

summary

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Board's Discontinuation of Wilson Reading Program Did Not Result in Failure to Provide FAPE

R.G., on Behalf of R.G., Petitioner, v. Sterling Regional High School Board of Education, Respondent, EDS No. 4860-06 (August 15, 2006) [Decided by Solomon A. Metzger, ALJ].

R.G. is classified as eligible to receive special education services. Her primary difficulties are in reading. In middle school, she began the Wilson Reading Program (Wilson), and continued with Wilson in ninth grade while attending Winslow Township High School.

In tenth grade, which occurred during the 2005-06 school year, R.G. was enrolled in Sterling Regional High School (Sterling). At Sterling, R.G. continued with Wilson, but was also in the district's "Read 180" program. R.G. also continued with Wilson twice per week during the summer of 2005.

The district decided to discontinue the provision of Wilson to R.G. for the 2006-07 school year. The district believed that the Read 180 program was equivalent or superior to Wilson. Subsequently, a due process petition was filed on R.G.'s behalf to challenge the decision to discontinue Wilson.

At the hearing before the ALJ, the district's learning disability teacher consultant, who was R.G.'s case manager, testified that Wilson was used to transition R.G., and that Read 180 is science-based and correlated to the core curriculum content standards. She believed that Wilson would be redundant because Read 180 covers substantially the same material as Wilson, but with different techniques.

R.G.'s Read 180 teacher testified that R.G. started the year at roughly a sixth-grade reading level, and by the end of the school year was at the seventh-grade level. She acknowledged that

Wilson is well regarded, but that Read 180 was also. She believed that doing both would be superfluous.

The ALJ framed the issue as whether R.G. can make meaningful educational progress using Read 180 without Wilson. The ALJ commented that the petitioner failed to present any expert testimony on the issue which was required. The ALJ stated that both district witnesses testified that R.G. made significant progress with Read 180, and that it was unnecessary to continue Wilson. Therefore, the ALJ determined that Wilson need not be provided to R.G. for the 2006-07 school year, and dismissed the petition.

Disabled Student, Who Turned 21 in August, Not Entitled to Special Education Services for the Academic School Year Beginning in September

C.T. on Behalf of M.T., Petitioner, v. Verona Board of Education, Respondent, EDS No. 3969-06 (August 23, 2006) [Decided by Thomas E. Clancy, ALJ].

M.T. was born on August 2, 1985 and is severely disabled. For the 2005-06 school year, he was placed in a full-day, full-year residential program at Woods Services in Langhorne, Pennsylvania. His program included an extended school year (ESY) program, which was to conclude on August 21, 2006. M.T. would turn age 21 on August 2, 2006.

On March 15, 2006, a petition was filed on M.T.'s behalf requesting that he be provided with special education and related services for the 2006-07 school year. At that time, no IEP was developed for the 2006-07 school year because M.T. was about to turn 21.

The petitioner argued that, if a disabled student turns age 21 on July 1st (which marks the start of a new school year) or, thereafter, and

is still receiving special education services, then the student is eligible to continue to receive such services for the subsequent school year. The board argued that M.T. "aged out" of the program because he turned age 21 before the start of the new academic school year beginning in September.

Citing 20 U.S.C.A. §1412(a)(1)(A), the ALJ explained that, in order to be eligible for services under the IDEA, the disabled child must be between the ages of 3 and 21. According to *N.J.A.C. 6A:14-1.3*, age 21 means "[a]ttainment of the 21st birthday by June 30 of that school year." Therefore, disabled children are entitled to special education services until their 21st birthday, and if they reach age 21 during that school year, they must continue to be provided with services for the balance of the school year.

Citing *N.J.S.A. 18A:1-1*, the ALJ further explained that a school year refers to the academic school year which is the period between the time school opens following summer vacation until the next succeeding summer vacation. An ESY program is an extension of special education services beyond the regular school year which is provided in accordance with a student's IEP. The ALJ determined that M.T.'s ESY program that ended on August 21, 2006 belonged to the 2005-06 school year as opposed to the 2006-07 school year. Therefore, the ALJ concluded that M.T. was no longer entitled to receive special education services beyond that date, and dismissed the petition.

Board Given Permission to Release Disabled Student's Records Without Parental Consent

Asbury Park Board of Education, Petitioner, v. M.J., on Behalf of S.J., Respondent, EDS No. 6265-06 (August 31, 2006) [Decided by Israel D. Dubin, ALJ].

S.J. is currently a fifteen-year-old eighth-grade student enrolled in the district. He is currently classified as emotionally disturbed, but prior to his referral to the CST for evaluation, he was involved in numerous incidents including fighting, disrespect toward staff and students, and suspected substance abuse. During the 2004-05 school year, which was while S.J. was in seventh grade, an IEP was developed for him that called for placement in a self-contained behavioral disabilities class for math, language arts, social studies, and science, with mainstreaming in all other areas.

By March 2005, S.J. had missed over 50 days of school, and his physical aggression increased. Following an altercation with other students, the district determined that S.J.'s presence placed other students' safety at risk. Therefore, his IEP was amended, and he was placed on home instruction for the remainder of the school year pending placement in an alternative middle school.

In April 2005, S.J.'s mother requested that the IEP be revised, and that S.J. be placed at the Meridian Academy with extended school year services. Meridian Academy is an out-of-district placement for students with behavioral problems. S.J. attended Meridian Academy for the remainder of the seventh grade and the beginning of the eighth grade.

On January 25, 2006, an annual review meeting was conducted. It was determined that, due to his continued inappropriate behavior, his placement at Meridian Academy would continue.

On February 21, 2006, the IEP team held a manifestation determination—S.J. had been suspended from Meridian Academy for more than ten days for fighting and assaulting staff. The incidents were determined not to be a manifestation of his disability. However, in

March 2006, another manifestation determination was held and S.J.'s IEP was revised to place him on home instruction for one month due to his aggressive behavior. The IEP team also determined that his program was not appropriate.

S.J. was subsequently arrested and placed in juvenile detention. He was sent to the Monmouth Day Program, which is operated by the Juvenile Justice Commission. However, despite the structured environment, S.J.'s behavior was unmanageable. S.J. was subsequently terminated from the Program, and was placed on home instruction pending the board finding an appropriate out-of-district placement.

S.J.'s mother, however, refused to consent to the release of his student records. She insisted that he be returned to an in-district placement. Therefore, the board filed a due process petition for judicial approval to release S.J.'s records to other schools.

Citing *N.J.A.C.* 6A:14-2.3, the ALJ explained that, once a child has been classified and the district desires to send his/her education records to potential out-of-district placements, the district must obtain parental consent to do so. If a parent refuses to consent, the board may request a due process hearing pursuant to *N.J.A.C.* 6A:14-2.7(b). The ALJ's decision is final and binding on both parties.

In this case, the ALJ was convinced that an in-district placement of S.J. was not a viable option, and that an out-of-district placement was necessary to provide a FAPE. In order for S.J. to be considered for any such placement, the schools need to review his records. Therefore, the ALJ entered an order allowing the board to release S.J.'s records without his mother's consent.

ALJ Dismisses Petition Seeking Compensatory Education and Reimbursement for Costs of Unilateral Placement at High School in New York

R.P. and V.P., on Behalf of E.P., Petitioners, v. Ramsey Board of Education, Respondent, EDS No. 11682-04 (September 5, 2006) [Decided by Irene Jones, ALJ].

E.P. is currently a seventeen-year-old, eleventh-grade student and resides in the Ramsey school district with his parents. At age three and one-half, he was diagnosed with pervasive development delay, an autistic spectrum disorder. At that time, the family resided in Newark, and the district placed him in a full-day, preschool handicapped class. E.P. was self-absorbed, nonresponsive to social interaction, and avoided eye contact. His fine and gross motor skills were impaired, and his intellectual capacity was borderline to low-average.

At age five, E.P. was evaluated by the school physician who found him unresponsive. Following an independent evaluation by the Hackensack Medical Center, E.P. was diagnosed with pervasive developmental disorder-NOS. Subsequently, E.P. was placed in a transitional kindergarten for two years. He was then placed in an out-of-district communication handicapped class in the Ramsey school district for three years. Sometime thereafter, E.P.'s family moved to Ramsey and he was enrolled in the Ramsey school district.

In the fifth grade, during the 1999-00 school year, E.P. was classified as multiply disabled. He was mainstreamed in all subjects, but his IEP called for a special class in language arts and reading. He received speech therapy twice weekly for 30 minutes, and was given supplemental aids and services such as a calculator, a computer, extended time for tests and assignments, and assistance with directions.

In April 2000, E.P. was given the California Achievement Test, 5th edition (CAT5). His scores were as follows: 17th percentile for total language; 22nd percentile for total reading; 6th percentile for spelling; 17th percentile for study skills; and 53rd percentile for total mathematics.

In August 2000, an IEP meeting was held for E.P.'s sixth-grade year. His IEP continued to provide the same supplementary aids and services. In terms of his classes, the IEP called for an aide for math, a learning and language disabled class for English, and support for study skills.

On April 9, 2001, an IEP meeting was held for E.P.'s seventh grade year. His IEP continued to provide the same supplementary aids and services. The IEP called for a learning and language disabled class for study skills, an aide for Spanish, and social skills for 30 minutes once per week.

On April 16, 2001, E.P. was given the CAT5 and scored as follows: 5th percentile in vocabulary; 93rd percentile in reading comprehension; 27th percentile in math concepts and applications; 12th percentile in spelling; and 45th percentile in study skills. In April 2002, E.P.'s results on the CAT5 were as follows: 8th percentile in reading vocabulary; 26th percentile in reading comprehension; 55th percentile in language mechanics; 14th percentile in language expression; 69th percentile in math computation; 23rd percentile in math concepts and application; 13th percentile in spelling; and 15th percentile in study skills.

In March 2002, an IEP meeting was held for E.P.'s eighth grade year. The IEP provided for replacement language arts and geography skills two times per week, modified Spanish and science, speech therapy once per week, and counseling as needed.

On January 15, 2003, an IEP meeting was held regarding E.P.'s triennial reevaluation. E.P.'s parents were dissatisfied with the CST's decision not to test him, and took him to Boston Children's Hospital (BCH) for an independent evaluation. E.P.'s parents did not inform the CST of the decision to seek an independent evaluation and did not share the results with the district.

BCH reported that E.P. was of average intelligence, but significantly below grade level academically. However, he could handle a general curriculum with modifications. Following BCH's evaluation, E.P.'s parents requested that he receive remedial reading and writing, counseling, and an increase in speech therapy to twice weekly. The district agreed to counseling and to provide a reading class.

In February 2003, an IEP meeting was held for E.P.'s ninth-grade year. His IEP provided for the following subjects: (1) general-developmental reading; (2) foundations of science with modifications; (3) physical education and health; (4) special social studies with resource room; (5) English; (6) algebra; and (7) speech therapy. He was also to be provided with supplementary aids and services.

On the first day of the 2003-04 school year, E.P.'s mother told the district that he would no longer be attending school and would be attending Ryken Education Center (REC) in Brooklyn, New York. Approximately one year later, on September 22, 2004, E.P.'s parents filed a due process petition alleging that the district failed to provide E.P. with a FAPE from the third through eighth grades. They also alleged that the ninth-grade IEP was deficient because it failed to have sufficient goals, failed to provide adequate speech therapy and counseling, and failed to address his deficits in reading and writing. The petition requested reimbursement for tuition, transportation and

other expenses for their unilateral placement of E.P. at REC. It also requested compensatory education. The district contended that it provided a FAPE and that the petitioners were time barred from seeking reimbursement for E.P.'s ninth-grade year.

At the hearing, Dr. Carol R. Trasborg testified on behalf of E.P. Dr. Trasborg is director of REC and was qualified as an expert in special education and counseling. Dr. Trasborg described the school and its curriculum. She testified that students are college bound, and that they are divided in each grade into two classes based on ability and self-regulation. E.P. was placed in the higher performing class.

She testified that, when E.P. first came to REC, he had a limited ability to interpret social information and had very poor coping skills. She described his ninth and tenth grade classes, and indicated that he is making meaningful academic and social progress.

Dr. Charlotte A. Tomaino also testified on E.P.'s behalf. Dr. Tomaino was qualified as expert in neuropsychology and performed an evaluation of E.P. in December 2004. She began the evaluation, as she does all her evaluations, with an IQ test. She stated that the IQ test helps her focus on a child's strengths, weaknesses and potential. E.P.'s full-scale IQ is 90, which is in the average range of intellectual functioning. She explained that a full-scale IQ is an average of the performance IQ and verbal IQ. She opined that the district's expectations of his academic performance were lower than hers based on his IQ. In particular, there was no evidence in E.P.'s records that he was ever provided with reading intervention by a reading specialist. She found that E.P. had not mastered specific decoding skills, and had problems with receptive and expressive language. Because of his decoding skills

deficiencies, she believed he should have multi-sensory training on phonics and automaticity.

Dr. Tomaino also found that the district failed to include math goals in E.P.'s IEP for the sixth grade. With regard to E.P.'s ninth-grade IEP, she opined that E.P. would not have derived meaningful educational benefits from his mainstream reading class because he had no decoding skills. She also believed that the IEP's goals were too high for him. She also opined that the therapeutic services E.P. received were not adequate for his needs.

E.P.'s mother testified that E.P. could not make friends because he lacked the required social skills. She believed that it was inappropriate for the district to reduce his social skills training from 45 to 35 minutes per week. She also went to Ramsey High School to observe the classes. After her visits, she did not believe the school could educate her son. E.P.'s father testified that, in early 2003, he met with the CST and told them that the proposed ninth-grade IEP was "more of the same" and requested that an out-of-district placement be considered.

The district's first witness was Dr. Martin Dank, who was qualified as an expert witness in psychology. Dr. Dank's ultimate conclusion was that E.P. was provided an appropriate education by the district. He believed that E.P. made steady progress in the district despite significant deficits, and that mainstreaming provided E.P. with interaction with his non-disabled peers. Dr. Dank explained that autistic spectrum disorder is a chronic condition, and therefore, it was not surprising that E.P. continued to have social relatedness and language issues while in the district. However, Dr. Dank found that, between fifth and seventh grades, E.P. became more socially responsive and interactive.

Dr. Dank opined that the evidence from E.P.'s records demonstrates that he made significant gains academically and developmentally. He maintained that just because a disabled student does not "keep up" with his non-disabled peers, or does not make a year's worth of improvements for each chronological year, does not mean there was a lack of meaningful progress. Each disabled student's progress should be measured by his/her own functional abilities. Dr. Dank cited and compared E.P.'s CAT5 scores to demonstrate that E.P. "kept up" with his peers.

Dr. Dank raised concerns about E.P.'s current placement at REC because after one year, E.P. began to avoid eye contact with students and teachers. There was also an incident in which E.P. stabbed another child with a pencil, and E.P. had no record of behavior problems in the district. In addition, Dr. Dank cited Dr. Tomaino's report which indicated evidence of significant depression where there had been none before. Dr. Dank also stated that there is a professional consensus that autistic students need interaction with non-disabled peers.

The district also presented testimony from two of E.P.'s teachers, E.P.'s case manager, and the district's director of special services. E.P.'s sixth grade special education teacher testified that E.P. was mainstreamed in reading, and that E.P.'s other teachers advised that he was able to read at the sixth-grade level. She also discussed his performance in other areas. She believed that he made considerable progress socially, and that he derived a meaningful educational benefit from his sixth-grade program. She testified that just because IEP goals are only partially mastered does not mean that there was poor performance. She explained that staff does not expect all IEP goals to be accomplished in one year.

E.P.'s seventh grade language arts teacher testified that her class was self-contained. E.P. was a good reader, but had problems with reading comprehension, not decoding. She explained that his eighth-grade IEP had many of the same goals and objectives as the prior year's IEP because they represented ongoing skills development.

E.P.'s case manager, who is a licensed clinical social worker, also testified. She was E.P.'s social skills teacher and one-on-one counselor from sixth through eighth grades. She testified that E.P. made social progress over those three years. She did not consider an out-of-district placement because the CST concluded that E.P. could be appropriately educated in the district.

The district's final witness was the director of special services who was qualified as an expert in learning disabilities. The director testified that E.P. made considerable progress in fourth and fifth grades, and was mainstreamed for math, science and social studies. She first learned that E.P.'s parents were not satisfied with his education when she received a letter from Mr. P. on the first day of the 2003-04 school year.

The ALJ explained that this case falls under the Individuals with Disabilities Education Act (IDEA), rather than the Individual with Disabilities Education Improvement Act of 2004 (IDEIA), because it was filed in September 2004; the IDEIA did not take effect until July 1, 2005.

The IDEA guarantees the provision of a FAPE to disabled children. A FAPE means the provision of special education and related services, under public supervision, at no charge, and in accordance with an IEP.

Citing *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982), the ALJ stated that the IDEA requires the provision of a “basic floor” of education and not does not require the provision of services that will maximize a disabled child’s potential. The ALJ further explained that the educational benefit conferred on a child must be more than trivial or *de minimis*, and that an IEP had to provide a meaningful benefit. The analysis of whether an IEP confers a meaningful benefit requires consideration of the student’s intellectual potential, and there is no bright-line rule.

With respect to the claim for compensatory education, the ALJ explained that compensatory education is a remedy for past deprivations of a FAPE. The right to compensatory education accrues from the point that a district knows or should know that the IEP is failing to confer a meaningful educational benefit to a student; an award of compensatory education does not require a finding of bad faith.

Citing *Bernardsville Bd. of Educ. v. J.H.*, 42 F.3d 149 (3rd Cir. 1994), the ALJ explained that a claim for reimbursement filed more than one year after a unilateral placement or a proposed IEP, without a mitigating excuse, would be barred for unreasonable delay. Moreover, 20 U.S.C.A. §1412(a)(10)(C) conditions reimbursement on the provision of ten business days notice to the school prior to the child’s removal.

In this case, the petitioners filed their claim one and one-half year after E.P.’s ninth-grade IEP was presented to them in the spring of 2003, and have not provided a mitigating excuse. Further, they did not provide the district ten days’ notice of their intent to remove E.P. The ALJ was also critical of E.P.’s parents’ failure to share the evaluation from BCH; she believed it was unreasonable for them to do so and found that it indicates that they were considering a private placement prior to

September 2003. Based on these facts, the ALJ concluded that the petitioners acted in bad faith and denied their claim for reimbursement.

The ALJ also denied the claim for compensatory education. She found that E.P.’s teachers were aware of E.P.’s skills, and that a review of his CAT5 scores objectively supports the fact that E.P.’s performance improved, and that the fluctuations were due to increasing difficulty of the work. The ALJ ultimately concluded that E.P. was provided a FAPE and dismissed the petition.

Eighteen-year-old, Who Properly Graduated from High School, Is Not Entitled to Independent Evaluations

Montclair Board of Education, Petitioner, v. C.M., Respondent, EDS No. 09728-06 (October 19, 2006) [Decided by Carol I. Cohen, ALJ].

C.M. was born on March 26, 1988, and entered the district in May 1996. C.M. was subsequently classified as communication impaired and his IEP provided for speech services.

In May 2005, during C.M.’s junior year in high school, an IEP meeting was held and C.M. was given the option to take English again in resource room because he was failing. However, C.M. and his mother opted for him to take the regular class. It was also determined at this meeting that updated testing was needed to apply for time modifications for C.M.’s SAT testing.

On July 25, 2005, an educational evaluation was scheduled for C.M. However, he failed to appear, and the district was advised that he was unavailable for testing during the summer. Similarly, C.M. was not available for a psychological evaluation.

During C.M.’s senior year, six out of his seven classes were regular education classes

with in-class support. C.M.'s mother came to school at the beginning of the school year because there was a problem with C.M.'s schedule. The fact that C.M. also had not had an education evaluation was also raised, and C.M. was placed back on the testing list.

On November 28, 2005, a re-evaluation meeting took place because the educational evaluation had not occurred within the statutory time frame. At the meeting, post-graduate planning was discussed, and C.M.'s mother requested that Huntington Learning Center (HLC) evaluate and tutor him. The CST advised that HLC was not qualified to evaluate C.M., and C.M.'s mother agreed to allow the CST to evaluate him.

In December 2005, C.M.'s mother filed a complaint with the Department of Education (DOE) alleging that C.M. had not been reevaluated since 1997. The district asserted that C.M.'s mother waived re-evaluation in 2000, and a re-evaluation occurred in 2003, but the records had been lost.

On December 5 and 8, 2005, C.M. underwent educational evaluations, and it was determined that C.M. was functioning in the low-average range. On December 12, 2005, the learning disability teaching consultant and college transition counselor met with C.M.'s mother. The results of his testing were reviewed and it was agreed that C.M. would receive a speech and language assessment. C.M. also received approval from the College Board to take the SAT untimed.

In January 2006, C.M. underwent a psychological re-evaluation by the school's clinical psychologist. The results placed C.M. in the average range. The speech and language evaluation was conducted in February 2006. The results showed that C.M. was within normal limits for articulation, voice, hearing, oral motor and fluency.

On February 7, 2006, DOE determined that the district was compliant with the 2005-06 evaluation. On March 23, 2006, C.M.'s mother met with the CST, but left because she did not trust them. Attempts were then made to reschedule the meeting, but C.M.'s mother refused because of lack of trust.

On June 19, 2006, three days prior to C.M.'s graduation, C.M.'s mother sent the CST a letter requesting independent evaluations in all areas. Following C.M.'s graduation, on June 29, 2006, the district responded that, since C.M. was an adult, pursuant to *N.J.A.C. 6A:14-2.3(k)*, he would have to make the request.

On August 3, 2006, C.M. wrote requesting independent evaluations. On August 31, 2006, the district filed a due process petition with DOE alleging that C.M. was no longer entitled to an independent evaluation because he graduated. The matter was then transferred to the Office of Administrative Law for a hearing.

The ALJ explained that, based on the decision in *Schaffer v. Montgomery Cty. Public Schools*, 126 S.Ct. 528 (2005), the district, as petitioner, has the burden of proving that it is not obligated to provide an independent evaluation. Pursuant to *N.J.A.C. 6A:14-4.11(a)*, a student's IEP must specifically address graduation requirements. It was undisputed that C.M. properly graduated from high school. He received passing grades in all subjects, and had sufficient credits to graduate. Moreover, there was no objection from C.M. or his mother about his graduating in June 2006. Therefore, the district fulfilled its obligation to provide a FAPE.

Furthermore, the ALJ also found that C.M.'s mother acted unreasonably. She refused to attend meetings to discuss evaluation results and did not request an independent evaluation until just days before C.M.'s graduation. Her

general distrust of district personnel was insufficient to qualify as a “disagreement” with the evaluation under *N.J.A.C. 6A:14-2.5(c)*. Therefore, the ALJ entered an order granting the district’s due process petition.

Disabled Student Is Not Exempt from School Uniform Requirement

J.R. and M.S., on Behalf of S.S., Petitioners, v. Secaucus Board of Education, Respondent, EDS No. 10208-06 (October 20, 2006) [Decided by Sandra Ann Robinson, ALJ].

S.S. attends school in the district and is classified as multiply handicapped. During the 2005-06 school year, pursuant to *N.J.S.A. 18A:11-8*, the board adopted a uniform dress code to be effective October 1, 2006. S.S.’s parents were opposed to their son wearing a uniform for philosophical reasons.

In July 2006, the board’s supervisor of special services met with S.S.’s mother regarding the uniform policy. On August 29, 2006, a due process petition was filed on behalf of S.S. S.S.’s parents requested that a provision be added to S.S.’s IEP which would allow him to opt out of the uniform policy. On September 19, 2006, a resolution meeting was held in which S.S.’s mother again expressed her reasons why she did not want S.S. to wear a uniform.

On October 13, 2006, a hearing was held by the ALJ. S.S.’s mother testified that she did not have a dispute with S.S.’s IEP and that S.S. did not have a medical condition or religious reason for requesting an exemption. However, they taught their son that he is different and that his ways and actions are different. Therefore, he should not wear what everyone else is required to wear, otherwise he will no longer believe he is different.

The supervisor of special services testified that S.S. failed to wear the complete uniform to school. She testified that wearing a uniform would not harm him since the goal is to mainstream students in every activity so long as it does not exacerbate their conditions. In this instance, S.S. has no sensory issues and can wear a shirt and collar, and can pull up his pants. She testified that he needed to comply with the rules just like every other student.

The ALJ agreed with the board’s position that it had developed an IEP that provided S.S. with a FAPE. There was no medical or religious reason why S.S. needed a waiver from the uniform policy. The board adopted the policy in compliance with *N.J.S.A. 18A:11-8* to improve social mobility, deter gangs, and instill a greater spirit of cooperation among students. Therefore, the ALJ entered an order denying the parents’ petition.

address all comments and questions to

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