State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION

OAL DKT. NO. EDS 01159-16

AGENCY DKT. NO. 2016 23923

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)

Roger Barbour, Esq., for respondent (Barbour & Associates, L.L.C., attorneys)

Record Closed: February 9, 2016 Decided: March 1, 2016

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

STATEMENT OF THE CASE AND 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 Salem City Board of Education's (Board) 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 for expedited hearing, which was held on February 9, 2016, after which the record was closed.

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 (P-2). He is a sophomore 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**.

Amiot Michel, District Superintendent, testified that he investigated an allegation that M.H. made reference to a gun in a passage that M.H. wrote in a school journal. The journal entry was in the form of a rap song that M.H. had written and made reference to a gun. Specifically, M.H. wrote in his journal for a class, 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" (J-2). Michel asked M.H. if he had even been bullied in school. M.H. was kind during his investigation and informed Michel that he had never been bullied and does not own a gun. M.H. advised that his father wants a gun but his grandmother, with whom he and his father lives, does not allow guns in the home. The police were contacted, but Michel was later advised that no charges were filed against M.H. Michel recommended the suspension and placement at the alternative school to ensure that everyone would be safe.

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. While "terroristic threats" is not defined in the District student handbook, it is not appropriate to mention shooting a gun in school. 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.

John Mulhorn next testified on behalf of the District. He is the Principal at Salem City High School. On December 10, 2015, he was approached by the Vice-Principal regarding what M.H. had written in his journal. District staff immediately secured M.H., called his father and the Superintendent. The District 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. There is no written policy that states a student cannot make reference to a gun. Mulhorn made the decision not to have M.H. removed by the police after no guns were found on school grounds.

Christine Menold next testified on behalf of the district. She is M.H.'s Case Manager and part of the District's Child Study Team. She had never seen the rap lyrics prior to the date of the hearing and she was not consulted as part of the discipline process. She has had conversations with M.H. and has found him to be quiet, soft spoken and polite. In December 2014, the Child Study team had recommended a psychiatric evaluation be conducted upon M.H., but his father refused the evaluation (D-5). The Child Study Team wanted him evaluated because his late 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 (D-2).

M.H. testified about the incident. He wrote the rap song approximately one month after school had started for the fall 2015 term. He never performed this or any other rap in school. He has never shot a gun and does not own or have access to a gun. He

advised that if he had a gun he would go to a shooting range and shoot it and then lock it up in his father's bedroom. His uncle has a gun and keeps it in a locked case. M.H. does not live with his uncle. M.H. knows that it is not appropriate to talk about guns in school. In November 2015, he told his class that his father might be getting a gun and stated that he likes guns, "They go bang bang." His father was called to school and he was instructed not to talk about guns again in school. He did not share his rap song with anyone and did not talk about guns in school again after the incident in November 2015. He wrote the rap song because he was bored in class.

C.H. testified that on December 10, 2015, he was called to school around 11:00 a.m. to discuss a rap song that M.H. had written. C.H. wanted to stay with his son and did not want anyone to speak to his son without him present. When he spoke to the superintendent, C.H. felt that the decision to send M.H. to the alternate school had already been made and was told that if he did not send him to the alternate school, M.H. would be truant. C.H. advised the District that they do not own a gun and that his mother, with whom he and M.H. lives, does not like guns and would never permit either of them to bring a gun into the home. M.H. has never touched or shot a gun in his life. As the rap song is not dated, C.H. does not know if it was written before or after he and M.H. met with the District in November 2015 to discuss M.H. talking about a gun in school.

Having had an opportunity to observe the appearance and demeanor of the witnesses, and consider the testimonial and documentary evidence, I further **FIND** as **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 and 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 Salem City’s staff and students.

LEGAL ANALYSIS AND CONCLUSION

The District asserts that the removal of M.H. to an interim placement is warranted based upon the terroristic threats made by him in the lyrics of the rap song he had written in a class journal. Petitioner argues that the charges underlying M.H. from Salem City High School are totally unsubstantiated. There is no definition of terroristic

threats in the District's handbook and the district violated M.H.'s due process rights by failing to adequately advise him prior to the Board's hearing that evidence of his prior discipline would be introduced.

Pursuant to N.J.S.A. 2C:12-3, Terroristic threats, a person is guilty of a crime of the third degree if he threatens to commit any crime of violence with the purpose to terrorize another or to cause evacuation of a building, place of assembly, or facility of public transportation, or to otherwise cause serious public inconvenience, or reckless disregard of the risk of causing such terror or inconvenience. Further, a person is guilty of terroristic threats if he threatens to kill another with the purpose to put him in imminent fear of death under circumstances reasonable causing the victim to believe the immediacy of the threat and the likelihood that it will be carried out. See, N.J.S.A. 2C:12-3b.

Here, M.H. was disciplined for making terroristic threats. The District, however, has not provided evidence that M.H. threatened to commit a crime of violence or to kill anyone. While it certainly can be argued that the lyrics of M.H.'s song which state "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" could be construed as a threat to commit a crime of violence, it was not directed toward any individual or facility. Further, M.H. did not share or perform the song with anyone so as to cause a victim to believe the immediacy of the threat and the likelihood that it will be carried out. As the District does not have a specific policy prohibiting a student to write a statement referencing shooting a gun, I **CONCLUDE** that M.H. did not violate the District's policy or N.J.S.A. 2C:12-3.

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."[1] 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).

Here the District made no determination that M.H.'s behavior was a manifestation of his disability, yet it seeks removal to an alternative placement on the basis of his alleged terroristic threats made in the lyrics of a rap song written in a school journal. At the hearing, M.H.'s case manager testified that the Child Study team was not consulted prior to assessing discipline upon M.H. The District did not offer any evidence that M.H. shared this song with anyone, directed it toward any school personnel or student or even had access to guns. It is clear that the conduct of M.H. which caused the discipline

[1] 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).

did not involve a child bringing a weapon to school, inflicting serious bodily injury on another person at school, or knowingly possessing or using illegal drugs while at school, on school premises, or at a school function. Therefore, I **CONCLUDE** that the District does not have the authority to remove M.H. to an alternative educational setting unless it is determined that M.H's conduct was a manifestation of his disability. Since no such determination was made, I **CONCLUDE** that the District's action removing M.H. to an alternative school is inappropriate.

I further **CONCLUDE** that the Board has failed to show by a preponderance of the credible evidence that M.H's recent conduct supports a finding that maintaining his current placement is substantially likely to result in injury, and that he should be removed to an alternative educational setting. While 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," a review of several administrative and judicial decisions shows the type of conduct that decision-makers have found to meet this standard.[2] First, 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, Final Decision (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.

In San Leadro Unified School District, 114 LRP 550 (CA SEA December 16, 2013), a hearing officer determined that an eight-year-old boy's continued presence in his current placement was substantially likely to result in injury due to numerous incidents of physical violence toward staff and students, including chair-throwing, punching, and kicking, lunging at a classmate with a plastic clay-sculpting tool, threatening to stab a teacher with four pencils and lunging at her, and hitting a

[2] In promulgating rules under the IDEA, the Department of Education explained that "[h]earing officers have the authority under [34 C.F.R.] § 300.532 to exercise their judgments after considering all factors and the body of evidence presented in an individual case when determining whether a child's behavior is substantially likely to result in injury to the child or others." 71 Fed. Reg. 46540, 45722 (August 14, 2006).

classmate in the face with a metal lunch pail, and ordered his placement in an interim alternative educational setting.

In Rialto Unified School District, 114 LRP 1023 (CA SEA November 19, 2013), a hearing officer ordered the forty-five-day removal of an eight-year-old boy who had a long history of physical violence toward staff and other children, including an incident in which the boy threatened to bring a knife to school and kill a staff member, and who, in several incidents in the weeks leading up to his removal, attempted to bite an aide, kicked another aide, and threw a chair; held a pair of scissors to a classmate's face and threatened the classmate; threw tacks and a white Board at a staff member, kicked him in the leg and head, and spat on two other staff members; "mule-kicked" an aide in the leg, causing her to be placed on modified duty for a month; and, threw a chair and swung his belt at staff, stabbed a staff member with a pencil, and used a nail to threaten staff members.

Finally, in Smithton R-VI School District, 110 LRP 22863 (MO SEA April 8, 2010), a hearing officer found that maintaining the current placement of a student was substantially likely to result in injury to himself or others because he had a long history of physically violent behavior toward staff and other students, including incidents in which he pinched, slapped, punched, kicked, scratched, and pushed staff members or classmates, and an incident in which he threatened to kill himself, and ordered his removal to an interim alternative educational setting for forty-five days.

In contrast, 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. In Clinton County R-III School District v. C.J.K., 896 F. Supp. 948 (W.D. Mo. 1995), the court held that, even though he repeatedly threatened staff members and students, including threatening to make a teacher "black and blue," threatening to place an explosive device in the principal's car, and warning a student he knew where she lived, maintaining a student's current placement was not substantially likely to result in injuries because there were "relatively few recorded perceptions of physical danger" with respect to the student's behavior.

In Sharon Public School, 45 IDELR 75, a hearing officer found that a school district failed to show that maintaining the current placement of a student who allegedly pushed a desk against a substitute teacher's thighs and "punched her wrist downward with his fist" was substantially likely to result in injury because the record indicated that this was an isolated incident of physical violence and because, although the student was involved in other, verbal confrontations with teachers, staff members "were far more concerned with [his] refusal to do homework than his potential dangerousness."

Finally, in Saddleback Valley Unified School District, 52 IDELR 56 (CA SEA January 7, 2009), a hearing officer found that a school district was not entitled to remove a student for an additional forty-five days after his initial forty-five-day removal for bringing knives to school, even though in the weeks leading up to the expedited hearing the student was involved in a physical altercation with one classmate and threatened to pull out another classmate's earrings and "rip his neck off." In denying the district's request for another forty-five-day removal, the hearing officer noted that bringing knives to school is a serious offense, but also noted that the assistant principal did not believe that the incident alone was enough to show that the student was dangerous; that the physical altercation was the result of teasing, and not anger or aggression; and, with respect to the verbal threat to another student, the hearing officer noted that the "[s]tudent's recent threat to another child is also of grave concern. However, there is no indication that it was anything more than words. If there had been any physical contact or a series of threats, the situation might be different, but the threat standing alone is not enough to show a substantial likelihood of injury."

Here, like in Clinton, Sharon, and Saddleback Valley, the Board, which bears the burden of proof, has failed to show that maintaining M.H. at Salem City High School is substantially likely to result in injury. M.H. has not threatened anyone and has not offered his rap song to anyone that could perceive it as a threat. Further, although M.H. has been instructed not to talk about guns in school in the past, there is no evidence that he has ever exhibited any physical violence or other behavior indicating that he would follow through with the acts described in the song. Like in Clinton, Sharon, and Saddleback Valley, the actions described in M.H.'s lyrics are very serious, but in the

absence of evidence that M.H. is physically violent, the District cannot show that, based on the lyrics alone, maintaining M.H. at Salem City High School is substantially likely to result in injury.

Therefore, I **CONCLUDE** 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). As this matter has been decided for the foregoing reasons, I make no determination regarding petitioner's claim that M.H.'s due-process rights were violated at the Board's hearing on January 6, 2016. I further make no determination whether the four day suspension or the demerits imposed upon M.H. were appropriate.

ORDER

Accordingly, it is hereby **ORDERED** that M.H. promptly be returned to his placement at Salem City High School.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2015) 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.A. § 1415(i)(2); 34 C.F.R. § 300.516 (2015). 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 1, 2016
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

JSK/vj

APPENDIX

WITNESSES

For Petitioners:

C.H.

M.H.

For Respondent:

Amiot P. Michel, Superintendent

John Mulhorn, Principal

Christine Menold, Learning Consultant

EXHIBITS

Joint Exhibits:

J-1 Student Handbook

J-2 M.H.'s Journal

J-3 December 18, 2015, correspondence from District's attorney to petitioner's attorney

For Petitioners:

P-1 Notice of Discipline, dated December 11, 2015

P-2 Eligibility Conference Report, dated January 8, 2015

For Respondent:

D-1 M.H.'s disciplinary records

D-2 Psychiatric Evaluation of M.H., dated December 20, 2007

D-3 Correspondence from Child Study Team regarding annual review, dated March 17, 2015

D-4 Correspondence from Child Study Team advising that annual review was conducted, dated April 10, 2015

D-5 Correspondence from Child Study Team recommending psychiatric evaluation, dated December 4, 2014