

*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.H.

ODR #3068/11-12-KE

Date of Birth:  
[Redacted]

Date of Hearing:  
April 30, 2012

CLOSED HEARING

Parties to the Hearing:  
Parent

Representative:  
Pro Se

Pittsburgh School District  
341 S. Bellefield Avenue  
Pittsburgh, PA 15213

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Date Transcript Received:

May 3, 2012

Date of Decision:

May 6, 2012

Hearing Officer:

Linda M. Valentini, Psy.D., CHO  
Certified Hearing Official

## Background

Student<sup>1</sup> is an elementary-school-age District resident with a genetic disorder who is eligible for special education pursuant to the Individuals with Disabilities Education Act [IDEA]<sup>2</sup> under the classification of Intellectual Disability<sup>3</sup>, and consequently a protected handicapped individual under Section 504 of the Rehabilitation Act of 1973 [Section 504],<sup>4</sup> as well as the federal and state regulations implementing those statutes. Student's eligibility for special education includes Extended School Year [ESY] programming.

The current matter concerns an expedited due process request from the Parent addressing the question of whether her child's attendance at the summer camp that had been District-funded as the ESY program the previous two years should again be provided for summer 2012, which is her preference. The Parent alleges that the ESY program now being offered by the District is inappropriate and cannot meet Student's individual needs. The District maintains that the ESY program it is now offering is appropriate and necessary given Student's current instructional needs and that the program preferred by the Parent is not appropriate for Student at this time.

## Issue

Is the ESY program being offered to Student by the District appropriate?

## Findings of Fact

1. Student has an intellectual disability. [S-3]
2. Student is working on letter and number recognition, sight word acquisition, speech/language skills, fine and gross motor skills, and compliance. [S-5]
3. Student's most significant needs are in the areas of functional academic skills primarily math, reading skills, fine and gross motor skills, communication and self-help skills. [NT 35]
4. Student's latest IEP dated December 5, 2011 emphasizes that Student needs "repetition and practice" and the Re-evaluation Report also dated December 5, 2011 noted that Student benefits from "continuous repetition and practice". [S-3, S-5]

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<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> 20 U.S.C. §§ 1400 *et seq.*

<sup>3</sup> All references to mental retardation in the record will use the term intellectual disability consistent with Rosa's Law, Pub. L. No. 111-256, 124 Stat. 2643 (2010); *see* 20 U.S.C. § 1401(3)(A)(i).

<sup>4</sup> 29 U.S.C. § 794.

5. Student's progress has been inconsistent and varies daily based on physical health, mood and compliance level. [S-5]
6. About twice a day Student yells "loudly and continuously" in class and about twice a week Student has a temper tantrum. [NT 36, 44; S-5]
7. Student receives Behavioral Health Rehabilitative Services [BHRS] [also called "wraparound" services] to address problems with limited communication skills, limited play and social skills, and challenges with behavioral regulation. [P-2]
8. Student's IEP team notes that Student "requires a highly structured environment that is familiar to [Student]". Specially Designed Instruction [SDI] in the IEP provides for "structured activities to enforce rituals and routines". [S-5]
9. Student has just achieved toilet training with about 90% success through the cooperative efforts of the current teacher and the Parent. [NT 45]
10. In December 2011 and in January 2012 the teacher assessed Student's regression/recoupment in reading through the presentation of 20 sight words on flashcards and in math through counting objects in groups from one up to 25. Student did not regress in reading but regressed and did not recoup in math. [NT 38-40]
11. Student's IEP team convened on April 17, 2012 and explained its ESY eligibility determination as follows: "Existing data indicate that this student does regress significantly and recoupment does not return to baseline levels. Since it is unlikely that this student will attain or maintain skills and behavior relevant to established goals and objectives, this student is eligible for ESY services". [P-6F]
12. For summer 2012 ESY the District proposed a program for Student other than the program it had provided the previous two years. [S-8]
13. The NOREP indicates and the teacher who testified confirmed that the IEP team did not consider any other ESY option for Student but the program it was offering. [NT 52; S-8; P6F]
14. The individual who decided on behalf of the District what ESY program would be offered to Student has never met Student or observed Student in class. [NT 58]
15. The District's ESY program is not located within the District's boundaries, but will be staffed with some special education personnel from the District. [NT 59-60, 67]
16. Student's current teacher is not participating in the District's ESY program. It is not known at this time whether either of the two aides in Student's current classroom will participate in the District's ESY program. [NT 60-61, 67]

17. The District's proposed ESY program would run for three weeks from Tuesday July 10<sup>th</sup> to Friday July 27<sup>th</sup> for 5 hours per day [8 am to 1 pm] for 5 days per week totaling 14 days of instruction. [NT 76-77; S-8]
18. The current academic year ends on June 13<sup>th</sup>. There is a 26-day gap between the end of the regular school year and the District's ESY program. [NT 77]
19. The Parent did not approve the March 8, 2012 Notice of Recommended Educational Placement [NOREP] wherein the District sought to place Student in its ESY program. [S-8; P6F]
20. For the past two summers [2010 and 2011] the District has provided/funded Student's ESY program at a day camp for special needs children serving pupils with physical, cognitive, emotional, social, and communication challenges. [NT 12; P-1A]
21. The camp program provides emphasis on communication, social interaction, recreation, vocational, and independent living skills. The program offers music therapy, art expression, basic nutrition/cooking, aquatics, adapted physical education, vocational living and responsibility training. [S-9]
22. The camp program will implement an IEP developed by a school district as per a child's ESY program. [S-9]
23. Children are grouped at the camp on the basis of age, ability and gender. Average counselor to camper ratio is 3:1. [P-1A]
24. The camp program provides activities that enhance and improve fine and gross motor skills. [NT 12]
25. The camp program provides opportunities for positive peer interaction and also provides opportunities for parents and children to spend time together. [NT 12-13]
26. The camp's administration is comprised of teachers, behavior specialists, assistants or administrators in regular or special education who work with children with special needs on a year-round basis. [P-1A]
27. The directors who manage the various units – Physical Support, Learning Support/Life Skills Support/Autistic Support and Emotional Support maintain positions during the school year within a school district or an Approved Private School that correlate with their expertise. [P-1A]
28. The director of the camp was an employee of the District in a special education supervisory position as recently as last year. [NT 64-65]

29. The camp recruits qualified counseling staff who have experience in special education, psychology, counseling and social work. The camp also utilizes volunteers who are in school and obtain credits for school by donating their services. [P-1A]
30. The camp runs for six weeks from June 18th through July 27<sup>th</sup>, for 5 hours per day [9 am to 2 pm] 5 days per week. [S-9]
31. As the current regular school year ends on June 13<sup>th</sup>, there is a four-day gap before Student would start ESY at the camp. [NT 77]
32. The camp ESY program offers 29 days of instruction. [S-9]
33. Student is familiar with the camp and its staff, Student would be with the same counselors and peers as in the past two summers, and knows the schedule, routines and what is expected. [NT 13]
34. Student interacts better with and relates better to others with whom Student is familiar. [NT 13]
35. Student has difficulty transitioning to unfamiliar settings and adjusts poorly to new environments. [NT 13]
36. Student has had the same teacher in the District public school for the past three academic years. [NT 34]
37. Student will have a new teacher for the 2012-2013 school year. [NT 86]
38. When Student has returned to school following ESY programming at the camp the last two summers Student's classroom teacher has noted Student made progress over the summer. [NT 54]

#### 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 Parent requested this hearing and was therefore, assigned the burden of persuasion pursuant to Schaffer and also bore the burden of production. The Parent met her burden of persuasion and therefore prevailed, given the preponderance of the evidence in her case. As the evidence was not evenly balanced, an analysis under *Shaffer* was not necessary.

#### 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).

Four witnesses testified in this matter. I found the mother’s testimony very credible and gave it significant weight. Proceeding pro se, rather than simply testifying to why she believed the camp ESY program was appropriate for her child, she also zeroed in on very practical problems with the District’s ESY program. Student’s BSC was likewise credible. Unlike the District’s witnesses, she has observed Student at home, at school and at the camp ESY program. I found her testimony about Student’s behavioral needs in the classroom to be credible. The current teacher testified credibly. Although she was called to support the District’s position, she candidly admitted that upon returning to her classroom after the last two summers at the ESY camp Student evidenced progress over the summer break and this candor as notable. I found the testimony of the technical assistant consultant for autism who coordinates and supervises the District’s ESY program not to be credible. She failed to give a reasoned response to inquiries about why she had approved the camp ESY the previous year but not this year, asserting that this year Student had an “academic IEP” [NT 68, 75] implying that Student did not have an academic IEP in the previous year. Additionally I did not find her defense of the District’s three week program, that it offers more intense and focused work on the IEP goals, to be educationally sound for Student given Student’s documented need for continuous repetition and practice.

#### Legal Basis:

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; and provided in conformity with an Individualized Educational Program (IEP). 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).

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, recoument 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).

Thirty years ago, in *Battle v. Pennsylvania*, 629 F.2d 269 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981), the federal courts 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.

In *Breanne C. v. Southern York County School District*, 2010 WL 3191851 (M.D. Pa. 2010) the court noted that when an eligible child receives an IEP, that IEP must be reasonably calculated to afford the child the opportunity to receive a "meaningful educational benefit" [See *Ridgewood*] and that an IEP confers a meaningful educational benefit when it is more than a trivial attempt at meeting the educational needs of the student, and it is designed to offer the child the opportunity to make progress in all relevant domains under the IDEA, including behavioral, social and emotional.

The Pennsylvania Department of Education [PDE] is charged by the General Assembly with developing rules and regulations to carry out its legislative enactments as set forth in the Pennsylvania School Code. Act of July 23, 1969, P.L. 181, § 1, 71 Pa. Stat. Ann. §§ 1037, 1038; Act of June 16, 1994, P.L. 319, No. 49, § 9, 64 Pa. Stat. Ann. § 468. The PDE explains that public education "prepares students for adult life by attending to their intellectual and developmental needs and challenging them to achieve at their highest level possible. In conjunction with families and other community institutions, public education prepares students to become self-directed, life-long learners and responsible, involved citizens." 22 Pa Code § 4.11(b).

Finally, attention is invited to 22 Pa Code 4.21(b) related to "Elementary Education: primary and intermediate levels" – which mandates that "curriculum and instruction in the primary program shall focus on introducing young children to formal education, developing an awareness of the self in relation to others and the environment, and developing skills of communication, thinking and learning".

#### Discussion:

The IDEA and Pennsylvania law are very clear on 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. Case law in our Third Circuit, and the Pennsylvania Department of Education, make it abundantly clear that education is more than academics and that behavioral and life skills needs must also be addressed.

Student's intellectual disability affects all areas of functioning. In addition to needs in the areas of reading, math, speech, and motor skills Student also has significant life skills needs including bowel and bladder control and emotional regulation. Furthermore Student has significant difficulty with change and transitions.

I find the District's proposed ESY program deficient in three major respects, First, Student has just recently attained daytime bowel and bladder control through the efforts of the Parent and a trusted teacher whom Student has known for three years. The Parent

and the teacher thanked one another in the hearing room in my presence for helping in this crucial step towards self-sufficiency. The Parent testified credibly that Student has difficulty with change and takes time to trust adults. Her belief that Student would be very unlikely to allow someone unknown to see Student's private parts and to assist in toileting was practical and credible [NT 82-83]. In the District's ESY program Student would not be with the teacher Student has had for three years, and may or may not be with one of the current aides. Conversely, Student is very familiar with staff at the camp and would have these same staff at camp this summer. It is more likely than not that Student's toileting skills will remain intact during and following the ESY program at camp.

Second, Student has significant difficulty with transitions and change. Because of natural grade progression Student is being required to have a new teacher for the coming school year. I agree with the Parent that requiring Student to endure two major changes in a short period of time is not wise, and I further observe that even if Student were able to adjust to the District's ESY staff, then being removed from them and put into the new teacher's class in September would likely make for an even more difficult transition than can be anticipated. The Parent's point that, given its three-week duration, just when Student started to adjust to the District's ESY program the ESY program would be over was well-taken.

Third, and most critically I find that the 26-day gap between the close of the regular school year on June 14<sup>th</sup> and the beginning of the District's ESY program is inordinately long given Student's significant needs, particularly when at the end of that period of time Student would be required to adjust to a new teacher. I also find that 14 days of ESY instruction for a child with an intellectual disability, particularly when the child has the added task of adjusting to new staff in the ESY program, is insufficient and unlikely to help Student maintain academic or behavioral skills over the summer. The individual who selected the ESY program for Student testified that the intense work on IEP goals in three weeks would be appropriate for Student. This contradicts the IEP which emphasizes "repetition and practice" and the Re-evaluation Report noting that Student benefits from "continuous repetition and practice".

### Conclusion

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 conclude that the District has not offered an appropriate ESY program to Student for Summer 2012. As the District has not offered an appropriate program the Parent must prevail in this matter, and the District shall be required to fund the summer camp program that the Parent prefers and which the District has offered to Student in fulfillment of ESY programming requirements for the past two years.

## Order

It is hereby ordered that:

The Extended School Year program the District offered to Student for Summer 2012 is not appropriate and therefore the District is obligated to fund the summer camp program that the Parent requests.

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

May 6, 2012

Date

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

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