

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: J.B.

ODR #1883-10-11-JS

Date of Birth:  
[redacted]

Date of Hearing:  
June 16, 2011

OPEN HEARING

Parties to the Hearing:  
Parent[s]

Representative:  
Pro Se

Cheltenham Township School District  
2000 Ashbourne Road  
Elkins Park, PA 19027

Claudia Huot, Esquire  
Wisler Pearlstine  
Blue Bell Executive Campus  
460 Norristown Road, Suite 110  
Blue Bell, PA 19422

Date Transcript Received:

June 19, 2011

Date of Decision:

June 22, 2011

Hearing Officer:

Linda M. Valentini, Psy.D., CHO

## Background

Student is an eligible District resident of elementary school age. The District has found Student ineligible for Extended School Year [ESY] services. The Parents requested an expedited hearing to address the question of Student's eligibility for ESY for summer 2011.

## Issue

Is Student eligible for ESY services for the summer of 2011?

## Findings of Fact

1. Student was evaluated in December 2009 and was found to have mild developmental delays in readiness concept development, speech/language, and personal-social interaction. [S-1]
2. Pursuant to a January 2010 IEP Student participated in an early childhood special education preschool program. [S-3]
3. Student was re-evaluated in June 2010 to facilitate transition from early intervention preschool services to kindergarten and was classified as having Other Health Impairment [ADHD] and Speech/Language Impairment. [NT 30-31; S-4]
4. Pursuant to a June 2010 IEP Student was assigned to the neighborhood school in a Supplemental Support classroom where Student received reading, math and language arts. Student attended science, social studies, specials, lunch and recess in the general education classroom. [NT 26-27; S-5]
5. Student's measurable annual IEP goals and progress reported for the 1<sup>st</sup> / 2<sup>nd</sup> reporting periods were as follows: Answering basic wh-questions: Good Progress/Inconsistent Performance; Following basic oral directions using basic linguistic concepts: Good Progress/Inconsistent Performance; Using 4-5 word utterances to communicate about a variety of activities: Goal mastered/Goal mastered; Identifying corresponding letters when given their sounds: Good Progress/Excellent Progress; Identifying uppercase and lowercase letters: Good Progress/Excellent Progress; and Identifying numbers: Consistent Progress/Excellent Progress. [NT S-7]
6. Student's report card reflects progress in every academic area assessed: reading, writing, listening and speaking, mathematics, social studies, and science. [S-8]
7. Student's report card reflects behavioral ratings of Satisfactory, Satisfactory plus or Satisfactory minus in every characteristic assessed by the time of the second marking period. [S-8]

8. If the last marking period were available on the report card Student's ratings would be similar or improved. [NT 51]
9. Student's behavior in the special education classroom is above average and in the general education classes Student has been successful such that the District seeks to put Student in general education math class next year. [NT 51]
10. The District collected academic regression/recoupment data before and after the Thanksgiving break, the winter break and the spring break using AIMSweb. Student was able to recoup skills in the expected timeframe. [NT 55, 59, 78-79; HO 1]
11. Student receives wraparound services for behaviors that occur in the home and in the before and after school daycare settings, but not in school. [NT 67-69]
12. Student's Behavior Specialist Consultant [BSC] and the psychologist who evaluated Student for reauthorization of wraparound services recommended that the Parents request ESY for Student. [NT 76, 109; S-9]
13. The District considered the Parents' request and based upon progress monitoring on IEP goals, curriculum-based assessments, report card ratings, and the factors under Pennsylvania Regulations [regression/recoupment, maintenance of skills, mastery of consolidation of important skills, skills for self-sufficiency and independence from caretakers, withdrawal from the learning process and severity of disability] deemed student ineligible for ESY and issued a NOREP to that effect in May 2011. [NT 103-104; S-11]
14. The Parents disapproved the NOREP, stating "[Student] needs therapeutic care over the summer". [S-14]
15. The Parents seek to have the District fund ESY for Student in a summer therapeutic activities program that is designed for children who require emotional support or who are on the autistic spectrum. The Parent has already secured funding from another source for Student to attend one of the program sessions, and would like the District to fund the other session. [NT 90; S-15]
16. Student is not classified with emotional disturbance and is not on the autistic spectrum. [NT 113-114]
17. If Student had been offered ESY Student would have been placed in a four week program in a neighboring school district for a total of 60 hours. [NT 92]

## Discussion and Conclusions of Law

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 meet their burden of persuasion and therefore did not prevail, given the preponderance of the evidence in the District’s case.

### Discussion and Conclusion:

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 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). 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.

22 Pa. Code § 14.132(a)(2) (i)—(vii) provides in relevant part:

(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.

(2) In considering whether a student is eligible for ESY services, the IEP team shall consider the following factors; however, no single factor will be considered determinative:

(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.

(b) Reliable sources of information regarding a student's educational needs, propensity to progress, recoupment potential and year-to-year progress may include the following:

(1) Progress on goals in consecutive IEPs.

(2) Progress reports maintained by educators, therapists and others having direct contact with the student before and after interruptions in the education program.

(3) Reports by parents of negative changes in adaptive behaviors or in other skill areas.

(4) Medical or other agency reports indicating degenerative-type difficulties, which become exacerbated during breaks in educational services.

(5) Observations and opinions by educators, parents and others.

(6) Results of tests, including criterion-referenced tests, curriculum-based assessments, ecological life skills assessments and other equivalent measures.

(c) The need for ESY services will not be based on any of the following:

(1) The desire or need for day care or respite care services.

(2) The desire or need for a summer recreation program.

(3) The desire or need for other programs or services that, while they may provide educational benefit, are not required to ensure the provision of a free appropriate public education.

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 (3<sup>RD</sup> Cir. 1999). 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)). Districts need not provide the optimal level of service, maximize a child’s opportunity, or even set a level that would confer additional benefits. 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).

The IDEA and Pennsylvania law are very clear on what qualifies a student for ESY and what ESY is supposed to accomplish. ESY is provided to prevent students from losing educational ground over a long break in schooling, such as during the summer. ESY is extended school year, and is not designed to provide therapeutic or recreational options for students no matter how attractive those options may be. In the case before me, while I understand the Parents’ desire for Student to keep up the momentum of a successful kindergarten year, I find that the District has made a correct determination that Student does not qualify for ESY. Student does not qualify on the basis of regression / recoupment, maintenance of skills, mastery of consolidation of important skills, skills for self-sufficiency and independence from caretakers, or withdrawal from the learning process. Student does not have a severe disability such as autism/pervasive developmental disorder, serious emotional disturbance, severe mental retardation, degenerative impairments with mental involvement or severe multiple disabilities. Student is in a fortunate position relative to peers who do require ESY.

## Order

It is hereby ordered that:

Student is not eligible for ESY services for the summer of 2011.

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

June 22, 2011

Date

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

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