

**THE BOARD OF EDUCATION BEARS THE
BURDEN OF PROOF AS TO ALL ISSUES RAISED
BY THE PARENT.**

Lascari v. Board of Education of Ramapo Indian Hills Regional High School District, 116 N.J. 30 (1988), squarely places the burden of proof upon the school district as to all issues raised by the parents. At page 44 of Judge Pollock's decision:

" ... we believe it is more consistent with the state and federal scheme to place the burden on the school district not only when it seeks to change the IEP, but also when the parents seek the change.

Various considerations lead us to that conclusion. Underlying the state and federal regulations is an abiding concern for the welfare of handicapped children and their parents. Consistent with that concern, the basic obligation to provide a handicapped child with a free, appropriate education is placed on the local school district. It is the district that must identify handicapped children and then formulate and implement their IEPs. Finally, the regulatory scheme vests handicapped children and their parents with numerous procedural safeguards. Those safeguards include the right to counsel and to the advice of experts, *20 U.S.C. 1415 (d) (1)*; *34 C.F.R. 300.508 (a) (1)*; to present evidence and cross-examine witnesses, *20 U.S.C. 1415 (d) (2)*; *34 C.F.R. 300.508 (a) (2)*; to 'have the child who is the subject of the hearing present,' *id.* at *300.508 (b) (1)*; and to a public hearing, *id.* at *300.508 (b) (2)*. Like those procedural safeguards, the allocation of the burden of proof protects the rights of handicapped children to an appropriate education ...

To conclude, we believe the obligation of parents at the due-process hearing should be merely to place in issue the appropriateness of the IEP. The school board should then bear the burden of proving that the IEP was appropriate. In reaching that result, we have sought to implement the intent of the statutory and regulatory schemes."

As a result, the Long Hill Township School District has the clear burden of proving by a preponderance of the credible evidence that the program and placement offered A.J. for

4th and 5th grades was appropriate and consistent with the standard set by statutory and case law.

THE 10/1/98 IEP IS INAPPROPRIATE AS IT DOES NOT OFFER A.J. THE OPPORTUNITY FOR SIGNIFICANT LEARNING AND A MEANINGFUL EDUCATION.

A.J. is once again mainstreamed for Science and Social Studies. Mrs. Newcomb testified before this Court that A.J. cannot read a Science or Social Studies text. Petitioners have testified that A.J. brought home either tests or study guides which enabled him to pass his Science and Social Studies exams. More importantly, the IEP is equivocal as to what the goals and objectives would be for Science and Social Studies. The 9th page of the October 1998 IEP, under the heading of "Participation in Regular (Mainstream)", indicates that there will be curriculum modifications in the mainstream. However, there is absolutely no enumeration as to what those curriculum modifications are. The next heading on the 9th page concerns how tasks will be modified in the mainstream, but they certainly are not curriculum modifications. There is a significant difference between a consideration of how something will be taught and what will be taught. The task modifications set forth on page 9 speak to changes in how the mainstream subjects will be taught, rather than how the content of those subjects will be changed or modified. Certainly for A.J. it makes good sense to modify **how** a subject will be taught, but this does not address the issue of **what** will be taught. *Appendix A to Part 300 of 34 C.F.R.* once again offers a notice of interpretation of the underlying statutes. In the introduction, under "Involvement and Progress of Each Child With a Disability in the General Curriculum", the interpretation comments as follows:

"In many cases, children with disabilities will need appropriate supports in order to successfully progress in the general curriculum, participate in State and district-wide assessment programs, achieve the measurable goals in their IEPs, and be educated together with their nondisabled

peers. Accordingly, the Act requires the IEP team to determine, and the public agency to provide, the accommodations, modifications, supports, and supplementary aids and services, needed by each child with a disability to successfully be involved in and progress in the general curriculum achieve the goals of the IEP, and successfully demonstrate his or her competencies in State and district-wide assessments."

Therefore, to the extent that the October 1, 1998 draft IEP seeks to modify A.J.'s tasks by reducing the number of problems on a page, using a highlight marker to identify key words, or using graph paper for Math problems is certainly appropriate. However, in two separate instances the draft requires curriculum modifications in the mainstream. The question that goes unanswered is what are those modifications? Exactly how A.J. will be involved in the general curriculum and how his progress will be measured is critical. Once again, the notice of interpretation under question number 1: "Present Levels of Educational Performance" states:

"The IEP team's determination of how each child's disability affects the child's involvement and progress in the general curriculum is a primary consideration in the development of the child's IEP. In assessing children with disabilities, school districts may use a variety of assessment techniques to determine the extent to which these children can be involved and progress in the general curriculum, such as criterion-referenced tests, standard achievement tests, diagnostic tests, other tests, or any combination of the above.

The purpose of using these assessments is to determine the child's present levels of educational performance and areas of need arising from the child's disability so that approaches for ensuring the child's involvement and progress in the general curriculum and any needed adaptations or modifications to that curriculum can be identified."

Since the IEP is silent as to the curriculum modifications in the mainstream, one would certainly expect the mainstream course curricula to be enumerated in the IEP.

Unfortunately, this is not done and therefore results in an IEP which is fatally flawed.

The notice of interpretation, under the heading of "Measurable Annual Goals, Including Benchmarks or Short-Term Objectives" continues:

"Measurable annual goals, including benchmarks or short-term objectives, are **critical** to the strategic planning process used to develop and implement the IEP for each child with a disability. Once the IEP team has developed measurable annual goals for a child, the team

(1) can develop strategies that will be most effective in realizing those goals and

(2) must develop either measurable, intermediate steps (short-term objectives) or major milestones (benchmarks) that will enable parents, students, and educators to monitor progress during the year, and, if appropriate, to revise the IEP consistent with the student's instructional needs.

The strong emphasis in Part B on linking the educational program of children with disabilities to the general curriculum is reflected in Sec. 300.347(a)(2), which requires that the IEP include:

a statement of measurable annual goals, including benchmarks or short-term objectives, related to -

(i) meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum; and

(ii) meeting each of the child's other educational needs that result from the child's disability.

As noted above, each annual goal must include either short-term objectives or benchmarks. The purpose of both is to enable a child's teacher(s), parents, and others involved in developing and implementing the child's IEP, to gauge, at intermediate times during the year, how well the child is progressing toward achievement of the annual goal." (emphasis added)

Therefore, a critical component in the development of A.J.'s IEP is missing. Thus, there is no way to know exactly what it is that A.J. will have to learn and master in Science and Social Studies, and in other mainstream classes, in order that he is given the opportunity for significant learning and a meaningful education. General education curriculum is in

effect a series of goals and objectives that each child is expected to master. In A.J.'s case, however, neither he nor his parents are given the opportunity in this IEP to understand what it is that he must master. This deprives the parents and the Child Study Team of the ability to determine whether or not A.J. is receiving a free, appropriate public education. As *Lascari, Supra*, indicated: "The shortcomings that rendered John's program incapable of review also render it inappropriate. As the classification officer found, what is not clear from the IEP or testimony are the specific goals and objectives either the Child Study Team or the teacher had for John. Equally unclear is how any goals or progress was to be measured or decided."

The 11th page of the October 1998 IEP also notes under "Exemptions from Regular Education Program" that: "A.J. is exempt from standard curriculum requirement." Once again, there is no statement of the alternate curriculum in any of the mainstream subjects, let alone Science and Social Studies.

On the 11th page of the October 1998 IEP is a statement that the occupational therapist will schedule and provide OT according to stated IEP goals and objectives. Testimony is clear that the district had no intention of altering OT, and this is a misleading and false assurance of services that would not be provided. This unfortunately is a reoccurring theme, as the Court will recollect the exact same misinformation dealing with the issue of speech and language goals.

A.J.'s significant social and emotional needs were to some extent reflected in the social and emotional goals that the draft IEP of October 1998 enumerates. Unfortunately, according to Dr. Seabrook, these are goals that can be very difficult to implement in a mainstream environment with twenty other children. There is no indication as to how the goals will be achieved, and who will facilitate them. Dr. Aitchison also had a similar comment with regard to implementing such goals in a larger environment.

The Math goals make reference to SRA Connecting Math Concepts, but nowhere do those goals appear in the IEP. Under Reading there is a statement that Wilson goals

will be utilized, but as testimony indicates, the Wilson goals that were attached are the wrong goals - those goals were purportedly implemented and achieved the following year - although not pursuant to any written document. Thus, there is no way for anyone to know exactly what will be taught in Reading and what the goals and objectives would be.

Under Instructional Strategies there is a statement at the beginning that: "A.J. may be distractible. He may be acutely aware of either visual or auditory stimulation or both. As much as possible, provide a quiet learning environment." How can this be reasonably accomplished in a mainstream setting? Indeed, the instructional strategies themselves suggest that this multiply disabled student needs a self-contained environment for all of his subjects. These strategies included the following:

"Avoid visual clutter or other distractions. Erase the board frequently so only relevant material is present.
Encourage the use of some type of marker for reading to retain his place on a page and filter out any unnecessary stimulation.
A.J. may have problems with organization. He may lose items such as pencils, books, or assignments.
A.J. may have difficulty completing assignments.
A.J. may have difficulty shifting focus or making the transition from one activity to another.
A.J. may have difficulty following directions.
A.J. may have difficulty with tasks involving written expression.
A.J. may occasionally be "off-task" or not focused on classroom work.
Keep unstructured time to a minimum.
A.J. may experience difficulties related to auditory processing of information.
A.J. may have difficulty with peer relations and self-esteem.
Reduce the emphasis on competition. Repeated failure may cause A.J. to feel that others do not like or care about him."

Elizabeth Richards, the Court will recall, testified that the October 1, 1998 IEP is really a draft and is not complete. Once again, the district did not fulfill its responsibility

of completing the process by offering a completed, intact IEP. What we have here, therefore, is an incomplete document that contains erroneous goals and objectives in one of A.J.'s greatest areas of need in Reading. It sets forth the promise of occupational therapy that was never intended to be offered. It contains no guarantee that T.P. would not once again be paired with A.J. in mainstream activities. While the incomplete IEP acknowledges that A.J. is multiply disabled and needs a great deal of instruction that can only be provided in a self-contained environment, it nevertheless mainstreams this youngster for a significant portion of each day. There is no description of the curriculum that A.J. is expected to follow in the mainstream, despite the fact that the IEP makes clear that there needs to be modifications for those classes. Finally, one cannot reasonably expect any parent to agree to take a child out of a new school in the middle of the year under the circumstances that presented themselves to Petitioners. Even if under the situation that presented itself the draft IEP of October 1998 was appropriate, Long Hill's egregious and callous disregard of A.J. and his needs ought not be rewarded by requiring him to leave the Banyan School in the middle of the year and be placed back into the district's program. What A.J.'s parents did essentially in this case was to accept the fact that their son was more disabled than Long Hill had led them to believe, and in response thereto sought out more services for their son. Long Hill on the other hand, while giving lip service to a new classification of Multiply Disabled, just continued the program that had proven itself to be ineffectual.¹

The Court will also recall the testimony of Elizabeth Richards, who indicated that had A.J. come back in October 1998 as a result of the draft 10/1/98 IEP, she would have recommended a reevaluation by a psychologist and a social update. The inference, therefore, is that these reports would have been necessary in order to prepare an

¹ It is interesting to note that social worker Elizabeth Richards was of the opinion that the parents were in the process of acceptance, and were going through some sort of denial. This clearly is not consistent with the rationale of this case, which is to force Long Hill to provide more intensive services for this multiply disabled youngster.

appropriate IEP and placement for A.J., and without them being done it would not have been a complete and appropriate program for him. This is another reason why the district's request that A.J. return in October was improvident.

Long Hill's delay in providing its Child Study Team with all the reports, and further delay in formulating a proposed IEP cannot be condoned. It is startling to recall the testimony of learning consultant Barbara McKenzie, when she indicated that she had not received Dr. Amorapanth's report as of her meeting with the Team in August. Dr. Amorapanth's report was sent to Mr. Salsovic under cover letter dated April 28, 1998, and marked received on May 15, 1998. This extraordinary delay in time was never explained, particularly in view of the fact that no program was offered A.J. prior to the start of the 1998-99 school year.

The criteria, procedure and schedule for evaluating A.J.'s goals and objectives are in fact all subjective, and not objectively measurable. There is no definition of what satisfactory performance is, which evidently is the standard upon which A.J.'s performance will be judged. *N.J.A.C. 6A:14-3.7 (d) 14* requires that the IEP contain "a statement of how the student's progress towards the annual goals described in (d) 2 above will be measured." The criteria must be based upon measurable, objective annual goals. See *N.J.A.C. 6A:14-3.7 (d) 2*. The IEP draft of October 1998 in this regard is severely lacking. The draft IEP, under the instructional area of "Support", contains two goals, the second one stating: "Improve academic performance in mainstream area subjects." The objective is: "Demonstrate grade-appropriate understanding of mainstream subjects." This cannot be considered to be the standard upon which performance will be judged for all mainstream areas that satisfies the requirements of the Code necessitating a device wherein a student's progress towards the annual goals will be measured. The problem here is that there are no annual goals for A.J. in the mainstream. And if there are no goals, then we do not know to what extent he will have to improve in order that we are able to make a determination as to whether or not he has met his annual goals. If the

finish line is non-existent, then one can never finish the race, let alone win it. Beyond that, how A.J. will demonstrate grade-appropriate understanding of mainstream subjects is not set forth. Is it based upon modified grades? Understanding only some of the mainstream subject topics? Is it based upon his effort rather than his abilities relative to peers? This uncertainty is not what IDEA calls for.

Although witnesses testified that there would be pre and post-testing for 5th grade, nowhere in the draft IEP is this even mentioned. A.J.'s history at Long Hill demonstrates that the program that he received was significantly different than the program that was enumerated in the various IEPs. This confusion and uncertainty continued even into the draft IEP of October 1998