

*This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.*

Pennsylvania

## Special Education Hearing Officer

### DECISION

Child's Name: A.A.

Date of Birth: [redacted]

Date of Hearing: April 20, 2011

### CLOSED HEARING

ODR No. 1658-1011JS

Parties to the Hearing:

Parent[s]

Sto Rox School District  
600 Russelwood Avenue  
Sto Rox, PA 15136

Representative:

Pro Se

Aimee Rankin Zundel, Esquire  
Law Offices of Ira Weiss  
445 Fort Pitt Boulevard, Suite 503  
Pittsburgh, PA 15219

Date Record Closed:

April 25, 2011

Date of Decision:

April 27, 2011

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student<sup>1</sup> is a transition-aged student in the above referenced school district (hereafter “District”). Student is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).<sup>2</sup> Student was determined to be eligible for extended school year (ESY) services for 2011, but Student’s Parent filed a due process complaint challenging the appropriateness of the ESY program proposed.

The parties were advised by letter of April 4, 2011 that since this case was expedited due to the ESY issue raised, the hearing would be completed in one day and the decision in this matter would be issued no later than April 30, 2011.<sup>3</sup>

The hearing convened in a single session on April 20, 2011, at which time both parties presented evidence in support of their respective positions. For the reasons which follow, I find that the program of ESY services proposed by the District is appropriate for Student under the applicable law; however, I will order the District to reconvene the IEP team to develop a plan to transition Student to the program where the ESY services will be provided, and to provide additional hours of ESY services to accomplish that transition.

### **ISSUE**

Whether the ESY program proposed by the District is appropriate to meet Student’s needs.

### **FINDINGS OF FACT**

1. Student resides with a Parent within the District. Student is eligible for special education as a student with autism, intellectual disability/mental retardation, and other disabilities. (Notes of Testimony (N.T.) 23-25, 52)
2. Student was most recently evaluated in late 2009-early 2010, and a Reevaluation Report (RR) issued in January 2010. The RR noted that Student used a picture schedule to transition between activities throughout the day and required prompting to begin a new activity. (N.T. 52; School District Exhibit (S) 1)

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<sup>1</sup> Student’s name and gender are not used in this decision to protect Student’s privacy.

<sup>2</sup> 20 U.S.C. §§ 1401 *et seq.*; *see also* 34 C.F.R. §§ 300.1 *et seq.*

<sup>3</sup> The actual decision due date of May 1, 2011, which is 30 calendar days after the April 1, 2011 request for due process (*see* Pennsylvania Special Education Dispute Resolution Manual § 1403, updated March 12, 2009), was stated on the record at the hearing (Notes of Testimony (N.T.) 104-05); in any event, this decision is issued before both dates.

3. Student experiences difficulties with changes to routine. For example, after Student was recently given a new eyeglass prescription, Student refused to wear eyeglasses. (N.T. 35-37)
4. Student's Individualized Education Program (IEP) was last revised in December 2010. That IEP included a plan for Student's transition to adulthood, as well as goals and short term objectives related to speech/language (understanding vocabulary and interactive social communication), activities of daily living, and pre-vocational/sorting tasks. Student was provided with wait time when asked a question, a one-to-one aide, and repetition of life skills instruction. (N.T. 54-55; S 3)
5. Student currently is placed in a full-time, non-residential autistic support program in a location outside of the District. (N.T. 52-53; S 3)
6. Student is eligible for ESY services. The IEP team discussed ESY services at the December 2010 IEP meeting but no decisions on programming were made at that time. (N.T. 42-43, 66, 68)
7. The principal of the school where Student currently attends notified the Parent in early February 2011 that Student could attend its ESY program for a 3½ week period, three hours per day, during July 2011. The Parent did not opt for this ESY placement. (N.T. 30-31; Parent Exhibit (P) 4)
8. The IEP team, including Student's Parent, agreed that Student needs to continue to work on the vocational goal in the IEP both during the school year and in the ESY program. (N.T. 43-44, 62-64, 72, 75-76)
9. The District, through the autistic support placement, obtained regression and recoupment data on Student's vocational goal between September 2010 and March 2011. Although the goal describes completion of tasks for fifteen-minute periods with fading prompts, the regression/recoupment data is reflected in terms of words correct per minute. (N.T. 65-68; S 3, S 4)
10. The Parent and District representatives discussed Student's 2011 ESY program further in January and February 2011. Student's Parent visited a number of adult vocational programs and chose one of those for Student to attend in 2011 with the possibility that Student could remain in that program for the 2011-12 school year. (N.T. 31-32, 35, 47, 63; P 3)
11. The District sent the Parent a Notice of Recommended Educational Placement (NOREP) dated March 4, 2011, proposing that Student's ESY program be provided by the adult vocational program chosen by the Parent for a 3½ week period, four hours per day. Students' Parent did not agree with the proposal and requested a program of 8½ weeks' duration. (N.T. 32, 75-76; P 5; S 6)

12. The District subsequently proposed providing Student with ESY services at the adult vocational program for four hours a day, five days a week, beginning on July 6 and continuing through August 19, 2011, a 6½ week period. Student would work on the vocational goal in the IEP. The NOREP setting forth this proposal is dated April 11, 2011. (N.T. 37, 77-78, 80; P 9; S 5, S 7)
13. Student's Parent ultimately did not accept the April 11, 2011 NOREP. (P 7, P 8)
14. If Student is provided with ESY services at the adult vocational program, Student will experience difficulty with the transition to a new environment. Additionally, Student will not have a one-to-one aide, unlike Student's educational programming for the past five years. (N.T. 37-39, 94-95)
15. Student's full-time autistic support placement concludes for the school year on June 6, 2011. (N.T. 96)
16. If Student returns to the current full-time autistic support placement for the 2011-12 school year, Student would return approximately one week after the ESY services would conclude on August 19, 2011. (N.T. 78, 82-83)
17. The adult vocational program operates 365 days a year and offers services based upon individual need. (N.T. 79-80)
18. The following exhibits were admitted into the record: P 1, P 3, P 4, P 5, P 7, P 8, P 9,<sup>4</sup> S 1 through S 9 (N.T. 102-03)

## **DISCUSSION AND CONCLUSIONS OF LAW**

As with all cases, it is important to recognize which party bears the burden of proof. Broadly stated, the burden of proof consists of two elements: the burden of production and the burden of persuasion. The burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005);<sup>5</sup> *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parent who requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in "equipoise." The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See generally David G. v. Council Rock School*

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<sup>4</sup> P 9 and S 7 are identical, and S 7 was substituted for P 9 to avoid duplication. (N.T. 102-03)

<sup>5</sup> The burden of production, "*i.e.*, which party bears the obligation to come forward with the evidence at different points in the proceeding," *Schaffer*, 546 U.S. at 56, relates to the order of presentation of the evidence.

*District*, 2009 WL 3064732 (E.D. Pa. 2009). The witnesses who testified in this case were credible, and the testimony as a whole was essentially consistent, reflecting that the parties' disagreement is not focused on any material factual disputes. Everyone agrees that Student is eligible for ESY services, and the disagreement is limited to the parties' views on whether the ESY program proposed is appropriate to meet Student's individual needs.

The law requires the provision of ESY services which are necessary to provide a free, appropriate public education (FAPE). 34 C.F.R. § 106(a)(1). In determining whether the proposed program is appropriate, the general principles applicable to special education must be applied. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that FAPE requires the provision of personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The *Rowley* standard is met when a child's program provides him or her with more than a trivial or *de minimis* educational benefit. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988). The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). School districts meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is "'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

Public agencies may not unilaterally limit the type, amount, or duration of ESY services. 34 C.F.R. § 106(a)(3). Additionally, ESY services must be provided in accordance with the child's IEP. 34 C.F.R. § 106(b). In the proposed ESY program, Student would work on a vocational goal in Student's IEP and in a vocational program in a location approved by the Parent. (FF 8, 10, 12) That program offers services based upon individual need. (FF 17) Thus, the proposed ESY program is individualized for Student.

The District contends that its program as set forth in the April 11, 2011 NOREP is appropriate,<sup>6</sup> while the Parent claims that Student requires a summer program of longer duration than the 6½ weeks proposed. The Parent did not contest the determination that Student will work on the vocational goal in the IEP during the ESY program,<sup>7</sup> and expressly stated that she was not challenging the appropriateness of that program. (N.T. 102)

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<sup>6</sup> The District also suggested that the original 3½ week ESY program was appropriate for Student. (N.T. 100) However, to its credit, the District maintained its willingness to provide 6½ weeks of ESY services in the vocational program (N.T. 100-01), and this is the proposal in the NOREP which prompted the filing of a due process complaint. Accordingly, this hearing officer finds this 6½ week offer is the appropriate one to review and consider.

<sup>7</sup> The Parent did express confusion and concern over what goals would be the focus of Student's ESY program, however. (N.T. 90-91, 93) The April 11, 2011 NOREP refers to "ESY goals identified in the IEP" (S 7 at 2), yet Student's current IEP does not specify what goals are related to ESY services for Student. This circumstance, coupled with the uncertainty in the report of the regression/recoupment data

As proposed, Student will not be receiving any educational programming from June 6, 2011 through July 6, 2011, a period of just over four weeks; and, again from August 20, 2011 for a one-week period. (FF 12, 15, 16) The Parent has concerns that the four-week gap between the end of the 2010-11 school year and the start of the ESY program is too long, and that the 6½ week duration of the ESY program is too short. The difficulty in reviewing these concerns with the proposed program is that there is no evidence in the record establishing a specific duration or timing of ESY services which is required in order to provide FAPE to Student. Even the available regression/recoupment data, imperfect as it may be (FF 9), provides little help in determining the timing and duration of ESY services necessary for Student. The U.S. Supreme Court has made it clear that the party challenging the program, in this case the Parent, bears the burden of presenting such evidence. The Parent's own testimony that Student "could regress in anything ... after a long, long period of time" (N.T. 35) is undoubtedly an accurate prediction and might support a conclusion that more services would benefit Student, as they would likely benefit any student. Nevertheless, the record lacks a foundation for determining that a longer period of ESY services is necessary in this case. In short, after careful review of the record, this hearing officer is unable to conclude that the District's proposed ESY program of 6½ weeks is of insufficient duration to provide Student with FAPE.

There is, however, one particular factor which was apparently not expressly considered by Student's IEP team in determining the ESY program for 2011.<sup>8</sup> Student experiences considerable difficulties with transitioning to new environments, and the ESY placement is unknown to Student. (FF 2, 3, 14) Further, Student will not be provided with a one-on-one aide in this vocational program, which is a significant change for Student (FF 14) and which will also require careful planning and preparation. This consideration is particularly crucial given the lengthy time period between the end of the school year for Student and the first day of the proposed ESY program. (FF 12, 15) This hearing officer further concludes that the absence of such a plan for transitioning Student to the ESY placement is encompassed within the Parent's stated concerns with the April 11, 2011 ESY proposal.

It is nevertheless difficult to determine the amount of time which would assist in Student's successful transition to this new program so that Student may derive meaningful educational benefit from the hours provided. In this hearing officer's estimation, it is reasonable to conclude that Student will need a minimum of ten hours of ESY services for gradual transition purposes, or approximately one half of the total hours of the first week of ESY services at the vocational program, to be provided over the four week period before the ESY program proposed by the District for Student begins. For these reasons, the District will be required to provide, in addition to the ESY hours offered in the April 11, 2011 NOREP and determined herein to be appropriate, no less than ten hours of services to be used for transitioning Student to the new placement. Those hours shall be provided over the four-week time period immediately

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(FF 9), helps to explain the Parent's inability to make an informed decision on whether to accept the April 11, 2011 NOREP at the time it was first provided to her.

<sup>8</sup> This hearing officer recognizes that the IEP team may not have had an adequate opportunity in this case to discuss whether a provision for transition would be necessary.

preceding the ESY program start date of July 6, 2011 and must be hours of services which are directly provided to Student. Any hours which the IEP team spends developing the transition plan are not included in this calculation.

The District will, therefore, be directed to reconvene the IEP team within fifteen days to develop a plan for transitioning Student to the new program where the ESY services will be provided, and to determine how the additional ten hours of ESY services will be provided.

### **CONCLUSION**

The ESY program proposed by the District on April 11, 2011 is appropriate for Student, lacking only a plan for transitioning Student to the new placement. The IEP team will be directed to convene to develop such a transition plan.

### **ORDER**

In accordance with the foregoing findings of fact, discussion, and conclusions of law, it is hereby **ORDERED** as follows.

1. The Parents' request for additional ESY services in the form of an additional week or weeks of programming is denied.
2. Within 15 days of the date of this decision, the District is ordered to convene the IEP team to consider an appropriate plan to gradually transition Student to the vocational placement, consistent with the discussion above. Student shall be provided with ten hours of ESY services for purposes of transition in addition to the hours proposed by the April 11, 2011 NOREP and determined herein to be appropriate.
3. The District is not ordered to take any further action.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed.

*Cathy A. Skidmore*

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Cathy A. Skidmore  
HEARING OFFICER

Dated: April 27, 2011