

# School Law for Administrators

## Idea

### Appeals court rejects argument that lower court erred in ruling in favor of district

Citation: *A.H. by and through K. P. v. Colonial School District*, 2019 WL 3021232 (3d Cir. 2019)

*The Third U.S. Circuit Court of Appeals has jurisdiction over Delaware, New Jersey, and Pennsylvania.*

The Third U.S. Circuit Court of Appeals recently affirmed a lower court's decision in favor of a school district in a case in which the parent of a disabled student alleged that the lower court had erred in ruling in favor of the district on two counts. The parent argued that the lower court's decision not to allow their psychologist to supplement the record following the administrative hearing and the decision affirming the administrative hearing panel were both made in error. The appeals court however found no clear error on either decision and affirmed.

A.H. was a student in the Colonial School District. She began kindergarten in 2011 and in the fall of 2014 was repeating the second grade. In mid-September 2014, the district prepared an evaluation summary report (ESR) to determine if A.H. had a disability under the Individuals with Disabilities Education Act (IDEA). The ESR include din formation from the parent about the student's family life, classroom behavior and performance, teacher observations, and occupational therapy assessment addressing the student's visual perceptual skills, fine motor skills, and educational needs related to school-based occupational therapy. The ESR also included an assessment by the school psychologist based on her interviews with A.H., A.H.'s parent, and her teacher, along with a review of A.H.'s record and assessment tests.

The psychologist's report acknowledged that A.H.'s cognitive ability and academic skills were a concern and that her emotional/behavioral needs affected classroom functioning. A.H. had a history of disruptive and atypical behaviors. The ESR team concluded that A.H. had an emotional disturbance, a disability under the law, and determined that a focus on her emotional and behavioral difficulties was needed. While the team noted that A.H. displayed some aspects consistent with an Autism spectrum disorder, the team believed the most appropriate classification for her was emotional disturbance given the history of trauma and abuse A.H. had experienced. The team then prepared an individualized education program (IEP).

In the fall of 2015, A.H. went on to third grade but her behavior continued to be problematic and present safety concerns for her and others. After an incident in which A.H. threatened to kill those present, she was admitted to the Terry Children's Psychiatric Center where she was diagnosed with a mood disorder and ADHD. She received psychiatric medication and the district arranged for homebound instruction. A.H.'s placement was later changed to Southern Elementary School Intensive Learning Center.

It was at this time that A.H.'s parent notified the district that she disagreed with the September 2014 ESR and requested that the district pay for an independent educational evaluation, but the district denied the request. In February 2016, the district requested a due process hearing, and in the meantime continued to update its evaluations and assessment of A.H.'s abilities.

At the hearing held in April, several witnesses appeared for the district and a psychologist, Kara Schmidt testified on behalf of the parent. Schmidt opined that the district's ESR had been incomplete and additional testing should have been informed. The hearing panel found the district's witness testimony more credible, in part based on the fact that Schmidt had not ever met or observed A.H., and concluded that the district's ESR was appropriate and that the district did not have to pay for an IEE.

The parent appealed this decision in federal district court. In the meantime, Schmidt performed a neuropsychological evaluation and made several recommendations. The parent asked to supplement the administrative record with this report but the court denied the request, finding it would be prejudicial to the district since they would not have the opportunity to rebut the additional testimony. Then, the court upheld the administrative decision denying the request for the district to pay for an IEE. In its opinion, it did refer to Schmidt's report in a footnote, noting that even had it allowed the parent to supplement the record with the report, the report would not have affected the outcome of the case.

The parent appealed this decision to the Third Circuit, raising two issues, including that the lower court erred by denying her motion to supplement the record with Dr. Schmidt's report and erred in upholding the administrative decision.

An appeals court reviews a lower court's decision to deny supplementing the administrative record for abuse of discretion. In deciding whether to allow supplementation in an IDEA case, a court must carefully consider if the evidence is relevant, non-cumulative, and useful to determining if a disabled child has been provided with adequate services. Considering these things, the appeals court found that the lower court did not abuse its discretion in denying the supplementation of the record. The court acknowledged that the report had some relevance even though it was conducted two years after the 2014 ESR. However, the court found the report was "cumulative" of Dr. Schmidt's testimony before the hearing panel and would "bolster that testimony by elaborating upon it." Therefore, the court found it would be prejudicial to the district because the district would not be able to rebut its substance. This was "sound" reasoning

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# New law requires public schools to display the national motto, “In God We Trust”

In March Gov. Kristi Noem signed a bill into law that requires all public schools to display “In God We Trust,” in an area where students are “most likely” to see it, such as a cafeteria or entryway. Additionally, the law requires that the motto must be at least 12-by-12 inches in size and easily legible. It can take the form of a mounted plaque, student artwork, or other appropriate forms determined by the school.

The intent of this new law, according to state legislators, is to inspire patriotism in the students. Katy Urban, the community relations manager for the Rapid City School District, which just put the motto up in all of the district’s 23 schools, says that although there are some questions, most people in the community support his new law. She said, “it’s a really great thing for our schools and our districts and that kids are seeing it posted on a daily basis.” Urban admits that the law does have some vocal critics.

Urban claims that she has seen some push back on social

media by people who claim that the motto excludes non-Christian faiths. Also, earlier this summer, a group of students from Stevens High School in Rapid City approached the school board and suggested alternating God with Buddha, Yahweh, and Allah on the signs—along with other terms such as “Science” or simply, “Ourselves”—in an effort to be more inclusive. This suggestion was denied by the school board.

Understanding that this law may lead to a lawsuit, legislators included a contingency plan that calls on the state to assume all financial responsibility for any fallout from the “In God We Trust” message. The plan states that in the event that a lawsuit is filed against a school district, employee, school board, or member of the school board, South Dakota’s attorney general will represent them at no cost.

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according to the appeals court, and therefore it found no error on this decision.

Turning next to the argument that the district erred in upholding the administrative decision, the appeals court explained that it reviews lower court findings of fact for clear error but plenary review over the legal standards applied and over the resulting legal conclusions. Under the IDEA, the districts are required to conduct an evaluation of each child with a disability in order to determine the child’s educational needs and develop an IEP. If a parent believes the evaluation conducted by the district was inadequate, they can request an IEE at public expense. However, this is not guaranteed and as is in this case, a school district can deny the request and instead initiate a due process request for a determination as to whether the district’s evaluation was adequate. Whether an evaluation was adequate is a question of fact.

At the administrative hearing, the hearing panel concluded that the district’s evaluation of A.H. was appropriate and that the district did not have to bear the cost of an IEE. The court considered the IDEA’s requirements and concluded the 2014 ESR complied, noting that a variety of tools and strategies were used. The court noted that while it believed the hearing panel should not have considered the student’s educational progress and the absence of a timely request for the IEE, the district had nevertheless appropriately considered all of the student’s assessments and did not make a decision based on a single piece of intelligence. The lower court, the appeals court noted, “carefully discussed the record evidence regarding the four areas of the IEE requested and explained why the Hearing Panel permissibly

concluded that additional testing was not necessary.”

The parent argued that the lower court erred in that while it denied the request to supplement the record with Dr. Schmidt’s report, the court still relied on it in reaching its conclusion. But the appeals court disagreed with this description of events. Instead, the court noted that the lower court cited to the report in a footnote merely to note that even had the court admitted the report, it would not have changed the determination as to the adequacy of the district’s evaluation. Rather than being unfair as argued by the parent, the appeals court found that this showed that the lower court “took the extra step of reconsidering whether Dr. Schmidt’s report would have made a difference had it been admitted.” This was a “thoughtful analysis” and provided information to the parent on the merits of the dispute. The appeals court also found no error by the lower court who had upheld the hearing panel’s credibility determination as to Dr. Schmidt’s testimony. The panel had accorded due weight to the district’s ESR, which was based on multiple assessments, observation of A.H. and interviews with his parents and teachers. Comparatively, Dr. Schmidt had neither met nor observed A.H. and was not aware of A.H.’s programs, placement, or the most recent data collected on A.H. Therefore, the appeals court found there were legitimate grounds for finding Dr. Schmidt’s testimony not fully credible.

Unpersuaded by the parent’s other arguments, the appeals court affirmed the lower court’s decision in favor of the district.

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# Headlines on School Law

## Schools struggle with vaping crisis

By Rob Taylor, PhD

In Colorado, which ranks highest among 37 surveyed states for teen vaping at 25% of teens surveyed, school officials have been vacillating between zero-tolerance disciplinary policies (such as in-school suspensions and out-of-school suspensions leading to expulsion) to strategies emphasizing addiction treatment and prevention. Lawmakers similarly are uncertain as to what steps to take. Colorado Governor Polis asked the legislature to impose new taxes on nicotine vaping devices, but the state Senate balked. According to the Associated Press, Oklahoma did pass a new law banning vaping on school property and a dozen states have passed legislation increasing the age for smoking and vaping to 21.

The Centers for Disease Control and Prevention (CDC) says the use of e-cigarettes amongst students has become much more popular than smoking traditional cigarettes and quotes a CDC survey finding that one in five high school students reported vaping in the previous month.

In Connecticut, Stamford High School Principal Raymond Manka has moved from a punishment paradigm to what he calls “cessation programs,” driven by what he increasingly believes is at heart an addiction to nicotine problem for young people. “We’ve got to figure out how we can help these kids wean away from bad habits that might hurt their body or their mind or otherwise create behavior that can create habits that will be harmful for the remainder of their lives,” Manka says.

The e-cigarette industry is not likely to be of assistance. Between 2011 and 2014, when vaping was beginning to take off, vape companies spent \$100 million in national advertising. And while vaping liquid is advertised by showing flavors appealing to youth—and packaged to appeal further to young people—many if not most youth who vape are unaware that e-cigarettes can and often do contain not only nicotine but heavy metals such as lead and cancer-causing agents.

A recent article in *The Week* magazine links serious breathing problems of 150 people across 16 states to vaping, even one episode, either with nicotine or THC. A study by the University of Pennsylvania concluded that vaping affects blood vessels, limiting their ability to transport blood around the body. “We did expect an effect, but we never thought the effect was as big as what we found,” said the study’s author, Felix Wehrli. “The results of our study defeat the notion that e-cigarette vaping is harmless.”

A recent *EdWeek* article starts off with the disturbing report that at least one death has been tied to vaping and that dozens of cases of young adults being hospitalized because of vaping have emerged. As the urgency of dealing effectively with the vaping “epidemic” increases, school officials are scrambling to find solutions.

The Boulder Valley School District in Colorado, for example, has appealed to the Boulder City Council to pass measures that would outlaw the sale of flavored nicotine and tobacco products, up the buying age of any tobacco and nicotine products from 18 to 21, and install a new city sales tax on such products. The city council has yet to act of these suggestions.

While medical experts agree that there are serious health hazards to vaping, teens are suspicious of these arguments. After all, isn’t vaping one step down from tobacco and often a way that adults are assisted in breaking a cigarette addiction? Educators, to the contrary, are looking to help teens understand that, with highly concentrated nicotine in e-cigarettes, vaping can cause respiratory issues, some cardiovascular problems, and seizures.

Many medical clinicians believe that evidence now exists that use of marijuana has potentially negative impacts on developing brains. Some are beginning to question the effects of nicotine as well. Robert Klesges, professor at the University of Virginia Cancer Center, states that “Nicotine will actually alter the structure of a developing brain, and we have no idea what that will do in the long run. All the adverse health consequences that we know about in e-cigarettes are short-term health consequences, and it will be 30 to 40 years before we know how dangerous e-cigarettes are.” That many be less than a persuasive argument to young people, especially knowing that 66% of teens think that e-cigarettes contain nothing more than flavoring.

Researcher Dr. Renee Goodwin a professor of epidemiology at Columbia University, cautions that even though risk factors of vaping have not been proven definitively, there is another factor to consider. “Studies have shown,” she says in an Associated Press piece, “that e-cigarettes among young people is potentially associated with an increased risk of progressing on to cigarette use and to vaping cannabis, which has become increasingly common in recent years.”

### **SCHOOL EXPERIMENTING WITH THEIR OWN PUSH-BACK**

Educators are being dissuaded by many voices from fighting the vaping craze with punishment alone. Medical director at Rushford, a mental health treatment center in Meriden, Connecticut says, “If your solution is to send these kids home, what do you think they are going to be doing at home? They are going to be taking rips off their Juul all day long to kill the time.”

Expert on adolescent substance abuse at the New York Center on Addiction, Linda Richter, suggests teens will listen to warnings about health consequences and how companies are manipulating students with high-priced, slick advertising campaigns. She says, “To expect a 13, 14, or 15– year-old to break an addiction by yelling at them or suspending them, it’s just not

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## State's repeal of vaccination exemptions could mean thousands of students can't go to school

As the 2019-2020 school year begins, nearly 26,000 students in New York will not be allowed to return to the classroom until they have been vaccinated due to New York State's recent repeal of the religious exemption for immunizations. Two lawsuits have been filed challenging the repeal of the religious exemption, but until those lawsuits are concluded, those students will be left in limbo, and they will not be allowed to go to school. Parents who refuse to vaccinate their children if the legal challenges should fail will have the option to home school their children, or to move to another state that allows students to attend school without being vaccinated due to religious exemptions.

John V. Dolan, the superintendent of the East Islip School District is pushing the courts to allow students to attend school until the legalities are finalized. He sent a letter to the court saying, "As we begin to prepare for the upcoming school year, we are now faced with the horrific ramifications of this decision with no clear direction on how to serve this preliminary injunction and a stay while a lawsuit seeking to overturn the law is pending." He continued, "As an educator, as a parent, and a member of the human race, I implore you to grant a stay so that we can work together for a solution to this situation."

This letter was submitted in support of one of the two lawsuits filed in the Albany County court challenging the repeal of the religious exemption. The suit he was supporting seeks a preliminary injunction and a stay allowing all students that had or would have been entitled to a religious exemption to continue attending their usual schools until a final decision has been

reached. The second lawsuit, filed in Brooklyn federal court, raises federal challenges seeking the same remedies for Special Education students with Individual Education Plans (IEPs).

Jeffrey Dinowitz, the State Assemblyman who sponsored the repeal law says that the only thing stopping kids from going to school are their parents. He said, "They simply have to get the appropriate vaccinations for their children in order to protect their own children, as well as other children." He continued, "If a child cannot attend school because their parents failed to have them vaccinated, then it's not anybody other than the parent who is keeping them out of school."

Unfortunately, as this legal battle ensues, many children are caught in the middle, not allowed to go to school and left in limbo. School officials who oppose the repeal, expressed their concerns about the emotional and educational impact of losing critical academic, extracurricular, social, and special education services. They claim that, as a result of the state law, thousands of students have become outcasts. Rita Palma, founder of advocacy group, My Kids, My Choice said, "Families fee cast aside like non-members of society and their children like castoffs and rejects from the educational system that has nurtured, loved, and educated them." She continued, "Vaccinating their children is not an option for most of these families. Religious beliefs did not change miraculously on June 13."

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going to happen. They need help, treatment, counseling, support, education, and understanding."

Atherton High School in Louisville, Kentucky has begun what principal Thomas Aberli calls an "intensive anti-vaping education program" with the help of the American Association of Pediatrics, in which one effective strategy has been to teach how vaping companies have been "courting them" with flavored products.

Many principals want to have in place a strong array of disciplinary reactions to vaping along with more flexible policies. In Florida's Hillsborough school district officials are working with the sheriff's office on a program called "Put Down the Pen," which urges students to stop vaping and informs them that along with suspension, they may face felony charges depending

on what substances may be contained in their vaping device.

Principal J. Eric Diener in Yakima, Washington became disappointed at the failure of a strictly punitive approach (Mandatory suspensions, locking students out of bathrooms, using an anonymous tip line to report who is selling vaping products) and decided to go a different route. "We need to look at how we educate our kids at younger age and how we get them help and treatment." He is now working more closely with the district's drug and alcohol counselor to set up addiction services for involved students, including off-campus treatment, with a new emphasis on teacher, parent, and student education.

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