

**M.B., THROUGH HIS PARENTS,  
R.B. AND J.B.,  
Petitioners,  
v.  
BERNARDS TOWNSHIP BOARD OF EDUCATION,  
Respondent.**

Decided: October 25, 1985

Approved for Publication by the Division of Special Education:  
October 7, 1986

**SYNOPSIS**

Petitioner sought to have the unilateral placement of their son in a private, residential, out-of-state school authorized retroactively and thus require the local school board to pay residential costs and tuition.

The administrative law judge assigned to the case found that petitioner's 13-year-old son, had been previously classified as emotionally disturbed and was now classified as neurologically impaired. After an evaluation by the local district's child study team, the child had been placed in an approved private day school for the handicapped but his parents, acting on their own initiative, sent the child to an out-of-state private school, based upon their feelings that that was where the best education was available. Following this placement, a new child study team again recommended a day placement close to home; a recommendation with which the parents refused to comply.

The administrative law judge noted that pursuant to *N.J.S.A.* 18A:46-14, the Commissioner of Education's approval is required for the provision of educational services outside the state when, in the opinion of the local board, such services cannot be provided within the state. When parents independently choose to enroll their child in a residential school, they must absorb the costs.

The local board need not provide the "best" education but must provide a free appropriate education, with personalized instruction and sufficient support services to allow the child to benefit educationally. The judge concluded that the record was clear that the local board had attempted to provide such an education and was ready to

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continue to provide it. Accordingly, petitioner's request for residential placement at an out-of-state facility was denied.

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**Howard Schwartz, Esq.**, for petitioner  
**Steven B. Hoskins, Esq.**, for respondent (McCarter and English, attorneys)

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**LAVERY, ALJ:**

R.B. and J.B., parents of M.B., seek to have the unilateral placement of their son in a private residential school in Vermont retroactively authorized. They do so to require the Bernards Township Board of Education to pay the residential costs and tuition for the school year 1984-85, as well as for 1985-86.

The Board denies the necessity for such placement, as well as its liability for the costs sought.

*PROCEDURAL HISTORY*

This matter was initiated by timely appeal to the Commissioner of Education, who filed it with the Office of Administrative Law on August 23, 1985. After attempts at settlement, plenary hearing was held on October 7, 1985. On that date the record closed.

*ISSUES*

There is no dispute as to the unilateral placement of M.B. by his parents in the Greenwood School in Vermont. The issues may be specifically stated as follows:

- a. whether the circumstances of M.B.'s placement were such that retroactive validation of petitioner's unilateral action is appropriate; and, if so,
- b. whether the Board should be responsible for residential and tuition costs for the 1984-85 school and the 1985-86 school year.

*Burden of Proof:*

The burden of proof in this matter falls on petitioner, who must carry it by a preponderance of the credible evidence. However, agency action shall not be accorded any presumption of correctness. *N.J.A.C.* 1:6A-4.1(e).

*Undisputed Facts:*

Some of the material facts in this dispute are not in contention.

M.B., born in 1972, is an educationally handicapped child. The fact that he was impaired to some extent was discovered in pre-kindergarten screening during 1977. Although he was not classified at the time, by 1978 it was apparent that the child was educationally handicapped. During that year he was classified as emotionally disturbed (ED) and placed outside the mainstream in Center School, a "day-school" environment. That school limited its enrollment to emotionally disturbed and neurologically impaired (NI) children. The schedule and classrooms used by children in each category were designed to be limited to one or the other. They were not intended to be mixed. During the 1979-80 school year at Center School, M.B. moved for a brief time to the neighboring State of Pennsylvania. His parents had become divorced. While in that state, he continued to be accommodated as an educationally handicapped child. After M.B.'s parents remarried each other, he returned to Center School.

After the second year at Center, it was clear, following a neurological consultation with Dr. Arnold P. Gold, M.D. in 1980, that petitioner should be reclassified. He consequently was designated as NI. The child retained that classification throughout his stay at Center School, which ended in June of 1984. While at Center, M.B.'s behavior was marked by hyperkinetic conduct. For this, he was administered Ritalin at the direction of Dr. Gold. He also displayed a poor self-image and engaged in destructive activity. These traits were exacerbated by an attention deficit disorder. M.B., in the main, revealed that he had extreme difficulty in controlling himself. This deficiency surfaced in aggressive, impulsive, and often damaging interaction while at Center School up through 1984. At the same time, M.B.'s home environment was plagued by the continuing mental health problems of his mother. Additionally, M.B. constantly engaged in altercations with his older brother, who is not educationally handicapped.

Against this background, R.B. met on June 7, 1984, with the child study team (CST) of respondent. He signed the resulting IEP at that time. The IEP called for continued classification as NI, and ongoing placement at Center School. Subsequently, the parents obtained psychiatric and neurologic reports from Dr. Gold and Dr. Albert M. Bromberg, M.D., the psychiatrist who had been treating M.B. Both doctors recommended residential placement as a therapeutic option. Because of the significant emotional and organic stresses endured by

the child, Dr. Sandy Waran, in a consulting report, thought M.B.'s history could "signify the beginning of a conduct disorder." The doctors collectively referred to the mother's medical problems, petitioner's divorce, sibling antagonism, and a generally disrupted home life. In any event, during that summer, petitioners decided to send M.B. to Camp Northwood, a seven week summer residential program for children with learning disabilities. M.B. performed well at camp. Eventually, the directors of the program concurred with the opinion of Drs. Gold and Bromberg that M.B. needed residential placement.

By the end of August, petitioners had determined to send their son to a residential school. Greenwood School, recommended by Camp Northwood, was selected. Greenwood is located in Putney, Vermont. Petitioners stipulate that they made this arrangement unilaterally, and without complying with the relevant regulations set forth at *N.J.A.C.* 6:28-1 *et seq.* Nevertheless, petitioners now seek reimbursement for attendance at Greenwood School. By January of 1985, R.B., having ascertained that respondent would not so compensate them, brought this appeal with his wife. A new child study team then was formed by respondent to evaluate M.B., and make recommendations. The team completed its evaluation after visits to Vermont, some testing, and a meeting with petitioners. The CST reaffirmed the earlier team's recommendation for day placement in a location close to home. Notwithstanding, petitioners refuse to remove M.B. from Greenwood, and demand compensation.

Consequently, this hearing ensued.

#### *ARGUMENTS OF THE PARTIES*

Although, as can be seen above, most facts are not seriously disputed, some are. There is also a difference in emphasis on the meaning of events. Additionally, there are contrasting views of Center School, the availability of respondent's officials during the summer of 1984, and the length of an evaluation meeting with the substitute CST during June of 1985.

#### **Petitioners' Argument:**

Briefly stated, petitioners assert that they moved M.B. to Greenwood School because of their belief that Center School was inappropriate, while Greenwood offered the best treatment they could find. Petitioners did so reluctantly, since it meant separating M.B. from the home. However, they acted in his best interests, on doctor's advice. Both R.B. and J.B. testified that they saw the Center School

as a disorganized environment populated by "wild kids" with little restraint or direction. M.B. had difficulty through all of his final year with "V," a child classified as ED. They had observed with increasing alarm M.B.'s deteriorating behavior. M.B. had become flippant, arrogant, immature, and somewhat destructive. Petitioners recalled that the deficiency of Center School was corroborated by Ms. Ursula Kresge, then a member of respondent's CST. She stated that Center School was a "horrible" place and recommended residential placement.

Both parents were emphatic that residential placement for them had always been an abhorrent concept. M.B.'s mother was intent on being near her child. Only following the June 7, 1984 meeting with the CST had they learned from their physicians, Dr. Gold, a neurologist, and Dr. Bromberg, M.B.'s psychiatrist, that residential placement was recommended for their child. They at first rejected the notion. They were then exposed to M.B.'s extraordinary performance at Camp Northwood during the summer. It surpassed any advancement evident at Center School during the entire four years of his attendance there.

During August of 1984, R.B. attempted to contact respondent's officials. He was determined to follow Dr. Gold's advice. He visited Greenwood School in late August on the recommendation of the Camp Northwood Directors. Eventually petitioners settled on that institution. When R.B. was finally able to contact Ms. Kresge, she wished M.B. well and suggested they might want reimbursement. R.B. agreed, and Ms. Kresge promised to discuss the matter with the CST. Lacking a response, R.B. called two weeks later, without success. When respondent's officials finally spoke again with petitioners, its position was that no payment would be forthcoming. R.B. recalled that respondent's officials at no time advised him of his rights. However, in his conversations with Dr. Carole Kernan, who supervised Special Education, and Dr. Fanning, Superintendent of Schools, R.B. remembered that he was repeatedly advised that the law would not afford a reimbursement remedy, and that it was improper to send children out of state. Despite R.B.'s insistence that he had new medical reports, these were not requested by the CST. After reviewing R.B.'s persistent requests for reimbursement, Dr. Fanning promised an answer by November 1984, but did not respond by that date. Reached again in January, Dr. Fanning apologized for the delay. He nevertheless maintained his stance that respondent Board would not pay

for Greenwood School. This persuaded petitioners finally that their only hope for compensation was through appeal.

Petitioners thought it particularly significant that, in marked contrast to his poor performance at Center School, M.B. has flourished at Greenwood. Concededly, M.B. had a poor start at Greenwood during the fall term. His behavior was consistent with the undesirable traits manifested at Center School. Nevertheless, thereafter his conduct and performance improved markedly. Both parents testified that the Center School, with its chaotic and occasionally mixed environment, was no longer an alternative for M.B. Moreover, R.B. was certain other schools suggested by respondent would not be acceptable, even though he had not visited them. Greenwood had demonstrated that M.B. could improve. R.B. stated he is certain he will not return M.B. to respondent's school district under any circumstances.

Discussing the costs at Greenwood, R.B. estimated expenses for attendance at approximately \$14,000 for 1984-85 to approximately \$15,000 for the 1985-86 school year. Petitioners admit the Commissioner of Education only temporarily approved Greenwood as an appropriate school for referral of NI children from New Jersey during 1984-85. They argue however, that his pending approval is inevitable for this year. New Jersey is only waiting for Vermont to accept the school as appropriate for teaching educationally handicapped children.

Finally, R.B. was certain that the meeting with the CST in June of 1985 amounted to no more than a cursory, 20 to 30 minute discussion. It was superficial and did not include distribution of any reports from the team.

**The Board's Argument:**

The Board contends that petitioners failed to comply with the rules governing educationally handicapped children: *N.J.A.C.* 6:28-1.1 *et seq.* Petitioners have admitted that they unilaterally removed their child from Center School, the least restrictive environment closest to the mainstream and the geographic location nearest home. The Board also argues that, factually, a structured day school placement rather than a residential placement is most appropriate for M.B.'s educational needs.

The Board presented its case through members of the CST, as well as through M.B.'s "case advocate." Barbara Semkow, school psychologist, stated that she reviewed the files on petitioner. She, like

the other team members, visited him in Greenwood School. She found him to be of average intelligence, nervous, lacking in self esteem and somewhat short of personal control. His NI status was not physically apparent, except for anxious behavior. Dr. Semkow concluded that M.B. was in need of a private or a public program with special educational techniques. Most importantly, Dr. Semkow thought that family support was a preeminent necessity. She believed it to be especially important in view of current adolescent changes, which would in themselves require constant reassurance from his parents. They are key to resolution of his current problems. Dr. Semkow noted that she had knowledge of Center School, and thought it suitable for the present educational purposes. She believed it to be a well-run institution with professional specialists. It assigned one teacher for each class, accompanied by a fulltime aide. However, in view of the negative effect of the parents' current antagonism toward that school, the team recommended other similar institutions to them for consideration. All of these alternatives were within transportation distance. The parents were not interested in viewing them.

Dr. Semkow recalled the CST conference which R.B. described, and which she chaired on June 14, 1985. She was certain that all reports by the team were given to R.B. at the time. This was a consistent policy. Not only the team participated. Also present were Carole Kernan, supervisor of Special Services and Willard Dolman, director of Pupil Personnel Services. The meeting itself took at least an hour to an hour and a half. The recommendation was for NI classification with a day school placement. Despite this recommendation, R.B. refused to sign the IEP or to permit release of information to schools in the area for day school placement.

Helen Palladino, the learning disability teacher consultant, recalled that the meeting of June 15, 1985 took the entire afternoon. Assessing the educational status of M.B., whom she had tested, Ms. Palladino placed M.B.'s functioning at the sixth grade level. She disagreed with the Greenwood testing which suggested a ninth grade level. She too thought that M.B. required a positive, closely controlled environment near home in order to improve social and behavioral skills. In like vein, Wendy Loos, social worker, recounted the long history of home conflicts. She noted however that these appeared to be diminished. J.B.'s psychiatrist had offered a guarded but optimistic prognosis for the mother's future adjustment. Relations with the older brother (now in boarding school) had improved. Significantly, J.B.'s

psychiatrist, Dr. Kluft, indicated that she appeared to be the strongest advocate for M.B.'s self-esteem and well being.

Ursula Kresge the "case advocate" for M.B., was herself a former member of the CST which had dealt with the child. She knew the Center School as an individualized and structured setting. She recalled saying so during the meeting of June 15, 1984, which she remembered as lasting at least an hour. Ms. Kresge denied ever having criticized Center School. The nearest comment she could recall which could be thought of as approximating R.B.'s testimony occurred in 1982. At that time she had indicated that placement in the Middle School might be an appropriate step in the future to regain mainstream status for M.B. Ms. Kresge had personally tracked M.B.'s conduct throughout his school history. It had been "up and down." Consistent with the rest of the team, Ms. Kresge would not now recommend Center School as an appropriate day placement because of the bad feelings of the parents. However, she did believe that some day placement was appropriate, and thought the alternatives suggested would be suitable.

Finally, as a matter of law, the Board argued that enabling legislation, as well as implementing regulations, demand that M.B. be placed in a free and appropriate educational setting which is as near as possible to home. Any deviation requires approval by the Department of Education, through its county office. Since petitioners did not comply with any of the preliminary regulatory conditions, they may not now seek payment for the unilateral placement of their son in Greenwood School. This is especially true for the current year, since the Commissioner of Education has not approved Greenwood for placement of NI children during this period.

#### *FINDINGS OF FACT*

Therefore, after considering the testimony previously set forth, and independently assessing the credibility of witnesses and parties, as well as reviewing the record as a whole, I make the following FINDINGS OF FACT:

As to UNDISPUTED facts, I **FIND** those discussed in my section on undisputed facts.

As to matters which are disputed, pursuant to *N.J.A.C.* 1:116.3(c)7, I **FIND**:

1. The Center School is professionally staffed and equipped to deal with neurologically impaired children. These children are separately taught. In each class, one professionally certified

teacher of the educationally handicapped and at least one full-time aide are present.

2. After the June 7, 1984 conference with the CST of that time, petitioners accepted M.B.'s program and placement. That acceptance was indicated by the signature of J.B., the father. The Board notified petitioners it would be available to respond to any related questions by letter of June 22, 1984.
3. The meeting of petitioner with the special child study team, assembled as a result of this litigation on June 15, 1985, lasted well over an hour. At that meeting, the separate reports of the team members were explained at length. These reports were given to petitioner, R.B.
4. Although the Greenwood School during the 1984-85 school year was approved for referral of neurologically impaired children from New Jersey by the New Jersey Commissioner of Education, that school is currently in "pending" status until Vermont approves the Greenwood School for special education purposes.

#### *ANALYSIS AND CONCLUSION*

There is no question but that petitioners want the best education possible for their educationally handicapped child. The record is replete with R.B.'s concern over M.B.'s development. Similarly, the Board's own witnesses have introduced testimony that J.B., for all her own difficulties, remains, as M.B.'s mother, "the strongest advocate for his self-esteem." Nevertheless, the law is at variance with their desire to be compensated for providing what they perceive, and have unilaterally selected, as the "best" schooling for M.B.

The Board correctly cites the controlling statutes and regulations. Plainly, *N.J.S.A.* 18A:46-14 demands that educational services outside the State which, in the judgment of the Board, cannot be provided inside the State, require the consent of the Commissioner of Education. The Board's obligation was to provide an individualized educational program. It had to do so in the least restrictive environment appropriate, in light of the pupil's needs. Placement of the child had to be in an appropriate educational setting as close as possible to the home, *N.J.A.C.* 6:28-3.6(e)5ii. Compensated enrollment of M.B. in a privately owned special class anywhere in the continental United States could only be accomplished after written approval by the New Jersey Department of Education through its county office, *N.J.A.C.* 6:28-4.2 (a)7. That approval is normally from a list of accepted

schools. Beyond this, if a Board wishes to place any child in a residential program, this action can only follow a determination that a free, appropriate education is not available in a public or private day school program. Placement must again be approved by the New Jersey Department of Education through its county office.

It is relevant here that, when the parents independently choose to enroll their child in a residential setting, they must absorb the costs, *N.J.A.C.* 6:28-7.3. M.B.'s parents do not contest their failure to comply with the foregoing. They agreed to the IEP, the basic plan, and the placement of M.B. at Center School in June of 1984. The thought of residential placement at that time was repugnant to them. The reports of Drs. Gold and Bromberg gave them pause for thought, but they took no action. Not until the 11th hour, in late August, did they decide to enroll M.B. in Greenwood, because of the Northwood experience and the recommendation of the camp's directors supplemented by the foregoing doctors' reports. The parents acted quickly because they knew the school was the "best" they could find.

Unfortunately, the "best" is not what the law envisions as reimbursable. The Board need only provide a free appropriate education, with personalized instruction and sufficient support services to allow the child to benefit educationally. This arrangement must be consistent with, and agreed upon through, an IEP, *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176, 203-204 (1982). The record as a whole discloses that until June of 1984, the Board complied with these minimum requirements. The testimony of the Board's witnesses credibly describes actions consistent with all the procedural demands associated with an IEP conference, in June of 1984. R.B. signaled his agreement at the time by signature. While R.B. rightly complains of the delay in answering his demand for money extending from November 1984 to January 1985, that delay is not fatal to the Board's case. R.B. himself disclosed that previously both Dr. Kernan and Superintendent Fanning, had warned him that his precipitant placement of M.B. was inconsistent with State law. Once the matter was contested, the Board even substituted a new CST to treat the issue in 1985. The team obviously conducted a thorough review. Despite the recollection of R.B., the believable testimony by the team is that they fully disclosed their view and reports at the meeting of June 15, 1985. The team's testimony was persuasive that the meeting lasted well beyond the brief time represented by R.B.

In sum, petitioners have sought and obtained what they feel amounts to the *best* education possible for their child. Their motivation is laudable. The testimony of R.B. has made clear, however, that under no circumstances would they accept placement in any other school but Greenwood. Under these circumstances, for the foregoing reasons, the Board has neither obligation nor authority to underwrite the decision of the parents, however well-intentioned it might be.

The question of residential as opposed to day placement need not be decided, because of petitioner's fixed stance. However, it may be observed that, beyond petitioner's bare allegations on that issue, they have offered only hearsay evidence, unsupported by sufficient competent evidence to support findings of fact, *N.J.A.C.* 1:115.8(b); *Weston v. State*, 60 *N.J.* 36, 51 (1972). The Board on the other hand, offered believable, competent testimony by sworn witnesses on the issue, subject to the test of cross-examination. Unlike petitioners, they satisfied the *residuum* rule. On the other hand, it cannot be said that appeal on this issue would be barred in the future. Such a petition could emerge if the parents change their present posture and explore options in New Jersey. That investigation would necessarily include visits in good faith to those alternative settings nearest home proffered by the Board. Disagreement on placement then unresolved could still generate entitlement to a due process hearing.

#### ORDER

I **ORDER**, therefore, that petitioners' request for residential placement at, and reimbursement for, schooling at the Greenwood School in Putney, Vermont be and hereby is **DENIED**.

This decision is final pursuant to 20 *U.S.C.*, §1415(e) and 34 *C.F.R.* 300.509, and is appealable by filing a complaint and bringing a civil action either in the Superior Court of New Jersey or in a District Court of the United States. If either party feels that this decision is not being fully implemented, they should communicate their written concern to the County Superintendent of Schools and to the Director, Division of Special Education.

**You must check the New Jersey Citation Tracker in the companion looseleaf volume to determine the history of this case in the New Jersey courts.**