



# Special Education Bulletin

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## summary

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**Parent’s Opinion That Board’s Brand New Autistic Program Is Unsatisfactory Is Insufficient to Justify an Out-of-District Placement**

*T.M., on Behalf of D.B., Petitioner, v. West Paterson Board of Education, Respondent*, EDS No. 11022-06 (March 26, 2007) [Decided by Daniel B. McKeown, ALJ].

D.B. is currently six years old and attends school in the West Paterson school district. When he was three years old, he was classified as autistic by the Little Falls school district. In 2004, he attended school in the Paramus school district and the Fairlawn school district. His family moved again, and he was placed in the preschool autistic program in the Lakewood school district. For the 2006-07 school year, Lakewood’s CST prepared an IEP that called for D.B.’s placement in a self-contained kindergarten class. D.B.’s family then moved to West Paterson in August 2006.

West Paterson accepted Lakewood’s IEP as appropriate for D.B. However, West Paterson did not have an autistic class, and the district’s supervisor of special services made arrangements to start a new program. The supervisor relied upon D.B.’s mother’s recommendations in formulating the class and materials, and also assigned a teacher to receive training in teaching children with autism. The new class was to start September 19, 2006 which is the date the teacher’s training would be completed. In the interim between September 6 and September 19, D.B. was placed in a mainstream class with a one-on-one aide.

On September 21, 2006, D.B.’s mother, T.M., filed an application for emergent relief with the Office of Special Education Programs requesting a change in placement. The application was rejected because of the request for an out-of-district placement, and the matter was transferred to OAL.

T.M.’s application requested that D.B. be placed in the Pompton Lakes school district, the Fairfield school district, New Beginnings, the Phoenix Center, or the Children’s Institute. At the hearing, she testified that West Paterson’s program was not appropriate for D.B.’s needs as described in the IEP. She alleged it is too new, and is not an ABA program because the teacher is not certified in ABA. She alleged that D.B. has severe sensory integration dysfunction and that his “sensory diet” was not completed. She also alleged that no behavior modification strategies have been implemented, and that D.B. has not received speech therapy, OT or PT.

The ALJ explained that it was T.M.’s burden to prove that D.B. could not achieve meaningful educational progress in the program offered by West Paterson. The ALJ found that her testimony failed to prove that the program being offered D.B. was not appropriate to his needs; her case was limited to her own opinion and not based on evidential facts. Therefore, the ALJ dismissed T.M.’s due process request.

**Parents’ Requests for Reimbursement for Unilateral Placement in Private School and for Independent Evaluations Denied Due to Parents’ Failure to Cooperate**

*M.S. and D.S., Individually and on Behalf of M.S., Jr., Plaintiffs, v. Mullica Township Board of Education, Defendant*, 485 *F.Supp.2d* 555 (D.N.J. 2007) [Decided by Joseph E. Irenas, U.S.D.J.].

M.S., Jr. was born on February 24, 1999, eight and one-half weeks premature. During the first five weeks of his life, he suffered from end-lung disease, heart failure and a brain hemorrhage. As a result, he had developmental delays in his gross and fine motor skills, speech-language development, and sensory integration.

In 2002, when M.S., Jr. turned three years old, the board's CST evaluated him, and he was classified as Preschool Disabled. His IEP for the 2002-03 school year, included PT, speech therapy, and OT; the OT was to be given once per week for 30 minutes.

One year after M.S., Jr. was enrolled in the board's preschool, the CST met for an annual IEP review conference. M.S., Jr.'s mother, D.S., attended the conference. The annual IEP review report dated February 21, 2003, indicated that M.S., Jr. demonstrated "wonderful progress" in OT and speech therapy, and is participating well with other children. The report indicated that he would continue to receive OT once a week for 30 minutes. D.S. signed the report indicating her agreement with its contents.

In September 2003, D.S. sought an independent evaluation of M.S., Jr.'s OT. M.S., Jr. was evaluated by Leigh Ann Bliss, an occupational therapist at Voorhees Pediatric Hospital. On September 26, 2003, Bliss met and evaluated M.S., Jr.; Bliss did not observe M.S., Jr. in the school setting, but conducted a one-time evaluation on that date. In addition, it appeared that Bliss did not review any of M.S., Jr.'s school records for her evaluation. However, based on her observations, she concluded that M.S., Jr. had: (1) "moderate to severe" impairment in fine motor skills and sensory processing; and (2) "moderate" impairment in postural mechanisms and visual perception. As a result, Bliss recommended that he receive OT once a week for 60 minutes.

Following the evaluation, D.S. wrote to the CST and conveyed the results of the OT evaluation. D.S. asked whether the CST could cover the cost of additional OT.

On October 1, 2003, the school social worker contacted D.S. and set up a meeting for October 17<sup>th</sup> to discuss her concerns and review

the program. The report from the meeting indicated that the CST reviewed Bliss' OT report. It commented that the goals in Bliss' report were the same as those focused on by the school's occupational therapist. The CST suggested a re-evaluation of M.S., Jr.'s occupational, speech, and academic skills. However, D.S. did not agree to the request; D.S. requested OT at Voorhees Pediatric Hospital instead of at school. D.S. signed the report but attached a one-page typed letter explaining why she disagreed with the CST.

On October 24, 2003, D.S. wrote to the superintendent to explain her son's situation. She indicated that he needed OT twice weekly with equipment that is not available at school. She then requested that her son no longer be treated by the school's occupational therapist.

On October 27, 2003, the school principal wrote to D.S. He advised that the CST had developed a reevaluation plan to determine whether M.S., Jr. required additional or different OT, and that the district would honor her request to cease providing OT. Subsequently, M.S., Jr. began twice weekly private OT.

On March 12, 2004, the CST held a reevaluation classification meeting to discuss M.S., Jr.'s OT and other needs. A new IEP was then prepared based on the information discussed at this meeting. The March 2004 IEP indicated that M.S., Jr.'s measurable annual goals were to improve sensory, fine and gross motor skills for all school-related activities, and to maintain age-appropriate communication skills. The IEP called for an integrated preschool with daily language arts, learning stations, gross motor activity, and OT once per week for 30 minutes.

On May 13, 2004, D.S. wrote to the CST and advised that she did not believe the district was providing M.S., Jr. with a FAPE. She stated that he needed an out-of-district place-

ment at the Orchard Friends School (OFS) in Moorestown. On May 21, 2004, D.S. wrote to the CST again, stating that she expected arrangements to be made for M.S., Jr.'s placement at OFS for the following week.

The CST then met to discuss a routine re-evaluation of M.S., Jr. in anticipation of him entering kindergarten in the fall of 2004. However, D.S. initially refused to consent to the evaluation. Finally, on July 27, 2004, she consented.

On August 16, 2004, D.S. wrote to the superintendent, advised that a due process petition would be filed, and requested that the board cover the costs for tuition, evaluations, and legal fees. In September 2004, M.S., Jr. was enrolled in OFS's full-day kindergarten. He received speech-language therapy and OT six times each per week. He also continued to receive private OT.

In May 2005, M.S., Jr. stopped attending OFS due to non-payment of tuition. On May 26, 2005, in anticipation of his return to the district for the 2005-06 school year, the CST met to reevaluate his classification and prepare an IEP for first grade.

On June 29, 2005, D.S. wrote to the CST and provided it with copies of independent evaluation reports conducted at the Davis Center for Auditory Processing in March 2005 and May 2005. On August 8, 2005, the CST met to incorporate the information from these reports into M.S., Jr.'s IEP. The IEP was revised to incorporate the Davis Center's recommendation that M.S., Jr. receive individualized speech-language therapy twice per week and a classroom therapy session once per week.

On June 29, 2005, D.S. also filed a due process petition with the Office of Special Education Programs. The petition requested the provision of a FAPE, reimbursement for tuition

paid to OFS, reimbursement for private OT, and reimbursement for various independent evaluations. The petition also sought a declaratory ruling that the proposed IEP for the 2005-06 school year violated the IDEA. Sometime in the fall of 2005, the family moved out of the district.

On November 9, 2005, the ALJ hearing the case issued a 150-page decision denying virtually all of the petitioners' claims. He found that the board made every effort to provide M.S., Jr. with a FAPE, and that there was no way to determine whether his IEP would have satisfied the IDEA since D.S. unilaterally removed M.S., Jr. for the 2004-05 school year. The ALJ found that the petitioners were not entitled to reimbursement for tuition at OFS or for reimbursement of the costs of private OT. However, he found that the board was responsible for the costs of M.S., Jr.'s evaluations to the extent the CST incorporated the recommendations into his IEP for the 2005-06 school year.

M.S., Jr.'s parents then filed a complaint in federal court to appeal the ALJ's decision, and the board filed a counterclaim. The complaint requested an order to enforce the ALJ's decision regarding reimbursement of the independent evaluations. It also sought reimbursement for tuition at OFS, costs of OT, attorneys fees and expert witness fees. The board's counterclaim sought a reversal of the ALJ's decision regarding reimbursement for the costs of the independent evaluations. The parties then cross-moved for summary judgment.

The federal judge explained that, when reviewing an ALJ's decision, the court applies a modified *de novo* standard of review, and is required to give due weight to the ALJ's factual findings. The court's decision is based on the preponderance of the evidence.

Before the district court, M.S., Jr.'s parents argued that the board failed to provide a FAPE and therefore, they are entitled to reimbursement for the costs of their unilateral placement at OFS for the 2004-05 school year. In order to determine whether they are entitled to reimbursement, the court must determine whether the IEP was reasonably calculated to confer meaningful educational benefits to M.S., Jr.

With regard to the 2004-05 school year, the CST did not create an IEP because D.S. decided to enroll M.S., Jr. in OFS before the IEP was completed. Moreover, D.S. did not initially consent to have M.S., Jr. evaluated for the 2004-05 IEP. The court found that the preponderance of the evidence supported the ALJ's findings that D.S. refused to cooperate with the CST to such an extent that it was prevented from creating an IEP. Therefore, reimbursement was properly denied under 20 *U.S.C.A.* §1412(a)(10)(C)(iii)(III).

The court rejected M.S., Jr.'s parents' arguments that the March 2004 IEP was inadequate with respect to OT. They argued that they were never provided periodic progress statements required by 20 *U.S.C.A.* §1414(d)(1)(A)(viii)(II). They also argued that the board failed to implement the 2002 and 2003 IEPs because they called for standardized testing which was not done.

The court explained that only those procedural violations of the IDEA which result in a loss of educational opportunity or seriously deprive parents of their participation rights are actionable. The court found no evidence in the record to suggest that the parents were uninformed about their son's progress. The court also found that neither the 2002 IEP nor the 2003 IEP required standardized testing for OT. Since there is no proof that M.S., Jr. failed to progress with the OT services the board provided him, M.S., Jr.'s parents failed to prove

that there was a loss of an educational opportunity. In fact, the board presented evidence that, by October 2003, M.S., Jr. had improved the grip in his right hand along with other progress.

With respect to the board's counterclaim, the court agreed that the ALJ's decision regarding reimbursement for the independent evaluations should be reversed. The court found no explanation for the ALJ's decision. The court found that, since the family moved out of the district in the fall of 2005, it was improper for the ALJ to have ordered reimbursement of the independent evaluations whose recommendations were incorporated into the IEP for the 2005-06 school year. Citing 34 *C.F.R.* §300.502, the court explained that the regulation allows for an ALJ to order payment of independent evaluations, but assumes that the disabled child is living in the district from which reimbursement is sought. Since the family moved out of the district before M.S., Jr. ever attended classes during the 2005-06 school year, the board was not legally responsible for M.S., Jr.'s education. Based on the foregoing, the court dismissed the complaint and granted the board's motion for summary judgment.

**Board Ordered to Amend §504 Plan of Student with Severe Peanut Allergy to Include Bus Transportation with an Aide to Administer EpiPen as Needed**

*J.B. and T.B., on Behalf of J.B., Jr., Petitioners, v. Manalapan-Englishtown Regional Board of Education, Respondent*, EDS No. 676-07 (April 13, 2007) [Decided by John R. Tassini, ALJ].

J.B., Jr. was born on April 26, 2001, and currently attends kindergarten in the district. In February 2005, J.B., Jr. ate a peanut butter cookie, and shortly thereafter had an allergic reaction including a cough, tiredness and hives covering his body. Ruby Reyes, M.D.

examined and tested J.B., Jr. for allergies, and determined that he has an allergy to nuts and a severe peanut allergy with anaphylaxis.

Prior to the start of the 2006-07 school year, when J.B., Jr. entered kindergarten, his parents requested the board to provide an accommodation plan. An emergency health care plan was developed which included the provision of a peanut-free classroom, notification to parents of classmates that peanut products would not be admitted in the classroom, and daily cleaning of desks and the classroom floor.

On October 4, 2006, J.B., Jr.'s parents met with district officials. They shared J.B., Jr.'s medical records including a report from Dr. Reyes stating the life threatening nature of food allergies and his recommendation that J.B., Jr. be placed in a peanut/nut-free environment and have peanut allergy measures in place at school.

On October 11, 2006, the board's §504 committee prepared a §504 individual accommodation plan for J.B., Jr., and mailed it to his parents. The plan provided for an EpiPen in the school nurse's office, and provided for transportation on a regular bus with the following accommodations:

- a) make sure bus driver knows the student and his allergy symptoms
- b) ensure the bus has a communication device
- c) ensure the bus driver knows to call 911 if a reaction occurs
- d) have the student sit in front near the driver
- e) enforce a "no food on the bus" policy
- f) if possible, assign student a bus buddy whose parents agree that the child will not eat nuts prior to boarding the school bus

Alternatively, the plan provided that, if J.B., Jr.'s allergies warrant his isolation, he could be transported alone on a minibus. The proposed

§504 plan did not include transportation with an aide trained to monitor J.B., Jr. and administer an EpiPen.

Since a trained aide was not being provided, T.B. drove her son to school. On October 16, 2004, the board's §504 committee revised the plan to indicate that the board would "start looking into an aide to be trained to ride the bus." T.B. then signed the plan.

On January 7, 2007, Dr. Reyes wrote an explanatory letter. He stated that J.B., Jr. has a severe peanut allergy, and based on a skin reaction test, J.B., Jr. is in the highest category of severity "with a very high risk of a potentially life-threatening reaction from exposure to even a trace amount of peanut protein whether ingested, touched or inhaled (through smelling)." Dr. Reyes commented that the §504 plan was unsafe because it did not include J.B., Jr. having his EpiPen on the bus with a trained adult to administer the injection.

Subsequently, J.B., Jr.'s parents filed a petition with the Office of Special Education Programs requesting an order to amend the §504 plan to provide a regular education bus to transport him to and from school and school-related activities, and to provide an aide to monitor J.B., Jr. and administer an EpiPen.

The ALJ hearing that matter explained that, under §504 of the Rehabilitation Act of 1973, the board is required to provide a reasonable accommodation plan to transport J.B., Jr. The ALJ further explained that, if J.B., Jr. experiences an allergic reaction, the administration of an EpiPen can control it. Since J.B., Jr. is too young to administer it himself, an adult would have to. The ALJ ruled out the bus driver since the bus driver would not be able to drive conscientiously and monitor J.B., Jr. at the same time. Therefore, the ALJ ordered the

§504 plan to be amended, and concluded that the board must transport J.B., Jr. to and from school and school-related activities on a regular education bus with an aide or other person available to administer an EpiPen.

**Board must Place Eighteen Year Old, Non-verbal Autistic Student in Non-approved, Private Residential Program since it Is the Only Appropriate Placement**

*C.A., on Behalf of N.A., Petitioner, v. Middle Township Board of Education, Respondent*, EDS No. 8703-06 (April 30, 2007) [Decided by Donald J. Stein, ALJ].

N.A. is a non-verbal, autistic student who turned 18 on January 27, 2007. N.A. exhibits severe aggressive, self-injurious behaviors. He is incontinent and has very irregular sleeping patterns. N.A. has been placed in a variety of day placements, schools, and residential programs; none have been successful.

On October 11, 2006, N.A.'s parent, C.A., filed a petition on N.A.'s behalf seeking a residential placement at Keystone Service Systems Southeast (Keystone). Keystone operates 12 residential homes in Pennsylvania and Delaware for persons with mental retardation, autism and developmental disabilities. The parties agreed that Keystone is the only appropriate placement which can provide N.A. with a FAPE. However, Keystone is not approved by the New Jersey Department of Education (NJDOE) as a private school provider of educational services under the IDEA. Therefore, the board argued that it was precluded by the Naples Act, *N.J.S.A.* 18A:46-14(h), from placing N.A. at Keystone.

The ALJ explained that the parties have stipulated that Keystone is the only appropriate placement for N.A., and that the board has not provided any alternative placement. The ALJ commented that, if the board's argument was to be accepted, then N.A. would have nowhere to go, and the petitioner would be left with the choice of having to pay for Keystone or receiving no services.

The ALJ explained that the Naples Act generally provides that disabled students may only be placed in approved facilities. However, under circumstances where it is determined that there is no approved public school that can provide a FAPE or adequate services, the student may be placed in a non-approved private school.

The ALJ determined, however, that the Naples Act was not applicable for two reasons:

First, the Act is only an available resource for school districts, rather than parents, when more conventional placements are not available for the child in question and the school district remains obligated to provide the child with a FAPE. Second, the Naples Act only applies to schools.

In this case, Keystone is not a school, despite providing an educational component. Since it is not a school, it cannot be accredited or approved by NJDOE. The primary focus of its program is to provide behavioral supports, so as to allow N.A. to obtain a meaningful educational benefit from his educational program.

Based on the foregoing, the ALJ concluded that the petitioner demonstrated that Keystone will provide N.A. with the most appropriate placement, and will confer an opportunity to receive a meaningful educational experience. Therefore, the ALJ ordered the board to place N.A. at Keystone.

**42 U.S.C.A. §1983 Is Not Available as a Remedy for Alleged Violations of the IDEA or of §504 of the Rehabilitation Act of 1973; *W.B. v. Matula* Overruled**

*A.W. v. The Jersey City Public Schools, et al.*, 486 F.3d 791 (3<sup>rd</sup> Cir. 2007).

A.W. is dyslexic and previously attended school in the district. In 2001, he filed a lawsuit in federal court in which he named the district, school officials, and state officials, including Barbara Gantwerk, Director of the Office of Special Education Programs, and Melinda Zangrillo, Coordinator of Compliance, as defendants. With respect to Gantwerk and Zangrillo, A.W. alleged that he had unidentified and untreated dyslexia, and that they failed to conduct a proper investigation of a complaint he made in December 1997. A.W. sought to hold Gantwerk and Zangrillo personally liable under 42 U.S.C.A. §1983 for violations of his rights under the IDEA and §504.

The defendants filed a motion for summary judgment seeking the dismissal of the complaint on numerous grounds, including qualified immunity and the use of §1983 to remedy alleged violations of the IDEA and §504. In April 2005, the trial court denied the motion and ruled that A.W. could use §1983 based on *W.B. v. Matula*, 67 F.3d 484 (3d Cir. 1995), in which the Third Circuit Court of Appeals held that §1983 was available to redress violations of the IDEA. The trial court also ruled that the defendants could not assert qualified immunity as a defense. Gantwerk and Zangrillo then appealed to the Third Circuit.

The first issue the appellate court addressed was whether §1983 is available to remedy “alleged violations of A.W.’s statutory rights as part of the qualified immunity [defense] that is the basis for the appeal.” The court stated that the availability of §1983 as a remedy for alleged violations of A.W.’s rights under the IDEA and §504 is “part and parcel” of the court’s threshold inquiry into the defendants’ qualified

immunity defense. It ultimately concluded that its holding in *Matula* must be overruled.

In reaching this conclusion, the court reviewed the *Matula* opinion and the basis for the holding in the case. In *Matula*, the court interpreted 20 U.S.C.A. §1415(l) of the IDEA to permit §1983 actions to remedy alleged violations of the IDEA. Subsequently, other courts including the Courts of Appeal for the Fourth and Tenth Circuits disagreed with the *Matula* decision.

Most recently, the Supreme Court in *City of Rancho Palo Verdes v. Abrams*, 544 U.S. 113 (2005) addressed the issue of the availability of §1983 to redress violations of federal statutes. The Court explained that, in order to bring a §1983 action for the violation of a statutory right, a plaintiff must demonstrate that the statute creates an individually enforceable right in the class of beneficiaries to which he belongs. When Congress includes private remedial provisions in a statute, this is ordinarily an indication that Congress did not intend to permit a remedy under §1983.

The Third Circuit then reviewed the IDEA to determine whether Congress intended to allow rights to be remedied through a §1983 action. The court concluded that the “provisions of the IDEA create an express, private means of redress. This, then, means that a §1983 action is not available to remedy IDEA-created rights . . . .”

The court reached the same result with respect to §504. The court found that Congress provided a private right of action under §504 by incorporating Title VI’s remedies, procedures and rights into the statute. Since Congress created a judicial remedy for violations of §504, §1983 is not available to provide a remedy. Based on the foregoing, the Third Circuit reversed the decision of the trial court, and remanded the case for the entry of a judgment in favor of the defendants.