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Petitioner Fails to Prove District Did Not Offer Granddaughter a FAPE

S.L., on Behalf of M.B., Petitioner, v. Clinton Township Board of Education, Respondent, EDS#10193-03 (November 23, 2004) [Decided by Douglas H. Hurd, ALJ].

The petitioner sought a due process hearing claiming that the district failed to provide her granddaughter, M.L., with a FAPE. The petition alleged that the IEP did not adequately address M.L.'s language-based learning disability. The petition also claims that M.L. needs a small, structured, quiet environment in which to learn.

M.L. was classified at the conclusion of third grade in another school district. In August 2002, M.L. and her brothers moved in with the petitioner who resides in Clinton Township. At the time M.L. commenced school in Clinton, she was in fourth grade. A neuropsychological evaluation performed in 2002 recommended that M.L. be placed in a special education school for children with language-based learning disabilities. She should also receive an intensive, multi-sensory approach to reading, spelling and written language including intensive language therapy "in a total therapeutic milieu."

M.L.'s former district, Franklin Township, had evaluated her and concluded that she had a hearing problem. The IEP team in Clinton determined that M.L. was eligible for special education and related services as she had a specific learning disability, based upon a severe discrepancy between general intelligence and her current achievement in oral and written language.

The IEP called for M.L. to have in-class support and be in the general education program for more than 80 percent of her day. M.L.

received instruction in an inclusion classroom—part of her time was spent in a class with 23 students, and part of her time was spent in a small group within the classroom. M.L. had math and language arts instruction in a smaller group setting (about six students.) M.L. also saw a school counselor and had speech services three times per week.

The petitioner objected to the classification, but signed the initial IEP. In December 2002, an audiology/central auditory processing evaluation revealed that M.L. has a moderate to severe auditory processing disorder. The district never saw the evaluation, but incorporated the recommended changes into M.L.'s program. M.L.'s hearing loss was surgically corrected in November 2002.

The district's witnesses testified that M.L. made a smooth transition. They also said that M.L. seemed happy at school. She was interacting well with other students—making friends and playing with other children at recess. The school counselor testified that M.L. was doing well.

M.L.'s grandmother believed that M.L. seemed isolated and was not enjoying going to school. S.L. said that she was concerned about M.L.'s mental health, she began sending her to a private counselor in March 2003. On March 13, 2003, M.L. wrote a note that said she wanted to kill herself. There had been an incident in Ms. Yager's class—M.L. had taken some candy without permission. The school counselor spoke with M.L. about the note, and M.L. told the counselor that she really did not want to kill herself. The day M.L. wrote the note, petitioner advised the district that she was withdrawing M.L. The petitioner said that she had made this decision because she wanted M.L. to be in a language-rich environment that specializes in teaching the language code. The petitioner placed M.L. in a private school for

learning disabled children in April 2003. After leaving, M.L. wrote a note to Mrs. Yager saying that she misses her and her friends.

The district's witnesses also testified that M.L. was making good progress while she attended school at Clinton. M.L.'s report cards, and DRA testing support the district's testimony. Mrs. Yager observed that M.L. was making good progress in reading. She also seemed more receptive and engaged. The evidence also demonstrated that M.L. had expanded her receptive and expressive vocabulary through curriculum-based materials. Another witness for the district, who was qualified as an expert in special education, testified that the district had given M.L. an appropriate IEP and that she was making striking progress in the district.

The administrative law judge (ALJ) ruled that the district had proved, by a preponderance of the evidence, that it had provided M.L. with a FAPE. The ALJ reasoned that the IDEA, 20 *U.S.C.* §§1400-1487, mandates that the education of a child with a disability be tailored to the unique needs of each child through an IEP which is a written plan that sets forth measurable annual goals and short-term objectives or benchmarks. It also must describe an integrated, sequential program of individually designed instructional activities and related services necessary to achieve the stated goals and objectives. The IDEA has a strong preference in favor of mainstreaming and educating a child in his/her own neighborhood school. A board must also educate a child in the LRE. Thus, it is the obligation of a school district to make an effort to provide a student with supplementary aids and services in order to accommodate him/her in the regular school environment. The requirements of both state and federal law have been met when a board provides an eligible child with an IEP including

sufficient support services to confer some educational benefit upon the child. The ultimate question to be resolved is whether an IEP offers a student an education designed to allow him/her to obtain a meaningful educational benefit with significant learning individualized to meet the child's needs.

Here, in only seven months, M.L. made significant progress in math, reading and comprehension. M.L. was receiving regular counseling services and was socially well-adjusted. The inclusion class acted as a benefit to M.L., but she was receiving education in a small setting where needed. The program represented an appropriate balance between personalized instruction and inclusion. Thus, the ALJ concluded that the district's program was appropriate, and it was not necessary to consider whether the program in which the petitioner had enrolled M.L. was appropriate.

Board's Motion for Summary Judgment Granted; Petition Seeking Reimbursement for Unilateral Placement Costs Dismissed

R.V. and R.V., on Behalf of M.V., Petitioners, v. Newton Board of Education, Respondent, EDS #9302-04 (March 4, 2005) [Decided by Stephen G. Weiss, ALJ].

The petitioners were seeking reimbursement for tuition and costs incurred when they unilaterally placed their son in a private school. The board made a motion for summary judgment stating that the proceeding should be dismissed due to the unreasonable delay in filing the petition following the unilateral placement. Specifically, the petitioners removed their son from the district in mid-September 2003, and did not file the due process petition until July 23, 2004—more than

22 months following the private school placement. The board argued that the delay was unreasonable. The petitioners are seeking reimbursement for all tuition costs associated with the unilateral placement, together with the transportation costs.

M.V. was classified as eligible for special education and related services. The district proposed an IEP in mid-June 2002. In September 2002, the petitioners enrolled their son in the Banyan School. The CST had recommended: (1) an extended school year program over the summer in a language class; (2) a specialized reading program; and (3) self-contained language and learning disabilities classes for academic instruction for the coming school year. The CST also recommended speech therapy four periods per week.

In early July, petitioners notified the board attorney that they would accept the summer program, but not the rest of the IEP. They advised that they would enroll their child in private school in the fall. The parents never requested a follow-up IEP meeting during the period July 1, 2002 through July 23, 2004. The board argues that the petitioners are not entitled to any relief because the unilateral placement occurred almost two years before the request for a due process hearing, and the current request is untimely. The district's Director of Special Services noted that petitioners had intended to place their child in private school in November of fifth grade, but did not do so when they learned that they would have to pay the transportation costs. The parties met in December 2001, and once again, the parents expressed their desire to place their child in private school. The district, however, continued expressing the view that it could meet M.V.'s needs.

In opposition to the district's motion, the petitioners claimed that there were genuine

issues of fact as to whether the IEP proposed by the board for the 2003-04 school year was appropriate and calculated to confer a meaningful educational benefit. The petitioners also assert that they complied with all of the notice requirements, and that any delay in filing the instant petition was due to "mitigating circumstances" and can be excused.

The petitioners contend that they gave the board sufficient notice, both orally and in writing, on several occasions, advising the district of their dissatisfaction with the proposed IEP and placement, and their intent to seek reimbursement for the private placement. The delay in filing the instant petition was due to the fact that the parties were engaged in serious settlement negotiations, and the petitioners reasonably believed that the matter could be resolved without the necessity for litigation. The petitioners' attorney wrote letters to the board advising that the petitioners were going to enroll their child in private school and would seek reimbursement from the board. The petitioners contend that they were constantly trying to work out a compromise and, therefore, they did not request a due process hearing for many months. The letters from the petitioners' attorney did declare the intent to file a petition if a settlement could not be reached.

The record indicated that, although there was correspondence from petitioners' attorney to the board attorney in March 2003, there was no follow-up correspondence from petitioners' attorney until late August 2003. In that letter, she stated that, although her clients were still willing to discuss settlement, it was imperative to receive an immediate answer because the matter could not be delayed indefinitely. It does not appear that any negotiations occurred between August 2003 and the filing of the petition in July 2004. A certification by petitioners' attorney did indicate that there had

been some telephone contact between the attorneys in addition to the correspondence. The petitioner's attorney went on maternity leave not long after she sent the August 2003 letter. When she returned to work in December 2003, she called the board attorney who responded that he would now have to review his notes and get back to her. A few weeks later, petitioners' attorney contacted the board attorney once again, and he advised her that he was having difficulty getting information because most of the district staff was on winter break. The petitioners' attorney kept contacting the board attorney by telephone through the balance of the winter and into the spring. The response was usually that the board attorney would check into the matter and get back to the petitioners' attorney. Later in the spring—March 23 and April 24, 2004, although the petitioners' attorney called the board attorney to discuss the matter, he did not return her telephone calls.

Contrary to petitioners' contentions, the board attorney indicated in his certification that any attempt to settle the matter was unilateral on the part of the petitioners. In addition, throughout the period of time that negotiations were allegedly occurring, petitioners were aware that they needed to resolve the question in a timely manner. The board attorney claims that his response was always that he would not consider any settlement involving reimbursement for tuition or transportation costs. He would only recommend a settlement that would contemplate a nuisance value.

The administrative law judge (ALJ) granted the board's motion for summary judgment and dismissed the petition. The ALJ reasoned that a 22-month delay between the unilateral placement of M.V. in a private school and the filing of the due process petition, was clearly unreasonable. The decision relied upon

Bernardsville Bd. of Educ. v. J.H., 42 F.3d 149 (3d Cir. 1994). Therein, the Third Circuit commented that due process review proceedings in connection with a unilateral placement, for which the petitioners are seeking reimbursement, must be initiated within a reasonable period of time of the placement. The Court explained that it thought that even more than one year without a mitigating excuse is an unreasonable delay. Although the courts never established a "bright line standard," it is accepted that whether a due process petition is considered untimely depends upon the circumstances. The current IDEA amendments, which took effect on July 1, 2005, established a two-year statute of limitations unless the state adopts a different time frame.

The ALJ found the delay to be unreasonable in this case. The circumstances described by petitioners to justify the delay are not sufficient. Whether the settlement discussions that did occur focused upon reimbursement of tuition costs, transportation costs, or both, is not relevant. The petitioners' attorney's letters themselves really indicate there was no reasonable expectation that a settlement was imminent so that the petitioners should delay the filing of a due process proceeding. There is always a time under such circumstances when potential litigants must either "fish" or "cut bait." The petitioners should have realized that no settlement would occur by the Spring of 2003. Petitioners then waited another 11 months before bringing the action. The kind of mitigation required by *Bernardsville*, given the totality of the circumstances, is lacking. The motion for summary judgment to dismiss the petition was granted.

Emergent Relief Granted; District Required to Maintain Status Quo for Student's Placement

M.M., on Behalf of J.M., Petitioners, v. Cranford Township Board of Education, Respondent, EDS #9078-04 (September 22, 2004) [Decided by Daniel B. McKeown, ALJ].

The petitioners filed a request for emergent relief seeking an order to require the district to immediately place their son, J.M., in an appropriate in-district placement. Certain facts were determined, but only for the purpose of a disposition on the motion for emergent relief. J.M. was diagnosed with a pervasive developmental disorder; he is 12½ years old. For the 2003-04 school year, J.M. was placed in a learning disabled class at the Hillside School. The class was staffed with a teacher for the handicapped and two aides. The students in the class were J.M. and another student. The IEP called for an extended-year program, and in accordance with the same, J.M. continued through the summer of 2004. The parents did agree to an out-of-district placement for the summer of 2004 only.

J.M. requires one-on-one assistance in eating; as a related service. The teacher for J.M.'s class was either not offered continued employment or resigned. The class itself was not continued for the following school year due to a lack of students. The assistant superintendent did indicate in testimony, however, that, had the teacher remained in the district, the class would have been continued for the following school year. The petitioners argued that J.M. has the right to a FAPE in the LRE, which would be in the class at Hillside. The board countered by stating that the Hillside placement was not appropriate. J.M. really requires an out-of-district placement.

The administrative law judge (ALJ) granted the petitioners' motion and ordered the board to assign a qualified teacher to the learning disabled class for the 2003-04 school year. The ALJ reasoned that a request for emergent relief must meet the following proofs: (1) the petitioner will suffer irreparable harm if the relief requested is denied; (2) the legal right underlying the petitioner's claim is settled; (3) there is a likelihood that the petitioner will prevail on the merits; and (4) balancing the equities between the parties, the petitioner will suffer greater harm than the respondent if the requested relief is not granted.

The ALJ also noted the importance of the "stay-put" provisions of the IDEA. In fact, where the stay-put provision comes into play, the petitioner is not held to the emergent relief standards. There is an absolute rule that, unless a placement is changed, the district must preserve the *status quo* unless the district can prove that there is a substantial likelihood that the student will do harm to him/herself or others. Here, no such showing was demonstrated by the district. Rather, the evidence offered demonstrates that the reason the class was eliminated was because the teacher did not remain employed by the district. The district did not provide any evidence that it made a reasoned decision to change J.M.'s placement. The ALJ granted the petitioner's motion and ordered the district to provide a qualified teacher for the class.

Petitioner's Application for Change to Full-Day Placement Program Denied

J.N., on Behalf of S.D., Petitioner, v. Toms River Regional Board of Education, Respondent, EDS #08107-048 (February 28, 2005) [Decided by Jeff S. Masin, ALJ].

S.D. is a four-year-old preschool disabled student. Her mother, J.N., requested a due

process proceeding to challenge her daughter's IEP for the spring of 2004. The petitioner asserts that the district is not providing her daughter with a FAPE.

S.D. is in a half-day, in-district program; however, her mother believes that she should be in a full-day program at the Children's Center of Monmouth County ("CCMC"). S.D. was born at 37 weeks and had several medical concerns including gross motor dysfunction, questionable genetic component, myopia, developmental delay, hypotonia, and repair of Grade V GU reflux.

Beginning in 2003, while in early intervention, S.D. received physical therapy once per week. At that time, S.D.'s level of educational performance was reported as low range. Her communication skills were considered to be moderately low range. Her daily living, socialization and motor skills were characterized as areas of relatively low strength. She was relatively strong in domestic skills and demonstrated good concentration and attention. She was in a 2.5 hour-per-day morning program in the district's preschool disabled program. The placement was heavily influenced by the child's limited vocabulary, pointing, one word utterances and her inability to comprehend language at an age-appropriate level. S.D. also received speech therapy as a related service, twice per week, in-class for 15 minutes each time.

In January 2004, the petitioner requested that her daughter be placed in the full-day program. The district advised the petitioner that it believed that it could appropriately meet her daughter's needs in the current half-day program. The petitioner claimed that the private evaluations that she had obtained from Children's Specialized Hospital (CSH) indicated that S.D. needed more physical therapy. In addition, due to S.D.'s developmental delays,

it was necessary to do everything possible to close the gap between her biological age and her developmental age.

The district presented testimony that S.D. was making good progress in her current placement. At the time that she first entered the program, she could not ride a tricycle, but could at the time this matter was heard. S.D.'s social skills were improving. The September 2004 IEP continued placement in a self-contained, in-district preschool disabled program with OT, PT and speech. S.D. receives adaptive physical education once per week; speech therapy for 30 minutes each day, and OT and PT twice per week for 20 minutes.

The district's speech pathologist testified that S.D. has improved in her expressive and receptive speech. The speech pathologist worked with S.D. in class. The in-class approach was the best way to get functional as opposed to contrived speech. S.D. was socializing with others in her class. She would initiate play. She began responding to two-step commands. She also made progress with quantity concepts, and began initiating speech. The speech and language evaluation conducted at the end of the 2004 school year, when S.D. was four years old, showed she was at 3.7 years of age for auditory comprehension. She was at 3.1 years of age for expressive communication, with a total language score of 3.3. These scores represented an improvement over the previous year's evaluation. The speech therapist recommended that S.D. continue in the same program for the following school year. As far as the parent's request for a full-day program, the speech therapist opined that children can only absorb "so much." She did not believe that a full-day program was the best approach.

Another district witness, Ms. Wynn, a speech and language specialist who works with children with apraxia, stated that S.D. was

making adequate progress. More school hours would not assist her in making further progress.

S.D.'s preschool teacher, Ms. Cranston, stated that S.D.'s fine motor skills were improving, and that she could now say her own name and the teacher's name. S.D. can now socialize spontaneously, knows the refrains to some of her favorite songs, and responds to and initiates greetings. As far as full-day program is concerned, Ms. Cranston does not believe that more is necessarily better, and that the current placement is educationally appropriate.

Lynn Chodos, Supervisor of Outreach for CCMC, testified as an expert in speech pathology. After an evaluation, she rendered a report noting that S.D. functioned well in class and was extremely focused and responsive during the 30 minute circle time. She could not say that she agrees that S.D. would benefit more from a full-day program. She concurred that S.D. is making progress.

The petitioner testified that she does not believe that her daughter has progressed with the Tom's River program, but only due to the private services she has provided. The actual instruction time in the half-day program is significantly less than 2.5 hours. A full-day program would give S.D. more academic time and more opportunity for repetition. The petitioner says that her daughter makes fleeting eye contact and needs redirection.

The petitioner's speech specialist recommended a full-day program. She opined that S.D. should have five sessions per week of intensive individual speech, language and or oral motor/feeding therapy for 30 minutes, and one or two group sessions per week. This witness believed that the in-district program does not present enough communication activity during circle time. She also believed that S.D. needs more opportunity for repetition

during the school day. S.D. should be enrolled in a full-day program because she is being pulled out for various therapy sessions. Thus, the district does not have adequate time to address S.D.'s needs in the manner and intensity required. The gain in language development in the current program is small.

The administrative law judge (ALJ) ruled that S.D. has achieved measurable and significant progress in her current placement and denied the petitioner's request for a change in placement. The board bears the burden of demonstrating that a placement is appropriate to meet the specific needs of the student. The IDEA requires that the board provide an education that is meaningful rather than merely trivial. The ALJ noted that S.D. has made progress since she first entered the program in the 2003-04 school year. At that time, she had no ability to speak. Her testing shows that she progressed from a developmental age of two years and ten months to four years. Her age equivalence went from 2.0 to 3.7 years and her expressive communication went from 1.11 to 3.1. In addition, the education is being provided in the LRE. There is often a natural clash between what every parent wants desperately for their child—which is the best opportunity to maximize their child's potential, and the opportunity the law mandates which is to provide an education that is meaningful or beneficial. S.D.'s overall potential to achieve educationally is uncertain. It is still unknown whether S.D. is mentally retarded, and thus, there is uncertainty as to whether she will be able to close the gap.

The argument in favor of a full-day program is that it will give S.D. more opportunity for constant repetition. There was some question in the minds of the educators as to whether other factors involved would be helpful such as a longer bus ride. In addition, the question for

determination here is not whether she will gain more from the full-day program; the legal standard does not require a school district to provide the best, but an opportunity to obtain meaningful progress. S.D. has achieved meaningful progress in her current program and placement, therefore, the district has provided a FAPE. Accordingly, the petition was dismissed.

District Ordered to Reinstate Student for Failure to Hold Manifestation Hearing

L.U., on Behalf of A.P., Petitioners, v. Township of Pemberton Board of Education, Respondent, EDS #566-05 (February 15, 2005) [Decided by Donald J. Stein, ALJ].

The petitioner filed this action challenging A.P.'s removal from school for more than ten days on the grounds that removal constituted a change in placement. The district claimed that because A.P. was disciplined for illegal drug use, and/or refusal to submit to a drug test, the district had the right to change the student's placement for a period of up to 45 days.

A.P. was born in 1988, and classified as multiply disabled. She has poor developmental skills in her interactions with adult authority figures, which may be the reason for her poor performance. She had been suspended about five times prior to January 2005.

The district had adopted a comprehensive substance abuse policy. On January 4, 2005, A.P. was observed smoking pot before the commencement of the school day. The student assistance counselor also directly heard some "snorting" as she entered the bathroom looking for A.P. The counselor also observed behavior that indicated that A.P. was under the influence of drugs. A.P. was asked to submit to a drug

test and refused. As a result, A.P. was suspended for ten days. A manifestation determination held after this incident indicated that A.P.'s drug use and refusal to submit to a drug test was not a manifestation of her disability. A.P. returned to school five days after she became eligible due to her failure to submit a medical report indicating that she was fit to return to school.

On January 24, 2005, A.P. again was observed smoking in the bathroom, she behaved as though she was under the influence of drugs, and she refused to submit to a drug test. Because this was a second offense, A.P. was suspended for 20 days in accordance with the district's policy. A manifestation conference was scheduled, but the petitioner refused to participate, and the district adjourned the conference.

The administrative law judge (ALJ) held that, because the district failed to conduct a manifestation hearing, A.P. must immediately be returned to school. The ALJ reasoned that *N.J.A.C. 1:6A-12.1(e)* permits a judge to order emergent relief when: (1) petitioner will suffer irreparable harm if the relief is not granted; (2) the right underlying the petitioner's claim is settled; (3) petitioner is likely to succeed on the merits; and (4) after balancing the equities, the petitioner will suffer greater harm than the respondent if the relief is not granted.

The removal of A.P. from school could amount to disciplinary action and still may be considered a change in placement for which there must be a manifestation determination prior to the change in placement. A district can remove of a child with a disability from their regular educational program for up to ten days, but must make a manifestation determination any time it considers removing a disabled child from his/her placement for more than ten days in a given school year. The IEP team can make

a determination that the behavior which led to the discipline is not a manifestation of the disability if, in relation to the behavior: (1) the IEP services and behavior intervention strategies are being implemented; (2) the child's disability does not impair the child's ability to understand the impact and consequences of the behavior; (3) the disability did not impair the child's ability to control the behavior; or (4) the IEP and placement are appropriate.

Here, there is no dispute between the parties that the district did not conduct a manifestation hearing. Accordingly, the child must immediately return to school. The ALJ also ordered the district to develop a behavioral assessment plan and behavioral intervention plan. The district was also ordered to provide a psychological evaluation with a drug-use component since the evidence suggests that the student may be involved with drugs. The parties were to agree upon the provision of compensatory education.

Board Ordered to Reimburse Tuition Costs for Unilateral Placement of Student with Asperger Syndrome in Unaccredited, Out-of-District Placement

D.C. and J.P., on behalf of K.C., Petitioners, v. Lawrence Township Board of Education, Respondent, EDS No. 50-04 (December 29, 2004). [Decided by Donald J. Stein, ALJ]

K.C., a fifteen-year-old classified student, is diagnosed as suffering from Asperger Syndrome, ADHD, Obsessive Compulsive Disorder, fine motor delays, verbal expression disability, and scoliosis. When K.C. entered elementary school, she was placed in mainstream classes with a one-on-one aide. Although K.C. did relatively well from an

academic standpoint, she suffered socially and emotionally—she had no friends, suffered from anxiety, and engaged in various types of compulsive behavior in the classroom.

Following the sixth grade, K.C. was transitioned into a middle school, and the program of mainstreaming with a one-on-one aide continued. The transition for K.C. into the seventh and eighth grades was terrible. Her behavior at home deteriorated; she was nervous and anxious. She did not sleep well, and had difficulty waking up and arriving to school on time. In class, K.C. would engage in various obsessive-compulsive behaviors. She would panic and get nervous about tests and projects.

On January 10, 2003, during K.C.'s eighth-grade year, a meeting was held to discuss an appropriate placement for K.C.'s ninth-grade year. K.C.'s mother called dozens of schools and K.C.'s records were sent to three different schools. However, K.C. was only accepted at Woodcliff Academy. After visiting the school, K.C.'s parents rejected Woodcliff Academy for a number of reasons. First, the school was for emotionally disturbed children. In addition, K.C. would be the only girl in her class, and the most well-behaved. Moreover, the school was 50 to 60 miles away from their home, and K.C.'s orthopedist advised against her traveling on a bus for more than 29 minutes because of her scoliosis.

On April 15, 2003, another meeting was held to discuss K.C.'s ninth-grade placement. At the meeting, the CST agreed that the district's high school and Woodcliff Academy were not appropriate placements for K.C. However, no other alternatives were proposed.

K.C.'s mother was then referred to Dr. Barron-Seabrook, a psychiatrist and expert in educational programming for students with disabilities. Dr. Seabrook recommended that

K.C. attend a small, structured, non-competitive school with an enriched academic curriculum.

K.C.'s mother then placed K.C. at the Lewis School's summer program for the purpose of seeing if the school would be an appropriate placement. K.C. did very well at the school and fit in with the other students. The school had a structured environment with individual attention. Therefore, K.C.'s parents enrolled her in the Lewis School and informed K.C.'s case manager in the district of their decision.

In July 2003, an IEP meeting was held, and the CST proposed an in-district placement at the high school. The proposed IEP included a full-time teacher for in-class support, meaning that a regular teacher and a special education teacher would co-teach certain classes. In addition, K.C. would be given a one-on-one aide and additional time to complete tests. The case manager would also have bi-weekly meetings with K.C.'s teachers.

K.C.'s parents rejected the proposed IEP, and K.C. began attending the Lewis School. On November 26, 2003, they filed a due process petition, alleging that the IEP failed to provide a FAPE, and they requested tuition reimbursement.

At the hearing, three witnesses testified on behalf of the board—the school psychologist, K.C.'s eighth-grade social studies teacher, and a LDTC. The school psychologist testified that he visited the Lewis School but was concerned about its appropriateness because it was not approved by the New Jersey Department of Education as a school for students with disabilities. He did not believe the school would serve K.C.'s needs because it specialized in handling students with learning and reading disabilities.

K.C.'s social studies teacher testified that K.C. got an "A" in the first semester and a "B"

in the second, and was graded in comparison to other students. K.C. was the only student with an aide, and the aide helped her keep her focus and concentration. He testified that other students tolerated K.C. but they did not socialize with her.

The district's LDTC was qualified as an expert in the evaluation of children with learning disabilities. She prepared an educational evaluation report on K.C., and concluded that K.C. was a bright child, and despite deficiencies in math, writing, and visual motor skills, she should be able to succeed academically.

Four witnesses (K.C.'s mother, Dr. Charles Martinson, Ann Holmes, and Dr. Sherry Barron-Seabrook) testified on K.C.'s behalf. K.C.'s mother testified that K.C.'s behavior improved at the Lewis School, she was no longer exhibiting obsessive compulsive behavior, and her anxiety was gone. K.C. also began to socialize with other students; she was making eye contact and was participating in extracurricular activities. K.C.'s mother also testified that K.C. was being academically challenged and could do her homework on her own.

Dr. Martinson, a qualified expert in psychology and program development for disabled children, testified that a conventional high school mainstream placement would be "disastrous" for K.C. He testified that she needs a small, highly structured environment. In his opinion, the ninth-grade IEP would "sabotage her" and leave her with no autonomy since it required mainstreaming with a one-to-one aide and a special education teacher. Dr. Martinson observed positive changes in K.C.'s behavior since she attended the Lewis School, including better social skills, participation in extracurricular activities, and she was no longer displaying nervous tics.

Ms. Holmes, the Director of Outreach and Support Services at Eden Family Services, was qualified as an expert in developing programs for children diagnosed with Asperger Syndrome. She met with the CST in April 2003, and did not believe the IEP in the high school would be appropriate. She concluded that K.C. needed a small classroom with frequent teacher support. She observed K.C. in April 2004 at the Lewis School and found that she was doing quite well. She ultimately concluded that the Lewis School was the appropriate placement for K.C.

Dr. Barron-Seabrook was the final witness. She testified that she evaluated K.C. in July 2003 and concluded that K.C. suffered from PDD, Asperger Syndrome, ADHD, Obsessive-Compulsive Disorder, and scoliosis. She determined that K.C. would be better off in a smaller, more nurturing environment and that it would be inappropriate for K.C. to have an aide in high school. She re-evaluated K.C. in July 2004, and noticed that K.C. had improved.

The ALJ framed the issues to be determined as whether the district offered K.C. a FAPE in the LRE and, if not, whether K.C.'s parents acted reasonably in placing her at the Lewis School. The ALJ explained that, when parents challenge the appropriateness of an IEP, the

district must show, by a preponderance of the evidence, that the IEP actually offered provides the child with a personalized educational program and sufficient services to confer some educational benefit.

Based on the testimony and exhibits presented, the ALJ determined that the district failed to demonstrate that the ninth-grade IEP provided K.C. with a FAPE in the LRE. The ALJ did not believe that K.C. should be placed in a mainstream setting with an aide and special education teacher. The ALJ found that the petitioners demonstrated that the Lewis School provided K.C. with a FAPE in the LRE.

Citing *School Comm. of Burlington v. Department of Educ. of Mass.*, 471 U.S. 359 (1985) and *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238 (3d Cir. 1999), the ALJ explained that parents are entitled to reimbursement for the cost of the unilateral placement if the district's program is inappropriate, and the parental placement is appropriate and made in good faith even if it is more restrictive. In this case, the ALJ found that K.C.'s parents were entitled to reimbursement of the tuition they paid to the Lewis School. In addition, he ordered the board to reimburse the parents for transportation expenses and reasonable attorney's fees and costs.

address all comments and questions to

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