State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

DECISION

OAL DKT. NO. EDS 13392-14

AGENCY DKT. NO. 2015 21845

D.K. ON BEHALF OF J.K.,

Petitioner,

v.

MAINLAND REGIONAL BOARD OF EDUCATION,

Respondent.

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Matthew Sykes, Esq., for petitioner

Louis Greco, Esq., for respondent

Record Closed: October 31, 2014 Decided: November 13, 2014

BEFORE **ROBERT BINGHAM II**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner D.K., on behalf of her son, J.K., challenges the determination of respondent, Mainland Regional Board of Education (the Board), that J.K.'s possession of an imitation firearm constituted a disciplinary infraction that was neither related to nor caused by his disability, resulting in potential discipline. Petitioner seeks the return of J.K. to Mainland Regional High School (Mainland Regional) and the performance of a functional behavioral assessment and intervention plan.

FACTUAL DISCUSSION

As stipulated by the parties (J-1), the background facts are not disputed and I thus **FIND as FACT** the following.

J.K. is a fifteen-year-old, tenth-grade special education student within the District, attending Mainland Regional in Linwood, New Jersey. Since May 2013 he has received special education services based upon his classification as multiply disabled, meeting the criteria for "other health impaired" (OHI) for a diagnosis of "attention deficit hyperactivity disorder" (ADHD), and "specific learning disability" (SLD) (unspecified). (P-1.) He received medication from his pediatrician to manage his ADHD. (P-2.)

A social history assessment dated February 28, 2013, described petitioner and teachers as being concerned with J.K.'s academic, behavioral and social skills. (P-3.) A psychological evaluation dated March 7, 2013, indicated that J.K. was functioning within the low end of the average range of ability. (P-4.) Tests suggested attention deficit disorder, a learning disability, and higher-than-measured cognition, as well as depressive and withdrawal tendencies. The evaluation further described his "acting out behavior" as likely resulting from "poor judgment, poor impulse control, poor attention and misperception of environmental cues." (Ibid.) It recommended, among other things, medical diagnosis and treatment for attention deficit disorder and related impulse control, counseling, and coping techniques.

As reflected in an Individualized Education Plan (IEP) dated October 1, 2014 (P-1), J.K.'s April 2014 IEP for his tenth-grade year included in-class resource support for Geometry, Geometry Lab, Spanish 1 and three college-prep courses: English II, Chemistry and U.S. History II. For the remainder, he was part of the general education curriculum. The IEP described him as generally well-behaved and stated specifically that he did not need a behavior intervention plan at the time, despite having had one altercation with a male student that was mediated and resolved, as well as a subsequent suspension for posting an inappropriate photograph to his Instagram account. (Id. at 4, 12.)

On September 17, 2014, J.K. brought a replica gun to school during school hours. After another student reported his possession of the gun (R-6), principal Mark Marrone discovered it in his backpack and contacted the Linwood Police Department, who responded, took J.K. into custody and charged him accordingly. (R-7.) J.K. was suspended and placed on home instruction. By letter dated September 23, 2014, the school notified petitioner that the Board had scheduled a hearing for October 7, 2014, to determine whether J.K. should be expelled from school or otherwise disciplined.

On October 1, 2014, a manifestation determination review (MDR) was held and it was determined that J.K.'s behavior was not a result of either his disability or a failure to implement the IEP. (R-8.) Present at the meeting were petitioner and her parent advocate, Jeanine Middleton, J.K.'s case manager, J.K.'s special education teacher, J.K.'s regular education teacher, and a District representative. Information considered included assessment/evaluation, J.K.'s IEP, interviews conducted, teacher observations, and information provided by the parent. All of the attendees signed the MDR, though petitioner and Middleton did not agree with the decision. At petitioner's request, the October 7 Board hearing was adjourned pending the outcome of the instant expedited due-process petition.

On October 21, 2014, a psychiatric evaluation was performed by Yeva Rubenstein, M.D., at petitioner's request. Dr. Rubenstein's report (P-8) indicates that J.K.'s current diagnoses are: ADHD, inattentive type; impulse control disorder, not otherwise specified; and psychological stress, moderate. It recommended continued attendance at the partial care program; behavior modification and cognitive behavioral therapy for impulse control; continued medication, perhaps at a higher therapeutic dose; and that J.K. obtain a Conners self-report scale for adolescents.

The superintendent's recommendation to the Board will be that J.K. be suspended for the remainder of the academic year, that he submit to psychiatric evaluation by a District-designated psychiatrist, be placed in an out-of-district placement, and be permitted to apply to the Board for return to Mainland Regional at the end of the current academic year.

Testimony

Mark Marrone, Mainland Regional's principal for three years and an educator of fifteen years, testified that he was familiar with J.K. from his freshman year when he was involved in a fight in December and an inappropriate Instagram posting in April. Both offenses were "bundled together" by the county prosecutor and resulted in an eighteen-month probation. J.K. returned to Mainland Regional and completed his freshman year, but on September 17, 2014, near the beginning of his sophomore year, he was discovered to have brought a replica gun to school. At the time, Marrone was notified by another student that J.K. had a gun and Marrone's impression was that it was real. Marrone called the police, located J.K. and, at approximately 11:45 a.m., found the gun in his backpack.[1] It looked real and appeared very similar to the responding police officer's Glock pistol, rather than like a BB gun, until the officer noted the distinction. (R-13.) However, upon inspection, the "internal workings . . . seemed to have been removed." According to Marrone, J.K.'s conduct constituted a severe disciplinary breach and the superintendent of schools, who was present when Marrone found the gun, suspended J.K.

Marrone described himself as having a good rapport with J.K. and had become familiar with his prior IEP. His overall impression is that J.K. makes "really bad decisions." As to his knowledge of J.K.'s motivation in the gun incident, J.K. had reportedly stated that he had brought the gun to school to return it to another student.

Jo-Anne Goldberg, supervisor of the special education child study team at Mainland and educator of twenty-five years, testified that she became familiar with J.K. in his freshman year, during which he was involved in a fight in December 2013 and inappropriate "texting" in April 2014.[2] In September 2014, J.K.'s sophomore year, she

[1] School begins at 8:00 a.m., so J.K. had the gun at school for approximately three hours and forty-five minutes before Marrone found it.

[2] It appears that Ms. Goldberg was mistaken in this part of her testimony, and that the incident involving inappropriate text messages occurred prior to J.K.'s beginning high school. The disciplinary incident that occurred in April 2014 involved J.K. posting inappropriate photos of a fourteen-year-old girl to Instagram.

was informed that he had brought a replica gun to school and a behavior-manifestation meeting was held to determine whether his behavior was related to his disability.

Goldberg testified that the Child Study Team (CST) understood J.K.'s disability to be ADHD, inattentive type, and that he exhibited no evidence of impulsivity. The participants at the meeting, as identified above, thoroughly considered all items as reflected on the Manifestation Determination Form (R-8), as well as J.K.'s specific disabilities, SLD and OHI by ADHD.[3] The team also considered the school staff's experience with J.K. and concluded that there was no evidence of impulsivity, as defined in the Fifth Edition of the Diagnostic and Statistical Manual (DSM 5), in other words, conduct occurring "in the moment." No staff member, home instructor or teacher had reported impulsive-type behavior such as roaming, climbing, inability to engage with students, excessive talking, or interrupting others during class discussion. Rather, the conduct appeared premeditated because multiple independent decisions were necessarily involved in J.K.'s possession and display of the gun in school,[4] though he may have packed the gun in his backpack on the previous evening when, perhaps, he had not taken his medication. Except for petitioner and her advocate, whose unified opinion was considered,[5] the team concluded that there was no nexus between J.K.'s disability and his prohibited conduct of bringing the replica gun to school.

Goldberg conceded that Mainland Regional had not performed a functional behavioral evaluation, but that was because there was no indication of a need for one; J.K. had been doing well, getting B and C grades, no impulsive-type behavior had been observed, and she was not aware of any prior psychiatric record as being in the school's file. But, she was aware that petitioner had previously requested an evaluation

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[3] Though Goldberg had not spoken to J.K. personally to explore whether his conduct had been impulsive, she believes that the case manager or other staff had done so.

[4] For example, he would have to have decided to: (1) put it in his backpack, (2) keep it in his backpack, (3) transport it to school, and (4) take it out and display it to another student.

[5] Petitioner had expressed concerns regarding situations at home that included J.K. forgetting medications and not following instructions, as well as making bad decisions, something that, in Goldberg's view, was not related to ADHD.

due to concerns with J.K.'s behavior. She was also aware that he apparently had not taken his medication at the time of the April 2014 "texting" incident; however, a conflict resolution that resulted in his return to school established that he would take medication, at the nurse's office, during school hours. Goldberg thus acknowledged his need for medication, but did not concede a nexus between any lack of it and that prior incident. And she discounted Dr. Rubenstein's October 2014 psychiatric report (P-8) as containing a number of discrepancies[6] and not addressing the potential connection between impulsivity and bringing a replica firearm to school.

D.K. testified that J.K. manifested behavioral issues at age three or four. At or about the end of third grade, he was placed on medication for ADHD. However, D.K. discontinued it within two months due to J.K.'s adverse reactions, and he went without medication, and was plagued by inattentiveness, disruptive behavior, and poor grades through eighth grade. According to D.K., in eighth grade his adverse behavior resulted in a CST evaluation and a prescribed medication regimen for ADHD and impulse control, as well as social services weekly and psychiatric monitoring monthly.[7] J.K.'s daily medication regimen has helped him focus, sit still in class, and improve both his academic interest and his grades. However, according to D.K., J.K. had not taken his medication on the date of the freshman-year "sexting" incident, because it was later found in his pocket by a nurse at the detention center while he was in custody.[8]

D.K. further testified that J.K. has consistently taken his medications during the current school year, but he told her that the effect wears off toward the end of the school day. On September 17, 2014, she received a call from the police, who said that J.K. was found to possess an imitation firearm. She believes that he had to have put it in his

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[6] According to Goldberg, Dr. Rubenstein never contacted the school for information about J.K. prior to preparing her report, and it contained inaccuracies such as where J.K. lived and an incorrect basis for J.K.'s probation.

[7] J.K. was prescribed 10 mg of Focalin on a daily basis, administered after breakfast and around 7:30 p.m. Due to the financial impact of D.K.'s own medical issue, J.K. discontinued therapy in December 2013, but he has continued to take his medication.

[8] According to D.K., J.K. explained to her at the time that he had posted nude photos of the girl because she had posted such photos of him, but he "knew that it wasn't a good idea."

backpack between the previous evening and that morning. According to D.K., J.K. regrets his conduct. D.K. believes that the subject behavior is related to his disability because, in her view, it was impulsive and she believes that he had not taken his medication.

Jeanine Middleton, a former teacher, principal and chief school administrator, and current parent advocate, testified that she attended the MDR on petitioner's behalf.[9] At the MDR, the school psychologist said that she had reviewed J.K.'s file comprehensively, including a BASC test[10] and an ADHD report; neither the teachers' reports nor the BASC testing showed impulsivity or ADHD. However, the case manager was the person most informed about the incident and she had said they had not reviewed the incident report, though she had some dialogue with students. As a parent advocate, Middleton raised the issue of whether there had been a functional behavioral evaluation and development of a behavior plan, as J.K. was taking medication. The CST entertained the view of petitioner and Middleton, that the incident was related to J.K.'s disability, but disagreed and instead determined that his conduct was premeditated rather than impulsive.[11] She testified that the impression she got at the meeting was that the Board had already determined that the incident was not linked to J.K.'s disability, and any input that she or the parent had was for a hearing, but would have no impact on their decision that day.

On cross-examination it was revealed, as going toward potential bias, that Middleton is in fact the mother of petitioner's attorney, and together they are working to establish the Learn Project, a volunteer organization through which she is an advocate.

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[9] Middleton testified that she has worked in education for twenty years, in the capacity of teacher, principal, superintendent, and in special education (she has a certificate of eligibility, which enables her to participate in CST meetings, and she is currently working on her special education teaching certification, but does not yet possess the teaching certificate).

[10] The BASC Report relied on information supplied by one of J.K.'s parents, as well as one of his teachers. The BASC Report reflected that J.K. acted more "withdrawn" during the day, as opposed to hyperactive or impulsive.

[11] The CST also reasoned that J.K. was doing well with his grades.

Middleton explained, however, that both her role and her relationship with petitioner's counsel were fully disclosed at the MDR.

Summary

In resolving factual disputes as to determine whether, by the preponderance of credible evidence, an IEP is reasonably calculated to provide a free appropriate public education (FAPE), judges must often rely upon the determinations of experts in the field of special education. Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206–08, 102 S. Ct. 3034, 3050–51, 73 L. Ed. 2d 690, 712–13 (1982). Further, although hearsay is admissible at the Office of Administrative Law and may be employed to corroborate competent proof, it cannot form the sole basis for a factual or legal determination. Weston v. State, 60 N.J. 36 (1972).

Here, there is no expert opinion in the record as to whether J.K. suffered from impulsivity when he committed the infraction. D.K.'s belief that J.K. had not taken his medication and therefore impulsively took the gun to school is both speculation and unqualified lay opinion. Middleton, though an experienced educator and dedicated advocate, did not qualify as an expert with regard to J.K.'s disabling condition and its potential nexus to the incident. And, as Dr. Rubenstein did not testify, her medical conclusion contained within her written psychiatric evaluation dated October 21, 2014, is uncorroborated hearsay that cannot constitute competent medical proof that J.K.'s conduct was a manifestation of his disability.[12] What is more, Dr. Rubenstein's evaluation mentions but does not assess the subject incident relative to J.K.'s disability. Goldberg also did not qualify as an expert with regard to J.K.'s disabling condition, but she was able to testify regarding her familiarity with J.K. and his school records, including teacher input regarding his behavior and grades, and the reasoning of the CST in its manifestation determination.

[12] Dr. Rubenstein's report does, however, corroborate some of D.K.'s testimony with regard to J.K.'s prior history and treatment.

Having had an opportunity to consider the testimonial and documentary evidence and observe the appearance and demeanor of the witnesses, I further **FIND** as **FACT**:

1. J.K. was diagnosed with ADHD in third grade, very briefly medicated with Strattera, again diagnosed with ADHD in eighth grade, and has since then taken a prescribed regimen of Focalin XR, 10 mg, daily.

2. J.K. had consistently taken his medications during the current school year, as D.K. testified. Even if, as J.K. purportedly told D.K., the effect of the medication wore off toward the end of the school day (not found as fact here), there is no preponderance of credible evidence proving that he did not take the medication on schedule on the prior evening or subject morning, or that he placed the replica gun in the backpack prior to his evening medication.

3. J.K. most likely placed the replica gun in his backpack on the evening of September 16, or the morning of September 17, 2014, when he then transported it to school, where he displayed it to, and discussed it with, another student. He then kept it in his backpack, and remained on school premises, before it was later discovered by Principal Marrone.

4. After Principal Marrone found the replica gun in J.K.'s backpack, J.K. reported that he had intended to return it to another student.

5. The replica gun possessed by J.K. bore the appearance of a functional firearm but had no "inner workings" and was not operational.

6. At the time of the MDR, no staff member, home instructor or teacher had reported impulsive-type behavior such as roaming, climbing, inability to engage with students, excessive talking, or interrupting others during class discussion. Also, J.K.'s grades had been satisfactory and there had been no behavioral incidents since April 2014.

7. The CST considered the required information, as well as the input and views of petitioner and her advocate, and it conducted an appropriate MDR.

8. The CST reasonably concluded, and the evidence here sufficiently demonstrates, that J.K.'s conduct was not a manifestation of his disability. Further, there is no evidence that his conduct resulted from a failure to implement the IEP.

LEGAL ANALYSIS AND CONCLUSION

Petitioner argues that J.K. should be returned to Mainland Regional because the September 2014 incident was a manifestation of J.K.'s ADHD impulsivity disorder. Petitioner further argues that even if the Board has the authority to remove J.K. for possession of a weapon, regardless of whether his behavior was a manifestation of his disability, it cannot suspend him beyond a forty-five-day period. Thus, two issues are presented: (1) whether the Board conducted an appropriate, comprehensive MDR on October 1, 2014, when it determined that J.K.'s conduct was not a manifestation of his disability, and (2) whether the Board may suspend J.K. for forty-five days, or more, for possession of a weapon. The latter issue begs the question of whether the replica firearm J.K. brought to school constitutes a "weapon" for purposes of removing J.K. from school for forty-five days, regardless of whether his behavior was a manifestation of his disability, pursuant to 20 U.S.C.A. § 1415(k)(1)(G).

The MDR

Whenever a district is considering removing a child with a disability for more than ten days, a manifestation determination is required. 20 U.S.C.A. § 1415(k)(1)(E); N.J.A.C. 6A:16-7.3(a)(7). The goal of a manifestation hearing is to determine whether the conduct for which the child is being disciplined was a result of or affected by the student's disability or a failure to implement the IEP. See generally 20 U.S.C.A. § 1415(k). In making a manifestation determination, the IEP team must consider all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine:

> (i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
>
> (ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.
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> [34 C.F.R. § 300.530(e) (2014); 20 U.S.C.A. § 1415(k)(1)(E).]

If the IEP team finds that the behavior was a manifestation of the student's disability, the IEP team must either conduct a functional behavioral assessment and implement a behavioral intervention plan, or review and modify any existing plan as necessary, and return the child to the placement from which he was removed, unless the parent(s) and LEA agree upon a change in placement. 34 C.F.R. § 300.530(f) (2014). If the manifestation-determination review does not find one of those two factors applicable, then the school may continue with the student discipline (including expulsion) just as it would for any pupil without an IEP, except that continued FAPE may be provided in an interim alternative educational setting. 20 U.S.C.A. § 1415 (k)(1)(C). Additionally, school personnel may remove a student to an interim educational setting for up to forty-five school days "without regard to whether the behavior is determined to be a manifestation of the child's disability" under special circumstances, including where a child carries or possesses a weapon at school. 20 U.S.C.A. § 1415(k)(1)(G); see also 34 C.F.R. § 300.530(g) (2014) (stating the same).

A parent of a child with a disability who disagrees with the manifestation determination may appeal the decision by requesting a hearing. 34 C.F.R. § 300.532 (2014). There, pursuant to N.J.S.A. 18A:46-1.1, the ultimate issue to be decided is whether the Board has met its burden of proving that the student's behavior was not a manifestation of his or her disability.

In T.M. & W.M. ex rel D.O. v. Washington Township Board of Education, EDS 2040-05, Decision (Aug. 23, 2005), <http://njlaw.rutgers.edu/collections/oal/>, the petitioners challenged the board's suspension of their son, who was found in school with a test tube bearing a radioactive symbol in his backpack, and its manifestation-review decision that the conduct was unrelated to his disability. The student, who had

consented to a search of his backpack, initially told the school that the vial may have come from his brother's chemistry set, but the mother said that it had not. A test of the vial revealed radioactive material inside, resulting in the school being quarantined and a media circus ensuing.

The student had been classified as multiply disabled, emotionally disturbed and having attention deficit disorder. He had primarily done well academically in eighth grade and had no behavioral issues, so a behavior intervention plan was no longer needed. Although there had been past behavioral problems, none seemed to be present at the time of the incident. Following his suspension, a manifestation review found that his disability "did not adversely impact his ability to understand the consequences of his act, nor impair the ability to control his behavior."[13] The administrative law judge (ALJ) upheld the board's decision that the student's behavior was not a manifestation of his disability, reasoning that the CST social worker and the high school principal credibly testified that the IEP team carefully considered all relevant information in making the decision, and no evidence was presented to contest the Board's determination. The ALJ also found that the evidence presented by the Board "overwhelmingly established" the requisite criteria.

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[13] The T.M. decision was written in 2005, prior to the August 14, 2006, amendment to the statute and regulation governing manifestation determinations. Under the former version of 20 U.S.C.A. § 1415(k)(1)(E) and 34 C.F.R. § 300.530(e), an IEP team could find that a student's behavior is not a manifestation of his disability only if it finds that:

> 1. In relationship to the behavior, the child's IEP and placement were appropriate, and that special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the IEP and placement;
>
> 2. The child's disability did not impair his or her ability to understand the impact and consequences of his or her behavior; and
>
> 3. The child's disability did not impair his or her ability to control the behavior.
>
> [34 C.F.R. 300.523(c)(2)(I)(iii) (removed and reserved).]

Nevertheless, the analysis in T.M. remains relevant to the present matter.

In a similar case heard at the California Office of Administrative Hearings[14] on March 20, 2014, the board, Riverside, suspended a student and recommended his expulsion based upon his possessing a firecracker at school, and lighting another firecracker later in the day. Riverside Unified Sch. Dist., 114 LRP 29098 (May 16, 2014). The board determined that this behavior was not a manifestation of the student's impulsive-type ADHD, and the student disagreed. A licensed clinical psychologist who never treated the student, but learned of the events from the student's mother, testified that the incident was an impulsive act, especially because the student was being goaded by others to light the firecracker. The hearing officer was not persuaded by the expert's testimony, and determined that the student's actions were not impulsive because he was aware that another student brought twenty firecrackers to school, yet did nothing to alert staff about the situation. Knowing that the student brought firecrackers, he decided to have lunch with him anyway. He then made the deliberate decision to wait until after school to light the firecracker, because he knew he could be expelled if he lit it during school hours. None of these actions indicated impulsivity.

Here, it is undisputed that the MDR was attended by petitioner and her parent advocate, J.K.'s case manager, J.K.'s special education teacher, J.K.'s regular education teacher, and a District representative. It is also undisputed that "[i]nformation considered included: assessment/evaluation, J.K.'s IEP, interviews conducted, teacher observations, and information provided by the parent." (J-1, ¶ 7.) Therefore, the team considered all of the information required by 20 U.S.C.A. § 1415(k)(1)(E) and 34 C.F.R. § 300.530(e) and conducted an appropriate MDR.

Further, the Board's proofs sufficiently demonstrate that J.K.'s conduct was not a manifestation of his disability, notwithstanding the absence of expert testimony. As in T.M., despite past behavioral problems, J.K. had primarily done well academically, and had no recent behavioral issues suggesting the necessity for a behavior intervention plan prior to the subject incident. Principal Marrone credibly testified that J.K. reported that he took the weapon to school with the deliberate intent to return it to another

[14] In California, unlike New Jersey, the student bears the burden of proving that his behavior was a manifestation of his disability.

student after "squashing a beef." J.K. apparently packed the weapon either the night before or the morning of the incident, took it onto school property, displayed it to and discussed it with another student, then maintained concealed possession on school grounds, and did not turn it over to school personnel. Based upon J.K.'s stated intent and collective actions, as well as the staff reports, the logical, probable and reasonable conclusion is that J.K.'s behavior was not an impulsive act, but rather the result of a calculated decision. The lay testimony of petitioner and her advocate does not amount to competent evidence of a direct causal connection between J.K.'s conduct and his disability. And, the hearsay report from Dr. Rubenstein similarly fails to establish such a nexus.

Accordingly, I **CONCLUDE** that the Board conducted an appropriate, comprehensive MDR on October 1, 2014, and properly determined that J.K.'s conduct was not a manifestation of his disability.

The potential discipline

The statutory authority providing for the discipline of pupils in general is N.J.S.A. 18A:37-1 to -12. Additional rules govern the discipline of special education students specifically, due to the statutory right of a classified student to FAPE under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C.A. §§ 1400 to 1487. A classified student can be removed for up to ten consecutive or cumulative school days per year for disciplinary reasons, and the district board of education is not required to provide services during that time. N.J.A.C. 6A:14-2.8(a). However, the removal of a disabled student from his or her current educational placement for disciplinary reasons for more than ten consecutive school days constitutes a change of placement, N.J.A.C. 6A:14-2.8(c)(1). The student thus suspended is entitled to a formal hearing before the district board of education, N.J.A.C. 6A:16-7.3(a)(10), as well as all of the procedural safeguards, as set forth in N.J.A.C. 6A:16-7 and N.J.A.C. 6A:14 (Special Education). N.J.A.C. 6A:16-7.3(g)(1). Thus, when a student is to be removed for more than ten days, the IEP team shall determine the services that are needed, and the district board of education shall provide such services, to the extent necessary "to enable the student

to progress appropriately in the general education curriculum and advance appropriately toward achieving the goals set out in the student's IEP." N.J.A.C. 6A:14-2.8(e).

For disciplinary changes in placement that exceed ten consecutive school days, "if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability . . . school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities." 34 C.F.R. § 300.530(c) (2014) (emphasis added). However, the removed student must continue to receive educational services to progress toward meeting the goals set forth in his IEP, and receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur. 34 C.F.R. § 300.350(d) (2014).

Additionally, as stated above, pursuant to 20 U.S.C.A. § 1415(k)(1)(G) and 34 C.F.R. § 300.530(g) (2014), school personnel may remove a student to an interim educational setting for up to forty-five school days "without regard to whether the behavior is determined to be a manifestation of the child's disability," in cases where a child carries or possesses a weapon at school. Pursuant to N.J.A.C. 6A:14-2.8(f), a similar protection applies, but that regulation limits removal to no more than forty-five calendar days.

So, as to whether the Board may suspend J.K. for forty-five days or more for possession of a weapon in school, regardless of the MDR, an initial consideration is whether the replica gun constitutes a weapon. "The term 'weapon' [as used in 20 U.S.C.A. § 1415(k)(1)(G)] has the meaning given the term "dangerous weapon" under section 930(g)(2) of title 18, United States Code." 20 U.S.C.A. § 1415(k)(7)(C). "The term 'dangerous weapon' means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2½ inches in length." 18 U.S.C.A. § 930(g)(2) (emphasis added). In a similar case before the Ohio Department of Education, Maple Heights City Schools, 110 LRP 65945

(Mar. 18, 2007), a student brought a cigarette lighter that was a replica gun to school, displayed it to another student, and was suspended for ten days.

During testimony presented in this matter, there was some confusion as to whether the weapon J.K. brought to school was a BB gun, or a non-functional, imitation weapon. Principal Marrone, who had an opportunity to inspect the weapon, testified that its "inner workings" had been removed, and that it did not appear to be a functional weapon. He characterized it as a replica and it is described as such in the parties' stipulated facts (J-1). Although J.K. was charged with possessing an "imitation firearm," this does not obviate the testimony that the weapon was non-functional. Because the replica weapon apparently was incapable of "causing death or serious bodily injury," it does not constitute a weapon under 20 U.S.C.A. § 1415(k)(1)(G). Therefore, the Board does not have the authority to remove J.K. for up to forty-five days, as a special circumstance and regardless of the MDR, for possession of a weapon. Because the replica gun was not a "weapon," the removal of J.K. for more than ten days constituted a change in placement under 34 C.F.R. § 300.536 (2014), and triggered the guarantees enumerated in 20 U.S.C.A. § 1415(k)(1)(D)(ii), which were not provided to J.K. after the ten-day period had expired.

A second consideration is whether the Board may remove J.K. for a period of time extending beyond forty-five days. Because it was properly determined that the incident was not a manifestation of J.K.'s disability, the disciplinary measures applicable to non-disabled children are available to the Board. Therefore, J.K. is left exposed to a potential long-term suspension or even removal for the remainder of the school year, should the Board approve the superintendent's recommendation at the upcoming Board meeting.

In accordance with the above provisions, I **CONCLUDE** that the Board does not have the authority to suspend J.K. for up to forty-five days as a special circumstance regardless of the MDR, for possession of a weapon in school. I further **CONCLUDE** that J.K. is entitled to receive continued educational services to progress toward meeting the goals set forth in his IEP, as well as a functional behavioral assessment,

and behavioral services and modifications that are designed to address the behavior violation so that it does not recur.

DECISION AND ORDER

Accordingly, I hereby **ORDER** that respondent immediately determine and deliver the appropriate services that are necessary to progress J.K. toward meeting the goals set forth in his IEP. Those services shall include, but not be limited to, a functional behavioral assessment and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2014) 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 (2014). 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.

November 13, 2014
DATE

ROBERT BINGHAM II, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

/bdt

APPENDIX

EXHIBITS

Joint:

J-1 Joint Stipulation of Facts

For Petitioner:

P-1 IEP, dated October 1, 2014

P-2 Tender Care Pediatrics PC Visitation Note, April 2013

P-3 Social History Assessment, dated February 28, 2013

P-4 Psychological Evaluation, dated March 7, 2013

P-5 Final Office of Special Education Programs Complaint Investigation Report, #C2014-4914

P-6 Behavior Assessment System for Children (BASC)

P-7 Manifestation Determination Form, dated October 1, 2014

P-8 Psychiatric Evaluation, by Yuva Rubenstein, M.D., dated October 21, 2014

For Respondent:

R-1 Principal's summary report of prior disciplinary incident, April 2014

R-2 Not in evidence

R-3 Manifestation Determination Form for April 2014 disciplinary incident

R-4 Letter from Atlantic County Prosecutor, dated September 24, 2014, regarding charges from April 2014 incident

R-5 Letter from Atlantic County Prosecutor, dated September 24, 2014, regarding charges from December 2013 incident

R-6 Witness statement for incident of September 17, 2014

R-7 Principal's summary report for incident of September 17, 2014

R-8 Manifestation Determination Form disciplinary incident of September 17, 2014

R-9 Letter from the Board, dated September 23, 2014, scheduling disciplinary hearing

R-10 Educational Evaluation, dated October 23, 2014

R-11 IEP, signed October 1, 2014 (same as P-1)

R-12 Letter from Matthew Sykes, Esq., requesting adjournment of expulsion hearing, dated October 1, 2014

R-13 Enlarged photograph of the replica firearm

WITNESSES

For Petitioner:

D.K.

Jeanine Middleton

For Respondent:

Jo-Anne Goldberg

Mark Marrone