

INTRODUCTION

This is a story of a child who, despite significant impairments, has been trying to communicate in the only way he knows how, of parents who have been desperately trying to understand his communication and of a school system which has repeatedly failed to follow the communication recommendations of their own consultants and experts.

It is also the story of how a State agency, charged with the affirmative duty to oversee and ensure compliance with State and Federal law, refused to take on the mantle of duty preferring a robe of thin air. On the surface the Agency acted, but a closer look shows that the Agency ducked the issues presented to it for resolution, leaving this student and thousands of other special education students, their families, and their teachers at risk of harm and caught in the same Catch 22 as presented in this case. A closer look will also show Courts burdened with appeals and lawsuits seeking guidance and answers that should have been provided by the Agency charged with the administrative duty to provide that guidance.

Although this case peripherally involves the federal Individuals With Disabilities Education Act (IDEA), this appeal does not. Appellants are not asking this Court to rule on a question of federal law. Appellants are also not asking this Court for a "solution" that calls for money and manpower that the Agency lacks in a time of declining revenues and budget cutbacks. Appellants assert that the only thing the Agency lacks is the will to act. Appellants ask this Court to help the Agency find its will by remanding this case with instructions to answer the questions presented.

BACKGROUND

The instant case illustrates why federal and state law recognize that for education to be successful there must be communication between child and school and that when faced with a child with a disability who cannot communicate verbally and who communicates through "behavior", the school is required to take extra steps to understand the behavior, to address the problems presented for child and school, and to teach the child more appropriate ways of communicating thoughts, desires, needs and feelings.

When that does not happen, the results can be heart-breaking and frustrating. In this case, a young child, who was at times overwhelmed by a school environment he could not control or communicate with, and

who was at times overwhelmed by a Teacher who locked him in a wooden seclusion box and a Teaching Assistant (TA) who overstimulated and abused him, responded in the only way he knew how – with increasingly aggressive behavior leading to a Molotov cocktail of medication, deep thoughts of suicide, two hospitalizations and breath-taking damage to his home including broken windows, doors, chairs and walls.

Michael has autism. Although he attempts to communicate with others and is now more successful, his verbal communication skills are impaired and, particularly when he was younger, it was often difficult to interpret what he was trying to convey. As a result, as it is with very young children, he often communicated with behavior and understanding his behavior is, and was, crucial to understanding his communication.

When a child's behavior is impeding his or her learning, the law requires school districts to engage in a "functional behavioral assessment" or FBA - an impartial observance of behavior throughout the school day to determine the triggers of objectionable behavior. In other words, if a child can't tell you what bothers him, then careful observation is needed to determine what people, noise, activities, situations, etc. are triggering objectionable behavior. The behavior is the communication.

The school district is next required to develop a "behavior intervention plan" or BIP that will guide the school response to the child's behavior communication. In large part it is meant to be a blueprint for teaching a child a more acceptable means of communicating his needs and desires. It is also a blueprint for documenting for the teaching staff those things that they should avoid doing that unnecessarily cause anguish for the student and trigger problem behaviors as well as the way in which they should respond to the behavior when it happens so as to make it a "teachable moment."

In Michael's case, despite the repeated efforts of his parents, over a six year period the district failed to undertake functional behavioral assessments when needed and, when they were finally done, failed to create and implement behavior intervention plans – even when recommended by their own experts. The months and years of delay created an unnecessary nightmare for Michael, his parents and the school.

However, this appeal is not about the JPS inappropriate responses to Michael's behavior – although that was part of the original complaint. It is not about the failure of the JPS to develop and follow appropriate behavior intervention plans – although that was part of the original complaint. Instead, this appeal is about the failure of the Michigan Department of Education to exercise the discretion and oversight entrusted to it by law when presented with evidence of the failure of JPS to develop and follow appropriate behavior intervention plans. This appeal is about the abuse of that discretion.

STATEMENT OF FACTS

Michael X has been in Michigan's special education system since the age of 21 months. He experienced positive gains in learning and behavior from age 2-5 when he attended programs operated by the Jackson County ISD. His significant difficulties began after he transitioned to elementary programs operated by the JPS.

When Michael transitioned from the early childhood program operated by the Jackson County ISD to the JPS kindergarten program in 2000, he was accompanied by an Individualized Education Program (IEP) Transition Report prepared by the ISD on June 1, 2000. (A. 1) Every student in special education is required to have an IEP which functions like a contract between the child (or the child's family on behalf of the child) and the school for the provision of services. Michael's transition IEP stated that among his strengths were "ability to read, visual learner, artistic ability." (A.1, p.2) It also noted that concerns and priorities for his education were "behavior concerns" and "tantrums." (A.1, p.2) The IEP specifically stated that he needed "visual structure" (A.1, p.2) and that his "communication requires visual communication strategies" (A.1, p.2; p.3) particularly when he is overstimulated by sensory input from the environment. For example, it stated:

"Michael continues to display difficulty processing sensory input. When he is overstimulated, writing of schedules/instructions helps to center him and increase his attention back to the activities presented."

(A.1, p.3)

The IEP specifically required the “use of written communication to aid Michael’s understanding” “all year” and in the “classroom and rest of school.” (A.1, p. 5)

The Jackson Public Schools signed its agreement with the transition IEP and assigned Michael to X Elementary School. (A.1, p. 7-8)

On June 29, 2000 a Multidisciplinary Team (MET) meeting was held by the ISD in preparation for the transition to the JPS and documented the following:

- he responds well to written directions, but not verbal ones (R. at 28)
- his ability to comprehend verbal directions was found to be the equivalent of a 19 month old (A.2, p.13)
- he has a great deal of difficulty turning his attention from one activity to the next particularly when he is unprepared for the transition (R. at 27)
- he can be prepared for transitions if Staff provides him with a written or visual sequence of daily activities so that he knows what to expect and when that happens he is generally compliant (R. at 27)
- he can process and respond to a written sequence of 3 to 4 activities (A.2, p.14)
- he has difficulty “processing sensory input from his environment and can become easily overwhelmed” (R. at 27)
- his “expressive communication” skills were equal to those of a two year old (A.2, p.13)

An example provided by the teaching staff was this:

“Several times a week (approximately 5-10 times) Michael displays acting out behaviors (flipping over chairs, kicking and scratching) when asked to leave a preferred activity. When activities are visually sequenced for him with reinforcers inserted within the sequence, Michael typically complies.” (R. at 27)

And this:

“The classroom should continue to use a written schedule with Michael. He benefits from seeing what the sequence of events will be and knowing what reinforcer he will receive at the end. Michael enjoys picking the preferred item/activity and then will often follow the schedule with

reduced frustration. Instructions should be given in simplified written form whenever possible and always when Michael does not respond to the verbal instruction.” (A.2, p.15)

2000-2001 School Year

On October 24, 2000, after Michael had been in the JPS system for two months, the JPS convened its first IEP for Michael. In the IEP report his strengths were recognized as “writing, reading, visual input.” (A. p.2). The parents indicated their concern that he did not want to return to school on Mondays which staff wrote as “difficult to transition into beginning of week “Monday.” (A. p.2) Staff wrote that Michael needed ‘consistent boundaries, predictable routine or schedule and physical structure.” (A. p.2) The Staff also recognized that Michael’s problem behaviors were related to his communication difficulties and that it was interfering with his education. “Michael’s behaviors related to his frustration in communication areas make progress in general ed curriculum difficult.” (A.2, p.2)

Once again included in the IEP was the observation: “Michael continues to display difficulty processing sensory input. When he is overstimulated, writing of schedules/instructions helps to center him and increase his attention back to the activities presented.” (A.2, p.4) A daily written schedule was to be provided to him. (A.2, p.6)

After five months in the JPS system Michael had become so unhappy and aggressive that his mother requested a meeting of the IEP team to address her concerns. In a 1/27/01 note she wrote:

“Michael has become very aggressive. This behavior is getting worse every day. Michael can’t communicate to me what the problem is, in words, but is showing his unhappiness in the only way he knows how – tantrums, screaming, hitting and breaking things. Michael is very unhappy. The mention of school sends him into a rage. Michael even changes his daily [written] schedule (at home) to exclude school and the bus.” (A.3)

She continued by asking specific questions about the daily activities and whether modifications could be made to investigate the cause of his unhappiness. (R. at. 28) She specifically asked, “Are there ways to modify his behavioral plan to include ways of teaching Michael to deal with his anger?” (A. 3)

At her request the IEP team met on January 29, 2001 and a plan of action was agreed upon including the use of the district's consultant, Dr. X, to prepare comprehensive testing and evaluation of Michael's behavior (A.4) for the preparation of "a functional behavior assessment, to work with the school team to develop a behavior intervention plan, and to make recommendations in regards to IEP issues." (A.5)

On March 17, 2001 Dr. X submitted his Clinical Behavior Assessment (A.5). While the Staff complained that Michael was spending too much time drawing "logos" of familiar businesses (A.5, p.1), Dr. X recognized it as Michael's way of coping with extreme anxiety and noted a definite correlation between Michael's anxiety level and his aggression. (A.5, p.2) He recommended that the use of "psycho-active medications" be explored and also indicated that Michael required a Behavior Intervention Plan:

"In regards to a behavior intervention plan, Michael **requires a plan** that includes the following: (a) intensive sensory integration plan, (b) active rotational schedule (integrated with physical movement and exercises), (c) incorporate the use of PEC with visual coping cue cards (e.g., emotional expression cards, coping options), (d) designate a specific area in the classroom for "calming/sensory area," (e) use compulsive ritualistic activities (in brief doses) to motivate on-task behaviors (not exceed 10-15 minutes), and (f) design ways to compete and distract from compulsive stimuli."

(A.5, p. 3) (emphasis added)

Nothing happened. No plan was developed. The parents, for their part, did follow Dr. X's suggestion and began to explore the use of a variety of drugs for the control of obsessive behavior and anxiety.

2001-2002 School Year

The following school year, with no plan in place to provide guidance to JPS staff on how to understand and work with Michael, he began to have increasing difficulties on the bus. For Michael, the ride on the bus can make or break the rest of the school day. On September 21, 2001 with the help of an advocate, Michael's parents filed a complaint with the Jackson Public Schools regarding 1) the use of a harness on the school bus, 2) social abuse and/or harassment while on the bus from the bus driver, and 3) the continued lack of a formal Behavior Intervention Plan. (A.6) That complaint was sent to the Jackson ISD to investigate. (A.7)

While that complaint was being investigated, another IEP with the Jackson Public Schools was held on October 5, 2001 where Michael's behavior was again addressed. The IEP specifically called for two additional two-hour sessions with a consultant to develop yet another Functional Behavioral Assessment and "if called for" a Behavior Intervention Plan. (A.8, p. 6) It also agreed Michael would use a harness on the bus unless the Functional Behavioral Assessment and Behavior Intervention Plan determined otherwise. (A.8, p. 7) Finally, it specified that "sensitivity training" would be offered to JPS non-certified staff (such as the bus driver). (A.8, p.7)

On October 19, 2001 the Jackson ISD released its complaint investigation report. (A.9) The ISD investigator reported that she had contacted the school district regarding the inclusion of bus issues in a Behavior Intervention Plan and was told that while Dr. X "was involved in a functional behavior assessment plan,...it did not include bus behavior." (A.9, p.9) The investigator concluded there was no violation because, among other things, there was no Behavior Intervention Plan in place addressing bus issues. (A.9, p.11). However, she did find a violation of MDE Rule 340.1701 b (e) finding that the bus driver was not trained to meet the unique needs of Michael. (A.9, p. 10) She made specific corrective action recommendations including:

1. Institution of a "case manager" to coordinate Michael's program
2. Replacement of the bus driver
3. Development of more comprehensive special education transportation requests (A. 9, p.11)

Upon review the Michigan Department of Education did not uphold the finding of a violation because "absent a state or federal standard that requires a district to train bus drivers to meet the unique needs of students with disabilities to aid in developing their maximum potential, a district is not obligated to provide specialized training for bus drivers." It did not address the lack of a Behavior Intervention Plan. (A.9, 1-2)

While the JPS did carry out the recommendations of the Investigator, the 2001-2002 school year continued and ended without the JPS carrying out the provisions called for in Michael's IEP by having

Michael spend two additional two hour sessions with a consultant, by developing a Functional Behavioral Assessment and, if called for, a Behavior Intervention Plan.

2002 –2003 School Year

In second grade Michael's special education program was transferred to X Elementary and he was placed with a new teacher, Ms. X, who was also brand new to teaching. At the beginning of that year, 2002-2003, a third IEP was initiated by the parents on September 25, 2002, adjourned and reconvened on October 28 and adjourned and reconvened on December 11, 2002. (A.10) During this time Michael's behavior deteriorated. A checklist was developed by his mother and utilized by staff to try to document problem behaviors and their triggers. An apparent connection was observed between seatwork and aggression and that most problem behaviors occurred before 10 AM. (A.10, p. 10) In December the school finally produced a Behavior Intervention Plan which included the use of structured choices, visual schedules and daily schedules. (A.10, p. 8-11)

Unfortunately, by that time Michael had been hospitalized because of his difficult behavior. The reason for his escalating behavior was unclear. The Igafo-Teo's continued to experiment with medication that would help him in the school environment and a medication adjustment combined with the new Behavior Intervention Plan led to these comments from his Teacher, Ms. X, at the end of the school year, "Michael has been a joy to work with this year. He has matured a great deal since the beginning of the year. I look forward to seeing him next year." (A.11, p. 3)

That spring Michael's three-year IEP was held to re-determine eligibility for continuation of special education services. (A.11) The JPS School Psychologist commented: "He is a delightful, personable, eight-year old." Significantly, the testing at that time continued to find that he had substantial difficulty comprehending verbal instructions, finding him only in the 2nd percentile - below the kindergarten level - but that his letter-word identification was at the 5th grade level, (A.11, p. 10), once again reinforcing the earlier findings that written - not verbal -communication was essential with Michael.

The School Psychologist specifically recommended that staff take into account the following (A.11, p.13):

- his need for a predictable schedule and his need to be prepared in advance for schedule changes,
- his need for visual communication and extra time to process verbal information and to respond verbally,
- modification of his environment to eliminate distractions,
- his need for access to a "low stimulus area" as he needs as a refuge from an overstimulating environment,
- and continued sensitivity to his sensory issues. She had previously identified hearing, touch, pain, smell and taste as issues for Michael.

Nothing happened. The existing 2003 Behavior Intervention Plan was not modified and no Behavior Intervention Plan was developed containing the School Psychologist's recommendations.

2003-2004 School Year

In September 19, 2003, in a letter to the Jackson ISD, Michael's mother requested a plan of positive behavior supports for Michael. (R. at 42-43) In response, Dr. X was once again called in to observe Michael and to complete a Functional Behavioral Assessment. A music evaluation was also scheduled. (R. at 44)

On October 10, 2003 Dr. X submitted his second Clinical Evaluation Report of Michael and again recommended that a Behavior Intervention Plan be developed that included the following:

1. opportunities for Michael to "refuel" by integrating high interest areas into his academic schedule;
2. opportunities for Michael to rest and recharge every 5-15 minutes by rotating him into a low stimulus area where he would have access to activities he enjoys;
3. specific strategies for dealing with problem behaviors when presented including "the development of reactive strategies that de-escalate aggressive behaviors such as the use of visual feedback cards, providing sensory/calming objects or items, backing off and providing him with physical space and reducing environmental distractions and stimulation." (A.13, p.4)

Nothing happened. Michael, again with Ms. X as his teacher, experienced increasing difficulty in the school environment as the year progressed and was again hospitalized in December 2003 because of his difficult behavior and suicidal ideations. His parents and doctors were baffled as to the cause. His parents finally refused to return him to Ms. X's classroom in the Fall of 2004 if Ms. X remained as his teacher. Despite this, the district did not develop another Behavior Intervention Plan and when the IEP team again met on March 9, 2004, no Behavior Intervention Plan was presented or integrated into the IEP. (A. 14)

2004-2005 School Year

In 2004 Ms. X was replaced by Teacher Ms. Y and Michael's parents agreed to keep him at X Elementary. That fall Michael drew for his mother a picture of a box which he labeled "time out" and "sad." (R. at 59) When his mother questioned Teaching Consultant Mrs. Z about the drawing, she admitted that Ms. X had been putting Michael in a "seclusion box" as a means of disciplining him, but that the new teacher, Ms. Y, refused to use it. Later, during an IEP meeting, the Staff also noted that "Michael tells us about what Miss X used to do to him." (R. at 4)

The use of such boxes is one of the dirty secrets of special education. Instituted at a time when mental illness, autism and emotional disorders were misunderstood, the boxes are – in the most charitable sense – designed to be a form of behavior modification. At worst, they are punishment and similar to chaining a child to a bed or locking a child in a closet when an imperfect adult is unable to cope with a given situation. For a child with impaired understanding and communication difficulties, the use of such boxes is terrifying and emotionally damaging. Michael's mother asked Michigan Protection and Advocacy to investigate and Teaching Consultant Mrs. Z eventually removed the box from the classroom and destroyed it. (See A.18 for a recent news story about the recent use of a "seclusion" box in a Michigan special education classroom.)

While now paired with a new teacher, as the 2004-2005 school year progressed there was a successive turnover of teaching assistants for Michael's classroom and as the year continued Michael's difficult behaviors increased. His mother suggested that "perhaps his BIP needs adjust[ing]." (R. at 56) She later learned that one of the "new" teaching assistants, Ms. XYZ, had actually been his aide during the

years he had Ms. X as his teacher. When TA Ms. XYZ was reassigned to Michael's room in the spring of 2005 Michael's behavior deteriorated dramatically.

An IEP was held on May 24, 2005. Although the IEP specifically noted that "positive behavior intervention, supports, and strategies for students whose behavior impedes learning" was "considered" and – by the failure of Staff to put any comments in that section – implied that no needs were found, the commentary in the body of the IEP suggests the opposite. Under "Present Level of Educational Performance" the Staff wrote:

"It is difficult for him to stay on task and complete his assignments independently. He continues to have difficulty managing sensory input and with transitioning. When he becomes upset or frustrated he can become aggressive, but will calm himself by isolating himself from the class."

(R. at 88)

Behavior sheets from that time period document:

"Ran out of Mr. M's (reading class), screamed, stomped on TA's foot, pulled down his pants (?)"
"Hit X student on back" "Hit teacher, layed on the floor" The teacher wrote, "Michael was aggressive today and used a lot of bad language." 3-11-05 (A.19)

"Pulled my hair and tried to urinate on the floor" "Peed on the floor and threw chairs" "Yelling. Hit TA in Mr. M.s class" "Difficulty sitting in library. Laying on floor, stomped on TA's foot." "During seatwork told Miss B (new TA) he was going to bloody her nose." 4-27-05 (A.19)

"Pulled down pants and attempted to pee" "Choked TA" "Tried to bite, hit and kick. Threw chairs and swore" "Threw tray" The teacher wrote "We haven't had a tough day like this in a while." 5-24-05 (A. 19)

"Threw a chair, swore and said Miss B is a "SOB" "Did not want to go to Mr. M's and do work"
"Michael's swearing and aggression has increased – change in seasons?" 5-26-05 (A.19)

"Hit, tried to bite and grab. Swore 4x in Mr. M's class" "Very aggressive today." 5-31-05 (A.19)

2005-2006 School Year

With TA Ms. XYZ again assigned to him in the 2005-2006 school year, Michael had problems from the very beginning of the school year. He was reported as hitting adults in the head, biting them, spitting, urinating on floors, swearing badly, pulling hair, throwing chairs, exposing himself, saying vulgar things of

a sexual nature, trying to stab the TA with a pen and a pencil. (A. 20) Most of his aggressive behavior was aimed at TA Ms. XYZ who exhibited loud, dominating and overstimulating behavior toward Michael. Under the most charitable of reports she was described as having a "personality conflict" with Michael (R. at 74)

On October 12, 2005 - at the parent's request (A. 15) - the IEP team met to discuss Michael's behavior. In attendance were Dr. X, his Teacher, TA Ms. XYZ, the JPS Special Ed Director, Teaching Consultants, Therapists and his parents. In a report prepared November 13, 2005 the team documented that they had identified the following triggers of problem behavior: work overload/mental stress – particularly in math, whether he is tired (early in am, late in the day), transitioning from one activity to another, meals/snacks when he wants more food, when he is scheduled to participate in an activity he doesn't want to do and "specials, in particular music." (R.110) Also discussed were having TA Ms. XYZ stay away from Michael so that he would not be as likely to lash out at her. (R. at 4)

The team documented proposed "proactive interventions" which included these suggestions (R. at 110-112):

- "increase his biological tolerance for auditory, visual, and vestibular input in a systematic manner with sensory breaks and a sensory diet to help calm and restore a relaxed physical and emotional state."
- Teaching Michael how to self-regulate by giving himself breaks when he feels overwhelmed.

The IEP Team reconvened on November 13, 2005 specifically for the purpose of continuing to discuss reactions to Michael's behavior. (R. at 74) At this meeting the parents expressed their concern about the interactions between Michael and TA Ms. XYZ (R. at 74). The teacher indicated that the TA's personality was "loud" and that she "talks a lot" which might irritate Michael. (R. at 74) The Staff also indicated that a tent that had been placed in the room at the suggestion of Dr. X to give Michael a place in which to seek refuge, had been removed because the Staff thought he was just using it to sleep (R. at 74). The parents again reiterated their objection to the use of physical restraint with Michael and indicated that it was not in his Behavior Intervention Plan. (R. at 74-75).

The instant complaint was triggered by an incident that happened the next day, November 15, 2005, when TA Ms. XYZ failed to follow recommended responses when Michael reacted in a predictable fashion. The specific trigger was music – a trigger the Team had previously identified as problematic. According to TA Ms. XYZ, Michael tried to leave the room to escape the music – a strategy (removing himself from the stressor) he had been taught to do and which had been identified as a desirable, proactive intervention. She followed him and verbally told him he could not go into the room he had entered and “escorted” him back into the classroom and the music. As soon as he again heard the music he again tried to leave the room. The TA reported she stood with her arms stretched out on either side of her and told Michael he could not leave the room. She claims that he then bit her arm. (A. 16) She filed a police report. According to the police report (A. 17) Michael admitted biting the TA, but said that she had twisted his arm and that was why he had bitten her.

Michael's parents refused to return him to the school without assurance that he would not be in contact with TA Ms. XYZ and that a behavior plan would be appropriately implemented.

As his mother summarized in her complaint filed December 9, 2005 with the MDE, “[W]e have seen phenomenal improvement at home. Michael is not pounding the walls or tables anymore. He hasn't broken a chair this year. He hasn't broken a window, cabinet or door in several years. He is exhibiting nearly zero physical aggression toward others. He is able to stay on task for up to 2 hours at a time. He is sleeping through the night – every single night of the week – for up to 10 hours at a time.” (R. at 3) She also noted that with the help of the transportation team, Michael's bus rides to and from school had become positive experiences.

In contrast, his school experience had continued to be negative and she noted, “[W]e are confused as to why these positive gains are not being reflected at school.” (R. at 3) She suggested that one possible reason, repeatedly suggested by parents and staff alike, was the continuing presence of TA Ms. XYZ. (R. at 3).

In January 2006 Michael was finally moved from X Elementary School where he experienced such difficulty and was placed in a supportive environment at the Middle School where he made impressive gains both academically and behaviorally through the remainder of the school year.

The Complaint Process

On December 9, 2005 after calling the MDE complaint hotline and being advised to file a complaint, the Igafo-Teo's sent a 4 page formal complaint to the MDE via e-mail. (R. at 1-5). In it they recounted that despite his substantial challenges he was making excellent behavioral progress both at home and on the bus, but continued to have significant problems at school. They complained that:

- Michael was paired with a TA who believed that his behavior was just "bad behavior" not communication;
- the school district had not implemented the numerous recommendations made by experts over the past many years;
- the school was not following Michael's behavior plan resulting in traumatic trips to the principal's office and disciplinary measures not mentioned in his behavior plan;
- among those disciplinary measures used on Michael but not included in his behavior plan and specifically opposed by the parents was physical restraint by the TA and the past use of a wooden "time out box" ;
- Michael was being held out of school because of the parent's fears of what might happen if put back in the custody and control of the TA;
- Michael has suffered emotionally and physically because of the lack of appropriate responses;
- they were concerned about how his educational progress was being affected by his absence from school due to the lack of appropriate responses by the school. (R. at 3-5)

According to the MDE's "Complaint Procedures for Special Education," within three days of receiving the complaint the MDE was required to mail and fax a copy of the complaint to the appropriate ISD. (R. at 1) The MDE failed to act. A month later, on January 10, 2006, the Igafo-Teo's resent their complaint with a cover letter complaining of the lack of action. (R. at 1).

On January 11, 2006 the MDE finally forwarded the complaint to the Jackson ISD for investigation. (R. at 6-7) On January 30, 2006 the ISD released its investigation report. (R: 8-17) The ISD investigation reframed the Igafo-Teo complaint into 4 allegations:

1. The Jackson Public Schools failed to provide an education for Michael during the two months his parents kept him out of school. Into this allegation was also included a complaint that speech and language therapy services had not been provided while he was out of school;
2. JPS failed to follow Michael's IEP and Behavior Intervention Plan;
3. JPS personnel improperly restrained Michael and twisted his arms;
4. JPS has not implemented numerous recommendations made by experts over the past many years.

The ISD found that JPS should have been providing speech and language services, but as to the other allegations found no violations. With respect to the first allegation, it determined that because the parents had voluntarily withheld Michael from school, the district was under no obligation to provide services. In a related discussion the ISD found that although the parents contended that the TA's behavior rendered Michael's special education placement inappropriate, they were really complaining that the TA's behavior was "abuse" and concluded that the ISD was without authority to investigate abuse complaints.

With respect to the complaint that JPS failed to follow Michael's Behavior Intervention Plan and the recommendations of many experts, the ISD avoided all issues by concluding that no Behavior Intervention Plan existed as part of Michael's IEP and therefore, the school was not required to follow that which did not exist. "Because there is no evidence of a Behavior Plan for Michael there is no violation surrounding the Behavior Plan." (R. at 13) Similarly, the ISD concluded that because the many recommendations of the experts regarding Michael's behavior had not been specifically written into his IEP, the district was not obligated to follow them.

With respect to the allegation that restraint – a tactic not agreed to in a Behavior Intervention Plan - was used on Michael, the ISD concluded that the allegation did not fall within the scope of a definition of a complaint and that it was outside the scope of its authority to consider. (R. at 12-15)

Appeal to the MDE

The Igafo-Teo's appealed to the Michigan Department of Education. (R. at 20-61)

They protested that not all of their complaints and/or information supplied to the ISD investigator had been addressed or included in her report. They repeatedly insisted that a Functional Behavioral Assessment had been done in 2001 and again in 2003 and that Behavior Intervention Plans had been done in 2003 and in 2005. Pages referring to all were included in their Appeal to the MDE. (R. at 32, 35-41, 44, 45-47)

They complained that JPS had acknowledged that a Behavior Intervention Plan was in place when Teacher Consultant Mrs. Z marked "yes" to the question "Is this student currently on a behavior plan?" on a Functional Behavioral Assessment document completed for the November 13, 2005 meeting of Michael's IEP Team. (R. at 51)

They noted that they had complained about the use of a wooden "seclusion" box as a behavior intervention, yet the ISD report failed to address the issue. They requested that their complaint about the wooden box be added to their appealable issues (R. at 20) and specifically complained that the Teacher, Teaching Assistant, and Teacher Consultant had all acknowledged the use of the box to discipline Michael and that the use of the box for restraint and seclusion was not a strategy included in Michael's IEP.

They complained that they had provided written notice to JPS on three separate occasions advising JPS that they had not and were not authorizing the use of restraint and/or seclusion tactics on their son and that the continued use of those tactics when they were not included in Michael's IEP as an approved means of behavior intervention interfered with Michael's education and learning and, as a result, JPS had failed to provide an appropriate education for Michael. (R. at 21)

Similarly, they complained that their allegation that JPS had failed to provide an education for Michael during the two months they had kept him out of school was based upon their complaint that the school had failed to follow the Behavior Intervention Plan that had been in place since 2003 and updated in 2004

and 2005 and that the failure to follow the Behavior Intervention Plan – or, alternatively, to create a Behavior Intervention Plan, had rendered Michael's educational placement inappropriate. (R. at 20)

They complained that, regardless of whether or not Michael's IEP included a Behavior Intervention Plan, JPS had documented, actual knowledge that Michael needed a behavior plan to facilitate his education and JPS was legally required to provide and follow one for Michael and that it had failed to do so. (R. at 21-22)

MDE Response

The Michigan Department of Education Office of Special Education and Early Intervention Services (the Department) issued its Investigation Report on March 10, 2006. In it the Department used the same interpretation of the Igafo-Teo's complaint as had the ISD. In addition, the Department added a "New Allegation" to address the use of the wooden box called "Use of Seclusion."

Allegation #1

The Department characterized the first allegation as a claim that JPS failed to provide an education to Michael during the time that his parents refused to return him to school from November 16, 2005 to January 4, 2006. As to this the Department found no violation finding that Michael had not been suspended by the school for more than one day and that the parents had made a unilateral decision not to return Michael to school. The Department also characterized the Igafo-Teo complaint that the behavior of the TA was not consistent with an agreed upon Behavior Intervention Plan as a complaint that the TA was abusive and stated that "issues of possible physical abuse by school staff are not within the definition of a complaint pursuant to Rule 340.1701a(c) and not under the jurisdiction or purview of the special education process." (Report at 4, R. at 66)

However, the Department's decision failed to address:

- the claim that the JPS had evidence and knowledge of Michael's behavioral responses to certain triggers,
- that the JPS had been advised by its own experts that JPS staff needed to avoid those triggers and respond to Michael according to proactive strategies outlined in several

Functional Behavioral Assessments and Behavior Intervention Plans – whether included in an IEP or not,

- that the response by the TA was completely contrary to all strategies previously discussed and agreed upon,
- that the District was without authority to use restraint on Michael in light of the parent's written withdrawal of any implied permission to use restraint,
- and that use of such restraint outside of the IEP interfered with Michael's educational progress and the failure to implement the behavior intervention strategies rendered his educational placement inappropriate.

Allegation #2

The Department characterized the Igafo-Te'o's second allegation as one alleging "the student's BIP had not been implemented," but – like the ISD – found no violation because on Michael's 5/24/05 IEP the box had been checked indicating that the need for positive behavior intervention, supports and strategies had been considered, but the IEP did not include statements indicating a need for a BIP. (Report at 4, R. at 66-67)

However, the Department's decision failed to address:

- the Igafo-Te'o claim that the 2002-2003 BIP – that had been attached to the December 2002 IEP – was still in effect.
- the claim that the 2002-2003 BIP had been updated in October and November 2005 by the IEP Team.
- the Igafo-Te'o's alternate claim that if a BIP was not part of Michael's IEP, the JPS had evidence and knowledge that without a behavior plan for both Michael and JPS Staff, his behavior and their responses were impeding his education and that JPS was required by 34 CFR 300.346(a)(2)(1) to create and follow such a plan and the failure to do so rendered his educational placement inappropriate.

Allegation #3

The Department characterized Allegation #3 as “use of restraint” and stated it as “The complainants stated that the school’s personnel restrained the student and twisted his arm after the complainants asked verbally and in writing several times that restraint not be used.” The Department included in its recitation of its investigation both the allegation that the TA had twisted Michael’s arm and the allegation that he had been put in a seclusion box. In its investigation the Department stated that it had interviewed Michael’s teacher, Ms. Y, who stated that a wooden box had not been used as a means of seclusion during her one and a half years of providing instruction to Michael. In its discussion the Department characterized the complaints of the arm twisting and the use of the box as an allegations of abuse and found no violation because “allegations of abuse are not within the definition of a complaint pursuant to Rule 340.1701a(c) and not under the jurisdiction or purview of the special education complaint process.” (Report at 5, R. at 68))

The Department’s decision failed to address the Igafo-Teo’s complaint that:

- their written notice to JPS demanding that restraint and/or seclusion not be used as a means of discipline on Michael rendered JPS without authority to use such restraint and/or seclusion unless sanctioned by Michael’s IEP, his BIP or perhaps circumstances necessitating the use of such restraint to protect the child or others;
- the arm twisting and use of the box were not methods of discipline and/or education sanctioned in the IEP;
- the arm twisting and use of the box were not methods of discipline and/or education sanctioned in a BIP.

The Department also failed to fully investigate the claim of the existence of the wooden seclusion box.

The Igafo-Teo’s complained that the existence of the wooden seclusion box was “acknowledged by Teacher, TA and TC” and that “TC destroyed the box on her residential property.” (R. at 23) In response, the Department only interviewed Teacher Ms. Y – a teacher who did not use the box and was not at the school during the period in which the box was used. The Department did not interview Teaching Consultant Mrs. Z who the parents claimed was responsible for removing the box from the classroom and destroying it.

The Department also failed to question the JPS contention that the “seclusion box” was actually a “study carol.” The allegation that the seclusion box was a study carol came from Ms. Y who was not Michael’s teacher at the time of the use of the seclusion box. It was also asserted by the ISD Investigator who claimed that the “incident occurred at the X School” (Report at 7, R. at 70) when it actually happened at X School under Ms. X. The Department also failed to address whether the “study carols” used in Michael’s classroom looked anything like the “time out box” Michael drew in his picture. (R. at 59)

Allegation #4

“The complainants stated that the school has not implemented the numerous recommendations made by experts over the past many years.” To this the Department found “no violation” concluding:

“although the language in the statute states the results of the evaluations ‘must be considered’ and ‘provide relevant information,’ there is no governance to implement or act upon those recommendations. The final decision to define and implement intervention strategies rests with the IEPT. The complainant was part of the IEPT and agreed with the IEP; therefore, the OSE/EIS does not determine a violation. If the complainants are not in agreement with the IEP, they can always ask for a new IEPT meeting.”

The Department’s decision failed to address the Igafo-Teo’s alternate argument that the many recommendations made over the years by the school’s own personnel and consultants put the JPS on notice and constituted actual knowledge that a Behavior Intervention Plan and specific behavior intervention responses were necessary for Michael to benefit from his education and for his educational progress. This, in turn, created an affirmative duty for JPS to institute such plans and responses whether or not they were part of Michael’s IEP and whether or not they were written.

Allegation #5

The Department again addressed the Igafo-Teo complaint about the use of the seclusion box and again construed it as an allegation of abuse and outside the definition of a complaint. In its discussion the Department did acknowledge being told that the Teacher Consultant had destroyed the box and that the conduct complained of occurred prior to the time that Teacher Ms. Y arrived at the school, but failed to

address the Igafo-Teo's implied claim that Ms. Y's assertion that no use of such a box during her tenure at X had taken place was irrelevant to the contention that the box had been used prior to her arrival.

STANDARD OF REVIEW

Under MCL 600.631; MSA 27A.631, a circuit court must overturn an administrative agency decision if the decision was contrary to law, was arbitrary or capricious, or was an abuse of discretion or otherwise affected by a substantial and material error of law. *Dignan v Michigan Public School Employees Retirement Bd*, 253 Mich App 571, 576; 659 NW2d 629 (2002) (citations omitted).

A failure to exercise discretion when called on to do so constitutes an abdication that is the equivalent of an abuse of discretion. *People v Stafford*, 434 Mich125; 450 NW2d 559 (1990); *Rieth v Keeler*, 230 Mich App 346; 583 NW2d 552 (1998).

ARGUMENT

I.

THE FAILURE OF THE MICHIGAN DEPARTMENT OF EDUCATION OFFICE OF SPECIAL EDUCATION AND EARLY INTERVENTION SERVICES TO RULE ON ISSUES PRESENTED BY APPELLANT'S COMPLAINT CONSTITUTES AN ABUSE OF DISCRETION

The Michigan Department of Education is the State agency responsible for implementing, overseeing and ensuring compliance with both State and Federal laws governing education to children with disabilities.

As the Department itself explained in its State Performance Plan filed with the federal government as required by 20 USC 1416 Section 616 (b) (1):

The Individuals with Disabilities Education Improvement Act (IDEA 2004) requires each state to ensure that school districts and other publicly funded educational agencies in the State comply with the requirements of the IDEA and its implementing regulations. Both state and federal law require local school districts to provide appropriate special education and related services. The Michigan Department of Education (MDE) is required to monitor and enforce regulations governing special education programs in public schools and in all agencies in the State serving eligible children. The Office of Special Education and Early Intervention Services (OSE/EIS) implements the Continuous Improvement & Monitoring System (CIMS) to meet requirements of law as well as support accountability measures for student outcomes.

Monitoring Priority 15, page 100. Part B Michigan State Performance Plan: 2005-2010. Submitted to the U.S. Department of Education Office of Special Education Programs December 1, 2005.

When the Department revised its Administrative Rules for Special Education in 2002 it was specifically required by the federal government to add this rule to assure its own compliance:

R 340.1701 Assurance of compliance.

Rule 1. All public agencies in the state, as those agencies are defined at 34 C.F.R. §300.22 of the regulations implementing the individuals with disabilities education act, 20 U.S.C. chapter 33, §1400 et seq., shall comply with these rules; all provisions of the state's application for federal funds under part B of the individuals with disabilities education act, 20 U.S.C. chapter 33, §1400 et seq.; the requirements of part B of the individuals with disabilities education act; and the regulations implementing the individuals with disabilities education act, 34 C.F.R. part 300, which are adopted by reference in these rules....

When problems arise, a many-tiered complaint and review system comes into play. One such tier is found in the Department's Administrative Rules which provide for the filing and review of complaints in Part 8 of the Rules. If a complaint filed under Part 8 of the Rules concerns actions or inactions of a local school district, as in the instant case, the Department has charged the Michigan Intermediate School Districts with the responsibility of investigating the complaint and of providing an investigation report. If the parents continue to be aggrieved by the results of the investigation, as in the instant case, they may appeal to the Department for review.

Michigan Administrative Rule R340.1852 (emphasis added) provides that

- (2) ...upon receipt of a complainant's appeal the Department, **shall:**
 - (a) Carry out an independent on-site investigation if the department determines that an investigation is necessary.
 - (b) Give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint.
 - (c) Review all relevant information and make an independent determination as to whether the educational agency is violating any of the provisions of law specified in the definition of "complaint" in R 340.1701a(c).
- (3) The department shall issue a written report to the complainant and to the educational agency against which the complaint was filed that **addresses**

each allegation in the complaint and contains all of the following

information:

- (a) Findings of fact and conclusions.
- (b) The reasons for the department's final decision.
- (c) Procedures for effective implementation of the department's final decision, if needed, including technical assistance activities, negotiations, and corrective actions to achieve compliance.

The duty to conduct an independent investigation, to add to the record, and “to address each allegation in the complaint” and to assure compliance requires the Department to go beyond the role that a Court assumes when reviewing a trial court record on appeal. The Department has an independent obligation to undertake a de novo review AND investigation AND to proactively ensure compliance with the laws, rules and regulations governing special education. Vested with the discretion to steer the ship of compliance, the Department is under a legal obligation to exercise that discretion and provide guidance.

Appellants assert that the Department abused its discretion by failing to rule on “each allegation” as required in its own rules and by the duty vested in it by state and federal law. Specifically, Appellants assert that:

1. The Department failed to address the claim that the JPS had evidence and knowledge of Michael's behavioral responses to certain triggers, that the JPS had been advised by its own experts that JPS staff needed to avoid those triggers and respond to Michael according to proactive strategies outlined in several Functional Behavioral Assessments and Behavior Intervention Plans – whether included in an IEP or not, that the response by the TA was completely contrary to all strategies previously discussed and agreed upon, that the District was without authority to use restraint on Michael in light of the parent's written withdrawal of any implied permission to use restraint, and that use of such restraint outside of the IEP interfered with Michael's educational progress and the failure to implement the behavior intervention strategies rendered his educational placement inappropriate.

2. The Department failed to address the Igafo-Teo claim that the BIP that had been attached to the December 2002 IEP was still in effect. It failed to address the claim that the 2002-2003 BIP had been updated in October and November 2005 by the IEP Team. (R. 45-47) It failed to address the Igafo-Teo's alternate claim that if a BIP was not part of Michael's IEP, the JPS had evidence and knowledge that without a behavior plan for both Michael and JPS Staff, his behavior and their responses were impeding his education and that JPS was required by 34 CFR 300.346(a)(2)(1) to create and follow such a plan and the failure to do so rendered his educational placement inappropriate.

3. The Department failed to address the Igafo-Teo's complaint that:
 - their written notice to JPS demanding that restraint and/or seclusion not be used as a means of discipline on Michael rendered JPS without authority to use such restraint and/or seclusion unless sanctioned by Michael's IEP, his BIP or perhaps circumstances necessitating the use of such restraint to protect the child or others;
 - the arm twisting and use of the box were not methods of discipline and/or education sanctioned in the IEP;
 - the arm twisting and use of the box were not methods of discipline and/or education sanctioned in a BIP.

4. The Department failed to fully investigate the claim of the existence of the wooden seclusion box. The Igafo-Teo's complained that the existence of the wooden seclusion box was "acknowledged by Teacher, TA and TC" and that "TC destroyed the box on her residential property." (R. at 23) In response, the Department only interviewed Teacher Ms. Y – a teacher who did not use the box and was not at the school during the period in which the box was used. The Department failed to address the Igafo-Teo's implied claim that Ms. Y's assertion that no use of such a box during her tenure at X had taken place was irrelevant to the contention that the box had been used prior to her arrival. The Department did not interview Teaching Consultant Mrs. Z whom the parents claimed was responsible for removing the box from the classroom and destroying it.

5. The Department failed to question the JPS contention that the “seclusion box” was actually a “study carol.” The allegation that the seclusion box was a study carol came from Ms. Y who was not Michael’s teacher at the time of the use of the seclusion box. It was also asserted by the ISD Investigator who claimed that the “incident occurred at the X School” (Report at 7, R. at 70) when it actually happened at X School under Ms. X. The Department failed to address whether the “study carols” used in Michael’s classroom looked anything like the “time out box” Michael drew in his picture. (R. at 59)

6. The Department failed to address the Igafo-Teo’s alternate argument that the many recommendations made over the years by the school’s own personnel and consultants put the JPS on notice and constituted actual knowledge that a behavior intervention plan and specific behavior intervention responses were necessary for Michael to benefit from his education and for his educational progress. This, in turn, created an affirmative duty for JPS to institute such plans and responses whether or not they were part of Michael’s IEP and whether or not they were written.

The Igafo-Teo’s find themselves in a Catch 22. Michael’s autism and communication difficulties required certain communication strategies that were not been followed. That failure, in turn, helped to generated behavioral responses that interfered with his education unless responded to in the systematic and effective manner recommended by the JPS experts and consultants. Those recommendations were not adopted or followed and Michael’s education was severely and negatively impacted. Yet, the very non-adoption of the needed strategies – non-compliance – is now used to bootstrap a finding of compliance. In essence, the Department is saying that without a Behavior Intervention Plan there is no basis upon which to find a violation and leaving unanswered the question of whether or not a Behavior Intervention Plan was required under the circumstances. In the Igafo-Teo’s complaint to the Department specifically raised the contention that the Jackson Public Schools had an independent duty to implement the behavior plans needed for Michael to benefit from his education. The Department failure to respond has left the Igafo-Teo’s and others on the field trying to execute plays without the guidance and coaching that the Department is paid to provide and is charged by law to provide. Worse than punting with 4th and an inch

to go, worse than calling bad plays that lead to a conversion, the Department simply threw down the ball, walked off the field and abandoned the game.

RELIEF REQUESTED

WHEREFORE, Appellants respectfully request that this Honorable Court:

1. Find that the failure of the Michigan Department of Education to respond to all of the allegations before it in the Igafo-Teo's complaint constituted a failure to exercise the discretion vested in it by law and, as such, an abuse of discretion;
2. Remand this case back to the Michigan Department of Education for whatever review and investigation may be necessary for it to exercise the discretion vested in it; and
3. Order the Michigan Department of Education to respond to the following allegations raised by the Igafo-Teo complaint:
 - a. that the JPS had evidence and knowledge of Michael's behavioral responses to certain triggers;
 - b. that the JPS had been advised by its own experts that for Michael to benefit from his educational placement JPS staff needed to avoid those triggers and respond to Michael according to proactive strategies outlined in several Functional Behavioral Assessments and Behavior Intervention Plans – whether included in an IEP or not;
 - c. that the response by the TA on November 15, 2005 was contrary to all strategies previously discussed and agreed upon;
 - d. that without written findings in his IEP documenting that a BIP was no longer needed, Michael's 2002-2003 BIP – that had been attached to the December 2002 IEP – remained in effect;
 - e. that the 2002-2003 BIP was updated in October and November 2005 by the IEP Team;
 - f. the alternate claim that if a BIP was not part of Michael's 2005 IEP, the JPS had evidence and knowledge that without a behavior plan for both Michael and JPS Staff, his behavior and their responses were impeding his education and that JPS was required to create and follow such a plan and the failure to do so rendered his educational placement inappropriate;

- g. the arm twisting and use of the box were not methods of discipline and/or education sanctioned in the IEP;
 - h. the arm twisting and use of the box were not methods of discipline and/or education sanctioned in a BIP.
 - i. the Igafo-Te'o's written notice to JPS demanding that restraint and/or seclusion not be used as a means of discipline on Michael rendered JPS without authority to use such restraint and/or seclusion unless sanctioned by Michael's IEP, his BIP or perhaps circumstances necessitating the use of such restraint to protect the child or others;
 - j. that the District was without authority to use restraint on Michael in light of the parent's written withdrawal of any implied permission to use restraint, and that in light of parental withdrawal of permission, the use of restraint outside of the IEP or BIP interfered with Michael's educational progress and rendered his educational placement inappropriate;
 - k. the alternate argument that the many recommendations made over the years by the school's own personnel and consultants put the JPS on notice and constituted actual knowledge that a Behavior Intervention Plan and specific behavior intervention responses were necessary for Michael to benefit from his education and for his educational progress. This, in turn, created an affirmative duty for JPS to institute such plans and responses whether or not they were part of Michael's IEP and whether or not they were written;
 - l. the implied claim that Ms. Y's assertion that no use of a seclusion box had taken place during her tenure at X was irrelevant to the contention that the box had been used prior to her arrival.
4. Any such other relief as this Court may find appropriate.

Respectfully Submitted,

Dated: _____ By: _____
Deborah K. Canja (P32626)
Attorney for Appellants