



COLE SCHOTZ

COLE, SCHOTZ, MEISEL, FORMAN & LEONARD, P.A.

Attorneys at Law

A Professional Corporation

SPECIAL EDUCATION ALERT

*A Publication of the Special Education Practice of
COLE, SCHOTZ, MEISEL, FORMAN & LEONARD, P.A.*

April 2007

We at Cole, Schotz, Meisel, Forman & Leonard, P.A. want to keep you advised of new developments in the area of special education law. To that end, we periodically publish the *Special Education Alert* whenever there is news of interest that we feel merits your attention. In this issue, among other things, we ask you to support New Jersey legislation which would place the burden of proof in special education hearings back on school districts where it was from 1989 through November 2005.

In the interest of efficiency, the *Special Education Alert* has been created as an e-newsletter. If you have received this through the mail but would like to receive the *Special Education Alert* via e-mail, please send your e-mail address to Christine Pomante at cpomante@coleschotz.com. We hope you find this issue useful. We welcome your comments, suggestions and ideas.

*Rebecca K. Spar, Esq.
Cole, Schotz, Meisel, Forman & Leonard, P.A.
rspar@coleschotz.com*

ACTION ALERT
Contact Your State
Legislators and Tell Them
That You Want the Burden
of Proof in Special
Education Hearings Placed
Back on School Districts.

In 1989, the New Jersey Supreme said in *Lascari v. Board of Education of Ramapo Indian Hills School District* that when parents challenge the appropriateness of a school district's plan for their special needs child, that the burden is on the school district in a special education hearing to prove that it was properly educating their child in the least restrictive environment. The Court reasoned that the school district had better access to the information and to the experts needed to show the appropriateness of its educational decisions.

In November 2005, the United States Supreme Court ruled in *Schaffer v. Weast*¹ that except when a state has a specific statute placing the burden of proof on a school district, the party seeking to change the existing IEP has the burden of proof. Most hearing officers in New Jersey have interpreted *Schaffer* to place the burden of proof on the party filing for a hearing.

The *Schaffer* decision has placed a significant obstacle on parents seeking to ensure that their children are receiving a free appropriate education. Virtually all special education hearings in New Jersey are initiated by parents who, following the *Schaffer* decision, are not only required to prove the inappropriateness of the school district's Individualized Education Programs (IEP) and/or that their child is being deprived of an education in the least

restrictive environment but are also required to present their cases first.

Since the *Schaffer* decision, some school districts have raised numerous barriers to prevent parents from accessing the information needed to meet their new burden. Barriers include delaying and/or refusing to allow parents to obtain independent evaluations and refusing to allow the parent or their expert to observe the proposed placement or the child in his/her current placement. Even when the parent's experts are allowed to observe, the duration of the observation is severely limited and the expert may be prohibited from speaking to the child's current or proposed teacher or other providers. The obvious purpose is to preclude parents from obtaining information demonstrating the inappropriateness of the district's program.

In response to the *Schaffer* ruling, this attorney along with other special education attorneys and advocacy organizations have worked to introduce state legislation putting the burden of proof back on school districts where it belongs. New Jersey's Public Advocate Ronald Chen, joined in this effort and recently issued a report supporting state legislation to place the burden of proof and the burden of presenting their case back on school districts. The report is available on the Public Advocate's website, <http://www.state.nj.us/publicadvocate>.

On March 8, 2007, state legislators introduced a bill, A4076, that will return the burden of proof to the school districts as was the law in New Jersey from 1989 to November 2005. The bill is sponsored in the Assembly by Assemblyman Joseph Cryan, Assemblywoman Joan M. Voss and Assemblyman David W. Wolfe.

Subsequently, Senators Stephen Sweeney and Joseph Doria introduced S2604, a companion bill to A4076.

If this legislation is to be enacted, it urgently needs your support !

Here's what you need to do:

(1) Find out who your legislators are - - You can find this out by going to the New Jersey Legislature's website at www.njleg.state.nj.us and clicking on "Find Your Legislator". You will have three legislators in total: One Senator in your district and two Assembly representatives.

(2) Send a letter or e-mail to Assembly Education Chair Craig Stanley, as well as a letter or e-mail to Senate Education Chair Shirley Turner, urging that A4076 and S2604 be posted to committee as soon as possible.

(3) Include in your letter or e-mail:

a. your name and town you live in;

b. how you are involved in special education;

c. that you are requesting their help in supporting A4076 and S2604, the legislation placing the burden of proof back on school districts in special education hearings;

d. If you can, include a personal story conveying how difficult it is for parents in due process hearings and/or the difficulties you experienced in obtaining information needed to meet the burden of proof in a due process hearing;

e. Point out that placing the burden of proof on school districts evens the playing field and ensures tax dollars are being spent for appropriate special education programs.

(3) Send a copy of your letter or e mail to the Bill's sponsors, Assemblypersons Joseph Cryan, Joan Voss and David Wolfe, and Senators Swccency and Doria as well as a copy to your state assemblyperson and senator.

Copies of the bills, "Talking Points" and a sample letter/e-mail are attached.

▪ If you would be willing to speak with legislators in support of the burden of proof legislation, please e-mail me at rspar@coleschotz.com or call 201-525-6284.

▪ Calls and letters to the editor of your local newspapers would also be helpful. Some school districts will be very opposed to this bill and it is imperative that the sponsors know how important the bill is to you.

PLEASE TAKE IMMEDIATE ACTION TO ENSURE THAT STUDENTS WITH DISABILITIES RECEIVE A FREE AND APPROPRIATE EDUCATION

Do School Districts Still Have The Burden Of Proof When They Seek to Change an IEP?

The issue in *Schaffer* involved a parent's contention that her daughter's current IEP was inappropriate. Left unanswered is which party has the burden of proof when a school district wants to change the existing IEP and the parent wants to maintain the status quo. A common situation might be when the school district wants to remove a student from the public school and place him/her in a segregated environment while the parents want their child to continue in the public school. Because New Jersey regulations provide that an IEP will go into effect 15 days after written notice is given, a parent who wishes to maintain the status quo must file for mediation and/or due process

within that 15 days. A strong argument can be made that the *Schaffer* Court intended that the party seeking to change the existing IEP or the school district in this example would have the burden of proof.

In a recent case where the school district wanted to change the student's placement, this firm participated with New Jersey Special Education Practitioners, Education Law Center and twelve other organizations who advocate on behalf of children with disabilities, in submitting an amicus brief in a federal district court case, demonstrating that both IDEA and *Schaffer* mandate that the burden of proof be placed on the party seeking to change the IEP. The case settled shortly thereafter.

Expert Fees

In another recent decision, the United States Supreme Court considered whether parents who prevail in a special education proceeding are entitled to recover the costs of an educational consultant who assists them in the administrative hearing.ⁱⁱ The Court held that IDEA provided for attorneys fees as part of the costs to a prevailing parent but not for reimbursement for an educational consultant who assisted with the administrative hearing.

Although the *Arlington* case involved an educational consultant, not an expert witness who testified at the hearing, its ruling applies to experts who testify at hearings in which a parent prevails and subsequently seeks reimbursement for fees charged by expert witnesses. The *Arlington* decision is yet another impediment making it more difficult for parents to ensure their children are receiving an appropriate education.

Efforts are underway to amend the federal special education statute (IDEA) to specifically provide reimbursement for

expert witness fees when parents are prevailing parties. Expert witnesses are critical in most special education hearings.

WRITE YOUR FEDERAL SENATOR OR REPRESENTATIVE AND URGE THEM TO INTRODUCE LEGISLATION ALLOWING PARENTS WHO PREVAIL IN SPECIAL EDUCATION PROCEEDINGS TO RECEIVE REIMBURSEMENT FOR EXPERT FEES!

Please note that the *Arlington* decision does not effect parents' right to independent evaluations at the district's expense. Parents are still entitled to request districts pay the cost of independent evaluations when the parent disagrees with the district's evaluation.

U.S. Supreme Court Hears Argument on Whether Parents May Represent Their Children in Court

On February 27, 2007, Jacob Winkelmann's parents argued before the United States Supreme Court that they should be able to act *pro se* or without an attorney in an appeal from an IDEA administrative decision. Although it is undisputed that IDEA allows parents to act *pro se* in administrative hearings, most states prohibit non-attorneys from representing other people, even family members, in court proceedings. The Sixth Circuit Court of Appeals had ruled that Jacob's parents must retain an attorney if they wished to pursue an appeal in federal court.

Questions during the oral argument focused on whether the procedural and substantive rights under IDEA belonged to parents and children together or whether they were solely the rights of the children. Although it is always difficult to predict how a court will rule based on oral argument, the general sense seemed to be that the parent and child

rights were either so intertwined they couldn't be separated or, at a minimum, parents could act *pro se* to enforce their own rights such as procedural rights and right to reimbursement. A decision is expected in late June or early July 2007.

The Threat That Parents May Have to Pay the School District's Attorney Fees

It has been brought to our attention that some district personnel have threatened parents that if they proceed with a due process hearing and lose, the parent may have to pay the school district's attorney fees.

IDEA allows for an award of attorney fees directly against a parent only in those very limited and unusual instances where the parent's complaint or subsequent cause of action was filed for an improper purpose such as to harass the district, to cause unnecessary delay or to needlessly increase the cost of litigation. As long as parents are taking legal action for a proper purpose, such as to obtain an appropriate education for their child, they should not have to pay the district's fees.

This provision went into effect with other federal changes in July 2005 and to date, there don't appear to any reported cases where a parent was required to pay a school district's attorney fees for filing a due process hearing for an improper purpose.

New Jersey Implements New Regulations Effective September 5, 2006

Copies of the revised state regulations are available on New Jersey Department of Education's website, <http://www.state.nj.us/education>.

Selected changes are:

- **Independent Evaluations:** Parents have always had the right to request an Independent Evaluation at public expense each time the District conducts an evaluation with which the parent disagrees. It was unclear, however, whether the parent had the right to request an Independent Evaluation in an area not assessed as a part of the District's evaluation. For example, what if the District conducted an educational and speech language assessments and the parent wanted the District to pay for independent educational and speech language assessments as well as a neuropsychological?

New state regulations clarify that when a parent seeks an Independent Evaluation in an area not assessed as a part of the initial or reevaluation, the District has 10 days of receipt of the parent's request to notify the parent in writing whether it will conduct the additional assessment and 45 calendar days from the date of the parent's request to complete the assessment.

- **Observation by Parent's Expert:** A question sometimes raised is whether a school district must allow a parent's expert to observe the student in the classroom. New state regulations make it clear that for any Independent Evaluation, whether at public or private expense, the District must permit the parent's evaluator to observe the student in the classroom or other educational setting.

- **Short-term objectives and benchmarks:** New Jersey regulations continue to require short-term objectives and benchmarks for all children with IEPs.

- **Reading Fluency:** Was added as an area in which a severe discrepancy can exist to support a finding of specific learning disability.

When Can A District File Due Process Compelling Receipt of Special Education and Related Services?

If a parent refuses to consent to implementation of an initial IEP, the District cannot request a hearing to override that consent. Once a parent has consented to initial implementation, he/she may revoke consent at any time, in writing. If a parent revokes consent for services, however, the District may file for due process.

New Jersey Supreme Court Holds School Districts Accountable When Students Harass Another Student

On February 21, 2007, the New Jersey Supreme Court removed all doubt when it held in *L. W. v. Toms River Regional Schools Board of Education* that New Jersey Law Against Discrimination (NJLAD) allows a cause of action against a school for student-on-student affectional or sexual orientation harassment.

In reaching its decision, the Court acknowledged that harassment, intimidation and bullying in public schools is a significant problem and one that falls within the overarching goal of NJLAD to eradicate the “cancer of discrimination.” The Court rejected the higher standard set for sexual harassment under Title IX, a federal statute, which requires deliberate indifference.

Instead, the Court held that a school may be liable when it knew or should have known of the harassment but failed to take actions reasonably calculated to end the harassment. The Court noted that what is reasonable would depend on the particular circumstances and might require expert testimony.

Although the situation in this case involved a student who was being harassed based on his perceived affectional or sexual

orientation, NJLAD also prohibits discrimination because of disability and, presumably, the same standard would apply to hold schools accountable for student-to-student harassment based on disability.

This is an important decision and one which will hopefully significantly reduce harassment, bullying and intimidation in schools.

New Jersey’s Appellate Division Holds Parent of Diabetic Preschooler May Bring Claim Against Private Pre-School Under New Jersey Law Against Discrimination

In yet another important decision on the reach of New Jersey Law Against Discrimination (NJLAD), it was held in *Ellison v. Creative Learning Center*ⁱⁱⁱ, that a private nonsectarian preschool could be liable under NJLAD for alleged discrimination against a child with juvenile diabetes. The preschool revoked the child’s admission when it learned that the child’s recently installed insulin pump would require special training of its staff and monitoring. The Appellate Division held that the preschool was a place of public accommodation and, thus, subject to the requirements of NJLAD. The case was sent back for the trial court to determine whether the accommodations needed by the child were reasonable.

New Jersey Supreme Court Finds Adult With Asperger’s Disorder Eligible for Services From Division Developmental Disabilities

At issue in *T.H. v. Division of Developmental Disabilities*, was whether a 55 year old man who suffers from Asperger’s Syndrome was eligible for services from Division of Developmental Disabilities. The State argued that he was not eligible because, although there was no dispute that T.H. had Asperger’s as a child, T.H. did not prove that his Asperger’s

caused substantial functional limitations in three major life areas before the age of 22.

T.H. lived with and was cared for by his parents until they died within eight months of one another. T.H. then attempted suicide, leaving him with a Traumatic Brain Injury and physical limitations and short term memory loss. After T.H. exhausted his inheritance from his parents' estates and was facing removal from his group home for inability to pay, his siblings sought services on his behalf from Division of Developmental Disabilities.

The Administrative Law Judge (ALJ) rejected the conclusions of the family's expert that T.H.'s Asperger's caused substantial limitations in three areas before age 22 because her conclusions were based on anecdotal commentary from family members and input from T.H. himself and not documentary evidence such as medical records. The fact that Asperger's Syndrome was not even identified and named by the medical community until well after T.H. reached adulthood was ignored. The Appellate Division upheld the ALJ's decision.

The New Jersey Supreme Court held that there was no statutory requirement that an applicant for services develop substantial functional limitations in three major life areas before the age of 22 and, thus, the regulation requiring this exceeded the power of DDD. All that was required was that T.H. have had a developmental disability before the age of 22 (which was stipulated to by the parties) and that it resulted in substantial functional limitations in three major life areas at the time of application for services. In addition, the Court found that DDD's rejection of evidence supplied by T.H.'s family because it was anecdotal and not documentary was arbitrary. The Court noted that "We can think of no more

relevant and probative evidence than testimony of relatives who lived with T.H. and his problems – year in and year out – over a lifetime."

Web Sites Collecting Information on "What Works" in Education

Both IDEA and No Child Left Behind emphasize the importance of selecting educational interventions based on what research has shown to be effective. This has led to a growing number of websites which collect information on what has been shown by research to work. As you prepare for your child's annual review IEP meeting, you may want to see what, if anything, research has shown about the effectiveness of the educational interventions being used with your child.

www.osepideasthatwork.org/index.asp
[contains, among other things, Parent Tool Kit which offers a collection of assessment, instructional practices, behavior and accommodations intended to assist parents in becoming active and informed participants in IEP discussions and decision making meetings. CD containing Tool Kit on Teaching and Assessing Students with Disabilities and CD of IDEA 2004 Part B Final Regulations is also available on same website]

www.colorado.edu/cspv/blueprints
[University of Colorado at Boulder lists programs found to be effective in reducing violent crime, bullying, delinquency, and substance abuse]

www.bestevidence.org [collects evidence from several research groups on promising practices and interventions in education]

www.whatworks.ed.gov [financed by the U.S. Department of Education, it reviews a

variety of educational programs and practices]

www.evidencebasedprograms.org [produced by the Coalition for Evidence-Based Policy

and includes a listing of interventions in education and social science areas that have been evaluated through randomized studies]

Cole, Schotz, Meisel, Forman & Leonard, P.A.
Court Plaza North
25 Main Street
Hackensack, New Jersey 07601
(201) 525-6284
Facsimile: (201) 678-6284
rspar@coleschotz.com

ⁱ 126 S.Ct. 528 (2005)

ⁱⁱ *Arlington Central School District Board of Education v. Murphy*, S.Ct. (2006).

ⁱⁱⁱ 383 N.J. Super. 581 (App. Div. 2006)