

*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: C.P.

ODR #13977-12-13-AS

Date of Birth:  
[redacted]

Date of Hearing:  
June 14, 2013

CLOSED HEARING

Parties to the Hearing:  
Parents

Representative:  
Pro Se

Central Bucks School District  
16 Welden Drive  
Doylestown, PA 18901

Scott Wolpert, Esquire  
Timoney Knox  
400 Maryland Drive PO Box 7544  
Fort Washington, PA 19034

Date Transcript Received:

June 16, 2013

Date of Decision:

June 29, 2013

Hearing Officer:

Linda M. Valentini, Psy.D., CHO

## Background

Student<sup>1</sup> is a late-high-school-age student who is eligible for special education pursuant to the Individuals with Disabilities Education Act [IDEA] under the current classification of autism and speech/language impairment and consequently a protected handicapped individual under Section 504 of the Rehabilitation Act of 1973 [Section 504] as well as the federal and state regulations implementing those statutes.

The current matter concerns an expedited due process request from the Parents<sup>2</sup> addressing the question of the location of Student's Extended School Year [ESY] program for summer 2013. The Parents would like Student to receive ESY in the public high school, maintaining that this placement represents the Least Restrictive Environment [LRE] and can be successful if the District puts the proper supports into that setting. The District maintains that the public high school is not an appropriate location for Student's ESY even with appropriate supports, and that the summer program should be delivered in [Redacted], the setting where Student has been placed for the 2012-2013 school year. The parties do not dispute Student's qualification for ESY services.

The hearing was convened and concluded in one session<sup>3</sup>.

## Issue

Where should Student's ESY program for summer 2013 be provided?

## Findings of Fact

1. Student is a late high school age student whose primary disability classification is autism with a secondary classification of speech/language impairment. [NT 36, 57]
2. Student attended ESY programming in the District for about eight years, up to and including summer 2008. [NT 47-48]

---

<sup>1</sup> 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.

<sup>2</sup> The term "Parents" is used throughout unless the reference is specifically related to Student's father. Student's father came to the hearing and presented the Parents' case and in doing so acted for both himself and Student's mother.

<sup>3</sup> The atypical format of this hearing session was proposed by Student's father who appeared pro se. The father first presented Student as a sworn witness and then provided sworn testimony himself. The District's counsel conducted a very brief cross examination of Student and chose to conduct no cross examination of the father. The father asked that the District select one person to whom he could direct questions, and he then conducted direct examination of that designated District employee. The father was advised by the hearing officer and by District counsel of his right to hear the District's entire case and to examine the District's documents as they were presented but he specifically waived this right so that he could accompany Student home. After father conducted his direct examination of the District witness the father and Student left the hearing according to his stated plan and with the permission of the hearing officer. [NT 21-25]

3. During the time that Student received ESY programming in the public schools ESY was operated by the County Intermediate Unit. The current 2013 summer is the first time that the District is operating the ESY programs for its students. [NT 57]
4. The District offered Student ESY in a public high school for summer 2009 but the Parents declined because they believed the 20-30 minutes traveling time that would be involved was too lengthy a bus ride. [NT 48]
5. Student was home-schooled for the 2009-2010 school year, and did not attend ESY programming in summer 2010. [NT 49]
6. For the 2010-2011 school year, Student was reintegrated back into a public high school, and placed in an autistic support program with a focus on a functional curriculum that included academic work. [NT 58]
7. In October 2010 Student started to perseverate on personal characteristics of individuals. Two peers were the subjects of Student's perseveration, one in Student's classroom and one in another classroom. One of the peers was a female who wore glasses and Student became preoccupied with the glasses, making statements and overtures to get the glasses. The other student was in a leg cast and when Student passed him in the hallway Student perseverated on the peer's being in a cast. [NT 58-59, 84-85]
8. The perseverations included verbalizations and gesturing with hitting and punching motions. Although Student did not strike anyone at that time Student was placed in a small classroom with a teacher and an aide. [NT 59]
9. On November 1, 2010 when Student was in the office area a custodian with whom Student had a relationship said hello to Student; unprovoked Student struck the custodian in the face with a closed fist. [NT 59]
10. Student's aide at the time was a male and a former football coach who had been a linebacker for a Division Two college. The aide could not hold Student. Student was isolated and police were contacted, as was the father. [NT 60]
11. Following this incident Student was admitted to an inpatient psychiatric unit and remained hospitalized there from November 1, 2010 until February 2011 when Student was placed through the mental health system at a Residential Treatment Facility until the end of April 2012. [NT 59-60]
12. Student admits to engaging in at least one act of physical aggression against a peer while in the Residential Treatment Facility despite having at the time what the parties consider to have been a very effective aide. [NT 42-43, 76]

13. In addition to the aide, at the Residential Treatment Facility there was a restrictive therapeutic milieu surrounding the educational environment and Student was under the supervision of a psychiatrist as well as a special education teacher and a staff of therapists, counselors, and behavior support personnel. [NT 76]
14. The residential treatment team recommended against Student attending a large public high school upon discharge from residential treatment. [NT 171]
15. For ESY in the summer of 2012 Student was offered a place in the IU program. The Parents rejected that in favor of Student's coming to the District's Administration Building accompanied by Student's father and being instructed by a special education teacher for 3 weeks, 5 hours each week. [NT 86]
16. The Parents approved an October 19, 2012 IEP and NOREP placing Student in a full time alternative setting for 2012-2013, including for the summer 2013 ESY program. [NT 91-94, 96; S-8]
17. Based upon Student's degree of impairment in emotional, social, and communication skills, the alternative setting at [Redacted] program for autistic students was deemed appropriate because of the supplementary support and services provided there. [NT 89; S-8]
18. The school and [Redacted program] members of the IEP team reconvened on February 25, 2013 and revised Student's present behavioral levels, Student's Functional Behavioral Analysis and Student's Positive Behavior Support Plan and included additional parental concerns. New behavioral concerns addressed were recently increased perseverative comments towards staff and peers that were becoming more aggressive and threatening in nature. [S-9]
19. No changes were made to the program location for the school year or for the ESY program. The Parents approved the accompanying NOREP. [S-9]
20. The IEP was revised again on March 15, 2013 when [Redacted program] and District staff members of the IEP team addressed an incident of Student's hitting Student's Personal Care Assistant in the face. Immediately before the incident Student was exhibiting safe and calm behavior. [S-11]
21. On April 8, 2013 the IEP team met, this time including Student and Student's father, to discuss increasing aggressive acts/attempts directed towards staff and multiple peers as well as verbalizations of intent to cut a staff's hair, smash a staff's glasses and cut a peer's face. Student was also exhibiting new challenging behaviors including kicking/hitting walls and doors, refusal to follow directions, and refusing to leave an area when told to do so. [S-12]
22. At the April 8, 2013 meeting the IEP team also considered that Student's overall engagement at [Redacted program] was being compromised by time spent outside

- the regular programming area for reasons of challenging behaviors, requests to skip activities, and needing breaks over 3 minutes. [S-12]
23. On May 16, 2013 the District staff and [Redacted program] personnel attended an IEP meeting to address incidents where Student [was aggressive toward peers and property]. Following that meeting the District issued a NOREP noting that “[Student] is demonstrating significant behavior – verbal and physical aggression...The team is recommending that the current program at [Redacted program] is no longer appropriate for [Student].” [S-12]
  24. A NOREP dated May 16, 2013 noted that the recommended educational placement was “Full Time Autistic Support at an Alternative School”. The District by letter dated May 21, 2013 asked the Parents’ permission to send packets to various other programs that might be appropriate and might accept Student. [S-12, S-13]
  25. In the same May 21<sup>st</sup> letter the District asked the Parents to sign a Permission to Re-Evaluate form for the mandated triennial evaluation. As the Parents withheld permission, the special education director conducted a review of records to satisfy the legal requirement of an evaluation. The Re-Evaluation in the form of record review was completed on June 4, 2013. [NT 142; S-13]
  26. The June 4, 2103 Re-Evaluation noted that due to behavioral concerns, Student was spending the majority of the day at [Redacted program] receiving 1:1 academic instruction from the PCA in a separate area from peers. A behavioral contract was developed to facilitate joining peers but Student was not meeting criteria for reintegration. Further, because of increasing safety concerns Student was not participating in off-campus activities such as field trips, job sampling or community-based activities. [S-15]
  27. On June 4, 2013 the Parents informed the District for the first time that they wanted Student’s ESY program to be located in the public high school and not at [Redacted program]. The Parents filed their due process request on that date. [NT 62, 94, 134; S-11]
  28. Student would like to attend ESY at [the high school] to see old friends. [NT 29-30]
  29. The Parents and the District recognize that some or all of Student’s friends from five years ago may have aged out of the program at [the high school]. [NT 52, 135]
  30. Student has a friend at [Redacted program]. [NT 45]
  31. Although it is a community high school [, the high school] is not Student’s neighborhood high school. [NT 48]

32. The Parents believe that as was the case through 2008, Student could be successful in public school ESY now with an aide, or perhaps more than one aide, who would develop a rapport with Student through being fair and honest, and who could monitor Student to ascertain when Student might be becoming agitated and calm Student. The Parents also propose that [the high school] bring on a full time behavior specialist to address Student's behaviors. [NT 50]
33. [Redacted program] provides Student with a 1:1 aide [Personal Care Assistant] for behavior management, transitions, focus and attention, and reinforcement of skills. Student is in a class of approximately 4-5 pupils, and the certified special education teacher is also a Board Certified Behavior Analyst [BCBA]. There is an assistant teacher in the classroom as well. [Redacted program,] has an additional full time BCBA on staff, as well as a crisis management team. [Redacted program] staff are familiar with Student. [NT 62-64, 68, 100-101, 110; S-15]
34. Even though Student has been at [Redacted program] for most of this school year with the supports listed, there are increasing significant behavioral issues regarding interference with instructional time due to behaviors. [NT 108]
35. At [Redacted program] Student currently spends about 63% of the school day isolated from peers due to behavioral challenges. Once Student is isolated Student exhibits compliance about 80% of the time. [NT 110-112]
36. Student is the size of a full grown well-built and well-nourished adult. [NT 84]
37. A total of 65 students will be attending ESY at [the high school]. Generally the students are lower functioning than Student, and likely in the autistic support classrooms the students will also be lower functioning than Student. Many of those students are nonverbal and sometimes engage in self-stimulating behavior, which is a trigger for Student. [NT 109, 128, 145]
38. Although everyone who works with Student likes Student, when the perseveration starts aggression can follow and although warning signs are there it is difficult to read the signs coming. Student requires familiar staff who know how to redirect Student, how to distract Student, and who are able to help Student apply coping skills to calm down. [NT 107, 145-146]
39. [The high school] is not currently capable of keeping Student and peers safe during the ESY program. [The high school] does not have a full-time BCBA on staff<sup>4</sup> and does not have a crisis team. The staff teaching in the [the high school] ESY program are not familiar with Student. [NT 64-66, 72, 132-133]

---

<sup>4</sup> ESY staffing for [the high school] includes a BCBA who will come out twice during the summer for 15 minutes each time to consult about the two students in the ESY program who have a behavioral contract. [NT 67]

40. The ESY program at [Redacted program] runs from July 8th to August 15<sup>th</sup>, Monday through Thursday for four hours, from 9:00 until 1:00. Despite Student's challenges, [Redacted program] can provide an appropriate ESY program for Student for summer 2013. [NT 161-162]

### Discussion and Conclusions of Law<sup>5</sup>

#### Burden of Proof:

The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3<sup>rd</sup> Cir. 2012). In this case the Parents asked for the hearing and thus assumed the burden of proof. However, as the evidence was not in equipoise, *Schaffer* did not apply.

#### 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).

Student testified in this matter and appeared to be responding to all questions candidly. Student was endearing, albeit somewhat groggy from medication, and made appropriate social overtures spontaneously and when prompted. Student's father represented the family in this matter and provided testimony. The kindness and respect with which this parent treated Student was palpable. Father's testimony conveyed his heartfelt belief that Student's appropriate placement for ESY in the LRE is the public high school. The two District witnesses who testified appeared to be testifying candidly and objectively. The

---

<sup>5</sup> The parties are in agreement that Student is entitled to ESY, and neither presented an argument about the content of the ESY programs offered in the two potential placements. Therefore, statutory provisions regarding ESY eligibility and purpose are not addressed in this decision.

father and the District staff shared a common bond of concern for the Student and all conveyed a great deal of positive regard for Student.

#### FAPE:

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; provided in conformity with an Individualized Educational Program (IEP). Acknowledging that some students may require programming beyond the regular school year, the federal legislature deemed that ESY 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). Pennsylvania regulations provide additional guidance for determining ESY eligibility, requiring that the factors listed in 22 Pa. Code §14.132 (a)(2) (i)—(vii) be taken into account.

#### ESY and FAPE:

Over 30 years ago, in *Battle v. Pennsylvania*, 629 F.2d 269 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981), the United States Court of Appeals for the Third Circuit declared unequivocally that school districts must determine ESY services on an *individualized* basis and consider all components of a student’s educational needs. As is the case for determining whether a district has offered an appropriate IEP, the standard for whether a proposed ESY program is appropriate is that it 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); *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3<sup>RD</sup> Cir. 1999).

#### Least Restrictive Environment:

The IDEA requires states to ensure that children with disabilities will be educated with children who are not disabled, “to the maximum extent appropriate ...” 20 U.S.C. §1412(a)(5)(A). Children with disabilities may not be removed from the regular educational environment unless “the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. §1412(a)(5)(A). In determining placement, consideration must be given to any potential harmful effect on the child or on the quality of services that he or she needs ... .” 34 C.F.R. §300.116(d). However, removal is not



permitted if the sole reason is “needed modifications in the general education curriculum.” 34 C.F.R. §300.116(e).

Contemplating the IDEA’s Least Restrictive Environment requirement, our Third Circuit has construed the language of the IDEA to prohibit local educational agencies from placing a child with disabilities outside of a regular classroom, if educating the child in the regular education classroom, with supplementary aids and support services, can be achieved “satisfactorily.” *Oberti v. Board of Ed. of Clementon Sch. Dist.*, 995 F.2d 1204, 1207 (3d Cir. 1993). *Oberti* set forth a two part analysis for determining whether or not a local educational agency has complied with the least restrictive environment requirement. First, the court must determine whether or not the child can be educated satisfactorily in the regular education setting with supplementary aids and services. Second, the court must determine whether or not the agency has provided education in the general education setting to the extent feasible, such as inclusion in part of the general education classes and extracurricular and other school activities. *Oberti*, 995 F.2d above at 1215. For our limited purposes at this time the second consideration is not a factor.

When considering the first part of the *Oberti* analysis, the court, and in this case the hearing officer must consider three things. First, I must determine whether or not the agency has given “serious consideration” to whether Student can be provided with FAPE “satisfactorily” and “appropriately” if placed in the general education setting with supplementary aids and services. A federal district court in the western part of Pennsylvania has instructed that such consideration must be more than a perfunctory glance toward the option of full inclusion, as the word “serious” implies. See *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 WL 22988892 (W.D. Pa. 2003). Next, I must compare and contrast the educational benefits that Student can receive in the regular education and segregated settings, particularly considering the benefits of learning social and communication skills in the general education context. Finally, I must consider the degree to which Student’s behavior in the regular education setting is so disruptive that Student is not benefitting and that the behavior is interfering with the education of the other students in the general education setting.

#### Discussion:

The sole dispute in this expedited matter concerns the location of Student’s ESY program. The Parents and Student would like ESY to be provided in a District public school while the District believes that this would not be appropriate for Student at this time. The parties disagree about which setting represents the Least Restrictive Environment for Student for summer 2013 ESY.

The Third Circuit court in *Oberti* noted a “tension” within the IDEA between the strong congressional policy in favor of inclusion, and the law’s mandate that educational services be tailored to meet the unique educational needs of the child. However, the court described the IDEA’s LRE requirements as a “presumption” in favor of educating an eligible child with non-disabled peers. Accordingly when considering the evidence

before me I begin with the presumption that Student's ESY for Summer 2013 should be located in the public high school.

Turning to the first part of the *Oberti* analysis as applied to Student's ESY program, I must determine whether the District has given "serious consideration" to utilizing the full continuum of placements and supplementary aids and services to place Student in the public high school. In this case I found that as far as was possible given time constraints the District did give serious consideration to the Parents' request once it became known. The Parents had approved an October 19, 2012 IEP and NOREP designating [Redacted program] as Student's placement for 2012-2013, including ESY for summer 2013. However, on June 4, 2013 the Parents for the first time informed the District of their desire that Student attend ESY in the public school setting rather than at [Redacted program,].

Second I must compare the educational benefits that Student can receive in the regular education and segregated settings, particularly considering the benefits of learning social and communication skills in the general education context. In this case ESY in the public school represents a population entirely composed of disabled peers. Further, Student would be placed in a classroom with a small group of peers who have autism, all of whom are intellectually lower functioning than Student. While it is possible that a few of Student's classmates would be peers with whom Student was grouped 5 years previously when Student last attended public school, this is not guaranteed. In contrast, while in the [Redacted] program Student would also be entirely with disabled students, Student will be with peers who have been together this school year and with whom Student has developed acquaintances and one friendship.

Third, I must consider the degree to which Student's behavior in the public school ESY setting would be so disruptive even with supplementary aids and services that Student would not be benefitting, and the degree to which Student's behavior is interfering with the education of the other pupils in that setting. Given Student's propensity toward unpredictable physical aggression, it can reasonably be foreseen that for at least part of the time Student would require removal to a separate area to ensure Student's safety and that of Student's classmates. The public school setting does not currently have a full-time Board Certified Behavioral Analyst [BCBA] scheduled to work in the ESY program, and if the District would somehow find and engage a BCBA willing to work full time during the length of the program this would not necessarily prevent Student's outbursts. Even in [Redacted program] where Student's classroom teacher is a BCBA and where there is another BCBA on Staff Student has engaged in, or needed assistance to refrain from engaging in, physically aggressive outbursts. The public school setting does not have a crisis team such as that at [Redacted program,] that is ready and able to provide assistance should Student's safety and that of others require such intervention.

The IDEA requires that students be educated in the least restrictive environment that is appropriate for them. When a program and its environment are appropriate, they are designed so that the student can receive meaningful educational benefit. Environment is more than the bricks and mortar of an actual physical location and includes access to

positive interaction with peers and to supports to keep a student safe from harming self or others. The peers at [the high school] are not at Student's functional level, and their disabilities are potential triggers for Student's perseveration that leads to verbally and physically aggressive behaviors. As past behavior is a significant predictor of future behavior, and because Student's perseveration and aggression have increased over the last three to four months, it can be expected that at [the high school] Student's perceptions of unfamiliar peers would become a trigger for aggressive behavior. I have given serious consideration to the Parents' thoughts about adding a full time behavior specialist to the staff and of perhaps having two aides provide 1:1 [or at times 2:1] assistance for Student. I find that although those ideas are worthy of consideration, the District was given very little notice in which to locate and engage such personnel, and moreover such a plan cannot reasonably include a crisis response team such as that offered at [Redacted program]. A large part of my consideration is that the [Redacted] program, while still ready and willing to continue educating Student, has reached the conclusion that Student requires a higher level of care, or at least a different setting, than it can provide.

#### Conclusion

I must conclude, not without regret, that my initial presumption favoring placement in [the high school] has been rebutted. I find that placement in [the high school] for summer 2013 ESY is not appropriate because that setting cannot offer the very high level of supports Student requires in order to be safe and to ensure the safety of other students and of staff.

Based upon the evidence presented at the expedited due process hearing in this matter, and the applicable law relating to ESY eligibility and appropriate programs and services, I find that [the high school] is not an appropriate placement for Student for summer 2013 ESY and that at this time [Redacted program,] represents the Least Restrictive Environment that is appropriate for Student's summer 2013 ESY.

## Order

It is hereby ordered that:

[Redacted program] represents the least restrictive educational environment for delivering Student's summer 2013 Extended School Year program.

[The] High School is not an appropriate environment in which to deliver Student's summer 2013 Extended School Year program.

Any claims not specifically addressed by this decision and order are denied and dismissed.

June 29, 2013

Date

*Linda M. Valentini, Psy.D., CHO*

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