Special Education Bulletin

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Please Note: Due to a lack of PERC cases, this edition of the ***Special Education Bulletin*** will replace the May 2006 edition of the ***Impact on Negotiations***.

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ALJ Denies Parents' Application for Reimbursement of Tuition Costs for Unilateral Placement in Nonpublic School

D.D. and N.D., on Behalf of A.D., Petitioner, v. Montclair Board of Education, Respondent, EDS No. 9295-05 (October 17, 2005) [Decided by Daniel B. McKeown, ALJ].

The petitioners are the parents of 13-year-old student, A.D., who had been attending school in the respondent district from about September 1998 until April 2002. A.D.'s parents unilaterally placed him in a private school. Subsequently, on July 5, 2005, the parents filed a due process petition, alleging that the district failed to provide their son with a FAPE in violation of the IDEA and Section 504 of the Rehabilitation Act of 1973.

The petitioners placed A.D. in a private school near the conclusion of the 2003-04 academic year. In this proceeding, the petitioners sought a determination that the board's placement for an "unspecified year" did not provide A.D. with a significant educational benefit in the LRE.

A.D. is currently attending a private school in Mountain Lakes. He began kindergarten in the respondent district in 1998. A.D.'s parents asked the district to evaluate A.D. when he was in first grade because A.D.'s pediatric neurologist had expressed concern that A.D. may have a learning disability and suspected ADHD. The district chose not to provide the comprehensive evaluation that had been requested; rather, it advised the parents that ADHD behavior management issues would be addressed, and that they would be meeting with the CST in the fall.

During A.D.'s second-grade year, A.D.'s teacher referred him to the CST because A.D. was making involuntary vocal noises. In addition, A.D. was demonstrating an inability to focus or complete assignments on his own. A.D. was also experiencing difficulty decoding words and answering basic comprehension questions. A.D. exhibited compulsive behavior, and in an undated report, the LDTC noted that his attention span was very limited. He crawled from one chair to another and simply could not stay focused. A.D.'s cognitive ability was in the average range, but his performance on underlying processes was uneven. His expressive vocabulary was strong. The LDTC found A.D. to be weak in auditory closure. Based on these observations and evaluations in January 2001, the CST notified the parents that, even though there were areas of concern, A.D. was making "wonderful academic progress," and was not eligible for special education and related services. A.D.'s mother, who is a special education teacher, agreed with this determination.

The parents had A.D. evaluated privately when he was in third grade. This evaluation revealed that A.D. was in the low to very low range for auditory closure and auditory memory. The private consultant recommended a behavioral management plan. In March 2002, A.D. was examined by a neurologist selected by his parents. The neurologist concluded that A.D. had ADHD, a central processing auditory disorder and Tourette's syndrome. The neurologist recommended that A.D. be seated in the front of the classroom, have untimed tests, an inclusion aide, be placed in small groups whenever possible, and have directions repeated and/or re-phrased. A.D. was also privately evaluated by an audiologist and a neuro-psychiatrist. These evaluators observed him and noted A.D.'s distractability and lack of focus. They also noted that his impulsive behavior needed modification through the use of a one-on-one aide. The evaluators also agreed that A.D. needed personal assistive technology such as listening devices and a device to enhance auditory processing abilities. Based on these reports, a 504 plan was prepared. The parents

demanded a conference, and the CST met on April 26, 2002. On the strength of the information submitted relevant to the requirements of Section 504, the CST decided to classify A.D. as having "OHI/ADHD and Tourette's Syndrome."

The district sent the petitioners an IEP which also called for A.D. to be retained in the current grade. The IEP provided A.D. with a program that included in-class support for reading/language arts and math, five days per week. The IEP also specified that A.D. would have a pull-out replacement program for these subjects on a daily basis. A.D. was to have a one-on-one aide, and evaluation of specific performance was to be accomplished through teacher observations, student work, and teacher-made tests. The IEP referenced assistive technology without providing any details. The district was required to make modifications and implement behavioral interventions. The petitioners signed and accepted the IEP on September 3, 2002. In or about December 2002, the IEP was modified to return A.D. to mainstream math due to the success he was showing as a result of being administered time-released medication.

The district began an annual review in April 2003. At this time, A.D.'s teachers and the CST agreed that he no longer needed an aide due to his success being treated with medication.

In March 2004, the annual review was conducted. Following the annual review, the CST decided to restore the assistance of an aide. In addition, the parties agreed that a behaviorist would be consulted with the goal that a more structured behavioral plan would be implemented. At about the same time as the annual review, petitioners had A.D. evaluated by a private LDTC. The private LDTC concluded that A.D.'s auditory processing, fluid reasoning, and processing speed were one to two years below his age-level peers. His short-term memory was four years below his age group. He also scored about one to two years below age level for reading, fluency, decoding, passage comprehension, word problems and writing. The private LDTC recommended a language-based curriculum with remediation in reading and writing, and a therapeutic support component to address his ADHD.

On June 9, 2004, the district held a follow-up review of A.D.'s IEP for the 2004-05 school year. At this meeting, the parties concluded that A.D. would receive an unspecified amount of reading support, three times per week. A.D. was also to have the assistance of a one-on-one aide for all subjects except math. The aide was also assigned to implement the behavior modification plan. The petitioners consented to the implementation of this IEP.

On June 22, 2004, before notifying the district, the petitioners signed a contract to enroll A.D. in a private school in Mountain Lakes. Subsequently, on June 29, 2004, the petitioners contacted the district's case manager and advised her that they planned to withdraw A.D. from the district and enroll him in the private school. The team leader confirmed the telephone conversation in writing and advised the petitioners that the IEP, which the petitioners had accepted, constituted an appropriate program calculated to render a meaningful educational and behavioral benefit to A.D. Thereafter, the petitioners' attorney advised the district that the petitioners were withdrawing A.D. from school on August 20, 2004.

The ALJ granted the board's motion to dismiss, noting that the petitioners acted in a manner which was inconsistent with the law when they unilaterally placed their son in private school. The ALJ reasoned that *N.J.A.C.* 6A:14-2.10(c) provides that a board shall not be required to reimburse private school tuition for a student if the district made a FAPE available to the student.

This regulation states that, if the parents of a student (who previously received special education and related services) enrolls the student in a nonpublic school or private school without the consent or referral of the public school district, an ALJ may require the district to reimburse the parents, if the ALJ finds that the district failed to provide the student with a FAPE in a timely manner prior to enrollment in the private/nonpublic school. The parents must provide notice to the district of their concerns and their intent to enroll their child in a nonpublic/private school at public expense. If the parents seek reimbursement, the cost of reimbursement may be reduced or denied if: (1) at the last parent-attended IEP meeting prior to the removal, the parents failed to notify the IEP team that they were rejecting the IEP; (2) the parents did not provide the district with at least ten business days notice prior to the removal of their concerns or intent to enroll their child in a nonpublic school; and (3) prior to removing the student from the district, the district proposed a re-evaluation of the student and provided notice under *N.J.A.C.* 6A:14-2.3(e) and (f), but the parents did not make the child available to conduct the re-evaluation; or (4) there is a judicial finding that the parents' actions were unreasonable.

The applicable federal regulation, 20 *U.S.C.A.* §1412(a)(1)(C)(ii), provides that a parent will be eligible to obtain reimbursement for a unilateral placement in private school only if a court or hearing officer determines that the public school district failed to provide the student with a FAPE in a timely manner prior to the enrollment.

Under the IDEA, as well as applicable state law, parents cannot receive tuition reimbursement if they do not provide the public school district with prior notice. At the last IEP meeting convened prior to the removal, the parents verbally consented to, and later provided written consent to the IEP offered by the district. In addition, the evidence demonstrated that the petitioners signed a contract to enroll their son in private school on June 22, 2004, but did not telephone the district's case manager until June 29th to advise the district of their intention to remove their son.

The ALJ concluded that, over the past five years, the petitioners had been generally in agreement with the programs offered by the CST. The CST did not classify A.D. until 2002, but the ALJ reasoned that there is no evidence in the record to demonstrate that the CST should have acted differently. The ALJ dismissed the petition for reimbursement and also ruled that the petitioners' request for a due process proceeding on the program offered to A.D. between 1998 and 2004 was untimely.

District Responsible for Tuition Costs of Unilateral Placement for Failure to Offer FAPE

S.C., on Behalf of D.C., Petitioners, v. Montgomery Township Board of Education, Respondent, EDS No. 10147-04 (December 22, 2005) [Decided by Joseph F. Fidler, ALJ].

The petitioners sought tuition reimbursement for the unilateral placement of their son, D.C., in the Solebury School Learning Skills Program for the 2004-05 school year. D.C. is 16 years old and has been classified as "Other Health Impaired." He has been diagnosed with ADHD, residual weaknesses in written expression, and comparatively weak fine motor skills. D.C. also has a reported history of experiencing depression and anxiety. He has received psychotherapy since 2001, and has been treated with anti-depressant medication since 2003. D.C. attended a private kindergarten and continued in private school through part of first grade. In the middle of first grade, he began attending school in the respondent's district. In second grade he was bullied, and he was struggling with language arts.

When D.C. began attending school in the district, he was not initially deemed eligible for special education and related services. He was, however, provided with occupational therapy to assist him with his fine motor skills. D.C. continued to struggle with language arts. D.C.'s parents took D.C. to be privately evaluated in third grade. Thereafter, he was offered a 504 plan, and was subsequently classified.

D.C. attended the Newgrange School from fourth to seventh grade. He attended the Bridge Academy in eighth grade. Both schools gave D.C. the opportunity to attend school in a small school environment. The placement at Newgrange was the result of litigation between the district and the parents. The district offered the petitioners an in-district placement, and the parents disagreed and unilaterally placed him at Newgrange. The parents, once again, unilaterally placed D.C. in a private school for his eighth-grade year. The result of the litiga-tion, which proceeded after that placement, was that the ALJ decided that D.C.'s placement in Newgrange provided D.C. with a FAPE. The ALJ's decision was subsequently affirmed on appeal to the federal district court.

As part of a re-evaluation in preparation for D.C.'s entrance into high school, the parents arranged to have Dr. Barbara L. Malamut, a school psychologist, conduct a neuropsychological evaluation of D.C. Dr. Malamut testified that she first met D.C. in 1999, and has evaluated him periodically throughout the years. She delivered a comprehensive report. As part of her observations, she noted that D.C. benefits from very supportive parents and teachers who have carefully monitored his progress. She also included recommendations to ease D.C.'s transition to high school. She advised that D.C. be placed in a small class due to his fragile self-esteem, organizational deficits, and slow processing speed.

Dr. Malamut also noted that D.C. benefitted greatly from active class participation. She explained that he requires extra time to complete assignments and tests without penalty. D.C. also needs extra monitoring as this assures that he stays on task. She recommended that D.C. continue to take medication and have the level of new tasks be monitored closely to avoid creating unnecessary frustration and reduce anxiety that prevents him from learning. He continues to need assistance with his visual-motor integration skills. She explained that an important goal for D.C. is to have him become proficient with typing which would permit him to use a laptop in class to take notes. D.C.'s need to engage in repetitive writing should be decreased. Due to D.C.'s difficulty with writing, he needs extra support in class when it is necessary for him to write paragraphs or essays. He also continues to need support to assist him with his organizational skills.

Dr. Malamut observed classes at both the Montgomery high and middle schools. She also observed the program at the Solebury school. She concluded that the Solebury school would be perfect for D.C. She believed the district's middle school program to be excellent, but felt it would be too embarrassing and humiliating for D.C. to repeat eighth grade. She opined that the classes at the Montgomery High School were too large for D.C. as he required more hands-on attention. She emphasized that the key to D.C.'s academic success has been keeping him emotionally stable and moving forward.

D.C.'s psychiatrist, Dr. Schnaps, testified that he has been treating D.C. since June 2001. He testified that D.C. really suffered during the three years he attended public school. D.C. felt stupid and different from other children and experienced bullying. Dr. Schnaps further explained that D.C. describes himself as being sad and depressed and had entertained thoughts that life was not worth living. Dr. Schnaps testified that D.C.'s public school years were traumatic, and D.C. becomes upset when discussing school work. For D.C., school tasks evoke anxiety, obsessional thinking and, at times,

catastrophic reactions. His thinking process regarding school work is obsessional and ruminative. Reading, organization, writing and comprehension are formidable tasks. D.C.'s perception of his three years in public school was that these years were a time of despair. He felt lost, isolated, anxious and, at times, felt like giving up on life all together. His transfer to the special needs school alleviated a great deal of anguish, but he still perceives school as a daily struggle. D.C. suffers from depression, and classification of ADHD remains. Dr. Schnaps also opined that D.C. would be at great risk for recurring symptoms of anxiety and depression if he were to be placed in a non-supportive environment. The doctor believed that, if D.C. were to return to public school, he would have anticipatory anxiety that would increase his symptoms of depression resulting in a negative impact on his ability to learn.

The CST did an evaluation, but accepted some of the parents' doctors' reports including that of Dr. Malamut. The CST rejected Dr. Schnaps' report and placement recommendations as premature. The CST also criticized Dr. Schnap's report for relying upon Dr. Malamut's testing yet, ironically, the CST accepted Dr. Malamut's test results as well. The CST decided that D.C.'s needs could be met in public school, noting that testing revealed that D.C. could do regular education work. The CST believed D.C. should return to public school and repeat the eighth grade. The parents objected to the recommended placement and asked the district to consider the Solebury school as a placement. The CST met and changed the placement to the ninth-grade Resource Center Program at the district's high school. He would be enrolled in replacement English, and Learning Strategies in Special Education. He would be in regular education classes for world studies and physics with in-class support. He would receive both individual and small group counseling two times per week. The parents did not object to the goals and objectives established in the IEP. The CST did not believe that the private school placement was the LRE.

The ALJ ruled that the IEP offered by the district would not have provided D.C. with a FAPE. The ALJ further held that the placement by the parents in the Solebury school was appropriate. Therefore, he concluded that the petitioners were entitled to reimbursement. The ALJ reasoned that, when parents are seeking tuition reimbursement for a unilateral placement, the threshold question is whether the public school district timely offered a FAPE. If the program/placement offered by the district is not appropriate, then the next issue to be determined is whether the placement selected by the parents is appropriate. The ALJ noted that, here, the district did not challenge the appropriateness of the placement selected by the parents.

The ALJ considered whether the program offered by the district was calculated to confer an educational benefit on the child. The ALJ explained that the program must also be implemented in the LRE. The school district has the burden of proving that the IEP it offered was appropriate. The ALJ stated that the key to making this determination is weight to be given to the parties' expert witnesses. The ALJ believed the parents' experts to be caring and competent. The ALJ noted that, when the CST recommended the in-district placements, it did not give appropriate weight to the findings and recommendations of the parents' doctors. These professionals had long-term extensive involvement evaluating and treating D.C. The ALJ found them to be candid and credible witnesses. The ALJ concluded that the evidence showed that the student has long-standing problems with his organization and attention skills. He also has emotional challenges, and school is a great source of his anxiety. His academic progress is greatly dependent upon his emotional stability. The ALJ was convinced that, if D.C. is placed back in public school, there is a great risk that he will

have recurring symptoms of anxiety and depression. The placement offered by the district failed to give sufficient consideration to D.C.'s disabilities in the context of his underlying issues of anxiety and depression. Therefore, the ALJ ordered the district to reimburse the parents for the tuition paid in connection with the unilateral placement.

Board Granted Permission to Transmit Student's Records to Potential Placements and Parent Ordered to Cooperate in Application Process

Berlin Township Board of Education, Petitioner, v. M.P. and C.P., on Behalf of S.P., Respondents, EDS No. 8656-05 (January 3, 2006) [Decided by Joseph F. Martone, ALJ].

S.P. is eligible for special education and related services and was classified as multiply disabled involving ED and other health impaired. S.P. enrolled in the district in August 2005, and the records from his prior school were reviewed by the CST. The records revealed that S.P. underwent a psychiatric evaluation in March 2005 by Dr. Joseph C. Hewitt, and that on May 27, 2005, the prior school district proposed an IEP with an out-of-district placement. Dr. Hewitt's report states that S.P. has significant problems with attention span, poor frustration tolerance, and disruptive behavior. S.P. was diagnosed with ADHD, and Dr. Hewitt recommended an out-of-district placement.

The CST met with S.P.'s parent in September 2005 and also proposed an IEP with an out-of-district placement. The parent opposed the out-of-district placement, and refused to provide written consent for the release of S.P.'s records to five public and private schools which are potential placements. Subsequently, the district filed a due process petition and application for emergent relief seeking an order to permit the release of S.P.'s records to the five schools and to require S.P.'s parent to visit the other possible placements. The Office of Special Education Programs rejected the application for emergent relief and the case was transferred to OAL.

The ALJ stated that the sole issue to be determined was whether he should order the release of S.P.'s records over his parent's objection, and direct the parent to visit the placements. In order to determine this issue, he needed to determine whether the proposed IEP for the 2005-06 school year provides a FAPE in accordance with the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA). A district provides a FAPE by offering personalized instruction with sufficient support services to permit the child to benefit educationally. The IDEIA does not require the provision of a program which maximizes the student's potential or provides the best education possible at public expense.

The IDEIA and New Jersey's implementing regulations create a strong preference for mainstreaming disabled students in their neighborhood schools. However, *N.J.A.C.* 6A:14-4.3(a) specifically authorizes districts to utilize special education programs offered by other school districts and approved private schools. The question is whether the out-of-district placement is the most appropriate placement to meet S.P.'s educational and behavioral needs.

The ALJ found, based on Dr. Hewitt's report and other evaluations, that S.P.'s disabilities are not likely to improve or disappear because of a change in S.P.'s home environment. S.P.'s former classroom teacher reported significant regression, nonexistent work production, isolation from peers, and resistance to help. The CST prepared its IEP

based on this information and on the recommendation for an out-of-district placement. The CST believes that S.P. needs a structured environment in a setting that emphasizes behavioral control, and with staff who have specialized training to handle emotionally disturbed students. Based on this evidence, the ALJ found the district's rationale for the IEP justified, and also found that the IEP would provide a meaningful educational benefit to S.P. Therefore, the ALJ granted the district's request for an order directing S.P.'s parent to visit all placements at which an opening is available, and permitting the district to transmit S.P.'s records to the other schools.

Court Denies Board's Motion to Dismiss Complaint Based on Limitations Provision in IDEIA

P.S., et al., Plaintiffs, v. Princeton Regional School Board of Education, Defendant, 2006 *WL* 38938 (January 5, 2006) [Decided by Stanley R. Chesler, J. U.S. Dist. Ct.].

E.S. is eligible for special education services. Her parents, P.S. and M.S., filed a due process petition alleging that the board failed to provide a FAPE. An ALJ heard the matter between April and December of 2004. The ALJ issued a decision on December 3, 2004. At that time, pursuant to 20 *U.S.C.A.* §1415(i)(2)(B) and *Ridgewood Board of Education v. N.E. ex rel. M.E.,* 172 *F.3d* 238 (3d Cir. 1999), there was a two-year limitation period in which to appeal an ALJ's decision.

In December 2004, Individuals with Disabilities Education Improvement Act of 2004 (IDEIA) was enacted and became effective July 1, 2005. The IDEIA amended the limitations provision, and currently provides:

> The party bringing the action shall have 90 days from the date of the decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for bringing such action under this part, in such time as the State law allows.

On October 3, 2005, P.S. and M.S. filed a complaint in federal court to appeal the ALJ's decision. The board then filed a motion to dismiss the complaint as untimely based on the amendment to the IDEIA. The board argued that the complaint needed to be filed by September 29, 2005 which is 90 days from the July 1, 2005 effective date of the law, and that such an interpretation is consistent with congressional intent to quickly resolve disputes. The plaintiffs countered that the board's position is inconsistent with the language in the IDEIA amendments and that there is nothing that indicates that the IDEIA was intended to be retroactively applied.

The district court found that the board's interpretation is contrary to the amended language in 20 *U.S.C.A.* §1415(i)(2)(B). The 90-day period runs from the date of the ALJ's decision and not 90 days from the effective date of the law as the board posited. The court stated that if "Congress intended to use the effective date of the amendment as the accrual date for appeals from all decisions rendered before that time, it would have stated so." In addition, citing *Lawrence Twp. Bd. of Educ. v. New Jersey,* 417 *F.3d* 368 (3rd Cir. 2005) and *Landgraf v. USI Film Prods.*, 511 *U.S.* 244 (1994), the amendments cannot be retroactively applied; they can only have prospective application. Therefore, the court denied the board's motion.