State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

CORRECTED DECISION
ON EMERGENT RELIEF
OAL DKT. NO. EDS 9213-16
AGENCY DKT. NO. 2016-24736

E.Z. ON BEHALF OF D.Z.,
Petitioner,
v.
AUDUBON BOARD OF EDUCATION
AND HAMPTON ACADEMY,
Respondents.

Jamie Epstein, Esq., for petitioner

Andrew Li, Esq., for respondent Audubon Board of Education (Parker McCay, attorneys)

Timothy Bieg, Esq., for respondent Hampton Academy (Madden & Madden, attorneys)

Record Closed: July 12, 2016 Decided: July 15, 2016

BEFORE **LISA JAMES-BEAVERS,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter petitioner E.Z. brought an action for emergent relief on behalf of minor child D.Z. against respondent Audubon Board of Education (Audubon) to: 1) Return her son D.Z. to his stay put placement at Hampton Academy (Hampton); and 2) Provide compensatory education for the period of time D.Z. was not receiving educational services since April 15, 2016. The matter was filed in the Office of Special Education Programs on May 20, 2016, and transmitted to the Office of Administrative Law (OAL) on May 23, 2016, as a contested case. The matter was heard on June 13, 2016, before Administrative Law Judge John Schuster. After that hearing, Judge Schuster ruled that Hampton Academy was an indispensable party that had to be included in the petition.

On June 20, 2016, petitioner again filed a petition seeking emergent relief and due process with the Office of Special Education programs, but this time included Hampton. The underlying due process case was retained by OSEP until the expiration of the resolution period at which time it was transmitted to the OAL. The emergent relief petition was assigned to the undersigned and scheduled for hearing on June 29, 2016. However, on June 28, 2016, I received a letter from Timothy Bieg, Esq. stating that his office had just been retained to represent Hampton Academy in the case and the staff members that he needed to talk to in order to answer the petition were on vacation. Petitioner did not consent to the adjournment request, but counsel for Audubon consented and supported Mr. Bieg with a letter indicating that the school year had ended and D.Z. did not have an extended school year on his Individualized Education Program (IEP), so it would not prejudice the petitioner to grant the adjournment. I granted the adjournment and rescheduled the case for July 12, 2016. On that date, I heard oral argument on the case from petitioner, Audubon and Hampton and closed the record.

BACKGROUND

The following facts are undisputed. D.Z. is a seventeen-year-old student who is classified emotionally disturbed. Pursuant to his IEP, his home district, Audubon, has

sent him to Hampton Academy since December 9, 2014. Hampton is an approved private school providing academic and therapeutic services for students with emotional needs. D.Z. was in eleventh grade during the 2015-2016 school year. On or about April 14, 2016, D.Z. attempted to visit his friend in another classroom. His teacher Ms. Howard prohibited D.Z. from leaving the classroom to visit his friend. D.Z. attempted to leave his homeroom anyway and Ms. Howard told him to return. D.Z. cursed at Ms. Howard then took out a book to read. Ms. Howard told the other students to leave the room and called in the counselor and security. D.Z. asked to go to the principal. He tried to walk down to the principal's office. The staff tried to grab D.Z., but he went in to the principal's office. The principal was not there. D.Z. threw some books off the shelf.

The following facts are according to the petitioner. After D.Z. threw the books, the Principal/Director, Mr. Cancelliere, came in and talked to D.Z. D.Z. apologized and cleaned up the office. D.Z. went down to the nurse and laid down and then went to the room for in-school suspension. During the in-school suspension, D.Z. requested to talk to his friend and the principal allowed that. D.Z. returned to in-school suspension for the rest of the day and later that day, went home on the bus. The next day, April 15, 2016, D.Z. took the bus to school and was told to report to in-school suspension. D.Z. went to his class instead. D.Z.'s teacher told the other students to leave the room. D.Z. went to the principal's office where Counselor Wellborn told D.Z. the bus was going to take him home. Counselor Wellborn called petitioner and said he was sending D.Z. home and then hung up on her.

On April 18, 2016, Audubon received a copy of a letter sent to petitioner stating that D.Z. was involved in "a serious behavioral situation that severely compromised the safety of D.Z. as well as the other students and staff." It goes on to describe D.Z. as "having thrown books and food all over the floors and walls" and state that he "refused any and all redirection." (Exhibit A to Exhibit A of Audubon's Answer.) It goes on to state that, "Accordingly, [D] has been suspended from Hampton Academy. He will be serving suspension on the following dates: 04/15/2016, 04/18/2016, 04/19/2016. He will be allowed to return on 04/20/2016." It also revealed his suspension history stating that D.Z. had received three suspensions for a total number of six days of suspension for the school year. Last, the letter set forth that the parent must meet with the district

case manager and the school prior to D.Z.'s return to Hampton Academy. (Exhibit A to Exhibit A of Audubon's Answer.)

On April 20, 2016, Counselor Wellborn informed petitioner by telephone that the meeting would be on April 21, 2016. Petitioner did not receive any written notice of what the purpose of the meeting was or what time it would be held. When petitioner arrived on April 21, 2016, Mr. Cancelliere told her that the meeting was over. She spoke with Mr. Rogers, D.Z.'s case manager from Audubon, who handed her a request for a psychiatric evaluation. (Exhibit C to Exhibit A of Audubon's Answer.) Mr. Rogers advised her Audubon had selected Dr. Hewitt. E.Z. refused to allow D.Z. to be evaluated by Dr. Hewitt. On the Written Notice of Evaluation, petitioner wrote, "Learning my Rights, Right Now before making my determination" and did not sign her consent. (Exhibit C to Exhibit A of Audubon's Answer at 4.) Instead, petitioner took D.Z. to Kennedy Hospital Crisis Unit on May 16, 2016. Petitioner certified that D.Z. was given a "safe clearance." Petitioner has not provided that report to Audubon, Hampton Academy or the court. On May 12, 2016, Mr. Rogers wrote a letter to Hampton Academy withdrawing D.Z. from Hampton Academy and indicating Audubon "hope[s] that you will reconsider his placement at your school once all conditions have been met."

E.Z. was never provided a written notice for D.Z.'s removal despite the fact that he has received no educational services since April 15, 2016. E.Z. was never provided written notice of a manifestation determination meeting or a notice for an IEP team meeting to amend D.Z.'s IEP or his behavior plan. However, on April 25, 2016, Audubon received a letter from Mr. Wellborn memorializing a meeting he had with only case manager, Mr. Rogers, in which they agreed that D.Z. not be considered for re-entry into Hampton until such time as a comprehensive psychiatric evaluation is conducted by an approved Audubon psychiatrist. The letter also stated that D.Z. will be placed on homebound instruction until the evaluation can be performed. Mr. Wellborn did not copy petitioner. (Exhibit B of Audubon's Answer.)

DISCUSSION

Petitioner argues that because Audubon has filed an answer with only a certification from Jeanne Opeil-Kernoschak, Audubon's Director of Special Services, and Andrew Li, Esq., neither of whom have any personal knowledge of the facts, and Hampton has filed an answer with no certification, petitioner's allegations should be accepted as undisputed facts. I **FIND** as **FACT** that D.Z. was disciplined for leaving his classroom without permission, cursing at the teacher, and vandalizing the director/principal's office by throwing books. D.Z.'s actions are the crucial facts needed for determination of this request for emergent relief. As Hampton has chosen to not admit or deny the allegations regarding its website, but to set forth that the site speaks for itself, I **FIND** as **FACT** that Hampton's website sets forth under Academics that, "Each classroom team establishes a Behavior Management Plan that helps cultivate a classroom environment that is conducive to academic learning and personal growth." And it sets forth under Clinical Services that "Intensive therapeutic services support our strong academic program. Experienced Licensed Clinical Social Workers conduct group therapy three times each week, for which students receive elective academic credit." Under Student Recognition/Behavioral Incentives, the website sets forth, "Hampton Academy provides a supportive therapeutic environment designed to help our students reach their greatest potential for academic achievement, behavioral control and personal growth." Under Specialized Programs, the website notes that, "We will work with district case managers and parents/guardians to develop programming specific to individual academic, social, emotional and behavioral needs." (http://hamptonacademy.com/programs-services.) I also **FIND** as **FACT** that neither Hampton nor Audubon have an academy or board policy stating that a student may be removed from school until such time as he or she presents a psychiatric evaluation or document stating that he or she has been "cleared" to return to school.

I further **FIND** as **FACT** that, despite Audubon's assertion that stay-put is not applicable because there was no change in placement, Audubon issued an IEP dated April 22, 2016, placing D.Z. on home instruction on April 26, 2016. (Exhibit A of Petitioner's Reply Brief.) There are no IEP participants listed on the first page of the IEP and no indication of notice to or consent by petitioner. The District offered home

instruction to D.Z. through an on-line system, in the same manner as other students in the District are provided home instruction. D.Z. has not accessed the on-line home instruction resources that the District has made available to him. (Exhibit A of Audubon's Answer.)

Petitioner further argues that even though it filed an emergent relief application, the standard for the application is the "stay put" standard and not the standard set forth in N.J.A.C. 1:6A-12.1(e)(Emergency relief pending settlement or decision) and Crowe v. DeGioia, 90 N.J. 126 (1982). Petitioner also argues that D.Z. has received no education since his suspension and therefore should be entitled to compensatory education.

Audubon argues that the petition alleges actions that were taken by Hampton Academy, not Audubon, and that it cannot force Hampton to re-enroll D.Z. if petitioner does not comply with Hampton's request for a psychiatric assessment.

LEGAL ANALYSIS

As set forth above, petitioner argues that the "stay put" standard of 20 U.S.C.A. § 1415 applies. N.J.A.C. 1:6A-18.4 sets forth,

> Unless the parties otherwise agree or the judge orders pursuant to N.J.A.C. 1:6A-12.1 or 14.2, the educational placement of the pupil shall not be changed prior to the issuance of the decision in the case, pursuant to 34 C.F.R. 300.514.

Audubon argues that the provisions of N.J.A.C. 6A:14-2.7 regarding emergent relief set the standard for this case. That standard sets forth the four-part Crowe v. DeGioia requirement that a petitioner must show: irreparable harm; a settled legal right; likelihood of prevailing on the merits; and that the equities and interests of the parties, when balanced, show that the petitioner will suffer greater harm than the respondent will suffer if the relief is not granted. N.J.A.C. 6A:14-2.7(s)(1). Audubon does not address all four of the standards, but argues that petitioner has not contended nor demonstrated that irreparable harm will be suffered if compensatory education is not provided.

Actually, the statute regarding alternative educational settings, 20 U.S.C.A. § 1415(k), governs any exclusion from school for a student with disabilities. 20 U.S.C.A. § 1415(k) and N.J.A.C. 6A:14-2.8 set forth the procedures to be followed when disciplining students with disabilities. (Exhibit C of Petitioner's Reply Brief at 5.) Reading the statute and the regulation together, a student with disabilities suspended for a period of ten days or less consecutive or cumulative school days is subject to the same district board of education procedures as nondisabled students. However, at the time of removal, the principal shall forward written notification and a description of the reasons for such action to the case manager and the student's parents. N.J.A.C. 6A:14-2.8. If D.Z. was suspended for only three days as argued, the April 14, 2016 letter from Director Cancelliere to petitioner would show Hampton complied with this requirement. (Exhibit A to Exhibit A of Audubon's Answer.)

However, because of Hampton and Audubon's agreed upon requirement of a psychiatric evaluation and clearance before allowing D.Z. back in to school, the suspension continued indefinitely. Thus, petitioner was effectively suspended from his placement and program at Hampton until such time as Audubon removed D.Z. from Hampton effective May 12, 2016. (Exhibit C to Exhibit A of Audubon's Answer.) Thus, Hampton effectively suspended D.Z. for twenty days after which time Hampton could no longer have him as a student because Audubon removed him from May 13, 2016 until the end of the school year.

Pursuant to N.J.A.C. 6A:14-2.8(c)(1), if a student is suspended for more than ten consecutive school days, the suspension is a removal and the removal is a change in placement. Audubon cannot argue that the suspension was not a change in placement because it unilaterally changed D.Z.'s IEP on April 22, 2016. When there is a change in placement caused by a suspension greater than ten consecutive days, the district must conduct a manifestation determination by the tenth day of removal, to determine if the "conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or . . . if the conduct in question was the direct result of the district's failure to implement the IEP. 20 U.S.C.A. § 1415(k)(E)(i). If the conduct is determined to be manifestation of the student's disability, the district cannot suspend and must return the student to his or her placement, unless the parent and district agree to

change the student's placement. 20 U.S.C.A. § 1415(k)(F)(iii). Even if the conduct is not a manifestation of the student's disability, the student, although suspended, must continue to receive the educational services enabling the student to continue to participate in the general education curriculum in another setting, and to progress toward meeting the goals set out in the student's IEP. 20 U.S.C.A. § 1415(k)(D)(i).

Despite being an approved school for children with disabilities, particularly the disabilities that D.Z. exhibited, Hampton did not hold a manifestation determination hearing before D.Z. had been out of school for ten consecutive days. Rather, for twenty days, Hampton and Audubon insisted on a requirement for D.Z.'s return that was not required anywhere in their policies or in law. Thus, just as in the complaint investigation report petitioner provided, the Hampton and Audubon ordered a private evaluation without determining whether a student with disabilities has needs that are not being addressed through his IEP, which is required in order to ensure a student is receiving a free, appropriate public education (FAPE). (Exhibit C of Petitioner's Reply Brief at 6.) As set forth in that report, "the OSEP is aware of no federal or state regulation that allows for students to be excluded from their programs pending a private mental health evaluation." (Exhibit C of Petitioner's Reply Brief at 7.) Just as the District in the complaint investigation report was deemed noncompliant by OSEP, I **CONCLUDE** that Hampton and Audubon violated 20 U.S.C.A. § 1415(k) and N.J.A.C. 6A:14-2.8 by excluding D.Z. from his program pending a psychiatric evaluation and not holding a manifestation determination by the tenth day he was out of school. I also **CONCLUDE** that Audubon violated 20 U.S.C.A. § 1415(k) when it unilaterally withdrew D.Z. from his last agreed upon placement at Hampton Academy and placed him on on-line home instruction, in disregard of his IEP.

ORDER

For the foregoing reasons, I **ORDER** that Audubon return D.Z. to Hampton Academy. Although compensatory education is not generally granted on a request for emergent relief, here, the decision is based on violations of the IDEA and stay-put rather than a showing of emergent relief factors. Therefore, I **ORDER** that Audubon convene an IEP team meeting with E.Z. and a representative from Hampton Academy

to determine services that can be provided over the summer of 2016 to begin to compensate D.Z. for his over fifty days of removal from his education program so that he will not be as far behind in September 2016.

This decision on application for emergency relief resolves all of the issues raised in the due process complaint; therefore, no further proceedings in this matter are necessary. This decision on application for emergency relief is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) 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). 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.

July 15, 2016 — Lisa James-Beavers

DATE — **LISA JAMES-BEAVERS**, ALJ

Date Received at Agency: July 15, 2016

Date Mailed to Parties: July 15, 2016

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