

OFFICE OF ADMINISTRATIVE LAW
33 WASHINGTON STREET
NEWARK, NEW JERSEY 07102

T.D., :
Petitioner : DKT No. HLT 01483-2012
v. :
Before:
Bergen County Special Child Health Services; :
State of New Jersey, NJ Early Intervention, :
Respondent : Hon. Imre Karaszegi, ALJ

PETITIONER'S POST HEARING BRIEF

On the Brief:

Date: September 14, 2012

Marilyn Arons, M.S.
Nonlawyer Representative

Cc: Nashon Hornsby, Esq.
Danielle Pasquale, Esq.
Parent

TABLE OF CONTENTS

<u>Subject</u>	<u>Page</u>
Questions:	
Does New Jersey’s Cost Share in Early Intervention Require Prior Written Notice for Parents of Children Eligible for Part C IDEA Services?.....	6
Did Bergen County and the State of New Jersey Provide T.D. With the Required Procedural Safeguards Regarding Her NJEIS Cost Share?.....	6
Legislative History, Federal.....	6-10
Summary.....	9-10
State of New Jersey.....	10- 12
Summary.....	12-13
Bergen County.....	13
Summary.....	13
Material Facts Chronology.....	14- 17
<u>Material Facts Discussion</u>	
Susan Choe, Service Coordinator.....	18- 20
Roni Wolfson, NJEIS Financial Officer.....	20
T ■■■ D ■■■.....	21
<u>Arguments of Law</u>	
<u>POINT 1</u> NJEIS VIOLATED FEDERAL LAW BY NOT PROVIDING PRIOR WRITTEN NOTICE TO PETITIONER FOR THE COST SHARE, WHICH IS PART OF THE IFSP PROCESS.....	22- 23
Pendency.....	23- 24

Table of Contents Continued...

<u>Subject</u>	<u>Page</u>
<u>POINT 2</u> PETITIONER DID NOT RECEIVE THE REQUIRED PROCEDURAL SAFEGUARDS FROM THE STATE OR COUNTY THROUGH WHICH TO APPEAL HER COST SHARE INCREASE.....	24- 25
Conclusion.....	26

TABLE OF AUTHORITIES

Federal

Subject	Page
P.L. 94-142.....	6
P.L. 101-476.....	7
P.L. 102-119.....	7
P.L. 105-17.....	7
34 CFR Sec. 303.403(a) (b).....	7
34 CFR 303.404 (a).....	7
P.L. 108-446.....	7
P.L. 108-446, Sec. 631 (b) (2).....	7
P.L. 108-446- Sec. 639 (a) (6) (7).....	7-8
34 CFR Sec. 303.521 (a).....	8, 9, 24
34 CFR Sec. 303.521 (e).....	8, 9
34 CFR Sec. 521 (3)(2).....	25
60142 FR, v. 76, No. 188.....	8, 9, 24
34 CFR Sec. 303.420 (a) (3).....	8
34 CFR Sec. 303.500 (b).....	9
34 CFR Sec. 303.421.....	9, 25
34 CFR Sec. 303.520(b)(1)(iii).....	22
34 CFR Sec.303.430 (e).....	23
34 CFR Sec. 500	

Other:

Http://www2.ed.gov/programs/osepiep/index.html	7
http://wiki.answers.com/Q/What is the definition for prior written notice	22
<u>Letter to Ingraham</u> , 55 IDELR 19.....	7, 22

New Jersey

P.L. 1981, Sec. 3, c. 415.....	10
N.J.S.A. 18A:46-6.2.....	10
P.L. 1992, c. 155.....	10
P.L. 1993, c. 309, s. 1.....	10
N.J.S.A. 26:1A-36.6.....	10
N.J.A.C 26: 1A-36.7.....	11
N.J.A.C. 26:1A-36.8.....	11
P.L. 1968, c. 410.....	11
P.L. 2000, c. 112.....	11
N.J.A.C. 8:17.....	11
N.J.A.C. 8:17-3.1(a)(1).....	12, 25
N.J.A.C. 8:17-9.1.....	23

Table of Authorities Continued...

<u>Subject</u>	<u>Page</u>
N.J.A.C. 8:17-9.1 (d).....	24
N.J.A.C. 8:17-9.2.....	12
N.J.A.C. 8:17-3.2 (a)(5).....	12
N.J.A.C. 8:17-3.1 (a)(10).....	12
N.J.A.C. 8:17-4.1 (a).....	12
N.J.A.C. 8:17-4.1 (c)(3).....	12, 25
N.J.A.C. 8:17-4.2 (c)(1).....	12
N.J.A.C. 8:17-4.2 (b)(2).....	12
N.J.A.C. 8:17-4.2 (c) (1).....	12
N.J.A.C. 8:17-9.2(b)(iv).....	12
N.J.A.C. 8:17-9.2 (b)(v).....	12
N.J.A.C. 8:17-9.2 (d).....	12

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State of New Jersey, NJ Early Intervention, :
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QUESTIONS:

DOES NEW JERSEY'S COST SHARE IN EARLY INTERVENTION REQUIRE PRIOR WRITTEN NOTICE FOR PARENTS OF CHILDREN ELIGIBLE FOR PART C IDEA SERVICES?

DID BERGEN COUNTY AND THE STATE OF NEW JERSEY PROVIDE TD WITH THE REQUIRED PROCEDURAL SAFEGUARDS REGARDING HER NJEIS COST SHARE?

Legislative History

P.L. 94-142, The Education for All Handicapped Children's Act of 1975, mandated a free appropriate public education for all children with disabilities. It ensured due process rights, individualized programs for each eligible child and the least restrictive environment. In 1986, subpart H was added to assist states in the development of a comprehensive, multidisciplinary statewide system of early intervention for infants and toddlers. Congress recognized "an urgent and substantial need" to:

- * enhance the development of infants and toddlers with disabilities;
- * reduce educational costs by minimizing the need for special education through early intervention;
- * minimize the likelihood of institutionalization, and maximize independent living; and
- * enhance the capacity of families to meet their child's needs.

In 1990, the law was renamed the Individuals with Disabilities Education Act through P.L. 101-476. In 1991 subpart H was amended in P.L. 102-119 to provide federal assistance to States so that early intervention services for children, 0-2, and their families could be provided. Funds were to be used to plan, develop, and implement a Statewide

system that was comprehensive, coordinated and had an interagency multidisciplinary system to provide early intervention services through a federal grant program. These grant programs were noncompetitive awards based upon a predetermined formula by the federal government. These formula grant programs are sometimes referred to as state-administered programs and called the Grants for Infants and Families program. Depending on whether a state has adopted a system of payment policy, which must be on file with and approved by the secretary of education, families who do not meet the state's definition of inability to pay may be required to pay for some services (<http://www2.ed.gov/programs/osepeip/index.html>).

In 1997 P.L. 105-17 reauthorized IDEA and changed the name of Part H to Part C. Federal Regulations were revised as of July 1, 1999 (34 CFR 303.1). Sec. 303.403 (a) stated:

Written prior notice must be given to the parents of a child eligible under this part a reasonable time before a public agency or service provider proposes, or refuses, to initiate or change the identification, evaluation, or placement of the child, or the provision of appropriate early intervention services to the child and the child's family.

(b) Content of notice. The notice must be in sufficient detail to inform the parents about—

- (1) The action that is being proposed or refused;
- (2) The reasons for taking the action;
- (3) All procedural safeguards that are available under Secs. 303.401-303.460 of this part...

In 2009 the Office of Special Education Programs (Letter to Ingraham, 55 IDELR 19) advised the States that:

When the early intervention services are revised on the IFSP, parent consent must be obtained before the initiation of provision of those revised services (34 CFR 303.404 (a)). Thus, when the IFSP team modified the early intervention services on the IFSP, including changes in frequency, intensity, duration, method, location, and **payment arrangements**, written parental consent must be obtained for the change. (Highlighting added).

These 1999 regulations and the 2009 policy clarification were in effect until 2011. Final regulations were published then regarding the reauthorization of IDEA in 2004 through P.L. 108-446. The Part C Findings and Policy, Sec. 631 (b) (2), stated that the policy of the United States was to facilitate the coordination of payment for early intervention services from Federal, State, local and private sources, including public and private insurance coverage. Sec. 639 (a) (6) (7) stated:

The procedural safeguards required to be included in a statewide system... shall provide, at a minimum, the following:

Written prior notice to the parents of the infant or toddler with a disability whenever

the State agency or service provider proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or placement of the infant or toddler with a disability, or the provision of appropriate early intervention services to the infant or toddler, (and) procedures designed to ensure that the notice required ...fully informs the parents...of all procedures available pursuant to this section.

No federal regulations were published for the 2004 IDEA reauthorization until 2011. Therefore, the 1999 regulations remained in effect, augmented by the 2009 OSERS policy clarification letter. Final regulations for Part C, 34 CFR Part 303, were published by OSERS, Department of Education, on September 28, 2011, effective on October 28, 2011. Section 303.521(a) was revised to provide that the State's system of payment policies must include the State's definition of ability to pay and indicate when and how the agency makes its determination regarding the parent's ability to pay. A new 303.521(e) was added to address a parent's procedural safeguard rights under a State's system of payments. (60142 FR, V. 76, No. 188) The Department believed that **parental consent**

...must be required when the lead agency or EIS provider seeks to use private insurance to pay for the initial provision of any early intervention service in the IFSP and each time consent for services is required due to an increase in the provision of services in the child's IFSP...we believe separate consent is needed because States implement the IFSP provisions in a variety of ways and may not have identified all funding sources for each service when they obtain consent for that service under 303.420...We agree that notifying parents of potential costs under 303.520 (b)(1)(iii) requires States to identify out-of-pocket costs such as loss of benefits due to annual or lifetime insurance caps (60225 FR V. 76, No. 188) ...in defining a parent's ability to pay, the State must include consideration of family expenses such as extraordinary medical expenses (60228 FR, V. 76, No. 188).

...States must inform parents about procedural safeguards when the State determines a parent's ability to pay or imposes a fee on parents...We...have clarified that a State may inform parents of these procedural safeguard options by either providing parents with a copy of the State's system of payments policies when obtaining consent for the provision of early intervention services under 303.420(a)(3) or including this information with the notice provided to parents in 303.421. (60229 FR, V. 76, No. 188) (Highlighting added)

Monitoring by the federal government of the States' Part C funding system was also explained in the Federal Register discussion.

Section 618 of the Act does not require States to report data on their use of insurance or a system of payments, and we do not want to place the added data collection and paperwork burden on States. The Department has long required each State that adopts a system of payments (including the use of insurance or family fees to pay for Part C services) to submit its policies and procedures as part of the State's Part C grant

application (60227 FR, V. 76, No. 188). **We agree...that States must inform parents about procedural safeguards when the State determines a parent's ability to pay or imposes a fee on parents...States (must) establish written policies as part of their system of payments to inform parents about the availability of procedural safeguards (60229 FR, V. 76, No. 188).** (Highlighting added)

34 CFR 303.521 (a) codified and updated federal regulations pertaining to a state's system of payments and fees.

If a State elects to adopt a system of payments in Sec. 303.500 (b), the State's system of payment policies must be in writing and specify which functions or services, if any are subject to the system of payments (including any fees charged to the family as a result of using one or more of the family's public insurance or benefits or private insurance), and include—

- (1) The payment system and schedule of sliding or cost participation fees that may be charged to the parent for early intervention services under this part;
- (2) The **basis** and amount of payment or fees. (Highlighting added)

34 CFR 303.521 (e) (1) said:

Each State system of payments must include written policies to inform parents that a parent who wishes to contest the imposition of a fee, or the State's determination of the parent's ability to pay, may do one of the following:

- i. Participate in mediation in accordance with Sec. 303.431;
- ii. Request a due process hearing under Sec. 303.436 or 303.441, whichever is applicable.
- iii. File a State complaint under Sec. 303.434.
- iv. Use any other procedure established by the State for speedy resolution of financial claims, provided that such use does not delay or deny the parent's procedural rights under this part, including the right to pursue, in a timely manner, the redress options described in paragraphs (e)(2)(i) through (e)(2)(iii) of this section.

(2) A State must inform parents of these procedural safeguard options by either—

(i) Providing parents with a copy of the State's system of payments policies when obtaining consent for provision of early intervention services under Sec.

303.420(a)(3); or

(ii) Including this information with the notice provided to parents under Sec. **303.421 (Prior written notice with procedural safeguards notice).** (Highlighting added)

Summary

Based upon the legislative history of early intervention in the United States, prior written notice is required relating to out of pocket costs to parents. Payment arrangements are

part of the IFSP process and require a separate consent from that given to the services set forth on the IFSP. This prior notice must provide the actions that are being proposed or refused and all of the procedural safeguards that are available. Speedy resolution of any claim dispute is required. The basis for the out of pocket costs is to be explained to the parent as a component of prior notice.

State of New Jersey

Early intervention in New Jersey originally placed early intervention in the Department of Education, P.L. 1981, Sec. 3, c. 415 (C. 18A:46-6.2). Sec. 3 was amended in 1992, P.L. 1992, c. 155, for the purpose of transferring early intervention responsibility to the Department of Health and Senior Services effective on July 1, 1993. The New Jersey legislature declared in P.L. 1993, c. 309, s.1 that:

- a. It is in the best interests of the State to provide a comprehensive system of early intervention services to support infants and toddlers with disabilities, those at risk for disability, and their families, that is built of existing social networks, and naturally occurring supports such as community associations and extended families which promote the inclusion of the child and the family within the community.
- b. Infants and toddlers with disabilities are uniquely dependent on their families for survival and nurturance, and while service systems and the personnel within those systems may fluctuate, a family is the only common thread in a child's life;
- c. There is urgent need to enhance the development of infants and toddlers with disabilities to minimize their potential for developmental delay and to enhance the capacity for families to meet the needs of these infants and toddlers;
- d. There is also a need to reduce the education costs to our society, reduce costs associated with reliance on social services, minimize the likelihood of institutionalization, reduce health care costs and improve long-term health and potential for future employability and independence of infants and toddlers with disabilities;
- e. No one agency or discipline can meet the complex needs of infants with disabilities and their families, and services to infants and toddlers with disabilities must be comprehensive and multi-disciplinary and must be coordinated so as to assure access and assist families in obtaining needed information and encouraging advocacy on their behalf; and
- f. Services and strategies to assist and support families must respect autonomy, interdependence and decision-making in a way which reflects the unique racial, ethnic, cultural and social-economic experiences and background of a family.
(N.J.S.A. 26:1A-36.6)

N.J.A.C. 26:1A-36.7 established a statewide system of early intervention services for infants and toddlers naming the Department of Health as the lead agency. N.J.A.C. 26:1A-36.8 noted that rules and regulations were to be adopted pursuant to P.L. 1968, c. 410 (C. 52:14B-1 et seq.) to carry out the purposes of this act. Those rules and regulations were not enacted until 2008, or 15 years after the statute was passed.

While New Jersey awaited its early intervention regulations, P.L. 2000, C. 112 was passed, known as the Developmentally Disabled Uniform Application Act. This created a form to apply for services from either Human Services or the Department of Education.

In the case of a request for early intervention services, an initial application shall be made when a referral for an evaluation of the child is made... The initial application shall contain the name, address, telephone number and Social Security number of the applicant, relevant family information, and the types of services requested or provided to the applicant.

The Family Cost Participation Handbook of 2/1/07 (R-3) set forth the policies in effect through 2011. Parents were to provide financial information prior to the initial IFSP meeting to ensure that NJEIS can provide the family with their cost participation co-payment notice prior to the initiation of services. They were to provide written documentation for changes in income in order to have the family cost share recalculated, the effective date at the discretion of the DHSS when there was failure to submit appropriate and timely documentation. (p. 3, R-3)

The service coordinator was responsible for explaining the family cost participation policies and procedures, inform the family of needed documentation, and collect required income information from the family. (p.3, R-3) For families identified as having one or more self-employed household members, service coordinators must assist the family in submitting appropriate self-employment income records to the NJEIS. (p. 4, R-3) The Regional Intervention Collaborative (REIC) will print and mail a NJEIS Family Cost Participation Notice to the family and the service coordinator with the family cost share determination. A family may request an administrative review by DHSS if asking for special consideration of their financial status. Families may also request mediation, a due process hearing or an administrative complaint. (p. 6, R-3)

New Jersey Protection and Advocacy, the federally funded P&A for New Jersey, published "New Jersey's Early Intervention Program: The Need for Fiscal Reform and Long Term Financing" in March 2008, authored by Sarah W. Mitchell, J.D., and Jennifer Halper, Esq. Seven months later, on October 6, 2008, N.J.A.C. 8:17 was published in the New Jersey Register. Prior to that, NJEIS was guided "by the Department's letters of agreement, grant agreements, practice guidelines, memoranda and policies and procedures." (P-1) In New Jersey:

1. Service coordinators shall coordinate the (EI) process by which children are potentially eligible and/or are determined to be eligible, and their families, to receive the services, rights, and **procedural safeguards to which they are entitled pursuant to Part C**; (N.J.A.C. 8:17-3.1 (a) (1)
2. Service coordinators shall assist families to understand and to collect information needed to complete the family cost participation documentation identified in N.J.A.C. 8:17-9.2; (N.J.A.C. 8:17-3.1 (a)(5)

3. Service coordinators shall inform families of the purposes and general functions of, and the types of services that are available and potentially available to them from the NJEIS, their rights, **procedural safeguards**, the requirements of this chapter, and the process for accessing services through the early intervention system; N.J.A.C. 8:17-3.1 (a) (10)
4. Service coordinators shall provide written notice containing the information provided in (c) below in the form and manner provided in (d) through (f) below to the parents of an eligible child 10 calendar days before a provider agency proposes, or refuses, to initiate or change the identification, evaluation, or placement of the child, or the provision of appropriate early intervention services to the child and his or her family; (N.J.A.C. 8:17-4.1 (a))
5. The notice shall contain the following information- **all procedural safeguards to which the parents are entitled**; N.J.A.C. 8:17-4.1 (c) (3)
6. Each service coordinator shall obtain written parental consent prior to arranging for the provision of early intervention services. (N.J.A.C. 8:17-4.2 (b) (2))
7. The service coordinator shall make reasonable efforts to ensure that a parent, in granting consent, understands that the parent is agreeing to satisfy the family cost share calculated pursuant to N.J.A.C. 8:17-9.2. (N.J.A.C. 8:17-4.2 (c) (1)).
8. Once eligibility for the child has been established, the service coordinator shall review the family cost participation policy and procedures with the family, and with family consent, collect information needed to complete the forms...for submission to the NJEIS...(N.J.A.C. 8:17-9.2(b)(ii)).

The specific funding policies for NJEIS include:

1. **Families shall be informed of their rights to an administrative review by the Department if asking for special consideration of their financial status, mediation, an impartial due process hearing, or an administrative complaint to challenge their family cost share. (N.J.A.C. 8:17-9.2 (b) (iv).** (Highlighting added)
2. In determining a household's gross income for purposes of calculating a family's cost share, the EIS shall consider written documentation that a family submits to show a change in or loss of household income, and shall deduct from a household's EIS-determined gross income the amount of lost income if the EIS determines the documentation to be credible. (N.J.A.C. 8:17-9.2 (b)(v)).
3. Early intervention services will not be provided in those instances in which a parent declines to pay the family cost share. (N.J.A.C. 8:17-9.2 (d)).

No revision to the 2008 New Jersey regulations has been published to date. No administrative law decisions are found in the Rutgers Law Library data base for an early intervention decision

Summary

New Jersey's Early Intervention System was not formalized into law until 2008, its purposes and lead agency evolving from 1992-2000 through legislative declarations. In 2000, a uniform application act required that all early intervention applications include

relevant family information. Service coordinators had multiple and complex duties including the collection of required income information from the family. By 2008 it was recognized that New Jersey's Early Intervention System needed fiscal reform and long term financing. Regional Collaboratives (REICs) printed and mailed the NJEIS Family Cost Share determination to parents and their service coordinator. Those service coordinators were required to provide parents with the procedural safeguards to which they were entitled, including due process. When parents challenged the cost share amount, they were to be informed of their rights when asking for special consideration. During fiscal year 2010, New Jersey informed OSEP that it was in the process of negotiating a new restricted cost rate to take effect in fiscal year 2011. The State was required to subject those policies to public participation requirements (P-56).

Bergen County

In 2009, Bergen County had a procedural safeguards complaint that was upheld, the county placed at High Risk for failure to implement service coordination responsibilities, among other issues. Several service coordinators left the agency so that the case loads were too high. On 9/14/09 Susan Choe was hired. A Corrective Action Plan for failure to implement service coordination responsibilities was issued by the State on 2/17/09. At that time, the Bergen service coordination units had a compliance percentage of 15%.

On June 16, 2010, Terry Harrison, Part C Coordinator, communicated with Bergen County that DHSS-NJEIS would fund the Bergen SCU from 7/1/10- 6/30/11. However, the agency was placed under special conditions due to ongoing unsatisfactory performance and High Risk grantee/contract status and an addendum was issued with Bergen's SFY 2011 contract. This required the agency to successfully complete correction of outstanding noncompliance issues by 12/31/10 or the Lead Agency would begin the process to move the contract to a new agency. On 11/3/10, the status was downgraded to At Risk, and on 3/23/11 the Corrective Action Plan was closed, all children receiving initial IFSP and transition services in a timely manner. (R-33)

Summary

From 2009-2011 the Bergen County early intervention unit functioned under a corrective action plan related to, in part, failure of the service coordinators to fulfill their duties to the families on their case loads. In 2010, the Part C Coordinator threatened to terminate their grant unless Part C violations were corrected. On 3/23/11, the Corrective Action Plan was closed concerning initial IFSPs and the provision of transition services.

Material Facts Chronology

- 6/9/10- Choe phoned mother, informing her that if 2009 tax returns were not available, copies of the last three pay stubs or corporate tax returns could be submitted at the Family Information Meeting. P-6
- 6/14/10- FIM meeting. Parents' tax extension had been filed and all options were explained. P-5
- 6/14/10- Choe noted that a self-employment letter was not applicable. P-7
- 6/14/10- Family Cost Verification Form did not check "self employed". P-57
- 6/16/10- IFSP meeting held. Parents wanted the cost share implemented when tax returns were available. Meanwhile, no services were to be provided. P-5
- 6/16/10- Terry Harrison, Part C Coordinator, contacted the Bergen County Health Department that DHSS-NJEIS would place the agency under "special conditions" due to unsatisfactory performance and High Risk grantee/contract status and an addendum was issued with their SFY 2011 contract which required the agency to successfully complete correction of outstanding noncompliance issues by 12/31/10 or the Lead Agency would begin the process to move the contract to a new agency. R-35
- 6/28/10- Choe left voice mail to ask about missing financial documents. P-5
- 7/1/10- Parent selected the full fee option while awaiting the cost share determination. If they did not, the IFSP would not be submitted and their son's file closed. P-8
- 10/1/10- Effective date of \$19 co-pay. P-9
- 10/12/10- Choe called parent regarding changing services. P-5
- 10/13/10- The father selected the NJEIS Family Cost Share. This form included, "I understand that if there is a household member that is self employed, I may be subject to an interim cost share determination to expedite service delivery. However, upon review by the DHSS-NJEIS of the self-employed family member's income determination, including his/her/their most current federal tax return, my family cost share is subject to change. P-10
- 10/14/10- Choe forwarded the revised payment option page with the current 1040. P-5
- 10/19/10- \$19 co-pay began for parent. P-44
- 10/21/10- The father FAXed Choe his Attestation. P-11
- 10/22/10- Choe received the letter of attestation, forwarding it to the REIC. P-5
- 10/25/10- Choe phoned parent to inform them of revised cost share. P-5
- 10/26/10- Cost Participation Notice printed, copied to Choe. It stated "I have the right to file an administrative complaint, request mediation, and/or initiate a due process hearing if disagreements regarding my family's cost share cannot be resolved at the service coordination unit level. P-9
- 10/27/10- Parent phoned Choe about a change in providers. P-5
- 11/3/10- Parent phoned Choe about providers and scheduling six month review. P-5
- 11/23/10- 6 month IFSP review. P-5
- 11/23/10- Written Prior Notice for IFSP meeting included the New Jersey Early Intervention System Family Rights. P-12
- 11/29/10- Parent phoned Choe about a change of providers. P-5
- 12/20/10- Choe sent parent Speech Therapy Assessment. P-5

1/3/11- IFSP Review was scheduled. P-5, P-32
 1/10/11- IFSP meeting addressed speech therapy services. P-5
 1/18/11- Parent phoned about scheduling providers. P-5
 1/25/11- Choe looked for O.T. provider. P-5
 1/31/11- REIC called Choe about parent concerns with provider. P-5
 2/1/11- Parent phoned Choe about provider. P-5
 2/2/11- Choe worked to reschedule provider. P-5
 2/4/11- IFSP review meeting. O.T. added once per week. P-5
 2/4/11- Parent declined counseling for herself due to the cost share. P-13
 2/15/11- Counseling was not added t IFSP because of cost share. P-5
 2/24/11-Parent phoned Choe about provider. P-5
 3/23/11- Concerns with lice. Child was treated. P-5
 4/28/11- Parent phoned Choe about O.T. billing. P-5
 4/28/11- Parent was billed for O.T. assessment. P-14
 5/3/11- Parent to schedule annual review with the O.T. P-5
 5/5/11- Speech therapist can attend IFSP review. P-5
 5/6/11- Choe tried to contact the direct instructor about the IFSP meeting. P-5
 5/9/11- Continuation of participants for IFSDP meeting. P-5
 5/ /11- Parent asked to change IFSP date to 6/6/11. All can make it. P-5
 5/17/11- Continued work for providers to attend rescheduled IFSP meeting. P-5
 6/2/11- 2010 tax return won't be ready for a few more months. P-15
 6/3/11- Annual IFSP review meeting. Cost share was discussed, with extension to be sent to Choe to complete. P-5
 6/3/11- Tax extension needed to be forwarded to Choe by 6/16/11 or payment would be full fee or public expense, the cost share changing on 8/15/11. P-15
 6/3/11- The father selected the NJEIS cost share on the Payment Option Form. P-16
 6/3/11- The Income Verification Form from the father provided an approved State Tax Year Extension for 2010 to 10/17/11. P-17
 6/8/11- Choe received the extension, saying that 2010 returns must be submitted to redetermine cost share by 10/17/11. All paperwork was processed. P-5
 6/14/11- Choe checked billing issue for O.T. P-5
 7/1/11- OSEP wrote NJEIS stating, "Your state indicated that DHSS has a provisional restricted indirect cost rate of 6% that expires on June 30, 2011, and the agency is in the process of negotiating a new restricted indirect cost rate that will be in effect for the FFY 2011 grant period." P-56
 7/12/11- Parent phoned Choe about O.T. billing. P-5
 7/13/11- Choe sought help on O.T. billing issue. P-5, P-18
 8/1/11- Cost Participation Notice effective date for full fee of \$110- P-21
 8/1/11- Effective date of 2/23/12 Cost Participation Notice of \$19 hourly co-pay. P-45
 8/1-16/11- Parent charged co-pay of \$106, totaling \$849.60. P-44
 8/5/11- The father forwarded his financial information to Choe. P-20
 8/10/11- Choe received the 2010 1040 from the parent. P-5, P-19
 8/10/11- Family Cost Participation Income Verification Form "self employed" not checked. P-57
 8/12/11- Choe sent the revised financials to Roni Wolfson. P-5, P-20, P-40, R-5
 8/12/11- Cost Participation Notice increase to \$110 co-pay- P-21

8/12/11- Family Cost Participation Income Verification Form “self employed” not checked. P-57

8/16/11- Wolfson letter about incomplete income information, therefore the parents were placed at full fee. P-22, P-40

8/26/11- Choe left a voice mail for Roni Wolfson. P-5

9/6/11-Choe received email from parent to discontinue direct instruction due to cost share. P-5

9/13/11- Parent emailed Choe to discontinue remaining services. P-5

9/21/11- An IFSP meeting was to be rescheduled. P-5

10/3/11- Choe worked to schedule IFSP meeting. P-5, P-23

10/5/11- Choe emailed all paperwork to the agency and parents. P-5

10/12/11- Wolfson sends letter to family requesting 2010 tax documentation. P-40

10/17/11- Extension granted by IRS for parents’ 2010 tax return. R-2

10/27/11- Wolfson emails Choe about getting additional financial information by 10/27/11 to avoid billing services at full fee. 2011 tax returns are needed to adjust the cost share. P-24, P-40

10/27/11- Wolfson working on the family appeal, which must be in writing. R-27

10/27/11- Parents calls NJEIS about incorrect billing for 8/11. R-32

11/1/11- Choe worked on scheduling transition meeting in Bergenfield. P-5

11/2/11- Choe phoned O.T. who told her services were discontinued since August. P-5

11/14/11- Choe continued to work on organizing transition meeting. P-5

11/16/11- Choe emails parent about billing and that cost shares start at the beginning of the month regardless of increases or decreases. P-25

11/18/11- Wolfson emailed REIC to set cost share to full fee by 11/1/11 if 2010 tax information not provided. P-40

11/29/11- IFSP review meeting was held. The parent discontinued services because of the cost share. P-5, P-26, P-27

11/30/11- Parent forwards all financial papers to Wolfson. P-28, P-29

11/30/11- Choe phoned Wolfson about parent concern of high cost share. Parent told to provide 2011 tax returns to modify cost share. Katiusea called from DOH to make an adjustment to the effective cost share from 9/1/11. P-5

11/30/11- Wolfson emailed parent, only accepting the 2010 income tax return, the 2011 statement from the parent’s CPA about 2011 not accepted. She requests more documentation, the family cost share at full fee until it is provided. P-29, P-40

11/30/11- Cost Participation Notice is printed, noting the parent has chosen not to release financial information. P-30, R-1

12/2/11- Wolfson emailed parent that cost share was full fee and the additional 2010 documentation needed. P-40

12/7/11- Wolfson emailed parents that accepted 2010 tax return but needed more documents. P-40

12/8/11- The father seeks clarification from Wolfson about the payment status, noting he paid over \$150,000 in taxes in 2010. Wolfson accepts 2010 income tax return, asking for more information. P-29, P-40

12/9/11- The father confirmed financial data. P-40

12/13/11- Wolfson spoke with the father regarding clarification of 2010 income. P-40

12/15/11- Parent phoned requesting Choe to write letter stating that services were not received due to cost share reasons. P-5, P-3

12/15/11- The father was to forward requested tax information. P-40

12/19/11- Choe sent email to parent regarding the cost share. P-5

12/20/11- Choe received call from Marilyn Arons. P-5

12/22/11- Additional income of the father was forwarded and accepted. P-40

12/28/11- NJEIS received all income documents from parent. P- 40.

1/1/12- Effective date of hourly co-pay of \$110. P-37, R-1

1/4/12- Wolfson informs parent that co-pay will be \$110. P-42, P-43

1/9/12- First due process petition filed by the mother.

1/9/12- Income Verification Form, unsigned, notes for the first time that the father is self-employed. P-33, P-35

1/9/12- Wolfson emails Choe noting if parents want to appeal, they can put concerns in writing with documentation.

1/9/12- Wolfson emails Choe seeking clarification on the family's financial history since entering EI. P-36

1/9/12- Wolfson emails the father, noting that the child would age out of EI in May 2012 and that 2011 taxes are needed for new rates, P-38

1/9/12- Full fee status for parents reversed. P-40

1/9/12- Wolfson emailed Choe about concern regarding previous employed status when The family first entered EI. P-40

1/10/12- The father informed Wolfson that his 2010 income was less than \$40,000, and asked about new rates. P-38

1/10/12- The mother paid \$160 for the costs from 8/1/11-8/16/11. P-41, R-29, R-30, R-31

1/25/12- Print date of Cost Participation Notice. P-37

1/31/12- Parent billed \$689 for August 2011 services. P-44

2/1/12- Parent's second filing for due process to join NJEIS as a party. P-2

2/23/12- Family Cost Participation Notice printed to "retro" full fee status. P-45, R-26

2/23/12- Corrected billing for August services did not go through. P-49

2/28/12- Parent tries to correct improper billing for August 2011. P-48

4/25/12- Family Cost Participation Notice printed for 1/1/12. R-1

6/4/12- An OSEP Memorandum noted that NJEIS systems of payments policy, in addition to two additional areas, made New Jersey's grant application incomplete. R-35

MATERIAL FACTS DISCUSSION

SUSAN CHOE, SERVICE COORDINATOR

When Susan Choe was hired as a service coordinator by Bergen County Health Services, the New Jersey Legislature had long before declared that early intervention services must be comprehensive and coordinated to assure access and to encourage advocacy on behalf of disabled infants and toddlers and their families. Choe went to work in an environment already functioning under a Corrective Action Plan, with insufficient service coordinators to meet the needs of Bergen County parents who applied for early intervention services. At the exact time that she was the service coordinator for the family, her agency was under fire by the New Jersey Part C coordinator, Terry Harrison. Bergen County was placed in the High Risk category with the threat that it would lose the NJEIS contract if it did not improve its functioning in the areas of transition and initial IFSP development.

When the mother applied to NJEIS for services in 2010, state law required a uniform application that contained relevant family information. The employment status of the parents was among the relevant information required because it was the basis for determining their cost share for EI services. Therefore, from the outset of the case and prior to Choe's 6/9/10 telephone call to the family, the father's self-employment status had to have been in the agency file. Nonetheless, at no time over her two years as the service coordinator did she utilize the cost share process for self-employed parents, nor did she ever discuss this as an interim payment option for the family. Thus, the family paid full fee for their son's services from 7/1/10-10/19/10. Choe requested the 1040 tax return several times from 6/9/10- 10/22/10, when she received the father's Attestation. It is unclear as to why this Attestation was not requested by Choe when she first knew that the parents' tax return would not be available until October of 2010. Choe received the 1040 of 2009 from the father on 10/13/10. The REIC then printed the Cost Participation Notice on 10/26/10 with the reduced hourly rate of \$19.

Choe addressed parental rights during her meetings with the mother. She explained rights relating to the IFSP (R-6) and provided a booklet called The New Jersey Early Intervention System (NJEIS) Family Rights (R-7). Neither contained any reference to the cost share. Choe used a Family Information Meeting Progress Notes form to check what she had gone over with the parents at these meetings (R-19). There is no reference on any of those forms to the Family Cost Participation Handbook (R-3) or any notation that it was provided to the parent. She did review the Family Cost Participation Tables with them.

Financial information from the parents was required again at the 6/3/11 Annual IFSP review, where the mother informed Choe that they were given a tax extension by the IRS to 10/17/11. Even so, Choe noted that the tax extension must be received by 6/16/11 or payment would be full fee or public expense. Following the 6/3/11 IFSP meeting, the father completed the Income Verification Form. Choe emailed the mother that her cost share would change on 8/15/11. The family's tax returns were given to Choe on 6/8/11, all paper work then processed.

Choe had given the family an incorrect date for the co-pay increase of 8/15/11 when the actual date was 8/1/11. As a result of this error, the parent was billed \$849.60 for services provided from 8/1-8/16/2011. On 8/5/11 and 8/10/11, the father gave Choe further financial information. Without an explanation found anywhere within this documentary or testimonial record, Choe sent the family's financial information to the NJEIS Financial Officer, Roni Wolfson, whose primary duties involved determining the interim cost share for self-employed parents. Previously, that financial information had gone to the REIC.

Though the child had not received services since 8/16/11 because the parents could not pay full fee, Choe did not schedule the IFSP meeting until 11/29/11. During this protracted period of interrupted services there is no documentation that Choe informed the parents of their due process rights. On 1/9/12, the day the parent filed for due process the first time, Wolfson emailed Choe expressing concern about the father's employment status when the D [REDACTED]'s first entered early intervention.

As the D [REDACTED] service coordinator, Choe was confronted with an incoherent, uncoordinated financial system of parent payment that remains almost impossible to understand in any reasoned way. Three separate financial calculations occurred simultaneously from August 1, 2011 forward. First, New Jersey decided to raise the co-pay for fiscal year 2011 on 8/1/11 in order to remain eligible to receive federal grant money. Second, an interim co-pay was to be used for self-employed parents that was determined by Roni Wolfson at the state level. Third was the sliding scale calculation that occurred at the regional level and where the Cost Participation Notices were printed. The parents had the choice of the NJEIS cost share or Full Pay. It remains unknown as to how to rectify the disparate dates between the time the Cost Participation Notice was printed and the dates the co-pay became effective. More importantly it is unclear as to how and when the parent or the service coordinator was informed of the cost share amount. Given such administrative chaos, any prior written notice for the cost share would have been impossible. When comparing all of the financial events that took place after August of 2011 in this case, it appeared that one hand literally did not know what the other hand was doing.

The Central Management Office (CMO) calculated the family cost share for each family based on services provided, mailing the Family Cost Statement (billing) to the family. It processed all revenue received through family cost participation and tracked suspension for nonpayment of the cost share (R-3). Yet, it could not manage to correct a single billing error for August 1-16, "the correction didn't go through..." (R-31) The REIC determined the co-pay and printed out the notice, while the CMO then billed and tracked services. But the element of human error, mixed with computer science and technology, resulted in a perfect storm of confusion and misinformation for the service coordinator, who, as a result, was unable to properly assist the family. The timelines below prove the point:

1. 10/19/10- The \$19 co-pay began. P-44

2. 10/22/10- Choe received the father's Attestation and forwarded it to the REIC. P-5
3. 10/25/10- Choe told the family about the revised cost share. P-5
4. 10/26/10- The Cost Participation Notice was printed. P-9.

The CMO billing noted that co-pay rates of \$19 began on 10/19/10. Choe did not know about the revised rate until after she received the Attestation, advising the family of the revised figure on 10/25/10. The Cost Participation Notice had the Effective Date of 10/1/10, and the Acceptance Date of 10/19/10. That being so, one wonders why the father's Attestation was needed when the matter had already been decided and why Choe did not know that the matter had been decided effective 10/1/10.

RONI WOLFSON, NJEIS FINANCIAL OFFICER

Roni Wolfson was the Financial Officer for NJEIS. Her primary duties involved the determination of interim co-pays for self-employed parents, as well as the handling of parent appeals of the cost share. Her involvement with the case began on 8/12/11 when Susan Choe sent the family's revised financials to her. From then until 1/9/12, Wolfson's actions regarding the financials of the family reflected her effort to establish an interim rate for a self-employed parent. She was never informed by Choe that the parents had not made that application and that Choe's contact was actually a parent appeal of the cost share, exacerbated by her mistake in the date of the increased co-pay.. By 11/30/11, Wolfson refused a financial statement for 2011 from the father's CPA and required the 2011 tax return which the father did not have. As a result, the cost share remained at full fee. Communications between her and the father revealed that he paid over \$140,000 in taxes in 2010. By 12/28/11, Wolfson received all of the income documents from the father, the co-pay remaining \$110 hourly as of 1/4/12.

After the mother filed her first due process petition on 1/9/12, Wolfson immediately engaged in a variety of activities concerning the cost share that she had not done before. It is evident that the due process request triggered an examination of the file for the first time, with efforts to try and rectify prior procedural and substantive errors. Suddenly, the father was found to be self-employed and the full fee status was reversed. Wolfson also emailed Choe to express concern about the family's employment status when they entered early intervention. She was unable to explain the family Cost Participation Notice printed on 2/23/12 that "retroed" the full fee status from \$110 to \$20 effective 8/1/11. Wolfson had never seen any similar action during her tenure as Financial Officer and did not know who created the document.

In addition to her other activities on 1/9/12, Wolfson emailed Choe and, for the first time, referenced the option of the parents' appeal of the cost share, suggesting they put their concerns in writing to Terry Harrison. She made no reference to the due process petition NJEIS received on that day, though her subsequent actions indicated the urgency of correcting the record because of that filing

THE MOTHER

The mother is a stay-at-home mother with two young children, the youngest being the disabled toddler whose cost share is the subject of this hearing. The father took care of all the family's financial matters, each parent doing their respective roles within the family unit. While a client of NJEIS, the mother demonstrated engagement, advocacy, courtesy and truthfulness on behalf of her son and herself toward both the service coordinator and the State. The record shows that she interacted with Choe or the REIC a total of 13 times on provider issues and IFSP meetings. It is evident that she understood her role in the IFSP process, the area in which Choe provided the mother with an explanation of her rights and procedural safeguards.

The family was contacted by Choe 12 times to obtain their financial information prior to 8/12/11. Because they did not understand the basis of the cost share, never having the father's self-employment status explained pertaining to the cost share, both mother and father complied with every request. Their actions provide the best proof of their innocence regarding their right to appeal the cost share without exhausting options at the local unit level. They paid full fee for their son's services from 7/1/10- 10/19/10 while awaiting the cost share determination. The mother refused the recommended additional IFSP services because the family could not afford the increased cost. At no time did the mother disagree with the IFSP recommendations, only the amount of money they would cost the family.

The mother's unexpected passivity concerning the cost share can only be attributed to her lack of knowledge about procedural safeguards, including due process. The record strongly confirms that she had no understanding of her rights in the determination of the cost share and co-pay process, which is why she did not act until the egregious mistake of the service coordinator concerning the start date of the increased cost share on 8/1/11, the triggering event for this hearing. The result of this error to the family was a bill of \$849.60 from NJEIS and the termination of all services to the child because the parents could not pay full fee. The mother sought out Choe for help, who told her to either use her insurance, pay for the services out of pocket, or appeal to the state. The directive on all of her Cost Participation Notices indicated that she had to exhaust dispute resolution at the local level before she could seek due process.

The mother attended the 11/29/11 IFSP meeting where services were formally terminated, though stopping 3 ½ months prior. Both parents believed that they were appealing their cost share through Roni Wolfson, which was why the father kept sending Wolfson the financial information she requested. In spite his efforts, the full fee status remained. Only when the mother filed for due process on 1/9/12 did NJEIS take the matter seriously, conducting a flurry of activity and suddenly finding the father to be self-employed. Mysteriously, a 2/23/12 Cost Participation Notice reversed the full fee status back to 8/1/11 and a \$20 co-pay. Sadly, this action held no benefit to the family in that there was no subsequent offer from the state to reinstate his services retroactive to August 2011.

ARGUMENTS OF LAW

POINT 1

NJEIS VIOLATED FEDERAL LAW BY NOT PROVIDING PRIOR WRITTEN NOTICE TO PETITIONER FOR THE COST SHARE, WHICH IS PART OF THE IFSP PROCESS.

“In general terms, prior written notice means someone is placed on notice of an act by putting it in writing and getting it to the person before the actions occurs.”

([http://wiki.answers.com/Q/What is-the definition for prior written notice.](http://wiki.answers.com/Q/What_is-the_definition_for_prior_written_notice.))

In the Individuals with Disabilities Education Act, Parts B and C, prior written notice to parents is required at each stage of the referral, evaluation, eligibility, program, and placement process before they occur. This notice informs the parent in adequate time to object to the proposed action if they disagree and invoke the appropriate procedural safeguards. The single difference, however, between Part B and Part C, other than the lead agency, is that Part C States have the option to charge parents a fee for the services provided on the individualized family service plan (IFSP). The ability of a state to charge fees for IFSP services does not remove that fee determination process from the prior written notice requirements of the rest of The Act. Fee determinations are an integral part of the IFSP meeting determinations. Development of goals, objectives and related services on the IFSP would be an exercise in futility if there was not also prior written notice to the family as to how much they would be required to pay in order to implement it. Therefore, the prior written notice requirement to the parents about their cost share is unseverable from the prior written notice requirement about their IFSP meeting and the provision of early intervention services.

In 2009, the Office of Special Education Programs (OSEP) advised the States that parental consent was required for payment arrangements on the IFSP as part of the individualized programming for the infant or toddler (Letter to Ingraham, 55 IDELR 19). This prior written notice requirement in Part C was expanded when the Part C regulations were published on September 28, 2011. At that time, the U.S. Department of Education explained that separate parental consent was needed for parents when billed for services so as to identify all funding sources for each service, including notification to parents under 34 CFR 303.520(b)(1)(iii). This restating of prior legislative intent confirms that a Notice of Cost Participation cannot be separate from IFSP agreements nor sent to parents after the agreement on IFSP needs. To do so forces the parent to pay full fee for IFSP services out of pocket until their cost share is determined at some undetermined later date.

NJEIS failure to provide prior written notice regarding the family’s cost share change, commencing on 8/1/11, violated federal law and is particularly onerous. The state knew it was going to raise the parental cost share before July of 2011 in order to maintain its financial viability to receive federal grant money from Part C. Yet, the record reflects that

no prior notice was given to the petitioner or any other family in the state. The record further suggests that prior written notice about the state increase in parent co-payment was not provided to the service coordinator, Susan Choe, or she would not have confused the start date of the increase. The cost share rate was raised after the 6/3/11 IFSP meeting and beyond the cost share policies in effect at that time. This error was later acknowledged when the state reversed that hourly rate increase of \$110 back to the amount in effect at the 6/3/11 IFSP meeting, or \$20.

New Jersey has completely separated its cost share system from the IFSP process. This was best exemplified when Choe threatened to close the file after the initial IFSP meeting due to the parents' delay in providing her with a 2009 tax return through no fault of their own. Similar to Part B of IDEA where a school district must have someone who can commit resources to implement the program developed at the IEP meeting, so the IFSP must establish at the meeting who will pay for the services delineated there. Otherwise, IFSP development is simply a futile exercise with no expectation of implementation. The difference in Part C procedures is that parents can be required to pay a share of the costs for service implementation. This must be finalized at the IFSP meeting and a second consent obtained from the parent which binds them to pay for the agreed upon out of pocket costs so that there is no undue delay in the implementation of the IFSP.

In the NJEIS system that confronted the family, their son's IFSP hung in limbo, with unacceptable risk that he would receive none of the IFSP services for a protracted time because of lack of prior written notice. And that is exactly what happened. Failure of NJEIS to provide prior written notice, both at the county and state level, resulted in harm to a developing child who needed the services but did not receive them from 8/16/11 until he aged out of early intervention in May of 2012. As a result of this profound structural flaw in the NJEIS funding system, the child was denied the services to which he was entitled as an eligible toddler under Part C of IDEA.

Pendency

There is a direct link between prior written notice requirements and the pendency provision of IDEA. 34 CFR Sec. 303.430 (e) requires that the status of a child during the pendency of any proceeding involving a due process complaint "must continue to receive the appropriate early intervention services...that is consented to by the parents." This stay-put provision freezes all aspects of the program, including funding and services, once prior written notice is received and the parent disagrees with the content of notice and files for due process. Without receipt of prior written notice the parent has no knowledge of the fee status until it has already taken effect. Providing a written notice after the fact is simply a billing procedure and cannot be used to substitute for prior written notice to which the parent either gives or withholds consent. In examining the language of N.J.A.C. 8:17-9.1, one finds that New Jersey's regulatory language for funding matters in its early intervention system is devoid of any consent requirements of the parent to the assigned cost share. The fee determination is done outside of public view or scrutiny and with NJEIS asserting a dictatorial role by holding:

“Early intervention services will not be provided in those instances in which a parent declines to pay the family cost share (N.J.A.C. 8:17-9.1 (d))”

The language of the New Jersey regulation on funding early intervention reflects an agency that believes it is immune from any form of transparency, functioning as the sole decision-maker in the calculation of the cost share for parents of disabled infants and toddlers. When examining NJEIS procedures as a whole, its failure to provide prior written notice to the parents regarding their co-pay removes parental right to prior written notice. This then negates the requirement for parental consent before the action takes place and removes any parental option of pendency so as to preserve the status quo. This position of NJEIS is not supported by either the legislative history of IDEA or the intent of its early intervention systems, which was subsequently supported by the New Jersey Legislature.

Based upon this analysis, prior written notice to parents is required for their cost share determination within New Jersey’s early intervention system.

POINT 2

PETITIONER DID NOT RECEIVE THE REQUIRED PROCEDURAL SAFEGUARDS FROM THE STATE OR COUNTY THROUGH WHICH TO APPEAL HER COST SHARE INCREASE.

At no time during petitioner’s involvement with NJEIS or Bergen County were the parents provided with the required information about procedural safeguards that would assist in appealing the cost share. This may be due to the fact that NJEIS has never had a due process hearing since its inception in 1993 and, therefore, does not fully understand the process. For whatever the reason, the facts are unequivocal regarding failure to provide the parent with the required procedural safeguards. Consider:

1. Mr. and Mrs. ___ were never informed of the basis for the amount of their cost share (34 CFR 303.521 (a) (2)). Though the father was self employed, which afforded him an alternative process for fee determination, this option was never explained by Susan Choe. Further, the State never informed the family of the NJEIS increase or its basis effective 8/1/11.
2. Petitioner was never informed about procedural safeguards when NJEIS imposed a fee (60229 FR, V. 76, No. 188). All Cost Participation Notices stated that efforts to resolve the dispute had to be exhausted at the local level before due process was requested. This misinformation violated their parental rights to seek due process in August of 2011 when the cost share error occurred and the amount increased. The testimonial and documentary record both make clear that the only appeal offered to the petitioner regarding the cost share was through Roni Wolfson, certainly not an impartial person and an employee of NJEIS.
3. NJEIS was required to inform the parents of their procedural safeguards by giving them a copy of their system of payments policies or providing them with an

- explanation of these safeguards through prior written notice (34 CFR Sec. 303.521 (e) (2)). It took neither option. They never received a copy of the Family Cost Participation Handbook payment policies, nor did Choe indicate in any of her documents that these policies were explained or provided to the parent.
4. New Jersey early intervention regulations place implied limitations on the procedural safeguards that are given to parents. N.J.A.C. 8:17-3.1 (a) (1) states that families are to receive the services, rights and **procedural safeguards to which they are entitled**. This language is again repeated relative to prior written notice at N.J.A.C. 8:17-4.1 (c) (3)). All procedural safeguards to which parents are entitled is to be provided in the written notice from the service coordinator 10 calendar days before a change in the provision of appropriate early intervention services. This phrase, “to which they are entitled” suggests a judgment call on the part of the service coordinator as to whether or not parents are entitled to certain procedural safeguards information. This is in stark contrast to 34 CFR Sec. 303.421 which contains no comparable language that limits what procedural safeguards information is given to the family whose infant or toddler is in early intervention.

Based upon the procedural safeguards for parents that are in federal law, when compared to the regulations and policies of NJEIS, support the assertion that the petitioner was not provided with the required information through which to appeal her cost share.

CONCLUSION

Based upon the foregoing material facts and arguments of law, Petitioner respectfully asks that its relief be granted in full as compensatory relief in this matter. N.J.A.C. 8:17-1.3 defines “compensatory early intervention services” to mean services that the NJEIS has approved for a child beyond age three to compensate for missed services that occurred, at no fault of the child or his or her parent, as a result of a failure of a practitioner to deliver such services during the child’s eligibility. Through no fault of either the child or the family, the child missed his early intervention services from 8/16/11- 5/23/12. Those services include at minimum:

1. 19 sessions of oral motor speech therapy;
2. 38 sessions of occupational therapy,
3. 38 sessions of direct instruction.

In addition, the parents seek reimbursement of all speech therapy sessions, at \$90 per hour, from September of 2011 to May of 2012, or 36 weeks, and \$140 for one session of private occupational therapy.

Respectfully submitted,
Marilyn Arons
Nonlawyer Representative
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Cc: Nashon Hornsby, Esq.
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Parent