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Pennsylvania Special Education Hearing Officer

DECISION

Child's Name: RC

Date of Birth: xx/xx/xx

Date of Hearing:
August 1, 2007
CLOSED HEARING
ODR #7866/ 07-08 AS

Parties to the Hearing:

Mr. and Mrs.
4140 Tollgate Road
New Hope, PA 18938

Central Bucks School District
Esquire
16 Welden Drive
Doylestown, PA 18901

0137

Date Record Closed:

Date of Decision:

Hearing Officer:
Jr., Esquire

Representative:

Pro Se

Joanne D. Sommer,
Eastburn and Gray, P.C.
60 East Court Street
P.O. Box 1389
Doylestown, PA 18901-

August 6, 2007

August 16, 2007

William F. Culleton,

INTRODUCTION

Student is a xx year old eligible resident of the Central Bucks School District (District). (NT 16-15 to 23, 17-10 to 18.) He is identified for educational purposes as exceptional in the areas of autism and specific learning disability in written expression. (NT 17-2 to 5, 17-10 to 18.) Mr. and Ms. , the Student's Parents, requested due process to determine whether or not the District had properly declined to provide Extended School Year services to the Student.

The Parents asserted that the Student is in the Department of Education's target group for ESY, which includes students with autism, that he had exhibited regression in life skills while at home in the summer, and that two medical service providers had recommended ESY for the Student. The District challenged the hearing officer's jurisdiction on several grounds; it also asserted that the District had no obligation to provide services because of the Student's removal to private school, and that the Parents had obstructed evaluation for ESY purposes until it was too late to provide them.

PROCEDURAL HISTORY

On October 31, 2005, the District offered the Student a revised IEP placing him in part time autistic support. Id. at 15. This IEP found that the Student was not in need of ESY services. Ibid. There followed a series of IEP meetings and revisions throughout the 2005-2006 school year. In re Educational Assignment of R.C., Spec. Educ. Op. 1813 at 1-3 (, 2007). In October 2006, the Parents removed the Student unilaterally to [redacted Private School] for the remainder of the 2006-2007 school year. (NT 59-10 to 14.)

On May 17, 2007, the Student's Mother sent an email to the District's Supervisor of Special Education requesting directions for enrolling the Student in time to receive ESY services. (S-4.) The Student was enrolled, (FF 19), and after a meeting on June 19, 2007, the District found the Student ineligible for ESY services. (S-9.) The Parents provided additional evidence and requested reconsideration on June 29. This was denied, (S-19) and the instant due process request followed.

ISSUES

1. Does the hearing officer have jurisdiction to determine whether the District appropriately denied ESY services for the 2004-2005 school year?
2. Does the hearing officer have jurisdiction to determine whether the District appropriately denied ESY services for the 2005-2006 school year?
3. Does the hearing officer have jurisdiction to determine whether the District appropriately denied ESY services for the 2006-2007 school year?
4. Did the District properly find that the Student was not entitled to ESY services in the summer after his 2006-2007 school year?¹

FINDINGS OF FACT

1. As a young child, the Student was diagnosed by the Bucks County Intermediate Unit and found to have developmental delays in cognitive development, receptive language, social behavioral skills and fine motor skills. (NT 72-18 to 19; S-1 p. 2.)
2. In 1998, a private evaluator reported that the Student displayed autistic like behaviors and presented a "multisystem developmental disorder." (S-1 p. 2.)

¹ The Parents requested due process belatedly, on or about July 5, 2007. The hearing commenced on August 1, too late to include the Student in any existing program providing ESY services. The Parents requested only a decision on the propriety of denial of services, and they did not request compensatory education. For this reason, and in light of the hearing officer's adverse findings on the Parents' request, there is no issue of compensatory or other relief.

3. In 1998, the District provided the Student with occupational therapy and speech and language services. (S-1 p. 2.)
4. The District's CER in 1999 found needs in speech and language, fine motor skills, visual processing skills, visual and auditory memory skills, social and emotional behavioral skills, and attention to task. (S-1 p. 2.)
5. In December 2004, a privately retained Certified School Psychologist diagnosed the Student with Pervasive Developmental Disorder - Not Otherwise Specified and recommended the rule out diagnosis, Disorder of Written Expression. (S-1 p. 3.)
6. In May 2005, the District issued a reevaluation report identifying the Student with Autism and specific learning disability in the area of written expression. (S-1 p. 18.)
7. The Student frequently loses attention to tasks, as a result of which he frequently misses assignments and instructions and fails to perform or complete classroom tasks. (NT 91-11 to 93-17; 95-15 to 19; S-1 p. 2-6, S-3 p. 1, 4, 13.)
8. The Student's educational needs include pragmatic language and social interaction, written language, reading fluency, working memory, processing speed, attention and focus, organization and transitions. (S-1 p. 17, 18.)
9. The Student needs a great deal of support in the classroom, including specially designed instruction, modified instruction, and adapted curriculum, along with related services. (S-1 p. 19, S-2.)
10. The Student has academic strengths in social studies and science, verbal reasoning, mathematics concepts and computation, and vocabulary. (NT 109-25 to 110-7; S-1 p. 17, S-2 p. 4.)

11. The Parents enrolled the Student in a private school, which did not provide him with special education services, for Kindergarten through fifth grade, and again for seventh grade. (NT 72-24 to 73-1, 73-13 to 14, 80-4 to 9.)
12. The Student was able to succeed academically in this private regular education setting for six years without special education services. (NT 109-25 to 110-7; S-1 p. 2-3, S-13.)
13. The student was able to pass most of his courses in the district's sixth grade curriculum with special education services. (S-3.)
14. In some academic years, the Student did particularly well academically and functioned relatively well socially in the first quarter of the year. (NT 103-15 to 106-25, 110-18 to 111-21, 177-21 to 181-5, 183-16 to 184-23.)
15. The Student's performance declined throughout the 2006-2007 school year. (NT 111-22 to 113-10, 116-9 to 18.)
16. While her son was enrolled in the private school for his seventh grade year, 2006-2007, the Student's Mother also sought to enroll him in the District in order to obtain ESY services for him in the summer of 2007. (NT 159-21 to 161-18; S-4, S-8.)
17. The District cooperated with the Student's Mother in allowing her to enroll the Student at the end of the academic year, by responding to her inquiries promptly and providing instructions on its enrollment process. (S-4, S-6, S-7.)
18. There were delays in enrolling the Student, due in part to the Student's Mother's delays in making an appointment to enroll the Student, and in part due to the District's staff erroneously insisting on a release of information from the Private School that was not necessary for enrollment in the District. (NT 159-21 to 163-11, 209-24 to 15; S-4, S-6, S-7, S-8.)

19. The Student was enrolled in the District as of June 13, 2007. (NT 278-7 to 279-17; S-8.)
20. The District offered to evaluate the Student for possible provision of ESY services, and asked the Parents to provide relevant information from the Private School and any private medical service providers. The District requested that a representative of the Private School meet with them and the Parents to discuss ESY eligibility, and offered alternative methods of communication with both Private School and medical providers. (NT 212-21 to 214-20; S-4, S-7.)
21. The Parents did not provide a requested information release for the Private School or the medical practitioners. With the exception of a report card, they did not provide any information about the Student's program at the Private School, his academic goals, any special educational accommodations or goals, or his progress overall and after any breaks in service at the school. (NT 97-5, 212-21 to 214-20, 218-12 to 219-10, 229-16 to 230-6; S-7, S-9, S-13, S-14, S-19.)
22. At a meeting on June 19, 2007, the District tried to elicit from the Student's Mother information relevant to eligibility for ESY services. The Student's Mother was mostly silent and declined to cooperate with the District, repeatedly denying that the District needed any additional information in order to determine the Student's eligibility. (NT 165-4 to 12, 214-21 to 218-11, 229-2 to 6, 234-7 to 239-10, 240-6 to 256-24, 282-3 to 284-2; S-9.)
23. After the meeting, the Student's Mother forwarded two letters from medical service providers recommending ESY services for the Student, and requested reconsideration. (NT 234-7 to S-11, S-12, S-14.)
24. The letters, one from a medical doctor and one apparently from a counselor, did not provide sufficient data to permit the District to conclude that the Student was likely to regress

in an academic setting in the absence of ESY services. The letters did not provide any data to support their predictions. The letters did not predict that the Student was likely to regress; they merely indicated that there was a risk of regression. Nothing in the letters suggests that they were based on data concerning the Student's functioning in an educational context. Rather, the predictions in the letters appear to be based upon clinical experience in treatment settings. (S-11, S-12, S-19.)

25. The record in possession of the District did not show need for ESY services. (NT 219-11 to 8, 225-19 to 226-15, 228-5 to 229-13, 230-7 to 232-15, 239-11 to 240-5, 289-8 to 290-7; S-3.)
26. During the summer of 2007, the Student has demonstrated regression in social skills and in self-care skills. (NT 95-15 to 96-20, 98-6 to 99-5, 117-20 to 128-10, 232-16 to 234-6.)
27. The Student's Mother observed what appeared to her as regression in social skills at the beginning of the Student's 2005-2006 school year, in that he resisted going into the school. (NT 99-9 to 100-9.)
28. The Student's Mother also observed withdrawal behavior during classes at the Private School. (NT 99-9 to 101-2.)

DISCUSSION AND CONCLUSIONS OF LAW

Jurisdiction

At the hearing, the Parents sought a decision that the District should have provided ESY services to the Student for three years, 2004-2005, 2005-2006, and 2006-2007. (NT 21-6 to 25-21.) The Parents had not included this request in their original due process complaint notice. (NT 21-19 to 22-2.) In its opening statement, the District orally challenged the hearing officer's jurisdiction to address the complaint.

As to the 2004-2005 school year, the District asserted

that it falls outside the applicable limitation period set forth in the IDEA. (NT 33-21 to 34-1, 49-23 to 53-5.) The Parent argued that this year should be considered because the District's previous findings of non-eligibility were a premise for its denial of ESY in 2007. (NT 23-15 to 25-7.) The hearing officer decided that the claim was barred by the IDEA two year limitations period. (NT 54-2 to 14, 55-17 to 25.)

As to the 2005-2006 school year, the District argued that the Parents had waived any claim for ESY services by failing to raise the issue at the time they signed the NOREP in October 2005 and by failing to raise the issue in the due process proceedings either by requesting due process on that issue or by injecting it into the proceedings brought by the District subsequently to test the adequacy of its offers of special education services. (NT 34-1 to 5, 48-4 to 22, 56-11 to 57-4.)² The Parents responded that the District had filed for due process, not they, and that the hearing officer had precluded them from raising other issues at the hearing. (NT 60-13 to 61-4.) The hearing officer declined to bar the Parents on this ground, but nevertheless decided that the Parents' claims regarding the 2005-2006 school year could not be heard in the instant matter because they had failed to include that year in their Complaint Notice, 20 U.S.C. §1415(f)(3)(B). (NT 63-17 to 68-15.)

As to the 2006-2007 school year, the District argued that it had no obligation to provide services because the Student had been enrolled in a private school with no IEP during the school year immediately preceding the summer for which ESY services were requested. (NT 34-6 to 15, 40-25 to 44-18.) The hearing officer reserved on this legal issue and received evidence limited to the appropriateness of the District's decision not to offer ESY services at the end of the 2006-2007 school year. (NT 69-7 to 25.)

As the District points out, (NT 41-7 to 44-18; S-21 p. 21), State policy absolves school districts of responsibility for providing special education services to students unilaterally enrolled in private schools, at least where the district has offered FAPE. Basic Education

² The District argued that any claims for 2005-2006 were barred by the one year equitable limitation period set forth in Montour. (NT 49-4 to 18.) The hearing officer reserved on that issue, (NT 57-7 to 21), and it is not necessary to consider it because he ultimately dismissed these claims on other grounds.

Circular, Special Education Services to Nonpublic School Students (July 1, 2001).³ However, the hearing officer does not find persuasive authority that a student enrolling in a district late in the school year has no right to ESY services because the student had been unilaterally placed in a private school without an IEP. The state regulations for ESY services do not advert to this situation at all. 22 Pa. Code §14.132. The BEC relating to ESY does not advert to this situation, either, addressing only the rights of students placed by their districts as part of their special education services. The BEC relating to non-public school students is similarly silent.

The closest language giving a hint of applicable state policy is in the ESY BEC, which provides at II A:

For a late enrolling student for whom an ESY determination has not been made, the decision as to ESY service eligibility or non-eligibility and program content must be determined at the IEP meeting.

Here, the Student was a late enrolling student. (NT .)

In sum, the governing Departmental policies and regulations do not provide clear authority to absolve the District of all responsibility due to the previous private placement. Similarly, there is no clear authority depriving this hearing officer of jurisdiction on this ground.

ESY

ESY is defined as special education and related services that are provided to a child with a disability, beyond the normal school year of the public agency; in accordance with the child's IEP; at no cost to the parents of the child; and that meet the standards of the State Educational Agency. 34 C.F.R. Sec. 300.106(b). IDEA's implementing regulations provide that extended school year services must be available as necessary to provide FAPE, and such services cannot be available only to students with particular categories of disability nor can public education agencies unilaterally limit the type, amount, or duration of those services. 34 C.F.R. Sec. 300.106(a)

³ Although this BEC expired on 2005, it is still on the Pennsylvania Department of Education website, which provides that all BECs made available on the web site continue to be in effect.

The Pennsylvania Code sets forth the obligations of a school district to provide ESY to its students. 22 Pa.Code §14.132.⁴ It begins with a procedural requirement and then lists criteria to be considered in deciding whether or not a student is eligible for ESY services. The procedural requirement is that the IEP team consider eligibility and need for services "[a]t each IEP meeting... ." The criteria for consideration are listed with the caveat that "no single factor will be considered determinative." 22 Pa.Code §14.132(2).

The regulation also lists potential sources of information that may be considered, 22 Pa.Code §14.132(3). These include parental reports of "negative changes in adaptive behaviors or in other skill areas." 22 Pa.Code §14.132(3)(iii). Finally, the regulation lists purposes for which ESY is not available, including "the desire or need for other programs or services, which, while they may provide educational benefit, are not required to ensure the provision of a free appropriate public education." 22 Pa.Code §14.132(4).

The Commonwealth of Pennsylvania established state-specific standards for ESY applicable to Pennsylvania school districts. See 22 Pa. Code Section 14.132. These standards increased the frequency for IEP determination of ESY eligibility, and reiterated the following factors (first articulated in the 1993 version of the state ESY regulation) that the IEP team must consider in making an ESY eligibility determination:

⁴ The new federal regulations make no change in the section on ESY, 34 C.F.R. §300.106 (August 3, 2006); thus, they would appear not to alter the Pennsylvania regulations.

- whether the student's difficulties with regression and recoupment⁵ make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives;
- the extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted;
- 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;
- the extent to which successive interruptions in educational programming result in a student's withdrawal from the learning process; and
- 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.

22 Pa. Code §14.132(2).

Pennsylvania's ESY regulations also contain a non-exhaustive list of what the Commonwealth considers reliable sources of information regarding a student's educational needs, propensity to progress, recoupment potential and year-to-year progress, specifically

- Progress on goals in consecutive IEPs;

⁵ Regression is defined as 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. Recoupment is defined as 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. 22 Pa. Code Sec. 14.132(2).

- Progress reports maintained by educators, therapists and others having direct contact with the student before and after interruptions in the education program;
- Reports by parents of negative changes in adaptive behaviors or in other skill areas;
- Medical or other agency reports indicating degenerative-type difficulties, which become exacerbated during breaks in educational services;
- Observations and opinions by educators, parents and others; and
- Results of tests including criterion-referenced tests, curriculum-based assessments, ecological life skills assessments and other equivalent measures.

22 Pa. Code Sec. 14.132(3).

These "other factors" in the Pennsylvania regulation are "problematic", since they appear to deflect the focus of inquiry away from loss of benefit and necessity of ESY for the provision of FAPE. In re Educational Assignment of J.A., Spec. Educ. Op. 1123 at 8 (May 21, 2001). Nevertheless, Appeals Panel decisions have made it clear that not every child entitled to FAPE is entitled to ESY. Id. at 8-10. In other words, the fact that a child may have a need for special education does not necessarily mean that the child needs ESY services. Rather, the requirement for ESY is to be applied "restrictively" to school districts. Ibid.

Moreover, the regulations make it clear that the additional factors listed in 22 Pa. Code Sec. 14.132(2) and the data sources listed in 22 Pa. Code Sec. 14.132(3) are relevant only to the extent that they assist in determining that the student is likely to regress because of an interruption in special education services. 22 Pa. Code Sec. 14.132(2)(i). Most of the additional factors themselves refer to regression due to interruption of educational programming. 22 Pa. Code Sec. 14.132(2)(iii), (iv), (vi).

The Appeals panels have so interpreted these regulations. In J.A. at 10, the Appeals Panel noted that

evidence of regression during the period when services are being provided - rather than during the period when they are not being provided - may be significant in this regard. In In re Educational Assignment of D.F., Spec. Educ. Op. 1131 at 8-9 (June 11, 2001), the Panel held that, while the absence of regression-related data do not absolve a district of the obligation to make a determination of likelihood of regression detrimental to the provision of FAPE, it is necessary to distinguish between regression due to interruption in special education services and regression due to inadequate services. Id. at 9, n. 47.

Taking all of this into consideration, the Appeals Panel in In re Educational Assignment of A.R., Spec. Educ. Op. 1152 at 8 (July 2001), summarized the legal standards to be applied in ESY cases as follows:

Children who qualify for special education are eligible for ESY programs if they would otherwise regress in essential skills or behavioral areas and then would have difficulty recouping these skills or behaviors after school breaks.

In Pennsylvania, the relevant regulations provide that an eligible student is entitled to ESY if regression caused by interruption in educational programming and limited recoupment capacity or other factors makes it unlikely that a student will attain or maintain those skills and behaviors relevant to the established IEP goals and objectives.

[I]n order to qualify for ESY, a child need not demonstrate that regression has occurred. The evidence must demonstrate the likelihood that regression may occur.

Denial of Eligibility for ESY Services

The Parents argue that the District failed to provide FAPE by denying ESY services in June and July 2007. They rely primarily upon the Student's Mother's observations that the Student at home is exhibiting what appears to be regression in self-motivation, independence in self-care activities such as dressing, eating and sleeping, and regression in social skills. (FF 26.) The Student's Mother also indicates that she observed or was told about the Student's regression in

his willingness to go to school after the summer of 2005. (FF 27.) She also observed what appeared to be withdrawal behavior during the Student's classes while at Private School. (FF 28.) This testimony is not conclusive and does not impeach the validity of the District's denial of ESY services in 2007, for four reasons.

First, the evidence is presented belatedly. The record clearly shows that these parental observations were not provided to the District at the meeting in which it was to decide eligibility, yet the information was presented to the hearing officer several weeks later. (FF 20-22.)⁶ The purpose of due process is not to second-guess school districts based upon after-acquired information; rather, the validity of a district's eligibility decision is to be reviewed based upon the information they had at the time of the challenged decision. Even if the observations of the Student's Mother were adequate to prove likelihood of regression detrimental to educational progress, they would not justify a finding against the District based upon hindsight. At the time of evaluation, the information known to the District did not justify provision of ESY services. (FF 25.)

Second, the three observations presented by the Parents do not establish a pattern of regression due to interruption in educational programming. The behavior observed by the student's Mother - the Student at home refusing to perform ordinary self-care activities without prompting, failing to socialize, and failing to engage in meaningful activities during the day - do not per se implicate a loss of learned

⁶ The Parents attempted to introduce a report, purportedly from a certified school psychologist, showing that the information available to the District would establish the Student's eligibility. (NT 129-12 to 132-18.) The evaluator was not offered as a witness. (NT 135-13 to 136-20.) The hearing officer excluded this report, because this hearing officer deems it inappropriate to rely upon a written report for expert opinion where the expert is not available for cross examination, and because the offer of proof did not indicate that the evaluator had any data on the Student's recent academic functioning other than a report card. (NT 137-15 to 140-21, 323-14 to 24.) This report was not provided to the District prior to the due process hearing; the Student's Mother testified that the District refused to consider the report. (NT 136-25 to 137-8, 323-14 to 24.) The matter was not pursued because of the evidentiary ruling, and the evidence on this allegation, considered as a whole with the offer of proof, is insufficient to outweigh the overwhelming evidence of record that the District acted reasonably in attempting to determine eligibility.

skills. There was no evidence to show that these behaviors, problematic and even alarming as they are to the Parents, were caused by a loss of learned skill, as opposed to a lack of motivation, or oppositional behavior directed toward the Parents. The Parents' argument, that the Student did not exhibit these behaviors during the school year, does not ipso facto prove that the Student was losing learned skills.

Third, the observations were not sufficient to establish a pattern in this hearing officer's judgment. Only one observation - the Student's resistance to returning to school with the District - occurred immediately after a summer break in programming. (FF 27.) One - withdrawal from school activities during class - was observed during the school year, and is typical of numerous reports that indicate that the Student was distractible in class. (FF 7-9, 28.) The Student's Mother provided several other observations of positive social and academic performance, some of them at the beginning of school years, thus demonstrating the absence of a pattern of regression after summer break. (NT 103-15 to 106-25, 110-18 to 22.) There simply are not sufficient instances of regression after a break in services to demonstrate a pattern of regression.

Fourth, there is no evidence of delayed recoupment detrimental to educational progress in periods after a break in services. In fact, the record indicates the contrary: the Student's two report cards in the record both indicate that he typically did well academically after a break in service, attaining high marks in the initial marking periods. (FF 12-14.) This is corroborated by the testimony of the Student's Mother, in which she affirmed instances of good performance in the beginnings of academic years. (FF 14.) Only if the regression or lack of progress interferes with achievement of educational goals can ESY be required; here, there is no evidence that the problems the Mother is observing will in fact interfere with the Student's educational progress. Her own concern to this effect, while important to consider, is not sufficient evidence.

The Parents point to the Student's academic performance during the 2006-2007 school year. (FF 15.) In that year, the Student's marks dropped

precipitously in the last marking period, the period preceding the present summer months in which the Parents reported what appeared to be regressed social behavior and self-care behavior around the home. (FF 15, 26.) However, this fact cuts against the Parents. It suggests that the Student's regression - if it is regression - began before the end of the school year, and is thus unrelated to the interruption in services. The Student's Mother herself attributed this falloff in performance to a new medication prescription. (NT 112-4 to 113-10.) Thus, there is no evidentiary basis to deny the possibility that this experience in the previous school year is a causal factor in the Student's present apparently regressed behavior.

The Parents suggest that the Student's autism is degenerative and that this alone requires a prediction of regression and inadequate recoupment. (FF 1-9; NT 149-2 to 8.) While the Parents point to a recent decline in academic performance, and what appears to be recent regression in social and self care skills, (FF 15, 26), the record does not support their larger argument. There is no evidence that the Student's condition is degenerative. Two letters from medical providers seem to assert this; however, these assertions of expert opinion were not admitted into evidence for their truth, because the hearing officer deems such reliance on hearsay expert opinion to be inappropriate both legally and in prudence. Even if these opinions were considered at face value, they would be inadequate to prove a degenerative condition, because they are not supported by any literature or data, nor was there any offer of such supporting facts. The District's expert witness contradicted this assertion. (NT 237-21 to 238-2.)

The Parents argue that the Student was regressing in writing skills, and therefore he needs ESY in the form of OT training. (NT 173-10 to 175-13; P-3.) They sought to show this by introducing an OT report showing a lack of progress. (NT 225-19 to 227-10; P-3.) However, this document does not support the Parents' argument. It finds that "writing speed plays only a minor part in [the Student's] performance." Ibid. It also shows that the Student actually had made progress in writing with a keyboard at the time of the report. Ibid. Thus, the record does not support that ESY was needed due to a failure to make progress in writing goals, even if those goals were

considered relevant to the student's present ESY needs.

The Parents seek to bolster their argument by pointing out that the IEP plans offered by the District did not consistently reference the question of eligibility for ESY services. (NT 72- 4 to 7, 74-4 to 7.) While it is true that the pertinent regulations literally require school districts to examine eligibility for ESY at every IEP meeting, it is clear that the regulations contemplate annual IEP reviews, not the frequent reviews and revisions that the District effected during the 2005-2006 school year. Thus, the District's non-feasance in this regard, while not in compliance with the letter of the regulations, is consistent with their spirit and intent, because the District did, within the year that the Student was enrolled, make an explicit determination regarding eligibility for ESY services. (FF 6.) At any rate, this non-feasance did not lead to a failure to provide needed services on the record before this hearing officer. On the contrary, there was no evidence that the Student needed such services.

The District defends by arguing that the Parents obstructed its efforts to perform a reasonable evaluation of the Student's eligibility for services. Failure to cooperate with reasonable district efforts to evaluate a student can be a valid ground for denying the relief requested in a due process complaint notice. See, M.S. v. Mullica Township Board of Education, 485 F. Supp. 2d 555 (D.N.J. 2007).

There is substantial evidence that the District made reasonable efforts to make a proper determination, and that the Parents did not cooperate with those efforts. (FF 16-22.) The Parents refused to provide educational and medical records. (FF 21-22.) They refused to authorize Private School to speak with representatives of the District, even though the school had information on the most recent year of the Student's educational performance, including performance after breaks in programming, that would have been the most relevant data in any analysis of eligibility for ESY services. (FF 21-22.) They refused to allow the medical providers to speak with District representatives, even though the Parents themselves were relying upon these medical providers' recommendations for ESY services. (FF 21-22.) The Student's Mother did not cooperate during the meeting

with District representatives intended to determine eligibility. (FF 22.)

The Student's Mother offers several contradictory excuses for her lack of cooperation in the District's eligibility evaluation process. She indicates that she had advice of counsel, (NT 165-14 to 22), that she was confused and overwhelmed, (NT 165-4 to 12), that she was intimidated by hostility, (NT 167-6 to 20), did not want to subject the people at Private School to hostile treatment by the District, (NT 10 to 16). She suggests that she could not get the information requested because it is summer and staff are not available. (NT 276-15 to 277-1.) She suggests that the school would not provide the information without the Student's consent. (NT 289-23 to 301-10.) The hearing officer does not find these excuses to be credible, in part because of their variety. Thus, the hearing officer cannot determine the real reason for the Parents' lack of cooperation; however, no excuse for lack of cooperation would be sufficient in this hearing officer's view, except outright oppression and manipulation by a district, and the record supports no such finding in the matter at hand.

Under these circumstances, the District is correct in its assertion that they were impeded unreasonably in making a valid eligibility determination, and that the Student's history is an insufficient factual basis for determining the Student's eligibility. (FF 10-14, 25.)

CONCLUSION

What convinces this hearing officer is that, without the data that the District sought and that the Parents denied, the history of this Student is mixed with regard to the criteria set forth in the regulation. (FF 10-14, 25.) There is no clear indication of a link between breaks in service and regression in educational performance - indeed there is evidence that such breaks in the past have led to no regression. (FF 14.) There is no evidence in the record linking the Student's present apparent regression to the break in service; indeed, the record suggests that this regression started well before the end of the regular school year, and was caused by extraneous factors including medication. (FF 15.) There is no data at all on recoupment. There is no

data indicating that the Student had learned or was learning crucial skills or crucial components of skills and that such progress would be lost due to the summer break in services. Although there was evidence that the Student presents as autistic, there is no evidence that this classification alone predicts significant regression and inadequate recoupment. The medical providers' recommendations were too general and conclusory to be a reliable prediction, without more data on the factual bases for those predictions. (FF 23-24.) Therefore, based upon this record, the hearing officer finds that the District's denial of eligibility for ESY services was appropriate.

ORDER

1. The Parents' claims regarding the 2004-2005 school year are barred by the applicable limitation period and therefore the hearing officer does not have jurisdiction to determine whether the District appropriately denied ESY services in that school year.
2. The Parents failed to disclose their claims regarding the 2005-2006 school year in their Complaint Notice and therefore the hearing officer does not have jurisdiction to determine whether the District appropriately denied ESY services in that school year.
3. The hearing officer has jurisdiction to determine whether the District appropriately denied ESY services for the 2006-2007 school year.
4. The District properly found that the Student was not entitled to ESY services in the summer after his 2006-2007 school year.

August 16, 2007

William F. Culleton, Jr.

WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER