JS v. Livingston Board of Education

Office of Administrative Law

90-3550

April 28, 1992

George Perselay., Administrative Law Judge

Counsel for Student: Theodore A. Sussan, Esq.

Counsel for Board of Education: James S. Rothschild, Jr., Esq. (Riker, Danzig, Scherer, Hyland & Perretti, Attorneys).

Statement of the Case

J.S., born August 27, 1989, was classified perceptually impaired by the respondent Livingston Board of Education on or about June 15, 1987, when he had completed first grade. J.S. attended the second grade at the grammar school of the respondent Board of Education until on or about December 23, 1987, which was the commencement of the Christmas vacation. J.S. did not return to that class in January 1988, but did attend the Winston School, a private school in Summit, New Jersey.

By letter dated November 20, 1989, T.S., mother of J.S., wrote to the respondent school system requesting that the respondent assume responsibility for "my son's yearly tuition at the Winston School in Summit, New Jersey." She based the request on *L.* 1989. *c.* 152, Assembly Bill 3122, more commonly known as the "Naples Bill" (*N.J.S.A.* 18A:46-14), which provides for educational placement of special-education pupils.

After the request for reimbursement, the parties cooperated in the total evaluation of J.S. and agreed upon a classification of neurologically impaired, but they were unable to agree upon an individualized education program (IEP) and a placement in which such program was to be conducted. The petitioner requested mediation by letter dated June 14, 1990, received June 18, 1990 by the branch of special education and pupil services of the State Department of Education. The parties attempted to reach agreement. Counsel for the petitioner requested a due-process hearing by letter dated August 28, 1990, received at the Bureau of Programs and Services on August 30, 1990.

In accordance with 20 *U.S.C.A.* § 1415 and 34 *C.F.R.* § 300.500 *et seq.,* the Commissioner of Education requested that an Administrative Law Judge be assigned to conduct a hearing in this matter. The undersigned was assigned by the Director of the Office of Administrative Law (OAL), pursuant to her powers under *N.J.S.A.* 52:14F-so to hear this matter. Hearings were held November 7, 1990; November 16, 1990; November 20, 1990; December 21, 1990; January 15, 1991; and February 8, 1991.

The issues to be determined in this matter are:

1. Was the IEP for the school year 1987-1988 appropriate for J.S.?

2. Was the parent's removal of J.S. from the respondent school system in January 1988 justified?

3. Is the parent entitled to reimbursement for tuition and related services in a State nonapproved private school for learning-disabled children?

4. What is the appropriate placement in which an IEP for J.S. may be delivered at the present time?

It is without dispute that J.S. is a learning-disabled child suffering from attention deficit disorder and/or attention deficit hyperactive disorder. His disability was known in kindergarten. The respondent chose a first-grade teacher with long experience and with sufficient training and understanding to handle J.S. in his first-year class. It is conceded by all parties that midway through the first grade, J.S.'s performance was deteriorating rapidly. His parents had seen a private counsellor (psychologist), who was treating J.S. on a weekly basis. J.S. remained unclassified through the end of the first grade.

The parents had J.S. evaluated by the Laurie Institute at Robert Wood Johnson Hospital, New Brunswick, New Jersey. Generally, the evaluation was that J.S. was impulsive, aggressive, and had difficulty in attention span, organization, and self-control. He was weak in fine motor coordination manipulation, auditory processing, and in his ability to discriminate. He had handwriting difficulties. Everybody was aware of his superior range of intelligence.

J.S. was on a Ritalin therapy. The affects of such therapy varied. He was from time-to-time exercising good self-control and at other times had problems with attention difficulty and self-control. Some days he was "off the walls and not held by limited dosages of Ritalin" and on

others unable to do any work or was very distractible and nonattendant to tasks.

In May 1987, the parent referred J.S. to the child-study team (CST). The parents stated that J.S. had been diagnosed as having attention deficit disorder and further stated, "He cannot function independently in a classroom without *constant* teacher attention. He is very bright but not working to his capabilities. He is on medication. He can become a behavior problem."

The CST accepted the Laurie Institute reports in June 1987 and updated the social history. The CST classified J.S. as "perceptually impaired" and formulated an individualized education plan on June 15, 1987.

The IEP was stated as follows:

J.S. will be in a regular second grade class for the 87-88 school year. He will go to the resource room for his independent work time up to one hour daily as scheduling and programming permit. An occupational therapy evaluation will take place in the fall. His need for a continuation of speech and language services will be assessed in the fall.

The program and related services were implemented by providing that a letter grade must reflect the achievement of J.S. in relation to the IEP's expected level of performance and would not necessarily be an indicator of the grade-level standard. The teachers were to take J.'s learning characteristics into consideration for instruction and grading in all academic areas.

The IEP was amended on December 7, 1987 to reduce the amount of written work of a routine or practice nature. Work of a concept nature was not reduced and J.S. was to bring seat work and unfinished class assignments to the resource room. The resource-room teacher was to help J.S. organize and focus his attention on his work and monitor completion of his modified work load. His report-card grades were not to be lowered due to the modification of his assignments.

The amendment also provided that he would receive occupational therapy as of December 9, 1987 and that the parent would provide the school with social-skills guidelines each Monday.

It was recognized that J.S. required occupational therapy. The respondent school system was unable to provide such therapy because of the resignation of the occupational therapist and its inability to employ another within the school system. The respondent

sought such services from Saint Barnabas Hospital and an educational consortium, but its efforts to obtain such occupational therapy services were unsuccessful. The parent, by her own resources, was able to obtain occupational therapy services in early December 1987.

J.S. did not return to the respondent school system after the holiday break which commenced on December 23, 1987. He was enrolled in the Winston School, Summit, New Jersey, a small private learning institution, approved by the mid-Atlantic states but not approved for special education by the New Jersey State Department of Education. He has remained a student in that school through the hearing to the present time.

It should be noted that the amendment to the IEP was at the suggestion of the parent. During the September to December session of the 1987 school year, J.S. continued to perform in an erratic manner. The petitioner questions the provisions of the IEP referring J.S. to the resource room for his independent work up to one hour daily as *scheduling and programming permit.* The argument made was that there was no definite commitment. I am satisfied that the language which is underlined resulted from a previous IEP for another student which created difficulty for the respondent special-services program. I am further satisfied from the testimony of Ms. Patricia Swanson, learning-disabilities teacher consultant (LDTC), that J.S. received his resource room on a daily basis.

The IEP set forth that such resource-room time was for J.S.'s independent work time. It was utilized for J.S. to do his seat work and other written assignments. The resource-room teacher stated that she spent approximately 8 to 10 minutes with J.S. explaining his work assignments for that resource-room period, made certain that he understood what he was to do, and then left him in a "carrel" where he was to perform his work while she attended to other children in the resource room. She was able to monitor J.S.'s attention to tasks and was able to speak to him to redirect his attention to tasks when he wandered.

***N.J.A.C.* 6:28-4.3(b) reads:**

Resource room programs shall be instructional centers offering individual and small group instruction in place of regular classroom instruction, based on curriculum adopted by the board of education.

The regulation then sets out separate criteria for resource-rooms. Between supplemental instruction and resource-room programs, it is

readily apparent that the resource room is the more structured program intended by the Department of Education.

The resource-room teacher must hold certification as a teacher of the handicapped or teacher of the blind or partially-sighted or teacher of the deaf or hard of hearing. Types of resource-room programs are divided into single handicapped, mixed handicapped, and open programs. Both supplementary instruction and resource programs are limited to five pupils.

While no doubt well-intentioned, the resource-room program for J.S. constituted nothing more than providing a monitor for whom J.S. did his required work. I am not aware of any testimony that set forth any affirmative learning program for J.S. in the resource room. A resource-room program is more highly structured and intended to be the more intensive program than supplementary instruction. It appears to this Administrative Law Judge that no matter how well-intentioned, the resource program for J.S. was misdirected. The resource room was for him to complete his seat assignments and written classwork within the normal school hours.

Of course, by attending the resource room, J.S. necessarily misses the classroom participation and subjects being taught and discussed during the period in which he was absent from the classroom.

It was the intention of the respondent CST to provide J.S. with an education in the least-restrictive environment. They anticipated that mainstream participation with a resource-room period would serve his unique educational needs. J.S. was placed by the second-grade teacher in the third reading group not because he was a poor reader, but because it was her opinion that he would be unable to do and complete the heavier writing assignments which were placed upon the students in the higher reading groups. The LDTC thought it better for J.S. to be successful in the lowest reading group than to have difficulty in a higher group. I am satisfied that this was a recognition of his motor deficiencies for which he was entitled to occupational therapy but which he was not receiving because of the lack of availability of such therapists. Eventually, the parents suggested an upgrade of reading groups, which was accomplished by the amendment to the IEP of December 7, 1987.

There was testimony that J.S. was placed in the hall, which was described as the entryway to the classroom and "an extension of the classroom," to complete his written work. The respondent argued that such placement was intended to provide an appropriate learning environment within which he could finish his incomplete work. Such

placement removed the child from the mainstream classroom and denied him the benefit of the class program, class discussion, and subject-matter education for a learning experience which his peers would experience.

J.S.'s self-control and discipline continued to be a problem. In early December 1987, his behavioral problems culminated in a situation where, after lunch, while playing in the playground, he took several jackets of other children, which had been removed by those children because of the temperature and climate, and threw them in a puddle on the playground. The school principal advised the parent that J.S. would not be permitted on the playground for the remainder of the week and, when questioned by the parent as to how such disallowal would be accomplished, the school principal explained that they had a "bad kids table" in the cafeteria and children who were not allowed on the playground had to sit at that table.

The parent objected, stating that J.S. had already been identified as a "bad" student, and she felt that placing J.S. at this table would only serve to alert the remaining staff and students of his misbehavior. The parent expressed the opinion that J.S. would be unable to remain seated at the table for any considerable period of time and that such discipline would result in further inappropriate behavior. The parent did not object to appropriate discipline for J.S.

When called upon to reconsider such discipline, the principal of the school became irate and angry. The parent reached out to Patricia Swanson, and she made inquiry of the principal, only to state that he was resolute and that she had never seen him so angry and determined.

The parent brought Dr. Tobias, who had been J.S.'s counsellor, into the fray and the principal relented. An accommodation was made for J.S. to spend disciplinary time in the office of the school nurse, which served as a reasonable alternative to the deprivation of free, unrestricted playground enjoyment.

I was impressed with the school personnel presented by the respondent. The teachers and specialists exhibited great interest, dedication, enthusiasm, and self-confidence in their ability to provide a free and appropriate public education for J.S. from which he could attain educational success in learning. Their knowledge and understanding of the needs of this special-education student was enthusiastically conveyed to this ALJ.

Significantly, it was the parent who took matters into he own control. "Mom" made the CST referral. I recognize the pain, guilt, fears, and the heartache such a determination impacts on the parent. *She* did it, she made the referral, she recognized the learning disabilities of her child, and she sought help for J.S.

The parents' action is at the heart of this case. The mother was concerned. She knew her child and was aware on a daily basis of his learning problems. She testified to his erratic behavior while lining up to enter school. When picking J.S. up at the end of his school day, she feared the beckoning finger of the kindergarten teacher on an almost daily basis to learn of J.'s undisciplined episodes of the day. The mother had to keep J.S. in the car until most of the students had entered the building. Then she would walk him into the building. If she did not contain him in that manner, J.S. was subject to the whims and suggestions of older students who encouraged him to misbehave.

The youngster's conduct was self-evident to his teachers and the school nurse. The learning-disabilities teacher consultant was keenly aware of J.S., had chosen the first-grade teacher because of her experience and abilities, and kept a special eye on his educational progress during the year.

The child's lack of self-control, attention to task, completion of work assignments, and educational disabilities have been well-documented in the records. Did any of the respondent's specialists or teachers suggest referral for special-education needs to the parent? Perhaps. Was J.S. referred by the respondent? The answer is in the negative.

It was the parent who became more aware of her child's needs as a result of a continuing interest into the (to her) unknown reality of special education. The respondent refers to the parent as a knowledgeable person in this field who is active in several parent organizations. After parental referral to the CST, the respondent accepted the evaluations undertaken by the parent's cost and expense.

J.S. was classified perceptually impaired as suggested in the evaluation. A mainstream placement with resource room was implemented for the 1987-1988 second-grade year.

Of significance in the referral, classification, and IEP preparation was the failure of the first-grade teacher to be invited to participate. Who had the most recent educational experience with J.S.? Who was aware of his most recent classroom behavior? The most recent teacher, of long experience and who was chosen as the teacher perhaps best able to assist J.S. in achieving success in learning (I have omitted the word

"best"), was not invited to attend and contribute to his IEP. That teacher may have made a significant contribution to the classification and program process. Conversely, she may not have done so. *N.J.A.C.* 6:28-2.3(h)1ii provides that a teacher having knowledge of the pupil's educational performance *shall* be present at meetings to "determine eligibility and to develop, review and revise" the basic plan of a pupil's IEP. *See New York City School District Bd. of Ed.,* 18 *IDELR* 501 (1991); 34 *C.F.R.* § 300.344(a)(2).

The regulations used the term "shall." The word "shall" in legislation, in this case *regulation,* is presumptively mandatory. *Shall* is generally construed in an imperative as opposed to a directory sense. Any other sense of intent must be derived from the wording of the statute or regulation. A reading of *N.J.A.C.* 6:28-2.3 reflects a clear intent of the mandatory. *See Sutherland Statutory Construction* § 57 (4th Ed.); 82 *C.J.S., Statutes,* § 380; *State v. Duva,* 192 *N.J. Super.* 418 (Law Div. 1983).

It may be argued that the LDTC was present at all meetings and she fulfilled the definition of teacher. There is little doubt the LDTC was a close monitor of J.S. and his progress, conduct, and needs.

A discussion of this case requires a two-part determination. First, those events leading to the parent's removal of the child from the respondent's school system in December 1987. The second approach must necessarily deal with those events which transpired and occurred subsequent to November 20, 1989, when the parent requested assumption of tuition reimbursement under the provisions of *N.J.S.A.* 18A:46-14, commonly known as "the Naples Act."

This case has proceeded as a Naples Act case. Let me state that I do not consider this case to be appropriate under *N.J.S.A.* 18A:46-14, as it applies to a private-school placement not approved by the State. I reach this determination upon my reading of *N.J.S.A.* 18A:46-14, which requires a cascade of placements. Placement in a suitable educational program most appropriate for the child in an academic program in an accredited nonpublic school within or without the State is available as an alternative if the prior alternatives do not fit the particular situation. That determination must be made by the CST and submitted to the Commissioner of Education for his consent.

There are conditions attached as to the school being nonsectarian and not necessarily approved for the education of handicapped pupils. The Commissioner of Education, by regulation, has delegated the determination under that statute for such nonsectarian, nonpublic school placement to the Office of Administrative Law (OAL). Such

private placement can be made only when it is "impractical" to provide services pursuant to the cascade of services set forth in the first seven paragraphs of the statute.

In my opinion, this is a case which must be determined in accordance with the holdings in *Burlington School Committee v. Massachusetts Department of Education,* 471 *U.S.* 359, 85 *L.Ed.*2d 385, (1985) which held that parents who believe the education offered by the public school is inappropriate may unilaterally place their child in a private school and are entitled to reimbursement from the district for tuition and expenses, if it is subsequently determined that the public school system failed to comply with its statutory duties and the private school provided an appropriate education.

A sub-issue in this case, under *Burlington, supra,* is whether placement in a private school not approved by the State is a bar to reimbursement under the Individuals with Disabilities Education Act (formerly, the Education of the Handicapped Act), 20 *U.S.C.A.* § 1400 *et seq.*

After the petitioner's request for reimbursement, the respondent proposed three possible placements for J.S. A proposed placement in a self-contained, perceptually-impaired program in Harding Township was deemed inappropriate for J.S. when the director of the program expressed his opinion that the program was inappropriate for J.S.

A second suggested placement was a self-contained class at a Township of Millburn School. The school personnel required J.S. to be interviewed to determine his acceptability into their program. The parents did not wish to subject J.S. to a possible rejection for whatever reason, thereby avoiding any negative impact on J.S. The respondent district agreed.

The third proposed placement was a self-contained, neurologically-impaired class at the respondent's Riker Hill School which consisted of nine students, compatible to J.S. in age and ability. The teacher was assisted by a full-time aide. This class may well have been an appropriate placement for J.S. except for the short period of time in which he would have been in the class, and there being no future program and placement after the completion of the school year in June 1991.

An underlying issue in this case is the appropriateness of the proposed placement following the parent's request for reimbursement of tuition and expenses. Unfortunately, the parties, in the opinion of this Administrative Law Judge, lost sight of the forest for the trees. More than six months elapsed between the November 20, 1989 letter request

and the parent's request for mediation to the State Department of Education, Division of Special Education. This time period consumed the school year of 1989-1990. Subsequent to the request for mediation, approximately three months elapsed before the parents requested a due-process hearing on August 28, 1990. The intervening nine months between the initiation of this action on November 20, 1989 and the request for due process placed in jeopardy the appropriate placement and IEP for J.S. for the school year 1990-1991. Indeed, the initial date set for hearing was adjourned at the request of the respondent and the subsequent hearing dates consumed the first semester and two months of the second semester of the 1990-1991 school year. An on-time decision by this Administrative Law Judge would have left approximately three months of placement at the Riker Hill School, the choice of the respondent as an appropriate placement for J.S., if this ALJ were of the opinion that such placement was the appropriate placement for J.S.

Complicating the three-month placement in a neurologically-impaired self-contained class at Riker Hill was the circumstance that Riker Hill was a kindergarten to grade 5 school, and J.S. would have been required to attend a middle-school placement upon completion of the school year in June 1991. Such middle-school placement would have been a second disruption to J.S.'s educational environment, the impact of which is necessarily speculative. However, considering his three and one-half years at the Winston School, it would have been a significant and sufficient disturbance of his educational environment. This situation is further complicated by the lack of any evidence as to the IEP and placement in which that IEP would be conducted in the sixth grade.

In a sense, the hearing in this matter was shortsighted. The parties became involved in placement without consideration for the succeeding school year. This undoubtedly was a result of the extended discussions and inability to agree upon a program and a placement after nine months of negotiation between the parties. It is unfortunate because I have no basis upon which to rule on placement. The respondent's middle school may be the appropriate facility in which J.S. could achieve success in learning and obtain an educational benefit from the program offered. To be certain, attendance at the middle school is necessarily attendance at a larger school facility, with more students, since the middle school becomes the focal point of all fifth graders in the respondent school system.

Would a three-month placement have been a proper adjustment for J.S.?

There is little doubt that the self-contained classroom teacher and the principal of the Riker Hill School are dedicated, qualified, and committed to the programs for the learning disabled. I am satisfied that the respondent produced sufficient evidence that in 1991 it could provide an appropriate education for the remainder of the year. It is not my intention to denigrate in any manner the special-education program of the respondent.

However, it is the interruption of J.S.'s routine which he has enjoyed for three and one-half years which bears comment. He would move from a small school dedicated to children with learning disabilities, which had approximately 28 students in all grades, to a self-contained class of nine children in a much larger school with a much greater student population. He would have gone from his school, where all students were entreated to proper and appropriate behavior programs and where his behavioral conduct was easily observed, to a school where playground would have subjected him to a large school population. Much was made of the tension which would be present during playground activities and the manner in which he would be observed.

The Winston School provides a total environment for the learning-disabled students. In essence, it is a self-contained school as compared to a self-contained class.

It is the opinion of this Administrative Law Judge that the transition to Riker Hill School for such a short period of time would have been detrimental to J.S. The transfer would have required a major adjustment by J.S. to the change in routine, finding of friends, and adjusting to the teacher. Furthermore, by the time he settled in, the end of the school year would have arrived, thereby leaving him to think for himself in a larger school environment, a change of teachers, and once again adjusting to new friendships and environment.

We must consider the decision by the parents in removing J.S. from the public school system of the respondent and placing him in the Winston School. Did the parents act improvidently because the respondent was providing a free and appropriate education to J.S.? Did the parents act because they reasonably believed that the respondent was not providing a free and appropriate education to J.S.?

The nature of J.S.'s conduct in school was known through kindergarten and first grade. Indeed, the respondent's experts and teachers were aware of J.S.'s failures, his lack of attention, and his inability to perform in accordance with his measured range of intelligence.

This all occurred prior to December 1987. At that time, it was the respondent's responsibility to provide an educational program in which the student could "best achieve success in learning." ***Geis v. Bd. of Ed., Parsippany-Troy Hills,*** **774** ***F.2d*** **575, 582 (3rd Cir. 1985). The basic obligation to provide a handicapped child with a free appropriate education is placed on the local school district (the respondent). It is the district which must identify handicapped children and then formulate and implement their IEP's. In New Jersey, the burden is on the school district, the respondent, to prove that the IEP and placement are appropriate. That burden does not shift. The parents' obligation in a due-process hearing is merely to place in issue the appropriateness of the program.** ***Lascari v. Bd. of Ed.,*** **116** ***N.J.*** **30, 43-44 (1989).**

Lascari, supra, **determined that the burden of persuasion and of production should be placed on the party better able to meet those burdens. It determined that the school board, with recourse to the CST and other experts, has ready access to the expertise needed to formulate an IEP.**

While today New Jersey abides by the federal concept of providing an IEP for a handicapped student that provides an education from which the child could benefit, prior to amendments to the regulations appearing in ***N.J.A.C.*** **6:28-1** ***et seq.*** **(May 1989), New Jersey used the terminology "could best achieve success in learning."** ***Geis, supra.*** **The significant events which changed J.S.'s educational placement and program took place in December 1987. Accordingly, the test which must be applied under the law at that time, according to** ***Geis,*** **was whether the program developed by the respondent enabled J.S. to best achieve success in learning.**

I am mindful that the ***Lascari*** **court did not decide the New Jersey standard prior to the May 1989 amendments to the regulations. The Department of Education stated that it had always abided by the Federal standard of acquiring an educational benefit and did not impose a higher standard. Did J.S. receive an educational benefit from the IEP? This must necessarily be reviewed in light of his superior range of intelligence.**

We deal here with a child who functions in the superior range of intelligence and who has been described by teachers in both schools as a terribly creative youngster with a wonderful imagination. J.S. possessed an exhibited all of the difficulties and learning problems of a child suffering from an attention deficit disorder: short attention span, lack of attention, freedom of movement, inability to abide by instructions, and inability to attend to tasks, together with other

learning problems which he manifested. Thus condition was well known to the experts on the child study team.

***Lascari, supra,* discusses the shortcomings which rendered an IEP incapable of review, thereby rendering it inappropriate. In reviewing the IEP from which J.S. was extracted at the end of the first semester in 1987, it is apparent that most, if not all, goals and objectives were subjectively based.**

The first annual goal set forth on page 4 of the IEP deals with instructional area behavior/effective.

The goal "to improve adaptive controls and performance to a significant degree."

The objectives are:

The student will develop a greater sense of responsibility and initiative and will reduce dependence on others for reinforcement.

The student will take a greater role in organizing and monitoring his own academic functioning.

The student will decrease avoidance techniques.

The student will begin independent classroom assignments more quickly.

The student will complete classroom assignments within the time periods provided.

Of the foregoing objectives, the only objective truly measurable is the completion of classroom assignments within the time periods provided. The remaining objectives and the annual goal are necessarily subjective determinations by those persons who may attempt to measure "a significant degree," "a greater sense of responsibility," "a greater role in organizing and monitoring," "in decreasing avoidance techniques," and "beginning independent classroom assignments more quickly."

The evaluation provides for teacher observation, parent reports, and "student self-evaluation," such student evaluation being asked of an eight-year-old child.

The second annual goal is "to develop study skills to enable successful grade level performance in academic areas."

The objectives are:

The student will attend to oral discussions and explanations.

The student will use a systematic approach to each assignment.

The student will complete all assignments on a consistent basis.

The student will check his own work before submitting for grading.

The measurement of this annual goal is necessarily the successful grade-level performance.

The effectiveness of oral discussions and explanations can be measured by the manner in which the work is performed. A systematic approach may only be measured by sitting with the child and observing the manner in which he does his assignments, correcting him when he errs in his approach.

Completing all assignments on a consistent basis does not necessarily provide an improvement. When he does not complete all assignments on a consistent basis, he does not meet the objective. The evidence is overwhelming that he did not complete all assignments within the allotted time.

The objective of the young student checking his own work before submitting it for grading is an empty objective. The student could well check his work before submitting for grading, be in error in the first instance, and be satisfied that he has checked it and is satisfied with the result.

The objective evaluation procedures provide classroom performance and report-card results. Parent reports and teacher assessment are necessarily subjective determinations. The same goal contains instructional strategies on page 8 of the IEP, which require the following:

The student should show teacher first item completed before continuing independent work.

The student will discuss planned strategies with teacher for suggestions.

The student will have a written daily priority task list to follow.

The student will maintain his own check sheet for completion of work.

These instructional strategies are appropriate and may be measured. The evidence certainly revealed that the time spent in the resource room was completion of work assignments and that J.S. was placed in the hallway to finish incomplete classwork assignments. There was testimony that the burden was placed upon the parent to assist in the completion of the schoolwork at home.

When one views the IEP for J.S. with his performance at the respondent's school during the first semester of 1987, it is readily apparent that the ability of J.S. to meet the goals and objectives of the program left much to be desired. Accepting the goal and objectives for his academic performance and acquisition of study skills, it appears that the mainstream placement was inappropriate. Granting that the least-restrictive environment should be the beginning of the special educational cycle, the performance factor by J.S. indicates, in retrospect, that he was incapable of meeting the goals and objectives of his IEP in the classroom setting in which he was placed. A self-contained classroom with an aide would have provided greater attention to his ability to perform.

The instructional strategies are sophisticated procedures for an eight-year-old. I am certain that the resource-room teacher was able to meet and fulfill the instructional strategies in the resource room. The classroom teacher attempted to maximize her attention on J.S. by preferential seating and speaking directly to him.

It is significant that the parent requested a change in reading group and requested that fewer routine exercises be given to J.S. because of his difficulty in completing such assignments. The assignment of fewer routine exercises enabled J.S. to complete the assigned exercises without the extra burden of having more to do. This was a strategy suggested by the parent and acceded to by the respondent CST and/or the LDTC.

Respondent argues that the parents did not make any request which was refused by the respondent. In its brief of February 6, 1991, at page 27, the respondent argues that when a child is suddenly removed to a private school, "the Board would have to pay the cost of that private school unless it could demonstrate that what it had done for the child was appropriate." ***Lascari,*** **indeed, places the burden of an appropriate program upon the public school. It is the respondent's burden to show that its program was appropriate. As stated earlier in this decision, the respondent school board has access to the expertise and personnel most knowledgeable in the subject matter.**

In the instant case, regardless of apparent sophistication in the field of special education, it was the parent who continually followed the progress of her child. The parents provided the independent evaluation at their own cost and expense and did not seek reimbursement. That evaluation was wisely and properly accepted by the CST in reaching its classification and placement. Thereafter, the parent was in continuing pursuit of the education being afforded the child. The parent was burdened with the incomplete work. The parent sought the reduction of the number of routine exercises which J.S. had to complete at home. The parent sought the change in reading group and, lastly, the parent produced the person to provide the necessary occupational therapy for J.S.

It is significant that after removing J.S. from the public school, occupational therapy was not available to J.S. at the Winston School.

I am satisfied that J.S. received much more individual attention at the Winston School and continues to receive it.

In this case, the parents seek reimbursement for the placement at the private school. The right to reimbursement is grounded in the statutory grant of power to State and federal courts to "grant such relief as the court determines appropriate." 20 *U.S.C.A.* § 1415(e)(2). The parents are entitled to reimbursement for such private-school placement if it is later determined that the education offered by the district was inappropriate. *Burlington School Committee v. Massachusetts Dept. of Ed., supra,* 471 *U.S.* 359, 85 *L.Ed.*2d. 385.

Placement by a parent in a private school which is not approved by the State does not preclude appropriate reimbursement by the local school district. The placement offered by the school was inappropriate under the Act, thus forcing the parents to unilaterally withdraw the child from the public school and, on their own, seek alternate schooling. It would be an empty victory to have a court tell them several years later that they were right, but that these expenditures could not be reimbursed by the public-school officials. Such a result would leave the child's right to a free appropriate public education less than complete. *Ibid.*

In *Carter v. Florence County School District 4, et als.,* 18 *IDELR* 350 (1991), the court held that the Individual with Disabilities Act, formerly the Education For the Handicapped Act (20 *U.S.C.A.* § 1400 *et seq.*), simply imposes no requirement that the private school be approved by the State in a parent-placement reimbursement case. The approval by the State of private schools applies only when the child is placed in such private school by the State or school district. In New Jersey,

placement may be made in a nonapproved school when the provisions of *N.J.S.A.* 18A:46-14 are met (the Naples Act).

As stated in *Lascari,* and also in *Carter, supra,* the Act provides for "such relief as the court determines is appropriate." It is a broad grant of equitable power designed to provide courts maximum flexibility in effectuating the statutory objectives. Reimbursement for the cost of private schooling, which insures that a child will receive an adequate education while administrative and judicial proceedings are pending, is therefore appropriate. *Burlington, supra,* 471 *U.S.* at 370, 85 *L.Ed.*2d. at 395.

In *Lascari* at 52, the court held that because a reviewing court may grant "appropriate" relief, its award can be informed by *equitable considerations* (emphasis supplied). It is appropriate to balance the equities in granting full or partial reimbursement for the cost of private schooling. "In balancing the equities, the court or the ALJ may consider whether the private placement selected was the least restrictive alternative." *Lascari,* at 53.

In the instant case, there is no residential component as set forth in *Lascari.* When a parent is forced to find alternative private schooling, the court should not ask for more than the parents' ability to do their best to provide an adequate and appropriate education.

In *Lascari,* the court's penultimate paragraph is fittingly appropriate in this case.

We close with the following thought. Under EAHCA, the right to a due-process hearing is the recognized remedy when a board fails to furnish a handicapped child with a free, appropriate education. In the future cases, a board might reduce the need for that remedy by increased communication with the child's parents. [Citations omitted.] We make this observation not to criticize the Ramapo school officials, but with the hope that it might prevent future cases from becoming quite so protracted.

(The EAHCA is now known as IDEA.)

The protraction in this case was initially the result of protracted negotiations, an ineffective mediation process, investigation of suggested placements, and a late request for a due-process hearing. As stated earlier, this directed attention to the school year 1990-1991.

While the petitioner has sought reimbursement since the enactment of the Naples Act in 1989, believing that this was an appropriate case

under such legislation, reimbursement for the removal of J.S. from the respondent school district might well apply to the date of removal from the respondent school district. Such request was made almost two years after the date of removal (23 months). Such reimbursement request, time-delayed as it was, would impose serious financial constraints upon any board of education which must necessarily be funded in each annual budget.

Balancing the equities, it would appear that based upon the findings that the removal to a private placement was fitting because the respondent failed to provide an appropriate free education, it appears equitable that the petitioners be reimbursed commencing January 1990. Such reimbursement should include the tuition and transportation expenses. If there are related services which have been provided to J.S., they should be included in the reimbursement.

Of necessity, because of the lack of proofs relating to the nature of any proposed education for J.S. after completion of the fifth grade, which would have been approximately three months after the completion of the hearings and submissions, I am unable to suggest any different placement which would be appropriate within the respondent school district. There is no proposed IEP, placement, nor, indeed, classification relating to any education after the fifth grade. Such placement would necessarily, if to be afforded within the respondent's school system, take place in the middle school. There simply is no evidence upon which to reach a determination.

I reach this determination with great reluctance and hesitation, but I do not believe I am at liberty to order the student's continued attendance at the Winston School through the completion of the eighth grade. I would have no basis on which to make such a decision.

To be certain, J.S. is a more mature child today, in years for certain, and I am reasonably sure in his sophistication. He can now better understand his deficits and, with an appropriate program, can learn his way around such deficits to compensate for his shortcomings and disabilities. If writing continues to be a problem, the use of computers, word processors, and dictating machines may enable J.S. to complete his tasks. The field of special education has undergone tremendous growth and the more creative and innovative the program, the greater the success in learning for those learning-disabled students who can be reached by such innovations.

I was impressed with the respondent's Director and Assistant Director of Special Services, who appeared to be innovative, well-trained, and motivated by their awesome responsibilities.

I am aware that the parents may look upon a change in school and program with disfavor. J.S. is now four year older. I would hope that the intensive attention to his learning disorder has made him aware of his conduct and behavior. His self-discipline should now be apparent to him. School should be pleasant and he must know by now what is generally expected of him. Pride of performance should motivate him and must be encouraged. He must be made aware of the real world, where continued protection is not to be anticipated.

It is with personal displeasure that I envision a further due-process hearing with regard to future program and placement. There must be communication between the parties and efforts must be made to compromise. The art of advocacy must be tempered with gracious understanding and a genuine interest in the education of J.S. There can be only one winner in this case, that is J.S. If J.S. is the loser in the long run, then we have all failed in our respective responsibilities.

There will be a new CST, that of the middle school. That CST will necessarily bring a new approach. While this decision and the evidence in this case may provide background material, the new CST must bring an independent approach to J.S., age 12, as he exists in 1992.

Accordingly, it appears appropriate that J.S. remain at the Winston School in accordance with the terms of this determination until an appropriate placement and educational program is provided by the respondent.

Based upon the foregoing and for the reasons stated, I CONCLUDE as follows:

1. J.S. is a handicapped student entitled to a free and appropriate education.

2. The respondent failed to provide such free and appropriate education to J.S. after his classification in June 1987.

3. The IEP provided J.S., together with his placement, was inappropriate to meet his educational needs.

4. The parents of J.S., questioning the appropriateness of the IEP provided for J.S. by the respondent, placed J.S. at the Winston School, Summit, New Jersey, a school for learning-disabled children in January 1988, removing J.S. from the respondent school system on December 23, 1987.

5. The parents of J.S. have demonstrated that they have acted in good faith.

6. Because the respondent failed to provide a free and appropriate education, the respondent should be responsible for reimbursement of tuition, transportation, and cost of related services for J.S. at the Winston School since January 1990.

7. J.S. shall continue as a student at the Winston School until the respondent provides a free and appropriate education for him.

8. The respondent shall be responsible for providing an appropriate independent evaluation of J.S. as it shall determine and shall be responsible for the determination of a classification, preparation of an IEP, and an appropriate placement where that IEP may be delivered to J.S. during the school year commencing September 1992.

Order

I hereby ORDER:

1. The petitioner shall be reimbursed for all tuition, transportation, and related services for J.S. at the Winston School from January 1990 to the present time.

2. The respondent shall obtain an independent evaluation of J.S., classify J.S. in his present state, prepare an individualized educational program for J.S., and propose a placement for J.S. for his continued schooling and educational program.

This decision is final pursuant to 20 *U.S.C.A.* § 1415(e) and 34 *C.F.R.* § 300.509 (1986) and is appealable by filing a complaint and bringing a civil action either in the Superior Court of New Jersey or in a District Court of the United States, 20 *U.S.C.A.* § 1415(e)2. 34 *C.F.R.* § 300.511. If either party feels that this decision is not being fully implemented, this concern should be communicated in writing to the Director, Division of Special Education.