

This is a redacted version of the original hearing officer decision. Select details may 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

ODR No. 8854/07-08 AS
LG , Student
Colonial School District

EXPEDITED HEARING

CLOSED HEARING

For the Student:

For the School District:
Colonial School District
230 Flourtown Road
Plymouth Meeting, PA 19452-1252

Sharon W. Montanye, Esq.
Sweet, Stevens, Katz & Williams
331 Butler Avenue
P.O. Box 5069
New Britain, PA 18901-5069

Date of Due Process Hearing Request:	May 14, 2008
Date of Expedited Hearing:	June 5, 2008
Date of Receipt of Transcript:	June 10, 2008
Date Record Closed:	June 10, 2008
Date of Expedited Decision:	June 12, 2008
Hearing Officer:	Daniel J. Myers

BACKGROUND

This case concerns how many weeks in duration the extended school year services (ESY) should be provided to this severely impaired teenager with autism, mental retardation, and pervasive developmental delay. The School District proposes 20 school days of ESY services during the month of July, while the parents request 39 school days over the months of June, July and August. For the reasons described below, I find for the School District.

ISSUE

Should Student receive 20, or 39, school days of ESY services for summer 2008?

FINDINGS OF FACT

1. Student whose date of birth is xx/xx/xx, is a xx year old resident of the Colonial School District (School District.) (N.T. 22) ¹ He is severely impaired, diagnosed with autism, mental retardation, and pervasive developmental delay. (N.T. 22) He is pleasant, friendly, outgoing, and seeks interaction with others. (N.T. 65, 105, 118)
2. Prior to January 2008, Student lived with his birth mother and step-father in a different Pennsylvania school district. While a resident of that school district, Student attended the nearby [redacted] Special Services School District in [neighboring state redacted]. (N.T. 23-24, 42) Student's pre-2008 ESY programs lasted all summer and constituted more than 20 days of summer programming. (N.T. 36, 43, 62)

¹ References to "N.T." refer to the transcript of the June 5, 2008 hearing session. References to "P," "SD," and "HO," refer to the exhibits of the parents, school district, and hearing officer, respectively.

3. On or about January 1, 2008, Student unexpectedly moved into the School District to live with his birth father and step-mother. (N.T. 39, 43, 46) Sometime in February 2008, Student began attending a Life Skills Support class in a School District school. (N.T. 30, 38; P1) On February 15, 2008, Student became excited at two different times, grabbing students and staff with great strength and not letting go. Security personnel were called to physically remove Student from the people he had grabbed. (P1; N.T. 24)
4. On February 26, 2008, Student began attending a multiple disabilities support class at the [redacted] approved private school (APS). (N.T. 106-107) Student has exhibited no problem behaviors since attending APS. (N.T. 116, 141) All parties agree that the content of Student's APS programming is appropriate for Student. (N.T. 24-25, 69, 93)
5. Student's 2007-2008 school year at the APS ends on June 13, 2008. (N.T. 33, 152) Student's 2008-2009 school year at the APS begins on September 2, 2008. (N.T. 152)
6. Student's parents believe that Student can tolerate only about one week of educational program interruption before he starts reacting with escalating negative behaviors. (N.T. 25, 37) Since attending APS, Student has had only one break of seven calendar (five school) days, after which no negative behaviors were reported. (N.T. 117-118, 125)
7. All parties agree that Student needs ESY services during summer 2008. (N.T. 121) During the summer 2008 ESY period, APS intends to transition Student from his current multiple disabilities support classroom to an autistic support

- classroom that Student will attend during the 2008-2009 school year. (N.T. 109-113)
8. The School District proposes that Student receive 20 days of summer 2008 ESY programming between July 7 and August 1, 2008. (N.T. 25, 126, 152, 166; SD3) These are also the dates of APS's ESY program, which dates are administratively determined and simply dictated to APS's program supervisor. (N.T. 156) The cost of the APS ESY program is \$4,600. (N.T. 25) School District personnel believe that 20 days of ESY programming at APS is appropriate for Student. (N.T. 166) APS's program supervisor testified, based upon his observation of Student's behaviors since his February 26, 2008 admission, that Student's behavior will not be impacted negatively by the two summer programming gaps of June 13 to July 7, and August 1 to September 2. (N.T. 146, 148)
 9. Student's parents propose that Student attend the [private special needs] summer program, which will provide the same ESY services as APS, but for a longer duration (39 days) between June 23, 2008 through August 15, 2008. (N.T. 27, 31, 35-36) The cost of the program is \$6,675. (N.T. 33, 35)
 10. School District personnel have expressed to Student's parents that the program is not appropriate for Student, is too campy, and might set a precedent with respect to similar requests that the School District has denied in the past. (N.T. 26-27, 171)
 11. On May 13, 2008, Student's parents rejected the School District's ESY offer. The Office for Dispute Resolution received the request for expedited due process hearing on May 14, 2008. An expedited hearing was conducted in this matter on

June 5, 2008. I denied the School District's request to accommodate its APS witness by changing the hearing location and start time. (HO2) Parent exhibits P1 and P2 were admitted into the record. (N.T. 184) School District exhibits SD3 and SD4 were admitted into the record. (N.T. 184) I permitted the parties to submit any written closing arguments by June 9, 2008, and I received the transcript of the hearing on June 10, 2008.

12. At the due process hearing, the School District suggested that this case may be motivated by parental need for supervision of Student during the summer. Student's father works in an office outside the home, and his step-mother has an office in the home from which she engages full-time in [occupation redacted] activities. (N.T. 47, 63-64, 78-79) Student has a full-time aide on days when he is not at school, and his parents are in the process of arranging an after-school aide with a certified home health care agency. (N.T. 95)

DISCUSSION

Under the Individuals with Disabilities Education Improvement Act (IDEIA), the School District is required to provide a free and appropriate public education (FAPE) to all students who qualify for special education services. 20 U.S.C. § 1412 ESY services must be provided if the IEP team determines that the services are necessary for the provision of FAPE. 34 CFR § 300.309(2) ESY services are not to be based on the desire or need for day care or respite care services, a summer recreation program, or services that are not required to ensure FAPE. 22 Pa. Code § 14.132

The United States Supreme Court has held that, in an administrative hearing such as this, the burden of persuasion (which is only one element of the larger burden of proof)

is upon the party seeking relief, whether that party is the disabled child or the school district. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); In Re J.L. and the Ambridge Area School District, Special Education Opinion No. 1763 (2006) Of course, where any party has produced more persuasive evidence than the other party (regardless of who seeks relief), then the evidence is not in equipoise, and the Supreme Court's ruling is not at issue – in that case I must simply find in favor of the party with the more persuasive evidence, and Schaffer does not come into play.

In this case, because Student's parents challenge the School District's proposed ESY program and seek an additional duration of ESY services as relief, they bear the burden of persuasion. In Re L-M.B. and the East Penn School District, Special Education Opinion No. 1795 (2007) Student's parents contend that, because they are part of the IEP team, the School District cannot claim that the IEP team determined that Student requires only 20 days of ESY programming. They also argue that the School District provided no evidence regarding the impact upon Student of the eight week programming gap that will result from the School District's proposed 20 days of ESY. They note that 20 days over three months is clearly less programming than Student otherwise receives during the school year, and they contend that the School District has offered no evidence indicating why this is appropriate. They contend that long gaps in programming result not only in a loss of educational skills, but also in losses relating to posture, motor skills, swallowing function, dressing and bathing/toileting skills. Finally, Student's parents emphatically contend that they are not seeking babysitting services because they already have sufficient home health care services.

No rights are violated when the School District claims that the IEP team determined that Student requires only 20 days of ESY programming –it simply means that everyone else on the team except the parents made that determination. This expedited due process hearing, then, is the procedure that is followed in Pennsylvania when IEP team members disagree over ESY programming.

As I describe in greater detail below, neither party has provided evidence regarding either the educational impact of, or more importantly Student's educational need for, either 20 or 39 days of ESY services. Both parties agree that Student is eligible for, and requires, some ESY services. How many days of ESY services Student specifically needs, however, is not established in the record.

Student's parents credibly established that Student has a full-time aide on days when he is not at school, and his parents are in the process of arranging an after-school aide with a certified home health care agency (N.T. 95), which convinces me that their request is not based on the desire or need for day care or respite care services, or a summer recreation program. 22 Pa. Code § 14.132 Student's parents also credibly testified that, while resident of a different school district, Student attended ESY programs that lasted all summer and constituted more than 20 days of summer programming. (N.T. 23-24, 36, 42-43, 62) They further credibly established that their preferred ESY program, [redacted] summer program, will provide the same ESY services as APS, but for a longer duration (39 days) during summer 2008, beginning on June 23, 2008 and ending on August 15, 2008. (N.T. 27, 31, 33, 35-36)

It is also clear from the record that the School District is proposing 20 days of ESY services simply because that is the length of APS's summer program. APS's ESY

dates (July 7 and August 1, 2008) are administratively determined - they are not determined on the basis of Student's particular ESY needs. (N.T. 156) I also believe Student's parents' allegation that School District personnel expressed to Student's parents that [parents' preferred program] is not appropriate, is too campy, and might set a precedent with respect to similar requests that the School District has denied in the past. (N.T. 26-27, 171)

The problem in this case, as I mentioned earlier, is that neither party has provided evidence supporting its position on the particular issue of this case, i.e., whether Student needs 20, or 39, school days of ESY services for summer 2008. On one hand, nothing in the record indicates that the School District's proposal of 20 days is based upon Student's needs; rather it is clear to me that the School District's ESY proposal is based upon administrative concerns rather than Student's needs. On the other hand, while the record supports the undisputed conclusion that Student needs some ESY services, there is no evidence that he requires 39 days, rather than 20 days, of summer 2008 ESY services.

The fact that Student exhibited escalating negative behaviors while attending a Life Skills Support (LSS) class in the School District's school (N.T. 24, 30, 38; P1) indicates to me that the LSS class was inappropriate in the first place. I reach this conclusion from the fact that Student has exhibited no problem behaviors since attending appropriate programming at APS. (N.T. 116, 141) Thus, Student's February 2008 response to an inappropriate program does not help me determine the necessary duration of appropriate programming that Student requires during the summer. In addition, the fact that no negative behaviors were reported after a break of seven calendar (five school) days at APS this spring bolsters my conclusion regarding the appropriateness of APS, but

gives me no information regarding Student's specific need for either 39 days or 20 days of ESY services. (N.T. 117-118, 125)

The fact that Student's pre-2008 ESY programs in [redacted] lasted all summer and constituted more than 20 days of summer programming is not evidence of the duration of ESY services that Student needs. (N.T. 36, 43, 62) It might serve to corroborate an expert's opinion, if that expert believed that Student needed more than 20 days of ESY services; but by itself, the mere fact that [redacted] gave Student "20 + x" days of ESY services could simply mean that "20 + x" days is [redacted's] administratively convenient ESY duration. It doesn't prove that Student needed "20 + x" days of ESY services.

In a case somewhat similar to this, a child's parents preferred a particular summer camp program because it offered longer programming, with greater social skill and communication instruction, and in a more inclusionary environment, than the school district's proposed ESY program. In that case, the parents presented expert testimony that an interruption in programming of more than two weeks made educational recoupment more difficult. The parents failed, however, to submit any evidence from educational sources regarding either the inappropriateness of the school district's proposed ESY placement or the appropriateness of the parents' preferred summer camp. The hearing officer and the appeals panel agreed with the parents regarding the necessary length of the program, ordering that the ESY services should not have a break longer than two weeks after the conclusion of school or two weeks before the beginning of the following school year, but they found that the content of the school district's convinced ESY program and placement was appropriate. In Re T.G. and the New Hope-Solebury

School District, Special Education Opinion No. 1759 (2006) Unlike the New Hope-Solebury School District case, however, in this case there is no expert testimony even regarding the educational impact of an interruption in programming of more than two weeks.

In another ESY case, the parents of a 10th grade student with PDD-NOS and mental retardation were seeking compensatory education because they believed ESY services had been necessary (but not provided) over the past two summers, and that the Student generally lost some ground over the summer, while the school district presented contrary testimony by several of the Student's teachers. Because the parents presented scant evidence supporting their belief, however, the Appeals Panel felt constrained to conclude that the parents had not sustained their burden of proof. In Re E.K. and the Easton Area School District, Special Education Opinion No. 1727 (2006)

Finally, in a third ESY case that I find instructive, the parents' sole witness testified that Student lacked independent functioning skills that were needed for first grade while the school district's witnesses testified that consideration of Student's specific needs led the team to conclude that Student was not eligible for ESY. Again, the determining factor for the decision maker was the lack of evidence placed into the record by the party having the burden of proof, i.e., the parents, which then forced the decision maker to find for the school district. In Re L-M.B. and the East Penn School District, Special Education Opinion No. 1795 (2007)

The burden of persuasion turns out to be a very significant factor in this case. Neither party has offered evidence on the specific issue, i.e., why Student needs X days of ESY services as opposed to Y days of ESY services. With a dearth of relevant

evidence, I must find that the record on this issue is in equipoise. In cases such as this, where the evidence on an issue is in equipoise, the party with the burden of persuasion loses because that party (which seeks relief) has not submitted more persuasive evidence than the opposing party.

Accordingly, I find for the School District.

CONCLUSION

The evidence regarding the duration of ESY services that Student needs is in equipoise because neither party has submitted persuasive evidence as to why Student's particular needs require either 20 days of ESY services or 39 days of ESY services. With the evidence in equipoise, I must find that the party seeking relief has failed to meet its burden of persuasion. Accordingly, I will not grant the parents' requested relief of 39 days of ESY services and I will, instead, approve the School District's proposed 20 days of ESY services.

ORDER

The Student's requested relief of 39 days of ESY programming is DENIED.

The School District's proposed 20 day ESY program and placement is APPROVED.

Daniel J. Myers

Hearing Officer

June 12, 2008

Re: ODR No. 8854/07-08 AS
, Student
Colonial School District