



Special Education Bulletin

December 2005

Vol. 11, No. 6

summary

Tuition reimbursement denied where district offered FAPE (page 2). Thirteen-year-old with migraines not eligible for independent evaluation (page 2). Mother's supplemental payments to aides not reimbursable (page 3). Multiply disabled classification appropriate (page 4). Classification change from other health impaired to multiply disabled appropriate (page 5). No tuition reimbursement where public school district never provided services to student (page 6). Emergent relief for stay put not applicable to early intervention placement (page 7). Student discharged from juvenile justice commission placement placed back in district (page 8).

The materials contained herein are not intended to provide legal opinions and should not be regarded by subscribers as furnishing a legal opinion. Subscribers are advised in all circumstances to consult counsel relative to legal questions.

RIGHT OF REPRODUCTION AND REDISTRIBUTION RESERVED



Tuition Reimbursement Denied Where District Offered FAPE

G.N., on Behalf of J.N., Petitioners, v. Livingston Board of Education, Respondent, EDS #03547-04 (January 27, 2005) (Sandra Ann Robinson, ALJ).

J.N., a 12-year-old girl, tested in the high-average range on achievement and IQ tests. She was classified as having a specific learning disability. She also had ADHD which resulted in inconsistent performance in completing projects or homework. In January 2004, the CST recommended that J.N. be placed in a resource center program for reading and language arts; however, her parents wanted her to remain mainstreamed with in-class support apparently for all subjects. The IEP, which the parents did agree to at that time, provided for some in-class support, plus the resource center program. The parents, however, continued to seek a mainstream program.

For the following school year, the parents unilaterally placed G.N., in an unapproved day placement, the Winston School. The board's LDTTC observed G.N. in that placement, and concluded that the program was not educationally sufficient for academic and social reasons, including not being exposed to nondisabled peers. The school psychologist also conducted an observation and found that J.N. acted in the same manner as she had in-district, and that her reading skills were better than the other students in her class at Winston. He felt that program was run more like an elementary school than a middle school. He believed the in-district program was more intellectually stimulating for G.N., who enjoyed participating in discussions. The district's expert also testified as to the appropriateness of the in-district program which would be the least restrictive and provide meaningful educational benefit.

Petitioner's expert agreed with the district that J.N. was appropriately classified, and that J.N. should remain in mainstream classes or a smaller resource room class. Another expert testified that the Winston School was a safe place for J.N. which provided her with feelings of success because the work is at a lower/slower level than in district. This expert also agreed that all but one of the proposals in the IEP would have benefitted J.N. Finally, the mother testified that she rejected a summer reading program as "demeaning." She admitted that J.N. had participated in several social and extra-curricular activities while in district.

The ALJ found that the IEP met the requirements of the IDEA and was designed to confer a meaningful benefit. The district had shown that J.N. had made progress in her program as evidenced by test scores, grades, teacher comments and the child's interactions with peers. Therefore, the parents were not entitled to reimbursement.

Thirteen-Year-Old with Migraines Not Eligible for Independent Evaluation

Hackettstown Board of Education, Petitioner, v. L.J., on Behalf of Minor Child, W.S., Respondent, EDS #11683-04 (February 10, 2005) (Ken Springer, ALJ).

The respondent requested a CST evaluation of her daughter, W.S., who was thirteen. W.S. had suffered from severe and chronic migraine headaches causing numerous absences over the years. Her attendance at school had improved after she began taking a prescription drug that was kept in the school nurse's office for W.S. to take when she felt the onset of a headache. W.S., who was bigger and more mature than her female peers, was reported to be "sensitive to criticism." The district concluded that W.S.

was ineligible for special education as she was doing well academically and had performed well on standardized tests. The mother sought an independent CST evaluation, and the district then filed a petition opposing an evaluation.

W.S. was able to do grade-level work, although she had a weakness in mathematics, only performing at a fifth-grade level. For seventh grade, W.S. was in an alternative class for at-risk children, where she had more individual attention and intensive instruction. She continued in that class for eighth grade. At the time of the hearing, W.S. was failing physical education because of body piercings which she refused to remove, particularly a tongue piercing. The principal had stated that he would have accepted a doctor's note stating the piercing could not be removed because of healing issues.

The mother felt the child had emotional issues, although the district's psychological testing showed average emotional adjustment. The mother testified that W.S. had been a victim of a criminal assault, and she had received nine sessions of private counseling paid for by the Victims of Crime Compensation Board. The mother felt this counseling had not benefitted her daughter, and that she needed psychiatric treatment rather than psychological counseling. The ALJ stated that this would be medical treatment outside of the scope of a school district's responsibility.

The ALJ held that an independent evaluation was not required. A child with a serious health problem is only eligible for special education if the problem "adversely affects a student's educational performance." Here, the child was performing well on standardized achievement tests, was earning good grades, and the district was providing her with supplemental instruction. W.S. was failing physical education by refusing to comply with school

rules, not because of a medical condition. Therefore, there were no issues raising a serious question regarding educational disability.

Mother's Supplemental Payments to Aides Not Reimbursable

N.F., Petitioner, v. Stafford Township Board of Education, Respondent, EDS #928-04 (March 14, 2005) (Israel Dubin, ALJ).

N.F.'s child is autistic. She complained in writing to the state that she was expending \$1,200 per month for a home and school aide, and sought reimbursement for monies spent. N.F.'s child, T.C. was enrolled in the district in the summer of 2001, when he was nine years old. The IEP called for a one-on-one teaching assistant for the entire school day. The IEP for the next school year added ten hours of in-home tutoring at the district's expense, as did the IEP effective October 2003 through October 2004.

The child had a series of aides over the years. Prior to the IEP providing for in-home tutoring, the petitioner had hired a person whom she paid directly. Subsequently, this man became the child's one-on-one aide in the district and was paid directly by the district. Later, after that person resigned, a Ms. Rogers, who had spent part of the summer as T.C.'s in-home aide, would not accept the in-school position unless she was paid more than the district offered. Therefore, petitioner agreed to supplement Rogers' salary. Petitioner had paid \$10 per hour for Rogers to serve as a home aide, and thereafter, petitioner paid Rogers \$10 for every hour she worked in school. Petitioner later increased the differential to \$12.50. This "private" arrangement continued through March 2003. Rogers only worked Monday, Wednesday and Friday; there was no properly trained aide to work on the other days, so the mother kept her son home on those days.

In October 2002, petitioner employed a Ms. Mauro to provide Lovaas training and work with T.C. as his in-home aide. Shortly thereafter, petitioner encouraged Mauro to submit an application to work as T.C.'s in-school aide. Petitioner claimed that Mauro advised her the salary was unacceptable, so therefore, she began paying Mauro \$300 a week to be an in-school and in-home aide. This arrangement continued until Mauro resigned in March 2004, after the school district allegedly "threatened" her for accepting supplemental payments.

The ALJ analyzed the claim for the reimbursement of expenses as being similar to one for reimbursement for a unilateral placement. He noted, however, that unlike the typical unilateral placement case, the petitioner did not contend that the IEP, its placement and/or services failed to provide her son with a meaningful educational benefit. He found the district had no reason to believe that it was not completely providing the services in the IEP, noting that none of the aides had resigned or threatened to resign on the basis of inadequate compensation. Petitioner did not advise the board of her intent to subsidize the aides until well after she had begun doing so. It was not until December 2003, when petitioner signed the 2003-04 IEP, that she placed her complaint in writing. Moreover, she did not provide documentation of the expenditures until after filing for due process.

The ALJ did acknowledge that the board was unable to provide a proper aide on Tuesdays and Thursdays during two months in 2002, and that there were other times where Lovaas trained aides were not available. The district, however, did have other aides that would have been provided to the child, if petitioner had not kept him out of school. Thus, the ALJ denied reimbursement for subsidies and other monies paid to aides, and ordered the petition dismissed.

Multiply Disabled Classification Appropriate

J.C. on Behalf of C.C., Petitioner, v. Somers Point Board of Education, Respondent, EDS #2182-04 (March 4, 2005) (W. Todd Miller, ALJ).

The petitioner initially challenged his son's classification as multiply disabled; he maintained his son should be classified as having a specific learning disability (SLD). After settlement negotiations failed, the petitioner also sought an out-of-state residential placement.

Petitioner's son, C.C., was enrolled in the district in April 2003, after the family moved from Barbados. Transferred records indicated that C.C. might have a disability, and the CST contacted the parents, who agreed to an evaluation. In July, the parties met and the district concluded that C.C. was eligible for special educational services on the basis of auditory issues, ADD, ADHD and ED. Therefore, the appropriate classification was multiply disabled (MD). The parents disagreed, believing SLD was the appropriate classification and would not sign the IEP. Therefore, C.C. was placed in a fifth-grade mainstream setting for 2003-04.

Within two weeks of the start of fifth grade, an IEP meeting was held because C.C.'s teachers felt he was not doing well. The district offered various services, but the parents still insisted C.C. be classified as SLD. Therefore, the CST determined to reevaluate C.C., but concluded again the primary disabilities were auditory impairment and ED. The district agreed to independent evaluations, the results of which did not justify a SLD classification. The parents filed a complaint with the Department of Education which investigated the situation. The investigator concluded that more

counseling was necessary and that some additional modifications were needed; the district agreed to these adjustments.

The district recommended to the parents that they obtain individual hearing aids for C.C., who has significant impairment in one ear and moderate impairment in the other. C.C.'s parents refused, so the district provided an FM system for C.C.

In December 2003, another IEP meeting was held to review C.C.'s progress. Based on teacher and CST observations, it was concluded that C.C. was not progressing in large classes, despite program modifications. The CST recommended an in-district self-contained program, but not at the school C.C. currently attended. The father refused to approve the change, but the CST drafted an IEP with this program and gave it to him. After the father did not dispute the IEP or file for mediation within 15 days, the district implemented the IEP.

In early February 2004, an IEP meeting was held which was attended by C.C.'s father. At that time, the father signed the IEP that included a self-contained program. A couple of weeks later, the father filed for mediation, which was unsuccessful. On April 30, 2004, he filed a due process complaint, in which he initially sought a change in classification to SLD.

In July, an eligibility conference was held with various people in attendance, including the parties' attorneys, and petitioner's educational consultants. As a result, the district agreed to incorporate SLD as part of the child's classification, and an IEP was presented including this change, but was not executed. Another IEP meeting was held in August, and although the consultants and lawyer had signed the IEP, the parents still would not do so. A hearing was held on October 13, 2004, at which time the father, for the first time, requested a residential

placement at a school in another state because of the child's behavioral problems at home. The petitioner filed an amended petition in December 2004, and another hearing was held.

The ALJ reviewed the child's classification, finding that the evaluations done by the district and those by the independent evaluators supported the MD classification. The district provided services to address both learning and behavioral deficits, and there was no evidence that C.C. did not receive a FAPE because he was classified as MD and not SLD. The ALJ also concluded that the district had provided a FAPE. C.C., who had a low average IQ, was receiving passing grades, and was making significant improvement in behavior.

The ALJ noted that the IEP was not perfect, and that a more challenging reading program could be provided. However, while the IEP concentrated on behavior remediation, it still provided related educational services, and that C.C. was making progress, although not to the petitioner's liking. Although petitioner's consultants had suggestions on how to improve the IEP, they did not claim it failed to provide a FAPE. The ALJ noted the strained relationship between the parties and its negative impact on the child. The ALJ suggested that petitioner's consultants serve as a liaison between the parties, noting that the district could not address nor solve all of C.C.'s behavioral issues.

Classification Change from Other Health Impaired to Multiply Disabled Appropriate

W.S., on Behalf of R.S., Petitioner, v. Pennsville Township Board of Education, EDS #00023-05 (March 16, 2005) (Lilliard Law, ALJ).

R.S. was classified as Other Health Impaired (OHI) when in the third grade. His parents placed him in private schools for most

of elementary school. R.S. began attending the board's middle school in eighth grade, but was placed on homebound instruction in January 2003. He then attended a public school in a neighboring district. That placement was determined inappropriate, and he continued on homebound instruction. R.S.'s mother is a special education teacher employed by the respondent.

There have been controversies about R.S.'s placement since he was enrolled in the respondent's schools. In March 2003, the parties entered into a settlement agreement that was sealed. In December 2003, petitioner filed a complaint with the Office of Special Education. In March 2004, an investigator filed her report regarding the allegations made about noncompliance with special education laws. The district was found to be compliant in most areas, and a corrective action plan implemented.

In August 2004, the parties developed, through mediation, the IEP for ninth grade. The parties agreed that new evaluations would be done by the end of the second marking period, and at that time, the IEP team would meet to develop a new placement for the rest of the year. His placement consisted of a half-day in a regular program at Pennsville High School. He is transported home at 11:00 a.m. where he remains until 3:00 p.m. when his parents return him to school for home instruction in two subjects. He has several accommodations, including leaving class early to avoid contact with other students.

The evaluations were performed as anticipated. One evaluation showed average academic ability, but a disparity between ability and performance, as well as problems with attention and concentration. A pediatric neurology evaluation noted that R.S. had already been diagnosed as having ADHD and took medication. The evaluator noted that R.S.

had an inability to read social cues and other socialization issues. He stated that the mother believed that many of the issues were the result of bullying and aggression, and that she advised that R.S. had been diagnosed with post-traumatic stress syndrome. A psychiatrist evaluated R.S. and he concluded that R.S. had an "emotional disturbance secondary to a post traumatic stress disorder with manifestations of a generalized anxiety disorder." He also felt that R.S. may have Asperger Syndrome, and might also be bipolar. He recommended continuation of medication and therapy and the current half-day homebound instruction.

The CST wanted to classify him as multiply-disabled because the evaluators had found R.S. to have ADHD, emotional disturbance and a specific learning disability. The parents disagreed, but the ALJ agreed with the district, noting that the agreed-upon placement would not change. The ALJ noted that there was even concern about Asperger syndrome. Therefore, the classification was appropriate.

No Tuition Reimbursement Where Public School District Never Provided Services to Student

B.G. and M.J., on Behalf of D.G., Petitioner, v. Somerset Hills Regional Board of Education and Bedminster Township Board of Education, EDS #21-05 (March 17, 2005) (Douglas H. Hurd, ALJ),

The petitioners sought reimbursement for the unilateral placement of their child in a private residential school. D.G. had attended public school in Bedminster for grades two through eight. Petitioners unilaterally enrolled D.G. in a private high school for ninth grade. While attending that school for eleventh grade,

he experienced serious emotional difficulties, and it was recommended that D.G. begin home instruction. He did not complete eleventh grade at the private school, and was not able to return because of his needs.

The parents felt that the high school in Somerset Hills, where Bedminister sends its students, would not be an appropriate placement because of their son's emotional issues. They hired an educational consultant who recommended several schools, including the Oxford Academy in Connecticut.

In June 2004, the parents registered D.G. with Somerset Hills, and he was referred for a CST evaluation. A meeting was held, and the parents consented to evaluations. The parents visited Oxford and advised the board by letter in late July that they intended to enroll D.G. in Oxford, noting that, since the CST had not yet formulated a plan, there was nothing to object to at that time, and therefore they were not requesting mediation or due process. The evaluations were subsequently completed, and D.G. was found eligible for services on the basis of other health impairment because of major depression. The CST's proposed IEP recommended a therapeutic day program, and it provided names of placements to the parents. The parents did not agree to such a placement, and they filed a due process petition seeking reimbursement for their unilateral placement.

Respondents filed a motion to dismiss the petition. The boards argued that, because D.G. had never received special education and related services from the district, it could not be responsible for reimbursement. Both *N.J.A.C.* 6A:14-2.10(b) and the federal regulation, 20 U.S.C. §1412(a)(10)(C)(ii) state that reimbursement for a private school placement may only be ordered where a student "had previously" received special education provided by a public entity, the public agency had not

provided a FAPE in a timely manner, and the private placement is appropriate.

The ALJ dismissed the petition because D.G. had never received special education or related services from the district. Therefore, the parents did not meet the requirements under the regulation to be reimbursed for a unilateral out-of-district placement.

Emergent Relief for Stay Put Not Applicable to Early Intervention Placement

H.B., on Behalf of M.G., Petitioner, v. Hazlet Township Board of Education, Respondent, EDS #00935-05S (March 18, 2005) (Jeff Masin, ALJ).

M.G. was receiving early intervention services until he turned age three, in March 2005, thereby aging out of those services. The petitioner requested an evaluation by respondent which was done, resulting in a determination that M.G. was eligible for services. The parents did not, however, agree with the proposed IEP, and filed for mediation. While mediation was pending, the mother filed an emergency due process petition seeking to have M.G. kept in the early intervention program pending the outcome of mediation. She argued that the "stay put" provision applied.

The ALJ noted that this issue had not been the subject of many reported decisions, and that his research did not find any state of federal court rulings addressing the applicability of "stay-put" to early intervention services. He did find two ALJ decisions from other states that relied on a response by the United States Department of Education Office of Special Education Programs (OSEP). That response stated that "stay put" does not apply in these circumstances. The ALJ stated that he was

“somewhat concerned” that the federal OSEP did not give sufficient recognition to the role that early intervention programs play in the education of disabled students, however, he was constrained to defer to the federal agency’s interpretation at this stage. He also stated that, on an emergent matter and without input from the state DOE, or the state DHHS, which is responsible for early intervention programs, he could not determine whether the process followed for formulating programs for early intervention, was the similar to the IEP process. Therefore, the ALJ denied emergent relief.

Student Discharged from Juvenile Justice Commission Placement Placed Back in District

C.R., Petitioner, v. Hammonton Board of Education, Respondent, EDS #2191-05 (April 4, 2005) (H. Todd Miller, ALJ).

C.R. had attended the board’s high school for the 2002-03 and 2003-04 school years, where he had a lengthy disciplinary record. C.R. was classified as “multiply disabled.” His last in-district placement was Cooperative Industrial Education (CIE), which was a work-study program involving one-half day academics in district and one-half day of job training. In September 2004, he was placed at the Southern Residential Community House by the Juvenile Justice Commission (JJC), apparently after C.R. had violated probation for breaking and entering. While there, he was mainstreamed but received an education in accordance with an IEP, and made good progress. In March 2005, C.R. was discharged and sought to reenter the district’s high school to complete twelfth grade.

An IEP meeting had been held on March 2, 2005, at which time the IEP team determined

that a specialized out-of-district program was appropriate, based in part on C.R.’s extensive disciplinary record which included disrespectful behavior and insubordination. At that time, the mother agreed to homebound instruction and tutoring while a final placement was determined. Petitioner filed a request for due process/emergent relief by the end of March 2005, contesting the out-of-district placement.

The ALJ found that the IEP process was “rushed and faulty.” He noted that the IEP was handwritten and included mostly “*pro forma* information and comments.” The ALJ noted that, before the JJC placement, C.R. was in district in a mainstream program. He found the district placed C.R. in an out-of-district program for disciplinary reasons and the need for intense therapy, although petitioner was not consulted or evaluated before the IEP was formulated. The reasons for the placement were conclusions or general statements, and the IEP did not reconcile with previous placements. The ALJ noted that he was “mindful” that C.R. was a difficult student and had an extensive disciplinary history, but both the district and the JJC had provided C.R. with mainstream programs. Petitioner argued that the proposed placement is extreme, not the LRE, and it removes him from his peers and home school.

The ALJ concluded that there was no clear stay-put placement. He looked to the last mutually agreed program which was the CIE, that provided an education in district for at least half of a day. Therefore, the ALJ ordered C.R. to receive at least one half day of in-district education, and the other half day to consist of homebound instruction, tutors or similar methods. He ordered an expedited IEP meeting, that must include student and parental input. As the parties had agreed to mediation, the ALJ returned the matter to the DOE for a mediation conference.