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pursuant to R. 1:21-3 (c)  
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Attorney for Petitioners

O.O., by his parent, M.F., and M.F.,

Petitioners,

vs.

IRVINGTON BOARD OF EDUCATION,

Respondent.

**BEFORE THE COMMISSIONER OF  
EDUCATION OF NEW JERSEY**

OAL Dkt. No. EDU

Agency Ref. No.

**VERIFIED PETITION OF APPEAL**

Petitioner O.O., a minor, by petitioner Marie Francois, his natural parent, and Marie Francois, both residing at 55 Becker Terrace, 1<sup>st</sup> floor, Irvington, New Jersey 07111, hereby request the Commissioner of Education to consider a controversy which has arisen between petitioners and respondent Irvington Board of Education (“Board”), whose address is 1 University Place, 4<sup>th</sup> floor, Irvington, New Jersey 07111, pursuant to the authority of the Commissioner to hear and determine controversies under the school law, N.J.S.A. 18A:6-9, by reason of the following facts:

**COUNT ONE**

1. Petitioner M.F. is the mother of petitioner O.O., a seventeen year old student domiciled within the Board’s public school district.
2. Respondent Board operates a public school district in the state of New Jersey and is responsible for providing a “thorough and efficient” free public education to all age-

eligible children and young adults residing within the district, and for ensuring that such education satisfies all constitutional, statutory, and regulatory requirements.

3. Without any constitutional, statutory, or regulatory authority, respondent has excluded O.O. from its traditional and alternative public high schools continuously since September 2004 and November 2004, respectively, and has failed to provide O.O. with any educational services at all since November 2004. In September 2005, respondent denied O.O.'s request for readmission to Irvington High School or Irvington Alternative School.

4. In September 2004, O.O. was prohibited from re-enrolling at Irvington High School by the principal and assistant principal of the school on the sole basis that he had received an excessive amount of absences during his previous ninth-grade year at the school.

5. Prior to this point, neither M.F. nor O.O. had ever received any form of notice - either written or oral - respecting the number of absences on record, or the consequences that this record of absences could hold for O.O.'s continuing enrollment at the high school.

6. Moreover, as of summer 2004, O.O.'s individual schedule reflected that he was slated to attend ninth and tenth grade courses as a returning student at Irvington High School during the 2004-05 academic year, and in September 2004, the school guidance counselor re-confirmed that this was the case immediately before the principal and assistant principal announced that he would not be permitted to enroll as planned.

7. O.O. was never given any type of hearing or other opportunity to contest the administration's abrupt decision to exclude him from the high school.

8. When O.O. was suddenly prohibited from enrolling, M.F. was told by the principal and the Board of Education that, if O.O. wished to stay in school, her only option was to sign a form transferring him to the Irvington Alternative School. No one ever explained to M.F. that this was a “withdrawal” form, and she did not understand the meaning of that word, as English is not her first language. M.F. never wished nor intended to withdraw her son from the high school, and would have never signed this form, had she not been misled into thinking that this was the only way O.O. would be permitted to stay in school.

9. Throughout the 2003-04 school year when O.O. was in ninth grade at Irvington High School, he amassed a record of consistent failing grades and absences. According to the district’s report card, O.O. failed every one of his seven classes, and he was absent a total of 94 out of 168 days.

10. During 2003-04, M.F. was never contacted by phone or in writing by anyone from the school – a teacher or school administrator, guidance counselor, dropout prevention specialist, community services coordinator, or otherwise - to notify M.F. that O.O. was at risk of transfer to the Irvington Alternative School as a result of his record of absences, or to propose any sort of interventions to address O.O.’s problems in school.

11. Despite O.O.’s record of absences and consistently poor academic record, the school never recommended any type of academic or psychological assessment for O.O., or referral to a Child Study Team for an evaluation. Further, the school never referred O.O. to meet on any sort of regular, sustained basis with an on-site or off-site guidance counselor, social worker, dropout prevention specialist, or community services coordinator.

No individualized program plan was ever devised for O.O., and he received no support programs or services to address his particularized academic, social, and health needs.

12. Even after M.F. specifically asked the school to provide psychological counseling services to her son based on feelings of depression he was experiencing that they both felt interfered with his academic performance, the school did not follow-up with the necessary interventions.

13. This was the case even after six of O.O.'s friends were killed, including one well-known and well-liked student whose death was widely felt across the school community.

14. Had the school notified M.F. or O.O. of the number of absences on record, and the consequences that his record of absences would hold for his continuing enrollment at Irvington High School, O.O. would have questioned the accuracy of the number of absences on record. O.O. believes that he may have sometimes been marked "absent" for the whole day when he missed homeroom – a frequent occurrence. Further, as a result of being marked absent for the day, he believes that he may not have been credited for the academic work that he completed on these days. Thus, had O.O. been provided with proper notice and an opportunity to be heard before he was excluded from enrolling for the 2004-05 academic year and forced to "withdraw" from the high school against his will, he would have contested the school's stated basis for this decision.

15. Further, had the school timely and appropriately intervened with the required and needed academic and mental health support programs and services, O.O. would have had a meaningful opportunity to address the issue of his absences before they became a

purported barrier to his re-enrollment at Irvington High School for the 2004-05 academic year.

16. In late September 2004, O.O. began attending classes at the Irvington Alternative School. Upon entering the Alternative School, O.O. still did not receive any type of academic or psychological assessment, nor was O.O. provided with any particularized support services and programs to address his clear academic and mental health needs. Although there was a social worker at the school, he did not meet with O.O., or refer him to a community services coordinator or a dropout prevention specialist who might have assisted in addressing these issues. Further, O.O. was never provided with a written, individualized program plan setting forth his present level of performance, measurable goals, and benchmarks encompassing his social and mental health as well as his academic progress.

17. O.O. was not provided with any of these assessments, programs or services in spite of the fact that the school social worker had identified him as a child with emotional or behavioral problems, and described him to appear “not to be performing up to his ability” and not to have a satisfactory attendance record. As the record shows, the foregoing write-up was itself only prepared by the school social worker on December 14, 2004, after O.O. was no longer at the Alternative School, upon specific request by a case worker from the Division of Youth and Family Services. In this write-up, the social worker also admits, without explanation, that although O.O.’s performance was below his ability, he was never referred to the Child Study Team for an evaluation.

18. In late November 2004, O.O. was expelled from the Alternative School for an act

of vandalism that he had no part in perpetrating: a student's discharge of a fire extinguisher in the school auditorium. Initially, the school administration accused four different students. Three days later, the school principal decided instead that O.O. was the guilty party. School district records demonstrate that the principal's decision was based solely on the unsworn, post-hoc statements provided by one or more of the same students who were initially suspected for the act. Although the principal once claimed to have an alleged tape of O.O. committing the act, he was never able to produce this purported evidence in response to M.F. and O.O.'s numerous requests, and in fact excludes from reference any mention of the tape in his September 20, 2005 statement.

19. Upon reaching the unfounded determination that O.O. was the guilty party, the principal responded to O.O.'s questions about the basis for his determination in a verbally and physically threatening manner - so much so that the school security guard advised O.O. to leave to protect his safety. Specifically, when O.O. asked to view the evidence against him, including the alleged tape, the principal screamed expletives, walked towards O.O. while rolling up his sleeves, as if he were prepared to fight him, and demanded that O.O. immediately leave the school property and that he not return.

20. Neither M.F. or O.O. was ever provided with written notice stating that O.O. had been suspended or expelled from the school, or explaining the reason for this expulsion. Moreover, O.O. was never offered a hearing of any kind, nor was he ever presented with evidence against him or offered the opportunity to contest such evidence.

21. When M.F. went to see the principal, after his confrontation with O.O., the principal remained adamant that O.O. would not return to the Alternative School. M.F.'s

repeated efforts, through the Board of Education and elsewhere, to get O.O. back in the Irvington Public Schools were unsuccessful. M.F. was never provided with an explanation as to how she could challenge the school district's exclusion of O.O. from school.

22. In September 2005, M.F. returned to Irvington High School to request her son's readmission to the high school. M.F. was informed by the principal that O.O. would not be readmitted without a recommendation from the principal of the Alternative School. At a subsequent meeting with the Alternative School principal, M.F. was told that her son would never be allowed to return to Irvington High School or the Alternative School. In response to her request to see the evidence that led to her son's exclusion from the Alternative School, the principal screamed at M.F. to leave, physically grabbed her, and forcibly pushed her out of his office.

23. Since November 2004, when O.O. was removed from the Alternative School, O.O. has not been permitted to return to Irvington Alternative School or Irvington High School, nor has he received educational services of any kind from the district.

24. The Board's continuing exclusion of O.O. from its traditional and alternative high school programs, including its failure to readmit O.O. to Irvington High School or Irvington Alternative School in September 2005 or to provide any educational services at all to O.O. from November 2004 to the present time, violates O.O.'s right to a thorough and efficient education under Article VIII, section IV of the New Jersey Constitution.

## **COUNT TWO**

25. Petitioners repeat the allegations of Count One as if set forth fully herein.

26. The Board's continuing exclusion of O.O. from its traditional and alternative high

school programs, including its failure to readmit O.O. to Irvington High School or Irvington Alternative School in September 2005 or to provide any educational services at all to O.O. from November 2004 to the present time, violates O.O.'s right to free public education under N.J.S.A. 18A:38-1.

### **COUNT THREE**

27. Petitioners repeat the allegations of Count One as if set forth fully herein.

28. The Board's failure to establish rules, standards, or procedures governing the imposition of suspensions, expulsions, and reinstatement, as well as transfer of students from the traditional high school to the alternative school (or alternatively, to properly implement those rules, standards, or procedures) in its continuing exclusion of O.O. from its traditional and alternative high school programs, including its failure to readmit O.O. to Irvington High School or Irvington Alternative School in September 2005 and its failure to provide any educational services at all to O.O. from November 2004 to the present time, is arbitrary, capricious, and unreasonable.

### **COUNT FOUR**

29. Petitioners repeat the allegations of Count One as if set forth fully herein.

30. The Board's continuing exclusion of O.O. from its traditional and alternative high school programs, including its failure to readmit O.O. to Irvington High School or Irvington Alternative School in September 2005 and its failure to provide any educational services at all to O.O. from November 2004 to the present time, without evidence of good cause; written notice of this cause and a hearing; a list of witnesses to be called in support of the charge and notice of O.O.'s right to cross-examination, to counsel, and to enter his



own defense; or reinstatement in the Irvington public schools, violates N.J.S.A. 18A:37-2; 18A:37-4; 18A:37-5.

### **COUNT FIVE**

31. Petitioners repeat the allegations of Count One as if set forth fully herein.

32. The conduct of the Board and its employees and agents constitutes state action.

33. The Board's continuing exclusion of O.O. from its traditional and alternative high school programs, including its failure to readmit O.O. to Irvington High School or Irvington Alternative School in September 2005 or to provide any educational services to O.O. from November 2004 to the present time, without written notice and a hearing (as well as a list of witnesses to be called in support of the charge and notice of O.O.'s right to cross-examination, to counsel, and to enter his own defense) violates the right of O.O. to procedural due process as guaranteed by the Fourteenth Amendment to the United States Constitution, as well as his right to fundamental fairness.

### **COUNT SIX**

34. Petitioners repeat the allegations of Count One as if set forth fully herein.

35. The Board's continuing failure to provide O.O. with the required and needed educational and educationally-related programs and services to address his academic, social, and health needs, despite all the warning signs exhibited by O.O.'s academic performance, record of absences, and mental-health needs, violates his right to a thorough and efficient education under Article VIII, section IV of the New Jersey Constitution by depriving him of the remedial measures ordered by the New Jersey Supreme Court in Abbott v. Burke, 149 N.J. 145(1997)(“Abbott IV”); Abbott v. Burke, 153 N.J.

480(1998)(“Abbott V”); Abbott v. Burke, 177 N.J. 578(2003)(“Abbott X”).

### **COUNT SEVEN**

36. Petitioners repeat the allegations of Count One as if set forth fully herein.

37. The Board’s continuing failure to provide O.O. with the required and needed educational and educationally-related programs and services to address his academic, social, and health needs, despite all the warning signs exhibited by O.O.’s academic performance, record of absences, and mental-health needs, violates N.J.A.C. 6A:10A-3.5(incorporating Appendix A)(2003); N.J.A.C. 6A:10A-3.6 (incorporating Appendix A) (2004); N.J.A.C. 6A:10A-4.3(d)(1)(incorporating Appendix A) (2005)(New Jersey Department of Education regulations implementing the Abbott v. Burke remedial measures).

### **COUNT EIGHT**

38. Petitioners repeat the allegations of Count One as if set forth fully herein.

39. The Board’s continuing failure to provide O.O. with intervention and referral services; to provide O.O. with social and health-related services; and to develop an individualized program plan for O.O., encompassing current performance assessments, goals and objectives, and benchmarks to measure both academic and social and health-related progress, despite all the warning signs exhibited by O.O.’s academic performance, record of absences, and mental-health needs, violates the requirements of N.J.A.C. 6A:16-8.1 et seq.; N.J.A.C. 6A:16-9.1; 6A:16-9.2.

**WHEREFORE**, petitioners demand the following relief:

A. A Declaratory Ruling that the Board’s actions violated O.O.’s rights and

breached its legal obligations as alleged.

B. An Order directing the Board to immediately readmit O.O. to Irvington High School and within fifteen (15) days prepare the assessment and educational plan described in paragraphs D and E below.

C. An Order enjoining the Board from removing O.O. from Irvington High School absent the requirements of procedural due process and fundamental fairness, and absent conformance with clear rules or standards governing suspension, expulsion, reinstatement, and transfer of students from traditional to alternative programs. D. An Order directing the Board to conduct an immediate assessment of O.O.'s academic, social, and mental health needs by qualified district personnel, including an assessment of his need for referral to a Child Study Team for an evaluation.

E. An Order directing that, based on these assessments, the Board immediately develop an educational plan for O.O. that includes: (1) recommendations for O.O.'s placement in the high school program that best fits his needs, upon compliance with the requirements of procedural due process and fundamental fairness, or parental consent; (2) provisions for all of the required and needed educational and educationally-related programs and services to address O.O.'s academic, social, and health needs; and (3) goals and measurable benchmarks to insure that O.O. has a meaningful opportunity to earn a high school diploma in a timely manner.

F. An Order directing the Board to promptly implement O.O.'s educational plan and to ensure that he has immediate and sustained access - through to graduation from this program - to all of the educational and educationally-related programs and services

necessary to give him a meaningful opportunity to earn a high school diploma.

G. An Order extending O.O.'s entitlement to a free public education beyond age twenty to compensate for the Board's violations of his rights.

H. Such other relief as is equitable and just.

Petitioners hereby preserve their claims against respondent for damages and attorney's fees under 42 U.S.C. §§ 1983 and 1988 for violation of their right to procedural due process.

EDUCATION LAW CENTER  
Attorney for Petitioners

Dated: November 17, 2005

By: Koren Bell, Esq., pursuant  
to R. 1:21-3(c)

Marie Francois, of full age, being duly sworn upon her oath according to law deposes and says:

1. I am the petitioner in the foregoing matter.
2. I have read the petition and aver the facts therein are true to the best of my knowledge and belief.

Marie Francois

Sworn and subscribed to

before me this 17<sup>th</sup> day of  
November 2005

Elizabeth Athos  
Attorney at Law  
State of New Jersey