



# *Special Education Bulletin*

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## **Board Ordered to Immediately Reinstate Multiply-Handicapped Student Who Was Expelled for Bringing Vial with Radioactive Symbol to School**

*T.M. & W.M., on Behalf of D.O., Petitioners, v. Washington Township Board of Education, Respondent, and Washington Township Board of Education, Petitioner, v. T.M. and W.M., on Behalf of D.O., Respondents*, EDS Nos. 2040-05 and 2194-05 (consolidated) (August 24, 2005) [OAL decision by Donald J. Stein, ALJ].

D.O. is a high school student who is classified as multiply disabled, ED and ADD. On November 16, 2004, D.O. was asked if his book bag could be searched because a wallet was missing. He consented to the search, and a vial with a yellow label and radioactive symbol was found. The vial had a rubber stopper with a long needle, and the labeling stated "cloud chamber source" with the name and address of the manufacturer. D.O. told the school staff that the vial may have come from his brother's chemistry set. His mother was called and said it did not come from the chemistry set.

The school nurse saw the radioactive warning label and called the Department of Health (DOH). In addition, the local police, emergency management, HAZMAT, and fire departments were called. The DOH examined the vial and found traces of radioactive material, but needed further testing. D.O. told the high school principal that he did not know where the vial had come from. The high school principal, after checking the science lab and questioning teachers, determined that the vial did not come from the school. Therefore, a lockdown and quarantine was ordered by the school resource officers emergency management team. Further testing revealed trace elements of radioactive lead at the tip of the needle, but the vial was empty.

During the lockdown, students called their parents on their cellular phones, parents came to the school, and helicopters and reporters flocked to the school. At approximately 2:00 p.m., the lockdown was ended and students were dismissed on schedule. It was later determined that the vial probably came from a child's chemistry set and was used to produce a simulation of a cloud chamber.

The high school principal then met with her executive principal to discuss the event and D.O.'s behavior. They concluded that bringing the vial to school caused public alarm and disruption of the educational process, and that D.O. did not seem to be forthcoming about the origin of the vial. Although there was no evidence that D.O. showed the vial to anyone, no evidence that he intended to disrupt the school, and despite the fact that this was D.O.'s first offense in high school, they did not believe it was an accident. They felt that a placement in an alternative school was appropriate discipline.

On November 22, 2004, D.O. was suspended. On December 1, 2004, a manifestation hearing was conducted. At the hearing, in accordance with 34 *C.F.R.* §300.52(c)(2)(I)(iii), the IEP team determined the following issues: (1) whether, in relationship to the behavior, D.O.'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) whether D.O.'s disability impaired his ability to understand the impact and consequences of his behavior; and (3) whether D.O.'s disability impaired his ability to control his behavior.

With respect to the first issue, all parties agreed that the IEP was appropriate; there were no behavior goals or BIPs in the IEP. However, D.O.'s parents did request an updated psychiatric evaluation. As to the second issue, the school social worker believed that D.O. did not have any cognitive impairments and could follow school rules. With regard to the last

issue, there was insufficient evidence to show that D.O.'s behavior was impulsive or premeditated, and thus, D.O.'s disability did not impair his ability to control his behavior. At the end of the hearing, it was determined that D.O.'s behavior was not a manifestation of his disability.

On January 25, 2005, the board conducted an expulsion hearing. At the hearing, the board accepted the recommendation to place D.O. in an out-of-district placement for the remainder of the school year. D.O. was then placed on home instruction.

On March 14, 2005, D.O.'s parents filed a due process petition seeking emergent relief; they requested the termination of his suspension and expulsion, and his immediate reinstatement to the high school. On March 28, 2005, the board filed a cross-petition requesting an out-of-district placement, as well as authorizing the release of school records.

The ALJ explained that a board can suspend or expel a disabled child in accordance with board policy if the IEP team determines that the child's behavior was not a manifestation of his/her disability. In making a manifestation determination, the IEP team must consider all relevant evidence including evaluations, diagnostic results, information from parents, the child's IEP, and observations. If the IEP team finds at the manifestation hearing that the three issues outlined above are not met, then the child's behavior must be considered a manifestation of the child's disability and the board cannot impose any removal that amounts to a change in placement.

Pursuant to 34 *C.F.R.* §300.519(a), a removal from school for more than ten consecutive days constitutes a "change in placement." If the suspension is less than ten days, the board is permitted to impose that discipline on a disabled child so long as it would be applied to a non-disabled child. In accordance with 34 *C.F.R.* §300.520(a)(2), a board may not order the removal of a disabled

child for more than ten consecutive days in the absence of a weapon or drug involvement. In cases not involving weapons or drugs, a change in placement can only be ordered by an ALJ. The ALJ can order a change in placement to an alternative educational setting for not more than 45 days, if the board has demonstrated by substantial evidence that maintaining the current placement is substantially likely to result in injury to the child or to others.

In the present case, the ALJ agreed with the IEP team's conclusion that D.O.'s behavior was not a manifestation of his disability. Having determined that the behavior was not a manifestation of his disability, D.O. could be subjected to an ordinary disciplinary hearing. Since there was no manifestation of a disability, the board's decision ordering D.O.'s immediate removal is subject to review under the arbitrary and capricious standard.

The ALJ found that D.O. did not commit any specific violation of the board's code of conduct; while D.O. may have exercised poor judgment, there is no rule against bringing a vial to school. There was no evidence that D.O. intended to disrupt classes or that he was a danger to himself or others. The vial was not illegal and was kept in his school bag. Since it was determined that D.O. was responsible for disrupting the school environment, the ALJ found that the closest code violation was disruptive behavior. Disruptive behavior will result in a one-day internal suspension only after three infractions. Based on this information, the ALJ found that there is no basis to place D.O. in an alternative setting, and he ordered the board to immediately reinstate him to the high school. The ALJ also ordered the board to conduct an evaluation of D.O. on an expedited basis and to include a psychiatric assessment.

## **Parent's §1983 Claim for Alleged Violations of IDEA Dismissed; Superintendent Entitled to Qualified Immunity**

*J.M., a Minor, Individually and by His Parent and Legal Guardian, A.S., Plaintiffs, v. Kingsway Regional School District and Terrence Crowley, in His Individual and Official Capacity, Defendants, 2005 WL 2000179 (D.N.J. 2005) [Decided by Hon. Robert B. Kugler].*

J.M., who was born on November 25, 1985, currently attends high school in the district. He had been diagnosed with ADHD, and adjustment disorder with disturbance of conduct. On April 26, 2000, J.M.'s parents signed an acknowledgment that they had received a copy of the "Special Education with Parental Rights in Special Education with Addendum" (PRISE), and the "Procedural Safeguards Statement."

In May 2001, J.M.'s mother, A.S., met with the CST to develop an IEP for the 2001-02 school year. The IEP, which A.S. agreed to, provided that J.M. would be mainstreamed for some classes and would receive in-class support for others.

In October 2001, J.M. was arrested after stealing A.S.'s car, and eluding police in a high speed chase. Shortly thereafter, A.S. told a member of the CST that she thought a residential placement might be best for J.M.

At a meeting with the CST on November 27, 2001, A.S. reiterated her belief that J.M. needed a residential placement. The CST provided A.S. with written notice of its intent to obtain a psychiatric update and psychological assessment of J.M. from Dr. James Hewitt. However, A.S. and J.M.'s father refused the evaluation. A.S. believed it was unnecessary since J.M. was "psychologically fragile" and had just been treated by Dr. Robertson Tucker. The CST believed that the evaluation by Dr. Hewitt was necessary because the evaluation by Dr. Tucker

only addressed J.M.'s behavior outside of school and not in school.

On May 3, 2002, A.S. met with the CST to develop the IEP for the 2002-03 school year. A.S. agreed to the IEP but voiced concerns as to whether A.S. required a residential placement.

On June 17, 2002, A.S. wrote to the CST and informed them that J.M. would be attending Sorenson's Ranch School in Utah for the 2002-03 school year. She did indicate that she would be seeking reimbursement for the placement. However, on July 23, 2002, A.S. unilaterally placed J.M. at Sun Hawk Academy in Utah.

On January 21, 2003, A.S. wrote again to the CST and requested a response in writing as to whether the board would be financially responsible for J.M.'s placement at Sun Hawk. The CST advised A.S. that the board was not financially responsible.

On May 30, 2003, A.S. filed a due process petition requesting reimbursement and compensatory education for the 2002-03 school year. On November 19, 2003, the ALJ determined that A.S. was not entitled to reimbursement for the placement at Sun Hawk because (1) A.S. did not give proper notice to the board, and (2) A.S. had not given the board the opportunity to explore other placements. The ALJ also found that J.M.'s parents had denied consent for an updated psychological evaluation. The ALJ's decision did not address the request for compensatory education.

Subsequently, J.M. and A.S. filed a civil action in federal district court pursuant to 42 *U.S.C.A.* §1983, alleging that the board and the superintendent of schools, in his individual and official capacities, violated the IDEA and §504 for failing to provide J.M. with a FAPE for the 2001-02 and 2002-03 school years. The complaint requested compensatory education, reimbursement for the private placement, punitive damages, attorney's fees and costs.

The defendants counterclaimed for enforcement of the ALJ's decision and also filed a

motion for summary judgment. The motion sought dismissal of the §1983 claims, the request for attorney's fees, and the claims alleging violations of the IDEA and §504. It also asserted that the superintendent, in his individual capacity, is entitled to qualified immunity to the claim that he violated the IDEA.

The district court granted the motion, in part, and denied it, in part. The court explained that §1983 provides individuals a private right of action for violations of the IDEA. However, in order to recover against the board or the superintendent, in his official capacity, the plaintiffs must establish that the deprivation of their rights was the result of official policy or custom. In this case, J.M. and A.S. had no evidence that the alleged IDEA violations were the result of an official policy or custom. Therefore, the court dismissed the §1983 claims against the board and the superintendent, in his official capacity.

Similarly, the court ruled that the superintendent, in his individual capacity, was entitled to qualified immunity because the plaintiffs could not demonstrate that he had taken specific actions that were impermissible under the IDEA or §504 as they were understood at the time of the alleged violations. The court also ruled that, since the claims under §1983 were dismissed, the plaintiffs cannot recover attorney's fees.

With regard to the plaintiffs' claim for tuition reimbursement under the IDEA, the board and superintendent argued that it should be dismissed because: (1) A.S. did not provide timely notice of her intent to seek reimbursement until January 2003; (2) A.S. did not permit the board to conduct a psychological evaluation of J.M.; and (3) A.S. and J.M. have not demonstrated that Sun Hawk was academically necessary for J.M.

The court explained that, under the IDEA, a parent may be denied reimbursement or have it reduced if s/he fails to give the school proper notice. However, reimbursement cannot be

denied for lack of proper notice if the parent has not received notice of the reimbursement notice requirement, or where compliance with the reimbursement notice requirement would likely result in physical or serious emotional harm to the child.

In this case, the parents had received notice of the reimbursement notice requirement, as they signed the PRISE booklet. However, the court found that there was a genuine factual issue as to whether A.S.'s compliance with the reimbursement notice requirement would likely have resulted in physical or serious emotional harm to J.M. There was testimony in the record that A.S. felt physically threatened by J.M. in July 2002, and Dr. Tucker opined that J.M. was "a danger to himself" at the time he entered Sun Hawk. Therefore, the court denied the defendants' motion to dismiss the claim for reimbursement. However, the court instructed the plaintiffs that, in order to recover, they will have to establish that compliance with the reimbursement notice requirement was somehow impracticable and such compliance would likely have resulted in physical or serious emotional harm to J.M.

The court rejected the defendants' arguments that the claim for reimbursement should be denied for failing to provide consent to the psychological evaluation. The court explained that a parent can be denied reimbursement if, prior to the unilateral placement, the board informs the parent, through the notice requirements in 20 *U.S.C.A.* §1415(b)(7), of its intent to evaluate the child, and the parent does not make the child available. The problem here was that the court did not have any evidence as to whether the board satisfied the notice requirements of §1415(b)(7), which include providing the parent with a description of the nature of the child's problem, and a proposed resolution of the problem to the extent known.

The court also rejected the defendants' arguments that the claim for reimbursement should be denied because the plaintiffs failed to

demonstrate that the placement at Sun Hawk was necessary for J.M.'s educational purposes. The court stated that, if it required the plaintiffs to demonstrate that the placement at Sun Hawk was necessary for J.M.'s educational purposes, it would, in effect, be requiring them to demonstrate that J.M. could not be educated in a public setting which is contrary to the precedent in *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238 (3d Cir. 1999).

The defendants' brief did not address the plaintiffs' request for compensatory education, nor did it address the defendants' request for enforcement of the ALJ's decision. Therefore, the court denied the defendants' motion as to each of these two subjects.

Lastly, with regard to the plaintiffs' §504 claim, the defendants argued that the claim should be dismissed because it is the same as the claim under the IDEA, and the plaintiffs have failed to make any showing of bad faith or gross misjudgment. The court rejected these arguments. It explained that, under §504, the plaintiffs do not have to make a showing of bad faith or gross misjudgment; rather, they need only prove that the board knew or should reasonably have been expected to know, about J.M.'s disability. In addition, the court explained that the failure to provide a FAPE can amount to a violation of §504.

### **District's Application Authorizing Board to Conduct Student Evaluation Granted**

*Ramsey Board of Education, Petitioner, v. I.A., on Behalf of M.A., Respondent*, EDS No. 9631-05 (October 11, 2005) [OAL decision by Daniel B. McKeown, ALJ].

The board filed a petition and order to show cause to obtain an order authorizing the board to evaluate respondent's son, M.A., to determine whether he had learning disabilities. M.A. is an eleven-year-old sixth-grade student. His fifth-grade teacher, Mr. Giancaspro, observed that M.A. was having significant problems with

reading comprehension and language arts during the 2004-05 academic year. The board's application relied exclusively on the fifth-grade teacher's testimony.

Giancaspro had been cautioned by M.A.'s fourth-grade teacher that he should closely monitor M.A.'s performance in reading and language arts as he had been exhibiting difficulties. Giancaspro reviewed the student's file. The file indicated that M.A.'s teachers from kindergarten to the present believed that he was capable of staying on task. The teacher resolved to monitor M.A. closely. He was teaching M.A. language arts, "some reading," vocabulary, spelling, science, life skills and penmanship. Giancaspro testified that M.A. performed well during the first marking period, but that the material covered was basically a review. However, once Giancaspro started to cover new material, M.A. began to have difficulty due to his poor reading comprehension skills. M.A. performed much better on tests that had been read to him.

Giancaspro tried different methods to help M.A. succeed including, but not limited to: (1) modifying assignments; (2) changing his seat to the front of the classroom; (3) giving frequent individualized feedback; (4) providing extra help; and (5) consulting with the school principal as well as the school nurse. The nurse had M.A.'s vision and hearing tested. The extra help provided by Giancaspro included use of a Franklin Speller—an electronic device which assists a student with using a correct word with correct spelling. The teacher also tried to assist M.A. with his test taking skills.

Giancaspro has been teaching in the district for seven years. M.A. is the fifth student that he has referred for district evaluation. All of the previous students that he referred were found to be in need of special education.

Giancaspro referred M.A. to the CST in the spring of 2005. He advised the CST that M.A.'s oral reading and reading comprehension were below grade level. He identified weaknesses in

M.A.'s sight-word vocabulary and noted that M.A. struggles with decoding skills and fluency. Giancaspro expressed concern over M.A.'s likelihood of success in sixth grade.

An evaluation planning meeting was held on July 11, 2005. The respondent was present; the meeting was four hours in length. The respondent does not believe that M.A. needs to be evaluated.

The administrative law judge (ALJ) granted the district's application seeking authorization to evaluate M.A. The ALJ noted that, while the district's evidence was slim, the respondent's evidence was slimmer. M.A.'s teacher fulfilled his obligation to observe and assess M.A. as a student. He isolated areas of academic weakness as being related to component parts of language arts, including reading comprehension and vocabulary. The teacher did make a case that there is a reason to be concerned about M.A.'s lack of strength in these areas.

The ALJ recognized that the parent was adamantly opposed to having her son evaluated. The ALJ reasoned that, regardless, the board is obligated to provide each student with a thorough and efficient education as well as a FAPE. Boards must also insure that all students with disabilities are evaluated. Under *N.J.A.C. 6A:14-2.3*, if a parent refuses to provide consent, and the district and parent have not agreed to some other action, the district must request a due process hearing to obtain consent. In addition, according to *N.J.A.C. 6A:14-2.7(b)*, the school district, or public agency responsible for the development of the student's IEP, may request a due process hearing when it is unable to obtain the required consent needed to conduct the initial evaluation. In order for a child to receive a FAPE, a district does have the right to file a petition to override a parent's refusal to permit his/her child to be evaluated.

The ALJ further reasoned that, here, the teacher identified a student with academic weaknesses, even though M.A. has been fairly successful in school, it is far better to have an

understanding now as to why this student is encountering these difficulties and to permit any learning issue to be addressed as soon as possible. The ALJ concluded that the board had provided sufficient proof that M.A. should be evaluated.

### **District's Emergent Relief Application Seeking Authorization to Evaluate Child Whose Parents Only Wanted Child Evaluated Privately Was Granted**

*Matawan-Aberdeen Regional Board of Education, Petitioner, v. H.G. and R.G., on Behalf of S.G., Respondents*, EDS No. 8330-05 (November 2, 2005) [OAL decision by Richard F. Wells, ALJ].

The district brought this proceeding seeking emergent relief to obtain consent to permit the district to arrange psychological, educational, and social evaluations of the respondents' daughter, S.G. The respondents have refused to give their consent, and have indicated their preference to provide the CST with independent evaluations performed privately. In addition, the respondents have offered to pay for these independent evaluations. The petitioners state that its CST members are the appropriate individuals to perform the requisite evaluations.

S.G. is in sixth grade and has been classified with a "specific learning disability" (SLD). During the 2004-05 school year, S.G. received special education and related services in reading and language arts. At the conclusion of the year, the resource room teacher observed that S.G. did not seem to be sufficiently challenged academically. Accordingly, for the following school year, the CST recommended that S.G. be entirely mainstreamed with certain modifications or accommodations. The CST proposed a re-evaluation in October 2005. The parents replied that they preferred to have their daughter's evaluations conducted at Morristown Memorial Hospital where S.G.'s original evaluations had been conducted.

The petitioner presented several witnesses at the hearing: (1) Jennifer Rabinovitz, the LDTC; (2) Dr. Barbara Chas, the school psychologist; and (3) Charlotte Dill-Oppito, the school social worker. All these witnesses testified that the district has never had the opportunity to evaluate S.G., and had to rely upon the past private evaluations. The witnesses all believed that, in order to confirm an appropriate classification and develop an appropriate IEP, the petitioner needed to perform its own evaluations. The witnesses also offered the opinion that the parents' failure to permit the CST to perform S.G.'s triennial evaluation had the very real potential to cause S.G. irreparable educational harm.

The administrative law judge (ALJ) granted the board's application to permit the CST to proceed with the evaluations. The ALJ was not persuaded by the parents' argument that the district should accept the private re-evaluations, because the district accepted the evaluations three years ago. The ALJ did not find any authority to support the parents' position. The ALJ reasoned, that, to the contrary, *N.J.A.C. 6A:14-3.4(a)* specifically refers to the CST concerning evaluations. In addition, *N.J.A.C. 6A:14-3.4(a)(3)* provides that the CST, the parent, and a teacher who is knowledgeable about the district's programs, are the individuals who are to determine which CST members and/or specialists should perform the evaluations. The evaluations are to be a multi-disciplinary assessment which should include at least two CST members. With regard to re-evaluation, once again the regulations place responsibility for this effort upon the CST or IEP team.

Here, the school district is seeking to fulfill its legal obligations. Based upon the parents' refusal to give the district permission to perform the requisite evaluations, the district properly proceeded under *N.J.A.C. 6A:14-2.3(b)* by commencing this proceeding. The ALJ explained that he was persuaded by the dis-

trict's testimony that the district has attempted to proceed in good faith. The ALJ noted that the CST is recommending proper evaluations. The petitioners need to determine if S.G.'s current placement and program are appropriate and, in order for the necessary assessments to be meaningful to the CST, CST members must be involved. Only performing private assessments will place the CST at a disadvantage in fulfilling the district's educational obligation to the student as required by the IDEA.

The ALJ was also convinced that the petitioners had met the necessary standards to qualify for emergent relief. Both S.G. and the student could suffer irreparable harm if the requested relief is not granted. The school district could be placed in a position where it would have no choice but to violate the law. S.G. could suffer irreparable harm by a continued delay in performing the necessary assessments.

At the time of the hearing, S.G. had already been through two full months of the school year without the benefit of re-evaluation. The ALJ also determined that the school district had a legal obligation to perform the evaluations, and thus, the petitioner satisfied the requirement that it was likely to succeed on the merits. Furthermore, the equities between the parties clearly favor the petitioner as a continued delay in performing the evaluations must be looked upon as creating a potential detriment to the student.

Accordingly, the ALJ held that the petitioner must be provided with an immediate opportunity to evaluate the student and ordered the assessments to commence on November 3, 2005. The ALJ refused to grant the petitioner's request to restrain the parents arranging independent testing, noting that it was up to the parents' good judgment not to do a disservice to the testing by negatively impacting upon its reliability by conducting the same evaluations in close proximity to each other.