

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

Student's Name: S.S.

Date of Birth: [Redacted]

ODR No. 3208-11-12-AS

CLOSED HEARING

Parties to the Hearing:

Representative:

Parents

Donald S. Litman, Esquire
P.O. Box 35
Lansdale, PA 19446

Quakertown Community Sch. District
100 Commerce Drive
Quakertown, PA 18951

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

Date of Hearing:

June 11, 2012

Record Closed:

June 15, 2012

Date of Decision:

June 28, 2012

Hearing Officer:

William F. Culleton, Jr., Esq., CHO

INTRODUCTION AND PROCEDURAL HISTORY

The Student named in the title page of this decision (Student) is an eligible resident of the school district named in the title page of this decision (District). (NT 15.) The District has identified Student with Autism, Speech or Language Impairment and Other Health Impairment. (NT 11; S-22.) Parents assert that the District has failed to provide sufficient and appropriate Extended School Year services (ESY), and thus has failed to provide the Student with a free appropriate public education (FAPE), as required by the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). Parents seek an order that the District provide an appropriate program¹. The District asserts that its Individualized Education Program (IEP) offered an appropriate ESY program.

The hearing was concluded in one session. The parties waived summations, and the record closed upon receipt of transcript.

ISSUES

1. Did the District fail to offer sufficient and appropriate ESY services to Student for the summer of 2012?
2. Should the hearing officer order the District to provide appropriate ESY services for the summer of 2012?

FINDINGS OF FACT

1. Student was identified with Developmental Delay and diagnosed with a communication disorder in 2009. Student was re-evaluated in 2010, 2011 and 2012, with indeterminate diagnostic results. (S-3 p. 2.)

¹ Parents also requested reimbursement for private evaluations and other relief that will be considered at a hearing scheduled within the next month; as this hearing was expedited, only the issues concerning the appropriateness of the offered ESY services will be considered in this decision.

2. Student received early intervention services and attended an autism support classroom operated by the county Intermediate Unit (IU) in the 2010-2011 school year. Student entered first grade in the District's elementary school in the 2011-2012 school year. (S-3 p. 3.)
3. In the 2010-2011 school year, Student showed progress in goals for identifying letter sounds, counting up to 20, classroom behavior and self restraint, copying letters, and answering "what" and "where" questions. (S-10.)
4. In November 2011, a private medical evaluation supported Occupational Therapy evaluation for sensory issues and strategies to address sensory issues. (P-21.)
5. In 2011, the IU administered a Functional Behavior Assessment, addressing Student's repetitive behaviors and noncompliance behaviors. The evaluators took data on several days in November and December 2011 and interviewed Student's teacher repeatedly. The FBA recommended utilization of class-wide behavior support systems, rather than an individualized Positive Behavior Support Plan. (NT 217-220; S-3 p. 2, 3, 5, P-19.)
6. There were days on which Student exhibited non-compliance and throwing objects with frequency and intensity. However, overall, Student did not display disruptive behavior frequently in class. (NT 54-55, 58; P-19, P-23 p. 3.)
7. A privately retained behavior analyst - evaluator observed nine instances of non-compliant behavior in a ninety minute period on an unspecified date in May 2012. In all but one instance, the Student was able to return to class work after the incident. (NT 46-50; P-23 p. 5.)
8. The private behavior analyst found discrepancies between a District-administered Assessment of Basic Language and Learning Skills – Revised (ABLLS) and the ABLLS that the private behavior analyst had administered. The private behavior analyst provided a report on the day of the hearing, recommending that the Student needed educational services sufficient to complete mastery of the basic skills assessed in the ABLLS, requiring more ESY time than had been offered by the District. (NT 31-40, 62.)
9. The private evaluator recommended a positive behavior support plan. (P-23.)
10. Although Parents listed aggression and destructiveness as behaviors of concern at home, the IU FBA detected such behaviors only 3% and .2% of the intervals recorded, respectively, in school. (P-13, P-19.)
11. In April 2012, the District issued a re-evaluation report, including the FBA done in 2011. The RR identified Student with Autism, Speech or Language Impairment and Other Health Impairment. (S-3 p. 31.)

12. The April 2012 RR included assessments of Student's cognitive ability, executive functioning, attention, working memory, impulse control, auditory processing, visual/spatial processing and memory skills. (S-3.)
13. The April 2012 RR noted the following educational needs: reading, writing, mathematics, interpersonal skills, fine motor/occupational therapy, executive functioning. Social conversation and play were noted as strengths. (S-3 p. 22.)
14. The District issued an IEP in April 2012 that did not note Student's behaviors as interfering with education. The IEP offered a placement of supplemental autistic support. (S-4 p. 5, 29.)
15. The April 2012 IEP listed as strengths the following skills: receptive and expressive language, intraverbal language, requesting, spontaneous language, daily routines, gross motor skills, social interaction and play skills. (S-4 p. 9.)
16. The April 2012 IEP listed as needs the following: reading, writing, mathematics, social language and pragmatic skills, and OT/motor needs. (S-4 p. 9.)
17. The April 2012 IEP offered goals for conversational turn taking, single digit addition, relationship between numbers and quantities, reading decoding, reading comprehension, forming upper and lower case letters, classroom compliance and work completion. (S-4.)
18. The April 2012 IEP offered speech and language therapy and occupational therapy. (S-4 p. 26.)
19. The April 2012 IEP offered ESY goals for single digit addition, reading phonics, word recognition and decoding, and conversational turn taking. Services were to be located at a District classroom and delivered by an itinerant special education teacher, 4 hours per week for five weeks. (S-4 p. 27.)
20. The ESY services also included speech and language therapy. (S-4 p. 27.)
21. Data indicated that Student did not experience regression or recoupment problems with handwriting. Anecdotal evidence indicated that Student did not experience regression in behavior. (NT 220-221; S-10 p. 36.)
22. In May 2012, a private occupational therapist - evaluator evaluated Student and found numerous areas in which Student needed occupational therapy services. The therapist recommended 20 hours of OT services as part of ESY services, in order to give Student's system a "jump start." (NT 72-96; P-35.)
23. An occupational therapist with appropriate certification and training determined that OT services were not necessary for Student's ESY program. (NT 196-206.)
24. Student made some educational progress during Student's first grade year, including some progress in appropriate behaviors. Student does require prompting frequently,

but sometimes is independent behaviorally. (NT 133, 178-191, 193-201, 214-215, 220-228; S-4, 10.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.² In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence³ that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006).

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called “equipoise”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

² The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

³ A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parents, who initiated the due process proceeding. If the Parents fail to produce a preponderance of the evidence in support of Parents' claims, or if the evidence is in "equipoise", the Parents cannot prevail.

DUTY TO OFFER A FAPE

The IDEA requires that a state receiving federal education funding provide a "free appropriate public education" (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan ("IEP"). 20 U.S.C. § 1414(d). The IEP must be "reasonably calculated" to enable the child to receive "meaningful educational benefits" in light of the student's "intellectual potential." Shore Reg'l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir.1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3rd Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

"Meaningful benefit" means that an eligible child's program affords him or her the opportunity for "significant learning." Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In order to provide FAPE, the child's IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied FAPE if his or her

program is not likely to produce progress, or if the program affords the child only a “trivial” or “de minimis” educational benefit. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3rd Cir. 1996), cert. den. 117 S. Ct. 176 (1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir. 1988).

Under the Supreme Court’s interpretation of the IDEA in Rowley and other relevant cases, however, a school district is not necessarily 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” – it is not required to provide the “optimal level of services.” Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit. Carlisle Area School v. Scott P., 62 F.3d 520, (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544(1996)(appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) Its appropriateness must be determined as of the time it was made, and the reasonableness of the school district’s offered program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010).

ESY SERVICES

The federal regulations implementing the IDEA require that a District provide ESY services “as necessary to provide FAPE” 34 C.F.R. §300.106(a)(1). Necessity for such services must be determined by the IEP team in accordance with the procedures for IEP teams.

34 C.F.R. §300.106(a)(2). The agency may not limit its ESY services by category of disability or limit the type, amount or duration of services. 34 C.F.R. §300.106(a)(3).

The state regulations implementing the IDEA requirement for ESY services add certain procedural requirements and criteria for determining eligibility, 22 PA. Code §14.132(a). Neither the federal nor the state regulations explicitly provide criteria for determining the extent or nature of the ESY services that are necessary in order to provide a FAPE.

Nevertheless, the state regulation's criteria for determining eligibility can provide a guide for the determination in this matter. See generally, William D. V. Manheim Twp. Sch. Dist., 2007 WL 2825723 (E.D. Pa. 2007). These criteria are:

- (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)(2).

In this matter, the Parent introduced evidence of regression in skills (criteria (i) through (iii) above), but it was not convincing in light of the sources of the information and the countervailing evidence introduced by the District. (FF 3⁴, 21, 23, 24.) Parents' private behavior analyst implied that Student had regressed in the basic skills assessed by the ABLLS instrument, but admitted that the discrepancy between the District's scores and the privately assessed results could have been due to overly-optimistic assessment by the District, rather than to regression. (FF 8, 24.) District witnesses indicated that differences in ABLLS scores could be due to differences in the evaluator or the setting in which the assessment is given. (NT 169-174.) A credible District witness testified that Student did not regress in behavior. (FF 24.) Moreover, documentary evidence and testimony by District witnesses indicated that Student had made educational progress during the Student's first grade year, thus raising an inference that any behaviors or skill deficits, regressing or not, had not interfered with Student's educational progress sufficiently to deny Student a FAPE⁵. (FF 5-10, 14, 17, 21, 23, 24.) In handwriting, specifically, there was data that Student did not regress during breaks in the school schedule. (FF 21, 23.)

⁴ This evidence from the prior year shows Student's ability to make progress only.

⁵ Parents' complaint regarding the District's alleged failure to provide a FAPE is scheduled to be heard after this decision. It is sufficient for resolution of the narrow issues before me presently to note that the record before me on the ESY issue preponderantly shows that Student made some progress. I do not reach a conclusion as to whether or not the District offered a FAPE to Student for Student's second year, or delivered a FAPE to Student in Student's first year. It may be that the evidence is incomplete as to the extent of that progress, or as to whether or not progress was made in all areas relevant to the question of the offer or delivery of a FAPE.

Parent also testified to behavioral regression, but Parent's experience in that regard was based largely upon observations of Student's behavior at home, not at school. (FF 10.) This evidence is given less weight because it is in conflict with School based observations to the contrary. In sum, the evidence is not preponderant that the Student was experiencing regression in skills to such an extent that additional ESY services were needed in order to provide Student with a program "reasonably calculated" to enable Student to receive "meaningful educational benefits" in light of the student's "intellectual potential." Souderton, above.

The extent of mastery of an important skill (criterion (iv) above) is another factor advanced by Parents as compelling the District to provide more ESY services. Parents point to behavioral issues, discussed above, and occupational therapy issues detected by their private occupational therapy consultant, who evaluated Student on one day at the therapist's clinic setting. As to the behavioral issues, I conclude that there is not preponderant evidence that Student has mastered important behavioral skills to the extent that a lack of ESY services with regard to such skill would jeopardize the progress made. Indeed, the record is preponderant that Student, although making progress behaviorally, was still prompt dependent to a significant extent, and thus had not mastered many behavioral skills needed for success in school. (FF 23, 24.) The Parents introduced no evidence of any particular skill whose mastery called for reinforcement during the break in the school year.⁶

The therapist concluded that Student was below same age norms in numerous areas of sensory, fine motor and gross motor functioning, a conclusion corroborated by Parent. (FF 22.)

⁶ This conclusion does not contradict the finding that there was some progress behaviorally. A child can make progress even in the absence of mastery, and the sufficiency of that progress for FAPE purposes is dependent upon the degree to which the child is capable of additional progress or a higher rate of acquisition of the skill, among other things. I reach no conclusion on the latter issues.

The therapist recommended 20 hours of occupational therapy during the summer, addressing all of these areas, in order to give Student “a jump start” in these areas of functioning. (FF 22.) However, the District presented testimony by an occupational therapist from the IU, who testified in direct contradiction to this witness’ findings. (FF 23, 24.) Moreover, various private therapists’ reports were not available to the District at the time at which it made the offer of ESY services to Parents, (NT 149-150, 206-207), and the appropriateness of an offer of services can be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, above; William D., above. Weighing all of this evidence regarding Student’s degree of mastery of important skills, I conclude that the Parents have failed to prove by a preponderance of the evidence that this factor necessitates additional ESY services.

Parents introduced evidence concerning the importance of developing behavioral skills in order to attain independence from caretakers (criterion (v) above). Various private observers noted that Student was substantially prompt dependent for control of distractibility and problematic behaviors. (FF 23, 24.) The documentary record supports these observations. (FF 11-20.) The question is whether or not this fact necessitates additional ESY services in order to ensure that FAPE is delivered for the current and subsequent school years, in the absence of preponderant evidence that the Student would regress substantially over the summer. I conclude that this factor alone does not prove preponderantly that additional ESY services are required to ensure a FAPE. District data indicated that Student was making some progress, both academically and in classroom compliance and control. (FF 24.) There was no evidence, either that Student’s rate of acquisition of these skills was so high that prompt dependence could be eliminated with additional ESY services, or that Student’s acquisition rate was so low that

additional ESY services would be needed in order to give Student a reasonable opportunity to become free of prompt dependence within a reasonable time. I conclude that the evidence does not preponderantly show that additional ESY services were required.

There was some evidence that Student tended to withdraw from the educational process (criterion (vi) above), but there was no evidence that this behavior (putting head on desk, looking away from the focus of the lesson, seeking breaks and simple non-compliance) was due to breaks in the school schedule. Thus the evidence is not preponderant that the criterion for withdrawal from the educational process necessitates additional ESY services.

The severity of Student's disabilities (criterion (vii) above) is the final factor to be considered under the Pennsylvania regulation. While this factor is clearly present in Student's case, its presence alone does not prove that Student needs additional ESY services in order to ensure delivery of a FAPE. Student is in supplementary autistic support, and has made some progress. The evidence is not preponderant that the Student's autism causes such a slow rate of acquisition of skills as to deprive Student of a FAPE without additional ESY services. There simply was not preponderant evidence of Student's rate of acquisition of skills. Moreover, there was not preponderant evidence that Student's needs so exceed what the District addressed in first grade that ESY was needed to fill in gaps in learning.

As noted above, the evidence on occupational therapy needs, including sensory, fine motor and gross motor skills, was at best mixed, and delivered to the District after it made the ESY offer at issue here. Moreover, I assign greater weight to those observers who saw Student performing in the school setting; the private evaluator on these needs did not make such an observation, and did not communicate with school personnel about the numerous needs that that evaluator saw in the clinical setting. Indeed, the Parents specified limits on the private

therapist's ability to contact school personnel. (NT 105.) Thus, the impact of the Student's OT needs on education was not assessed with any reliability⁷, and that impact on education is essential to determining what is necessary to provide a FAPE, because educational impact is part of the definition of the need for special education. 34 C.F.R. §300. 8(a), 300.17, 300.39(b)(3)(ii). In sum, the evidence was not preponderant regarding the need for additional occupational therapy services.

Similarly, the evidence was not preponderant that Student had such behavioral needs that additional ESY services would be necessary for the provision of a FAPE. Student does display unwanted behaviors, but Parents' evidence, based upon single-day observations by a behavior specialist and a special education teacher, did not prove preponderantly that these behaviors interfered with educational progress, especially in the face of District evidence that Student had made some progress even with these unwanted behaviors.

I have considered all of the factors set forth in the state ESY regulation together, and find that the whole is not greater than the sum of its parts. Taking into consideration the Student's severe disabilities, the need for Student to become independent, and the extent to which Student has consolidated important skills in the academic and behavioral areas, the Parents did not introduce sufficient evidence to show that these considerations together necessitate additional ESY services in order to ensure the provision of a FAPE.

Parents raised procedural issues at the hearing. (NT 149-156.) Parents complained that the District at various times did not want to listen to Parents explain their desires for

⁷ Parents submitted documentary evidence of a recommendation from a private tutoring agency for over 200 hours of that agency's services during the summer, to address Student's needs in reading. (NT 140-141; P-25.) This recommendation, without more evidence, does not raise an inference of the necessity of the services recommended in light of the District's FAPE obligation.

programming for Student. At the same time Parents admit that the District always received their input in writing, held multiple IEP meetings, one of which lasted over three hours, and responded to their requests and assertions. Moreover, Parents admitted that many of the evaluations upon which they relied at the hearing had not been provided to the District before the District made its ESY offer. Weighing all of the evidence regarding the procedures used in determining what would be offered for ESY, I find that the evidence does not prove a procedural violation by a preponderance.

In reaching the above conclusions, I weighed the credibility and reliability of the witnesses. I found that Parent's testimony was credible, but was not based upon sufficient knowledge of Student's performance at school, as discussed above. Parents' experts' testimony was similarly credible but given less weight for the same reason. In addition, the private occupational therapist's findings were given less weight because the credible testimony of more than one District witness, corroborated by the documentary evidence when taken as a whole, contradicted many of the therapist's conclusions. I found the District's regular education teacher's testimony to be credible, but gave it less weight because it was contradicted by the documentary record, although it was corroborated also by other witnesses as to progress made in behavior.

CONCLUSION

I conclude that the Parent's proofs failed to demonstrate by a preponderance that the District failed to offer a FAPE because of the limits of the ESY services offered for the summer of 2012. Therefore, I will not order the District to provide additional ESY services. Any claims regarding issues that are not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The District did not fail to offer sufficient and appropriate ESY services to Student for the summer of 2012.
2. The hearing officer will not order the District to provide appropriate ESY services for the summer of 2012.

William F. Culleton, Jr. Esq.

WILLIAM F. CULLETON, JR., ESQ., CHO
HEARING OFFICER

June 28, 2012