

**This is a redacted version of the original hearing officer decision. Select details may have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.**

## **Decision**

Due Process Hearing for WW  
Date of Birth: xx/xx/xx  
File Number: 7621/06-07LS

Date of Hearing:  
May 8, 2007

### **OPEN HEARING**

Parties:

Mr.

Ms. Lee Carr  
Scranton City School District  
425 N. Washington Avenue  
Scranton, PA 18503-1305

Representative:

Harold McGrath, Esq  
McGrath Law Office  
321 Spruce Street, Suite 600  
Scranton, PA 18503

Date Transcript Received:

May 11, 2007

Date of Decision:

May 20, 2007

Hearing Officer:

David F. Bateman, PhD

## I. BACKGROUND

Student is a xx-year-old student eligible for special education and related services identified by the District as a student with autism and other disabilities. He currently attends the local high school. The District has found him eligible for extended school year services for the summer of 2007 and offered an individualized education program (IEP) for extended school year (ESY) services on March 23, 2007. The Parent disagrees with the IEP, specifically the amount and duration of the ESY services offered.

This hearing was held shortly after the U.S. Supreme Court issued their decision in the *Schaffer v. Weast*<sup>1</sup> matter shifting the burden of persuasion to the party filing for the hearing. It was clear a lot of animosity existed in this hearing. The issues in this hearing were very similar to a previous due process hearing and appeal from 2004.<sup>2</sup>

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<sup>1</sup> *Schaffer v. Weast*, 126 S.Ct. 528

<sup>2</sup> *In re W.W. v. Scranton*, PA SEA 1490, June 20, 2004.

## II. FINDINGS OF FACT<sup>3</sup>

### A. Background

1. Student was born on xx/xx/xx. He is currently xx-years of age (S-17, p. 2).
2. Student is a resident of the School District of Scranton eligible for special education and related services identified by the District as having autism (NT 11).
3. A previous due process hearing was held involving Student and the Scranton School District in April 19, 2004 (S-10) with an appeal issued on June 20, 2004 (S-12). The decision of the hearing officer and the appeals panel supported the amount and duration of the extended school year program offered by the District.
4. Student's team members at [redacted] High School met on February 10, 2006 and determined his eligibility for extended school year services (S-13). Specifically, they recommended half-day summer programming for six weeks, four hours, four days per week (S-13, p. 2).
5. The Parent called ConsultLine on March 9, 2006 requesting an IEP meeting to discuss ESY services (S-15).
6. Student's Parent was invited to an IEP meeting for March 22, 2006 for the purpose of completing the ESY IEP (S-14, p. 1). Parent was unable to attend the meeting (S-14, p. 2).

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<sup>3</sup> References to notes of testimony will be designated "NT" followed by the relevant page number. References to District evidentiary exhibits will be designated "S" followed by the relevant exhibit number.

7. The District offered an IEP for the ESY services for the summer of 2006. Specifically, they offered three hours per day for 22 days (S-14, p. 11).
8. A team held a meeting on January 15, 2007 to discuss Student's eligibility for ESY services (S-20; NT 28-29). The team recommended half-day summer program, 4 hours, 4 days per week. The Parent checked he wanted Student to participate in ESY but wrote in the comments section: Please create an appropriate ESY program for my son for 5 days a week, 6 hours a day for all summer long (S-20, p. 3).
9. Student's Parent was invited to an IEP meeting for March 23, 2007 for the purpose of completing the ESY IEP (S-16, p. 1).
10. The District issued a letter to the Parent detailing the ESY program would run for 22 days from July 2, to August 9, 2007. The program would meet for three hours a day (S-17).
11. The IEP states the student is eligible for ESY services based on: "Student demonstrates significant regression over school holidays and vacations and does not demonstrate the ability to recoup within an expected amount of time. He would be better able to achieve his goals with the benefit of extended school year." (S-17, p. 22)
12. The IEP states he we will receive ESY services at [redacted] School, four days a week, three hours a day, from July 2, 2007 to August 9, 2007 (S-17, p. 22).
13. It is clear there have been numerous IEP meetings over the years regarding Student (S-17, pages 26-27).

14. Progress monitoring charts provided by Student's teacher indicate progress in some areas, and limited progress in others (S-18).
15. The Parents filed a due process complaint on April 27, 2007 (S-19). The complaint specifically requests ESY for full school days for six hours, 5 days a week, and all summer long (S-19, p. 8).

### **III. ISSUE PRESENTED**

Is the extended school year program offered by the Scranton City School District for the summer of 2007 appropriate for Student?

### **IV. DISCUSSION AND CONCLUSION OF THE LAW**

A Due Process Hearing was requested by Student's Parent (hereinafter Parent) as a result of a disagreement over the duration and amount of extended school year (ESY) services offered for the summer of 2007. There is no dispute regarding Student's eligibility for special education and related services for ESY services for the summer of 2007. The dispute lies in the amount and duration of services offered by the District. The IEP from the District offers three hours a day, four days a week, for six weeks. The Parent as a result of this hearing was seeking full-day services for every day of the summer.

This is not the first time the parties have had a due process hearing regarding ESY services for Student (FF:3). In the spring of 2004 a due process hearing was held regarding ESY services and the Pennsylvania Special Education Appeals Panel stated in their Order:

The decision of the Hearing Officer is affirmed in part and modified, with clarification and reasoning consistent with this opinion. The hearing officer's Order is reversed. District is required to **immediately** convene the ESY IEP Team and fashion an **appropriate** IEP for Student so that it may be implemented on the first scheduled day of District's ESY Program, July 5, 2004. The IEP must meet all state and federal requirements including, but not limited to, specificity and measurability; and must be based upon Student's 2003-2004 IEP and current needs and summer programming goals, as specified by District's witnesses, emphasized by the parent, and identified

herein.<sup>4</sup>

The Hearing Officer and the Appeals Panel did not change the amount or duration of services offered to Student.

The District as a part of their presentation of their case stated the present hearing was essentially *res judicata* (NT 14-15) because of the previous due process hearing.

The Pennsylvania Special Education Dispute Resolution Manual defines *res judicata* as:

## **Chapter 12 - Questions of Jurisdiction and Res Judicata**

### **1201. Questions of Jurisdiction**

The Hearing Officer, based on materials received from ODR prior to the hearing, discussions with the parties during a conference call, or after listening to opening statements, may raise the question of whether or not the issue(s) to be heard at the hearing are within his or her jurisdiction. Both parties, either before the start of the hearing or at the hearing may file motions to dismiss some or all of the issues based on questions of jurisdiction. Jurisdictional challenges may occur if the hearing officer is not empowered to address the issue being presented, or if the issue is subject to the doctrine of *res judicata*. *Res judicata* is a legal principle that denies the same parties the right to relitigate an issue on which a final decision has been rendered in a previous litigation. In other words, a party only has one opportunity to argue a case in any one court, unless an appeal is filed.

Examples of *res judicata*:

A. The LEA prevailed at the prior hearing and all four of the following apply to the present hearing: the LEA's program and/or placement is the same; no new circumstances have arisen which might result in a reversal or modification of the earlier decision; there has been no change in law, regulation, or policy in the interim between the hearings which might require reversal or modification of the prior decision; and there is no manifest error on the record of the previous hearing. If the prior decision was appealed and no manifest error was found in the record by the Appeals Panel, the record is

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<sup>4</sup> *In re W.W. v. Scranton*, PA SEA 1490, June 20, 2004, page 14.

assumed to be free from manifest error and cannot be reviewed by a Hearing Officer; or

B. The LEA did not prevail at the prior hearing and all five of the following apply to the present hearing: the LEA's program and/or placement is the same; the parent's program is the same; no new material is introduced; there has been no change in law; and there is no manifest error.

C. The passage of a significant period of time since the previous hearing may itself raise new issues. For example, a child of thirteen (13) might not have needed a transition program, but would as a fourteen (14) year old.

A previous Appeals Panel Decision has helped to define *res judicata*:

Correctly, the Hearing Officer sets forth the parameters of the *res judicata* doctrine. It operates to bar consideration in a later action of that which was the subject of an earlier action, in terms of whether those later proceedings consider what was or could have been raised in the earlier one. See Thomas v. Brown, 868 F. Supp. 959 (E.D. Pa. 1997); Balent v. City of Wilkes-Barre, 542 Pa. 555 (1995); In Re the Educational Assignment of E.R., Special Education Opinion #1209; In Re The Educational Assignment of B.C., Special Education Opinion #1262. The elements to be considered in assessing satisfaction of these requirements, which are applicable in special education due process proceedings, are identity of claims and issues, identity of the parties, and a prior decision on the merits. See Dempsey v. Cessna Aircraft Company, 439 Pa. Super. 172 (1995); In Re The Educational Assignment of S.M., Special Education Opinion #1579; In Re The Educational Assignment of E.S., Special Education Opinion #1291.<sup>5</sup>

In this present case, it is clear in 2004 the issues presented to the Hearing Officer and the Appeals Panel were basically the same, but that was three years ago, and eligibility for, and subsequent programming for ESY are decisions requiring an annual review. Therefore, the claim of *res judicata* is dismissed.

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<sup>5</sup> *In re K.B. v. Sto-Rox*, Pa SEA 1605, May 31, 2005.



## ESY Services

Special education is to be individualized. The principal hallmark of a need for ESY services is a well-founded prediction that, without such services, the student will regress so far over a summer break, and the student will take so long to recoup the knowledge or skill that was lost, that the student will not progress over the course of years.

Quoting heavily from the previous Appeals Panel decision which described the components of the law:

The IDEA statute does not mention ESY services, however, IDEA’s regulations, the Pennsylvania Code (the “PA Code”), and the Pennsylvania Basic Education Circulars (BEC) provide authority and specific guidance for determining ESY eligibility, and general guidance for the development, content, and delivery of ESY programs. See 34 CFR § 300.309; 22 PA Code § 14.132; PA BEC Extended School Year Eligibility, April 1, 2003; see also *Armstrong v. Kline*, 476 F Supp. 583 (ED PA 1979) (establishing the mandate in PA for ESY programming).

The purpose of ESY services is to avoid the regression and poor recoupment experienced by some eligible students. If, inter alia, regression during program breaks, and subsequent recoupment makes it “unlikely the student will maintain the skills and behaviors relevant to IEP goals and objectives,” then ESY is required, without which, the school year IEP would not provide FAPE. 22 PA Code § 14.132 (2) (iii).

Once the determination is made that ESY services are warranted, the programming must be designed and implemented based upon federal and state mandated principles. The federal regulations, stated in the negative, are as follows:

“In implementing the requirements of this section, a public agency may not

- (i) Limit extended school year services to particular categories of disability; or
- (ii) *Unilaterally limit the types, amount, or duration of those services.* 34 CFR § 300.309 (a) (3) (emphasis added).

Pennsylvania requires the following:

### **II. A. Timing – Target Group Students**

...The IEP review meeting must occur no later than February 28 of each school year...the program specifics must be included in the IEP ...[and issued with a NOREP] no later than March 31....

## **II. B. Notice of Eligibility and Content of ESY Program**

LEA notice to the parent concerning ESY eligibility or ineligibility must be by NOREP...

When ESY services are offered by the LEA, the IEP that accompanies the NOREP must contain the following:

- Description of the type and amount of ESY service;
- Projected beginning dates and anticipated duration of service;
- Frequency;
- Location.

Of course, as with all IEP team decisions, the ESY components of the IEP must be individualized to meet specific child's needs, and must be developed with the participation of the parents at an IEP team meeting.

## **II. E. Types of ESY Programming**

While many ESY programs are held during the summer, children eligible for ESY services can require weekend or even virtually continuous programming. It is also important to note that ESY programs are not limited just to self-help and basic skills. Academic and vocational goals can also be part of a child's ESY IEP if appropriate. All decisions regarding types of programming must be made on an individual basis by the IEP team. PA BEC, ESY Eligibility § I; II. A., B., E. (hereinafter referred to as "PA ESY BEC") (italicized emphasis added). See also 22 PA Code § 14.132 ESY.<sup>6</sup>

Student has been diagnosed with autism, and identified as eligible for special education and related services. He participates in specified regular eleventh grade classes and a Learning/Life Skills Supplemental Intervention program per his Individualized Education Program (IEP). This school year's IEP has not been signed (NT 36). A meeting for which ESY services were discussed, was developed and approved by the parent with the comment that appropriate ESY services be provided (FF: 8). Following the meeting, the District offered an IEP delineating the services discussed (FF:12).

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<sup>6</sup> *In re W.W. v. Scranton*, PA SEA 1490, June 20, 2004, page 6.

Parent disapproved District's ESY IEP proposal requesting full day services, five days a week for the complete summer (FF:15). Specifically, the Parent objected to the program and offered only the Pennsylvania Department of Education Basic Education Circular (S-1) as evidence.

Similar to the 2004 due process hearing, this due process hearing was convened on May 8, 2007, at which Student's father appeared *pro se*. The relief sought is a full summer, full day ESY program.

The program offered by the District is similar to the program offered during the summer of 2006. Testimony was provided by Student's teacher that he benefited from the summer 2006 program (NT 66-76). She actually stated he improved over the summer using the time frame of services delineated by the District. She kept data on his academic functioning and offered it as an explanation of the benefits he received during the summer of 2006 (S-18). Similar to the previous due process hearing's appeal, one of the factors discussed was the benefit of the program as offered from a previous summer on Student's education.

Neither do the parties dispute that Student maintained 2002-2003 IEP skills over the summer of 2003, during which he participated in "a program similar to the one being offered for this year." HO @ 4. FF 5, 6, 7, 8, 9, 10. Although not determinative as to the similar, but updated, 2004 ESY program's appropriateness *per se*, the lack of regression in all IEP areas over the previous summer speaks well for the appropriateness of the methodology and delivery of that 2003 ESY program. Consequently, it would be reasonable for the hearing officer to conclude that, absent essential 2003-2004 IEP methodology or delivery system alterations, a similar ESY proposal by the District, based upon Student's updated levels of functioning, would be an appropriate approach to this summer's 2004 ESY programming.<sup>7</sup>

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<sup>7</sup> *In re W.W. v. Scranton*, PA SEA 1490, June 20, 2004, page 4.

His teacher testified the program provided to Student is based on the specific needs he has from resulting from the 2006-2007 school year (NT 83-87). Student's teacher provided progress monitoring charts indicating the specific areas where he was not making progress; math, keyboarding, and English. Her charts clearly demonstrate progress was made in those areas, but that he did not make the progress expected (S-19). The IEP team recommended services in English, reading, math, and typing (S-20).

The ESY program offered by the District stems from the areas of need articulated by his teacher, with the addition of a swimming component. His program over the summer would consist of reading, English, math (NT 30, S-17, p. 14), and keyboarding (NT 30-34; S-17, pages 14-20). Specifically, he would receive one hour of math, 45 minutes of reading, 45 minutes of typing, and then half an hour of gym. Once a week he would have swimming. He would also have speech and language for 45 minutes total per week (NT 33).

While this hearing officer understands the Parent may believe more hours, additional days or increased academic emphasis would be desirable, in the absence of supporting evidence, and in the presence of District's witnesses' testimony concerning the success of the 2006 ESY program and the similarly designed 2007 ESY services, the District's proposed 2007 ESY services and program outlined on the record is warranted at this time. The Student benefited from his 2006 ESY program, will probably benefit from the District's proposed 2007 ESY program, services, delivery, as described in the transcript and exhibits. The burden of persuasion this time around lies with the Parent, and they must show that there are other services or

programming Student child requires to receive FAPE. In this case, there was no evidence offered indicating the District-described program and placement, memorialized in the ESY IEP document and supplemented by the rest of the record, would not afford Student the opportunity to maintain his 2006-2007 IEP goals and objectives.

**V. ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** the extended school year program offered by the Scranton City School District for Student for the summer of 2007 is appropriate.

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Date

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Hearing Officer