

***Egg Harbor Township Board of Education, Plaintiff v. S.O., by his Guardian  
Ad Litem, R.O., Defendants***  
**U.S. District Court, New Jersey**  
**90-1043**  
**August 19, 1992**

**Gerry, Chief Judge.**

**Counsel for Plaintiff: Richard J. Kaplow, Esq., Weinberg and Kaplow,  
P.A., 80 Morris Avenue, Springfield, NJ 07081.**

**Counsel for Defendants: Theodore A. Sussan, Esq., 407 Main Street,  
Spotswood, NJ 08884.**

**This matter arises under the Individuals With Disabilities Education Act  
(the "IDEA" or the "Act"), 20 U.S.C. §§ 1400-85. We have jurisdiction  
pursuant to 28 U.S.C. § 1331 and 20 U.S.C. § 1415(e)(4)(A).**

**S.O. (hereinafter "S.") is a fourteen year old boy of average intelligence  
with a severe reading disability. In June of 1989, after S. completed the  
fifth grade in the Egg Harbor Township ("Egg Harbor") public school  
system, his parents asked Egg Harbor to place him in the Landmark  
School ("Landmark"), a private school specializing in educating  
children with learning disabilities like S.'s, in Prides Crossing,  
Massachusetts. Egg Harbor denied this request, proposing instead to  
place S. in a self-contained special education class within the district.  
S.'s parents rejected Egg Harbor's proposal and unilaterally placed S.  
at Landmark.**

**On June 19, 1989, S.'s parents filed for a state administrative hearing,  
requesting that Egg Harbor be ordered to place S. at Landmark and to  
reimburse them for the costs expended in placing S. there, including  
attorney's and experts' fees, and costs of suit. See 20 U.S.C. §  
1415(b)(2). On January 23, 1990, after an eighteen day hearing, an  
administrative law judge ("ALJ") of the New Jersey Office of  
Administrative Law found that Egg Harbor had failed to provide S. with  
an "appropriate" education pursuant to the requirements of the IDEA  
and state regulations and that Landmark was an "appropriate"  
placement for S. The ALJ thus ordered Egg Harbor to place S. at  
Landmark for "so long as it is educationally appropriate" and to pay for  
it. This lawsuit followed.**

On April 28, 29, and 30, 1992, a bench trial was held in this court. See 20 U.S.C. § 1415(e)(2)(c) ("In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.") Having reviewed the entire record, and having heard substantial additional evidence,<sup>1</sup> we now present our findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a) and enter judgment in favor of defendants and against plaintiff pursuant to Fed. R. Civ. P. 58.

### I. Findings of Fact

1. At all times relevant to this litigation, and continuing through the present, S. has manifested a severe reading disability, sometimes referred to as dyslexia, for which he has been appropriately "classified" as a child with a "perceptual impairment," and for which he requires special education and related services. There is no dispute that his problems are extraordinarily complex and involve visual as well as auditory information processing dysfunction.

2. S. attended the Egg Harbor schools from 1983 through 1989, with the exception of the 1984-85 school year, when he attended first grade in the Atlantic Friends School. For the 1983-84 school year S. attended regular kindergarten. For the 1985-86 school year, S. attended a regular first grade class (repeating first grade). During this year, the school system formally identified his reading problems.<sup>2</sup> Accordingly, pursuant to state regulations, S. was evaluated by the school district and classified as a child with a perceptual impairment, and he received special education services in a "Learning Resource Center" ("LRC") twice per day.

3. Apparently because of his age, S. skipped second grade, and, beginning in 1986, and lasting through 1989, S. attended grades three through five in Egg Harbor's Alternative Program. Although not officially special education classes,<sup>3</sup> the Alternative Program classes were smaller than regular classes and served a variety of children including some, like S., with classified impairments. The program was developed to serve children with average intelligence who were experiencing learning problems in school, including reading problems. Within the Alternative Program classes, and supplemented by the LRC, S. received special education and related services. For instance, an aide provided assistance during the school day, and for the three years in the Alternative Program S. received speech and language therapy. During the third grade, he was assisted by a reading specialist three times per week. In fourth grade, he received individual special

education reading services every day in the LRC for 30 minutes. We note that the Individual Education Programs ("IEP")<sup>4</sup> prepared for S.'s third and fourth grade years failed to set annual goals. During the fifth grade, S. spent an hour each day in the LRC, and he received a 30 minute session with a reading specialist twice per week.<sup>5</sup>

4. With respect to reading remediation, both the Alternative Program and the LRC initially relied upon the Open Court series, which is a phonics based series, and later, because of S.'s difficulties with that program, switched to the Focus series, which is a reading program which includes phonics as well as other approaches. There has been general agreement that an educational approach based primarily upon phonics is inappropriate for S.

5. During S.'s fifth grade, Egg Harbor became concerned about his reading progress. Accordingly, the school district proposed an IEP for 1989-90 which would place S. in a "self-contained" special education class for sixth grade,<sup>6</sup> where the student-teacher ratio would be lower and where the class would be taught by a special education teacher. Additionally, such a class would provide S. with daily small group reading instruction based primarily on the Focus series; a half-hour session per day with a reading specialist; daily work with a speech and language therapist; and opportunities for mainstreaming.<sup>7</sup>

6. S.'s parents rejected this proposed placement, and unilaterally placed S. at Landmark.<sup>8</sup>

7. Despite evidence to the contrary offered by various Egg Harbor professionals, we agree with Egg Harbor's expert, Dr. Reschly, that during his tenure at Egg Harbor, S.'s progress in reading was "rather modest," "relatively limited," and "disappointing." This is not to say that S. made no progress at Egg Harbor. Reading is a multifaceted skill, and in some areas, such as sight vocabulary, S. clearly did make progress. However, overall, his progress was negligible enough that by the end of fifth grade, when S.'s parents unilaterally placed him at Landmark, he remained, for all intents and purposes, a non-reader.<sup>9</sup>

8. We do not agree, however, with the hypothesis suggested by Egg Harbor, that, due to the severity of his disability, no greater reading progress could have been achieved.<sup>10</sup> This proposition was refuted by Dr. Margolis, a reading expert who testified in S.'s behalf, and undermined by S.'s positive experience at Landmark.

9. S. has made more than negligible and minimal reading progress at Landmark, which is a school that specializes in the education of children with severe disabilities like S.'s. S.'s reading level has

progressed to somewhere in the second to third grade level. We note that, among other things, the Landmark program remediates reading through the Let's Read series, which is not as dependent upon phonics as the Focus series. Moreover, the degree, intensity, and quality of individual instruction delivered in this specialized milieu appear to have contributed to the increment of success S. has realized there.

## II. Conclusions of Law

1. Our review of this matter is "something short of a complete *de novo* review of the state educational program," *Colin K. by John K. v. Schmidt*, 715 F.2d 1, 5 (1st Cir. 1983), because we are required to give "due weight" to the findings and conclusions reached in the administrative proceeding. *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 102 S.Ct. 3034, 3051 (1982). Nevertheless, after consideration of record below, and based upon a preponderance of the evidence, we are "free to accept or reject the findings in part or in whole." *Town of Burlington v. Department of Education*, 736 F.2d 773, 792 (1st Cir. 1984), *aff'd*, 105 S.Ct. 1996 (1985).

2. The central issue before us is whether Egg Harbor provided S. with a "free appropriate public education." 20 U.S.C. § 1400(c). The statute explains that:

The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414 (a)(5) of this title.

*Id.* § 1401(18).

3. In order to determine whether Egg Harbor provided S. with an "appropriate" education, we ask first whether "the state has complied with the procedures set forth in the Act[.]" *Rowley*, 102 S.Ct. at 3051. Second, we ask whether "the individualized education program developed through the Act's procedures [is] reasonably calculated to enable the child to receive educational benefits." *Id.*

4. The Supreme Court has held that the IDEA requires that participating states provide access to education "sufficient to confer *some educational benefit*" upon children with disabilities. *Id.* at 3048 (emphasis supplied) ("We . . . conclude that the 'basic floor of

opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."). The *Rowley* Court rejected the argument that Congress intended to require the states "to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children." *Id.* According to the Court, the primary concern of the IDEA is providing children with disabilities access to educational services, and thus the Court stated that "Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful." <sup>11</sup> *Id.* at 3043 (emphasis supplied).

5. The Third Circuit in turn has interpreted *Rowley* to hold that "the [IDEA] calls for *more than a trivial educational benefit.*" *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 180, 182 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989) (emphasis supplied). Noting that the *Rowley* Court relied upon the legislature's intent in passing the IDEA to enable children with disabilities "to achieve a reasonable degree of self-sufficiency," *Rowley*, 102 S.Ct. at 3048 n. 23, the Third Circuit stated:

[W]e infer that the emphasis on self-sufficiency indicates in some respect the quantum of benefits the legislators anticipated: they must have envisioned that significant learning would transpire in the special education classroom—enough so that citizens who would otherwise become burdens on the state would be transformed into productive members of society. Therefore, the heavy emphasis in the legislative history on self-sufficiency as one goal of education, where possible, suggests that the "benefit" conferred by the EHA and interpreted by *Rowley* must be more than *de minimis*.

*Polk*, 853 F.2d at 182.12

6. In all cases, the school district carries "the burden of proving that it is providing an appropriate education to the child." *Lascari v. Board of Education*, 116 N.J. 30, 33, 560 A.2d 1180, 1188 (1989).

7. We agree with the ALJ that Egg Harbor failed to comply with various procedures set forth in the IDEA. For instance, the IEPs prepared for S.'s third and fourth grade years failed to set annual goals as required by the IDEA as well as by New Jersey regulations. See 20 U.S.C. § 1401(19)(B); N.J.A.C. 6:28-3.6. This failure essentially rendered the IEPs in question incapable of review, and therefore inappropriate. See *Lascari*, 116 N.J. at 48-49.

8. We also agree with the ALJ's conclusion that the IEPs prepared for S., including the proposed 1989-90 IEP which was never implemented, were not "reasonably calculated to enable the child to receive educational benefits."<sup>13</sup>*Rowley*, 102 S.Ct. at 3051.

9. While the benefits or lack of them actually realized by a child are not dispositive of the question whether the program was sufficient to satisfy *Rowley's* "floor of opportunity," see *In re Conklin*, 946 F.2d 306, 316 (4th Cir. 1991), they are certainly one indicator. Where a child's progress is *de minimis*, and where there is evidence that the potential exists for more than *de minimis* progress without undue burden to the school district, it is fair to infer that due to deficiencies in the programs offered, the school district failed to provide an "appropriate" education.<sup>14</sup>

We reject Egg Harbor's argument that due to the severity of S.'s disability the school district's efforts should be judged on their face and the child's lack of progress discounted. While we do not consider S.'s lack of progress at Egg Harbor dispositive of the question of the appropriateness of Egg Harbor's program, we consider it a relevant factor.

10. In addition to failing to satisfy some of the procedural requirements of the IDEA, Egg Harbor failed to satisfy its substantive requirements by providing S. with an "appropriate" educational program. The school district failed to provide S. with a degree, intensity, and quality of special education and related services adequate to provide educational benefit to S. For instance, for grades three through five, Egg Harbor placed primary responsibility for S.'s education upon its Alternative Program, a non-special educational program. While S. received some supplementary special and related services in and through the Alternative Program during these years, the combined effort was inadequate to the task.<sup>15</sup> The school district essentially conceded this when, for S.'s sixth year, it belatedly proposed a self-contained placement, which would have consisted of full time special education services.

11. We must also evaluate the adequacy of the IEP proposed by Egg Harbor for 1989-90, which was rejected by S.'s parents. See *Lascari*, 116 N.J. at 30, 560 A.2d at 1189. Although this program proposed full-time placement in a special education class with an intensified degree of special education and related services, we agree with the ALJ that Egg Harbor's proposal failed to indicate how such a program would be qualitatively superior to the programs it had provided in the past and which had proven inadequate for S. There is nothing in the record which would suggest that Egg Harbor had been able to develop a

proposal which would address some of the substantive shortcomings in the programs that had previously been implemented with respect to S. As a result, we agree with the conclusion that the proposed placement was not designed to provide S. with an "appropriate" education as required by the IDEA. The ALJ found that the proposed program represented little more than an intensified version of the inadequate programs implemented in the past. We agree.<sup>16</sup>

12. In addition to arguing that its programs all along were legally and educationally adequate, Egg Harbor has insisted in the alternative that there is nothing unique about the program provided at Landmark that could not be replicated in the district. Moreover, Egg Harbor has suggested that the closed-mindedness and lack of cooperation of S.'s parents and their expert, Dr. Margolis, have stood in the way of the school district implementing such modifications.

It is the school district's responsibility, in cooperation with the parents, to design an "appropriate" educational program for children with disabilities. See *Rowley*, 102 S. Ct. at 3051; N.J.A.C. 6:28-1.1. There is nothing in the record of this case that convinces us that S.'s parents or Dr. Margolis prevented Egg Harbor from developing a program that would have been acceptable to them and designed to deliver an "appropriate" education to S. Additionally, there is nothing in the record which would indicate Egg Harbor's ability or readiness to replicate a program such as Landmark's. Of course, pulling S. out of the district and unilaterally placing him at Landmark thwarted the school district's plans. However, the inappropriateness of those plans justified such action.

13. By stating that "[t]o the maximum extent appropriate" children with disabilities be included in regular classroom settings, as close to home as possible, the IDEA incorporates a least restrictive environment requirement and "create[s] a statutory preference for educating handicapped children with nonhandicapped children." *Greer by Greer v. Rome City School District*, 950 F.2d 688, 695 (11th Cir. 1991), *opinion withdrawn on other grounds*, 956 F.2d 1025 (11th Cir. 1992). See also 20 U.S.C. § 1412(5)(B); 34 C.F.R. § 300.552(a)(3); N.J.A.C. 6:28-2.10(a)(3) and (5).

A residential placement in a school for children with special needs is a more restrictive placement than a self-contained special education class in a public school, although both clearly fall towards the restrictive end of the spectrum. Egg Harbor has argued that the opportunities for mainstreaming available through the proposed 1989-90 IEP, as well as the proximity to home and friends, and the unestablished need for residential placement, weigh in favor of the

appropriateness of home placement for S.17 Mainstreaming, however, is not the primary issue in this case. The question before us is the appropriateness of the educational program designed for S. by Egg Harbor.

Egg Harbor bears the burden of demonstrating its ability to design and implement an appropriate educational program for S. in a less restrictive environment. See *Norton School Committee v. Massachusetts Department of Education*, 768 F. Supp. 900, 910 (D. Mass. 1991). To date no such demonstration has been made.<sup>18</sup> Under such circumstances, a family seeking reimbursement for a private school placement need show only that the placement unilaterally chosen is appropriate, see *id.* at 907, and we believe that S.'s family has demonstrated this. As noted by the First Circuit, "the least restrictive environment guarantee . . . cannot be applied to cure an otherwise inappropriate placement. . . ." *Town of Burlington v. Department of Education*, 736 F.2d 773, 789 n. 19 (1st Cir. 1984), *aff'd sub nom. Burlington School Committee v. Department of Education*, 105 S. Ct. 1996 (1985). Accordingly, at this point in time, Landmark remains legally the least restrictive appropriate placement for S.

14. The Supreme Court has held that, pursuant to our power under section 1415(e)(2)(c) of the IDEA, we may order a school district to reimburse parents for the reasonable costs of unilaterally placing a child in an appropriate private setting after turning down an inappropriate public school placement, and we may order the school district to implement an IEP continuing the private placement at public expense. See *id.* at 2002-2003. Such is the case here, and S.'s parents will accordingly be reimbursed for expenses incurred in placing S. at Landmark, which would have otherwise been incurred by the school district, including transportation and related expenses, as well as interest on a loan procured to effect the placement initially, and experts' fees related to the litigation that followed. See *Burlington School Committee v. Department of Education*, 105 S. Ct. 1996, 2002-2003 (1985); *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153, 1160 (5th Cir. 1986).

15. The IDEA's "Attorneys Fee Bill" provides that:

In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party.

20 U.S.C. § 1415(e)(4)(B). Having succeeded on all significant issues in this matter, S. and his parents clearly are prevailing parties. See *E.P. v.*

***Union County Regional High School District No. 1*, 741 F. Supp. 1144, 1148 (D.N.J. 1990).** The only question is whether an award of attorney's fees must be limited to the amount S.'s parents were obligated for pursuant to a retainer agreement between them and their attorney.

The retainer agreement in question, which is part of the record, provided that S.'s parents would be obligated to counsel for a total of \$7,500. The agreement further stipulated that:

**My actual and appropriate hourly rate is \$175.00 an hour and if this matter goes to trial and we prevail, then I reserve the right to make application to the federal district court for fees based upon the actual mentioned hourly rate and that after returning the fees and expenses expended by you, I will keep the balance towards what should have been my appropriate fee.**

Egg Harbor argues that the statute provides only for "reimbursing attorney's fees and other costs to the parent," and does not "create any rights in favor of third parties or establish the right of a third party private attorney to seek direct first hand payment for legal fees which are not charged or even chargeable to the client." However, Egg Harbor concedes that "public interest law firms or legal aid attorney organizations" may recoup attorneys' fees because "the spirit and intent of the IDEA was furthered by compensating these kinds of not for profit legal assistance groups." See, e.g., *Burr v. Sobel*, 888 F.2d 258 (2d Cir. 1989) (awarding fees to public interest group).

Defendants' counsel, on the other hand, argues that the purpose of the fee shifting provision of the IDEA is "to place parents on an equal footing with school districts in terms of their ability to . . . litigate children's rights as they are protected under the Act." We agree, and we see no reason to distinguish between private counsel and a public interest group in such a matter. Accordingly, we reject Egg Harbor's argument that an award of attorney's fees must be limited to the parents' \$7,500 obligation as provided by the retainer agreement.

Finally, in this case, in which a child and his family clearly have prevailed, we believe that there should be full recovery of reasonable attorney's fees as part of costs awarded.

### **III. Conclusion**

Having found that Egg Harbor's proposed 1989-90 IEP, the only IEP currently before us, fails to provide S. with an appropriate education as required by the IDEA, and that Landmark is an appropriate placement for S., we concur in the judgment of the ALJ. Accordingly, we will order

Egg Harbor to continue full funding of that placement until an IEP can be developed, in cooperation with S.'s parents, providing for a less restrictive, appropriate placement. Additionally, we will order Egg Harbor to reimburse S.'s parents for the costs incurred in placing S. at Landmark as well as attorney's fees.

1 In view of the fact that the statute provides for the court to "receive the records of the administrative proceedings," the ground rules that we adopted for trial were as follows: first, we excluded evidence that was cumulative; second, we excluded evidence introduced for the purpose of impeaching or attacking the credibility of witnesses that testified during the administrative hearing; third, we excluded evidence introduced for the purpose of embellishing testimony or proofs from the administrative hearing; and fourth, we restricted admission of evidence to that which could not by reasonable due diligence have been proffered for admission during the administrative hearing.

2 S.'s parents became aware of his learning problems during S.'s pre-school experiences. In fact, they arranged for a private evaluation prior to his entry into kindergarten. Although it is not clear what happened during his kindergarten year, his learning problems were clearly recognized during his year in the Friends School, where it was recommended that he repeat first grade. When S. returned to Egg Harbor, his parents requested a child study team evaluation.

3 The teachers of these classes were regular education teachers, not special education teachers.

4 The IEP is developed at a meeting among qualified

officials, the child's teacher, the child's parents or guardians, and, when appropriate, the child. It must include, among other things, statements of the child's present level of educational performance, annual goals for the child, the specific educational services to be provided the child, and the extent to which the child will be able to participate in regular education programs. School officials must convene a meeting at least annually to review and, when appropriate, revise the IEP. As this court has recognized, 'the IEP is more than a mere exercise in public relations. It forms the basis for a handicapped child's entitlement to an individualized and appropriate education.' Thus, the importance of the development of the IEP to meet the individualized needs of the handicapped child cannot be underestimated.

*Greer by Greer v. Rome City School District*, 950 F.2d 688, 694-95 (11th Cir. 1991) (quoting *Doe v. Alabama State Department of Education*, 915

F.2d 651, 654 (11th Cir. 1990)), *opinion withdrawn on other grounds*, 956 F.2d 1025 (11th Cir. 1992). See also 20 U.S.C. §§ 1401(a)(19) 34 C.F.R. §§ 300.343-46; N.J.A.C. § 6:28-1 *et seq.*

5 There do not appear to be any significant factual disputes about what special and related services were provided to S. during his years at Egg Harbor.

6 There is a factual dispute between the parties as to when the school district determined that S. should be placed in the special education class. Defendants have presented evidence suggesting that the determination was made towards the beginning of fifth grade, and that the district negligently chose to keep S. in the Alternative Program for the remainder and majority of the fifth grade. We do not reach this Particular issue in light of our conclusion that S. was in need of a more intensive special education program even before his fifth grade.

7 The specific class placement was to be implemented in an Egg Harbor school housing exclusively fifth and sixth grade classes.

8 We note that pursuant to a private evaluation at the Children's Seashore House in the fall of 1988, S.'s parents had been advised that a private school placement might be necessary for S. if Egg Harbor failed to provide a sufficiently intensive special education curriculum.

9 A great proportion of the testimony in this matter---both at the administrative level and in this court---concerned the appropriateness of relying exclusively upon test results as a way of measuring S.'s reading progress over the years. Moreover, there was considerable disagreement concerning the interpretation of various test results. We have not relied exclusively upon test results in reaching factual conclusions as to the degree of progress achieved by S. either at Egg Harbor or at Landmark. Instead, we have viewed the test results through the prism of the testimony of all of the witnesses who assisted both courts involved in evaluating S.'s progress. As a bottom line, we find that after five years at Egg Harbor, S. did not progress much beyond a first grade reading level.

10 This theory is documented in the last interchange between Egg Harbor's counsel and Dr. Reschly during our hearing:

Q. Do you believe that there are some educationally handicapped students whose deficits in the areas of reading and information processing are so severe that their progress is always realistically going to be slow and limited despite the particularized instruction that they receive?

**A. Yes. And considerable experience would bear out that assertion.**

**Q. Do you believe that S.O. is one of those students?**

**A. Yes, I do. And I make that decision reluctantly, but I described in detail as well as in my testimony the extraordinary information processing difficulties exhibited by S.O., and these extraordinary information processing difficulties have been persistent, they've been observed by a number of different independent evaluators and I believe those information processing difficulties continue to interfere with his ability to make progress in reading.**

**In his October 15, 1990 report, Dr. Reschly concluded that "[a]cademic progress even with specially designed instruction continues to be slow, laborious, and frustrating. The gains have been small and inconsistent; persistence of gains fragile; no startling breakthroughs have occurred; and none are likely."**

**11 *Rowley* involved a deaf eight year old child who received many special and related services from her school district, and who clearly was receiving substantial benefit from her education. The legal dispute involved whether she was entitled to a full-time interpreter, which would have enabled her to understand 100%, as opposed to 60%, of what transpired in her class. In holding that the child was not entitled to the interpreter, the Court relied upon the fact that the child was "performing above average" in school and advancing from grade to grade without the interpreter. *Rowley*, 102 S.Ct. at 3049.**

**12 In *Polk*, at issue was whether a school district had to provide "hands-on" physical therapy to a child with severe mental and physical impairments. The district court granted summary judgment in favor of a school district, holding that the child had derived "some educational benefit" from the program he was provided with. *Polk*, 853 F.2d at 172. The court of appeals reversed, noting that the *Rowley* "Court was not espousing an entirely toothless standard of substantive review." *Id.* at 179.**

**13 We apply this federal standard and do not reach the question whether New Jersey at a relevant time might have adopted a higher standard. Plaintiffs have devoted substantial resources to demonstrating that the ALJ applied a higher standard while giving lip service to the lower federal standard. We have weighed the ALJ's conclusions of law keeping this argument in mind and have based our conclusions upon the federal standard.**

14 It is only to this extent that we contrast the results obtained at Landmark with those obtained at Egg Harbor.

15 While a great deal of testimony in this matter concerned the appropriateness of specific methods of teaching S., we are aware of our limitations in this area and are "careful to avoid imposing [our] view of preferable educational methods upon the States." *Rowley*, 102 S. Ct. at 3051. Thus, wherever possible, we have evaluated the appropriateness of Egg Harbor's program without resolving disputes about substantive educational methodology.

We appreciate the difficulty of selecting and implementing an appropriate educational methodology for S. While we conclude that Egg Harbor was not up to the task, we are not persuaded, as was the ALJ, that there was bad faith involved. Moreover, we in no way preclude the possibility that the school district will be able to design and implement an appropriate program for S. in the future.

16 Egg Harbor contends that S.'s parents rejected this proposal out of hand, and in fact had predetermined to send S. to Landmark. We are not convinced by the record that if Egg Harbor had proposed an appropriate plan for sixth grade that it would have been summarily rejected by the parents. In any case, in light of our conclusion that the proposed plan was legally inappropriate, S.'s parents were entitled to reject it.

17 Egg Harbor suggests that S.'s placement far from home, among other factors, has placed him in psychological jeopardy. S.'s parents argue that, if anything, S.'s experience of failure at Egg Harbor jeopardized his emotional well-being. Moreover, S.'s parents suggested, and the ALJ concluded, that because S. is placed with children with similar disabilities at Landmark, he feels less singled-out and stigmatized than he did while attending Egg Harbor. We note that under the circumstances S. appears to be a remarkably well adjusted young man, and there is no dispute that he feels satisfied with and encouraged by his experience at Landmark.

However, while there may be merit to each of these contentions, we do not sit here to weigh the relative advantages of a placement in Egg Harbor as opposed to the Landmark placement with respect to the IDEA's mainstreaming prescriptions. It is the school district's responsibility to design an appropriate placement for S. in the least restrictive environment. While residential placement at Landmark legally constitutes the least restrictive appropriate environment at this time, we express no judgment as to whether a less restrictive

appropriate placement might be available, because this question is not before us.

18 We agree with Egg Harbor that "[i]n a case where the segregated facility is considered superior, the court should determine whether the services which make the placement superior could be feasibly provided in a non-segregated setting." *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir.), *cert. denied*, 464 U.S. 864 (1983). However, it is not enough for Egg Harbor to assert that it could duplicate the services provided at Landmark. The school district bears the burden of showing that an appropriate, less restrictive placement is available. Here, no such showing has been made.