



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

EMERGENT

ORDER

OAL DKT. NO. EDS 10541-2022

AGENCY DKT. NO. 2023-35176

**STERLING HIGH SCHOOL DISTRICT,
BOARD OF EDUCATION,**

Petitioner,

v.

J.L. ON BELHALF OF J.L.,

Respondent.

Brett E.J. Gorman, Esq., for petitioner (Parker McCay, P.A., attorneys)

J.L., on behalf of J.L., respondent, pro se

Record Closed: December 1, 2022

Decided: December 2, 2022

BEFORE **JUDITH LIEBERMAN, ALJ**:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

By a request for emergent relief, petitioner Sterling High School Board of Education (hereinafter "District") seeks the immediate placement of student J.L. on homebound instruction for forty-five days, pending placement in an out-of-district placement. Petitioner argues that by his behavior, J.L. presents a danger to himself and

to others, disrupts the academic process and there are no appropriate less restrictive settings. Petitioner also seeks an Order finding that its October 24, 2022, individualized education plan (“IEP”) constitutes the current and stay-put IEP; requiring that respondent, Mr. J.L., student J.L.’s father, provide consent to the District to release J.L.’s student records to prospective out-of-district programs and permitting respondent District to forward copies of J.L.’s student records to potential out-of-district programs. Respondent Mr. J.L. opposes this request on the grounds that the Board has not satisfied the requirements for obtaining emergent relief because his son does not present the risk of harm to himself or others that is represented by the District.

The Request for Emergent Relief was transmitted by OSE to the Office of Administrative Law, (OAL) where it was filed on November 25, 2022, 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 November 30, 2022, by way of Zoom video technology. The record remained open until December 1, 2022, to allow the parties to submit requested documents. The record closed on December 1, 2022.

FACTUAL DISCUSSION

J.L. is a ninth-grade student who is eligible for special education and related services under the classification of Other Health Impaired. He has been diagnosed with attention deficit hyperactivity disorder (ADHD), unspecified mood disorder and oppositional defiant disorder. Certification of Debra Sukinik (“Sukinik Cert.”). P-A.¹ He is currently on homebound instruction. Previously, he was in the emotional-regulation-impairment (ERI) classroom, which is staffed by one teacher and an aide. Students with a variety of emotional needs are placed in this class. Sterling High School does not have a classroom dedicated to students with behavioral impairments.

¹ These diagnoses were reported by Dr. Thomas O’Reilly, who conducted a psychiatric evaluation of J.L. on September 24, 2021, which was incorporated in a September 1, 2022, IEP. Exhibit A at 6. The same IEP references diagnoses of ADHD, Bipolar 2 disorder, severe hyperactivity and inattention by Cooper Behavioral Health at Camden. Id. at 8. Respondent submitted a letter from Rama Rao Gogineni M.D., who wrote that J.L. receives treatment at Cooper University Hospital for ADHD and mood dysregulation disorder. R-2.

On February 15, 2022, Mr. J.L. requested a due process hearing on behalf of J.L. Mr. J.L. disputed the District's proposed IEP, dated February 10, 2020, which placed his son on homebound instruction pending an out-of-district placement. Mr. J.L. sought to have his son returned to school in the district. A hearing was conducted by Honorable Catherine A. Tuohy, ALJ, who issued a Final Decision on August 17, 2022. In her Final Decision, Judge Touhy made the following factual findings, which are incorporated here.

J.L. did not have an IEP in place when he started at Sterling High School in September 2021.

J.L. is eligible for special education and related services under the classification "other health impairment" and was placed in the ninth-grade emotional-regulation-impairment (ERI) self-contained classroom at Sterling High School during the 2021–2022 school year, pursuant to his IEP dated October 1, 2021.

J.L. has been diagnosed with attention deficit hyperactivity disorder, combined type, unspecified mood disorder and oppositional defiant disorder. J.L. takes three medications, specifically, dexamethylphenidate ER 50 mg per day, Focalin XR 40 mg, and Depakote.

Pursuant to the October 1, 2021, IEP, J.L. received special-education services in language arts and mathematics instruction daily for 80 minutes each, for a total of 160 minutes of instruction, and related services of school counseling once per week for 20 minutes and a direct 1:1 aide daily.

The October 1, 2021, IEP indicated that J.L. exhibits behaviors that impede his learning or that of others. "Appropriate strategies, including positive behavioral interventions and supports, are included in the Behavioral Interventions section." Under the Behavioral Interventions section of the IEP, it states: "Student does not evidence behavior that warrants a behavior intervention plan." No targeted behavior, prior interventions, description of positive behavior supports, procedures to evaluate the effectiveness of the interventions or other positive supports or considerations are listed.

The counselling goals set forth in J.L.'s October 1, 2021, IEP stated: "Student will come to school and class every day with 80% success." The benchmark for this goal

was that the student will attend school for at least five days each week. The evaluation procedure was observation.

The second counselling goal stated: "When student expresses a negative emotion at school he will identify and appropriately use a coping skill to maintain acceptable school behavior with 80% success." The first benchmark or short-term objective stated: "When faced with a negative emotion student will accurately express a plan to change the situation and/or thoughts that lead to the negative emotion." The second benchmark or short-term objective for this goal stated: "Student will express his negative emotions by appropriately using words to state feelings." The criteria for mastery of both of these objectives was 80 percent and the evaluation procedure for both was "charting of targeted behavior, observation."

The October 1, 2021, IEP also set forth a Study Skills goal that J.L. will complete homework and classroom assignments for all of his classes with 75 percent success and listed seven benchmark or short-term objectives as follows: J.L. will accept appropriate assistance from teachers and other support staff without protest; J.L. will consistently hand in completed assignments on time; J.L. will correctly follow oral and/or written directions; J.L. will independently initiate and complete three class assignments; J.L. will independently seek out appropriate assistance from teachers and support staff; J.L. will self-check all school work for completeness, accuracy, and writing errors and J.L. will turn in long-term projects on time. Mastery for these criteria was 75 percent and the evaluation procedure was class participation and observation.

The October 1, 2021, IEP also set forth numerous academic goals and objectives for English/language arts and mathematics.

Mr. J.L. consented to the implementation of the October 1, 2021, IEP on October 1, 2021.

On October 1, 2021, Mr. J.L. and J.L. signed an agreement to abide by all the rules and regulations of Sterling High School. J.L. signed the agreement, stating: "I promise to do my best to live up to these expectations to the best of my ability."

On December 6, 2021, a Revision—30-Day Review IEP meeting was conducted which resulted in a revised IEP dated December 6, 2021. This revised IEP added the

additional courses of science, social studies and physical education/health daily for 80 minutes each class. The related services and the goals and objectives remained the same as in the October 1, 2021, IEP. Likewise, it also states that J.L.'s behavior impedes his learning and that of others, but no behavior intervention plan is warranted. Mr. J.L. consented to the implementation of this IEP on December 6, 2021.

The December 6, 2021, IEP set forth J.L.'s Present Levels of Academic Achievement and Functional Performance for the subjects of English and mathematics as follows:

Subject: English

J.L. was enrolled in my Self-contained English class this year. While he had a bit of an adjustment period acclimating to school rules, he seems to have settled in and is doing well. He at times will volunteer to read aloud in class and typically participates in class discussions. He will answer questions and takes notes. At times, he is distracted and needs redirection to stay on task. His behavior has been appropriate for the most part. He functions better when engaged in work, and does well with down time as long as he has his tablet and headphones. The main behaviors are muttering profanities under his breath, but that is infrequent at this point. His interactions with his peers are typically appropriate and he at times is kind and helpful.

Subject: Mathematics

J.L. is a new student and had trouble at first respecting his elders and his peers. He has now gained trust in his teachers and classmates. Moving forward, J.L. still needs to understand the importance of healthy peer relationships and continue to grow and show consistency in this area. I feel J.L. got off to a slow start because he was trying to "fit-in," and his immaturity got the best of him. This affected his behavior and his overall mathematical abilities. Fortunately, I feel J.L. has turned the corner and has improved behaviorally, academically and socially. He has become a better classmate, works harder and is now willing to do an extra task. His maturity and overall seriousness for mathematics has reflected in

his behavior and his grade. He has not had any discipline issues with me or any other of the teachers in our class. I am extremely proud of the progress J.L. has made. If he can stay focused, keep this effort and attitude going daily, I feel he's going to have a great rest of the year.

There was an incident in the gym on February 8, 2022, involving J.L. No direct testimony, incident reports or facts were introduced detailing specifically what transpired or the circumstances surrounding the incident.

J.L. was removed from school and placed on homebound instruction following this incident.

On February 10, 2022, an IEP meeting was conducted for a Change in Placement Revision—30-day Review, which proposed to place J.L. on homebound instruction until an out-of-district placement could be secured. R-9. The IEP stated that “J.L. is being placed on homebound instruction due to academic, behavioral and emotional needs until an out of district can be found.” R-9 at 5. Under the Educational History section, last paragraph, it states: “J.L. began this school year at Sterling High School. At this time, the youth study team has determined that Sterling High School no longer has the ability to meet his needs academically and behaviorally and an out of district placement is being sought.” Under the Special Education Determinations section, it states: “Due to being placed on homebound instruction right now, J.L. will be provided with 2 hours of instruction per subject per week equaling 6 total hours right now for 3 subjects. All instruction will take place virtually on the Microsoft Teams platform.”

The PLAAFP statement that was set forth in the February 10, 2022, IEP was the same PLAAFP statement set forth in the December 6, 2021, IEP.

The February 10, 2022, IEP states that J.L.'s behavior impedes his learning or that of others. The Behavioral Interventions section of the IEP states: “Student's behavior warrants a behavior plan” and “Please refer to file for behavioral plan.”

No behavioral plan has been introduced into evidence. No progress reports have been introduced into evidence regarding how J.L. was progressing towards his IEP goals.

Mr. J.L. did not consent to the February 10, 2022, IEP, and filed for due process seeking J.L.'s return to school in district in his previous placement.

[Final Decision EDS 01242-22 at 14–19 (citations omitted).]

Judge Tuohy concluded that the District failed to prove by a preponderance of the competent and credible evidence that the February 10, 2022, IEP offered J.L. a free appropriate public education (FAPE) with the opportunity for meaningful educational benefit and progress appropriate in light of J.L.'s circumstances, in the least restrictive environment. She explained her conclusion as follows:

The October 1, 2021, and December 6, 2021, IEPs placed J.L. in the ninth-grade self-contained ERI class. The PLAAFPs from the December 6, 2021, IEP and the February 10, 2022, IEP indicated that J.L. had improved behaviorally, academically and socially. Following an incident on February 8, 2022, in the gym, a revised IEP dated February 10, 2022, removed J.L. from school and placed him on homebound instruction pending an out-of-district placement. The February 10, 2022, IEP is the first time that an IEP states that J.L.'s behavior warrants a behavior plan, yet no behavior plan has been introduced into evidence. The prior October 1, 2021, IEP and December 6, 2021, IEP both stated that J.L.'s behaviors impede his learning or that of others, but that J.L. does not evidence behavior that warrants a behavior intervention plan. No manifestation-determination hearing was conducted following the February 8, 2022, gym incident and no functional behavior assessment was done. The October 1, 2021, IEP set forth numerous goals and short-term benchmarks. The December 6, 2021, IEP included identical goals and benchmarks to those in the October 1, 2021, IEP, even though science, social studies and physical education/health were added to J.L.'s special-education services. There were no goals set forth for these three additional special-education subjects. No progress reports were introduced into evidence demonstrating that J.L. was progressing towards any of his IEP goals. No report cards were introduced into evidence.

[Final Decision, EDS 01242-22 at 22–23.]

Judge Touhy also found that the ninth grade IEP, which provided for a self-contained ERI class, was the stay-put IEP. She found that the two exceptions to the stay-put rule, agreement by the parties to a different placement or a request by the District for an expedited hearing, based upon its determination that it is dangerous for the student to be in the current placement and the parent and district board of education cannot agree to an appropriate placement, were inapplicable. Mr. J.L. did not agree to an alternative placement and the District had not filed a request for an expedited hearing. Because Mr. J.L. filed a due process petition following the February 10, 2022, IEP meeting, the last agreed upon educational placement at the time petitioner filed for due process (the above-referenced ninth grade IEP) became the stay-put placement pending the outcome of the hearing. Judge Touhy further concluded that the District's failure to enforce this IEP constituted a denial of FAPE. She explained:

If the District had abided by stay put, J.L. would have remained in his current educational placement, the ERI self-contained class. He was removed from his self-contained ERI class and put on homebound instruction pending an out-of-district placement. It impeded his right to a free appropriate public education in the least restrictive environment. It also significantly impeded his father's opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to J.L., since the district unilaterally removed him from his current educational placement despite Mr. J.L.'s objection and filing of due process. Removing J.L. from the self-contained ERI class and putting him on homebound instruction caused a deprivation of educational benefits to J.L.

[Final Decision, EDS 01242-22 at 25.]

Judge Tuohy ordered the District to develop an IEP placing J.L. in the ERI class, with appropriate supports, including a one-to-one aide and counseling services. She also ordered the District to conduct a functional behavioral assessment as soon as practicable to determine the necessity for a behavior intervention plan. Id. at 25–26.

The following facts are derived from petitioner's written submissions, a brief, certification and exhibits, the parties' oral arguments and documents submitted by both parties after the hearing.

In response to Judge Touhy's Final Decision, the District developed a September 1, 2022, IEP that provided for placement in the ERI classroom, school counseling once per week for twenty minutes and a one-to-one aide for J.L. (Exh. A.) The ERI class is the most restrictive setting at the high school and provides the most support for the students there. Six to eight students are assigned to the class, which has one teacher. J.L.'s dedicated aide is also in the classroom. His is the only aide in the classroom.

In support of its petition, the District produced the following:

- An undated, unsigned behavioral intervention plan (BIP) that purportedly accompanied the September 1, 2022, IEP and was incorporated into the October 24, 2022, IEP. P-C. It identified "target behaviors," which included disruption, verbal or physical aggression and noncompliance/off task." Id. at 1–2. The document advised, "In previous placements, many BIPs were put into place but failed to change the behavior. These include: general classroom management, SWPBS Tier 1², social praise, positive verbal reinforcement." Id. at 2. The "Intervention Plan" directed staff to provide positive praise every ten minutes in the absence of a target behavior; J.L. being seated in the front of the class and permission for J.L. to take breaks when he asks appropriately. When an increase in targeted behavior is observed, staff are to "implement the Premack Principle" and display papers that say "First" and "Then." Ibid.
- The BIP also directed staff to record all incidents of target behavior on a data sheet, listing every occurrence or attempt of the target behavior along with the date and time of the incident. Staff were also directed to complete an "ABC sheet" for any target behavior that last for more than

² This is not defined in the document.

two minutes. They were to identify what occurred prior to the incident; the target behavior; the consequence and duration. The BIP advised that J.L.'s target behaviors "Should decrease by 50% within one month. Case manager will review all data sheets to determine if the behavior has decreased." Id. at 3.

- The District provided J.L.'s discipline records for the 2022–2023 school year. While J.L. committed other infractions, these are considered the "higher degree" offenses.
 - September 6, 2022, "Violation of technology contract:" J.L. reported that he did something to his computer and it no longer worked. "[C]omputer was assessed by Tech; wiped clean; had to be reimaged." P-D at 5.
 - September 13, 2022, J.L. cut detention. Father signed him out early. Assigned detention September 14, 2022. Ibid.
 - September 14, 2022, J.L. cut administrative detention. Assigned September 15, 19, and 20, 2022. Ibid.
 - On October 4, 2022, in a classroom, a teacher Dan Stuart³ told J.L. and another student to stop playing a video that had inappropriate language, or to wear headphones while listening to it. J.L. replied, "It's my phone, it's none of your business." Stuart opined that J.L. "was trying to push buttons and trying to cause an issue." P-D at 4. When J.L. returned to the room, he spoke about an instructor disrespectfully and then criticized another student for doing "weird stuff." J.L. and that student then "started to get into it[.]"

³ These reports do not identify the roles of the personnel who were involved. They are referred to as teachers or instructors here.

After other students left the classroom to go to the media center, J.L. asked to go there. Stuart did not permit him to leave because he was not having a good day. Tom McLaughlin reported that J.L. said to Stuart, “F**k you, this school keeps discriminating against me;” complained that the denial was akin to be denied food and “F**k these teachers.” He continued to swear at the instructor and mocked the teacher’s reaction. P-D at 2–4. Stuart reported that J.L. said he was recording Stuart and called him a “dumbass.” P-D at 4.

J.L. said to instructor Tom McLaughlin that the prior instructor was going to lie and say that he threatened him. McLaughlin wrote, “I said, ‘nobody is saying that you threatened anyone but you were very disrespectful, and like I said before if you are upset with someone you need to work on keeping your thoughts to yourself.’” P-3 at 3.

When personnel told him to report to the office and that he would go home, he continued to curse and swear at an instructor and mocked an instructor’s reaction. J.L. also referenced discrimination.

- On October 4, 2022, a teacher reported that J.L. said he did not have to listen to the teacher and cursed at the teacher, while they were in the classroom. J.L. was asked to leave the classroom and was to be sent home. J.L. refused to leave the room and repeated that he did not have to listen to the teacher and that his father said he did not have to listen to other personnel. He reportedly also said, “F**k you” and “racists.” P-D at 2.
- On October 13, 2022, a student reported that J.L. said, to another student, “I’m going to kick your ass and F**k you up, you b**ch-ass.” The report indicated that the student to whom J.L. spoke

“instigated the friction in the class[.]” The author the note, however, wrote, “I have strong reason to believe that J.L. caused this situation.” P-D at 1.

- On October 25, 2022, J.L. became disrespectful and upset an instructor told him to speak quietly with his peers while in class. Another instructor redirected him to be respectful and report to the nurse’s office. As he was exiting the class with the latter instructor, he said to the former instructor, “Don’t talk to me because you’re getting on my f**king nerves. You need to shut the F**k up with stupid f**king deaf ass before I f**k you up! I don’t give a f**k about his god damn stupid f**king deaf ass because he can’t tell me when and not to talk!” P-D at 1.
- “Target Behavior” forms for September 19, 2022, through October 5, 2022. They indicated that J.L. engaged in disruption, verbal aggression and physical aggression and was off task on September 22, 23, 26, 27, 28, 29, 30, 2022, and October 3, 4, 11, 13 and 25, 2022. P-E. With the exception of October 4, 2022, the reports indicate that he engaged in all of these behaviors from 8:50 a.m. to 3:00 p.m.⁴ On October 4, 2022, he engaged in all of these behaviors during a shorter period of time.⁵ The other forms provided by the District report that J.L. was absent on September 19, 20 and 21, 2022, and from October 14, 2022, through October 24, 2022. He was suspended from October 5, 2022, through October 7, 2022. P-E. These forms report the “general tone” of J.L.’s behavior and demonstrate the amount of time spent responding to and redirecting J.L.

⁴ The last noted time is “13:00.” P-E.

⁵ District representatives advised that J.L. attends only two academic classes, plus lunch and study hall, from 8:55 a.m. to 1:10 p.m. P-H at 5. This was requested by Mr. J.L., given J.L.’s response to medication that he takes in the morning. The October 24, 2022, IEP, however, indicates that he attended only two school “blocks” because the high school does not offer a full day self-contained classroom. P-H at 5. The correlation between this schedule and the times reported on the Target Behavior reports is unclear.

- September 24, 2021, psychiatric evaluation by Thomas O'Reilly, M.D. P-F. Dr. O'Reilly recommended J.L. return to the school district in a self-contained setting with a one-to-one aide. "If [J.L.] struggles and reverts back to previous behaviors of significant disruptive behaviors, physical aggression or threats of harm to others/self, he should be removed from that setting and placed on virtual/homebound instruction, with another alternative out of district placement sought." Id. at 5.
- July 12, 2021, psychological evaluation by Thomas M. Lodge, Ph.D.

J.L. was subject to administrative detention on September 13, 2022, for altering the computer. He was subject to suspension on September 19, 2022, for cutting the prior administrative detention. On October 4, 2022, he was externally suspended for three days, October 5, through 11, 2022, from school for "disruption to school program, insubordination and profanity toward an administrator. On October 17, 2022, he was externally suspended for five days, from October 17, through 24, 2022, for "disruption to school program, second offense." On October 25, 2022, he was externally suspended for profanity towards a staff member (threats of physical harm), for two days, October 26 and 27, 2022. P-L.⁶

On October 6, 2022, the District invited Mr. J.L. to a thirty-day IEP review meeting to "review any further changes that need to occur in the IEP" after the creation of the September 1, 2022, IEP. P-J. The meeting was originally to be held on October 21, 2022, but was moved to October 24, 2022, because there was a death in Mr. J.L.'s family. The District represented that it understood Mr. J.L. would be in the school building at that time. It advised that it would proceed with the meeting if he did not attend. Ibid. Mr. J.L. did not attend the meeting.

On October 24, 2022, the District prepared a new IEP, to be effective the same day, which recommended an out-of-district placement with a one-to-one aide to assist with behavioral modifications/goals and academics. P-H. The IEP provided that the

⁶ After the hearing, respondent submitted additional exhibits, marked P-H through K. They have been redesignated P-J through L, to correspond to its original set of exhibits.

District “does not offer a full day self-contained classroom. Therefore, student is only attending blocks 2-4 and is not able to obtain a full day of schooling. Sterling High School is not the most appropriate setting for this student due to his academic needs and the fact that we do not have an appropriate program for him.” Id. at 5. The IEP referenced the September 24, 2021, and July 12, 2021, evaluations. A functional behavioral assessment was not included with the IEP or referenced in the document. Id. at 10. The IEP noted that J.L.’s behaviors impede his learning and that of others. Id. at 12. It also reported that he “is capable of class participation and following directions, within a small group setting.” Also, he “had periods of success whereby he demonstrated an ability to actively participate in class and be respectful toward staff and peers.” Id. at 13.

The IEP reported J.L.’s present levels of academic achievement and functional performance:

- English: Grade 94; stays “on top” of work; completes tasks and participates in class, sometimes volunteering to read out loud. Requires redirection in order to stay on task “at times.” Asks for help when needed. No negative reports about behavior. Id. at 11.
- Math: “[A]t times can be a nice, young man. When he is having a good day, he respects his elders, but needs to learn how to respect his peers the same way. I thought he has gotten better in this area, until two weeks ago. [J.L.] still needs to understand the importance of healthy peer and student/teacher relationships moving forward. He started this school year off good and was not trying to ‘show off’ and ‘fit in,’ but lately his immaturity has gotten the best of him. This affects his behavior and overall academics.” Ibid. “We did see signs of him turning the corner but the consistency still isn’t there. . . . When he is quiet, focused, polite and on task he is a good student. The key is to keep his behavior and comments in check[.] . . . This way the good days become good weeks, and good weeks before [sic] good months and good months become a great year.” Ibid.
- Science: Same statement as in the September 1, 2022, IEP. P-A at 11, P-H at 11.

The present levels statement for the September 1, 2022, IEP reported the following for English:

JL, is a challenging student and needs constant redirection in order to stay on task. He is very easily distracted and gets off task and off topic. He struggles to pay attention and often need [sic] to ask to have directions, notes, questions repeated. . . . He likes to participate in class but usually shouts out random answers that are not very relevant. . . . Early on, [J.L.] was kind and helpful to his peers, but as time went on, started exhibiting behaviors that were negative and borderline bullying. I witnessed him make threatening comments to a supervisor shortly after he was enrolled at Sterling. He often needs to be reminded that profanity is unacceptable language in the classroom.

[P-A at 11.]

Also on October 24, 2022, the District determined that J.L.'s behavior was not a manifestation of his disability. P-K. In making this decision, it relied upon Dr. O'Reilly's September 24, 2021, psychiatric evaluation, J.L.'s IEP and teacher observations. Ibid. The determination noted that the "IEP was implemented correctly as [J.L.] had his 1:1 aide with him at all times." Ibid. The District concluded that J.L. had been given eight days external suspension for disciplinary infractions and "there have been other times that [he] has been insubordinate to staff that he was not disciplined for. At this time, the IEP team feels that his needs cannot be appropriately met within a public school setting and are seeking placement out of district." Ibid.

On October 26, 2022, the District wrote to Mr. J.L., advising him that J.L. demonstrated "concerning behaviors that resulted in threats to students and staff" and has "derived no educational benefit from attending the program set forth in his IEP and has negatively impacted other student's [sic] educational programming." It sought his consent to the October 24, 2022, IEP and an out-of-district placement, as well to the release of J.L.'s records to prospective out-of-district schools. Absent his consent, the District would file a due process petition seeking an order placing J.L. in an alternate setting for forty-five days and compelling the release of his records. P-I. The District further advised, "[i]n the meantime, the District will place [J.L.] on homebound

instruction pending [the] due process filing and/or your agreement for an out of district placement based on the thirty-day IEP review meeting and manifestation determination meeting on October 24, 2022.” Ibid.

In summary, the District asserts that J.L. had a “complete breakdown while attending the District’s program” and that “[m]atters have truly reached a fever pitch at this point, precipitating the filing of” its petition. Pet. Brf. at 7. This has prevented him from learning and also adversely impacted the other students. Significant time is required to address his behaviors, which denies students attention. Also, staff have become fearful of acting in response to J.L., who will not work with counselors. Consequently, there is a risk of a “bad incident” occurring. The District asserts that J.L. requires smaller student-teacher ratios in a therapeutic setting, which will have the means to address his needs via behavioral supports without resorting to discipline. It could not conduct a functional behavioral analysis due to the number of disturbances and absences in a short period of time. Despite attempts, it became “impossible.” This points to the conclusion that J.L.’s program is inappropriate for him, as the District high school is unable to provide support for J.L. beyond that which it currently provides him. J.L. is now receiving schooling at home, due to the manifestation determination.

The District also contends that the October 24, 2022, is the controlling IEP because Mr. J.L. did not object to it or file a due process petition to challenge it.

Mr. J.L. asserted during the hearing in this matter that he filed a due process petition to challenge the October 24, 2022, IEP. After the hearing, he submitted an OSE “Request for Enforcement of Decision Issued by the Office of Administrative Law” (“Request for Enforcement”) that appears to bear his electronic signature and is dated November 3, 2022. R-1. It refers to an OAL decision dated August 17, 2022, and indicates that the parties have not reached any agreements that modify the decision or the terms of the Order. R-1 at 2. It includes an assertion that the Order has not been enforced; the principal and superintendent have engaged in bullying; the CST has not developed plans for J.L. and Mr. J.L. filed harassment charges against the school. It added, “My son need[s] to return to school immediately per order of the Judge.” Ibid.

Mr. J.L. asserted that District personnel lied about J.L.'s behavior; sought to desegregate the school; continually harassed him and his son and retaliated against them in response to Mr. J.L.'s advocacy on behalf of his son. He asserted that he filed criminal charges against school personnel. He also asserted that his son did not alter the school-issued computer. Rather, he did it himself.

Mr. J.L. provided a November 30, 2022, letter from Rama Rao Gogineni, M.D. who advised that J.L. is receiving treatment at Cooper University Hospital for ADHS and dysphoric mood dysregulation disorder (DMDD) and that he "has not been exhibiting any signs and symptoms of Bipolar Disorder." R-2. He asserted that the school is not providing services recommended by the doctor, which were not specified.

Mr. J.L. asserted that he could not attend the October 24, 2022, IEP meeting because he had to go to a funeral home to pay for his brother's funeral. He also indicated that he did not want to attend because school personnel lied.

LEGAL ANALYSIS AND CONCLUSIONS

Emergent relief shall only be requested for specific issues, including a break in the delivery of services and/or placement pending the outcome of due process proceedings. N.J.A.C. 6A:14-2.7(r). Here, petitioner seeks to remove J.L. from his current placement to the interim alternative educational setting of home instruction, pending identification of an appropriate out-of-district placement, and an order compelling respondent to produce J.L.'s records for review by prospective out-of-district schools. Therefore, I **CONCLUDE** that petitioner has established that the issue in this matter concerns a change in placement for J.L.

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.]

To obtain emergent relief, petitioner must demonstrate more than a risk of irreparable harm should J.L. remain at the District high school. 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) (irreparable harm found where an eight-year-old's "physical aggressiveness and disruptive behaviors [posed] a safety concern to himself and others, and the district's behavior modification techniques [were] no longer effective").

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 45 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 45 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.”⁷ 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. “The 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 IDEA and its implementing regulations do not include factors for determining whether maintaining a child's current placement is “substantially likely to result in injury.” Proof of physical violence toward staff members or classmates has been deemed sufficient for a finding that maintaining a student's current placement is substantially likely to result in injury. In Lawrence Township Board of Education v. D.F. ex rel. D.F., EDS 12056-06, (January 9, 2007), <http://njlaw.rutgers.edu/collections/oal/>, an ALJ found that maintaining in his current placement a teenage boy who physically attacked other students in two separate incidents was substantially likely to result in injury to others and ordered the child's removal to an interim alternative educational setting. See also J.W. obo D.W. v. Glassboro Bd. of Educ., 2009 N.J. AGEN LEXIS 165 (April 9, 2009) (student ran away, ran into traffic, hit himself, other students and teachers); Ridgewood

⁷ 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).

Village Bd. of Educ. v. I.R. and K.R. obo J.R., 2008 N.J. AGEN LEXIS 1415 (February 7, 2008) (student assaulted teacher and students more than once and needed to be restrained on four occasions).

“An absence of, or minimal, physical violence, even if a student has threatened staff members or classmates, is unlikely to result in a finding that maintaining the student in his or her current placement is substantially likely to result in injury.” C.H. v. Salem City Bd. of Educ., 116 LRP 1023 (SEA Ca. Nov 19, 2013). See also Tenafly Boro Board of Education v. A.M. and S.M. obo I.M., OAL Dkt. No. EDS 01478-22 (student exhibited problem behaviors including but not limited to “rough physical contact with peers on school grounds,” verbal threats toward teachers, inappropriate conduct toward female students and regular foul language; removal from school facility was not permissible because an expert could not say with certainty that there was a substantial likelihood of injury to self or others); Washington Township Board of Education v. R.M. and V.M. obo J.M., OAL Dkt. No. EDS 15608-14, 2015 N.J. AGEN LEXIS 18 (January 13, 2015) (no evidence of physical violence; student’s alleged verbal threats and threats on social media did not meet the applicable standard for removal and was not based on “legally competent evidence but only hearsay”).

Petitioner contends that irreparable harm is established by J.L.’s “disruptive outbursts and insubordination” and threats of physical violence against classmates and staff, the discipline for which has caused J.L. to suffer a break in services. The District also asserts that it seeks to remedy the break in services and “prevent further physical and educational harm” to “ensure the safety of J.L., other District students and staff.” Pet. Brf. at 5.

Accepting the District’s representations about J.L.’s actions and behavior,⁸ none involves actual physical violence or behaviors that did or could likely result in harm to J.L. or others. These actions, as asserted by the District, while inappropriate in a classroom and disrespectful of school personnel, without more, do not permit a finding

⁸ The District provided the written hearsay statements of individuals who reported J.L.’s actions. It did not supplement these statements with affidavits or certifications of those individuals or others with firsthand knowledge of the incidents.

of a substantial likelihood of injury. There is also no evidence in the record concerning the impact of J.L.'s behavior on other students. While J.L. has missed school due to suspensions, there is insufficient evidence in the record that he will be unable to return to school and receive an education. Indeed, the record is inconsistent with respect to how J.L. has fared in his classes. The statement of his present levels of performance in his October 24, 2022, IEP includes praise for his work and demeanor, in some instances. Furthermore, it must be noted that J.L. has attended the District school for a very limited period of time. He has either attended other schools or has been educated at home since before schools were closed due to the pandemic. The District did not conduct a functional behavioral assessment and there is no other expert report issued close in time to the new IEP. Rather, the District relied upon the 2021, evaluations. As noted, Judge Tuohy directed that the District readmit J.L. and prepare an IEP with appropriate provisions and prepare a functional behavioral assessment. Her order did not render J.L.'s continued attendance contingent upon his being free from all discipline. For these reasons, I **CONCLUDE** that the District has not demonstrated by a preponderance of the evidence that it will suffer irreparable harm if the requested relief is not granted.

The second consideration for emergent relief is whether the legal right underlying the Board's claim is settled, and the third requires the Board to make a preliminary showing of a reasonable probability of success on the merits. Crowe, 90 N.J. at 133. As noted, the IDEA permits a change of placement to an interim alternative education setting for forty-five days on a finding that maintaining the student in his current placement "is substantially likely to result in injury to the child or to others." 20 U.S.C. § 1415(k)(1)(3)(b)(ii)(II). For the reasons discussed above, the District has not demonstrated by a preponderance of the evidence that maintaining J.L. in his current placement is substantially likely to result in injury to him or to others. Consequently, I **CONCLUDE** that the District has failed to meet the first three prongs of the requisite showing for an award of emergent relief.⁹

⁹ During the emergent hearing, Mr. J.L. accused District personnel of racist and criminal behavior. These allegations were not the subject of the hearing and this Final Decision should not be considered an endorsement of them.

Controlling IEP

Citing to N.J.A.C. 6A:14-2.3(h), petitioner contends that, because Mr. J.L. neither objected to the October 24, 2022, IEP nor filed a due process petition challenging it, it is the controlling IEP. The regulation provides:

(h) Written notice according to (g) above shall be provided to the parent as follows:

1. The district board of education shall provide written notice no later than 15 calendar days after making a determination;
2. The district board of education shall provide written notice at least 15 calendar days prior to the implementation of a proposed action so that the parent may consider the proposal. The proposed action may be implemented sooner, if the parent agrees in writing;
3. The district board of education shall implement the proposed action after the opportunity for consideration in (h)2 above has expired unless:
 - i. The parent disagrees with the proposed action and the district board of education takes action in an attempt to resolve the disagreement; or
 - ii. The parent requests mediation or a due process hearing according to N.J.A.C. 6A:14-2.6 or 2.7. A request for mediation or a due process hearing prior to the expiration of the 15th calendar day in (h)2 above shall delay the implementation of the proposed action according to N.J.A.C. 6A:14-2.6(d)10 or 2.7(u).

In its brief, petitioner acknowledged that the New Jersey Department of Education “has been in contact with the District regarding compliance” with Judge Tuohy’s August 17, 2022, Order and that the Department “has represented that they intend to notify the OAL that the District is not in compliance with” the Order. Pet. Brf. at 3. Despite this, petitioner asserts that the IEP issued in response to Judge Tuohy’s Order has been nullified by its issuance of the October 24, 2022, IEP. Although

petitioner did not produce documentation of the Department's communication, respondent, as noted above, produced what appears to be a November 3, 2022, request for enforcement of Judge Tuohy's Order. R-1. He also produced a November 16, 2022, letter to Matthew Sheehan, District Superintendent, and respondent, from Kimberly Murray, OSE Director. Ms. Murray wrote, with respect to Judge Tuohy's August 17, 2022, Final Decision, "Since no stay in this matter has been granted and based on 34 CFR 300.518(d), N.J.A.C. 6A:14-2.7(u)(1), which makes the WRI class at Sterling High School with the appropriate supports, including a 1:1 aide, the new stay put placement, you are directed to implement the above captioned order per N.J.A.C. 6A:14-2.7(t) within [sic] all practicable speed." R-3.

If, in fact, respondent's request for enforcement was submitted to OSE on November 3, 2022, it was done so within fifteen days of the October 24, 2022, IEP and could, conceivably, be considered an objection to the latter IEP, particularly given respondent's pro se status. As the District acknowledged the Department's communication related to this, and that communication was issued close in time to the October 24, 2022, IEP, I am unable to conclude that the October 24, 2022, IEP is the operative IEP.

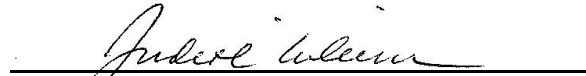
ORDER

Based on the foregoing, petitioner's request for emergent relief is **DENIED**.

This order on application for emergency relief shall remain in effect until issuance of the decision in the matter. The parties will be notified of the scheduled hearing dates. 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.

December 2, 2022

DATE



JUDITH LIEBERMAN, ALJ

Date Received at Agency:

Date Mailed to Parties:

JL/jm

APPENDIX

WITNESSES

For petitioner

Debra Sukinik
Matthew Sheehan

For respondent

Mr. J.L.

EXHIBITS

For petitioner

Certification of Debra Sukinik
P-A IEP, September 1, 2022
P-B 2021-2022 discipline records
P-C Behavioral intervention plan
P-D 2022-2023 discipline records
P-E Target behavior forms
P-F Thomas O'Reilly, MD psychiatric evaluation report
P-G Thomas M. Lodge, Ph.D., psychological evaluation report
P-H IEP, October 24, 2022
P-I Sukinik letter to Mr. J.L., October 26, 2022
P-J Correspondence with Mr. J.L. concerning IEP meeting
P-K Manifestation Determination, October 24, 2022
P-L Correspondence concerning discipline of J.L.

For respondent

R-1 Request for Enforcement of Decision Issued by the OAL, November 3, 2022
R-2 Letter from Rama Rao Gogineni, M.D., November 30, 2022.

R-3 Letter from Kimberly A. Murray, OSE Director, to Matthew Sheehan and Mr. J.L., November 16, 2022