BEFORE THE IOWA DEPARTMENT OF EDUCATION
(Cite as 20 D.o.E. App. Dec 220)

In re Maurice M. Robin M., Appellant v. The Des Moines Independent Community School District and the Heartland Area Education Agency (AEA 11), Appellees	)	Decision on Rehearing #130 Admin Doc. No SE-235

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Background

On December 4, 2001, the undersigned Administrative Law Judge (ALJ), Larry Bartlett, issued a ruling in the above entitled matter. On December 24, 2001, the Attorney for the Appellant, Curt L. Sytsma, filed an Application for Rehearing under the authority of Section 17A.16 (2), Iowa Code and Rule 281-6.20 of the Iowa Administrative Code. The Request for Rehearing asked correction of mistakes of law or fact, or an expanded ruling on four grounds regarding the December 4, 2001 decision. In a telephone conference call on December 31, 2001, Attorney Andrew J. Bracken indicated that in an effort at potential resolution of the remaining issues in the December 4 administrative ruling, rather than engage immediately in litigation over the matter, the Appellees would not object to a rehearing.

Without objection, the ALJ granted the Application for Rehearing on January 2, 2002. By mutual agreement of the parties, the matter was continued until February 15, 2002, and January 24 was set as the time for argument on the issues. Arguments took place on January 24 in Des Moines, Iowa at the offices of Mr. Sytsma. By mutual agreement, the record was not

expanded by this proceeding.

Ground No. 1: The first ground for rehearing was settled to the mutual satisfaction of the parties before the time of oral argument and decision and is hereby dismissed.

Ground No. 2: The original Amended and Substituted Request for Due Process Hearing at Issue No. 6 raised the question of the District's failure to transfer Maurice's educational records, as required by the IDEA, when school officials engaged in "reporting a crime" to law enforcement authorities (20 U.S.C. § 1415 (K)(9)). The December 4 ruling concluded that District officials did not "report" a crime on April 11, 2001, when they summoned police to the school to assist with Maurice's out of control behavior and were not required to transfer Maurice's education records.

The Appellant argues, for purposes of this Rehearing, that the December 4 finding was a mistake of law. She argues that the law does not require that school officials need to "request" an arrest or even " intend" that the student be arrested in order for the transfer of records requirement to be triggered. She argues that the phrase be given its "plain meaning" which includes the provision of mere facts and information to police which "may" result in the arrest of a student with disabilities. The Appellant correctly argues the importance of the public policy behind the mandatory transfer of education records when a crime is reported–the better

understanding of the situation by police when making decisions regarding the arrested student.

The District does not refute the argument regarding the public policy, but it does challenge the Appellant's position that virtually any contact with law enforcement by school officials which may result in an arrest constitutes "reporting" a crime. The District argues that the result would be that every contact with law enforcement regarding a child with disabilities would require the transfer of education records, and many times that transfer would be inappropriate. The District argues that the school must intend to report a crime before the requirement of transfer of education records is triggered.

This ALJ hereby finds that the mere reporting of facts and situations and mere requests for assistance from law enforcement authorities, in the absence of a manifestated intent to report a crime, does not trigger the mandatory transfer of educational records to the law enforcement authorities. Contrary to the Appellant's argument that "well established law" provides that reporting a crime includes the relating of "relevant events to the arresting authorities," this ALJ has concluded that more is needed.

None of the authorities cited by the Appellant establishes that the reporting of a crime is exclusive of an intent on the part of the reporter to notify law enforcement authorities of facts which lead the reporter to believe that a crime was (or may have been) committed. The record in this proceeding does not establish that District officials had any intention of reporting a crime, or that "criminal conduct" was relevant to their actions and decisions. As they had done several times in the previous month, District officials called law enforcement authorities on April 11for assistance in controlling the behavior of Maurice when he was out of control and extremely disruptive for an extended period of time. They sought again to have Maurice escorted safely to

his mother following his removal from school. The suspensions were usually only for part of a day and were described by school staff as a cooling down period. Past experience in that previous tumultuous month does not establish anything to the contrary.

The record does not establish why the police decided to arrest Maurice on April 11, when had not done so previously on four occasions. At least three factors not previously present and not directly attributable to District staff were possible reasons for Maurice's arrest on April 11. The first was the potential cumulative effect of police being called to school four times previously in a one month time period (which included a week of spring vacation; March 13, 2001, April 12, 2001, April 4, 2001 and April 10, 2001; the last two at Ms. M.'s request) as a result of Maurice's out of control, severely disruptive, and potentially dangerous behavior. The cumulative effect of repeated calls for assistance involving grossly disruptive behavior at school committed by the same student was likely to have some impact on how the situation was handled by police the fifth time. The arrest report included the following: "There is an ongoing situation where suspect is continuously disruptive toward atmosphere at his school." (R. p.229). Whether that information came from District officials on April 11, or whether that is the cumulative result of five similar episodes cannot be determined from the record.

A second factor which may have made this situation different than the previous situations involving Maurice and police at school was the absence of Ms. M. at or near school. Previously, Ms. M. was nearby when police had been summoned for assistance with Maurice. On April 11, following a warning from her Attorney to not go on school grounds, Ms. M. was reluctant to go to the school to pick up Maurice as requested by school officials unless and until her Attorney advised her to do so. Attempting to obtain her Attorney's advice delayed her arrival that day.

A third difference was the behavior of Maurice toward the police on April 10th, the day before. For the first time during these episodes, Maurice was uncooperative and belligerent with police on that date. Previously he had generally complied with police directions when confronted. School officials had worked continuously to resolve behavioral issues with Maurice and the record discloses no concerted effort by them to have him removed from school for more than brief durations for the purpose of cooling down the situation. On the two occasions when Maurice's mother summoned police to the school, Maurice's behavior had, due to efforts of school staff, evolved to a calm state before police arrived.

The Appellant has argued previously that many of the documented events and stated times regarding the April 11 incident were inconsistent and lead to the conclusion that District officials at Merrill must have requested the police to arrest Maurice, or at least that they "reported" a crime. This ALJ remains unconvinced that the existing inconsistencies in various reports of the morning of April 11 must have such a conclusion. On at least four occasions, the ALJ has reviewed the events of April 11 as reported by a number of persons and contained in the record. A number of inconsistencies were noted. There are however, potential explanations other than that implied by the Appellant for the inconsistencies. Without a better showing on the record that the inconsistencies were the result of the District officials "reporting" a crime, all that remains is speculation as to the reasons for the inconsistencies.

The Appellant admits that no clear definition exists in law for the phrase "reporting a crime committed by a child with a disability," yet asks that a "bright line" definition be established in this ruling. The desired perspective for understanding the phrase "reporting a crime" as put forth by the Appellant is that merely telling (or writing) the police about the facts

constitutes "reporting" a crime. The difficulty with this position is that law enforcement officers serve many functions in our society. Their sole role is not merely arrest for criminal conduct. They provide numerous services in the advancement of public safety and are referred to by many persons as "peace officers." The reasons that school officials may call upon law enforcement officers for assistance are numerous and it would not be possible to determine all the situations which may inherently or by coincidence involve a crime. Police requested to come to a school to supervise a crowd at a football game, to provide traffic control at an event, or in the modern understanding of terrorism, to bring a confidence of safety by their mere presence at a large school event, such as a graduation ceremony, may observe something, or determine from the situation that a criminal law may have been broken. Those situations do not involve the reporting of a crime. In order for a crime to be reportable as a crime under 34 C.F.R. 300.529, school officials must believe that events in the situation are a crime or that they may constitute a crime. Any other interpretation would require schools to turn over education records to police in numerous inappropriate situations.

While Maurice was charged with the criminal offense of "disorderly conduct," it is unlikely that school officials were cognizant that Maurice was actually engaged in such criminal conduct. School officials are not trained in criminal law. Compare Maurice's situation to one in which one high school student intentionally strikes another student, or a teacher, with a fist and police are called belatedly to the scene to investigate. While school officials may not know the legal details of the crime of "assault," it is obvious from the facts of the situation that school officials have the situation under control and are seeking a review of the situation for possible criminal charges.

A similar result would occur when school officials request police to come to a school where students are engaging in vandalism of school or private property while staging a protest demonstration. School officials knew or could be expected to know that vandalism of public or private property likely constituted a crime. They sought police involvement in the situation from a potential arrest perspective. But, if you change the timing of the acts of vandalism to first occur after the police arrive to maintain order during a student demonstration, there is less likelihood that school officials were "reporting a crime."

For an incident to be considered "reporting a crime," it must be determined from all relevant known facts that school officials intended to knowingly "report a crime," whether or not they understood all the legal definitions of the crime. School officials' communication with police must have resulted from some desire of police action related to criminal or knowingly potential criminal activity. A New York state review hearing officer reviewed two situations involving law enforcement "reports" by school officials. He had the following to say about school officials reporting crimes:

> Although I agree with the hearing officer that school officials cannot be expected to be experts in criminal law, they should make some effort to investigate the facts and consult with counsel before determining that an incident should be referred to the police. (Board of Educ., 31 IDELR π 203, p. 708, NY, September 30, 1999)

While this ALJ does not necessarily agree with all of the above quote, it does mirror his interpretation that school officials must manifest an intent to report a crime before the requirement to transfer education records is triggered. School officials must have wanted police to make an arrest, or conduct an investigation which could lead to an arrest for a crime, before that phrase results in the school's requirement to transfer education records to juvenile

authorities. There must be present in the actions by school officials a manifested intent and understanding that their communications to law enforcement officials should or could likely result in the arrest of a student with a disability for a crime. If such an objective standard is not present, the many typical interactions between school officials and law enforcement officials, including those involving school police liaison officers and school staff, could all potentially trigger a requirement to transfer student's education records, and no one would know it at the time.

The Appellant has requested that, in the absence of a statutory definition or legislative history, a "plain meaning" be assigned to the phrase "reporting a crime." A plain meaning of the phrase to most educators would be that "reporting a crime" includes an intent to take action knowingly which is likely to or may involve the arrest of a student. That is the situation where public policy means for the law enforcement authorities to have the greatest reasonable knowledge. Merely providing police with information, without an intent or understanding that an arrest may result, places educators in an unwinable position of not knowing when to transfer a student's education records to juvenile court and law enforcement authorities.

It should be noted the fact that FERPA allows the transfer of education records to only juvenile court authorities without written parent consent or the situation being one of the exceptions to the prohibition of release of records present in law, results in complications when the student is an adult (age of majority) or a minor charged with an adult crime.

It does not appear to this ALJ on the record that on April 11, 2001, District officials summoned police for the purpose of arresting Maurice or to conduct a criminal investigation which could lead to Maurice's arrest. They sought assistance in removing Maurice from the

volatile and disruptive situation at school. Pursuant to Ms. M.'s previous demands that school staff not put their hands on Maurice and past recent experiences with police successfully escorting Maurice from school to his mother, school officials had little in the way of other options.

Ground No. 3: The Appellant argues that the December 4 Decision's interpretation of the applicability of the Family Educational Rights and Privacy Act is a mistake of law.

The original Decision issued on December 4, 2001, concluded, contrary to the Appellant's position, that the District was not required by the IDEA to provide Maurice's special education and disciplinary records to the police and juvenile court authorities as a result of Maurice's arrest on April 11. The Appellant argues that the statutory requirement that school officials "reporting a crime . . . shall ensure that copies of the special education and disciplinary records of the child are transmitted" to the authorities to whom the crime was reported as provided in 20 USC § 1415 (K)(9)(B) must be followed even though the federal regulations implementing that provision may be in conflict.

First, the record does not establish that District officials "reported a crime" and therefore the mandatory transfer of education records does not apply. As a result, the Family Educational Rights and Privacy Act (FERPA) requirement of written parental consent or the existence of one of the express exceptions to written consent must be present (See "Analysis of Comments and Changes," 64 Fed. Reg. 12537, 12631 (March 12, 1999). One of the exceptions is disclosure, pursuant to a state statute requiring transfer of education records to a juvenile justice system, but

only prior to adjudication of the student 34 C.F.R. § 99.38. Iowa has such a requirement through written agreement (§ 280.25 Iowa Code).

Second, the provisions of 20 USC § 1415 (K)(9)(B) requiring the transfer of special education and disciplinary records to "appropriate authorities to whom it reports a crime" are inconsistent with the FERPA statute requirements of 20 USC § 1232g. The United States Department of Education attempted to clarify the issue in its regulations by expressly limiting the transfer of special education records "only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act" (34 C.F.R. § 300.529 (b)(2). Its rationale in attempting to alleviate a statutory conflict and potential equal protection violation claims of children with disabilities is found at 64 Fed. Reg. 12537, 12631-12632 March 12, 1999).

The Appellant argues that if the IDEA requirement to transfer records to law enforcement authorities is in conflict with FERPA statutes, this ALJ should apply "fundamental principles of statutory construction" and declare rule 34 C.F.R. § 300.529 (b)(2) invalid. While this ALJ may come to this as a personal legal conclusion, he is not inclined to exercise legal authority reserved to the courts. It might be noted that this is not the only IDEA situation where the regulations are inconsistent with the express terms of the statute. For instance, 20 USC § 1415 (K)(4)(A) requires schools to conduct manifestation determinations in all situations of removal of students from school for disciplinary reasons, § 1415 (K)(1)(B) requires a functional behavioral analysis and behavior intervention plan for all disciplinary removals and free appropriate public education must be continued for all students suspended (20 USC § 1412 (a)(1)), yet the federal regulations require these procedures only after ten days of removal from school (34 C.F.R. § 300.520 & .523; § 300.121 (d). While the regulations' ten day removal trigger is consistent with expressed

legislative intent, it is in conflict with express statutory language.

The Appellant argues accurately that the above interpretation may limit school staff authority in the release of important and timely information regarding students with disabilities to law enforcement officers when the situation does not involve a manifestated intent by school staff that the student be arrested, or at least that no crime was "reported." Several examples were discussed during oral argument involving emergency information about medication, disability characteristics, family history, or other matters which law enforcement officers will not likely know from the mere observation of situations.

This ALJ has two responses to that argument. First, no professionally acting educator is going to allow the mere fear of the loss of federal education funds to the school or potential liability for the release of information contained in education records to prevent the release of information to law enforcement officers when such release may prevent serious injury or harm to a student or others.

Second, the Family Educational Rights and Privacy Act (FERPA) provides an exception to the requirement of written parental consent for the release of education records in situations involving bonafide health and safety emergencies. 20 U.S.C. § 1239g (1)(I).

The regulations detail that result.

> 34 C.F.R. § 99.36 What conditions apply to disclosure of information in health and safety emergencies?
> (a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.
>
> . . . . .
>
> (c) Paragraphs (a) and (b) of this section will be strictly construed.

Prior written parental consent is not required for the transfer of education records when a report of a crime is made by school officials to police which refers to the involvement of a student with disabilities, so long as the student is being processed by juvenile court authorities or an emergency situation exists where the transfer of record information is necessary to protect the health and safety of the student or others.

Ground No. 4: The Appellant argues that the Decision's chronology of the events that took place on April 11, 2001 is in error.

The Appellant argues that inconsistencies in the chronology of events in the record involving Maurice's arrest on April 11 must be addressed and explained. The implication is that those discrepancies and inconsistencies constitute evidence of some unexpressed acts of impropriety on the part of District officials, such as a conspiracy of school officials and law enforcement officials to have Maurice arrested. Since the Appellant has argued that this issue is not about the District attempting to circumvent the IDEA procedures for change of placement through Maurice's arrest, this ALJ is left to speculate why the District and law enforcement officers would desire to engage in or document the unfolding of a conspiracy. The only apparent reason to hide a District request for an arrest of Maurice is to eliminate the need for a mandatory transfer of his education records. That is not a reasonable explanation for the inconsistences presented in the record of the April 11 arrest. Inconsistencies and discrepancies do exist in the record regarding the details of events occurring in the arrest of Maurice on April 11. Most of these inconsistencies and discrepancies have potential multiple explanations. It does not appear

appropriate for this ALJ to construct any particular scenario and rule on them as "fact," when in reality doing so is mere speculation.

It is not helpful, meaningful, or fair for the Appellant to point to a series of inconsistencies, most of which have potential multiple explanations, and argue that together they show evidence of improper actions on the part of District officials. It should be noted that "Appellant's Chronology" of the events that early morning relies itself on speculations about the time of some events (Items #87 and #89), and the record documentation of several events are likely in error (police report at record page 229 indicating that disturbance began at 7:15 a.m.). It is not unlikely that the existing chaotic events brought about changes in and observer confusion about the timing of events. It is quite possible that the thirty minute warning to Ms. M. that the police would be called changed as events escalated, and the estimate by District officials that police were called twenty minutes later is only an estimate. The Appellant has simply not established that the inconsistencies are evidence of wrongdoing or that they are even related to the specific issues presented in this hearing.

In the absence of clear cut or even circumstantial evidence of improper conduct or motive on the part of school officials, the context of the situation is crucial. First, the April 11 incidents leading to the request for police presence at school was the fifth such incident in about a three school week period of time (this month time period includes a week of spring break). During none of the previous four incidents did District officials seek the arrest of Maurice. At most, they requested that Maurice, who had been suspended briefly in order for the situation to cool down, be escorted to his mother's custody and away from school. During several of these prior incidents, the actions of Maurice and/or his mother resulted in warnings of potential arrest made

by police officers. District officials had ample opportunity and reason to request Maurice's arrest on previous occasions had that been their goal. Instead, District officials suspended Maurice only a portion of the days he was out of control and causing severe disruption (March 13, April 12, April 4 and April 10, 2001) and only one other entire school day (April 3, 2001). If there is anything in the record that points to change of philosophy or approach by District officials on April 11, it has not been shown to this ALJ. A pile of inconsistencies of accounts of events, most of which remain unexplained and are subject to multiple explanations, are not evidence of anything.

Second, for the first time in the March-April series of police being called to school, Maurice's mother was not at school or nearby.

Third, the situation at Merrill Middle School in the early morning hours resulting from Maurice's out of control behavior was unbelievably chaotic. It is quite understandable that many details in the reporting of those events would not dovetail nicely with each other. Watches and clocks were probably not synchronized, some reports may not have been contemporiously recorded, police reports are non-communicative in the extreme, and none of the reporters witnessed all the events. There are just too many potential explanations to the situation's reported inconsistencies. It is the Appellant's responsibility to establish an improper motive or explanation to these inconsistencies. She has not done so.

The record does not establish that District officials had a duty to provide Maurice's education records to the authorities arresting Maurice.

Conclusions of Law and Fact

A review of the forgoing issues and relevant portions of the record have not resulted in

this ALJ changing his conclusions rendered in the December 24, 2001 decision in this matter. The conclusions of law and fact rendered in that ruling, and expanded in this Decision on Rehearing remain the Decision in this matter.

Larry D. Bartlett, J.D.; Ph.D.
Administrative Law Judge

2-12-02
Date