

*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: F.H.

Date of Birth: [redacted]

Dates of Hearing: May 17, 2010

### CLOSED HEARING

ODR No. 01002-0910-AS

Parties to the Hearing:

Parent[s]

Ms. Andrea Chipego  
Director of Pupil Services  
Radnor Township School District  
135 S. Wayne Avenue  
Wayne, PA 19087

Date Transcript Received:

Date of Decision:

Hearing Officer:

Representative:

Caryl Oberman, Esquire  
Grove Summit Office Park  
607 A North Easton Road  
Willow Grove, PA 19090

Sarah Davis, Esquire  
1301 Masons Mill Business Park  
1800 Byberry Road  
Huntingdon Valley, PA 19006

May 22, 2010

May 26, 2010

Cathy A. Skidmore, Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

The parents of [Student] (hereafter Student)<sup>1</sup> filed a complaint in due process which was received by the Office for Dispute Resolution on April 26, 2010. The complaint included claims related to extended school year (ESY) services, specified as an expedited claim, and also challenged portions of Student's prior and future educational program. An initial hearing date was scheduled for May 17, 2010 before a different hearing officer, who asked the parties to submit written briefs regarding her authority to consider ordering a residential placement in the context of an expedited ESY hearing.<sup>2</sup> The parties complied with that request but no ruling was issued. The District also filed a motion to bifurcate the ESY claim from the remaining issues in these proceedings, which was opposed by the parents. The motion to bifurcate was granted,<sup>3</sup> although the parties and the hearing officer also discussed proceeding with all of the issues on a non-expedited basis.

This case was reassigned to this hearing officer on May 14, 2010. After review of the due process complaint and the parties' ESY filings, and after discussion with the former hearing officer, this hearing officer met with counsel off the record prior to convening the hearing on May 17, 2010. Counsel for the District strenuously objected to proceeding on the expedited ESY issue on May 17, 2010, claiming prejudice based upon prior communications from the former hearing officer as well as the expectation that the ESY issue would be decided on the basis of briefs and that the remaining issues would be heard beginning on May 17, 2010.<sup>4</sup> (N.T. 19-21) This hearing officer concluded that, because the parents had not waived their right to an expedited hearing and further because there had been no determination on the authority of the hearing officer to hear the ESY issue under the circumstances, the hearing would proceed on May 17, 2010 solely on the ESY claim. (Notes of Testimony (N.T.) 21. This hearing officer further found no limitation on her authority to hear and decide a residential placement issue within the context of an ESY proceeding, and in addition, considered the District's contention that the placement issue for the ESY claim (although not any other issues)

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<sup>1</sup> Student's name and gender are not used in the body of this opinion in order to protect Student's privacy.

<sup>2</sup> See 22 Pa. Code § 14.132(e) (affording parents an expedited due process hearing where they disagree with an ESY recommendation); Pennsylvania Special Education Dispute Resolution Manual (2009), § 1403 ("All ESY expedited due process hearings must occur and a Hearing Officer decision must be issued within thirty (30) school days of the date the hearing is requested.").

<sup>3</sup> See Scheduling Order of April 30, 2010; Notes of Testimony (N.T.) 18. This hearing officer shared the concern of the former hearing officer that consideration of a residential placement within the context of an expedited hearing process would be difficult given the time constraints placed on issuing such decisions.

<sup>4</sup> In this hearing officer's estimation, the District and its counsel did not give the impression of being at all unprepared to address the ESY issue on May 17, 2010. The parents and their counsel likewise appeared to be well prepared to address the ESY issue on that date, and did not raise an objection to proceeding on the expedited claim. Although both parties stated on the record that certain witnesses who would have provided helpful evidence on the ESY issue were not available on May 17, 2010 (N.T. 278-79), the necessary limitation on the scope of the hearing affected both parties. I find that sufficient evidence was presented to enable me to make a timely, informed decision on the ESY issue within the strict constraints placed on expedited cases.

were related, which suggested a lack of substantial prejudice to the District in proceeding in this manner. (See Email message from counsel for the District to the former hearing officer dated April 29, 2010.) After hearing argument from counsel on the determination of the scope of the May 17, 2010 hearing, the matter proceeded on the ESY issue only in one session held that date.<sup>5</sup> The transcript was received by the hearing officer on May 22, 2010.

For the following reasons, I find that the District's recommendation for Student's ESY programming for 2010 is appropriate.

### **ISSUE**

Whether or not the District's proposed ESY program for 2010 is appropriate for Student.

### **FINDINGS OF FACT**

1. Student was born on [redacted] and is a resident of the District. Student is eligible for ESY services. (Notes of Testimony (N.T.) 29-30)
2. Student has been identified as eligible for special education in the category of autism with reported delays in speech and language, social, cognitive, behavioral, and physical development. Student's autism has been described as severe, and Student has significant needs. (N.T. 84, 188; Parent Exhibit (P) 46; S 35)
3. On January 29, 2010, the principal of the Approved Private School (APS) where Student attends a day program sent a letter to the parents and the District outlining a proposal for Student's ESY program for 2010. Attached to this letter were a summary profile which reflected data collected on three of Student's IEP goals/short-term objectives on December 14, 2009 (pre-holiday), on January 4, 2010 (post-holiday), and on January 18, 2010 (two weeks post-holiday). Student showed regression on each of these goals/objectives from December 14 to January 4, and by January 18 Student had not recouped the performance level demonstrated on December 14 on these short-term objectives. The reasons for the ESY recommendation were both fear of regression and acquisition of critical skills. The proposed ESY program is very similar to that provided in 2009. (N.T. 33-37; School District Exhibit (S) 21)

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<sup>5</sup> The District had filed a motion *in limine* to preclude evidence relating to events occurring before April 28, 2009, attaching a settlement agreement signed by the parents on that date which released the District from any and all claims accruing before that date. This hearing officer granted the motion for purposes of the May 17, 2010 hearing over objection of the parents. (N.T. 22, 24) The parents were permitted to present evidence relating to Student's educational programming and progress during the summer of 2009 which was certainly relevant to the 2010 proposed program, but this hearing officer concluded that evidence about events occurring before April 2009 was not sufficiently material to the narrow issue presented at the May 17, 2010 hearing.

4. Student's current IEP was developed on January 29, 2010 and revised on February 19, 2010 and April 12, 2010. When this IEP was developed, Student had not yet achieved all of the goals and short term objectives in the prior IEP. The current IEP contains eight annual goals with a total of 39 specific short term objectives in the eight domains: 11 short-term objectives/benchmarks in the Communication domain; 4 short-term objectives in the Socialization domain; 6 short-term objectives in the Self-Help domain; 3 short-term objectives in the Community Based Instruction Domain; 2 short-term objectives in the Positive Behavior Support domain; 5 short-term objectives in the Gross Motor and Fine Motor domain; 6 short-term objectives in the School-based Skills domain; and 2 short-term objectives in the Recreation and Leisure domain. Student's IEP also includes a number of listed modifications and items of specially designed instruction, as well as related services in the form of transportation, speech and language therapy, physical therapy, and pragmatic engagement therapy. Student's placement is full time autistic support. (N.T. 58, 265-67; P 53; S 20)
5. Student has a severe speech and language delay in both receptive and expressive language, and Student is essentially non-verbal. Student's behavior is quite variable. (N.T. 86, 100, 184, 187-88)
6. In addition to the special education and related services provided at the APS, Student currently receives wraparound services and also has an Individual Support Plan through the Office of Mental Retardation which provides home and community services. Student has additional private speech therapy and occupational therapy, and Student's various services are coordinated between home and school through extensive consultation. (N.T. 83-85, 91, 95, 110-11, 127-31, 159-64, 184-85; S 62, 63, 64)
7. The ESY program proposed would begin on July 6, 2010 and end on August 26, 2010 with no school from July 23 through July 30, 2010. Student would receive 32 6-hour days of ESY services with essentially the same special education and related services as in the current Individualized Education Program (IEP). However, the APS proposed to collect data only on Student's short-term objectives/benchmarks in the following domains: communication, social skills, behavior, and daily living skills.<sup>6</sup> (N.T. 34-35, 58-66; P 45; SD 21)
8. With the proposed ESY program, Student would also be provided with additional hours of speech therapy/ pragmatic engagement therapy, and consultation with a behavioral consultant at home and at the APS. (N.T. 62-65)
9. Student's progress on IEP goals and objectives has historically been slow and variable. In a comparison of Student's progress on the short-term objectives/benchmarks in the April 2009 IEP during the first data reporting period of April 2, 2009 to July 2, 2009 with that in the second data reporting period of

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<sup>6</sup> The APS principal testified that it would collect data on all of Student's IEP goals if requested by the parents or the District. (N.T. 35-36, 61)

July 2, 2009 to October 2, 2009 (essentially demonstrating regression and recoupment after the 2009 ESY program), Student showed regression in the level of performance on the following short-term objectives/benchmarks.

- 1.1 Following one-step direction to stand up  
Following one-step direction to throw away
- 1.2 Independently follow a schedule for snack
- 1.4 Verbally approximate “help” independently
- 1.7 Verbally approximate “up” with partial prompting
- 1.8 Request an item by verbal approximation of “I want” independently
- 2.1 Respond to greetings by verbally approximating “hi” and “bye” independently
- 2.3 Follow another’s gaze to gain information independently
- 3.2 Perform dressing routine independently
- 4.4 Exchange money for purchases independently
- 7.1 Respond to “get” a familiar object (water, coat) independently
- 7.2 Sorting objects by attribute (light, dark) independently
- 7.3 Imitate actions and simple body movements in group activities (turn around, jump) independently

(N.T. 37-44, 55-57, 249-50, 267-71; P 43, 44; S 13)

- 10. Of the short term objectives/benchmarks listed in paragraph 5, Student had not recouped the level of performance from the first data period by January 2010 with respect to some or all of the skills in numbers 2.1, 3.2, 7.2, and 7.3. (N.T. 39-43; P 44; S 33)
- 11. On many of the short-term objectives/benchmarks not listed in paragraph 5 above, Student made progress on or maintained the level of performance in a comparison of the same time periods: Numbers 1.3, 1.5, 1.6, 1.9, 2.2, 2.4, 3.1, 3.3, 3.4, 3.5, 3.6, 4.1, 4.2, 4.3, 5.1, 5.2, 6.1, 6.2, 6.4, 6.5, 7.4, 7.5, 8.1, 8.2. (P 44)
- 12. Student has made appropriate progress on speech and language goals during the 2009-10 school year. (N.T. 182-84, 213-14, 227-34, 237-38, 261; S 33) The District has recently introduced the Picture Exchange Communication System (PECS) and all of Student’s speech and language therapists work together to coordinate those services throughout Student’s day at school and at home. (N.T. 184-86, 227-34; Hearing Officer Exhibit (HO) 2)
- 13. Student has also demonstrated progress during the first data reporting period on a number of the short-term objectives in the current IEP. (S 32)

14. Student's progress on many of the goals and short-term objectives on the current and most recent IEPs is not necessarily demonstrated in the home environment or in the community. At home and in the community, Student does not have an awareness of personal safety and requires constant 1:1 supervision. (N.T. 75-77, 88-90, 101-02, 112-13, 133-34, 136-44, 147-49)
15. Transitions are very difficult for Student. For example, Student enjoys riding on the bus and often does not want to get off the bus after school. When Student transitions to new environments or situations, Student's problematic behaviors (such as tantrums) increase and Student appears anxious. (N.T. 135-36, 147-48, 188-89, 240)
16. The parents believe that Student requires a residential placement for ESY services. They raised the possibility of residential placement in a telephone conversation with the principal of the APS before the April 2010 IEP meeting. The mother credibly testified that she believed the APS principal recommended residential programming for Student. (N.T. 151-56, 167-71, 275-78) The principal of the APS provided information to the parents about at least one such facility but stopped short of specifically recommending a residential placement for Student. (N.T. 275-78) The District does not believe a residential placement is necessary for Student to be provided with FAPE in the 2010 ESY program. (S 21; HO 2)
17. The following exhibits were admitted during the May 17, 2010 hearing: P 43, P 44, P 45, P 46, P 53; S 15, S 20, S 21, S 32, S 33, S 34, S 35, S 60, S 61, S 62; HO 1, HO 2. Additionally, counsel were invited to, and did, submit written closing statements on May 19, 2010.

## **DISCUSSION AND CONCLUSIONS OF LAW**

The burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden in this case rests with the parents who requested the hearing in this case. 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.<sup>7</sup>

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). There is no question here that Student is eligible for ESY services. (Finding of Fact (FF) 1) The real dispute

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<sup>7</sup> 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 District*, 2009 WL 3064732 (E.D.Pa. 2009). This hearing officer found each of the witnesses to be generally credible, except as specifically noted in this decision.

here is whether the District's proposed program of ESY services for 2010 is appropriate for Student. The District contends that its program is appropriate, while the parents claim that Student requires a residential placement for the summer. (N.T. 25-29, 279-87; HO 1, 2; *see also* Parents' Post-Hearing Memorandum; District's Written Closing)

Public agencies may not unilaterally limit the type, amount, or duration of ESY services. 34 C.F.R. § 106(a)(3). ESY services must also be provided in accordance with the child's IEP. 34 C.F.R. § 106(b). Pennsylvania regulations provide additional guidance for determining a child's eligibility for ESY services, setting forth seven specific factors for the IEP team to consider:

(i) Whether the student reverts to a lower level of functioning as evidenced by a measurable decrease in skills or behaviors which occurs as a result of an interruption in educational programming (Regression).

(ii) Whether the student has the capacity to recover the skills or behavior patterns in which regression occurred to a level demonstrated prior to the interruption of educational programming (Recoupment).

(iii) Whether the student's difficulties with regression and recoupment make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives.

(iv) The extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted.

(v) The extent to which a skill or behavior is particularly crucial for the student to meet the IEP goals of self-sufficiency and independence from caretakers.

(vi) The extent to which successive interruptions in educational programming result in a student's withdrawal from the learning process.

(vii) Whether the student's disability is severe, such as autism/pervasive developmental disorder, serious emotional disturbance, severe mental retardation, degenerative impairments with mental involvement and severe multiple disabilities.

22 Pa. Code § 14.132(a). School districts are not required to provide ESY based upon "[t]he desire or need for ... respite care... [or] the desire or need for other programs or services that, while they may provide educational benefit, are not required to ensure the provision of a free appropriate public education." 22 Pa. Code §14.132 (c)(3).

I find nothing in the statute or regulations or existing case law which would preclude a school district, or a hearing officer or court, from determining in the context of ESY services that a residential placement is necessary to provide FAPE to a student.

In determining whether the proposed program is appropriate, the general principles applicable to special education must be applied. In *Bd. of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that the FAPE requirement is met by providing 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). The Student's IEP must, of course, be responsive to the child's identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. §300.324.

The parents do not challenge the appropriateness of the goals and short-term objectives in the current IEP, nor do they contend that the specially designed instruction and related services set forth therein fail to address Student's significant needs. Instead, they argue that based upon the District's data after virtually the same program was provided in 2009, the proposed 32-day non-residential ESY program contains too few hours and too many transitions to sufficiently address Student's needs. (Parent' Post-Hearing Memorandum)

It is evident that Student failed to make progress and even demonstrated some regression on several of the short-term objectives in the then-current IEP over the summer of 2009. (FF 9, 10) Nevertheless, it is also apparent that Student did make progress on a number of the other short-term objectives in that IEP over the same timeframe. (FF 11) It is also important to keep in mind that strict comparison of data collection over two reporting periods cannot tell the whole story of how Student did over the summer of 2009.<sup>8</sup> Additionally, there appears to be no dispute that Student's educational progress in general has historically<sup>9</sup> been variable, as has the frequency and type of Student's problematic behaviors. (FF 9) For all of these reasons, and for purposes of this decision, the evidence of Student's inconsistent performance does not necessarily mean that the 2009 ESY program was not successful, or that a similar program in 2010 will not provide FAPE.

As noted, the IEP itself was not challenged in this expedited proceeding. The proposed program is highly intensive and would implement Student's current IEP in its entirety, going well beyond the school day, with no more than a one-week break before, during, or after the ESY program. (FF 7, 8) The proposed ESY program would further provide continuity of the current educational program to Student. It is also not insignificant that there was no specific evidence offered on what a more restrictive residential placement would offer to Student to permit meaningful educational benefit that is not contained in the ESY proposal by the District.<sup>10</sup> After careful consideration, I am compelled to conclude that there simply is not sufficient evidence that a more

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<sup>8</sup> Once again, I recognize that the expedited nature of the hearing necessitated a limitation on the scope of the hearing.

<sup>9</sup> This conclusion may appear to contradict the ruling that no evidence of events occurring prior to April 2009 would be admitted at the May 17, 2010 hearing. However, this conclusion is supported by the record as it presently exists and, moreover, does not appear to be in serious dispute.

<sup>10</sup> See n. 8, *supra*.



restrictive placement, including a residential placement, is necessary to provide FAPE to for Student for the 2010 ESY program.<sup>11</sup>

I recognize that there is a conflict in the testimony of whether a residential placement was recommended to the parents. However, regardless of the nature of such conversations, the narrow issue in this decision is whether the proposed ESY program is appropriate for Student for the summer 2010. For the reasons explained above, I find that the District's proposed program is reasonably calculated to provide meaningful educational benefit to Student in accordance with the current IEP.

### **CONCLUSION**

The District's proposed ESY program for 2010 addresses Student's needs and is reasonably calculated to provide meaningful educational benefit. The District's proposal is, therefore, appropriate for Student.

### **ORDER**

In accordance with the findings of fact and conclusions of law as set forth above, the ESY program proposed by the Radnor Township School District for summer 2010 is appropriate for Student.

*Cathy A. Skidmore*

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Cathy A. Skidmore  
HEARING OFFICER

May 26, 2010

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<sup>11</sup> Again, the parties will have the opportunity to present relevant evidence relating to past and future programming in a full hearing on the merits of those claims.