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Can Parents Obtain Tuition for Private School for their Child with Disabilities?

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At some point in the life of a child who receives special services in school, parents may consider enrolling the child in a private school that specializes in educating students with disabilities. Since the average tuition for such schools is around $100,000 per year (more if the student needs a full time one-on-one aide), many parents cannot afford to send their child to a private school unless they can convince their public school district or an administrative law judge ("ALJ") of the legitimacy of the claim. Cases decided by ALJs as recently as April of 2021 help explain how to prove that a local school district must pay private school tuition, as well as the pitfalls which may doom that attempt.

Types of Cases in which Parents Prevail

In D.S. and M.S. on behalf of A.S. v. East Brunswick Twp. Bd. of Ed. (initials used to protect confidentiality), a high school sophomore was enrolled by her parents in The Lewis School in Princeton. A.S. was classified "Other Health Impaired" due to diagnoses of Pervasive Developmental Disorder, Attention Deficit Hyperactivity Disorder, Attention Deficit Hyperactivity Disorder, Anxiety Disorder, Disruptive Mood Disorder and Expressive Language Disorder. Through grammar school and middle school, she was in self-contained classes for LLD and in general education with supports. While A.S. passed every grade, she began to decline "both academically and socially" in high school.

The ALJ heard testimony from the director of special services, the case manager, and a supervisor, and two witnesses for the parents — an expert in educating children with learning disabilities, and A.S.' mother. The ALJ had to decide two issues: did the school district provide A.S. "with a free appropriate education, or FAPE," and was "the placement selected by the parents. . . proper." The law placed the burden of proof of both issues on the school district. Not surprisingly, given the deterioration experienced by A.S. in high school, the ALJ found that the district

did not provide A.S. with "significant learning" which conferred "meaningful benefit," the minimum requirement for FAPE. Also, on the issue of whether the Lewis School placement was appropriate, "petitioners provided documentary evidence of A.S.' progress at the Lewis School and provided testimony that A.S. was indeed demonstrating significant academic progress." Finally, the ALJ found that the parents gave the school district sufficient notice of their intent to enroll A.S. in the Lewis School in order to comply with N.J.A.C. 6A:14-2.10, and ruled that the district had to reimburse the parents for the costs of the Lewis School "as long as that placement remains appropriate."

In J.H. and S.R. on behalf of E.H. v. Morris School District Bd. of Ed., "at the time of the hearing E.H. was a nine-year-old rising fourth grader at The Craig School, a private out-of-district placement, where he had been unilaterally placed by his parents since the second grade." He was classified as having Specific Learning Disability (SLD); specifically, E.H. "was profoundly dyslexic." The parents had placed him in the private Chatham Day School for kindergarten and first grade, but after first grade they informed their school district that they would move him to Craig School. The school district argued that "the District's program is the least restrictive environment for E.H. Students in the in-class support classes have varying abilities, strengths and weaknesses, and students with severe disabilities have better outcomes when educated with neurotypical peers rather than placed in a setting with students with their disability." This argument was based on the legal requirement that students with disabilities should be educated in the "least restrictive environment," to the maximum extent appropriate.

The ALJ made a preliminary finding that the school district did not deny E.H. a FAPE for the first summer when he was unilaterally placed in the Craig summer program by his parents since "the parents did not provide the District with any notice of their unilateral placement prior to mid-August." However, on the main issue, the ALJ found that the parents were entitled to reimbursement for E.H.'s Craig School tuition for two school years. To reach that conclusion, the ALJ found that the school district had not provided E.H. with a FAPE since "the District's witnesses did not convince me that E.H. would make any meaningful progress with a reading program that is limited to 40 minutes per day and is not multi-sensory." The ALJ also found that E.H. was making "meaningful progress at the Craig School" and held that Craig School was the appropriate placement at least for the years at issue. This was not surprising, as often ALJs have to decide a private school placement is appropriate when there is evidence that the child progressed at the school.

Types of Cases Where Parents Face Challenges Recovering Tuition

There are, of course, numerous cases in which parents have difficulty obtaining reimbursement for private school tuition. A classic example is the recent decision in S.W. and L.L. on behalf of D.W. v. Glen Ridge Bd. of Ed. D.W. was a child with autism. D.W. also suffered from brain cancer for some time. His parents placed him in SEARCH Learning Group after he spent two years, starting with pre-kindergarten, in District schools. The last two paragraphs

of the ALJ's opinion describe why D.W.'s parents did not obtain an order awarding them tuition reimbursement:

> I CONCLUDE that the parents' failure to provide the District with {their expert's} report or at least inform the District of [their expert's] specific concerns and recommendations, prior to the unilateral placement was unreasonable and denied the District any opportunity to address these concerns.
>
> I also CONCLUDE that the petitioners acted unreasonably and denied the District any opportunity to address their concerns when they: refused to attend the May 2019 IEP meeting; only informed the District of their intent to unilaterally place D.W. at SEARCH by letter dated May 13, 2019 (which did not even express any concerns with the District's program) while the District was attempting to schedule the May IEP meeting; signed the contract and paid a $5,000 retainer fee on May 31, 2019, unilaterally placing D.W. without even informing the District of same, not even at the June 2019 meeting; and refusing to even discuss the District's proposed program or their concerns at the June 2019 meeting. I CONCLUDE that the petitioners' unreasonable conduct and refusal to collaborate with the District in good faith warrants a complete bar to the relief they seek.

We quote the above rulings not to criticize or disparage the efforts of the parents or their advisors. They may have acted entirely reasonably given their belief in the unreasonable position of their school district. Nor are they quoted to say that the parents' conduct was the only, or even the primary, reason they did not prevail; the ALJ also found that the District gave D.W. a FAPE, since he had been making some progress with the District's IEP. We quote the rulings to show that parents should collaborate and communicate with their school district.

A.C. on behalf of Z.P. v. West Windsor-Plainsboro Reg'l Bd. of Ed., although not involving a tuition dispute, is another 2021 case in which an ALJ voiced concerns about the parents. The judge noted that the parents' advocate did not allow the school district to assess a child since the child had not yet turned three years old, even though the child would turn three in eleven days. The ALJ also noted that the mother claimed lack of notice of an eligibility meeting even though the records of the case showed that there was notice. We mention the A.C. case to point out that in these battles it is vital not to give the ALJ any excuse or reason to even implicitly criticize parents who are seeking tuition reimbursement from their school district.

The State of Private School Tuition Disputes in 2021

There are enough case decisions from January to April 2021 to make several statements about current New Jersey law regarding parents' efforts to obtain private school tuition reimbursement:

1. **Expense to the School District Is Not a Defense**. Fortunately, none of these cases even mention the cost to the school district. One 2021 case, J.A. and J.A. v. Monroe Twp. Bd. of Ed., explicitly stated that "Costs are

never a factor in making educational decisions." It seems obvious, of course, that cost is never far from anyone's mind in these disputes. The average tuition for a New Jersey private school for students with disabilities is at least $100,000 per year. Once a student is enrolled in a private school, he or she will likely remain there through graduation, costing the school district several hundred thousand to over one million dollars total. The bottom line is that children have a right to a FAPE, no matter how much the educational services may cost a local school district.

2. **Parents Must Hire a Very Competent Expert**. No one wins these legal battles without an expert. The expert must (a) personally observe the child in a classroom setting for at least a few hours; (b) personally observe and speak with the child one-on-one; (c) review every test conducted of the child; (d) be able to explain why the IEP does not give the child a FAPE; and (e) explain why the private school would provide a FAPE. In most of these cases, the private school can and does supply witnesses who are school employees; these witnesses usually testify either that the child is doing well in the school if he or she has already been placed there or that the school can meet the child's needs if he or she were placed there.

3. **Parents must inform their school district in writing when they want a private school for their child**. As S.W. explains and as set out in more detail in N.J.A.C. 6A:14-2.10, parents must inform the child study team in writing at least ten (10) days in advance of removing their child from the public school and enrolling the child in a private school. Enrollment is often found to occur when a deposit is sent to the school. With so much at stake in these matters, it would be catastrophic to lose a case on account of lack of timely notice.

4. **Parents must not miss IEP meetings**. While disputes often become bitter, ALJs still hold it against parents if they do not cooperate with their local school district and child study team. In close cases, parents could lose if they fail to cooperate.

5. **As cases like D.S. teach us, school districts can almost never prevail when a child either regresses, or more often, fails to progress**. An IEP may look sensible at the time, the child study team could have had the best intentions, the IEP may even have been working for a year or more, but none of that can save a school district if the IEP is no longer appropriate for a child. Every child is entitled to a FAPE every single year.

6. **Specialization pays off**. As cases like J.H. demonstrate, specialization in teaching students with particular disabilities, like specialization in other areas, is usually beneficial to a parent's tuition claim. In J.H. it would have been difficult for any public school that educates students with a wide variety of strengths and weaknesses, to offer nearly as worthwhile a program for a "severely dyslexic" student as was offered by The Craig School. To give one more example, assume a child has cerebral palsy; it would be very difficult for most public school districts to offer the child a program as robust as that offered by the Cerebral Palsy Institute, which has a history of helping so many students, and can offer compelling examples such as students learning to walk, graduates going on to successful

careers, etc. The law does not permit ALJs to compare public school programs with private schools, but ALJs are human and cannot easily put out of their minds what they learn about an excellent specialized private school the student could attend.

7. **Most cases settle, with the school district paying tuition**. There are 162 private schools for students with disabilities in New Jersey that are approved by the State Department of Education. Some are quite large; for example, there are a total of 285 students in the Upper and Lower Schools at Academy 360 in Essex County. There are also scores of private schools in New Jersey which do not have State approval. Overall, many thousands of New Jersey students are enrolled in private schools for students with disabilities, virtually all of whose tuition is being paid by their local school districts. Yet there are only a few reported ALJ decisions in this area every year. The reason for the discrepancy between the number of reported cases and the number of children with disabilities in private schools is that most school districts agree to settle, since settling saves them the cost of their experts and legal fees, as well as the parents' legal fees, which, under the law, the school districts owe if the parents prevail in a legal challenge. The average hourly legal fee awarded by ALJs for parents' counsel the past few years is high enough that school districts may decide to settle a case if the parents have a reasonable argument for private school placement.

8. **The "least restrictive environment" is an important part of the law, but not the whole law.** The strongest defense for school districts in private school tuition battles with parents is the legal requirement that children receive a FAPE in the "least restrictive environment." As cases like D.S. demonstrate, if a child is having difficulty in making friends in a program in the local school district — and is actually regressing—ALJs can reject the public school placement if there is no benefit to the child in the real world the child is facing in the local school.

If you have questions on this subject or related Special Education issues for students, please contact a member of our School Law Practice:

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