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Editor

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When IDEA Met a Sexual FAPE at the Shore: Complexity and Implications

Ronald T. Hyman, Esq.*
Graduate School of Education
Rutgers University
New Brunswick, New Jersey 08901-1183
(732) 932-7496, Ext. 8223 Fax (732) 932-6803
rhyman@rci.rutgers.edu

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Introduction.

This paper* will focus on the intersection of two separate provisions in the federal statute entitled Individuals with Disabilities Education Act, commonly referred to simply as IDEA. The two provisions of concern in IDEA are: schools accepting federal funds must offer a free appropriate public education (FAPE) to students classified as being special education students; and parents of a student with a disability may enroll their child unilaterally in an out-of-district school and receive reimbursement for the tuition paid if the local school has not offered a FAPE to their child. Specifically, this paper will present and analyze a case brought in New Jersey by a boy who was classified as having a disability and his parents against his local high school. P.S. and his parents sought reimbursement for the tuition incurred when the boy was placed in a neighboring out-of-district school. After presenting the essential facts of the case, I will explore the aspects of complexity in this case as an example of the general complexity of IDEA placement cases. I will also present the decisions of the judges at the three levels of litigation and comment on some implications arising from this significant case.

Essential Facts of the Case.¹

P.S., born on June 19, 1986, and entered the first grade in September, 1991 at the Wolf Hill Elementary School in Oceanport, New Jersey. Oceanport is a small city in the central part of New Jersey on the Atlantic shore. P.S. attended Wolf Hill through its four grades and then moved on with his classmates to Oceanport's Maple Place Middle School for grades five through eight (1995-1999). Sexual harassment of P.S. began in the first grade when he felt insulted by being called a girl. Relentless harassment occurred through the eighth grade. Near the end of grade five the school's Child Study Team (CST)² classified P.S. as a student with a disability. Almost at the end of grade eight P.S. and his parents requested that he be placed at Red Bank Regional High School (Red Bank) for his high school program. The CST agreed because P.S. feared attending Shore Regional High School (Shore), the local public high school for Oceanport students. When Shore rejected the requests, it offered an individualized education program (IEP) to P.S. The parents rejected Shore's offer and unilaterally placed their son at Red Bank.

***Shore*³ as a Complex Case.**

Any lawsuit that goes through three separate courts, as *Shore* did, is of necessity complex. Litigation in *Shore* began in what is called a due-process hearing, which in New Jersey has all the characteristics of a standard court setting. (A state administrative judge from the Office of Administrative Law (OAL) presides and hears testimony offered from both parties of the dispute.) *Shore*, the losing party at the due process hearing, brought the case to the United States District Court, District of New Jersey for review. P.S. and his family lost in the District Court and appealed to the Third Circuit appellate court. *Shore* accrued even more complexity as the litigation proceeded. *Shore* is an example of a

complex case, complexity arising from the characteristics of its individual aspects as well as from the intersections of two or more its separate ones. Let us now look at the complicating aspects of *Shore* below.

Complicating Aspect # 1: Parents Brought Their Claim under IDEA Law. The first step in understanding the complexity of this case is the recognition of the fact that special education law is comprised of two main components, the primary federal law and a state's implementing law. The federal law arises from congressional statutes, the implementing regulations prepared under the aegis of the Department of Education, and the federal common law stemming from the Supreme Court decisions, circuit court appellate decisions, and decisions of regional district courts. The state law for this case arises from New Jersey's implementing statute (N.J.S. 18A: 46.1 *et seq.*), the implementing New Jersey regulations⁴, and the available state court decisions (the state's supreme court⁵, appellate courts, and administrative law courts). It is fair to say that the two most influential and powerful sources of the law are the federal legislation and several Supreme Court decisions. The legislation is primarily the Education for All Handicapped Children Act (EAHCA) and its successor (through revision and title change), IDEA. These two statutes are coded as 20 U.S.C. § 1400 *et seq.* For this case the two most pertinent Supreme Court decisions are *Hendrick Hudson Central School Dist v. Rowley* (*Rowley*)⁶ and *School Committee of the Town of Burlington, Mass. v. Department of Education of Massachusetts* (*Burlington*).⁷

The federal law deals with procedural issues, not substantive ones. That is to say, the federal law sets the framework within which the states must operate to provide an appropriate education. The law aims to give the states, local school districts, and the

parents of special education students an active and significant role to play in determining the individualization of the educational programs designed to suit their students. Within this framework, therefore, it is the local school district that confers with the parents to determine the actual unique and individualized educational program for each special education student.

Under prevailing special education law each state must provide a “free appropriate public education” for all handicapped (now “disabled”) students if it wishes to receive federal funds for educating its students under IDEA. The IDEA statute states:

- The term “free appropriate public education” means special education and related services that—
- (A) have been provided at public expense, under public supervision and direction, and without charge;
 - (B) meet the standards of the State educational agency;
 - (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
 - (D) are provided in conformity with the individualized education program required under section 1414 (d) of this title. (20 U.S.C. § 1410 (8).

In *Rowley*, the first case that came to the Supreme Court after passage of EAHCA in 1975, the Supreme Court faced the issue of what constitutes a FAPE.⁸ The Court held that a state first must comply with the procedures set forth in EAHCA and then must provide an individualized educational program that will benefit the student who is classified under the law. The Court stated that it is not necessary to provide for the maximum benefits for each student. Rather, the requirement is for benefits to be meaningful. The Court stated:

By passing the Act Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the states any greater substantive educational standard than would be necessary to make such access meaningful....When the language of the Act and its legislative history are considered together, the

requirements imposed by Congress become tolerably clear. Insofar as a State is required to provide a handicapped child with a “free appropriate public education,” we hold that it satisfies this requirement by providing personalized instruction with sufficient support to permit the child to benefit educationally from that instruction.⁹

The IDEA statute also provides that a placement for a special education student be in the least restrictive environment (LRE), an environment in which the disabled student studies with nondisabled to the maximum extent possible. The statute states:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1412 (5).

The Court also noted that EAHCA permits parents and school districts who disagree with decisions by administrative hearings to bring a suit in court. Thus, pursuant to New Jersey’s implementation regulations, parents of a child receiving special education who disagree with the evaluation or placement of their child can unilaterally place their child in another school and can seek mediation of their dispute with a school district as the first step in their efforts to obtain reimbursement for their child’s out-of-district tuition. If mediation fails, the parents’ complaint goes to New Jersey’s Office of Administrative Law to schedule the required due process hearing. Further, the parents may request an independent evaluation of their child. The state’s Office of Administrative Law then appoints an Administrative Law Judge (ALJ) to conduct the due-process hearing. Any party aggrieved by the ALJ’s decision may then bring suit in a civil court, either a state court of competent jurisdiction or a federal district court. (Other states have similar procedures.)

When a United States District Court reviews a case in which parents seek reimbursement after a state has issued a decision based on a due process hearing, it must decide two main issues: Did the school district comply with the procedural requirements set forth in the IDEA federal statute?; and Did the school district offer an IEP to the student that would reasonably have provided him/her a meaningful FAPE? The school district, not the parents, has the burden of demonstrating that it has complied with the procedures set forth in IDEA and that the IEP was reasonably calculated to provide a FAPE.¹⁰ If the school district meets its burden, then the school district does not need to reimburse the parents for the tuition paid. However, if the school district does not meet its burden, then the District Court must determine whether the parents acted appropriately. That is, did the parents place their child in an environment that suits their child? If yes, then the school district must reimburse the parents for the tuition paid to the out-of-district school. If not, the school district does not need to reimburse the parents for that tuition.

In deciding these two issues, the District Court must give due weight to the decision by the state's administrative law judge (ALJ) The use of the due-weight criterion means that the District Court must not impose its own ideas upon the parties. The Supreme Court said:

Thus, the provision that a reviewing court must base its decision on the preponderance of the evidence is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.¹¹

The procedures involved in a unilateral placement case are a complex set derived from federal statutory and common law in combination with state statutory and common

law. The main framework is the federal law; the states differ in their specific, though similar, implementing laws that focus on the federally required due-process rights of parents.

Major federal statutory law on the education of individuals with disabilities reasonably began in 1975 with the passage of the Education for All Handicapped Children Act, commonly referred to as Public Law 94-142. This Act spawned an entire flourishing subset of education law due to its complexity, the number of children with disabilities involved, and the increase in the overall impact of the federal law on schools. Even after nearly a third of a century of heated and frequent litigation on what should comprise the appropriate education of such children, this case, brought by P.S. and his parents, sought clarity on the fundamental, original issue of how to provide for a free appropriate public education to a student diagnosed and classified as being under coverage of IDEA, (which is in essence an updated revision of EAHCA with a new name).

Because the parents of P.S., a student who was classified as having emotional disturbance at the time the lawsuit started, disagreed with their designated local public high school about that school's ability to provide a free appropriate public education for their child, the parents enrolled P.S. in another public high school of their choice and sought reimbursement from their local school for the tuition they were paying to the out-of-district school. In the absence of a child being in special education they would have been like other parents who enroll their children in private secular schools, or private religious schools, or out-of-district public schools. Such parents cannot seek reimbursement for the tuition they are paying.

The complexity of this case continued once the case was litigated under IDEA law, because the web of federal and state provisions is tangled. While there is a general, broad definition of a FAPE, there is no specific definition. By design there is no one-size-fits-all FAPE. This is indicated by the law's name alone, although that is not obvious by the name used most often in daily practice. That is to say, each student must receive an **individualized** program. However, the program is generally called an **IEP**, where the use of initials obscures the fact that each such program is created by a school's child study team to fit the uniqueness of a particular student who has a disability.

The nature of an IEP as the embodiment of a FAPE is complicated due to the lack of substantive specificity in the law, the need for the involvement of parents and local educators, the uniqueness of each special education student, and the multiple levels of review available to people challenging an IEP in court. This situation is related to the very history and ideology of the federal law for the education of children with disabilities who had suffered for many years as outcasts from the normal domain of the public schools in our country. The law attempted to remedy the situation of isolating and warehousing children with disabilities, a situation that was no longer acceptable to American society. The attempt necessitated a complex statute in order to achieve the multiple goals of the legislators and the advocates for students with disabilities.

Complicating Aspect #2: Intense and Relentless Harassment. In second grade peer harassment of P.S. became constant, and social isolation set in by the third grade. Usually, this took place in the playground, in the cafeteria, and during recess when the teachers were not present to supervise the students as much as they did in their classrooms. Students called him a "girl" and a "girl in boy's clothes."

The harassment intensified every year. The focus of the students' remarks was on P.S.'s lack of athletic skills, his physical appearance, and his perceived effeminacy. Students called him such names as "faggot," "gay," "homo," "slut," "transvestite," "queer," "loser," "big tits," and "fat ass." Students said, "I hate you." Students threw rocks at him, said that they hoped he would go to another school, and even hit him on the head with the padlock for his locker in gym class. The principal did nothing effective to help him with any of these episodes. On the contrary, the principal believed that P.S. instigated the incident in which he was hit by his padlock. P.S.'s resource room teacher testified that one of the several principals of the middle school during the time P.S. attended that school was particularly insensitive to P.S.'s needs. When P.S. would come to see him, the principal would say, "What's your problem now?" or "Here you are again." Accordingly, P.S. later testified that the situation "just got worse and worse." The principal failed to discipline the tormentors in such a way as to alter their behavior toward P.S. and to change the negative school atmosphere.

The students ostracized P.S. in the cafeteria by leaving the table whenever he tried to sit with them. When he tried to sit apart from his classmates, they would approach him to continue their harassment. The students ostracized him and taunted him in the fourth grade because he won a role in the high school production of the musical *Mame*. When he complained to his teacher about the harassment, it became even worse. One result of this behavior was that he did not want to move to the middle school with his classmates for grades 5 through 8. He wanted to enter a Catholic school, but did not do so due to the lack of available transportation. By the end of the fourth grade he had only one friend, a girl. He later testified that "he was very much alone." The District Court characterized the

situation as, “P.S. was the victim of relentless physical and verbal harassment as well as social isolation by his classmates throughout elementary and middle school¹².”

In the fifth grade in the middle school the harassment continued to worsen, and P.S.’s ability to learn in school decreased. He had no friends at that time. Students told him that they hoped he would attend another school because they did not want to see him anymore. As a result he lost all “hope and happiness.” When his grades fell below average, particularly in mathematics, his teacher referred him to the child study team of the school to be evaluated. The child study team classified P.S. in April of that school year as eligible for special education services based on “perceptual impairment.” He received help in mathematics in a resource-room atmosphere, which offered him a temporary safe haven from the constant harassment. He remained with that special education arrangement in grades 6, 7, and 8.

Shortly after the beginning of Grade 8, P.S. became “unbelievably depressed because of the harassment” that had recurred after the summer vacation. (He had spent some time during the summer at camp free from harassment.) He attempted suicide by cutting his wrists. At the request of a psychiatrist who was treating him then, the school placed P.S. on home tutoring for six weeks during the autumn semester. When P.S. returned to school, even the safe haven he had in his resource room ended. The students new to the resource room had joined in the harassment. In March of that school year, the child study team re-evaluated P.S. and reclassified him as being emotionally disturbed.

In preparation for the next year, the child study team (CST) recommended that P.S. be placed at Red Bank Regional High School (Red Bank) instead of Shore Regional High School, the designated public high school for students who live in Oceanport. Red Bank is

a neighboring public high school with a well-known and respected performing arts program. P.S. had already auditioned for that program and was accepted into it during January of his eighth grade year. P.S., his parents, and his school's CST believed that a placement at Red Bank would suit P.S.'s talents and preferences and also remove him from his tormentors who would be going to Shore as their local high school. The CST believed that Shore would not be a safe environment for P.S. because he would be with the same harassing students with whom he was a student for eight years. One CST member believed that P.S. would not get a needed clean start at Shore.

Complicating Aspect # 3: The Intersection of IDEA and Long-Term Harassing.

The long-term harassment and the lack of effective remedial action by school officials persisted. P.S.'s mother called her son's suicide attempt a "cry for help." P.S. told his mother that he attempted suicide "to show the principal how badly he was feeling."

The harassment of P.S. constituted sexual harassment in that the students ridiculed his physique and his lack of athleticism and rejected him because they perceived him to be feminine. The names that he was called reflect the sexual nature of the harassment. The harassment was so relentless that P.S. came to hate and fear school, especially his gym class. He also came to hate himself. One teacher and the school's child study team recognized that P.S. needed help. To give him a refuge from his harassers the CST assigned him to a resource room with only a few students in the class. To do so they needed a classification that would permit him to enter a safe haven.

The key for the school's child study team was to cope with the harassment because the school principal was not at all effective in this matter. The child study team classified P.S. as being perceptually impaired, but not all members of the CST agreed on the basis for

the classification, as shown by the testimony of the members of the team. A quotation from Judge Alito's decision highlights this point, "The CST manager believed that P.S.'s poor academic work was due to the bullying rather than any cognitive deficiencies."¹³ In any case, classification as a special education student was a means to offer P.S. a safe environment and special services to help the boy academically. The child study team placed P.S. in a resource room with the intention that the placement would be only for the remaining time in the school year, part of April through the last part of June. What was actually a harassment situation not remedied by the principals and teachers became a special education situation.

It turned out that what was to be a brief placement in a resource room at the end of grade five continued through the end of grade eight, albeit under a new classification of emotional disturbance near the end of eighth grade. Due to changes in IDEA guidelines, P.S. no longer qualified as perceptually impaired. The changes in IDEA led the child study team to find another way to keep P.S. in a resource room to protect him from severe harassing. In the end, P.S. spent not just the end of grade 5 in a resource room but also all of his time in grades 6, 7, and 8. When the parents brought their claim for reimbursement the case was in reality a means to solve a long-term incidence of severe harassment.

Complicating Aspect #4: Unilateral Placement of P.S. in an Out-of-District Public School. The parents of P.S. unilaterally enrolled their son in Red Bank Regional High School, a neighboring public school, when they believed that Shore, their designated local public high school did not offer a FAPE to their son. The issue was not whether the parents were permitted to remove their IDEA-classified child from their local public school and enroll him elsewhere. Rather, the threshold issue in this case was whether the parents of

P.S. were eligible to receive reimbursement for their son at Red Bank, pursuant to New Jersey law.

The issue of reimbursement for tuition at Red Bank was a threshold one because the established law, federal and state, already had provisions for dealing with reimbursement regarding enrollment in a private school. After all, the basic assumption underlying the legislation was that parents who removed their child from a public school would select a private school, not another public school. Who would choose a public school over an available private school? The drafters of the legislation did not conceive of removing a student from one public school only to enroll the student in another one. The result was that the available regulatory law in New Jersey did not provide explicitly for reimbursement for public school tuition but did provide for reimbursement for private school tuition.¹⁴

Recognizing its possible burden of having to pay tuition for P.S., Shore argued that reimbursement was barred in this case. Shore cited state law that provides, in pertinent part:

If the parents of a student with a disability, who previously received special education and related services from the district of residence, enroll the student in a **nonpublic school, an early childhood program, or approved private school for the disabled** without the consent of or referral by the district board of education, an administrative law judge may require the district to reimburse the parent for the costs of the enrollment. (emphasis added)

That is to say, Shore argued that reimbursement is available *only* when the school of choice is nonpublic, or an early childhood program, or an approved private school for

special education of the disabled. Because a regular public school is not explicitly mentioned as a possibility, according to Shore's argument, the parents of P.S. were responsible on their own for the tuition at Red Bank. Shore claimed, and the administrative law judge agreed, that this reimbursement eligibility issue must be dealt with before even considering the quality of Shore's IEP for P.S. or the qualifications of Red Bank to be a receiving school for P.S. For this reason the administrative law judge began his legal analysis of the case before him with the reimbursement issue before tackling the IDEA substantive issue.

Complicating Aspect #5: Shore Regional H. S. Is a Separate School District from Oceanport. Although Shore is the local public school for Oceanport's high school students, Shore is an independent school district with its own board of education, facilities, faculty, and staff. It has its own culture and rules governing it. Shore, as a regional public high school, serves as the local, designated high school for four communities along the central Jersey shore -- Monmouth Beach, Oceanport, Sea Bright, and West Long Branch. It draws students from the public schools in those districts as well as students from the parochial schools there.

The reception of students from four independent communities to form one independent high school necessitates articulation between Shore's staff and the elementary schools' staffs. Without close and continuous articulation regarding policies, curriculums, counseling, and other educational matters, Shore cannot function well and neither can the sending elementary schools. While in any regular unified K-12 school district there are articulation issues between the lower levels of the district and their high school level even though they all share a common, central administration and board of education, the

demands for articulation between Shore and its sending districts is even greater. The potential for trouble became evident when the Oceanport and Shore child study teams met to discuss the future IEP for P.S. as he was preparing to enter ninth grade. The distance between the two child study teams of Oceanport and Shore was much more than a geographical one. The differences between the two teams reflected two separate school cultures, rules, and interpretations of the needs of P.S. and his parents. It was not a surprise that the two teams disagreed on where to place P.S. for the forthcoming ninth grade school year.

The available public decisions in *Shore*, mostly the decision of the Third Circuit appellate court, do not explicitly state that Shore is an independent school district, although this is the case. The result is that general readers often do not realize that Shore is separate legally from the Oceanport schools. The independence of Shore comes out unexpectedly and explicitly in a brief to the District Court of New Jersey when Shore brought its case there for review, after losing in the due process hearing conducted by an administrative law judge in New Jersey. Near the very end of its brief as the plaintiff/appellant against the parents of P.S., Shore states, “The Oceanport District had done nothing for P.S. for the five [sic.] [should be eight] years he was enrolled with them and it is much easier now for Oceanport to recommend sending P.S. to an out of district at the cost of a different Board of Education, namely Shore Regional.”¹⁵

Shore’s brief goes on to state, “Shore Regional is being punished for the wrongdoing of Oceanport Board of Education.” Here Shore seeks not merely to state a legal fact but to blame Oceanport and to hold it responsible for reimbursing P.S.’s parents. It is as if Shore were saying, “Do not punish innocent Shore; punish Oceanport that did

nothing to help P.S.; Shore is not at fault; it's not fair!" Shore's statement raised a legal position in addition to revealing its attitude about its possible liability for reimbursement.

Complicating Aspect #6: The Need to Travel to Shore by Bus. P.S. recognized that were he to attend Shore, he would have to travel by bus to school to and back home again each day. The very thought of traveling by bus twice a day with the very same schoolmates who had been tormenting him for eight years "terrified" P.S. The prospect of being at the mercy of his tormentors on the school bus, a place without professional supervision that might protect P.S., was a primary reason for refusing to attend Shore. Thus, the potential for trouble for P.S. on the school bus became a serious issue of contention between the parties, as well as a factor in deciding the overall quality of Shore's ability to provide a FAPE for P.S. at Shore. The administrative judge recognized this point clearly upon listening to the testimony offered by P.S. and the various witnesses. The judge said, "Perhaps even more frightening [than the same students being with him in school] was the thought that they would also be accompanying him on the school bus to and from school."¹⁶

Complicating Aspect #7: Middle School Principal and Special Education Faculty Disagreed. Testimony during the due process hearing conducted by ALJ Reback revealed facts about Oceanport's middle school that were damaging to P.S.'s situation as a student there. Although the harassment of P.S. intensified at the start of fifth grade at Oceanport's middle school, the school did not soon recognize what the effect was on the child."

Only when his fifth grade teacher referred P.S. to the Child Study Team in March 1996 because his grades fell below average, did the school begin to evaluate P.S. as a candidate for special education. The first IEP meeting took place on April 6, 1996 to offer

special services to P.S. for less than three months of the school year. For this period of time the school classified P.S. as perceptually impaired. This classification “means a disorder in one or more of the basic psychological processes involved in understanding or using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.”¹⁷ The CST intended the classification of P.S., because of perceptual impairment, to be only for the remainder of the 1995-1996 school year. However, the child study team subsequently continued it for three more years.

Even though the Maple Place Child Study Team classified P.S. as it did, the school psychologist, according to his testimony, believed that P.S. performed below his academic ability level because of his emotional state due primarily to the constant peer harassment rather than due to any cognitive deficiencies. For this CST member it was unhappiness and hurt that led to P.S.’s poor achievement. The special education faculty realized what was happening and took some steps that the CST members believed would help the boy. In any case, there was not agreement between the principal and the faculty, nor was there total agreement within the child study team. The result was that the school did not have a united point of view on how to help P.S. The head of Oceanport’s CST testified later that, when P.S. was in the middle school “we didn’t know what to do at that time, and we were learning along with everyone else that you can’t just ignore it.”

Complicating Aspect #8: Strong, Conflicting Testimony by the Two Primary Professionals. The two primary professionals who testified at the due process hearing -- Barbara Chas, a psychologist who functioned as the supervisor of special services for

Shore, and Carol Friedman, a licensed neuro-psychologist at the Institute for Child Development, Hackensack University Medical Center¹⁸ -- offered strong positions for their respective parties to the conflict. Dr. Chas testified on behalf of Shore, and Dr Friedman testified on behalf of P.S. and his parents. (Dr Friedman served as the psychologist on the child study team that independently conducted an evaluation of P.S. in November and December, 1999). Dr. Chas offered testimony on behalf of Shore, claiming that Shore did offer an IEP to P.S. that would have provided a FAPE; Dr. Friedman testified on behalf of P.S. and his parents that the IEP offered by Shore would not have provided a FAPE and that P.S. needed a school such as Red Bank (in which he was at that time already enrolled) so that he could have an appropriate environment for learning.

Chas testified that Shore's child study team (CST) had accepted the re-evaluation and eligibility findings of the Oceanport CST, issued during the spring semester of P.S.'s eighth grade. (IDEA requires that a re-evaluation occur within three years from the prior evaluation for each classified student. The CST classified P.S. as being emotionally disturbed for the remainder of eighth grade.) Shore's IEP for P.S. for the ninth grade offered to maintain resource room mathematics, offer a course in skills for organizational assistance along with tutoring for P.S.'s mainstream courses, offer courses in theater and adaptive physical education, and provide counseling once a week as support for his emotional needs. Chas said that with the above IEP elements, along with the school's structured disciplinary system, which includes a hierarchy of punishments, a peer mediation program, and the school's willingness to press charges against noncompliant bullies, Shore would have been able to provide a FAPE to P.S.

Judge Reback asked Dr. Chas, in light of her emphasis on Shore's structured discipline program, whether she could guarantee that P.S. would not become violent or be excluded socially due to further peer harassment. Chas admitted that she could not give a guarantee. She also admitted that harassment and isolation can be subtle, leading teachers not to notice the harassment of a student by his or her peers. Judge Reback was concerned about the harassment of P.S. lest "the next suicide attempt could be successful or perhaps result in a 'Columbine' type catastrophe."¹⁹ This reaction by Judge Reback triggered a comment by Shore in its subsequent brief to the U.S. District Court of New Jersey to play down the severity of P.S.'s situation. It also led Shore to discount Reback's alleged "heightened sensitivity" and his allusion to the Columbine tragedy in this case. Shore stated in its brief, "No school can guarantee that any student will not become violent. Nor can any school guarantee that a child will not be teased at all."²⁰ To imply that the peer actions against P.S. were merely teasing, an action that expresses a playful quality, is to distort and deny the hostility manifested toward P.S. Surely the harassment of P.S. was more than teasing. To use the term *teasing* is to condone the damage done to P.S. and to minimize the responsibility for providing a remedy to the situation. Later, when Judge Alito described the situation as involving much more than teasing, he wrote, "All of the witnesses agreed that P.S. had been subjected to unusual levels of harassment."²¹

On the other hand, Dr. Friedman maintained that Shore would not have been an appropriate environment for P.S. due to the ever-present threat of harassment by so many classmates from Oceanport at Shore. Friedman was particularly concerned about the "ripe opportunity" for harassment while riding the bus with his harassers twice daily to and from Shore. She testified that she could pretty much guarantee that the bullies from Oceanport

would continue to harass P.S. She stated that intervention with bullies is most effective when it is undertaken when harassment is first beginning. However, by the time Shore offered its IEP to P.S. the harassers already had done eight years of damage. Therefore, just seeing these children and being with them would suffice to threaten P.S. and affect his ability to concentrate on his studies. She stated that in her evaluation of him P.S. showed symptoms of anxiety, depression, and withdrawal that had led him to become a “fragile” person. For this reason the independent CST recommended an environment like that of Red Bank where P.S. was enrolled and thriving at the time of its evaluation.

ALJ Reback credited Dr. Friedman’s testimony. The question for the two civil courts (the federal district court of New Jersey and the Third Circuit Court of Appeals) was not whether Chas’s or Friedman’s testimony was correct, for both were worthy of belief.²² Rather, the issue was how the District Court dealt with the decision by the administrative law judge in the due process hearing. If the District Court disagrees with the administrative law judge’s decision, as it did, the District Court is obligated to justify its differing decision based on evidence beyond the direct testimony, which only the administrative judge had heard first hand. The reviewing civil courts need a substantial justification to disagree with the final state decision in a due process hearing.

Litigation History: Decisions by Judges Reback, Cooper, and Alito in *Shore*.

When it became clear that Shore had rejected the recommendation of Oceanport’s CST to place P.S. at Red Bank, the parents of P.S. on May 28, 1999 filed for mediation with the New Jersey Department of Education pursuant to the state’s regulations. The filing was the first legal step toward the goal of receiving reimbursement for tuition costs at Red Bank. Mediation was unsuccessful. The dispute then moved to the state’s Office of

Administrative Law (OAL) to set up a due-process hearing under IDEA's provisions. It was at that point, the parents, as plaintiffs, and Shore, as defendant, agreed to an independent evaluation of P.S. by the Institute for Child Development at Hackensack University Medical Center.²³ The Institute's CST subsequently recommended that P.S. be placed in an environment such as Red Bank, where P.S. was already in attendance, that would be supportive of the academic, social, and emotional needs of P.S.

The due-process hearing took place of over four separate days from March 29, 2000 through June 27, 2001. Administrative Law Judge (ALJ) Steven Reback presided over the hearing and issued his decision on November 2, 2001. Judge Reback, upon study of the record that included the briefs filed by the parties, his impressions gained while presiding over the testimonies, a transcription of the testimonies offered, and other various pertinent documents, drew two major conclusions, both in favor of P.S. and his parents. In responding to the defense by Shore that P.S.'s parents were not eligible for reimbursement, Judge Reback concluded that unilateral placement of a student in a public high school, although it is not explicitly and specifically provided for by state regulations, is consistent with New Jersey's legal principles upon reading pertinent state laws together. He offered a four-part rationale for his decision on this threshold issue. First, there is no need to list public schools in the regulation (N.J.A.C. 6A:14-2.10 (b), as cited by Shore, because the entire thrust and intent of IDEA is to provide for a free appropriate public education for students with disabilities. Second, the complete regulation itself provides for a "a full continuum of alternative placements shall be available to meet the needs of students with disabilities."²⁴ Third, in reading statutes and regulations relating to the same subject matter, the New Jersey Supreme Court states that judges should "strive to harmonize them" in

order to resolve doubts or uncertainties.²⁵ Fourth, IDEA is a remedial statute in its nature and that it was created to assist in the special needs of students and the procedural safeguards of parents. Thus, pursuant to New Jersey common law,²⁶ judges should construe remedial statutes broadly. In short, Judge Reback read the regulation cited by Shore in its defense against the reimbursement claim to have a broad meaning of “even though it is public,” rather than the narrow meaning of “only if it is nonpublic,” as proposed by Shore.

Judge Reback further concluded that Shore did not provide a FAPE in the IEP offered to P.S. and that P.S. should remain at Red Bank where by then he was successfully enrolled in his third year of high school studies. In his decision the judge stated:

The petitioner [P.S.] from the outset of his formal education had been continuously harassed, abused, and sadistically attacked psychologically, emotionally, and on some occasions physically by groups of students who remained in his school environment throughout the educational process because they were from the district....Among the reasons expressed ...for the unilateral transfer was the legitimate and real fear that the same harassers who had followed P.S. through elementary school and middle school would continue to follow him and continue to impose their testotoronic cruelties upon him had he stayed at the Shore Regional High School....[P]erhaps even more frightening was the thought that they would also be accompanying him on the school bus to and from school.²⁷

In sum, Judge Reback decided that the parents were entitled to reimbursement even though they placed their child in a public school, that Shore did not offer P.S. a FAPE, and that Red Bank was an appropriate placement for P.S. He ended his decision on the

unilateral placement by the parents of P.S. by stating strongly, “P.S. has plainly flourished in the program at Red Bank, a public school that satisfies the requirements of both the IDEA and relevant state law and regulations. A school, school board, or parent should not simply wait for a child’s condition to worsen, when another reasonable placement is at hand.”²⁸

Pursuant to federal statutory law 20 U.S.C. § 1415 (i) (2), Shore appealed the ALJ’s decision to the United States District Court of New Jersey on December 10, 2001. Judge Mary L. Cooper reviewed the record and applied the pertinent standard for this case, as set forth by the Supreme Court in *Burlington*. The two-pronged standard calls for the District Court first to determine whether the IEP created by Shore for P.S. indeed would have provided P.S. a FAPE. If the answer is in the affirmative, then the court must determine whether Shore is the least restrictive environment for P.S. If the answer is in the affirmative, Shore need not reimburse the parents. However, if the answer is in the negative, then the District Court must determine whether the placement by the parents is appropriate for P.S. (Recall here that in any appeal to a District Court the school district has the burden of proof to show that it complied with the procedures set forth by IDEA and that it had offered an IEP, at the time of the parents’ unilateral placement, that would have provided a FAPE to the student.) Then in reviewing the state’s administrative agency’s decision, the District Court must give due weight to the state’s decision. If the District Court does not agree with the state’s decision, then it must justify its disagreement.²⁹

Judge Cooper in her opinion for the District Court on April 16, 2003 determined that the IEP created by Shore for P.S. indeed provided a FAPE for P.S. and that the placement at Shore was the least restrictive environment for P.S. The judge relied on the

testimony of Dr. Barbara Chas , Supervisor of Special Services for Shore. The judge credited Chas’s testimony over the testimonies of the witnesses who had testified on behalf of P.S. By that determination the judge did not have any need to deal with the issues of whether the parents were entitled to reimbursement, or whether Red Bank was an appropriate placement for P.S., or whether any other issues needed her attention. Thus, the parents were not entitled to reimbursement for the tuition they paid to Red Bank.³⁰

Upon losing in the District Court of New Jersey, P.S. and his parents appealed to the Third Circuit , challenging the decision of Judge Cooper to credit the sole witness for Shore over the five witnesses for P.S. Judge Samuel Alito, writing on August 20, 2004 for the panel of three judges of the appellate court, reversed the District Court’s decision after reviewing the facts of the case and the two decisions by Judges Reback and Cooper. Judge Alito set forth the pertinent federal and New Jersey law for a suit seeking reimbursement for tuition arising from a unilateral placement of a special education student in an out-of-district school.

The focus of the Third Circuit’s appellate decision was the standard by which the District Court reached its decision. Specifically, Alito examined the standard that Judge Cooper had used to decide that whether Shore had met its burden of proof that its IEP for P.S. provided a FAPE to P.S. Judge Alito presented a multi-step procedure for the District Court. The fundamental step derives from *Burlington*, as mentioned above, that the court must determine whether the school district has met its burden of proving that the IEP it had offered to the student at the time of the unilateral placement would have provided a FAPE. In doing so, the district court must give “due weight”³¹ to the state’s administrative judge because he had heard live testimony and was able to determine the credibility of the

witnesses. Under the due weight standard the factual determinations of the ALJ are “considered to be prima facie correct” and if the district court disagrees with them, it is “obliged to explain why.” Moreover, because the administrative judge heard live testimony in addition to reviewing documents, such as early IEPs, the District Court must give the testimony credited by the ALJ “special weight.” Judge Alito put it this way, “[I]f a state administrative agency has heard live testimony and has found the testimony of one witness to be more worthy of belief than the contradictory testimony of another witness, that determination is due special weight.”³²

In reviewing the way the District Court used this multi-step procedure, Judge Alito faulted the District Court. He showed that the District Court relied on the testimony of Dr. Chas rather than the witnesses for P.S., in particular Dr Friedman, who was the psychologist of the independent CST and the key witness for P.S. Friedman strongly claimed that Shore could never provide a FAPE because of the unsafe environment for P.S. at that high school due to the presence of the same students who had been harassing P.S. since the first grade. Friedman also pointed out essential elements about harassment that Shore discounted or could not overcome, such as the observation that harassing does not go away on its own, particularly when the victim is 12 years of age or older, and that the harassers of P.S. would surely continue their behavior because they would have opportunity to do so on the school bus twice daily. In this way Alito determined that the District Court failed to meet the standard established for its review of the ALJ’s decision in that it did not give due weight to that decision. The result was that the Third Circuit reversed the District Court’s decision and remanded the case in favor of P.S. and his

parents and for a determination of the tuition costs for tuition, attorney fees, and other costs that Shore was obligated to pay.

P.S. thrived at Red Bank High School, according to the testimony offered during the due process hearing. P.S. graduated in June 2003 with tuition paid by Shore, pursuant to Judge Alito's decision for the appellate court's panel of three judges.

We now turn to the implications of this case's facts, legal context, decisions by the three judges, and the aspects that create complexity by their very presence as well as by their interactions with the other aspects of the case.

Commentary: Implications of *Shore*.

The implications of *Shore* in terms of the experiences of P.S. in the Oceanport schools and in Red Bank Regional High School are several. The implications set forth below have meaning for members of boards of education, administrators, lawyers, and parents of classified special education students.

First and foremost is the fact that school districts need to attend to the harassment of students,³³ especially of special education students,³⁴ by their schoolmates. *Shore* was a case litigated under IDEA law and a case categorized as being one about special education. However, the actions that led to the need for a different learning environment for P.S. were actions of harassment rather than of perceptual impairment or emotional disturbance for which he was classified as a special education student. It was these sexual harassment actions and the resulting hostile environment that P.S. feared and sought to escape.³⁵

The damage to P.S. took place over eight school years because the teachers and principals of the two Oceanport schools did not cope successfully with peer harassment of a student. As the federal government's chief of civil rights wrote in a letter to all school

leaders early in 2006, “Unfortunately, a significant number of students are still subjected to sexual harassment, which can interfere with a student’s education as well as his or her emotional and physical well-being. Preventing and remedying sexual harassment in schools is essential to ensuring a safe environment in which students can learn.”³⁶

Oceanport’s inability and lack of strong commitment to creating a positive environment for all students led P.S. to suffer personally and socially, even to the point of attempting suicide before employing a legal maneuver to escape his local school environment. One teacher who testified called the situation a “shame and a crime.” P.S.’s mother pointed out in her testimony that the efforts of the child study team to help her son were nothing more than “damage control” instead of a district-wide effort to remedy the existing negative atmosphere. The resulting situation was an educational disaster for the child.

The main upshot of this matter is that every school district should establish a policy against peer harassment along with an implementing program for teaching appropriate school behavior.³⁷ (New Jersey statute 18A: 37-15 requires that each school district establish such a policy.) Each district should incorporate a strategy for creating a school climate that supports the established school district policy so as to be able to intervene early on when violations of that policy occur, as Dr. Friedman testified in *Shore*. The policy should call for a positive approach to establishing a the desired school climate rather than a reliance on reactive disciplinary enforcement.³⁸ Such a policy will also entail continuing professional development for all staff members because peer sexual harassment does not disappear on its own. All staff members should learn that they have a role in dealing with harassment, how victims feel, and how victims often react when others are insensitive to the victims.³⁹

As part of its efforts to create a positive learning environment for all students, each school should implement an antiharassment program for teaching students to respect and tolerate others, especially special education students, who are especially vulnerable to harassment. “Research reports consistently suggest that individuals with disabilities experience a significantly higher level of abuse than non-disabled individuals, regardless of age or gender that children with disabilities are at least two times more likely to be victimized than the general population.”⁴⁰

That program should also focus on teaching students how to protect and defend victims when they witness or know of incidents of harassment. Students should learn the skills of and develop motivation for intervening and reporting. Finally the program should teach how harassment affects the victims. Two sentences from the District Court decision highlight the need for such a program in the schools.

Students who were not participating in the harassment failed to defend P.S.; instead, they ostracized him in fear of being teased themselves....P.S. told his mother that his reason for the attempted suicide was “to show the principal how badly he was hurting.”⁴¹

Districts must realize that they are dealing with the lives of their students and staffs, as the Shore incident of attempted suicide⁴² and a recent event in Wisconsin indicate. (During September, 2006, in Wisconsin a 15-year-old boy shot and killed his principal because the principal “would not do anything” about the other students who were harassing him sexually.⁴³) As Judge Reback noted in his decision, peer harassment can be serious and life-threatening. Reback was not unduly sensitive, as Shore claimed in its brief to the District Court,⁴⁴ but quite prescient about the possible negative results of peer harassment.⁴⁵

Receiving schools of all types (including middle schools and high schools even within the same district as their sending elementary schools, regional high schools, and public high schools that serve students from private schools) should review and revitalize their articulation efforts with their known sending schools. Effort by receiving schools that is devoted to improved articulation with their sending schools regarding curriculum, special education, and professional development programs, will establish interschool relationships that foster harmony among students, staffs, and parents. Newcomers to the receiving school will understand the expectations and programs that lie ahead. Faculties should operate within a known context that can benefit everyone. Receiving schools should take a leadership role in seeking to orchestrate the flow of students into their future programs so as to create a healthy and blending environment. The absence of a diligent effort to attain knowledge about the sending schools and articulate with them was evident in *Shore* when Shore's special education officer testified. She did not even know that Oceanport has two schools in its elementary district. Such lack of knowledge was emblematic of Shore's lack of sensitivity to P.S.'s situation and his need for a changed learning environment.

The affirmance of Judge Reback's decision in regard to the threshold issue in *Shore* concerning the eligibility of parents for reimbursement when they place their children in an out-of-district public school is significant. Knowledge of such eligibility should become widespread through annotated references to *Shore*, especially since Judge Alito's decision, which is the only decision in the case that is readily available to lawyers and educators, does not specifically mention the issue of eligibility. Reback's clear and strong rejection of Shore's initial defense position deserves attention throughout the Third Circuit and beyond

it because reimbursement is a national issue stemming from IDEA and Supreme Court case law. That is to say, reimbursement is not just a state or regional issue.

Another issue also is absent from the Third Circuit's decision by Judge Alito even though it is present in the two preceding court decisions. This issue has implications nationally, too. It concerns hostility, either from other students or from educators and a school district. The issue is whether hostility can justify the rejection of an offered IEP, lead to placement of a student in an out-of-district school, and trigger a reimbursement lawsuit. In other words, can hostility create conditions that legally justify the unilateral placement of a child in an out-of-district school? Judge Reback dealt with this issue in favor of the parents of P.S. Reback held that the hostility experienced by P.S. led to "gripping fear"⁴⁶ in such a way that it negated the possibility of a FAPE at Shore for P.S.

Three previous cases that also dealt with hostility merit mention here. In a case dealing with peer hostility toward a 13-year-old girl classified as emotionally handicapped and also as health impaired due to attention deficit disorder, the judge ruled in favor of the girl and her parents. The judge held that the hostility between the parents and the school district, as well as the hostility by other students toward the girl, created a hostile learning environment that justified the unilateral placement of the girl in a private school and subsequent tuition reimbursement.⁴⁷ To emphasize the importance of a proper school environment the judge took the approach that was expressed by the girl's treating physician who had written letters to the school. The judge, quoting the doctor, said, "All the therapists, counselors, and well-meaning teachers cannot make up for a hostile peer environment at this crucial time in the [girl's] life."⁴⁸

In the second case, which ALJ Reback said was “especially relevant” to *Shore*,⁴⁹ parents of an eleven-year-old special education student with a learning disability claimed that the administration, teachers, students, and the bus driver were harassing their son to such a degree that the school environment prevented their son from receiving a FAPE. The parents unilaterally placed their son in an out-of-district public school.⁵⁰ The hearing officer in the due process hearing held that the boy “must have his IEP implemented at a location other than at [his local school] as the focus must be “to ensure that James receives an education which is of benefit to him.”⁵¹ Upon review of that decision the United States District Court of Maine affirmed the decision below, stating that the hearing officer’s decision was reasonable and supported by the evidence.

The third case dealt with a fifteen-year-old boy with a learning disability and a behavior disorder. In this case the Seventh Circuit affirmed the decision of the Illinois Level II hearing officer that the hostility of the parents was “so entrenched as to preclude hopes for a proposed IEP” offered to the parents by the local school district.⁵²

The point of all of these cases, the three cited above plus *Shore*, is a large one about the purpose of IDEA. They all show that the law primarily seeks to provide a meaningful education for a child with disabilities and that other concerns are secondary. For that reason the focus of the courts must be on the child and the child’s education, not on punishing or rewarding parents. The Seventh Circuit in the Illinois case cited above concerning parental hostility put it this way:

Under the EHA [Education for the Handicapped Act]...our concern is not rewarding or punishing parents. The appropriate concern is finding a program which will be of educational benefit to the child.⁵³

A focus on the student is the position that Judge Reback took in *Shore* and which was affirmed by Judge Alito under the fundamental criterion of “due weight.” One implication of *Shore* for school districts is to keep their focus on the child when preparing and defending IEPs that they offer to students.

Perhaps as large as the harassment issue is the one concerning the inseparability of the emotional and social needs of classified students with disabilities and the educational needs of these students. Judge Reback accepted the position that “under certain circumstances there is no distinction between the emotional needs and the educational needs a child; they are too complex to separate.”⁵⁴ He saw the issues of hostility, emotional needs, social needs, and educational needs as being intertwined. Therefore, he credited the testimony of Dr. Friedman, who offered an environmental view of Shore, over the view of Dr. Chas, who took mainly a disciplinary and separability approach toward dealing with P.S.’s situation.

The affirmance of Reback’s decision by Alito, even though Alito did not deal directly with these issues as they were raised below, sends a clear message to future litigants and their lawyers in the Third Circuit and beyond. The affirmance of *Shore* at the circuit court level combines with the Seventh Circuit decision cited above to set a strong precedent.

The *Shore* decision also put to rest the issue raised by the high school in its brief to the United States District Court of New Jersey. The school raised, but did not fully explore, the question mentioned in Complicating Aspect #5 earlier. The issue concerns who should pay for the tuition reimbursement due to the parents of P.S. In its attempt to deflect responsibility for reimbursement from itself to the Oceanport Board of Education

raised, Shore took the position that the responsibility to pay for reimbursement belongs to the district at fault in causing the unilateral placement in an out-of-district school. The implicit premise of Shore's position is that the IDEA duty to pay for a FAPE is based on fault.

In a prior related case dealing with peer harassment that resulted in a claim for reimbursement, the judge rejected the at-fault premise by a defendant school district. The judge called the denial of responsibility based on fault "absurd" and offered an analogy to support his rejection. He said, "Such a denial could be likened to an argument that a school is not responsible to provide wheelchair access because the wheelchair-bound student's walking disability was not caused by the school."⁵⁵ The judge went on to demonstrate that the IDEA standard is not legally based on fault, as in a tort law. Rather, the IDEA standard is strict liability, as provided in the statute. "[A] school is strictly liable to either provide access to the wheelchair bound-student or pay for a private school that can provide such access...."⁵⁶ For further support the judge quoted a precedent:

Courts are not called upon to assign blame to the respective parties in order to determine who is more at fault for the conflict between parents and school officials. Our responsibilities under the Act are, fortunately, much less complicated. Focusing on the child, we must determine whether his or her IEP and school placement offers educational benefit. If not, the plan does not satisfy the requirements of IDEA....⁵⁷

Shore did not develop its defense position based on fault theory. It simply raised the issue in its brief, as quoted above, but said no more. Judge Cooper, to whom the brief was directed in the District Court, did not even discuss the issue. Neither did Judge Alito

when he wrote his opinion for the Third Circuit Court of Appeals. While the fault defense ultimately was ineffective in protecting Shore, it did succeed in expressing Shore's strong negative feelings about having to pay for reimbursement for what happened in another school district.⁵⁸ Another implication of *Shore* to all receiving schools is clear -- articulate with the sending schools while focusing on the child.

Finally, the results in *Shore* imply that all schools should educate their staffs about the laws pertaining to special education at the federal, state, and local levels. After all, special education plays a significant role in our schools today, and the applications of its laws affect all students, parents, and staff members in terms of the financial, social, and curriculum issues that schools face. Students and parents should become aware of what the prevailing laws require regarding inclusion of students with disabilities in regular classrooms. Moreover, there is now fresh appellate court support for alerting all receiving schools that they, not their sending districts, might be held liable for tuition reimbursement when parents unilaterally place their children in out-of-district schools. The Supreme Court itself pointed out as far back as 1985 in *Burlington* that reimbursement is not a matter of damages but a requirement "to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP."⁵⁹ No one today is untouched by these laws.

Conclusion.

Shore is complex, and the final decision reflects the history of special education in the United States. Thirty-two years ago American society finally became aware that its public education system had shortchanged many students who simply did not fit the standard mold of the mentally and physically healthy, upward aspiring student,

thereby assigning these students to be outside of the public schools. Now these outsiders can gain access to the public schools through a “special education” designed for each and every individual who is classified as “special.” Local special educators working with parents of these students create individualized programs that, although the schools need not maximize these students’ education, do offer some degree of meaningful benefits. Each school must make some effort to protect those who were former outsiders as they now interact with each other, the regular students, and their teachers. These people do not necessarily share the zeal, love, and understanding which parent-advocates of special education manifested when they lobbied successfully for the creation of a foundation of statutory and common law to confirm society’s changed view about children with special needs.

The Third Circuit’s *Shore* decision affirmed Judge Reback’s due-process decision and at the same time it affirmed that public schools are responsible and accountable for changing what and how they teach their students and staffs. Public schools are not perfect institutions and never will be, but they are still the hope of most parents and students. (After all, the school of choice in *Shore* was another public school, one with a reputation for offering a high quality performing-arts program.) Clearly, the schools need to develop continually. Special education has arrived; it and its laws are not going away.

Author Note

I thank Michaelene Loughlin, Esq. for help with this paper. She is an attorney who represents parents of children with disabilities in special education law cases.

End Notes

¹ The facts here and elsewhere in this paper are derived from the transcripts of the testimonies given by the witnesses (called by the parties to the case) and from the decisions of the three courts.

² Pursuant to New Jersey regulation N.J.A.C. 6A:14-3.1, a Child Study Team, consisting of specialists in the area of disabilities, "shall include a school psychologist, a learning disabilities teacher-consultant, and a school social worker." It may also include other specialists in disabilities, such as an audiologist, a school nurse, and a physical therapist.

³ In this paper I shall use the term *Shore* to indicate the entire lawsuit hierarchy through the three courts: the due-process hearing held in a New Jersey administrative law court; the United States District Court of New Jersey; and the Third Circuit Court of Appeals that rendered decisions in that order. I shall use the terms *Shore 1*, *Shore 2*, and *Shore 3* to refer respectively to the three decisions by Judge Reback, Judge Cooper, and Judge Alito in that order for their separate courts. *Shore 1* = P.S. v. Shore Regional Bd. of Educ., EDS4687-99, Final Decision, (November 1, 2001). <http://lawlibrary.rutgers.edu/oal/search.html>; *Shore 2* = Shore Reg. H.S. Bd. of Educ. v. P.S., No. 01-5758, unpublished slip op. (D.N.J. April 16, 2003); and *Shore 3* = Shore Reg. H.S. Bd. of Educ. v. P.S., 381 F.3d 194 (3rd Cir. 2004).

⁴ In New Jersey the regulations passed by the State Board of Education appear in the New Jersey Administrative Code (N.J.A.C.)

⁵ The key case is *Lascari v. Board of Educ. of Ramapo Indian Hills*, 560 A.2d 1180 (N.J., 1989). It determined that in New Jersey the school district has the burden of proving that it provided a FAPE to the student.

⁶ *Hendrick Hudson Central School Dist v. Rowley*, 458 U.S. 176 (1982).

⁷ *School Committee of the Town of Burlington, Mass. v. Department of Education of Massachusetts*, 471 U.S. 359 (1985).

⁸ Susan Clark, *Meaningful Benefit as a Measure of FAPE: How Do Courts Decide Whether a FAPE Was Provided?* Presentation at the 52nd Annual Conference of the Education Law Association (October 12-14, 2006).

⁹ *Rowley*, 458 U.S. at 192 and 203.

¹⁰ *Lascari v. Board of Educ.*, 560 A.2d 1180, 1182 (N.J. 1989); *Oberti v. Board of Educ.*, 995 F.2d 1204, 1219 (3^d Cir. 1993). Pursuant to a recent decision of the Supreme Court the burden of persuasion now lies "on the party seeking relief." (That is, in this case the burden of proof would be on P.S. and his family.) *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 531 (2005).

¹¹ *Rowley*, 458 U.S. at 206.

¹² *Shore 2* at 6.

¹³ *Shore 3* at 196.

¹⁴ N.J.A.C. 6A14-2.10 (b).

¹⁵ Brief for Plaintiff/Appellant, *Shore 2* at 30-31.

¹⁶ *Shore 1* at p.7.

¹⁷ The then current N.J.A.C. 6A:14-3.5 ©.

¹⁸ Hackensack University Hospital is an affiliate of the University of Medicine and Dentistry of New Jersey.

¹⁹ *Shore 1* at 7.

²⁰ Brief for Plaintiff/Appellant, *Shore 2* at 30.

²¹ *Shore 3* at 197.

²² *Id.* at 201.

²³ The evaluation was done pursuant to N.J.A.C. 6A:14-2.5 (c).

²⁴ N.J.A.C. 6A:14-4.3.

²⁵ *Shore 1* at 8, quoting, *In the Matter of Return of Weapons to J.W.D.*, 693 A.2d 92, 96 (N.J. 1997).

²⁶ *Id.*, citing *Sabella v. Lacey Twp.*, 497 A.2d 896, 898 (N.J. App.Div. 1985); *for similar reasoning when interpreting the law on special education, see Frank G. v. Board of Education of Hyde Park*, 459 F.3d 356 (2nd Cir. 2006).

²⁷ *Shore 1* at 6-7 and 11.

²⁸ *Id.* at 12.

²⁹ *Burlington*, 471 U.S. at 374.

³⁰ *Shore 2* at 26.

³¹ *Rowley*, 458 U.S. at 206.

³² *Shore 3* 199.

³³ Dan Olweus, *Peer Harassment : Critical Analysis and Some Important Issues*, as well as some of the companion chapters in *Peer Harassment in School: The Plight of the Vulnerable and Victimized* ed. by Jaana Juvonen and Sandra Graham (2001).

³⁴ Z. Marini, L Fairbairn, and R. Zuber, *Peer Harassment in Individuals with Developmental Disabilities*:29 *Developmental Disabilities Bulletin*, 170 (2001).

³⁵ Kathleen Conn, *Peer Sexual Harassment in Elementary Schools*. Presentation at the 52 Annual Conference of the Education Law Association (Oct. 12-14, 2006); *Bullying, Harassment, and Student Threats*, 203 Ed.Law Rep.1 (Dec. 29, 2005); and *Bullying and Harassment: A Legal Guide for Educators* (2004).

³⁶ Stephanie Monroe, *Dear Colleague* [letter to school district leaders] (U.S. Department of Education, Office for Civil Rights) (January 25, 2006). Available from www.ed.gov

³⁷ Fred Hartmeister and Vickie Fix-Turkowski, *Getting Even with Schoolyard Bullies: Legislative Responses to Campus Provocateurs*, 195 Ed.Law Rep. 1 (2005); Updated in Fred Hartmeister, *Preventing Bullying: Legislation, Litigation, Research, and Reality*, Presentation at the 51st Annual Conference of the Education Law Association (Nov. 17-19, 2005).

³⁸ R. T. Hyman & S. K. Hyman, *Changing the Code of Silence: School Structure and the Law*, 51 N.J. Journal of Supervision and Curr. Devel. (in press 2006).

³⁹ *See Revised Guidance : Harassment of Students by School Employees, Other Students, or Third Parties* ,U.S. Department of Education, Office of Civil Rights (Jan. 2001).

⁴⁰ Marini , *supra*, at 170.

⁴¹ *Shore 2* at 7

⁴² *See*, Sharon L. Nichols, *Gay, Lesbian, and Bisexual Youth*, 99 *Elementary Sch. J.* 506, 510 (1999) for data on the percentage rate of suicide attempts by a related group of students who have experienced sexual harassment as that experienced by P.S. According to Nichols, “[G]ay and lesbian adolescents are two and three times more likely to attempt suicide than their heterosexual peers [and] prevalence of suicide attempts among gay and bisexual male youths is high (39%) , especially as compared to reports of presumably heterosexual youths in high schools (11% -16%... [Other researchers have] pointed out that peer pressure, social isolation, family rejection, and harassment may also be significant precipitating factors for adolescent suicide.” *Id.* at 510.

⁴³ Libby Sander, *Principal Killed by Shot in Struggle with Angry Student*, N.Y. Times, Sept. 30, 2006, at A9.

⁴⁴ *Shore 1* at 30.

⁴⁵ *For a look at principals see*, Joseph A. Dake and others, *Principals’ Perceptions and Practices of School Bullying Prevention Activities*, 31 *Health Education & Behavior* 372 (June 2004).

⁴⁶ Judge Reback took the term *gripping fear* from *Greenbush School Committee v. Mr. and Mrs. K*, 949 F. Supp. 934, 343 (D. Me. 1996). The judge in that case also said that the fear of the student was “a consuming fear, a fear that severely curtails his education.” *Id.* at 342.

⁴⁷ *Leslie B. v. Winacunnet Coop. School Dist.*, 28 IDELR 271 (D.N.H. 1998).

⁴⁸ *Id.* at 275.

⁴⁹ *Shore 1* at 11.

⁵⁰ *Greenbush School Committee v. Mr. & Mrs. K*, 949 F. Supp. 934 (D. Me. 1996).

⁵¹ *Id.*, at 197.

⁵² *Board of Educ. of Community Consolidated Sch. Dist. No.21 v. Illinois State Bd. of Educ.*, 938 F.2d 712, 718 (7th Cir. 1991).

⁵³ *Id.* at 717.

⁵⁴ *Shore 1* at 11, citing *Kruelle v. New Castle County School Dist.*, 642 F.2d 687,694 (3rd Cir. 1981).

⁵⁵ *Leslie B.*, 28 IDELR at 276.

⁵⁶ *Id.*

⁵⁷ *Id.* at 275, quoting *Greenbush*, 949 F. Supp. at 941.

⁵⁸ Having to pay the reimbursement was especially aggravating to Shore because the district at fault was one of its own sending districts. Oceanport did not deal adequately with the harassment of P.S. The negative feelings of Shore came out on the very first page of that same brief to the U.S. District Court when Shore stated, “Judge Reback was sensitive [to the Columbine incident] and let his sympathies rule.” The negative feelings also appeared later in that brief when Shore argued that the parents of P.S. were using P.S.’s classification under IDEA as a pretext for having Shore pay for tuition in Red Bank’s so that P.S. could participate in a drama program. Plaintiff/Appellant brief to *Shore 2* at 1 and 32.)

⁵⁹ *Burlington*, 471 U.S. at 370-371.

DEVELOPMENTS IN THE COURTS & LEGISLATURE

Religion

The U.S. Supreme Court heard oral arguments at the end of March in the case of *Morse v Frederick*, better known as the “Bong Hits 4 Jesus case.” Frederick, a senior at Juneau-Douglas High School in Juneau, Alaska, with the help of a graduate of the school held up a banner with the saying “Bong Hits 4 Jesus” as the Olympic Torch passed by. Frederick was already on the bad side of the school principal Morse after turning his chair around during the recitation of the Pledge of Allegiance. When Morse crossed the street to grab the banner and issue Frederick a 5 day suspension. He added salt to the wound by quoting Thomas Jefferson on the topic of freedom of speech and Morse responded by increasing his suspension to 10 days.

The major question which has lawyers speculating is whether the current Court is going to follow the rule set down in *Tinker v Des Moines* that students “do not shed their constitutional rights at the school house gate” or continue to increase the restrictions on students’ freedom of speech by school administrators. Under the “material and substantial disruption test” established by *Tinker*, speech can not be limited unless it creates a material and substantial disruption to the educational atmosphere. Students interviewed said that the banner was considered stupid by the majority of students and was largely ignored. The disruption came by the way in which the administration reacted, getting on their walkie-talkies and calling for back-up.

And now the lines have been set. On the side of Frederick and freedom of speech are the ACLU, about a half-dozen Christian groups who worry about future censorship of religious or pro-family speech in school, constitutional rights organizations, groups supporting drug-policy reform, gay rights groups, booksellers, librarians, and feminists. The basic stance of this group is that the state should not be allowed to punish non-disruptive student speech just because they feel that it contradicts school policy. On the side of the school district are the NSBA, William Bennett, and the Solicitor General of the United States. Kenneth Starr is representing the school district pro bono. The school district’s allegation is that Frederick’s banner encouraged smoking marijuana which contradicted school policies against the use of drugs.

This case presents an interesting mix of facts. At the time of displaying the banner Frederick was 18 and was not on school grounds. At least one of the individuals helping him was not a student and at the time Alaska was in the middle of a debate over the legalization of marijuana. Even the school acknowledged that the actions were not disruptive but is arguing that the conduct was during a school sponsored event since the school had released the students to watch the Olympic torch pass by. Consequently, the speech was done on a “field trip” in the words of Starr, the district’s attorney.

Fundamentalist Christians have again challenged the curriculum in a public school. In this case their concerns have allegedly resulted in the termination of a 5th grade teacher in New York who taught her 5th grade class about the Salem witch trials, exposed the students to children’s books about witches and wizards, and taught Shakespeare’s “Macbeth” in which there are three sisters who appear to be witches. The Fundamentalists accused the teacher of practicing witchcraft. During a meeting with the

school principal prior to her termination she was accused of enticing children to learn about witchcraft, magic, and pornography, and cited her eccentric and bizarre behavior which was attributable, supposedly, to the fact that she was a witch.

This same principal promoted Christianity in the morning announcements and through prayer sessions at school. The “witch” rumors allegedly started when the teacher failed to attend some of the Christian services held by the principal.

Morgan v Plano Indep. Sch. Dist., 2007 WL 654308 (E.D. Tex. Feb. 26, 2007): The Liberty Legal Instituted sued the Plan Independent School District on behalf of a student, Jonathan Morgan, who was denied under school policy from passing out candy cane pens with Bible verses attached during a winter break party. Instead he was directed to leave the pens on a table for his classmates to pick up. The court stated that because the school policy was viewpoint neutral that the “time, place, and manner” test rather than the “material and substantial disruption” test should be used to determine the constitutionality of the policy. Using that test, the court using the recommendations of the magistrate judge, found that the rules were constitutional except for one area. The court found that the restrictions on distribution in elementary school cafeterias was overbroad and not supported as being reasonably necessary to protect the school’s interest.

The New Jersey ACLU is suing the Newark public schools on behalf of a Muslim student over the district’s decision to hold graduation ceremonies in a Baptist Church. Because the Muslim student’s religion forbids him from entering a building with religious images, the ACLU is arguing that the district is excluding him from his graduation ceremony. Moreover, the ACLU is arguing that the district is also violating the New Jersey State Constitution which forbids public institutions from showing a religious preference. In response, the school district is taking the position that state law allows the use of religious facilities and that the Baptist Church is the only venue available to hold the roughly 250 graduating seniors and guests.

Parker v Hurley, 2007 WL 543027 (D. Mass. Feb. 27, 2007): The Parkers were upset over a “diversity book bag” given to their son at his elementary school because, the bag contained a book depicting a gay family. They informed the school that discussing same-sex unions and homosexuality were contrary to the religious beliefs. Therefore, it was their assertion that the use of the diversity materials violated their right to raise their children as they chose unless they were allowed to opt out of that specific curriculum. The school denied the opt-out request so the Parkers, along with several other families, filed suit.

The Massachusetts federal district court, while recognizing a parent’s right to raise his or her children as they choose, stated that such a right does not extend to the ability to dictate public school curriculum. The court refused to apply a strict scrutiny standard and that under the applicable reasonableness standard, that the school had met its burden of showing a rational basis for its curriculum. The curriculum was in line with state requirements, therefore it was presumed to be rationally related to the goal of preparing students for citizenship.

No Child Left Behind

The United States Congress has begun debate the reauthorization of the NCLB and has acknowledged that the goals of 100% compliance by 2014 are probably unrealistic. Still there is hesitation to rewrite the rhetoric of the bill for fear of diluting its impact. Those critical of the NCLB which include teachers unions and testing experts are lobbying the legislature to lower the goal of 100% compliance and delay the 2014 deadline for compliance. The U.S. Department of Education's position is that the percentages and compliance deadlines should remain where they are for fear of hurting gains already realized by poor and minority students. Both democrats and republicans alike, however, are in favor of renewing the legislation.

Virginia is getting down and dirty with the federal government over the NCLB. The Bush administration has threatened to withhold millions of dollars of federal funds because of a disagreement with the state over testing rules. In response, legislation has been introduced by Virginia's U.S. Senators to give states an extra year to develop tests for non-English speaking students which would be agreeable to the federal government. Virginia's representatives have introduced an identical bill in the House. The Warner-Webb bill would apply to any state that won federal approval for their test for the 2005-06 school year but was rejected for the 2006-07 school year.

Students' Rights

Governor Jon Huntsman of Utah has signed state legislation which creates criteria to establish a recognized student organization. To obtain approval any student club must provide a state purpose for the club, a name and a budget. Moreover, before any student may participate in the club, the student must obtain his or her parent's signed consent on a form provided by the school and the parents have the right to review material presented to the club within 24 hours after any meeting of the club. The new legislation also required clubs to stay within the "boundaries of socially appropriate behavior."

Brandt v Board of Education of City of Chicago, No. 06-2573 (7th Cir. Feb. 20, 2007): Beaubien Elementary School in Chicago sponsors a contest each year for 8th graders to submit designs for a class t-shirt. This year approximately 30 designs were submitted. The winning design would be selected by popular vote so the gifted students (number 27 of the 99 8th graders) decided to vote as a block. They calculated that their 27 votes as a block would exceed the other 72 votes which would be split among 29 other entries and would guarantee that a shirt designed by one of them would be chosen. Their plan was derailed when the teacher in charge had the students vote again on the 3 top vote getters. The gifted students' shirt was not chosen. The teacher refused to explain to the gifted students why she had deviated from past practice and held a vote-off. In response the gifted students decided to protest by wearing the shirt they had designed rather than the one chosen. The administration caught wind of the plan and warned the students that if they carried through with their protest that they would be disciplined for disruption of the school and for wearing clothing with inappropriate words or slogans. The students wore the shirt and received in-school suspensions.

In hearing the case on appeal, the 7th Circuit reaffirmed the lower court decision in favor of the school district. The court found that the t-shirts in question were not protected speech under the First Amendment, but rather were part of a demonstration against the procedures used by the school to determine the winner of the contest. The court confirmed the school's authority to determine the manner in which to administer the school to insure an orderly educational environment.

Pace v Talley, No. 05-30528 (5th Cir. Nov. 21, 2006): The decision of the administration of a Louisiana high school to report a student's alleged threat about school violence to law enforcement without first notifying the student and giving him a chance to respond did not deprive the student of his constitutional due process. The court found that the school district had a compelling interest in acting quickly in the interest of school safety.

Special Education

Board of Education of City of New York v Tom F., Docket No. 06-637: The United States Supreme Court has agreed to hear the case of Tom F. which raises the question of whether, under the IDEA, a parent who places his or her disabled child in a private school without the student ever having been enrolled in the public school system, may require the public school to cover the expense of the private school. In a 1985 case, *Burlington School Committee v Massachusetts Department of Education*, the Court said that a parent can receive reimbursement for a unilateral placement of his or her child in a private facility if the courts determine at a later date that the public school placement was not the appropriate placement for the child and the private school was the appropriate placement. In this case, however, the question is whether that same reimbursement is mandated when the public school district has never been given the opportunity to provide an appropriate placement under the IDEA.

In the instant case, in 1995 Thomas Freston, one of the co-founders of MTV and former president and CEO of Viacom Inc., enrolled his son in a private school for children with special needs. In 1997 and 1998 the New York City schools established and IEP for the boy, which the district itself deemed inappropriate and therefore paid tuition for the boy to be placed in a private school for the 1997 and 1998 school year. In 1999 the school district proposed a new placement for the boy. Without even visiting the proposed placement, Freston sought tuition reimbursement for the 1999-2000 school year. As the disagreement worked its way through the system, all decisions required payment of tuition as the most appropriate placement. In an appeal to the U.S. District court, the court concluded that "where a child has not previously received special education from a public agency, there is no authority to reimburse the tuition expenses arising from the parent's unilateral placement of the child in private school." This decision was then reversed by the U.S. Court of Appeals for the 2nd Circuit, finding it to be unreasonable to force parents to enroll their children in inappropriate programs first in order to be reimbursed for tuition to an appropriate program. This is the issue now before the Supreme Court.

The United States Supreme Court has already heard oral arguments on whether parents may provide *pro se* representation for his or her child. The right of a citizen to represent himself *pro se* is an accepted practice in the US judicial system. The question posed in *Winkelman v Parma City School District*, Docket No. 05-983 is whether a non-lawyer parent may act as a “lawyer” for his or her child in a federal court action under the IDEA. The 6th Circuit dismissed the parents’ appeal because they were acting prosecuting the appeal without the use of a lawyer. The Winkelman’s argue that the IDEA provides that a federal lawsuit may be brought by “any party aggrieved” by the prior administrative proceedings. They allege that they, as well as their child, have been aggrieved so they are not just representing their child but they are representing themselves as well; it is an issue of access to the courts. The school district’s attorney argued that the IDEA gives substantive rights only to the children.

During questioning Justice Breyer indicated that he had difficulty in believing that despite the numerous references to the parents that “party aggrieved” applied only to the student. Justice Souter stated that a “free and appropriate education” appeared to be a right of the “family group, the parents and the child together, rather than the right of the child alone.”

Federal Regulations

The U.S. Department of Justice has issued an interim rule requiring sex offenders to register pursuant to the Sex Offender Registration and Notification Act, even if they were convicted before the SORNA was passed. The reason given for the interim rule that would be to exempt those sex offenders convicted prior to the passage of SORNA would contradict public policy by making the registry incomplete and far from the comprehensive data base intended by the law. Moreover, the majority of sex offenders being released out into the community at this time would have been convicted and sentenced prior to the passage of SORNA and would therefore be in the community with no record as to their locations.

Developments in the Illinois General Assembly

HB 1347: This bill which is close to being called to a vote would add additional requirements for school boards when they contract with a third party to perform non-instructional services. Some of these requirements include:

- A 90-day written notice to educational support personnel before they are laid off (i.e. if the district decides to contract with an outside food service provider, the district would need to give an approximately 3 month notice to the food service workers who would be laid off)
- No contract could be entered into with a third party during the term of collective bargaining agreement
- A contract with a third party could only take effect at the beginning of a fiscal year, which would be July 1 for many school districts
- The third party would have to provide would have to provide comparable insurance and benefits to its employees, it would need to list the number of employees which it would use, and the wages of those employees would need to

be disclosed. Further more the third party would need to disclose any criminal and disciplinary record of their employees, including sexual misconduct issues.

- The school board would be required to provide a cost comparison before entering into the contract.
- Review and consideration of all bids would need to be done in open session. At least two public hearings held prior to regularly scheduled board meetings would have to be held to discuss the contract, and at least 6 months notice before the first hearing was held. In other words, boards would no longer be able to sneak into a third party contract under the radar on short notice.
- Any contract would have to give a chance for the public school employees laid off because of the contract to be employed under the contract.

HB 146: The Diabetes Management Bill has been approved by the House Elementary and Secondary Education Committee and is now before the full House. This bill would require school districts, once a diabetic student is identified, to have at least two people on site who are trained to help manage the student's diabetes and respond in the case of an emergency related to the illness.

If the parents submit a diabetes medical management plan to the school, the school principal must assign a school nurse and a school employee who volunteers to be trained to be an aide to provide diabetes care for the student. For schools where a diabetic student attends, one volunteer aide would be required if there is a school nurse assigned to the school; if no nurse then three volunteer aides would be required. The student may not be assigned to a different school just because there is no school nurse assigned to his or her home attendance center.

The bill also requires a school to provide an information sheet to school employees that provide transportation for a diabetic student or who sponsors a school activity in which the diabetic student participates.

It is EXTREMELY disheartening to see that The Alliance (read IASB, IASA, and IPA) are opposing this potentially life saving bill. For a child with Type I diabetes, should his or her blood glucose start to drop during the day and there is no one on premises trained to recognize the signs and provide immediate appropriate emergency therapy, there is a very real possibility that the child could DIE prior to the summoning of external emergency medical assistance. It is unconscionable that school board members, school superintendents, and school principals would prefer to risk having a student die at their institution rather than have a law passed that would put some assurance on the standard of care that is reasonable. That is taking the concept of "local control" to a malicious and negligent level. Right now, without safeguards many schools, including those which are considered some of the top schools in the state have no one at the premises to deal with a diabetic emergency of one of their students even though Type I diabetics are in attendance. The training needed is easy – every diabetic child, parent of a diabetic child, and siblings of a diabetic child can understand what must be done. It is a small price to pay to ensure the health and safety of the public school students of the state of Illinois.

HB 381: A bill requiring that all school buses purchased new after July 1, 2008 be equipped with seat belts has been approved by the House Transportation Committee and has been sent on.

Anyone see the policy irony in these two bills?

SB 1463: This bill is a change to the Silent Reflection and Student Prayer Act to take away the voluntary nature of the law. Under this bill would force every teacher and every pupil in the state of Illinois to participate at the beginning of every school day. And to think that I thought forced prayer was one of the things our ancestors were trying to escape when they fled from Europe!

SB 1702: Ironically, this bill like SB 1463 is sponsored by Lightford. Unlike SB 1463, however, which would require everyone to pray at the beginning of the day, SB 1702 requires prior notice and written parental consent before a school district could obtain any biometric information such as fingerprints, retina scans, etc. from students. I guess the State of Illinois only wants control over our eternal souls not over our corporeal bodies!

Luckily these two bills have only been approved by the Senate and are now being sent to the House for its consideration. Let's hope that common sense prevails on the other side of the aisle!