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**DECISION**

OAL DKT. NO. [EDS2157-02](#)

AGENCY DKT. NO. 2002 6273

**D.H. o/b/o S.H.,**

Petitioners,

v.

**SOUTHAMPTON BOARD OF  
EDUCATION,**

Respondent.

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**Jamie Epstein**, Esq., for petitioners

**David M. Serlin**, Esq., for respondent

**Frank P. Cavallo**, Esq., co-counsel for respondent (Parker, McCay & Criscuolo,  
attorneys)

Record Closed: October 16, 2002 Decided: January 3, 2003

BEFORE **JOSEPH LAVERY**, ALJ:

**STATEMENT OF THE CASE**

This is an appeal by D.H. on behalf of her son, S.H. She seeks reimbursement for a compelled unilateral placement, and compensatory education of S.H. because of the following alleged shortcomings of the school district:

1. Failure of respondent to accommodate S.H.'s disability so he could attend public school during the 2000-01 and 2001-02 school years.
2. Failure of respondent to provide petitioner S.H. with a free and appropriate education in the least restrictive environment during the 2000-01 and 2001-02 school years.
3. Failure of respondent to abide by the "child-find" provisions in statute and rule: [20 U.S.C. 1412\(a\)\(3\)\(A\)](#), 34 *CFR* sec. 300.125, and *N.J.A.C.* sec. 6A:14-3.3 during the 1998-99, 1999-00, and 2000-01 school years.

Additional questions raised during the course of the May 30, 2002 hearing were:

1. If all issues are resolved in the parents' favor, and schooling in an out-of-district placement is ruled appropriate: (a) in *future*, must the Board maintain the child at Chesterbrook, as a matter of law? or (b) is the choice of school for *future* FAPE an issue outside the scope of this appeal?
2. If all issues are resolved in the parents' favor, and unilateral placement is affirmed, must the final administrative decision include rulings on (a) whether Chesterbrook was a legally appropriate choice, and (b) whether it provided a FAPE, thus justifying reimbursement for *past* schooling.

Respondent Southampton Township Board of Education contests the appeal, responding that it had provided a free and appropriate public education (FAPE) in the least restrictive environment, and that petitioner had removed S.H. from the district unilaterally, without cause.

**Today's decision (a) denies reimbursement for unilateral placement, (b) grants compensatory special education in Southampton school district for two-and-one half years, and (c) compels partial payment for the cost of extra hearing for unintentional discovery defect.**

## **PROCEDURAL HISTORY**

This matter was filed in the Office of Administrative Law for hearing on April 3, 2002, by the Office of Special Education Program, Department of Education. Thereafter, the case was scheduled for hearing and convened on April 25, April 30, May 30, June 11, June 21, 2 [002 September 18](#), 2002. It was continued to October 16, 2002, and adjourned for cause finally on that date.

## **ANALYSIS OF THE RECORD**

### **Background:**

While their import is in dispute, the basic facts underlying the relevant history of S.H. while in the Southampton School District (the District; the school) are in large measure uncontroverted:

S.H. had entered kindergarten in September of 1998. In October of that year, based on pre-kindergarten screening, the results of the Brigance Kindergarten Screening Test and classroom teacher observation, the child was selected to participate in the Basic Skills Improvement Program (Exh. P-21).

In the school year 2000-01, S.H., following a retention in kindergarten during the 1999-00 school year (Exh. P-16), moved on to first grade at Southampton School #1, a class taught by Catherine Raymond, a regular education teacher. Over time, the child took and passed both a visual and an auditory examination more than once (Exhs. P-8, P-17), yet reading and focusing difficulties emerged. After failed interventions, Ms. Raymond, working with the parents, saw enough signs of academic delay for her to determine that there was sufficient evidence to warrant a referral for evaluation by the Child Study Team. On January 2, 2001, Ms. Raymond did so (Exh. BOE 3), and the parents concurred with that decision (Exh. BOE 4).

By the end of February, after testing, a learning evaluation was reported by Denise M. Foster, Learning Consultant (Exh. BOE 5), a psychological evaluation by School Psychologist Anne Marie J. Last (Exh. BOE 6), a social assessment by Susan DeCesari, School Social Worker (Exh. BOE 7), an audiologic assessment by audiologist Elizabeth Kennedy (Exh. BOE 8, followed up in April, 2001, Exh. BOE 11), a speech language evaluation by Lee Ann Thomas, Speech/Language Specialist (Exh. BOE 9), and a neurodiagnostic evaluation by Chester J. Minarcik, Jr., M.D. (Exh.

BOE 10).

It is significant that on or about April 2, 2001, S.H. was involved in an altercation with a classmate, which resulted in a serious arm injury. While there is some lack of clarity as to what days S.H. returned to school thereafter, petitioner had consulted with the classroom teacher, Ms. Raymond, by April 30, 2001, when she sent a letter of memorialization and instruction (Exh. P-10). It is not in contention that by May 17 she had submitted a medical excuse for absence from the family physician, Dr. Eufemia (Exh. BOE 15). For the remainder of the school year from the date he did not return to School No. 1, the boy was placed in home instruction.

However, notwithstanding S.H.'s absence from School No. 1, with this accumulation of information in hand, the principals, including petitioner, two members of the CST, the regular and special education teachers, and the speech therapist gathered during an eligibility conference on April 26, 2001. Recognizing his difficulty in keeping up with reading, even though S.H. was diligent and cooperative, the conclusion of the group was that S.H. should be classified as "auditorily impaired," because of some conductive hearing loss, and an overlay of auditory processing problem. There was a "concern" about attention to task and "minimal signs of attention disorder," but a recognition that S.H. "works very hard." As a remedy for his reading problem, speech-language therapy was recommended for inclusion in the IEP, but the group determined that regular education was still appropriate, since cognitive scores showed that S.H. remained in the "average" range of functioning (Exh. BOE 12). An IEP issued the day of the conference which reflected the parties' positions (Exh. BOE 13), with a notation reflecting petitioner's agreement that S.H. should continue in his current grade 1 classroom despite the absence of a recommended field sound system. Petitioner was concerned that S.H. would be without sufficient time to adjust to new classmates and a class routine. She did agree the sound system should be in place in grade 2.

With the IEP now in place, at the end of the school year, the District sought to schedule an annual review meeting in preparation for the 2001-02 school year. Its efforts were unsuccessful, ending when petitioner, in her letter of July 30, 2001 to Michael Harris, Principal of School No. 1, and also Director of Special Services, declared her intent to remove her son from School No. 1, and to place him in a private school because of her opinion that the District had failed in its obligation to provide a FAPE. Petitioner, who had in June independently brought S.H. for evaluation by Linda Barniskis, M.Ed., specifically noted her decision to forego an IEP meeting or mediation, but nonetheless stating that she would seek reimbursement for the private placement.

Thereafter, Edward Silver, a social worker in private practice forwarded a letter to the District, received on August 15, 2001, declaring that he had advised the parents of S.H. to, among other things, place the child in a different school. A revised IEP (Exh. P-11, Exh. BOE 14) was prepared that day, with petitioner present. It incorporated the Wilson Reading Language program, and now provided special education resources for reading and spelling.

At a meeting with the Superintendent of Schools, District of Southampton, and Mr. Harris, on August 22, 2001, petitioner asked that her child be placed in the Chesterbrook Academy in Voorhees, N.J. This request was rejected. Nonetheless, S.H. was placed unilaterally in Chesterbrook Academy, on August 31. The District's position was formally set forth in a letter from Mr. Harris to petitioner on September 21, 2001.

Eventually, the school moved for due process hearing in a petition filed on October 24, 2001 in the Department of Education. The instant proceedings then ensued.

### **Arguments of the Parties**

#### ***The parents' argument:***

Interpreting S.H.'s condition as an expert in special education, **Linda J. Barniskis**, M.Ed., rendered her opinions following evaluations of June 11, June 15, and June 18, 2001 (Exh. P-3), with a supplementary report of June 28, 2002 (Exh. P-20). Ms. Barniskis completed a behavioral checklist with the parents, but not the teacher, and interviewed the child, who appeared cooperative, pleasant and diligent.

After extensive testing, she found academic deficits in reading, sight vocabulary and passage comprehension, written math calculation, spelling, grammar, and expressive writing ability. In contrast, S.H. performed in the average/high average performance range in applied problems, social studies concepts, one-word receptive and one-word expressive vocabulary development. S.H. showed exceptional ability in science concepts, and a relative deficit in the low-average range in humanities concepts.

Visually and auditorily in the perceptual/cognitive areas, the boy obtained levels in the average range for visual and auditory closure, visual and auditory discrimination, analysis-synthesis ability, and auditory memory for word spans and story recall. Deficits were assessed in visual-motor

integration visual sequential recall, visual processing speed, visual memory, visual spatial relationships, visual form constancy, auditory memory for numbers reversed, sentence retrieval, active working memory and the ability to learn new information presented in the visual-auditory format for both short-term and long-term recall.

Fine motor ability involving penmanship was adequately developed for legibility. Inconsistencies and deficits were assessed in the gross motor area. Ms. Barniskis also outlined the medical history made available to her by the parents (Exh. P-3, p.28).

Asked during the course of hearing for her opinion of the school's charged lack of action

Ms. Barniskis reported (Exh. P-20) that the District had not acted timely. In her view, significant lags were noticeable in the April 1998 kindergarten screening, and deficits were ignored. Had S.H. been referred to the CST then, she believed, he would have been saved three years' frustration. Providing the Basic Skills Improvement Program in a regular kindergarten, rather than with a small group, was insufficient. Learning difficulties were obvious from the outset, yet evaluation by the CST was not completed until April 26, 2001, although intervention strategies were discussed at the PAC meeting as early as February 24, 2000. In Ms. Barniskis' view, the time for referral to the CST was at the kindergarten screening.

In oral testimony, Ms. Barniskis confirmed that she did not recommend a special school until after her reports, and that was because S.H. is anxious about returning to Southampton. She added that she believed a Wilson Reading Program as well as an FM audio field system was necessary to accommodate S.H. Her evaluations and recommendations were outlined in her first report (Exh. P-3, p.33-34).

**Edward Silver**, a licensed Clinical Social Worker (Exh. P-12) who counsels all ages on emotional and relationship issues, recalled his interviews of S.H., and his mother. The first occurred on May 10, 2001, after S.H. had stopped attending school. Mr. Silver concluded that S.H. suffered from post-traumatic stress syndrome, and referred him to a child psychiatrist. In recent visits since S.H. changed schools, Mr. Silver observed, his state of mind had improved, according to the child himself and the parents, he testified.

**Jennifer De Young**, a regular education teacher certified in 2000, testified as to her experience with S.H. at Chesterbrook School, which he attends. It was her understanding that the principal of

Chesterbrook, who had initially relied on the Southampton IEP, over time had created a new IEP which was adopted by Camden County, now responsible for S.H.'s special education. She noted that, in the Paladin program, Wilson Reading was taught, but not by a Wilson-certified teacher. There was no FM field audio sound system. Neither she nor the other regular education teacher responsible for S.H. were trained in Wilson Reading. Ms. De Young did not teach it. Her area was math. Neither teacher was certified in special education.

**D.H.**, mother of **S.H.**, described the medical history of difficulties her son had encountered (Exh. P-14). She recalled that after a May 1998 kindergarten enrollment screening, she had been told by the tester of potential learning problems, he lacked alphabet, had problems with colors and with counting to ten. Although told verbally, she had been given no written information about the results. No intervention was suggested, and no one informed her of those rights under special education law which might have applied, she emphasized.

During the first kindergarten year, D.H. stated, the teacher, Ms. Greif, stated that S.H. was more than developmentally immature. He was delayed in letters, in numbers, and in memory. She wanted S.H. retained, and he was (Exh. P-16). D.H. said she still had not received a statement of special education rights, and there was still no referral to the CST at that time.

In the following 1999-00 second kindergarten year, Ms. Greif remained unsatisfied with S.H.'s progress, D.H. testified. At a speech conference during the following year on September 12, 2000, with Lee Ann Thomas, the Speech-Language Specialist (Exh. P-18), D.H. learned that her son was eligible for speech-related services, and an IEP conference was scheduled. She contended that no special education rights were made known to her. In October, the regular classroom teacher, Ms. Raymond, reported her concerns over S.H.'s reading skills, and recommended the Basic Skills Program for first grade. By December she reported no progress, noting the PAC referral and the recommendation for CST evaluation, a delay Ms. Raymond confirmed in March of 2001 (Exh. P-19). D.H. recalled that her first IEP meeting was not until April 2001, when S.H. was classified as auditorily impaired, a classification she thought inadequate. By the second IEP meeting on August 15, 2001, D.H. stated, she had already decided to move her son to Chesterbrook.

In addition to this history, D.H. emphasized that the injury to her son which followed in April 2001 required almost immediate home instruction even though no formal application was entered until May 14, 2001. D.H. acknowledged that the school offered counseling, which did not satisfy her, so

she sought an evaluation by her expert, Ms. Barniskis, in June. There was no ESY provided for S.H., she recalled, despite Ms. Barniskis' recommendation, and despite her physician's recommendation for a psychologist, S.H. was not provided counseling. D.H. stated that she wanted to have the child who injured S.H. removed from the district, though that was not the only option she would have found acceptable. By July 30, 2001, because of the lack of safety, the slowness of the District's response, and because of a need for new goals and a fresh start in a new locale, she placed her child unilaterally.

Arguing the law, petitioner states that "stay put" provisions are ineluctable, and payment for S.H.'s education is mandated by federal and state authority if her appeal is ruled meritorious. Moreover, if the Board failed to offer a FAPE, yet unilateral placement is held inappropriate, compensatory education is still to be granted, petitioner maintains. Petitioner argues also that the conduct of parents is irrelevant to entitlement to compensatory education. It is the Board which must provide whatever education is demonstrated as appropriate.

Assessing the burden of proof, petitioner contends that the Board must prove that it provided a FAPE in the least restrictive environment. Further, it must show that in that environment it conferred more than a trivial educational benefit. Significant learning and meaningful benefit must have occurred, gauged in relation to S.H.'s potential. That determination must turn on the IEP as existed during the period in question. Moreover, the Board must show that it tracked the disabled student, faithful to the procedural safeguards which compel that duty, petitioner argues.

Following what petitioner views as an assault of S.H. in April 2001, the IEP neither addressed the resulting psychological trauma this event engendered, nor did it properly classify him as multiply disabled, as it should have, petitioner insists. The classification of auditorily impaired was inaccurate, she maintains. Additionally, petitioner states, the school did not comply with the "child find" provisions compelled by rule and statute, consequently entitling S.H. to compensatory education from April 28, 1998, through April 26, 2001. This should be accomplished by payment of a special education teacher and speech therapist to be selected by the parents, and should be introduced in coordination with the current and future IEP, now under the control of the Camden County Educational Services Committee.

Finally, petitioner asks that sanctions be levied against the Board for its failure to comply timely with its discovery obligations.

***Respondent's argument:***

In testimony, the Board sought to establish that an FAPE had been provided:

**Anne Marie J. Last** recounted how, as case manager and school psychologist, after the parent-approved referral, she undertook on February 1, 2001, to evaluate S.H. (Exh. BOE-6). After WISC-III testing, the boy achieved a verbal IQ score of 98, a performance IQ score of 86, and a full-scale IQ score of 92. While Ms. Last found S.H. to be functioning on an age-appropriate level, worked hard and fared well among his peers, there were problems. The classroom teacher as well as the accumulated reports and testing of other CST members after referral showed distractibility, difficulty with perceptual organization and processing speed, and articulation impairment. The record convinced her that special services were appropriate, and she supported his ultimate classification of auditorily impaired.

Ms. Last, certified in Level One of the Wilson Reading System, was certain S.H.'s needs could be addressed in School No. 1 in a regular classroom with field sound system, with pull-out replacement for language arts, reading and spelling in the resource room, and speech and language therapy. Ms. Last observed that the rationale for the team's actions could be found at p.16-17 of the IEP completed on April 26, 2001 (BOE 13). She added that the IEP of August 15, 2001 (BOE 14), continued the earlier recommendations for small group attention in S.H.'s areas of weakness, but added goals and objectives, after the Barniskis report was taken into account. Counseling was promised. The IEP also included the Wilson Reading Program sought by the parents. Ms. Last intended to undertake that instruction herself. Ms. Last testified that D.H. had agreed to the academic component in both IEP's, and had not mentioned school safety until August. Ms. Last then referred her to the principal. Ms. Last observed that the home instructors adhered to the IEP.

The Chesterbrook placement caught her unawares, Ms. Last said, and when told of it by the principal, Mr. Harris, she called there to compare programs. She learned that in the Chesterbrook placement, S.H. was mainstreamed with 45 other children, as opposed to the close instruction with three pupils that Southampton would provide under the IEP. Wilson reading instruction was to be provided outside the school at \$45 per hour. The school was outside the home area, and not state approved. Ms. Last was certain that the Southampton program was less restrictive than that of Chesterbrook.

Responding to questioning, Ms. Last stated that she spoke with Mr. Silver in September 2001

(BOE 17) after S.H. had been moved from the district. He had diagnosed adjustment anxiety disorder as a result of the schoolyard injury, and told Ms. Last that he saw S.H. and the parents once a week. Ms. Last stated that she had been given no information concerning a psychological component to the schoolyard injury before preparing the IEP's.

Principal and Director of Special Services, **Michael Harris**, who had investigated the schoolyard injury incident of April 2, 2001, recalled that after questioning all those involved, he determined that it occurred during a game of Power Rangers. In the course of play, the student who caused S.H.'s injury had done so by twisting his arm. When S.H. returned for one day after the incident, he seemed happy to be there. Mr. Harris stated that he had made certain that S.H. and the other student were not in contact thereafter, and that the boy met with the Guidance Counselor on return.

As to the record of addressing S.H.'s needs, Mr. Harris acknowledged that the first PAC referral (Exh. P-15) was on February 24, 2000, in the middle of the second year of kindergarten, yet the CST evaluation was not until the following year. The district did not believe the PAC referral seemed sufficient to warrant CST evaluation, Mr. Harris testified. Other interventions seemed more appropriate. There was no evidence of hearing impairment. Additionally, S.H. was making progress.

In like fashion, **Catherine Raymond**, S.H.'s first grade teacher, described the child's positive emotional state during the short time he returned to school following the incident. She assured that he was monitored and assisted all during the time he wore a cast.

Arguing the law, and in addition to the original phrasing of the issues, *supra*, respondent Board contends that further issues to be considered are (1) whether placement in the Southampton school district was free, appropriate and in the least restrictive environment for the school year 2000-01, (2) whether Chesterbrook provided a FAPE after unilateral placement during the school year 2001-02, and (3) whether the parents made their unilateral placement in good faith.

In addressing those issues, the Board argues that this tribunal cannot consider education offered beyond 2001-02, since this must be preceded by an annual review and IEP, which are not part of this record. It argues that the testimony of Ms. Last supporting the propriety of S.H.'s education in the district was uncontroverted. Moreover, Ms. Young's testimony showed that Chesterbrook could not provide the instruction which petitioner's expert deemed necessary, and the school had no Wilson-certified reading instructors, the Board contends. Further, the Board states that

petitioner misrepresented the facts in its arguments. In rebuttal, it described the events as it found them of record, and contended that they proved the Board had provided a FAPE in the school year 2000-01, a successful effort which precluded petitioner's unlawful unilateral placement of S.H. which followed.

Finally, the Board states that sanctions for inadvertent failure to provide discovery are inappropriate. It was penalty enough for petitioner to enjoy a "second bite of the apple," through further testimony of her expert ordered by the administrative law judge after the overlooked documents were provided by the Board.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

#### **Findings of Fact:**

To resolve disputes of material fact, I make the following **FINDINGS:**

1. During the pre-kindergarten screening in 1998, S.H. showed readiness deficits. Skills that should have been developed to age 5.0 were at a level below those of the age 4.0. Referral for evaluation was not made on the theory of the kindergarten teacher, Ms. Greif, that testing at that age did not supply a true reading. D.H. was not provided notice at that time of her special education rights.
2. As a result of the Brigance Kindergarten Learning Test, as early as October 1998, S.H. had demonstrated the need for Basic Skills Improvement Program (Exh. P-21).
3. On February 3, 2000, and November 22, 2000, the school recorded that S.H. passed an audiometric screening test (Exhs. P-8, P-17).
4. On February 24, 2000, Ms. Cundiff, S.H.'s kindergarten teacher, referred him to the Pupil Assistance Committee (PAC) to address the target behaviors of "letter identification/sight word" (Exhs. P-15, P-17). D.H. was not provided notice at that time of her special education rights.
5. On September 12, 2000, the school invited the parents to attend an Eligibility/IEP conference (Exh. P-18).
6. Throughout the first half of the year 2000-01, S.H. was struggling with reading skills, but by

December had not been evaluated (Exh. P-19). This did not occur until the second half of that school year.

7.

Once S.H. was classified as auditorily impaired, two IEP's were completed, the first on April 26, 2001, the second on August 15, 2001, the latter taking into account the input of Ms. Barniskis to the parents, as well (Exhs. BOE 13, BOE 14).

8.

No evidence of record preponderates that S.H.'s condition differs from that addressed by the Board in the most recent IEP (Exh. BOE 14), or that the special education steps recommended in that IEP do not focus on his condition. Before arriving at its IEP conclusion, the school took into consideration the recommendations of petitioner's expert. The parents did not advise the school of Mr. Silver's diagnosis when the IEP was last prepared.

9.

In the main, the parents decided to remove S.H. unilaterally to Chesterbrook School because of anxiety over the safety of their child, following the altercation of April 2002 in Southampton School No. 1.

## **Conclusions of Law**

### ***Burden of persuasion:***

The burden of persuasion in IDEA cases requires only that a parent put in issue the remedy sought. It is the Board of Education which then must prove that the IEP and/or related services is appropriate. *Lascari v. Board of Educ.*, [116 N.J. 30](#), 46 (1989). The court in *Lascari*, at 44, stated that "[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."

The Board must meet its burden of persuasion by a preponderance of the credible evidence, which is the standard in administrative proceedings, *Atkinson v. Parsekian*, 37 N.J. 143 (1962). Precisely what is needed to satisfy the standard must be decided on a case-by-case basis. The evidence must be such as to lead a reasonably cautious mind to a given conclusion, *Bornstein v. Metropolitan Bottling Co.*, [26 N.J. 263](#) (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power, *State v. Lewis*, [67 N.J. 47](#) (1975). Credibility, or more specifically,

credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well, *Spagnuolo v. Bonnet*, [16 N.J. 546](#), 554-55 (1954).

***The Issues:***

1. **Whether the Southampton Board of Education failed to accommodate S.H.'s disability so he could attend public school during the 2000-01 and 2001-02 school years, and**
2. Whether respondent failed to provide petitioner S.H. with a free and appropriate education in the least restrictive environment during the 2000-01 and 2001-02 school years.

The answer to both of the above issues is that the school district did carry out its duty, at least beginning in the second half of the 2000-01 school year. The Board has proved its case on these issues that far. When Ms. Raymond informed the team of D.H.'s reading problems, the school acted appropriately. It called for meetings of the team, it attempted to incorporate the recommendations of Ms. Barniskis and Mr. Silver, where those recommendations seemed appropriate, and it would have implemented them in IEP's of April 26, 2001, (Exh. BOE 13), and later, August 15, 2001 (Exh. BOE 14), had the district been given that opportunity. Instead, the parents exercised their judgment to remove D.H. from the school.

The Board proved by these IEP's that it was in the process of providing a free and appropriate education in the least restrictive environment. These IEP's addressed the auditory, reading, and language arts problems which troubled S.H. His handicap would have been treated through special education undertaken in a small group environment. The Wilson Reading program sought by the parents would have been available with Ms. Last, a school psychologist and certified Wilson instructor. The field auditory system also requested was to be available. S.H. also would have been provided speech therapy as a related service. All of this would have been accomplished in a school closest to his home.

In contrast, the recommendations from Ms. Barniskis, or of Mr. Silver for a different school, coming for the first time after the altercation of S.H. in April, 2001, have not overcome these basic facts. Mr. Silver, a clinical social worker specializing in adult mental health issues, confirmed only that S.H. was for a time emotionally affected by the schoolyard encounter, not rendered

educationally handicapped under the provisions of the IDEA. Ms. Barniskis was no more successful in her supplementary report and testimony which, for the first time, asserted a need for different school setting, at least not a need that would have been warranted under the IDEA.

The parents had available a program designed to deal effectively with the problems of S.H. in his home school district, in a way that would have provided significant educational benefit, suitable to his unique needs. The Board had no legal obligation to do more. While the parents were understandably concerned about their son's welfare after the April altercation, this was a concern best pursued through appeal to the Commissioner of Education as a controversy and dispute, if necessary. Schoolyard safety is not a problem which may be remedied through reliance on the IDEA.

In moving their child to school for services which could better have been provided by the Board, they have not succeeded in showing this was necessary because of Southampton's prior inaction. The parents had made their decision before, and in spite of, the August 2002 IEP. Neither of the teachers provided by Chesterbrook were trained in Wilson Reading, neither of the teachers were certified special education teachers. Chesterbrook, located entirely in another county, was not closer to S.H.'s home. Ms. De Young testified that her class does not have the audio field system necessary to accommodate S.H.'s handicap, and that the principal of Chesterbrook initially was content to rely on the IEP prepared by Southampton School District when S.H. arrived. The overall effect of the parents' decision to move their child to Chesterbrook, however well-meaning in their pursuit of his safety, was to reduce the amount of educational benefit which would have been available to S.H. in the Southampton school district through the IEP's prepared by the Board.

**Failure of respondent to abide by the "child-find" provisions in statute and rule: 20 U.S.C. 1412(a)(3)(A), 34 CFR sec. 300.125, and N.J.A.C. sec. 6A:14-3.3 during the 1998-99, 1999-00, and 2000-01 school years. of "child-find" provisions in statute and rule: 20 U.S.C. 1412(a)(3)(A), 34 CFR sec. 300.125, and N.J.A.C. sec. 6A:14-3.3 during the 1998-99, 1999-00, and 2000-01 school years.**

The Board has not met its obligations associated with the "child-find" elements of these statutory and regulatory sections. Therefore, compensatory special education should be made available in the Southampton school district.

The persuasive aspects of the record suggest that S.H. should have been identified sooner. Ms.

Barniskis was believable in her testimony that the pre-kindergarten screening and Brigance testing undertaken when S.H. was five years and two months showed that he had not mastered the skills to be expected of a five-year-old. Ms. Barniskis saw the record of his shortcomings at that date as having been confirmed by the testing, which should have raised a "red flag" to those responsible for referral (Exhs. P-3, P-20). Ms. Last, as a school psychologist, recognized S.H.'s handicap when his struggling style was brought to the attention of the CST. Yet, neither the case manager of those earlier years, 1998-99 and 1999-2000, nor the regular education kindergarten teachers of the time provided rebuttal of this assessment by disclosing how it would not apply before the referral in January 2001. Nothing in Ms. Last's testimony or her psychological evaluation counters these crucial facts, perhaps because she herself had not been involved with S.H. then, and had focused only on the conditions extant when referral was taking place, in 2001.

According to D.H., one kindergarten teacher, Ms. Greif, did inform her that S.H. was delayed in letters, numbers, and memory. It was she who recommended retention for a second year of kindergarten. Nothing in the Basic Skills Improvement Program selection (Exh. P-21) would have alerted D.H. to the possibility that special education was needed. The Board did not offset the credible testimony of D.H. that she had not been informed of her special education rights during the critical years of 1998-99 and 1999-00. This shortcoming also prevailed in the first half of the year 2000-01, when Ms. Raymond, the regular first grade teacher, was telling D.H. of her son's difficulties. It was this signal which eventually triggered referral for evaluation during the second half that school year. The Board's assertion that D.H. knew of her rights have weight only as of January 8, 2001, when D.H. signed the Written Notice of Evaluation/Consent To Evaluate form (Exh. BOE-4). At that point referral was in everyone's mind.

Additional questions raised during the course of the May 30, 2002 hearing were:

1.

**If all issues are resolved in the parents' favor, and schooling in an out-of-district placement is ruled appropriate: (a) in *future*, must the Board maintain the child at Chesterbrook, as a matter of law? or (b) is the choice of school for *future* FAPE an issue outside the scope of this appeal?**

2.

If all issues are resolved in the parents' favor, and unilateral placement is affirmed, must the final administrative decision **include rulings on (a) whether Chesterbrook was a legally appropriate choice, and (b) whether it provided a**

**FAPE, thus justifying reimbursement for *past* schooling.**

In view of the above reasoning, and today's decision, these issues are moot.

***The motion for sanctions:***

Petitioner moves for sanction in the form of reimbursement for an extra day of hearing caused by the Board's failure to provide discovery until documents sought were made known during the course of hearing.

It is believable that the Board neglected to provide discovery through oversight and not through intention, as its witnesses credibly testified. However, sanctions for failure to provide discovery are not dependent on intent, if discovery rules are to be effective. *In re Timofai Sanitation Co., Inc.*, [252 N.J. Super 495](#), 505 (App. Div. 1991). The boundary of such sanctions, derived from *N.J.A.C.* 1:1-10.5, invoking *N.J.A.C.* 1:1-14.14, is administered within the discretion of the administrative law judge. Here it is clear that the cost of Ms. Barniskis' reappearance and supplementary report should be carried by the Board, not the parents. Nonetheless, all the costs of counsel's preparation should not be awarded. In the main, counsel would still have been required to prepare in the same way as he normally would, had the later-found discovery been provided timely. It is not likely that this review would have entailed appreciably significant time or effort, considering the documents involved and the concise parameters of Ms. Barniskis' amended report. For these reasons, only the following of counsel's proposed costs incurred because of the overlooked discovery should be provided:

Motion to reopen trial \$421.80

Preparation for trial 400.00

Travel 25.60

Trial 300.00

Aff. of services 100.00

Barnskis' fee 500.00

**Total: 1747.70**

***Conclusion:***

The parents' unilateral placement of their child in Chesterbrook is without justification under the IDEA. The IEP prepared in August 2001 (BOE 14) provides a free and appropriate public education in the least restrictive environment nearest to their home. That IEP is designed to accomplish significant educational benefit, taking into account S.H.'s particular needs.

Nonetheless, compensatory special education in the Southampton school district is owed for the school years 1998-99, and 1999-00, as well as the first half of the school year 2000-01. During those periods, the record discloses that the Board knew, or should have known enough concerning S.H.'s handicapped condition to refer him for classification. That process did not begin in reality sooner than the second half of the 2000-01 school year.

Though the Board's failure to provide complete discovery was unintentional, the legitimate costs of further trial which that oversight necessitated should not be borne by the parents, and provision for reimbursement of the resulting expense, sought through motion and modified as noted *supra*, should be granted.

**ORDER**

**I ORDER** therefore that the remedies afforded by the above reasoning be implemented.

This decision is final pursuant to [20 U.S.C.A. ?1415\(i\)\(1\)\(A\)](#) and [34 CFR 300.510](#) (2000) and is appealable by filing a complaint and bringing a civil action either in the Superior Court of New Jersey or in a district court of the United States. [20 U.S.C.A. ?1415\(i\)\(2\)](#), [34 CFR 300.512](#) (2000). If either party feels that this decision is not being fully implemented, this concern should be communicated in writing to the Director, Office of Special Education Programs.

January 3, 2003

DATE **JOSEPH LAVERY**, ALJ t/a

The caption forwarded from the Department of Education lists only one parent, but the record should reflect that both parents were present and fully engaged in the case.

Complaints numbered one and two in petitioner's letter to the Office of Special Education on March 21, 2002, initiated the present appeal. Complaint number three was submitted through amendment of the appeal in a letter to the administrative law judge dated April 1, 2002.

Phrased in letter from the administrative law judge to counsel dated May 31, 2002.

By the administrative law judge

At p.17

Phrased in letter from the administrative law judge to counsel dated May 31, 2002.

By the administrative law judge

OAL DKT. NO. [EDS2157-02](#)

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