's Brief in Support of Summary Decision.) This is the only reason given for the discipline. It has already been concluded by this tribunal that no "terroristic threats" were made. Although New Jersey Law permits a District to suspend a student for good cause, which includes many various acts of misconduct, the specific act of misconduct alleged to have occurred by M.H., based on my March 1, 2016, decision, did not occur. I therefore **CONCLUDE** that the imposition of the four-day suspension was improper. N.J.A.C. 6A:32-7.7 permits a parent or adult student to seek to expunge inaccurate, irrelevant or otherwise improper information from a student record. M.H. has already served the suspension. The only remedy is to remove the suspension from his disciplinary record. For the foregoing reasons, I **CONCLUDE** that any reference made to the four-day suspension served by M.H. on December 10, ,11, 14 and 15, 2015 should be expunged.

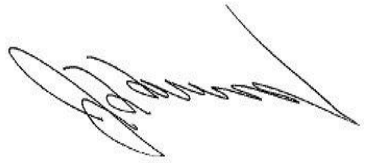
ORDER

Accordingly, it is hereby **ORDERED** that any reference made in M.H.'s disciplinary record or any other record maintained by the District to the four-day suspension served by M.H. on December 10, 11, 14 and 15, 2015, shall be expunged.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



May 31, 2017
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency

Date Mailed to Parties:

JSK/dm

APPENDIX

EXHIBITS

Petitioner:

Brief in Support of Summary Decision with Exhibits A, B, J-1, J-3 and P-1

Respondent:

Brief in Response and Cross Motion for Summary Decision with Exhibits A and B