



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**FINAL DECISION**

**DISMISSAL**

OAL DKT. NO. EDS 04744-22

AGENCY DKT. NO. 2022-34343

**A.M. ON BEHALF OF M.M.,**

Petitioner,

v.

**WEEHAWKEN TOWNSHIP**

**BOARD OF EDUCATION,**

Respondent.

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**A.M.**, petitioner, pro se

**Douglas M. Silvestro**, Esq. for respondent (Busch Law Group, attorneys)

Record Closed: July 14, 2022

Decided: August 11, 2022

BEFORE **KELLY J. KIRK**, ALJ:

**STATEMENT OF THE CASE**

Petitioner, A.M. on behalf of M.M., filed a petition for due process against respondent, Board of Education of the City of Elizabeth, seeking a child study team evaluation, special education and related services, and development of an individualized education plan.

## **PROCEDURAL HISTORY**

On May 24, 2022, A.M. (Mom) on behalf of M.M., filed a petition for due process against the Board of Education of the City of Elizabeth (Board or District), seeking a child study team (CST) evaluation, special education and related services, and development of an individualized education plan (IEP). The matter was transmitted by the New Jersey Department of Education (Department), Office of Special Education, to the Office of Administrative Law (OAL), where it was filed on June 13, 2022.

On June 23, 2022, the District filed motion to dismiss the petition with prejudice, consisting of a brief and Certification of Counsel with fifteen exhibits. On July 14, 2022, petitioner filed a response, consisting of a Certification of Petitioner, as well as emails dated January 14, 2022 (two), January 18, 2022, and January 19, 2022, a suspension report, a Certification of Disposition and Expungement Order, and a photograph of M.M.'s drawing. No reply was filed by the District.

## **FACTUAL DISCUSSION**

The documents submitted reflect the following:

An Eligibility Conference Report – Initial reflects parental consent for evaluation on November 22, 2017, and an eligibility meeting on February 13, 2018. It also reflects that four evaluations were conducted—educational, psychiatric, psychological, and social—and that M.Z. was determined not eligible for special education and related services but would “continue to receive support in the academic and social/emotional areas” and would “receive a 504 Plan where accommodations have been recommended.” (Respondent’s Exhibit G.)

An Evaluation Plan – Initial reflects that M.Z. was referred to the CST on November 29, 2021, for the purpose of conducting an evaluation to determine eligibility for special education and related services, and a meeting date of December 17, 2021. (Respondent’s Exhibit H.) It also reflects that M.Z. was “Meeting and Exceeding Standards in his gifted and talented classes” and that “Mother expressed her concerns

for [M.Z.] that she says are not being addressed in his 504 plan.” (Respondent’s Exhibit H.)

On December 20, 2021, Mom filed a petition with the Department (First Petition) that stated as follows:

My son . . . currently attends . . . School in Weehawken, NJ and is in the fifth grade . . . I am writing to inform you that the school and I are in disagreement concerning my son’s IEP eligibility and ESS need. We have been unsuccessful in resolving this dispute by granting my son the access to a re-evaluation for an IEP and the inclusion of ESS into my son’s current 504 Plan, and I am requesting mediation so that we may resolve our differences.

I would like the mediation to be done as soon as possible. Please let me know when this can be arranged and send me a copy of the school’s guidelines on mediation. . . . Thank you for your assistance in this matter.

An email dated January 11, 2022, from B.Z. (Dad) to the District, reflects:

. . . I am declining any evaluations of [M.Z.]. At this time there has been no concern expressed by the school, teachers, or his counselor to warrant any evaluation. [M.Z.] is exceeding in his gifted and talented program, taking part in extra curricular activities (STEM program, dance program, basketball team) and showing no signs of distress. [M.Z.] deserves to have a normal school experience and if there was any need or concern that would warrant this evaluation I would approve the evaluation. [M.Z.] was evaluated three years ago at the request of [A.M.] his maternal mother. He scored above average on all the standards. As his father I am making the decision based on [M.Z.’s] best interest and well being. I find the request from the mother for an evaluation an abuse of power, harassment, and psychological abuse to make him feel he has done something wrong (or there is something wrong with him as she has a history of doing) or not performing at his full potential/inferior. School records will prove he continues to exceed academically and with the feedback of teachers, counselor, or anyone that spends time around him can say he also is exceeding as an outgoing, caring, kind, funny boy. [M.Z.] has regular meetings with his counselor where he is able to speak freely with him on whatever he wants to speak about. Once again I am declining any evaluations based upon the facts.

[Respondent's Exhibit B.]

Mediation was scheduled for January 14, 2022, at 10:00 a.m. (Respondent's Exhibit K.) A Mediation Agreement dated January 14, 2022, ostensibly signed by petitioner states:

1) The Weehawken Twp. BOE CST agree to have the BCBA conduct a behavioral observation over multiple school environments (structured and unstructured). These observations will also include teacher interviews. The BCBA will developed [sic] a report to be shared with both parents. Both parties further agree that the process will be completed in the next 30 to 40 days.

2) Both parties agree that this agreement resolves the petition with agency #2022-33702 and that this matter is considered closed by way of this agreement.

[Respondent's Exhibit J, Respondent's Exhibit K.]

Multiple emails were exchanged between Mom and the District and/or the District's attorney between January 17, 2022, and February 17, 2022. (Respondent's Exhibit L.)

On February 18, 2022, petitioner wrote to the Department as follows:

. . . I am writing to request enforcement of the Mediation Agreement in which the Weehawken Twp. BOE CST agreed upon on January 14, 2022. The BCBA observation completed by Brianna Reagan failed to meet the agreement by unsuccessfully including any observations made in any unstructured environments. Furthermore, Brianna Reagan's observations in structured environments strongly observed the classroom as a whole rather than the agreed upon observation of my son, M.Z.

Additionally, during our mediation, Mr. Silvestro and Mr. Orecchio verbally agreed to provide a complete copy of my son's educational records and remedy the communication and IT issue which has prevented my access to my son's daily educational assignments. My requests for a 504 Plan Meeting so that we may resolve our differences was also denied by the Weehawken Twp. BOE CST.

I would like the requested enforcement of the Mediation Agreement to be done by an independent BCBA and the verbal agreement receiving a copy of my son's education records and full access to his daily educational work which the Weehawken Twp. BOE CST committed to be done as soon as possible. Please let me know when this can be arranged. .

..

[Respondent's Exhibit L.]

Petitioner attached the BCBA's Behavior Observation, email correspondence with Silvestro and Orecchio, and "Dr. Judith Springer's Letter of Concern." (Respondent's Exhibit L.)

On May 23, 2022, Mom filed a petition with the Department (Second Petition) that stated as follows:

My son . . . currently attends . . . School in Weehawken, NJ and is in the fifth grade . . . I am writing to inform you that the school and I are in disagreement concerning my son's need for re-evaluation. On January 14, 2022, Dan Spearing BOE Mediator conducted the mediation, that I as the parent to the student requested. Judith Springer, PsyD, Mr. Douglas M. Silvestro, Esq., Weehawken School District attorney and Al Orecchio, Director of Pupil Services were in attendance. Unbeknownst to the parent and the BOE Mediator, on January 14, 2022, my son was suspended for 2-days outside of school due to his behavior. The revelation of the suspension was not disclosed until March 28, 2022 when my ongoing request for a copy of my child's educational record was provided by Mr. Crespo, Weehawken Superintendent.

I have requested a Child study team evaluation that has not been granted. I am requesting an Initial Child Study Team Evaluation for eligibility under special services and related services, development of an IEP that addresses my son's behavior issue, another Mediation and Due Process.

I would like the mediation and due process to be done as soon as possible. Please let me know when this can be arranged.

...

Additionally, petitioner's June 10, 2022, email to Catherine Anthony, Administrative Analyst 3 at the Department, states, in pertinent part:

As per my submission, the communication just made by Mr. Silvestro stating this issue already was resolved he knows to be untrue. My son was suspended from school for two days on January 14, 2022 and that information was withheld by the Weehawken District from the BOE and I, his mother during and after our mediation session that took place on that same day. I learned of the suspension and the email communications surrounding the new significant occurrence of my 10 year old son's two day suspension on March 28, 2022. Therefore, it is impossible for the new significant occurrence to have been resolved and Mr. Silvestro is aware of this fact. Mr. Silvestro has copied an Alyssa K. Weinstein . . . in his response. Kindly indicate her position in this matter.

Please transfer immediately to Due Process. This is a matter of child safety and I respectfully [sic] request assistance in helping the district respect the procedures in place to help us work towards the urgently needed resolution.

An email dated May 24, 2022, from Dad to the District, reflects: "Yes I am still opposed and will revoke Any consent granted for any type of evaluations." (Respondent's Exhibit C.)

The Start Strong assessments key is as follows: Level 1 Strong Support May Be Needed; Level 2 Some Support May Be Needed; and Level 3 Strong Support May Be Needed. M.Z.'s fifth-grade Start Strong English Language Arts Assessment Report and Math Assessment Report the level of support required by M.Z. to be Level 3. (Respondent's Exhibit E.) M.Z.'s fifth grade report card reflects that he was meeting or exceeding standards in all subjects, except Music, where he was approaching the standard. M.Z.'s fifth grade report card also reflect his behaviors ("Respects authority, others, [and] the environment"; "Follows directions [and] classroom rules"; "Demonstrates responsibility and effort"; and "Works with care and cooperation") as satisfactory, except that "Follows directions [and] classroom rules" in Science and Social Studies and "Respects authority, others, [and] the environment" in Social Studies, reflect that improvement is needed. The first trimester teacher comments were:

**Social Studies (K. Mackin):**

Completes all assignments with great thought and detail. Is a cooperative, pleasant, and focused student who is

genuinely motivated to learn.

[M.Z.] is a very hard working student and puts much effort into his Social Studies assignments. He is encouraged to do better with working with others and refrain from distracting his classmates. Stay focused and keep up the great work!

**Science (J. DeCampo):**

[M.Z.] has been working so hard on his Science Fair Project. He has been very enthusiastic!

**Music 5 (D. Ingersoll):**

[M.Z.] is fully capable of meeting the standard when he is on task, but he has fallen behind the rest of his class due to his behavior. [M.Z.] is often socializing instead of using his time to develop core instrumental skills.

**Physical Education 5 (I. Oates):**

Student actively participates in class.

**Art 5 (Y. De Cordova):**

Is a cooperative, pleasant, and focused student who is genuinely motivated to learn.

[Respondent's Exhibit F.]

## **LEGAL ANALYSIS AND CONCLUSIONS**

At any time prior to transmittal of the pleadings to the OAL, in the Commissioner's discretion or upon motion to dismiss filed in lieu of answer, the Commissioner may dismiss the petition on the grounds that the petitioner has advanced no cause of action even if the petitioner's factual allegations are accepted as true or for lack of jurisdiction, failure to prosecute or other good reason. N.J.A.C. 6A:3-1.10.

The District filed, "pursuant to N.J.A.C. 1:1-12.1, *et seq.*," a motion to dismiss the Second Petition with prejudice, consisting of a brief and Certification of Counsel, with fifteen exhibits, on the bases that (1) the Second Petition "fails to advance a valid cause of action" against the respondent; and (2) because the respondent "cannot provide the relief [Mom] is seeking." Specifically, the District argues that the Second Petition is barred as a matter of law because it is duplicative of the First Petition and controlled by the binding Mediation Agreement, and also argues that the claims in the Second Petition are moot because Dad "will not consent, and will in fact revoke consent for evaluations or services" and the District therefore cannot provide the services.

With respect to mootness, the District argues that Dad “has joint legal custody (and sole physical custody) and therefore has the legal right and ability to prevent [Mom] from performing the evaluations or providing the services [Mom] seeks.” Emails from Dad reflect that he does not agree that special education and related services are warranted and that he is opposed to Mom’s request. The order submitted relative to the parents’ respective rights does not terminate Mom’s parental rights, but also does not specifically address the parents’ rights with respect to M.M.’s education or special education. The parties’ filings and exhibits reflect considerable conflict and animus between the parents and there appears to be an overarching parental rights dispute. Given the parents’ adverse positions with respect to M.M.’s education and his need for special education and related services, the parents’ respective rights regarding the same should perhaps be resolved in the appropriate forum in order that M.M.’s education not be disrupted or negatively impacted. However, unless parental rights have been terminated by a court of appropriate jurisdiction, the parent retains all rights under N.J.A.C. 6A:14. N.J.A.C. 6A:14-1.3. Accordingly, I **CONCLUDE** that there is no per se bar to Mom filing a petition. As it stands, Dad cannot unilaterally “revoke [a]ny consent granted for any type of evaluations” or prevent Mom from filing a petition for due process. There was no Superior Court—Family Part order or other document submitted that reflects that Mom’s parental rights were terminated or that reflects any specific limitation of her rights with respect to special education. That said, custody and other factors alleged by the District may certainly be factors in a decision on the merits.

With respect to the issue of a justiciable cause of action, the Mediation Agreement reflects that the First Petition was resolved and closed after the CST agreed to have the BCBA conduct a behavioral observation over multiple school environments (structured and unstructured), including teacher interviews, and prepare a report within forty days. The Evaluation Plan—Initial, dated December 17, 2021, reflects “Mother expressed her concerns for [M.Z.] that she says are not being addressed in his 504 plan” and the First Petition, filed December 20, 2021, sought “re-evaluation for an IEP and the inclusion of ESS into [his] 504 Plan.” The Second Petition, filed May 23, 2022, seeks a “[CST evaluation] for eligibility under special services and related services, development of an IEP that addresses [his] behavior issue.” Both petitions seek a CST evaluation and eligibility for special education and related services. Although Mom argues that she was not aware that M.M. had been suspended at the time she signed the Mediation Agreement, the District was



on notice of Mom’s behavior concerns and the evaluation by a BCBA (board-certified behavior analyst) was conducted in February—after M.M.’s suspension. Further, although not specifically referenced in the Second Petition, the artwork, which Mom dated as January 3, 2022, and Mom’s January 21, 2022, email to the District, which included a photograph of the artwork and Dr. Springer’s January 19, 2022, “Concern for [M.M.]” email, all predated the BCBA evaluation, and Mom’s certification states, “Dr. Judith Springer present in the mediation advocated her concern for M.M. given the drawing” and “BOE Mediator suggested Dr. Judith Springer put her concerns in writing.” Accordingly, the drawing and Dr. Springer’s concerns were referenced at the mediation and predated the Mediation Agreement, which resolved the First Petition. In view of the foregoing, I **CONCLUDE** that the matter of a CST evaluation and eligibility for special education and related services was resolved by the Mediation Agreement, dated January 14, 2022, and the Second Petition should be dismissed.

**ORDER**

It is hereby **ORDERED** that the Second Petition is **DISMISSED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2022) 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. § 1415(i)(2); 34 C.F.R. § 300.516 (2022).



August 11, 2022

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DATE

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**KELLY J. KIRK, ALJ**

Date Received at Agency

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Date Mailed to Parties:  
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