

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: R.H.

ODR #3094/11-12-AS

Date of Birth:
[Redacted]

Date of Hearing:
May 16, 2012

CLOSED HEARING

Parties to the Hearing:
Parents

Representative:
David Arnold, Esquire
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West Conshohocken, PA 19428

School District of Philadelphia
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Philadelphia, PA 19130

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Date Transcript Received:

May 19, 2012

Date of Decision:

May 26, 2012

Hearing Officer:

Linda M. Valentini, Psy.D., CHO
Certified Hearing Official

Background

Student¹ is an elementary-school-age resident of the School District of Philadelphia [District] who is eligible for special education pursuant to the Individuals with Disabilities Education Act [IDEA]² under the classification of Autism and consequently a protected handicapped individual under Section 504 of the Rehabilitation Act of 1973 [Section 504],³ as well as the federal and state regulations implementing those statutes. Student's current placement, a private school [Private School] for children with Autism, is funded by the District.

The current matter concerns an expedited due process request⁴ from Student's Parents [Parents] who maintain that an IEP meeting to determine Student's Extended School Year [ESY] programming for Summer 2012 was not held on or before February 28, 2012 and a Notice of Recommended Educational Placement [NOREP] for ESY Services was not sent on or before March 31, 2012 as per Pennsylvania regulations, and that no IEP Meeting has been held to date regarding Student's 2012 ESY services. The Parents believe that the proposed ESY program in the current placement is not appropriate, and in a subsequent hearing intend to challenge the appropriateness of the placement overall.

Issue

Is the Summer 2012 ESY program the District has proposed for Student appropriate?

Findings of Fact

1. Student is eligible for special education under the IDEA, having been diagnosed with Autism at 18 months of age. [NT 16]
2. Student is also diagnosed with verbal apraxia and feeding difficulties. [P-3]
3. Student resides with the Parents in the District. [NT 18]
4. Student was enrolled in a District school in September 2010 and placed in an Autistic Support Program. [NT 19]
5. From December 2010 to February 2011 Student was hospitalized at a local hospital for children to address a feeding disorder. [NT 20-21]

¹ This decision is written without further reference to the Student's name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.

² 20 U.S.C. §§ 1400 *et seq.*

³ 29 U.S.C. § 794.

⁴ The expedited issue was one of a number of issues the Parents raised in their complaint. The hearing officer bifurcated the matter so that the expedited issue could be heard separately from the other issues. A new case number has been assigned to the remaining issues and another date has been set for that hearing.

6. Student's behaviors regressed subsequent to leaving the hospital. [NT 41]
7. In April 2011 Student was placed through District funding in a private school other than the current Private School and remained there through the Summer 2011 ESY program. [NT 41-43, 54]
8. The Parents were very pleased with the first private school placement, with the mother characterizing Student's behavior there as "amazing". [NT 44]
9. The District sought to move Student to Private School, and with the Parents' agreement Student has been placed in the Private School since September 2011. [NT 44-45]
10. In October 2011 the Parents brought concerns about the Private School program to the IEP team. [NT 46]
11. The mother has never observed Student in the program at Private School other than morning drop-off and afternoon pick-up. [NT 57-58]
12. Student is attended by two adults at Private School – a one-to-one aide provided by the District and a Therapeutic Staff Support [TSS] worker funded through the state's "wraparound" or Behavioral Health Rehabilitative Services [BHRS] program. [NT 58-59]
13. In addition to the program at Private School, Student receives private speech/language therapy and occupational therapy partially funded through insurance, applied behavioral analysis funded by the Parents, and a Behavior Specialist Consultant [BSC] funded through BHRS. [NT 50-51]
14. Student has always qualified for ESY services since being diagnosed with Autism as a toddler. [NT 54]
15. The Private School's ESY program is a continuation of the regular school year. [NT 92]
16. Student's most recent IEP is dated June 13, 2011. [P-1/S1]
17. The IEP dated June 13, 2011 notes that due to Student's diagnosis, recoument and regression Student is eligible for ESY. [P1/S1]
18. The IEP dated June 13, 2011 carries Annual Goals and Short-Term Objectives that were to be addressed in the Summer 2011 ESY program. [P1/S1]

19. Although the IEP team met with attorneys present in February 2012, the Private School did not hold an IEP meeting specifically to re-determine ESY eligibility for Summer 2012 by February 28, 2012. [NT 24, 91-92]
20. Prior to the expiration date of the current IEP the Private School intends to hold Student's annual IEP meeting to draft the new IEP including Annual Goals and Short-Term Objectives to be addressed in ESY for Summer 2012 and in the coming school year [NT 91-93, 103-104]
21. The District did not issue a NOREP regarding ESY by March 31, 2012. [NT 24, 94]
22. In or around March 2012 the Private School did issue a notification to the Parents that based upon Student's IEP Student is eligible for ESY and provided dates and times for the program for Summer 2012. [NT 90; S-2]
23. On or before March 23, 2012 the Parents received and signed the notification indicating that Student would be attending ESY at the Private School. [S-3]
24. The Parent did not make any inquiries to the Director of the Private School about the proposed ESY program. [NT 104]
25. The Private School Director who is responsible overall for the ESY program holds an undergraduate degree in psychology and communication disorders, a Master's Degree in special education and a Master's certification in Applied Behavioral Analysis [ABA]. [NT 102-103]
26. The proposed ESY program runs from June 26 to July 31 [excluding July 4th], Monday through Friday, from 8:30 am to 1:30 pm. [S-2]
27. As an extension of the school year, Student's proposed ESY program is exactly the same, with the exception of a shorter day, as the program during the regular school year and would be delivered in accordance with the new IEP to be written before the current IEP expires in June. [NT 96-97]
28. Supportive services delivered in the regular school year are delivered in the ESY program. [NT 98]
29. For ESY Student would be in a class of no more than eight pupils, the majority of whom are in Student's current class. [NT 98-99]
30. Student would have a different teacher for ESY than Student's teacher this school year, but Student is familiar with the teacher that would be assigned because Student's and the teacher's classrooms are next to one another, the classes go swimming together and are on the playground together. [NT 99]

31. The ESY teacher to which Student would be assigned holds a Master's Degree in special education and is trained in Discrete Trial Training, having worked in programs that exclusively use that model prior to coming to the Private School. [NT 100, 103]
32. Student's ESY classroom would have a teacher's aide, and Student would have the PCA and, if BHRS approval continues, a TSS worker. [NT 103]

Discussion and Conclusions of Law

Burden of Proof:

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 establish through a preponderance of evidence that the ESY program proposed by the District is inappropriate and therefore cannot prevail on this issue.

Credibility:

During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); See also generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009).

I found the Parent to be a committed and caring advocate for her child, but could give her testimony limited weight as she testified emphatically about events and conditions at the Private School that she had not witnessed. Most importantly, significant aspects of the Parent's testimony regarding safety and discipline were undermined by the testimony of the TSS worker whose contribution became increasingly credible as she was asked to be more specific about her observations and experiences. The Director of the Private School credibly established that the proposed ESY program is a continuation of the regular school year in all respects save for one hour a day difference in length, that the ESY goals and objectives are established in the annual IEP meeting, that the annual IEP meeting for

Student is planned to occur in a timely manner, and that the ESY program per se is appropriate in accord with the purposes of an ESY program.

Legal Basis for Decision:

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; and 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)).

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). 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).

Under the Supreme Court's interpretation of the IDEA in *Rowley*, and in interpretations rendered in other relevant circuit court cases, a school district is not required to provide the best possible program to a student, or to maximize the student's potential. Rather, an IEP must provide a "basic floor of opportunity". There is no requirement to provide the "optimal level of services." *Mary Courtney T. v. School District of Philadelphia; Carlisle Area School District v. Scott P.*, 62 F.3d 520, 532 (3d Cir. 1995), *cert. den.* 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544 (1996). 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). Citing *Carlisle*, Pennsylvania's federal court in the Eastern District noted, "Districts need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by the IDEA represents only a basic floor of opportunity." *S. v. Wissahickon Sch. Dist.*, 2008 WL 2876567, at *7 (E.D.Pa., July 24, 2008). The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit.

Pennsylvania regulations provide guidance for determining ESY eligibility, at 22 Pa. Code §14.132 (a)(d):

(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.

* * *

(d) Students with severe disabilities such as autism/pervasive developmental disorder, serious emotional disturbance; severe mental retardation; degenerative impairments with mental involvement; and severe multiple disabilities require expeditious determinations of eligibility for ESY services to be provided as follows:

(1) Parents of students with severe disabilities shall be notified by the school entity of the annual review meeting to encourage their participation.

(2) The IEP review meeting must occur no later than February 28 of each school year for students with severe disabilities.

(3) The Notice of Recommended Educational Placement shall be issued to the parent no later than March 31 of the school year for students with severe disabilities.

(4) If a student with a severe disability transfers into a school entity after the dates in paragraphs (2) and (3), and the ESY eligibility decision has not been made, the eligibility and program content must be determined at the IEP meeting.

(e) School entities shall consider the eligibility for ESY services of all students with disabilities at the IEP meeting. ESY determinations for students other than those described in subsection (d) are not subject to the time lines in subsection (d). However, these determinations shall still be made in a timely manner. If the parents disagree with the school entity's recommendation on ESY, the parents will be afforded an expedited due process hearing. [Emphasis added in all paragraphs in this section]

Non compliance with IDEA procedures is not enough to find a lack of FAPE. In matters alleging a procedural violation, the IDEA provides that a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies:

(I) Impeded the child's right to a free appropriate public education;

(II) significantly impeded parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefit.

Case law addresses the issue of procedural errors and FAPE, for example, *R.B. ex rel. F.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 940 (9th Cir. 2007); *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 860 (6th Cir. 2004); *L.R. v. Manheim Twp. Sch. Dist.*, 2008 U.S. Dist. LEXIS 23966 (E.D. PA 2008). Further, when no substantive harm occurs, an "IDEA procedural error may be held harmless." *R.B.*, 496 F.3d at 938; see e.g., *Robert B. ex rel Bruce B. v. W. Chester Area Sch. Dist.*, 04-2069, 2005 U.S. Dist. LEXIS 21558, 2005 WL 2396968, at 9 (E.D. Pa. Sept. 27, 2005) (denying relief because although "no regular education teacher was present at the IEP meeting," "the Court finds no evidence in the record that Robert has been denied any necessary service . . . as a result of the flaw"). *L.R. v. Manheim Twp. Sch. Dist.*, 2008 U.S. Dist. LEXIS 23966 (E.D. PA 2008).

Discussion:

Procedural Errors: The Parents allege, and the District acknowledged, procedural errors in there having been no IEP team meeting on or before February 28, 2012 to consider eligibility for ESY, and in there having been no NOREP issued by the District regarding ESY on or prior to March 31, 2012.

IEP Meeting: Giving due deference to the District's acknowledgement of a procedural error, I nevertheless read the Pennsylvania regulations as being interpretable as meaning that a child's eligibility for ESY programming must be determined by February 28, 2012. Student had already been deemed eligible for ESY and Student's current controlling IEP so stated. The Pennsylvania regulation states that ESY eligibility should be determined at each IEP meeting, and at the June 2011 IEP meeting such a determination was made. Whether or not it was also required that an additional IEP meeting needed to be held to fulfill the requirements of the Pennsylvania regulations is not clear; if in fact there was a procedural violation, it was harmless as Student was, is and will remain eligible for ESY barring a significant change in Student's needs or the IDEA/Pennsylvania regulations.

NOREP: The District acknowledges a procedural error in not issuing a NOREP for Student's Summer 2012 ESY program. I agree that this was a procedural error and that a NOREP should have been issued so that the Parents could approve or disagree with the proposed ESY program for 2012. The Private School's issuance of a notification that Student was eligible for ESY and listing the dates and times of the program did not substitute for a proper NOREP. Again, however, this procedural error did not result in a denial of Parents' meaningful participation in their child's education and did not result in a denial of educational benefit to Student. Parents in fact exercised their option to challenge the District's offered placement by filing for this hearing, and the regular school term for Student has not yet ended. This procedural error, asserted by the Parents,

acknowledged by the District, and recognized by the hearing officer is judged to be harmless.

Program: The Private School offers a year-round program to its students and given the severity of the disabilities its students present, IEP goals are addressed continuously, whether in the regular school year or the ESY program. I found the testimony of the Director of the Private School persuasive in establishing that the District's proposed ESY program is appropriate under the *Rowley* standard. It is designed to address Student's needs as articulated in IEP annual goals and objectives. Specific tailoring of goals for Summer 2012 ESY, based on Student's present levels, is planned to take place at the annual IEP meeting on or before the current IEP expires in June. Indeed, the timing of the IEP meeting for this particular Student is fortunate, because it gives the team the opportunity to examine Student's most current present levels and create/revise goals to meet the needs identified through the ESY program.

When determining whether the ESY program offered to Student for Summer 2012 is appropriate, I carefully considered testimony and evidence provided by the Parents. The Parents allege that Student has regressed and that the current placement at Private School presents a dangerous environment for Student.⁵

Although the Parents submitted letters from four professionals providing services to Student, all opining that the Private School, and by reference the ESY program at the Private School, is inappropriate, I could give these documents little weight. The writers' credentials and school-based experience, as opposed to clinical or agency experience, were not established. Three of the authors, the developmental pediatrician, the speech/language pathologist and the occupational therapist, have no direct knowledge of the Private School program and placement. One of the authors, the behavior specialist, has been present at the Private School for about an hour a week and therefore has some direct familiarity with the program. Her opinion was tainted however by her written admission that lack of communication with staff at the Private School was and continues to be a problem, raising questions of whether her personal difficulties with staff affect her opinion. Additionally, she has only worked with Student since November 2011 and has no prior personal knowledge on which to form a basis for comparing Student's previous behavior with present behavior in school.

The TSS worker who testified was able to provide some valuable information about Student's functioning in the Private School. It appears that she has had some conflicting opinions with the Private School about how Student's behaviors should be handled, but her testimony suggests that the differences are based in methodology rather than substance [NT 77-79, 81]. The Parents are concerned about the Private School's use of a quiet room to help Student de-escalate [NT 52], but the TSS's testimony revealed that in the past five months Student has been placed in a quiet room for about five to ten minutes a total of five times [NT 76-77, 79, 87], and that on occasion Student prefers to remain in

⁵ The Parents also allege, *inter alia*, that certain services specified in the IEP are not being delivered, and certain equipment has not been provided. Those issues will be addressed in the upcoming hearing. [See for example, NT 48-50]

the quiet room rather than rejoin the group [NT 87]. I find neither the number of times the quiet room was used, nor the fact that the Student may prefer to remain in the quiet room rather than re-engage in class work [NT 79], surprising or atypical. Regarding the Parents' concerns about safety and the mother's rather alarming testimony [NT 52-53], the TSS clarified in her testimony that she and Student waited for about *three seconds* before a staff person opened the door on the occasion that smoke was generated from something burning in the microwave [86-87], and the witness from the Private School explained that once an alarm sounds all door locks are released such that the TSS could have exited with Student unassisted [NT 104-105]. Student's recently choosing to urinate around the rim of the toilet rather than into the toilet bowl [NT 37, 71-73] may present an emerging concern, but it is not inconsistent with occasional behaviors of neurotypical children Student's age. Finally, leaving a seat in the classroom without asking permission [NT 75] and eloping from a classroom is not an atypical behavior of children with autism or other disorders that affect behavior. Given that Student has two adults in attendance, it would be a defect in supervision if Student managed to get further than the classroom door, and the TSS's testimony established that Student typically does not leave the classroom and has never left the building [NT 74-76, 88].

Based upon the evidence presented at the expedited due process hearing in this matter, and the applicable law relating to ESY eligibility and the reasons for ESY services, I must conclude that the District has offered Student an appropriate ESY program for Summer 2012.

Order

It is hereby ordered that:

The Summer 2012 ESY program the District has proposed for Student is appropriate.

Any claims related to the identified issue in this expedited matter not specifically addressed by this decision and order are denied and dismissed.

May 26, 2012

Date

Linda M. Valentini, Psy.D., CHO

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