



Special Education Bulletin

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summary

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**ALJ Upholds Five-Day Suspension
Imposed on Multiply Disabled Eighth
Grader for Defiant Behavior and
Threatening School Principal**

S.W.-R. on Behalf of E.R., Petitioners, v. Ocean Township Board of Education, Respondent, EDS No. 4148-07 (May 29, 2007) [Decision by Joseph F. Fidler, ALJ].

E.R. is an eighth-grade student who is classified in the category of multiply disabled. E.R. has ADHD, central auditory processing disorder, very low self-esteem, and anxiety. E.R. was suspended from school for five days, beginning May 23, 2007. On May 24, 2007, E.R.'s mother, S.W.-R., filed a petition with the Office of Special Education Programs seeking emergent relief; she requested E.R.'s immediate return to school pending a due process hearing.

At the hearing, E.R.'s mother testified that, on May 21, 2007, E.R. began school in the district's intermediate school behavioral program, after being discharged from the Collier School in Marlboro, New Jersey. E.R.'s mother learned that an aide followed E.R. throughout the day, as this had not been discussed in advance. She was concerned that the aide's presence would impact E.R.'s self-esteem. She also was shocked to learn that E.R. was being transported by an alternative school bus that had students who were more disabled than he was. E.R. did not want to ride the bus, but did so after a staff person spoke to him.

E.R.'s mother testified that, at the end of the second day of school, E.R. refused for quite a while to board the bus. He finally boarded the bus and shouted to the school principal that he was going to look up his address and "egg" his car. The principal called E.R.'s mother and told her he was

going to be suspended. The principal subsequently notified her that he was to be suspended for five days for defiance of authority and threatening a staff member.

E.R. was to be provided with home bound instruction for four days, two hours per day. Following the suspension, E.R. would be provided with exclusive transportation home from school. The principal also notified the police.

S.W.-R. believed that E.R.'s behavior was a manifestation of his disability and that he was wrongfully suspended. She acknowledged that E.R. owed the principal an apology but believes that he has suffered irreparable harm because of the scene that was created in front of his peers. The district countered that S.W.-R. did not satisfy the elements under *N.J.A.C.* 6A:14-2.7(s) which were necessary to entitle her to emergent relief.

The ALJ explained that, pursuant to *N.J.A.C.* 6A:14-2.8(a), school officials may order the removal of a student with a disability from his/her current educational setting, for disciplinary reasons, for up to ten consecutive or cumulative school days in a school year. These suspensions are subject to the same board procedures that are applicable to non-disabled students. Pursuant to *N.J.A.C.* 6A:14-2.8(a), a district is not required to provide services during periods of removal for ten school days or less in the school year unless services are provided to similarly situated regular education students.

In this case, the ALJ determined that there was no significant break in E.R.'s educational services, and that he will not suffer irreparable harm if he is not returned to school immediately. Therefore, the ALJ denied the request for emergent relief.

Classified High School Senior, who was Failing English and Placed in the District's Alternative Education Program for Disciplinary Reasons, was Ineligible to Participate in Graduation Ceremony

M.H. on Behalf of G.S., Petitioners, v. Deptford Township Board of Education, Respondent, EDS No. 4282-07 (June 12, 2007) [Decided by Douglas H. Hurd, ALJ].

G.S. is a high school senior who was classified as eligible for special education and related services under the specific learning disability category due to ADHD. G.S.'s IEP placed him in regular classrooms for math and English.

The board made a decision that G.S. was not eligible to receive his diploma nor participate in graduation services on June 13, 2007. The board determined that he was ineligible to graduate because he was failing English and because he was placed in the district's Alternative Education Program (AEP) six times during the school year for disciplinary reasons. Pursuant to board policy, students who have been assigned to the AEP three or more times in the course of a school year are ineligible to participate in the commencement and graduation ceremony.

On May 30, 2007, G.S.'s mother, M.H., filed a request for emergent relief with the Office of Special Education Programs. The application requested that M.H. be permitted to march and receive his diploma at the graduation ceremony, or alternatively, to hold his diploma but allow him to walk with his classmates during the processional and make up the English course during the summer.

The ALJ hearing the matter explained that, in order to receive emergent relief, the

petitioners must establish that: (1) they will suffer irreparable harm if the relief is not granted; (2) the legal right underlying their claim is settled in their favor; (3) they have a likelihood of prevailing on the merits of the underlying claim; and (4) in balancing the equities of the parties, they will suffer greater harm than the board if the request relief is not granted.

The ALJ found that the G.S. and his mother did not satisfy the second or third elements. It is clear that local boards of education are charged with the responsibility of protecting the health, safety and welfare of their students and ensuring the orderly conduct of their schools. As such, the law is settled in favor of the board. The board's disciplinary policies are presumed valid, and the petitioners have not shown that the board acted arbitrarily and outside the scope of its discretionary authority. The evidence presented indicated that the board has uniformly applied its AEP policy and has not granted any exceptions. Given the fact that G.S. was placed in AEP six times, the ALJ could not disturb the board's decision. Furthermore, by failing English, G.S. did not receive sufficient credits to graduate. Therefore, the ALJ denied the application for emergent relief.

School Districts Must Share the Costs of Residential Placement of Disabled Student Whose Divorced Parents Reside in Different Communities and Share Joint Legal Custody

Cumberland Regional High School District Board of Education, Plaintiff, v. Freehold Regional High School District Board of Education, Defendant, 2007 U.S. Dist. LEXIS 44212 (D.N.J. 2007) (unpublished opinion) [Decided by Robert B. Kugler, U.S.D.J.].

L.G. is the daughter of I.G., her father, and K.D., her mother. L.G. is eligible for special education and related services. In 1998, L.G.'s father filed a due process petition to require their school district of residence, Freehold Regional School District (Freehold Regional), to contribute to L.G.'s residential placement at Bancroft. Freehold Regional settled the dispute by agreeing that I.G. would make an annual, nominal contribution towards the cost of the placement, and the district would bear the remainder of the cost.

In 1999, L.G.'s parents separated, and were subsequently divorced in 2001. L.G.'s parents then became her co-guardians and shared joint legal custody. Following the divorce, L.G.'s mother, K.D., moved to Bridgeton in Cumberland County, and lived within the Cumberland Regional High School District (Cumberland Regional).

In November 2001, Bancroft discharged L.G. because it could no longer care for her. I.G. then contacted Freehold Regional for assistance in finding a new placement, but the district offered no assistance. I.G. then placed L.G. in a facility in New Kent, Virginia called Cumberland Hospital. Initially, I.G.'s private insurance covered the residential placement. However, when I.G.'s insurance would no longer cover the cost, I.G. filed a due process petition in April 2002 requesting that Freehold Regional assume financial and administrative responsibility for L.G.'s placement.

The ALJ hearing the matter ordered Freehold Regional to pay the majority of the costs associated with the residential placement. Freehold Regional then filed a third-party petition seeking contribution from Cumberland Regional for the cost of L.G.'s placement.

Cumberland Hospital subsequently determined that it could no longer care for L.G. effective December 31, 2002. I.G. requested assistance from Freehold Regional in finding an appropriate placement. I.G., however, found a placement at the Florida Institute of Neurological Rehabilitation (FINR), and on December 16, 2002 filed a request for emergent relief to place L.G. at FINR.

On February 25, 2003, the ALJ ordered Freehold Regional to assume the costs of L.G.'s placement at FINR. Freehold Regional then filed a motion for summary decision asserting that Cumberland Regional was responsible for one-half the cost of L.G.'s placement based on her mother's domicile in Cumberland County.

On July 29, 2005, the ALJ ordered Cumberland Regional to reimburse Freehold Regional for one-half the education and related expenses incurred in connection with L.G.'s out-of-state placement for the period from October 22, 2002 until March 24, 2004. Cumberland Regional then filed an appeal of the ALJ's decision, and the case was eventually transferred to federal district court where the parties cross-moved for summary judgment.

Before the court, Cumberland Regional argued that an individual can only have a single domicile, and that L.G.'s domicile was located in Monmouth County since she did not establish a new domicile in Cumberland County. Freehold Regional argued that L.G. has no clear domicile and that the ALJ acted properly by splitting the cost between the two districts.

The court explained that New Jersey courts historically have held that a person can only have one domicile, and that a child's domicile is normally that of his/her parents.

After a divorce, a child's domicile is that of the parent with whom the child resides. However, these basic principles were modified following the Appellate Division's and Supreme Court's decision in *Somerville Bd. of Educ. v. Manville Bd. of Educ.*, 332 N.J. Super. 6 (App.Div. 2000), *aff'd* 167 N.J. 55 (2001).

In *Somerville*, parents had joint legal and shared physical custody of their disabled child on an alternating basis. The Appellate Division found that, because of the increasing number of nontraditional custody arrangements, the single-domicile rule had to be re-examined. The appellate court found that fairness dictated that each of the school districts in which the child's parents lived should equally bear the costs of the child's special education. The Supreme Court, in a *per curiam* decision, affirmed the Appellate Division's ruling. The Court held that, in the interest of educational continuity, it was necessary for both school districts to share the cost and development of the child's IEP.

Based on the decision in *Somerville*, the federal court found that there was a "break with the single-domicile rule." Therefore, the court affirmed the ALJ's decision, and granted Freehold Regional's motion for summary judgment.

Board did not Violate its "Child Find" Obligation When it failed to Refer Kindergarten Student with a Medical Condition to the CST for Evaluation

T.K. and A.K., on Behalf of B.K., Petitioners, v. River Vale Board of Education, Respondent, EDS No. 1335-06 (June 19, 2007).

In September 2003, B.K. began kindergarten in the district. The day before kindergarten began, B.K.'s parents informed the

school nurse that B.K. had a medical condition called ocular albinism. Ocular albinism is a condition in which the eyes lack melanin pigment and the lack of pigment causes various vision problems including reduced visual acuity, sensitivity to bright light, and nystagmus, which is an involuntary back-and-forth movement of the eyes. B.K.'s parents completed the necessary health questionnaire forms and submitted a report from Tenaflly Pediatrics. B.K.'s mother informed the nurse that B.K.'s vision was 20/50, and that she wears eyeglasses. She also advised the nurse that B.K. was being treated by an ophthalmologist named Fredrick M. Wang.

The school nurse then informed the kindergarten teacher and school principal that B.K. had ocular albinism. B.K. was then given certain accommodations in her kindergarten classroom. The accommodations included moving B.K.'s seat to the front of the room and avoiding glare from windows; large-type books were already in use in the classroom. B.K.'s mother was aware of these accommodations and approved of them.

B.K. performed all assigned tasks in kindergarten without incident. B.K. did not have any significant academic difficulties and posed no behavior problems. There was no discussion between B.K.'s parents and the kindergarten teacher about B.K.'s medical condition, and the kindergarten teacher recommended B.K. for promotion to the first grade.

On March 15, 2004, B.K.'s parents entered into a contract with the Elisabeth Morrow School (EMS) for the 2004-05 school year. EMS is a private school located in Englewood. EMS is not a school for disabled students and is not on the state list of approved private schools for the disabled. The admissions process into EMS takes anywhere from one week to one month to complete.

In the late spring of 2004, B.K.'s mother told the kindergarten teacher that she was considering enrolling B.K. in a private school because B.K.'s grandfather believed a private school would be better for her. The kindergarten teacher did not inform any administrators because she considered the family's decision to be a private, personal matter.

The tuition for EMS was \$18,200 with 50% due by August 1, 2004. B.K.'s grandfather, a physician, apparently paid the tuition. On August 6, 2004, the family wrote a letter to the board informing it of their intention to place B.K. at EMS. The letter complained that the board failed to refer B.K. for an evaluation despite her visual deficits. The letter requested that the board pay the tuition, related costs and transportation.

The CST coordinator wrote back and advised that the board could not honor the request for tuition reimbursement. The letter advised that, if they would like the district to complete a comprehensive evaluation, B.K. would need to be re-enrolled. The letter further advised that, if B.K. attends EMS, it will be the Englewood school district's responsibility to evaluate her. The CST followed-up on her letter with a personal telephone call to the family.

At the start of the 2004-05 school year, B.K.'s mother met with the EMS school staff to discuss proposed accommodation. The accommodations agreed to were similar to the accommodations provided by the district in kindergarten. B.K. had no trouble adjusting to first grade at EMS.

In December 2004, B.K.'s parents filed a due process petition seeking tuition reimbursement from the board. At the time, B.K. had not been determined eligible for special education by any agency. The Department of

Education rejected the petition and advised that the request would be treated as a challenge to the identification, evaluation and eligibility obligations of the board.

It was not until April 2005, that B.K.'s parents requested the administration at EMS to have B.K. evaluated. Therefore, EMS arranged for Bergen County Special Services (BCSS) to evaluate B.K. On June 14, 2005, BCSS determined that B.K. was eligible for special education and related services as visually impaired.

At the hearing before the ALJ, the board maintained that it did not violate its obligation to find children in the district who may be eligible for special education and related services. The board circulated flyers regarding the availability of services to schools in the district, surrounding communities, to local health and doctor's offices, and to nursery schools. In addition, the board is a member of the Region II Special Education Office (SEO). The SEO, on behalf of its members, places advertisements in newspapers and circulates flyers five times per year.

With regard to referrals of children for evaluations, the board has a Pupil Assistance Committee (PAC). The board maintained that a medical diagnosis of a vision problem is not in and of itself sufficient to automatically refer a child for evaluation; there has to be some evidence that the condition interferes with the child's ability to receive an education. In this case, there was no indication that B.K. was having any problems in kindergarten; on the contrary, she was doing well.

The ALJ explained that, pursuant to 20 *U.S.C.A.* §1412(a)(3) and *N.J.A.C.* 6A:14-3.3, boards of education have an affirmative duty to locate, identify and evaluate children with disabilities. The ALJ stated that "[t]he duty is

triggered when the board has reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability.” Pursuant to *N.J.A.C. 6A:14-3.3*, prior to referring a child for an evaluation, classroom interventions can be attempted to alleviate the problem.

In this case, the board was aware that B.K. had a condition that impacted her vision. However, there was no evidence during B.K.’s kindergarten year that her academic performance was negatively impacted by the condition. Moreover, the board provided classroom interventions to deal with B.K.’s condition. The ALJ concluded that the board met its child find obligations. The ALJ commented that, although B.K. is currently classified, at the time she was in kindergarten, there was no evidence that her condition adversely affected her educational performance. Once B.K. was removed from the district, the board’s responsibility to identify and evaluate her ended. Based on the foregoing, the ALJ dismissed the petition.

Parental Request for Five Independent Evaluations Denied

Lawrence Township Board of Education, Petitioner, v. M.S. and D.S., on Behalf of E.S., Respondents, EDS No. 595-07 (June 20, 2007) [Decided by Donald J. Stein, ALJ].

Prior to the start of the 2006-07 school year, E.S. was classified as preschool disabled. Back in 2003, when he was two years and nine months old, E.S. underwent a neurological evaluation by Dr. Mintz. Dr. Mintz determined that E.S. had pervasive developmental disorder (PDD)/childhood autism.

In May 2006, when E.S. became kindergarten eligible, a comprehensive evaluation plan was made in order determine his classification. E.S. underwent an evaluation

for expressive and receptive language conducted by a certified speech and language pathologist employed by the board. E.S. scored in the average range for receptive language, and above average in expressive language. The speech pathologist’s conclusion was that E.S.’s skills were normal, and that he speaks in complete sentences and understands what he is told.

E.S. also was evaluated by the school psychologist who was also E.S.’s case manager. The school psychologist conducted classroom observations and administered to E.S. the Wexler Primary Pre-School Scale of Intelligence (WPSSI) which is the equivalent of an IQ test. E.S. scored with the normal range, except that his comprehensive verbal test results were in the above average range.

During the summer of 2006, E.S. was evaluated by the board’s LDTC. She administered the Wechsler Individual Achievement Test-II (WIAT-II) which measures reading, math, oral language, and written expression. E.S. scored in the average or above-average range. Despite these results, E.S.’s parents requested a re-evaluation. Therefore, another LDTC conducted a comprehensive test of phonological processing (CTOPP). E.S. scored above average in two composites, and below average in the third composite.

On July 31, 2006, Dr. Mintz re-evaluated E.S., and concluded that the traits in the PDD/autism spectrum that were noted in his prior evaluation were no longer applicable. Based on these evaluations, in August 2006, E.S. was classified as emotionally disturbed.

E.S. then began attending kindergarten in a team-taught classroom; 9 of the 18 children in the class have IEPs. His IEP dated November 16, 2006 includes speech and language therapy three times per week, OT two times per week, and a social skills group once per week.

E.S.'s parents believed that the evaluations conducted by the district were not appropriate. They complained that independent psychiatric, occupational, speech and language, psychological, and educational evaluations needed to be conducted.

On January 29, 2007, the board filed a due process petition alleging that the independent evaluations requested by E.S.'s parents were unnecessary because the district had conducted evaluations of E.S. between May and July 2006. At the hearing before the ALJ, five witnesses testified on behalf of the board including E.S.'s kindergarten teacher, the speech pathologist, an LDTC, the school psychologist, and the director of special services.

E.S.'s kindergarten teacher testified that E.S. was a little shy at first, but he now engages and jokes with his peers and is very social. She testified that his level of socialization is on par with his peers, and that he was doing very well academically in the regular kindergarten program. He has received grades of "C" (consistently achieving objective) or "P" (progressing toward objective) in all of his subjects. She did not believe there was anything to warrant additional evaluations of E.S.

The speech pathologist and one of the LDTCs that evaluated E.S. testified as to the results of their evaluations. Both concluded that there was no additional need for further evaluations.

The school psychologist testified as to the results of the evaluation undertaken by him. In addition, he testified that the change in E.S.'s classification to emotionally disturbed in August 2006 did not mean the original classification was inaccurate. It simply reflected the fact that E.S. was doing better.

He testified that E.S. will benefit from team-taught kindergarten, and did not believe further evaluations were necessary. On the contrary, he believed that independent evaluations could have an adverse effect on E.S. since all of his evaluations began with great hesitation on his part, and he could lose his eligibility for services.

E.S.'s father, M.S., testified in opposition to the board's position. M.S. was stipulated to be an expert in the field of child psychology and the evaluation of students with disabilities. He testified that his son was diagnosed by Dr. Steinberg, a developmental neurological psychiatrist, as having PDD/autism with an IQ of 59, which is mildly retarded. The evaluation was conducted over the course of three days in July 2005. Therefore, M.S. disagreed with the classification of emotionally disturbed.

M.S. testified that E.S. had social skills problems. He testified that, in the morning, E.S. would leave his bedroom and sit in a corner. E.S. places a blanket on his head and refuses to have breakfast unless he has a special sippy cup. M.S. testified that E.S. avoids interaction with him and his wife, and does not have friends over. He also testified about other behaviors exhibited by E.S.

M.S. testified that E.S. has poor communication skills, and has problems with fine motor control. M.S. acknowledged that E.S. is making progress academically. However, he questioned the school psychologist about the difference in IQ scores between the WPSSI and the test administered by Dr. Steinberg. M.S. believed that E.S. met the criteria for PDD under the DSM-IV. E.S. makes no eye-to-eye contact, has no friends, and does not exhibit spontaneous speech, among other things. Based on his own observations and opinions, M.S. believed that

independent psychiatric, occupational, speech and language, educational, and psychological evaluations were necessary.

The ALJ explained that, pursuant to *N.J.A.C. 6A:14-2.5(c)*, a parent may request an independent evaluation if there is disagreement with the evaluation provided by the board. If the board denied the parental request for an independent evaluation, the ALJ may order an independent evaluation for good cause. To determine whether there is good cause, the board must show that its evaluation(s) is appropriate and contains enough information about the pupil and his educational needs to aid in the development of an IEP. If a parent seeks an independent evaluation in an area that is not assessed as part of an initial evaluation or re-evaluation, the board has the first opportunity to conduct the requested evaluation.

In this case, the district has not conducted its own psychiatric and occupational evaluations; those evaluations had been performed back in 2003, and the district offered to perform new ones but E.S.'s parents have refused. Since there were no such evaluations performed by the board, there are no such evaluations with which E.S.'s parents could disagree. Therefore, the ALJ concluded that the board had no obligation to perform independent psychiatric or occupational evaluations.

With respect to the speech and language evaluation, the only expert who testified was the board's speech pathologist. Based on her persuasive testimony, the ALJ concluded that the speech and language evaluations performed by the board were appropriate, and an independent evaluation was not necessary. The ALJ also concluded that the educational and psychological evaluations performed by the board were appropriate, and no inde-

pendent evaluations were necessary. Based on the foregoing, the ALJ granted the board's petition and entered an order stating that the board was not required to provide any independent evaluations.

**ALJ Grants Parents' "Stay Put"
Emergent Relief Request to Maintain
Disabled Student in Second Grade
Pending Outcome of Due Process
Petition**

M.H. and M.H. on Behalf of B.H., Petitioners, v. Mantua Township Board of Education, Respondent, EDS No. 8335-07 (October 30, 2007) [Decided by Patricia M. Kerins, ALJ].

B.H. is eight years old and is eligible for special education and related services from the board. B.H. is blind and is multiply disabled due to cognitive limitations. For the 2006-07 school year, he was taught math, reading and language arts in a self-contained second grade classroom in the district's Centre City School. He was mainstreamed in social studies, science, library, art, music, physical education, computers and Spanish. He also received OT, PT, speech therapy, Braille instruction, and orientation and mobility services through the New Jersey Commission for the Blind. He also received a one-to-one aide, transportation with an aide, and an ESY.

On May 25, 2007, B.H.'s parents met with the IEP team to review recommendations for the 2007-08 school year. The only significant recommended program change was B.H.'s placement in a self-contained third-grade class in another district school.

B.H.'s mother and father were not in agreement with the proposed IEP. B.H.'s case manager then suggested psycho-educational and speech-language evaluations for B.H. During the summer, B.H. was evaluated by Associated Services for the Blind.

On September 18, 2007, the IEP team and B.H.'s parents met to discuss the results of the evaluation and to review the IEP for the 2007-08 school year. An agreement could not be reached on the placement, and B.H.'s parents filed a due process petition and an application for an emergent "stay put" order. B.H.'s parents asserted that he has become acclimated to his physical surroundings at the Centre City School, and they contested his transfer to the third grade in another school. Until the placement issues could be resolved, they requested an order maintaining his second-grade placement at the Centre City School.

The ALJ hearing the matter explained that, when a school district proposes a change in placement of a disabled student, it must notify the parent, who may request mediation or a due process hearing, to resolve any disagreements. Pursuant to the "stay put" provision of 20 *U.S.C.A.* §1415 and *N.J.A.C.* 6A:14-2.7(u), when a parent makes a timely request for mediation or due process, the district's proposed action cannot be implemented pending the outcome of the case. Once a court determined the current educational placement, the movants are entitled to an order without having to satisfy the normal requirements for injunctive relief.

The issue in this case is what is B.H.'s current educational placement. B.H.'s parents maintain that it was his IEP for the 2006-07 school year, while the district asserts that it is the proposed IEP for the 2007-08 school year.

There was a factual dispute between the parties as to the discussion that occurred at the May 25, 2007 IEP meeting, and whether the decisions regarding B.H.'s program and placement were to be placed on hold pending the outcome of the evaluations. B.H.'s parents maintained that, at the IEP meeting, the placement was put on hold pending the results of the evaluation, while B.H.'s case manager maintained that the IEP was not on hold. In support of their position, B.H.'s parents submitted the certification of another individual who attended the meeting with them, which indicated that the parties agreed that no IEP was to be implemented until the evaluations were completed.

The ALJ found in favor of the petitioners. The ALJ found that the evidence from B.H.'s parents, which was corroborated by a third-party at the IEP meeting, is clear and consistent with their actions following the meeting. Furthermore, a review of the IEP prepared by the district for the September 2007 meeting shows that the district listed its implementation date as September 6, 2007 through June 12, 2008. Therefore, there was no agreement reached by the parties as to the implementation of the proposed IEP in May 2007.

Based on the foregoing, the ALJ granted the "stay put" relief, and ordered that B.H. be entitled to remain in the second grade at the Centre City School under the terms of his IEP for the 2006-07 school year, pending the outcome of the due process petition.