

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

EXPEDITED DUE PROCESS HEARING

Name of Child: L.L.

ODR #01839-10-11-JS

Date of Birth:
[redacted]

Date of Hearing:
June 3, 2010

OPEN HEARING

Parties to the Hearing:
Parent[s]

Representative:
Pro Se

West Chester Area School District
829 Paoli Pike
West Chester, PA 19380

Sharon Montanye, Esquire
Sweet, Stevens, Katz and Williams
331 Butler Avenue Box 5069
New Britain, PA 18901

Date Transcript Received:

June 6, 2011

Date of Decision:

June 6, 2011

Hearing Officer:

Linda M. Valentini, Psy.D., CHO

Background

Student is a high-school-age District resident with Down Syndrome who is entering the last year of eligibility for special education services. The current matter concerns an expedited due process request from the Parents addressing the question of whether their child's attendance at the summer camp that had been District-funded as the Extended School Year (ESY) program in previous years should again be provided for summer 2011. The District maintains that the ESY program it is offering is appropriate and necessary given Student's age and current instructional needs.

Issue

Is the ESY program being offered to Student by the District appropriate?

Findings of Fact

1. Student qualifies for Extended School Year services. [NT 29; S-2]
2. Student will turn 21 during the coming school year. [NT 16]
3. For the past eight summers Student's ESY has been provided at a special needs day camp through funding by the District. [NT 12, 15]
4. The Parents and Student would like Student to attend this camp for ESY one final summer; Student loves the camp. [NT 13]
5. Student would be assigned to the 18-21 year old group at the camp. Campers engage in various activities such as going into the community to eat, attending baseball games, preparing meals, learning and practicing camping skills during several overnight stays, picking crops at a farm, shopping at the mall, running the concession stand at the camp show and visiting a senior citizen home. [NT 17-19]
6. The camp is staffed largely by college students, and the camp does not implement the campers' IEPs. [NT 20]
7. The camp does not provide reading instruction nor does it have job coaches. [NT 23-24]
8. The camp does not collect data or do progress monitoring on goals. [NT 22]
9. For summer 2011 ESY the District has proposed the Transitional Living Program [Apartment Program] which would run 5 days per week from June 27, 2011 through July 29, 2011, from 9:00 am to 2:00 pm with the related services of speech/language, job coaching, and transportation. [S-4]

10. Student's current IEP, dated April 15, 2011, carries annual goals related to making conversation with peers and adults and asking for help as needed, mastery of employment skills, following written, verbal and pictorial directions for cooking and cleaning, functional reading [for example, product labels] and functional math [for example keeping records in a checking account]. [S-2]
11. Supportive services in Student's IEP include speech/language, job coaches, and vocational specialist. [S-2]
12. During the past school year Student has participated in the Apartment Program. [NT 28, 30]
13. In a real apartment setting a group of eight students learn cooking, cleaning, apartment maintenance, food shopping, nutrition, budgeting – the skills necessary for independent adult living. [NT 30-31]
14. The students in the Apartment Program also go out twice a week to volunteer at various job sites close by in the community to acquire job skills and improve social skills. [NT 31-34, 37]
15. This past year Student's work experiences were at a thrift shop and an assisted living facility. [NT 41-42]
16. The students are taught functional academics, working on reading and math that they use in their everyday lives. [NT 35-36]
17. Student enjoys the program. [NT 38]
18. As of April 2011 Student's Vocational Exploration Progress Report from the job coach noted that Student displayed appropriate hygiene and grooming, followed safety rules, showed independence, and sought help from staff "part of the time" which translated into 3 out of 5 times. Student followed directions, used appropriate social behavior, accepted supervision, stayed with task until completion and transitioned between tasks "most of the time" which was 4 out of 5 times. Student was always prompt. [NT 42; S-6]
19. The April 2011 progress report shows improvement from Fall 2010. [S-6]
20. Over the summer Student needs to maintain the work skills gained during this past school year. [NT 48]
21. As this is the last summer before Student goes into the adult world, the District believes that the skills that will be worked on and maintained are critical for Student's development and transition. [NT 52]

22. Student will not be placed in the Apartment Program next school year. [NT 54-55]
23. The Needs identified in Student's last Evaluation Report were functional reading skills, functional math skills, vocational skills, practice of daily living skills, self-advocacy, independence on stairs and effective communication. [S-1]

Discussion and Conclusions of Law

In November 2005, the U.S. Supreme Court held the sister burden of proof element to the burden of production, the burden of persuasion, to be on the party seeking relief. However, this outcome determining rule applies only when the evidence is evenly balanced in " equipoise," as otherwise one party's evidence would be preponderant. *Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. *L.E. v. Ramsey Board of Education*, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). Thus, the party bearing the burden of persuasion must prove its case by a preponderance of the evidence, a burden remaining with it throughout the case. *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006).

Here, the Parents requested this hearing and were therefore, assigned the burden of persuasion pursuant to *Schaffer* and also bore the burden of production. The Parents did not meet their burden of persuasion and could not prevail, given the preponderance of the evidence in the District's case and the resulting lack of evenly balanced evidence between the parties.

Legal Basis:

Having been found eligible for special education, Student is entitled by federal law, the Individuals with Disabilities Education Act as Reauthorized by Congress December 2004, 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; provided in conformity with an Individualized Educational Program (IEP). A student's special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (*Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. PA. 1996)). Districts need not provide the optimal level of service, maximize a child's opportunity, or even set a level that would confer additional benefits. What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

Acknowledging that some students may require programming beyond the regular school year, the federal legislature deemed that Extended School Year services are to be provided to an eligible student if necessary to assure that the student receives a free, appropriate public education (FAPE). 34 C.F.R. §300.106(a)(2). Pennsylvania regulations provide additional guidance for determining ESY eligibility, requiring that the factors listed in 22 Pa. Code §14.132 (a)(2) (i)—(vii) be taken into account.

22 Pa. Code § 14.132(a)(2) (i)—(vii) provides in relevant part:

(a) In addition to the requirements incorporated by reference in 34 CFR 300.106 (relating to extended school year services), school entities shall use the following standards for determining whether a student with disabilities requires ESY as part of the student's program:

(1) At each IEP meeting for a student with disabilities, the school entity shall determine whether the student is eligible for ESY services and, if so, make subsequent determinations about the services to be provided.

(2) In considering whether a student is eligible for ESY services, the IEP team shall consider the following factors; however, no single factor will be considered determinative:

(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.

(b) Reliable sources of information regarding a student's educational needs, propensity to progress, recoupment potential and year-to-year progress may include the following:

(1) Progress on goals in consecutive IEPs.

(2) Progress reports maintained by educators, therapists and others having direct contact with the student before and after interruptions in the education program.

(3) Reports by parents of negative changes in adaptive behaviors or in other skill areas.

(4) Medical or other agency reports indicating degenerative-type difficulties, which become exacerbated during breaks in educational services.

(5) Observations and opinions by educators, parents and others.

(6) Results of tests, including criterion-referenced tests, curriculum-based assessments, ecological life skills assessments and other equivalent measures.

(c) The need for ESY services will not be based on any of the following:

(1) The desire or need for day care or respite care services.

(2) The desire or need for a summer recreation program.

(3) 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.

In determining whether the District has offered an appropriate ESY program, as is the case for determining whether a District has offered an appropriate IEP, the proper standard is whether the proposed program is reasonably calculated to confer meaningful educational benefit. Rowley "Meaningful benefit" means that an eligible student's program affords him or her the opportunity for "significant learning." *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3RD Cir. 1999).

Almost 30 years ago, in *Battle v. Pennsylvania*, 629 F.2d 269 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981), the federal courts declared unequivocally that school districts must determine ESY services on an *individualized* basis and consider all components of a student's educational needs. The Pennsylvania Department of Education Basic Education Circular on Extended School Year services specifically directs the IEP team to consider the extent to which students have mastered and consolidated specific skills. Further, the team must consider the extent to which a skill or behavior is particularly crucial for the student to meet the IEP goals of self-sufficiency or independence from caretakers.

Discussion:

The IDEA and Pennsylvania law are very clear on what ESY is supposed to accomplish. ESY is provided to prevent students from losing educational ground over a long break in schooling, such as during the summer. ESY is extended school year, and is not designed to provide recreational options for students no matter how attractive those options may be. In the case before me, Student's needs as articulated in the IEP will all be addressed in the District's proposed ESY program. As the District points out, this is a critical summer for Student, being the start of the last full year of Student's entitlement to a free, appropriate public education. Student has made progress toward independence and self-sufficiency but there is more progress to be made.

While I understand the Parents' desire for Student to have one last summer at the familiar and beloved childhood camp, I must follow the law, which in this case is unequivocally on the District's side. If the District proposes an appropriate program it must prevail, even if the option desired by the Parents would be better for one reason or another. I may not base my decision on "better", just on whether the District's offer is appropriate. Given Student's needs, and given the very brief period that remains to educate Student, the District's proposed ESY program is appropriate.

Conclusion

Based upon the evidence presented at the expedited due process hearing in this matter, and the applicable law relating to ESY eligibility and appropriate programs and services, this hearing officer concludes that the District has offered an appropriate ESY program to Student for Summer 2011. As the District has offered an appropriate program the District must prevail in this matter, and shall not be required to fund the summer camp program that the Parents and Student prefer, even though the camp was previously offered to Student in fulfillment of ESY in past years.

Order

It is hereby ordered that:

The Extended School Year program the District offered to Student for Summer 2011 is appropriate and therefore the District is not obligated to fund the summer camp program that the Parents and Student prefer.

Any claims not specifically addressed by this decision and order are denied and dismissed.

June 6, 2011

Date

Linda M. Valentini, Psy.D., CHO

Linda M. Valentini, Psy.D., CHO
Special Education Hearing Officer
NAHO Certified Hearing Official