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: J.S.

Date of Birth: [redacted]

ODR No. 01103-0910 AS

CLOSED HEARING

Parties to the Hearing:	Representative:
Parents	Pro Se
Dunmore School District 300 West Warren Street Dunmore, PA 18512	Harry P. McGrath, Esquire McGrath Law Office 321 Spruce Street, Suite 600 Scranton, PA 18503

Date of Resolution Session	May 12, 2010
Date of Hearing:	June 3, 2010
Record Closed:	June 7, 2010
Date of Decision:	June 15, 2010
Hearing Officer:	William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

[Student] (Student) is an [elementary school-aged] eligible student of the Dunmore School District (District), who is finishing second grade in the District. (NT 18-4 to 22-17; P-15 p. 1, 28.) The Student is identified with Specific Learning Disability and Speech and Language Impairment. (NT 21-23 to 22-5.) Parents requested this due process proceeding, asserting that the District had failed to offer an appropriate plan of Extended School Year services. In addition, Parents complained that the District failed to provide written answers to questions they posed, and failed to agree to record the IEP meeting during which ESY services were discussed. (P-1.)

The Parents' Complaint Notice, on an Office for Dispute Resolution (ODR) form, is dated by hand for April 28, 2010; however, it was not stamped as received by ODR until May 18, 2010. I received the assignment on May 19, 2010, listed as an expedited matter. On May 25, the District filed its response to the complaint with me. The hearing was held and this decision is filed within thirty days of receipt of the complaint Notice by ODR.

Prior to the hearing, I ruled that the Parents' complaint concerning the answering of questions in writing and the recording of an IEP meeting would not be part of the issues in this case, because those issues were already before another hearing officer, who has jurisdiction. (NT 29-11 to 33-17.) The hearing was conducted and concluded in one day utilizing accelerated procedures customary in these matters. (NT 28-3 to 19.)

ISSUES

1. Did the District fail to comply with the IDEA and state regulations by failing to provide written prior notice to the Parents with regard to ESY services for the summer of 2010?

2. Did the District fail to offer an appropriate plan of ESY services to the Student?

FINDINGS OF FACT

1. The Student's specific learning disability affects [Student's] ability to learn basic reading skills, reading comprehension, mathematics calculation and problem solving, and written expression. (S-4 p. 7.)

2. The District is providing explicit direct instruction to the Student in all areas of learning disorder, in a learning support placement. (S-4 p. 15 to 26, 30.)

3. During its meeting on November 6, 2009, the IEP team, including the Parents, found the Student eligible for ESY services due to a history of regression and difficult recoupment of skills. ESY goals identified at that time included word attack, oral reading fluency, written language, computation and speech. (NT 120-19 to 121-13, 188-1 to 13, 192-24 to 195-8, 230-2 to 231-20, 241-1 to 244-3; S-4 p. 28, S-7.)

4. The Parents were invited to subsequent IEP team meetings, but did not participate. (NT 47-22-23, 129-19 to 134-13, 139-2 to 140-14; P-19 to 21, S-9.)

5. The November 2009 IEP stated as a proposed action that the District provide ESY services to the Student. (S-4 p. 28.)

6. The November 2009 IEP stated the basis or reason for the District's proposed action. (S-4 p. 28.)

7. The November 2009 IEP stated that the Student would work on [Student's] IEP goals as set forth in that document, but did not discuss the location, frequency and duration of proposed ESY services. (S-4 p. 28.)

8. On February 24, 2010, the Student's Learning Support Teacher sent a notice to Parents indicating that the Student is eligible for ESY services and urging them to enroll the Student in a program, operated by the local Intermediate Unit (IU), to address [Student's] specific learning disabilities. (P-1.)

9. The February notice stated that the Student could attend on specific dates for specified hours on each date; thus, the duration and frequency of services offered were at least partially conveyed, but the location of services was not specified. (P-1.)

10. The District did not issue a formal prior written notice or NOREP because there had not been an IEP meeting. (NT 44-4 to 16, 55-7 to 19.)

11. The District's practice is not to conduct educational program planning in the absence of a face to face IEP team meeting. (NT 62-9 to 22, 125-15 to 128-21, 232-11 to 18.)

12. The November 2009 IEP indicated at least part of the basis for the District's conclusion that the Student needed ESY services, by reviewing [Student's] problems with retention in the present levels section, and indicating the source of the data on retention. (S-4 p. 7 to 12.)

13. The District did not convey a specific Prior Written Notice with reference to procedural safeguards in reference to ESY services, but the November 2009 IEP did reference the Procedural Safeguards Notice, as well as sources for assistance in understanding parental rights. (NT 44-4 to 16, 55-7 to 19; S-4 p. 35.)

14. The District did not convey a specific Prior Written Notice with reference to options considered and rejected with regard to the Student's retention and recoupment problems. (S-4.)

15. The District attempted to convene an IEP meeting to determine an ESY placement and program, along with discussing the Parents' concerns about the Student's overall program, but the Parents refused to attend unless the District would agree to answer, in writing, a series of forty three written questions and to record the meeting by tape or transcription. (NT 121-22 to 125-14, 166-19 to 167-4; P-3 to P-13, P-16 to 25, S-9.)

16. The Parents were aware that the District was trying to finalize plans for ESY services for the summer of 2010. (NT 183-2 to 184-21, 267-23 to 275-3 ; P-1, P-2, P-11, P-13, P-20, P-21.)

17. The District offered an appropriate NOREP for ESY services to the Parents on the date of the hearing in this matter. (NT 82-23 to 83-21, 86-6 to 13, 91-17 to 95-5, 96-2 to 19, 104-19 to 105-1, 114-2 to 7, 142-16 to 143-15, 152-12 to 155-22, 207-14 to 208-1, 211-9 to 14, 228-1 to 19, 232-11 to 18, 234-2 to 238-11, 241-1 to 246-2, 257-12 to 22, 260-2 to 18; S-6, S-8.)

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.[1] The United States Supreme Court has addressed this issue in the case of an administrative hearing challenging a special education IEP. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). There, the Court held that the IDEA does not alter the traditional rule that allocates the burden of persuasion to the party that requests relief from the tribunal.

The Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed "equipoise" – that is, where neither party has introduced a preponderance of evidence[2] to support its contentions. In such unusual circumstances, the burden of persuasion provides the rule for decision, and the party with the burden of persuasion will lose. On the other hand, whenever the evidence is clearly preponderant in favor of one party, that party will prevail. Schaffer, above. Therefore, the burden of proof, and more specifically the burden of persuasion, in this case rests upon Student's Parents, who initiated the due

[1] 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).

[2] 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.

process proceeding. If the evidence is in "equipoise", the Parent will not prevail.

LEGAL STANDARD FOR DETERMINING APPROPRIATENESS OF ESY SERVICES

Every state must assure that an eligible child receives a Free Appropriate Public Education (FAPE). 20 U.S.C. §1412(a); 34 C.F.R. §300.17. To fulfill this requirement, an IEP must be "reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress." Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982). "Meaningful benefit" means that a student's program affords the student the opportunity for "significant learning." Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999).

The federal regulations implementing the IDEA require local educational agencies to provide ESY services to an eligible student if necessary to assure that he or she receives a FAPE. 34 C.F.R. §300.106. Pennsylvania special education regulations provide additional and more specific guidance. 22 Pa. Code §14.132. Almost 30 years ago, in Battle v. Pennsylvania, 629 F.2d 269 (3d Cir. 1980), cert. denied, 452 U.S. 968 (1981), the Third Circuit Court of Appeals 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. Basic Education Circular, Extended School Year Eligibility (April 1, 2003)(BEC). Thus, the purpose of ESY in most cases is to prevent regression or other damage to the Student's ability to make meaningful educational progress on his or her IEP goals, caused by the normal breaks in schedule in a typical school year. See, 22 Pa. Code §14.132; BEC, Extended School Year Eligibility (recommending finding of eligibility if student's needs "make it unlikely that the student will maintain skills and behaviors relevant to IEP goals and objectives … .")

I note that the Pennsylvania regulation, 22 Pa. Code §14.132(a)(1), requires the "school entity" to both determine eligibility and "make subsequent determinations about the services to be provided." Thus, I determine that the absence of parental

participation in an IEP meeting does not absolve the educational agency of its obligation to offer an appropriate ESY plan.

APPROPRIATENESS OF THE ESY PROGRAM AVAILABLE FROM THE DISTRICT

I find that the District failed to formally offer an ESY program to the Parent in compliance with the procedures set forth in the law, until the date of the hearing in this matter. I also find that the ESY program contemplated by the District for the Student is appropriate, individualized and in compliance with the law substantively. (FF 1, 2, 3, 4, 5, 6, 7, 12, 17.) Since I also find that the District has cured its procedural failures by submitting an appropriate NOREP at the hearing, (FF 17), and since the District has offered an appropriate ESY program substantively, I will not order any relief in that regard, because no such order is necessary, and because any procedural failure was in large part the result of parental obstruction.

The offer of ESY services was not made in one place and with the proper documentation. (FF 3, 5 to 7, 8 to 10, 12 to 14.) The District did not provide proper written prior notice because it was their procedure not to offer a program before collaborating with the parents in an IEP team meeting. (FF 10, 11.) Yet it was their duty under Pennsylvania regulations to make an ESY offer anyway, as noted above. Moreover, the IDEA requires agencies to provide written prior notice of any proposal to initiate services. 20 U.S.C. §1415(b)(3); 20 U.S.C. §1415(c). Thus, the District should have offered an appropriate NOREP to the Parents, setting forth the Student's eligibility and its basis, the kinds of assessments that the District relied upon in making that assessment, the proposed location, dates and times of instruction, the specific areas of educational need to be addressed, a description of other options and other factors considered, and the procedural safeguards and sources of information on parental rights that the law mandates. 22 U.S.C. §1415(c); 34 C.F.R. § 300.503. BEC, Extended School Year Eligibility, above. The District provided some, but not all of this information. (FF 3, 5 to 7, 8 to 10, 12 to 14.)

As noted above, this procedural failure was due largely to the Parents' obfuscation and obstruction of the District's attempts to comply with the procedural requirements of the law. The Parents refused to participate in an IEP aimed at planning ESY for the 2010 summer. (FF 4, 15.) They were

well aware that ESY needed to be planned and that the District was holding off action in order to include them in the planning. (FF 8, 16.)

The Father attempted to show that he was confused about the purpose of the District's many contacts with him during the Winter and Spring of 2010, as it beseeched him to sit down with them for an IEP meeting; he tried to show that he believed that these entreaties were for purposes of the Student's overall IEP, and not related to ESY. I find that this argument is disingenuous. (NT 277-10 to 279-3, 281-21 to 287-19.) The preponderance of the evidence demonstrates that Parents knew that ESY planning hung in the balance and that they refused to cooperate in order to make a stand on their insistence on written answers to questions and "accommodations. (FF 16.)

Many of the Father's questions belied a lack of understanding of education. (NT 84-2 to 86-1, 96-2 to 98-13, 100-18 to 25, 101-11 to 106-17, 159-15 to 160-13, 248-12 to 256-15, 265-24 to 266-2.) Notwithstanding that understandable lack of knowledge in a lay person, I find that the Father's questions were but a thin façade – a flimsy vehicle from which to prosecute the Parents' real concern: the written questionnaire and "accommodations".

The Parents indicated, beyond the scope of relevance, that there was a history that created their extreme distrust. (NT 289-23 to 290-2.) I pass no judgment on that claim. Nevertheless I caution the Parents that their own actions must first be directed to securing adequate educational services for the Student, even if they have a reasonable request that the District disagrees with (I make no finding regarding the reasonableness of the Parents' insistence on written answers or accommodations). I urge them, despite their distrust, to go more than half way with the District on every legitimate issue, and to offer reasonable cooperation at all times. Only this way can they hope to seek justice for themselves and their child with clean hands and a credible case. Their choices here preclude any order in their favor.

CONCLUSION

For the reasons set forth above, I will issue no order in this matter.

ORDER

1. The District failed to comply with the IDEA and state regulations by failing to provide a complete written prior notice to the Parents with regard to ESY services for the summer of 2010.

2. The District offered an appropriate plan of ESY services to the Student for the summer of 2010.

William F. Culleton, Jr. Esq.

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

June 15, 2010