

**UNDER THE CIRCUMSTANCES OF THIS CASE,
PETITIONERS WERE FULLY JUSTIFIED IN
UNILATERALLY PLACING A.J. AT THE BANYAN
SCHOOL FOR THE 1998-99 SCHOOL YEAR.**

In determining whether a proposed program and placement are appropriate, and whether or not the parents' reaction thereto was reasonable, the Court must consider the program actually offered and not one that the district could have offered if it had been so inclined. In the case at bar, the Court must determine what program was offered to A.J. at the time that Petitioners decided to place him at the Banyan School. This time period was late July and early August 1998, just a short time before the commencement of the 1998-99 school year.

In *Lascari, Supra*, the Court dealt with the issue as to whether or not an IEP could be held to be appropriate and valid if the district could have altered it after the fact:

"To conclude, we believe the obligation of the 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 the IEP was appropriate ... We also conclude that, **in determining whether an IEP was appropriate, the focus should be on the IEP actually offered and not on one that the school board could have provided if it had been so inclined** ... Other courts that have addressed the issue of the appropriateness of the district's education likewise have focused on the IEP actually provided, and not on a hypothetical one that the board could have provided. *Burlington, Supra*, 471 U.S. at 374 ... *Rowley, Supra*, 458 U.S. at 206-07 ... *Tatro, Supra*, 703 F.2d at 830; *Adams by Adams v. Hansen*, 632 F. Supp. 858, 865 (N.D. Col. 1985); *Davis v. Board of Education*, 530 F. Supp. 1209, 1212 (D.D.C. 1982).

In short, a school board that has failed to meet its obligation to provide an appropriate education should not escape liability by showing that it could have done so."

Lascari, 116 N.J. at 46-47 (emphasis added)

This Court should not be misled by the specious argument offered by the district that the notion of least restrictive environment (inclusion) mandates education in a public

school. The concept of least restrictive environment does not trump all other considerations. As Chief Judge Gerry announced in *Egg Harbor Township Board of Education v. S.O.*, 90-1043, 19 IDELR 15 (D.N.J. 1992):

"Egg Harbor bears the burden of demonstrating its ability to design and implement an appropriate educational program for S. in the least restrictive environment. ... To date no such demonstration has been made. Under such circumstances, a family seeking reimbursement for a private school need only show that the placement unilaterally chosen is appropriate, 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 ...' " *Burlington, Supra*