

*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: M.D.

Date of Birth: [redacted]

Date of Hearing: June 14, 2010

### CLOSED HEARING

ODR No. **01147-09-10-JS**

Parties to the Hearing:

Parents

Ray M. Milke  
Director of Student Support Services  
Kiski Area School District  
200 Poplar Street  
Vandergrift, PA 15690

Representative:

Pro Se

Aimee Willett, Esquire  
Andrews and Beard  
P. O. Box 1311  
Altoona, PA 16603-1311

Date Transcript Received:

June 19, 2010

Date of Decision:

June 21, 2010

Hearing Officer:

Cathy A. Skidmore, Esq.

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student<sup>1</sup> is [a preteen-aged] student who resides within the geographical area served by Kiski Area School District (hereafter District). Student is eligible for special education by reason of mental retardation and oppositional defiant disorder (ODD). Student's parents requested a due process hearing to determine whether the District should be obligated to provide transportation for Student to attend an extended school year (ESY) program at a private school.

A one-session hearing was held on June 14, 2010. For the reasons set forth below, I find in favor of the District.

### **ISSUES**

Whether the District should be required to provide transportation for Student for the summer program in which Student is enrolled in 2010.

### **FINDINGS OF FACT**

1. Student is [preteen-aged] and resides with Student's parents within the geographical area served by the District. (Notes of Testimony (N.T.) 43-44)
2. Student is eligible for special education based on diagnoses of mental retardation and ODD. Student's overall development is delayed and Student has limited language ability. (School District Exhibit (S) 1)
3. Student's parents placed Student in a private school in 2007 because they were concerned over Student's progress, and Student was withdrawn from the District on October 16, 2007. Student was not subsequently re-enrolled in the District. (N.T. 25, 35, 44; S 3)
4. Student has an Individualized Education Program (IEP) at the private school, which had its last day of school on June 4, 2010. Student's IEP team at the private school determined that Student is eligible for ESY services due to regression and recoupment concerns. The ESY program proposed for Student runs from June 28, 2010 through July 23, 2010 at the private school. (N.T. 44, 47; Parent Exhibit (P) 1; S 2)
5. The District provides transportation for Student to attend the private school during the regular school year. (N.T. 28-29)

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<sup>1</sup> Student's name and gender are not used in this decision to protect Student's privacy.

6. The District provided transportation for Student and one other student to attend the private school ESY program in 2008. The District did so erroneously since it does not provide transportation to private schools for summer programs, but after it discovered the error, the District continued the service for the remainder of the 2008 summer program. (N.T. 31-33, 38-40)
7. The District did not provide transportation for Student to attend the private ESY program in 2009, and Student was transported by another means for that summer. That mode of transportation is not available for summer 2010. (N.T. 33-34, 41, 45-46, 52)
8. Student requires ESY programming in order to maintain skills acquired during the 2009-10 school year and to prevent regression. (N.T. 47, 50)

## **DISCUSSION AND CONCLUSIONS OF LAW**

The burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden in this case rests with the parents who requested the hearing in this case. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.<sup>2</sup>

The law requires the provision of ESY services which are necessary to provide a free, appropriate public education (FAPE). 34 C.F.R. § 106(a)(1). There appears to be no question here that Student is eligible for ESY services. (Finding of Fact (FF) 4, 8) The real dispute here is whether the District is obligated to provide transportation services to Student to attend a summer program located in a private school.

It would seem logical that the District, which provides transportation during the school year for Student, should do the same for summer programming. Unfortunately, the law does not impose such an obligation. The Pennsylvania Public School Code does make provision for transportation services to nonpublic school students within certain geographic areas when the nonpublic school is in “regular session.” 24 P.S. § 13-1361. The regular school year ended at the private school on June 4, 2010. (FF 4) Thus, the transportation provision of the Public School Code does not obligate the District to provide transportation for Student for a summer program beyond the regular school year.

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<sup>2</sup> Hearing officers are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D.Pa. 2009). This hearing officer found each of the witnesses who testified at the hearing to be credible and the testimony was essentially wholly consistent rather than contradictory.

The relevant federal special education regulations support this conclusion. Section 300.137 provides that, “No parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school.” 34 C.F.R. § 300.137(a). The Pennsylvania Department of Education has published a guide to ESY services which reiterates that students who have been placed in private schools by their parents have no individual entitlement to services.<sup>3</sup> It follows, therefore, that a school district likewise has no obligation to provide transportation for ESY services at a private school.

### **CONCLUSION**

For the foregoing reasons, the District is not obligated to provide transportation for Student to attend the private school ESY program in 2010.

### **ORDER**

The District is not ordered to provide transportation for Student to attend the private school ESY program.

*Cathy A. Skidmore*

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Cathy A. Skidmore  
HEARING OFFICER

June 21, 2010

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<sup>3</sup> Pennsylvania Department of Education, *Extended School Year (ESY) Services in Pennsylvania*, available at <http://www.pattan.net/files/ESY/ESY-Guide121608.pdf>; see also Basic Education Circular 34 C.F.R. § 300.403 issued July 1, 2001, which has not to date been replaced.