

SARASOTA

Sarasota School Board considering future lawsuits as DJ case awaits

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Correction: An earlier version of this story misstated the total amount billed to the district by attorney Kevin Pendley.

The Sarasota County School Board will meet in an executive session on Tuesday to discuss legal strategy in a special education case that has attracted the attention of state investigators and could lead to substantial costs for the district.

In October, Administrative Law Judge Diane Cleavinger ordered the school district to pay for six and a half years of private school tuition for DJ, a student who was inappropriately placed in a program for children with severe cognitive disabilities and missed out on standard curriculum from third grade to ninth grade.

The total cost of obeying the judge's order could easily be \$100,000, but it's not that dollar amount that has district officials most worried — it's the potential cost of the more than 100 students who may have also been wrongly placed in the alternative curriculum.

The School District has retained Kevin Pendley, a special education attorney who has defended school districts in similar cases, to assist in the legal strategy moving forward. The district has paid Pendley \$37,559 over three months, according to invoices obtained by the Herald-Tribune.

When board members meet Tuesday, Pendley and Matthews Eastmoore attorney Keith DuBose will lay out their legal options, including whether to appeal Cleavinger's ruling. A chief concern as the board develops a strategy will be what impact their actions could have on future lawsuits.

"When a judge makes a decision on something, it doesn't just affect the individual case that's in front of it," said board vice-chairwoman Shirley Brown.

Board member Eric Robinson said the district's concerns likely go well beyond just DJ.

“They are looking at the 100 other kids behind him,” Robinson said.

113 inappropriately placed

Internal emails obtained through a public records request suggest district officials moved as many as 113 nondisabled students into Access Points, a curriculum designed for children with low IQs who do not participate in the Florida Standards Assessment tests.

“There are 113 students that are on FSAA/Access Points curriculum that are NOT identified as InD (intellectually disabled),” Special Education Program Specialist Victoria Stillo-Gross wrote in a Nov. 8, 2016, email to special education administrators.

Stillo-Gross again confirmed that there were several students in a voicemail she left for special education advocate Susan Magers in October 2018.

“There was a cadre of students who were identified as participating in Access Points that never had an intellectual assessment at all. There were several, that once we did the intellectual assessment they could not meet the criteria that is set for Access Points curriculum participation,” she said in the voicemail.

Many of those students regressed significantly during their time in Access Points, according to an email from school psychologist Candis Castorani to her bosses last year. Castorani warned district administrators that students who had been inappropriately funneled into the program were showing sharp declines after years in the program.

“Kids who were in the 80’s (IQ range) in initial evaluations were placed on Access Points curriculum before we had more solid criterion, and when I went to re-evaluate, scores had often dipped 20 points on average, which is substantial,” Castorani wrote to administrators, shortly after removing herself from DJ’s case because of the district’s actions.

At this point, DJ is the only student who has brought litigation against the school district, but the board’s response to Cleavinger’s ruling could lay the groundwork for future suits.

‘It was like fighting Goliath’

Pendley represented the Atlanta, Georgia, public school system in a case very similar to Sarasota’s DJ case, down to the initials involved.

In the Atlanta case, a judge found that the school system had misdiagnosed J.D., an

Atlanta student, as mentally disabled in 1998 when he was in fourth grade and placed him on an alternative curriculum. Subsequent evaluations years later revealed that J.D. was not disabled but had dyslexia and an IQ in the average range.

In 2005, an administrative law judge ruled that the Atlanta school system had failed to provide a Free and Appropriate Public Education by placing J.D. in an inappropriate curriculum and that he had the right to compensatory education at a private school, at the school district's expense.

As in DJ's case, the Atlanta ruling was a seemingly decisive victory for the special education advocates.

Despite the ruling, J.D.'s family struggled to get the district to pay for private school, leading to a 2007 appeal of the decision by both the school district and the family.

In his 2007 review of the case, U.S. District Court Judge Marvin Shoob noted that Pendley, who represented the Atlanta Independent School System at the time, had misinformed the family as to which private schools would accept their son and ignored multiple requests to pay for an independent evaluation necessary to get J.D. enrolled.

Once J.D. was accepted to a private school, Pendley subsequently notified the family that the Atlanta school system would pay for only one year of tuition at the school, according to Shoob's review.

Shoob ruled in favor of the student and his family in the 2007 appeal, ordering the school system to pay at least \$34,150 annually for J.D. to attend a private school in Atlanta to earn his high school diploma. That decision survived another appeal in 2008, in the Eleventh Circuit U.S. Court of Appeals.

"It was like fighting Goliath," J.D.'s aunt, Denice Smith Morgan, told the Atlanta Journal Constitution after the ruling.

Clock is ticking

The Sarasota School Board has had 90 days to determine whether to appeal Cleavenger's decision. Agencies can appeal administrative law judge decisions if there are factual errors within the ruling.

Advocates for DJ worry that a drawn-out appeals process will jeopardize DJ's academic progress. After more than six years in the alternative program, his IQ had fallen

significantly, from 100 to 66, according to testimony by Ginger Mims, a special education liaison at Brookside Middle School.

DJ has been attending a private school since last January that costs roughly \$15,000 annually, in hopes of getting caught up to his peers.

His mother, who works in retail and supplements her income with other side jobs, has been using roughly \$5,000 in state McKay Scholarship funding to offset the cost, and the private school has temporarily agreed to not charge DJ the full amount.

That arrangement was never expected to continue for this length of time though, said Sue Memminger, one of the advocates working on the case. Memminger said the family is worried that further legal battles could derail progress DJ is making.

Robinson said he wanted the district to pay the difference in DJ's tuition, while the board figures out how to handle future possible litigation.

"This kid has been wronged. He has gotten a raw deal," Robinson said. "Right now every second counts with this kid. If we fight this until the kid graduates, do we really win?"

If the board decides to appeal, it is not clear how long the process could take or if DJ's private school will continue to waive thousands of dollars in tuition fees each year.

"Any client that is exposed to liability has the option to appeal," Pendley said Friday. "The legal process works at its pace, and it works that way for both sides."