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## **Decision**

Due Process Hearing for XB  
Date of Birth: xx/xx/xx  
File Number: 7999/07-08KE

Dates of Hearings:  
September 7, 2007; October 26, 2007

### **OPEN HEARING**

Parties:

School District of Philadelphia  
440 North Broad Street  
Philadelphia, PA 19139

Representative:

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Date Transcript Received:  
Date of Decision:  
Hearing Officer:

October 31, 2007  
November 14, 2007  
David F. Bateman, PhD

## **I. BACKGROUND**

Student is a xx-year-old student eligible for special education and related services identified by the School District of Philadelphia (District) as a student with specific learning disabilities. During the 2005-2006 and 2006-2007 school years he received services from the District in a learning support classroom. The Parent requested the present due process hearing seeking reimbursement for extended school year (ESY) services for her son for the summers of 2006 and 2007 that was held at the [redacted] Clinic. The Parent paid for this placement due to its reading, math, and social component provided by the interactions through basketball.

The District stated it has at all times satisfied the requirements of the IDEA and has offered an appropriate program for Student.

Though the sole issue of this hearing was extended school year services, it was not held in an expedited timeline because the summer program for which the Parent was requesting reimbursement was already completed.

## II. FINDINGS OF FACT<sup>1</sup>

### A. Background

1. Student was born on xx/xx/xx. He is currently xx-years of age (P-13).
2. Student is a resident of the School District of Philadelphia eligible for special education and related services identified by the District as having a learning disability (P-13).
3. An IEP meeting was held on May 10, 2005 (P-28). The IEP provided for instruction in math, literacy, science/social studies, organization/study skills, writing/spelling, and communication.
4. The District issued a Notice of Recommended Educational Placement (NOREP) on May 10, 2005. The NOREP indicated placement in a learning support resource room (P-29).
3. During the 2005-2006 Student attended school in seventh grade (NT 15).
4. The District completed a reevaluation report on February 28, 2006 (P-13).  
The report found his continued eligibility for special education and related services. The report also found the existing data was sufficient.
5. A pre-hearing conference was held on March 16, 2006 (P-15). The meeting focused on assessments requested by the District.

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<sup>1</sup> References to notes of testimony will be designated "NT" followed by the relevant page number. References to Parent evidentiary exhibits will be designated "P" followed by the relevant exhibit number.

6. A NOREP was issued on March 16, 2006 with continued placement in a learning support classroom with resource level support (P-14). The Parent agreed to the recommendation.
7. On April 26, 2006 the District completed a Writing and Reading Assessment Profile (P-18). This informal assessment found his level to be fourth grade.
8. During the 2005-2006 school year Student's grades were mostly C's and D' with an A in physical education (P-25).
9. A NOREP was issued on May 19, 2006 (P-17). The NOREP provided for part-time learning support placement.
10. A NOREP was issued on May 23, 2006 (P-16). The NOREP provided for part-time learning support placement. The Parent rejected the NOREP, requesting mediation, in disagreement with the placement, time out of class, and frequency of the SDI.
11. An IEP meeting was held on May 26, 2006 (P-20). The IEP provided for goals and objectives in literacy, math, and speech/language. The IEP provided for Student to receive part-time learning support services.
12. The District offered a permission to evaluate on May 26, 2006 (P-19). The Parent rejected the permission to evaluate requesting mediation.
13. The District sent a letter on May 31, 2006, indicating Student is entitled to participate in the summer program that is provided by the District as a means to extend his school year (P-26).

14. During the summer of 2006 Student attended the Clinic (NT 47). The cost of the program was \$390 (P-27).
15. The [redacted] Institute completed an evaluation of Student in October 2006 (P-23). Numerous recommendations were made relating to his reading and memory. Specifically, the Wilson Reading Program was recommended, as was the use of independent reading material at the third grade level (P-23, p. 16). Additionally, there were recommendations relating to occupational therapy, social skills, along with steps to help him transition to high school. Finally, the report indicates functioning in math, reading, spelling, and written expression at the second to third grade level.
16. On November 20, 2006, the District completed a reevaluation of Student (P-24). The reevaluation found his continued eligibility for special education and related services in the category of other health impaired. Specifically, the reevaluation recommended Student continue to be placed in special education where support can be provided to promote his academic skills across subject and speech/language skills. The report also indicated he needs a structured reading program.
17. A progress monitoring report issued by the District on March 29, 2007 indicates progress on his goals and objectives ranging from satisfactory to not introduced (P-3).

18. Grades from the first quarter of seventh grade are an F in reading, C in mathematics, D in science, C in social studies, C in writing, B in tech and comp studies, C in world language, A in physical education, C in music, and B in visual arts (P-21).
19. A progress monitoring report issued by the District on April 9, 2007, indicates progress on his goals and objectives ranging from satisfactory to not introduced (P-4).
20. An IEP meeting was held on April 10, 2007 (P-1). The IEP provided for instruction in literacy, math, and speech/language.
21. A NOREP was offered to the Parent on April 10, 2007 (P-2). The NOREP was rejected because the Parent disagreed with the ESY options in the district.
22. On May 22, 2007, a statement from [redacted] Summer Program indicates a total charge of \$900 (P-12).
23. A May 25, 2007, statement from [redacted] Summer Program indicates balance due of \$650 (P-9).
24. The District sent a letter to the Parent indicating a need for Student to attend a summer program to improve his reading and math skills in the summer of 2007. The letter states the subject area failed was reading, with a grade level of 7.7 (P-6).
25. During the summer of 2007, Student attended the Play it Smart component of the Clinic (NT 71). The cost of the Play it Smart program was \$400 (P-34, p. 3).

26. Final grades from eight grade indicate a C in reading, B in mathematics, C in science, B in social studies, C in writing, B in tech & comp studies, B in physical education, C in music, B in visual arts, and B in Algebra 8 (P-8).

### **III. ISSUE PRESENTED**

Is the Parent entitled to tuition reimbursement for programming for the summers of 2006 and 2007 at the Clinic?

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

The Parent requested the present due process hearing seeking tuition reimbursement for the placements during the summers of 2006 and 2007. The District offered programming and placement at the [redacted] School in the form of a school district regular class (NT 127). The Parent enrolled Student in the Clinic that is run by [redacted].

Though the issue in this matter related to extended school year services, the hearing was not held in an expedited fashion due to the fact he had finished the program and the Parent was seeking reimbursement for the program. The hearing was also delayed to allow the Parent to have an advocate present (NT 273).

This decision will delineate the specifics requirements under the law for extended school year services, and then review the requirements for tuition reimbursement.

#### **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 a recent Appeals Panel decision which described the components of the law:<sup>2</sup>

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).

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.

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<sup>2</sup> *In re W.W. v. Scranton*, PA SEA 1490, June 20, 2004, page 6.

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>3</sup>

It is clear Student needs ESY programming (NT 184-185, 211). The Parent argued as a part of their case the program offered by the District was not appropriate. The program of the District for 2006 was for a school district regular education class (NT 127) also later described as traditional summer programming (NT 133) (see P-26). Though there was testimony he would receive special education services from a special education teacher (NT 130-133, 179), there was no clarity regarding of how much. He was offered the same program for the summer of 2007 (NT 151, 152, 154). There was no indication for the summer of 2006 or 2007 the District offered a program that clearly delineated the specifics required for ESY. Specifically, there was no description of the type and amount of ESY services, no description of the frequency, and yes, the classes may be held at Elementary but one is left of unsure of that fact. It is also unclear what, if any, special education services Student would be provided as a part of the summer programming. There was testimony that he would receive the same services over the summer he received during the school year, but that same testimony came from an individual who stated she was unsure of the

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<sup>3</sup> *In re W.W. v. Scranton*, PA SEA 1490, June 20, 2004, page 6.

specifics of the program (NT 195-197).

The summer programming offered by the District was described as traditional summer programming. Student has specific needs in literacy and mathematics that are clearly stated in the present levels of educational performance section of his IEP. The Parent bears the burden of persuasion in this due process case<sup>4</sup> and it clear the Parent has met her burden here.

#### Parents Request for the Clinic

Under the two-part test for private school reimbursement established by the Supreme Court, the school district must establish the appropriateness of the education it provided to the student. If the school district is unable to establish the appropriateness of its own educational program, the burden then shifts to the parents to prove that the private school selected for their child did provide an appropriate education. See *Burlington School Committee v. Massachusetts Department of Education*, 471 U.S. 379 (1985).<sup>5</sup>

As *Rowley* principles have been applied in the context of private placements, a disabled child is “not . . . entitled to placement in a residential school merely because the latter would more nearly enable the child to reach his or her full potential.” *Abrahamson v. Hirschman*, 701 F.2d 223, 227 (1st Cir. 1983). In making a

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<sup>4</sup> This Hearing occurred after *Schaffer v. Weast*, 126 S.Ct. 528, and the Parents had the burden of demonstrating the District’s program was inappropriate.

<sup>5</sup> Later, in *Florence County Sch. Dist. v. Carter*, 114 S.Ct. 361 (1993), the Supreme Court reaffirmed the test for private school tuition reimbursement established in *Burlington*, and added that private school placements selected by parents need not be at facilities which are approved by state departments of education for the provision of education to students with disabilities.

determination regarding a school district's obligation to pay for private placement, a court must make the following inquiries:

First, the court must ask whether the district's IEP was reasonably calculated to confer an educational benefit on the student. If the court determines that the IEP was not so calculated, the court must then ask whether the parents' unilateral choice to place a student in a residential setting is the appropriate educational choice for the student. If the answer to the second inquiry is yes, then the parents would be entitled to reimbursement from the school district for the cost of the placement.

*Hall* at 1527. (citations omitted).

Importantly, in gauging the appropriateness of the District's actions toward Student, the IEP must be judged as to its appropriateness at the time that it is written, and not with respect to subsequently obtained information about the student. The ideas that "an IEP is a snapshot, not a retrospective," and that the IEP must take into account what was objectively reasonable at the time that the IEP was drafted were recognized by the First Circuit in *Roland M.*, *supra*, and have been adopted in the Third Circuit. See, e.g. *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 534 (3d Cir. 1995); *Fuhrmann v. East Hanover Board of Educ.*, 993 F.2d 1031, 1040 (3d Cir. 1993). See also *Philadelphia School District*, 22 IDELR 825, 826 (SEA PA 1995).

It is true that school districts have been required to pay for the educational components of private placements even in cases where the students require those placements solely for medical reasons when the school district's own educational programming for the student is deemed deficient. See *Board of Education of Oak Park and River Forest High School v. Illinois State Board of Education*, 29 IDELR 52 (N.D. Ill 1998), (Where student's need for private placement was primarily for non-educational reasons, district court limited parents' claim for reimbursement to the

educational component of the private placement given that the school district's educational provisions for the student were inappropriate, and the academic program the student received at the school was appropriate). The evidence presented does not clearly establish Student was provided with an appropriate education for ESY.

In this case there was testimony and comments about the requested private school placement that need be addressed. In that connection, the second part of the Burlington-Carter test is the appropriateness of the private school placement. See *Burlington School Committee v. Massachusetts Department of Education*, 471 U.S. 379 (1985). The program is not appropriate given the analysis below.<sup>6</sup>

Tuition reimbursement is an available remedy for parents to receive the costs associated with a child's placement in a private school where it is determined that the program offered by the public school did not provide FAPE, and the private placement is proper. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985). Equitable considerations are relevant to making such a determination. *Id.* However, the parents' choice of private placement need not strictly satisfy the IDEA requirements in order to qualify for reimbursement. *Carter*. The standard is whether the parental placement was reasonably calculated to provide the child with educational benefit. *Carter; David P. v. Lower Merion School District*, 27 IDELR 915 (E.D.Pa. 1998).

The Clinic is four-week program for instructional basketball, instructional reading and instructional math that runs daily from 9:30 to 2:30 in July (NT 46).

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<sup>6</sup> The analysis of the Parent's request for tuition reimbursement is based on the analysis found in the appeals panel decision of April 20, 2004. *In re C.B.*, Pa. SEA no. 1472.

The program takes all kids grades five through ten who are normally attending regular schools throughout the Philadelphia area (NT 46). The program is an informal camp setting designed to supplement, but not replace, what is traditionally taught in summer school programs and is not a substitute for summer school (NT 47-48). It does not replace summer school in that it does not offer a specific curriculum-all activities are tied to sports (NT 50). It specifically has a focus on basketball (NT 51).

The Clinic did not look at Student's IEP for summer 2006 or 2007 (NT 54, 65) except as a part of the Play it Smart Program (NT 79). He was grouped with other students according to his grade in school (NT 57) and then further grouped based on athletic ability (NT 68). In the summer of 2006 the reading focus of the camp was poetry taught by way of song lyrics (NT 64) and then a focus on Romeo and Juliet (NT 64). In the summer of 2007 the reading focus was on public speaking (NT 66) and creating a piece of writing that was worthy of articulating to an audience (NT 66). During the summer of 2007 he also attended the Play it Smart program, a program held after the Program (NT 70). In this program they had the focus on George Orwell's Animal Farm (NT 71). There is no written documentation of progress made by Student during the Play it Smart program (NT 86).

Student has very specific needs, clearly documented in the IEP under the present levels of performance section. The focus of the Clinic is basketball. It was not individualized, nor did they even read his IEP. The curriculum covered in the program does not relate to the needs he presents in school. The Play it Smart program has greater attention to reading and math progress; though the focus of the

instruction was a book that was multiple grade levels above Student's reading ability. There was also no documentation kept about progress he made (or did not make) during the four weeks. Given the lack of academic programming tied to the needs of Student, reimbursement for the summer of 2006 and the summer of 2007 is not due.

**V. ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** the offers by the School District of Philadelphia for extended school year programming for the summers of 2006 and 2007 were not appropriate. However, the placement provided by the Parent is also not appropriate and therefore no tuition reimbursement is due.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Hearing Officer