



# *Special Education Bulletin*

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## **summary**

ALJ denies parents' request for tuition reimbursement for unilateral placement in extended school year program (page 2). Board ordered to reimburse parents of preschool disabled child for tuition and other costs for their unilateral placement at non-public preschool and for home-based ABA program (page 2). Based on student's conduct and suicidal ideation, board's placement of him on homebound instruction for 60 days was appropriate, and application for "stay put" denied (page 5). Parent only entitled to recover the amount the board approved for the cost of an independent psychiatric evaluation (page 7). ALJ denies parents' request for transportation reimbursement; parents are not entitled to reimbursement for their individual travel to pick up their child and/or their return trip home after dropping their child off (page 7).

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**ALJ Denies Parents' Request for Tuition Reimbursement for Unilateral Placement in Extended School Year Program**

*A.P. and M.P. on Behalf of A.P., Petitioners, v. Monroe Township Board of Education, Respondent*, EDS No. 6976-07 (October 17, 2007) [Decided by Joseph F. Fidler, ALJ].

A.P. was born on August 7, 2002. He was classified as eligible for special education and related services under the category of autism. On June 16, 2007, the IEP team met to develop his IEP. His IEP for the 2007-08 school year provided for an in-district extended school year program (ESY) for a six-week period from July 2 to August 13, 2007. The ESY was four hours per day and included use of Applied Behavior Analysis (ABA) services that he received during the school year. A.P.'s father told the IEP team that four hours per day for six weeks was insufficient and that his son would regress without a full-day program. He told an IEP member that he wanted his son to attend the nonpublic Harbor Haven Summer Camp (Harbor Haven).

On June 25, 2007, A.P.'s parents filed a request for due process with OSEP. They alleged that A.P. would regress if he did not have more hours and more days in the ESY program. The same day the parents filed the due process request, they sent written notice to the board that they were unilaterally placing A.P. at Harbor Haven and would seek tuition reimbursement. The board did not receive the notice until June 27, 2007.

The board responded by filing a motion for summary decision with the ALJ. The board argued that A.P.'s parents failed to give timely and proper notice. The ALJ agreed with the board and granted its motion. Citing *N.J.A.C. 6A:14-2.10*, the ALJ explained that in order for

parents to be eligible for reimbursement for unilaterally placing their disabled child in a nonpublic school program, they must notify the board of their concerns and their intent to enroll their child in that program. Reimbursement can be reduced or denied if the parents did not inform the IEP team that they were rejecting the proposed IEP at the IEP meeting prior to the removal, or if they fail to notify the board in writing at least 10 business days prior to the removal of their intent to enroll their child in the other program.

In this case, the informal statements by A.P.'s father at the IEP team meeting, that he was unhappy with the ESY proposal, was not a definitive statement that he was rejecting the IEP. Furthermore, the parents failed to give the board ten business days' written notice of their intent to enroll him at Harbor Haven. Because the parents failed to provide the required notice, they deprived the board of any opportunity to attempt to resolve the dispute. Therefore, the ALJ ordered the dismissal of the petition.

**Board Ordered to Reimburse Parents of Preschool Disabled Child for Tuition and Other Costs for Their Unilateral Placement at Non-Public Preschool and for Home-Based ABA Program**

*G.V. and L.V. on Behalf of J.V., Petitioners, v. Wyckoff Township Board of Education, Respondent*, EDS No. 11295-06 (October 26, 2007) [Decided by Jesse H. Strauss, ALJ].

J.V. was born in July 2002. At age 18 months, J.V. was developmentally behind and, through early intervention, began receiving 20 hours of home-based Applied Behavior Analysis (ABA), 2 hours of OT, and 1 hour of speech/language therapy (S/LT). His parents also provided him with another two hours of private S/LT.

In November 2004, at age 28 months, J.V. was diagnosed with PDD by Dr. Lisa Nalven, a developmental/behavioral pediatrician. J.V. had no language, was non-compliant due to tantrums and had feeding issues. Dr. Nalven recommended a full-day, out-of-district placement for preschool because she did not believe that the district's half-day language-based program was sufficient.

In February 2005, the case manager from the district's CST visited J.V.'s home and explained the district's preschool disabled program to J.V.'s mother and the early intervention case manager.

In March 2005, J.V. was tested by a speech language pathologist who determined that J.V. was four months behind in language comprehension, and one year behind in expressive communication. She recommended that J.V. continue to receive S/LT. In April 2005, the district's speech/language specialist observed J.V. and accepted the assessment of the speech language pathologist.

In May 2005, the case manager performed an educational assessment of J.V. The case manager noted that J.V. had made progress since she last saw him in February. She found that he had progressed in transitioning from one activity to another, that he was compliant, and he was using spontaneous language. She determined that preschool level programming was warranted so that J.V. could acquire age-appropriate skills. The school psychologist also observed J.V. in May and also noticed that he made progress in terms of maintaining eye contact during ABA sessions.

In an evaluation report on May 10, 2005, Dr. Nalven noted J.V.'s recent "explosion" of using two- and three-word phrases. She maintained that he had a global developmental delay and recommended full-day programming to include ABA, among other therapies.

On June 3, 2005, the IEP team met and determined that J.V. was eligible for special education and related services under the category of preschool disabled. The CST disagreed with Dr. Nalven's recommendation of a full-day, out-of-district placement. It proposed an in-district program of one-half day duration, five days per week. The program included 20 minutes of S/LT and 30 minutes of OT per week. However, the proposed IEP did not include ABA.

J.V.'s parents agreed with the classification but disagreed with the proposed IEP. Therefore, the CST and J.V.'s parents agreed that during the extended school year (ESY) for 2005, J.V. would receive 20 hours of ABA for 4 weeks.

In July 2005, J.V.'s parents had him evaluated by Dr. Jan Handleman, an educational consultant, and Dr. Lara Delmolino, a board certified behavior analyst. Dr. Handleman recommended a program with an ESY that included ABA for the full school day. Dr. Delmolino found that although J.V. did not meet the overall criteria for autism or PDD, his communication scores met the autism criteria. Therefore, she recommended continued intervention using the same model and intensity as he had been receiving.

On August 19, 2005, J.V.'s parents met with the district's director of special services. The CST did not agree with the recommendations from Drs. Handleman and Delmolino. However, the parties agreed that J.V. would start in the district's preschool disabled program on September 6, 2005, and that J.V. would receive a supervised lunch followed by two hours of ABA on a 90-day trial basis.

J.V. then attended preschool in the district. In the morning, he attended class with children his age, and in the afternoon he had class with older children. He received S/LT for 60 minutes per week, 30 minutes of individual OT per week, and 30 minutes of infused OT per week.

On December 19, 2005, J.V.'s parents met with the CST, and it proposed modifying J.V.'s interim program. It recommended placing him in a 2½ hour afternoon half-day, self-contained preschool disabled program with the same related services. The CST did not believe a full-day program was appropriate because of J.V.'s episodes of crying and falling asleep. J.V.'s mother learned for the first time at this meeting of J.V.'s tantrums and falling asleep. The parents rejected the proposed IEP because it was only a half-day program and did not include specifics about ABA.

Since an IEP could not be agreed upon, and because they believed J.V. was regressing, at the end of February 2006, J.V.'s parents removed J.V. and unilaterally placed him at a typical preschool at the Wyckoff Reformed Church, and provided him home-based ABA through the early intervention service provider. This placement continued through August 2006. For the 2006-07 school year, J.V. was unilaterally placed at the Archer School in Allendale, New Jersey, which is a typical preschool. He was also provided a shadow aide and home-based ABA.

On October 17, 2006, J.V.'s parents filed a due process petition alleging that the district's preschool disabled program for 2005-06 was not based on the principles of ABA, that it did not afford J.V. the opportunity to make meaningful educational progress, and that the modified proposed program did not meet his

needs. They requested an appropriate placement. They also requested reimbursement for tuition for the 2005-06 and 2006-07 school years, and an additional 20 hours of home-based ABA.

At the hearing, J.V.'s mother testified. The parents also presented the testimony of two expert witnesses, Dr. Anita Breslin and Dr. Alan Schnee. The district presented testimony and evidence from J.V.'s preschool teacher, his case manager, and the director of special services.

Dr. Breslin, a certified school psychologist and behavior analyst, found that J.V. exhibited behavioral characteristics of children with PDD. Although J.V. is not autistic, she recommended the provision of 20 hours per week of ABA-based intervention services on a twelve-month basis. She explained that ABA is used effectively not only for autistic children, but for those who are globally developmentally delayed.

Dr. Schnee, an expert in ABA and clinical psychology, is president of Nexus Language Builders, which provided home-based ABA to J.V. He explained that ABA can be used for children who are not autistic, but who have language and attention disorders. Dr. Schnee recommended that J.V. receive a combination of 30 hours per week of ABA in the home and preschool setting, and the use of a shadow in the classroom to facilitate language.

Based on the evidence and testimony presented, the ALJ concluded that the district failed to provide J.V. a FAPE. The ALJ found that J.V. made significant progress in the early intervention program which used home-based ABA. The ALJ also found that ABA's use is not limited to autistic children, but can be

successful for other disabled children. The ALJ commented that the district failed to produce its behaviorist to explain or defend its program, and it did not offer expert testimony to counter the opinions of Drs. Schnee and Breslin. The ALJ thus found that the district failed to offer or provide J.V. an education designed to allow him to obtain a meaningful educational benefit. The ALJ determined that ABA was appropriate to address J.V.'s expressive language and attentional deficits. Furthermore, the parents' unilateral placement of J.V. in typical preschools, augmented by home-based ABA, was appropriate. Therefore, the ALJ ordered the district to reimburse J.V.'s parents for:

- (1) the tuition they paid to the Wyckoff Reform Church preschool and the Archer School;
- (2) the costs of home-based ABA for the 2005-06 and 2006-07 school years; and
- (3) the costs of the shadow aide and related services for the 2005-06 and 2006-07 school years.

**Based on Student's Conduct and Suicidal Ideation, Board's Placement of Him on Homebound Instruction for 60 Days was Appropriate, and Application for "Stay Put" Denied**

*E.B., on Behalf of E.A., Petitioner, v. Lower Cape May Regional Board of Education, Respondent*, EDS No. 8923-07 (November 20, 2007) [Decided by W. Todd Miller, ALJ].

E.A. is a 16-year-old eleventh grader who is classified as mildly cognitively impaired. His IEP provided for a self-contained classroom.

On October 16, 2007, E.A. brought a cell phone into school which was confiscated since cell phones were not permitted under school policy. School staff noticed that there was a photograph on the cell phone of E.A. dressed in the garb of a "blood gang member"—E.A. was dressed in red clothing with a bandanna around his face and was holding what appeared to be a semi-automatic assault weapon. E.A. was posed in a similar fashion to photos of the shooter who committed the shootings at Virginia Tech. E.A. had been subject to bullying, and in 2005 had threatened to use a gun against students who were picking on him.

E.A. was suspended from school for two days and notice was provided that a conference would be held on October 19, 2007. The conference was attended by E.A., his mother, his case manager, the principal, and the assistant superintendent for support services. At the conference it was learned that E.A. had written a suicide note which stated as follows:

2:26 - Go home then smoke a cigaret (sic)  
3:00 - Buy a Gun  
3:30 - Buy the Amo (sic)  
4:00 - Get the gun ready  
4:30 - Go to my room  
5:00 - Put the to my head (sic)  
5:30 - Say good bye  
6:00 - Pull the trigger  
Tonight!!!  
List  
6:01 - i am Died!! (sic)

It was decided that E.A. needed immediate intervention. In addition, it was apparently agreed that E.A. would be placed on home instruction for up to 60 days. E.A.'s mother, whose native language is Polish, signed a cover sheet to the amended IEP. She also signed the participant section along with waiving the 15-day advance notice requirement.

On August 20, 2007, E.A. was admitted to the psychiatric unit at Bridgeton Health Center. He received in-patient treatment and was discharged on October 29, 2007. E.A. was cleared to return to school upon discharge.

On November 14, 2007, E.A.'s mother filed an application for emergent relief with the Office of Special Education Programs. She alleged that she had not agreed to homebound instruction for 60 days. She contended that she only agreed to homebound instruction for 15 days, and that E.A. should be returned to his previous placement in accordance with the IDEA's "stay put" requirement.

At the hearing before the ALJ, E.A.'s mother testified that she was tricked or confused by the cover sheet to the amended IEP, and did not agree to a 60-day home placement. The principal and case manager testified that the material provisions of the amended IEP were thoroughly discussed and agreed upon.

The ALJ explained that pursuant to 20 U.S.C.A. §1415(e)(3), a disabled child is to remain in the then educational placement until all proceedings have been completed. E.A.'s mother contended that last uncontested placement was E.A.'s self-contained classroom. However, E.A.'s mother admitted in the verified petition that she agreed to homebound instruction for a period not to exceed 15 days. The ALJ concluded that since E.A.'s mother agreed to a change in placement, the "stay-put" becomes homebound instruction.

The only question remaining was the length of time for the homebound instruction. The ALJ found, based on the extraordinary and serious nature of E.A.'s conduct, that E.A. needed immediate intervention and, therefore,

the fact that there may have been a deviation in the procedural requirements to effectuate a change in placement was *de minimis*. The ALJ concluded that 60 days of homebound instruction pending further evaluations was reasonable under the circumstances. The ALJ also determined that E.A.'s mother failed to prove that she was entitled to equitable relief. In particular, the ALJ found that the balance of equities weighed in favor of the district since it has a duty to protect its 1800 students.

The ALJ also rejected the argument that E.A. was being subjected to discipline. Citing 34 C.F.R. §300.519, the ALJ explained that removal of a student for more than 10 days constitutes a change in placement. Except in cases involving weapons or drugs, a change in placement can only be ordered by an ALJ. Further, a change in placement for more than 45 days can only occur if the board has demonstrated by substantial evidence that maintaining the current educational placement is substantially likely to result in injury to the child or to others. The ALJ found that the district presented substantial evidence that returning E.A. to his self-contained class was substantially likely to result in injury to himself or others. The ALJ believed that homebound instruction was a reasonable accommodation pending further evaluations, and that the district had sufficient grounds for its actions.

Based on the foregoing, the ALJ denied the application for emergent relief. He ordered that E.A. be reevaluated by the CST, including psychiatric and psychological evaluations.

**Parent Only Entitled to Recover the Amount the Board Approved for the Cost of an Independent Psychiatric Evaluation**

*N.P. on Behalf of J.P., Petitioner, v. East Orange Board of Education, Respondent*, EDS No. 9621-07 (January 17, 2008) [Decided by Mumtaz Bari-Brown, ALJ].

J.P. is a 13-year old student who was enrolled in the Coastal Learning Center. In March 2005, he was reevaluated to determine whether he was still eligible for special education and related services. The district conducted a psychiatric evaluation of him on July 5, 2005. However, on October 5, 2005, J.P.'s parent, N.P., through the Rutgers Special Education Clinic (RSEC), requested an independent psychiatric evaluation.

The board agreed to the request for an independent psychiatric evaluation, and offered N.P. a list of physicians to conduct the evaluation. The board advised that arrangements would be made by it directly with the physician. N.P. selected Dr. Ellen Platt from the list, and subsequently the board approved a contract authorizing Dr. Platt to conduct the evaluation for a fee of \$600 based on Dr. Platt's fee schedule. However, on July 31, 2006, RSEC paid Dr. Platt \$1,200 and requested that she contact N.P. to schedule the evaluation. Dr. Platt's office later sent a bill to RSEC for a "complex psychiatric consultation" of J.P.

The board refused to reimburse N.P. and/or RSEC for the \$1,200 paid to Dr. Platt. N.P. then filed a petition seeking reimbursement for \$1,200 for the bill submitted by Dr. Platt and paid by RSEC.

Based on the evidence presented, the ALJ found that Dr. Platt provided the board with a fee schedule which listed the cost of a basic evaluation at \$600. The board did not share this information with N.P. or RSEC. However, RSEC paid Dr. Platt \$600 above her basic fee and did not consult with the board prior to doing so. Furthermore, RSEC failed to provide any evidence to explain the \$1,200 fee from Dr. Platt other than speculation that she charged \$300 for every 45 minutes after the basic evaluation.

The ALJ explained that a parent may request an independent evaluation, generally at no cost to him/her, if there is disagreement with the district's evaluation. The board is required to provide a list of evaluators for the parent to choose from. The ALJ further explained that boards are accountable for their actions and may impose reasonable cost criteria before approving a request for an independent evaluation. The ALJ found the board acted reasonably in refusing to pay RSEC an additional \$600 beyond what it approved. Therefore, the ALJ only ordered the board to reimburse RSEC \$600.

**ALJ Denies Parents' Request for Transportation Reimbursement; Parents are not Entitled to Reimbursement for Their Individual Travel to Pick Up Their Child and/or Their Return Trip Home After Dropping Their Child Off**

*W.S. and P.S., on Behalf of W.S., Petitioners, v. Ramsey Board of Education, Respondent*, EDS No. 1544-08 (February 20, 2008) [Decided by Daniel B. McKeown, ALJ].

W.S. is 12 years old and is eligible for special education and related services. On October 29, 2007, the board agreed to continue W.S.'s placement at Celebrate the Children (CTC), where he had been for summer camp. CTC has a self-contained school for autistic children located in Stanhope. CTC is an 88 mile round trip from W.S.'s home in the district. W.S.'s IEP provides transportation as a related service.

The board offered to reimburse W.S.'s parents 48.5 cents per mile for transporting him to and from CTC, or to provide transportation through a consortium that it belongs to. The parents did not want W.S. riding on a school vehicle because there were times he was transported by a driver or aide who could not speak English. They objected to the board's proposed contract to reimburse them for their transportation costs because it only paid them for a round trip of 88 miles, and did not include their individual travel after dropping him off or picking him up. They contended that they have to make four trips each day and that the board's proposed transportation reimbursement should

be doubled. Subsequently, W.S.'s parents filed a due process petition.

Citing *N.J.A.C.* 6A:27-5.1, the ALJ explained that disabled students are entitled to transportation in accordance with *N.J.S.A.* 18A:39-1, *et seq.* and their IEPs. If there is an out-of-district placement, the board must provide transportation consistent with the school calendar of the receiving school. It is undisputed that W.S. is entitled to transportation to and from school. However, the IEP does not state that his parents will provide him transportation and receive reimbursement. However, *N.J.A.C.* 6A:27-7.7 authorizes a parent to transport his/her own child under a negotiated contract with the board.

In this case, the petitioners failed to prove that they are entitled to additional reimbursement—the board's offer to reimburse the petitioners or to have W.S. transported using a vehicle provided through its consortium was not arbitrary, capricious or unreasonable. Therefore, the ALJ ordered the petition dismissed.

**address all comments and questions to**

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