

**WHETHER BY DESIGN OR CIRCUMSTANCE, PETITIONERS WERE MISLED AS TO THE NATURE AND EXTENT OF A.J.'s DISABILITIES AND HIS ACHIEVEMENT LEVELS, AND WERE FURTHER DEPRIVED OF THE OPPORTUNITY FOR MEANINGFUL PARTICIPATION IN THE VARIOUS DECISIONS THAT WERE MADE REGARDING HIS PROGRAM THROUGHOUT THE YEARS.**

The regulations implementing IDEA that were in effect prior to May 11, 1999 (the date of the recently adopted IDEA regulations) contain a question and answer format in *Appendix C* that appropriately describes the roles of the parent and the Child Study Team in working cooperatively together to ensure that each child who is disabled receives a free, appropriate public education. *34 C.F.R. 300 et seq., Appendix C* is entitled "Individualized Education Programs (IEPs). Interpretation of Requirements of Part B of the Individuals with Disabilities Education Act, I. Purpose of the IEP". This section states as follows:

"There are two main parts of the IEP requirement, as described in the Act and regulations:

- (1) The IEP meeting(s), where parents and school personnel jointly make decisions about an educational program for a child with a disability, and
- (2) the IEP document itself, that is, a written record of the decisions reached at the meeting. The overall IEP requirement, comprised of these two parts, has a number of purposes and functions:
  - a. The IEP meeting serves as a communication vehicle between parents and school personnel, and enables them, as equal participants, to jointly decide what the child's needs are, what services will be provided to meet those needs, and what the anticipated outcomes may be.
  - b. The IEP process provides an opportunity for resolving any differences between the parents and the agency concerning the special education needs of a child with a disability; first, through the IEP meeting, and second, if necessary, through the procedural protections that are available to the parents.
  - c. The IEP sets forth in writing a commitment of resources necessary to enable a child with a disability to receive needed special education and related services.

d. The IEP is a management tool that is used to ensure that each child with a disability is provided special education and related services appropriate to the child's special learning needs.

e. The IEP is a compliance/monitoring document that may be used by authorized monitoring personnel from each governmental level to determine whether a child with a disability is actually receiving the FAPE agreed to by the parents and the school.

f. The IEP serves as an evaluation device for use in determining the extent of the child's progress toward meeting the projected outcomes."

The IEP, therefore, is a communication device between the parents and the district which envisions a collaborative process wherein parents are informed as to the program that is being offered their children and given the opportunity to participate in making decisions regarding all aspects of special education. This was effectively denied Petitioners in this case.

By the time Petitioners were forced into the position of having to make placement decisions for their son in the summer of 1998, they had become aware of some of the more troubling aspects of A.J.'s history in this school district.<sup>1</sup> These include the following:

1. A.J. was subject to teasing by peers, and by one child in particular in Kindergarten, but no effective steps were taken to rectify the situation, nor was A.J. ever offered social skills training until the last few weeks of 4th grade.

2. The Kindergarten IEP was extremely confusing in that Long Hill used obscure terminology in defining academics as meaning only core subjects and not Science or Social Studies.

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<sup>1</sup> The significance of A.J.'s history at Long Hill is twofold. First, it describes the consistency of A.J.'s disabilities throughout the years, and Long Hill's reaction thereto. Second, it should enable this Court to make a determination as to what reliance it will place upon the testimony and opinions of Long Hill's witnesses, given their carelessness and cavalier disregard of A.J.'s rights and educational needs. In other words, it has everything to do with what weight the Court should afford Respondent's evidence in this matter.

3. The Kindergarten IEP was misleading and confusing in that it indicated that there were speech and language goals that would be implemented, when in fact speech and language goals never existed.

4. Petitioners were led to believe that if A.J. needed a self-contained class in Science and Social Studies he would be given one, but in reality, and consistent with Long Hill's testimony, no self-contained Social Studies or Science classes are available no matter how severe the child's disability. This one-size-fits-all mentality is not in keeping with the spirit of IDEA, which requires programs to be individually tailored to meet a child's needs. A.J. is a bright youngster who obviously has the capability of learning. Therefore, it is not surprising to observe that his achievement levels in Science and Social Studies are where they are. However, it is unfortunate that he was placed in a class where he was unable to read his Science and Social Studies text books, consistent with the testimony of Ms. Rau. One can only wonder what he would have achieved had he been able to read these text books like the other children.

5. The IEP amendment which added OT in Kindergarten (T-13) again falsely states that there are speech and language goals.

6. A.J.'s IEP for Kindergarten, 1st, 2nd and 3rd grades never enumerated what testing modifications would be employed for him.

7. Throughout the years, A.J. was never able to adequately understand the concept of time or the use and function of money, and fell further and further behind.

8. Petitioners were misled into believing a statement in the IEP that A.J. was working at a certain instructional level meant that he was achieving at that level. Indeed, the last IEP prepared for A.J. in April 1997 showed him to be working at grade level when in fact he was not.

9. The Current Educational Status section of A.J.'s IEPs, including the last one offered in April 1997, often contained erroneous information, relying upon outdated

progress reports. This made it difficult, if not impossible, for A.J.'s parents to understand what was being offered and whether or not A.J. was making any progress.

10. A.J. was moved from self-contained Math to mainstream Math, back to self-contained Math, without following any of the required procedures that are mandated under IDEA. There is no indication of any deliberative process that was entered into that documented reasons for the change. Petitioners trusted the Child Study Team to do what was appropriate, but were misled.

11. Petitioners bent over backwards in cooperating with Long Hill, even to the extent of appearing for meetings on only two day's notice. On every occasion both of A.J.'s parents cooperated and participated in the meetings, but their ability to offer input was severely hampered by Long Hill's refusal or inability to be forthcoming and to clearly explain the nature, extent and scope of A.J.'s program.

12. There was a great deal of confusion and uncertainty as to what curriculum A.J. was following when he was mainstreamed for Math, and it became difficult if not impossible for anyone to determine if progress was being made. This uncertainty, in fact, spilled over to all mainstreamed areas.

13. No neurological evaluations were ever requested by Long Hill, which was particularly upsetting for Petitioners given that Mr. Salsovic, at the 4/1/98 IEP annual review, stated that he was surprised that there had never been a neurological evaluation on A.J. Petitioners testimony in this regard was never rebutted.

14. The Special Education Teacher Progress Report of April 1996 (T-36) states that A.J. was mainstreamed for Math, while both Mr. and Mrs. S. testified that they thought that the only mainstreaming for Math that A.J. had was from the end of March 1995 through the end of the school year. Their confusion as to exactly what their son's program was resulted in their inability to give meaningful input into the IEP process.

15. Various IEPs and reports were internally inconsistent, including the 1996 Special Education Teacher Progress Report (T-36), which on page 2 states that A.J. was

mainstreamed for Art, Music, Library, Physical Education, Science and Social Studies, but on the prior page indicated that A.J. was also mainstreamed for Math. This was another point of confusion for A.J.'s parents.

16. A.J.'s parents were under the impression that tests in Science were sent home the day before, and that these enabled A.J. to pass the tests when they were read aloud to him the following day. Whether these were the actual tests that were given or very close study guides, the fact of the matter is that Petitioners were never given an adequate explanation or opportunity to see for themselves exactly what it was that was occurring in the mainstream. On numerous occasions Petitioners requested that they be able to observe A.J. when he was taking tests, since he was unable to perform these activities at home. In each and every instance they were denied the opportunity to see for themselves what he could and could not do in the school setting. What they did know was that A.J. was unable to tell time, make change, and was extremely frustrated and anxious in doing school work or in fact going to school.

17. Long Hill completely forfeited its responsibility to A.J. in not completing the IEP process on April 1, 1998, and relied instead upon an outdated IEP that was prepared in 3rd grade on April 9, 1997. Had A.J. commenced 5th grade, he would have had an IEP for that year that was created for him in 3rd grade. Moreover, the IEP referred to above did not even have the proper Current Educational Status section, as it relied upon outdated reports.

18. Much to the chagrin of Petitioners, A.J. was once again in 4th grade paired with T.P. in the mainstream. He was continually targeted and virtually tortured by this other classified student. Proof of the enormity of this problem can be gleaned from the October 1, 1998 draft IEP, which makes it clear that T.P. and A.J. should not be in the same class. The proverbial straw that broke the camel's back was when A.J.'s mainstream teacher, Julie Rau, called Mrs. S. and informed her that A.J. would unfortunately be in the same mainstream class as T.P. for 5th grade. This is confirmed by Ms. Rau's

testimony as well as the report cards which show that both children were assigned the homeroom of Mrs. Silberfein. By this time, A.J. was experiencing so much anxiety that he was resisting going to school in the morning, and developing psychosomatic complaints.

19. It was never adequately explained to Petitioners exactly what the Wilson Reading Program was, and in fact his 3-4 IEP prepared on 4/9/97 makes no mention whatsoever of the Wilson Reading Program or its goals. Besides the fact that the teacher for 3rd grade was evidently not a trained Wilson teacher, there was no IEP amendment for 4th grade which in any way made mention of the Wilson Reading Program or its goals and objectives. Beyond that, Mrs. Newcomb<sup>2</sup> testified to various strategies that she used, but once again they were never enumerated in any IEP document. Ironically, the draft IEP that the district offered the parents in October 1998 itself even contained the wrong Wilson goals and objectives.

20. Dr. Amorapanth's report rendered on April 28, 1998, painted a much bleaker picture of A.J. than any other report heretofore. Given the fact that this expert was suggested and paid for by Long Hill, it gives even more credence to the proposition that the Child Study Team had grossly underestimated the nature, extent and scope of A.J.'s disabilities. Dr. Amorapanth's recommendation that A.J. needed "compatibility with his learning style with higher ratio of teacher/student, in a very supportive environment where the social interaction skills can be consistently facilitated" does not seem to be congruent with simply a continuation of the same program.

21. Dr. Sherry Barron-Seabrook's report recommended a small, highly structured classroom within a small school environment.

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<sup>2</sup> The Court will recollect that Mrs. Newcomb, on 4/26/99, testified that A.J. had feelings of "total inadequacy" when it came to Math, and was not consistent in any progress that he had made. She also testified that from 4/1/98 through June 1998 she followed the 4th grade regular education curriculum in Math. Given A.J.'s Math levels at that time, it should be manifest that not only did he receive little or no benefit, but became extremely frustrated in that endeavor. Indeed, Mrs. Newcomb candidly admitted that A.J. had changed in the Spring, and was even becoming more critical of fellow students. She also testified that A.J. could not read the Science or Social Studies text books.

22. Dr. Aitchison's report was accepted by Long Hill, and even Ms. McKenzie, the district's learning consultant, recognized that Dr. Aitchison was well-respected in the community. The tests of achievement, starting at page 10 of T-58, reflect among other things that A.J.'s basic reading skills were at the 2.8 grade level, broad reading score at the 3.7 grade level, word attack skills at the 2.6 grade level, broad written language at the 3.6 grade level, basic math skills at the 3.3 grade level, skills in applied problems at the 3.3 grade level, and ability to apply quantitative concepts at the 3.0 grade level. For a boy with at least average intelligence, and completing 4th grade and going into 5th grade, A.J. is significantly behind his chronological peers. A review of the Compuscore for the Woodcock-Johnson, which is attached to Dr. Aitchison's report, also reflects grade equivalence in many areas at the Kindergarten, 1st, and 2nd grade levels. These scores, however, do not even take into consideration the social vulnerability and psychiatric diagnoses that were found to exist by both Dr. Sherry Barron-Seabrook and Dr. Schweibert, including Adjustment Disorder with Mixed Emotional Features, anxiety, as well as other specific learning disabilities. Even Dr. Schweibert noted in regard to the global assessment of functioning that A.J.'s difficulties were in the nature of "moderate-to-severe difficulty with social, interpersonal, and academic functioning." (T-62, P-3)

It would appear very reasonable to concur with Petitioners' decision not to place A.J. back into the same environment in Long Hill which had not served him well in the past. Any other decision would have been irresponsible and certainly detrimental to A.J.'s best interests socially, emotionally and academically.

There are specific and exacting requirements that must be met in order to ensure that a handicapped child is receiving a free, appropriate public education. *Egg Harbor, Supra*. The definition of special education contains a requirement (B) that the services "meet the standards of the state educational agency." The importance of this requirement cannot be overstated. In *Rowley, Supra*, Justice Rehnquist remarked at page 189: "... thus, if personalized instruction is being provided with sufficient supportive services to

permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a 'free, appropriate public education' as defined by the Act." In addition, the Court went on to comment at page 206:

"Therefore, a court's inquiry in suits brought under *Section 1415 (e) (2)* is twofold. First, has the state complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefit? ... Entrusting a child's education to state and local agencies does not leave the child without protection. Congress sought to protect individual children by providing for parental involvement ... in the formulation of the child's individualized educational program. ... When the elaborate and highly specific procedural safeguards embodied in *Section 1415* are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, see, e.g., *Section 1415 (a)-(d)*, as it did upon the measurement of the resulting IEP against a substantive standard. We think that the Congressional emphasis upon full participation of concerned parties throughout the development of the IEP, as well as requirements that state and local plans be submitted to the Commissioner for approval, demonstrate the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP."

From all of the above, it is manifest that the procedural and substantive violations in this case rendered A.J.'s education significantly flawed almost from the outset. The purpose of reviewing A.J.'s history from Kindergarten is to enable this Court to judge whether or not what the parents did in the summer of 1998 was reasonable under the circumstances. As the Court stated in *Lascari, Supra*:

"Because the reviewing court may grant 'appropriate' relief under 20 U.S.C. § 1415 (e) (2), its award can be informed by equitable considerations. Several courts have held that it is appropriate to balance the equities in determining whether to grant 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. ... At no time has the board questioned the academic program offered by Landmark. ... Because the district's program was inappropriate, the Lascaris were forced to find alternative private schooling for their son. Confronted with this stressful decision, they did their best. We should not ask for more." (citations omitted)