

*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

Child's Name: RM

Date of Birth: xx/xx/xx

Date of Hearing:  
July 14, 2008

CLOSED HEARING  
ODR #8938/ 07-08 AS

Parties to the Hearing:

Ms.

Palmerton Area School District  
3533 Fireline Road  
Palmerton, PA 18071-0350

Representative:

Pro Se

Andrew E. Faust, Esquire  
Sweet, Stevens, Katz & Williams, LLP  
331 East Butler Avenue  
New Britain, PA 18901

Date Record Closed:

July 24, 2008

Date of Decision:

August 1, 2008

Hearing Officer:

William F. Culleton, Jr., Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student is a teen aged eligible resident of the Palmerton Area School District (District). (S-3, S-20 p. 1.) The Student is identified with Serious Emotional Disorder, based upon, among other things, a longstanding diagnosis of school phobia. (NT 190-191.)

Ms. (Parent) requested due process on June 4, 2008, alleging that the District had refused to provide ESY services in the form of a summer camp that had been the pendent ESY placement for three summers, Camp [redacted]. The Parent also asserted that the District had insisted upon ESY services in a school setting that the Student was unable to attend due to Student's disability of school phobia. (HO-1.) The Parent requested an order that the District pay for the Student's attendance at Camp.

The District, in its response dated June 24, 2008, moved to dismiss the Complaint Notice on grounds that a previous hearing officer had found the District's offered in-school programming appropriate. (HO-1.) The District asserted that this hearing officer was precluded by the doctrine of issue preclusion from making any findings on the appropriateness of the District's ESY offer. Ibid.

The hearing officer denied the motion to dismiss and convened the hearing on July 14, 2007. However, he did rule that the previous hearing officer's findings were binding. In particular, he ruled that evidence of past school phobia and past benefit from the summer camp would not be determinative, because the previous hearing officer had found that the Student's emotional condition "may be different now than it was in the past." (HO-1.) The record was held open for receipt of documents offered to supplement the record (NT162-166; S-22), and the record closed on July 24, 2008.

## **ISSUES**

1. Does the Student's school phobia prevent Student from benefiting from the school-based ESY program offered by the District for the summer of 2008?
2. Is Camp an appropriate ESY placement for the Student?

## **FINDINGS OF FACT**

1. The Student has a history of suffering from serious levels of anxiety, including school phobia, which manifests itself in school avoidance. (NT 114-115, 189-191; HO-1, S-20.)
2. In November 2006, the District and the Parent entered into an agreement in settlement of the Parent's request for due process. The agreement provided that the District would pay for tuition at a private boarding school in [state redacted], in which the Student would be placed as of the date of the agreement. (NT 73-74; S-2, HO-1.)
3. The November 2006 settlement agreement provided that, if the Student should return to the District before graduating from high school, the District would conduct an educational evaluation and convene an IEP meeting. The resulting IEP – or the proposed IEP if the Parent did not approve it – would constitute the pendent placement for the Student. (NT; HO-1, S-2.)
4. The Student attended the private boarding school for about three months; Student then returned to Student's home within the jurisdiction of the District. (NT 80-81; P-19 p. 1-2.)
5. The District attempted to conduct an educational evaluation and convened an IEP meeting. (HO-12, S-3.)
6. The Parent did not cooperate with the attempted evaluation. (S-3, 8, 20.)
7. The District offered an IEP in April 2007. (S-3.)

8. The April 2007 IEP recognized that the Student exhibits behaviors that impede Student's learning, and in addition needed explicit, intensive support in language arts, including decoding, spelling and writing, as well as mathematics. The IEP contained goals addressing self esteem and management of anxiety over school attendance. (S-3, P-21.)
9. The April 2007 IEP offered by the District recognized that the Student is eligible for ESY services due to the risk that interruptions in service would result in withdrawal from the learning process. The IEP offered the District's regular ESY program, which is school-based, and provides explicit instruction in language arts and mathematics. (NT 160-161; S-3, S-8.)
10. The District offered a revised IEP in October 2007, and the Parent did not accept it. This IEP continued to recognize that the Student exhibits behaviors that impede learning, the need for explicit, intensive academic instruction, and needs with regard to self esteem, school anxiety and school avoidance. The October 2007 IEP added a related service consisting of school based counseling. (S-8.)
11. The District offered school based ESY services in the April and November IEPs and NOREPS presented to the Parent. (NT 160-161; S-3, S-8.)
12. The ESY program would be provided in a school building; however, the bulk of the student body at the District's high school would not be present during the summer. (NT 161.)
13. In the October 2007 NOREP, the District indicated its recommendation against providing services outside of a school environment, stating in the NOREP that home based services and shortened school day had been ineffective in the past and would reinforce the Student's school avoidant behavior. (S-8 p. 3.)
14. The November 2007 IEP offered as part of the ESY program some home based academic instruction to be administered on a consulting basis by District personnel. (S-8.)

15. The Parent has sought private alternative placements for the Student's education, including [a] cyber charter school and the [state redacted] private school which the Student attended for about three months pursuant to the November 2006 settlement agreement. (P-12, P-19, S-2.)
16. Camp is a summer camp licensed as such by the [state redacted] Department of Health. Primarily, it offers the service of helping children to lose weight. (NT 47-48, 53-54, 60-61; P-21, S-22.)
17. Camp is not a school, nor does it have any educational licensure or certification. Its staff are not licensed or certified as educators. (NT 53-55, 57-58, 153; P-21 p. 2-4, S-22.)
18. The Camp does not offer educational services and it is not experienced with providing services in conformity with an IEP. (NT 55, 155-156.)
19. The Student exhibited avoidance behavior by leaving Camp early during the first summer in which Student attended. (NT 43-44, 66.)
20. During the following summer, the Student appeared to be more comfortable and was able to participate in the programs at Camp. The Student has attended at least one reunion meeting of Camp participants. (NT 45, 66-67, 140; P-21 p. 9.)
21. The Parent reports that Student's experience at Camp helped to improve Student's self esteem. (NT 67.)
22. The Parent reports that Student's experience at Camp helped Student to feel less anxiety about being with other children Student's own age. (NT 67-68.)
23. The Parent reports that Student's experience at Camp helped Student to have a more positive attitude toward school and that Student returned to school at the District in the Fall of 2007 with hope that Student could succeed. (NT 66-68, 73-75, 79.)

24. The Student returned to the District's high school in the Fall of 2007, with learning support classes for core academic subjects of decoding, spelling, writing and math. The Student left after about four weeks, failing most of Student's subjects. (NT 82; P-19 p. 2-7.)
25. The District initiated approximately 111 truancy proceedings against the Student and the Parent during the 2007-2008 school year. (NT 70-73, 84-86, 105.)
26. The Parent reported that Student's anxiety level was increased and Student was distracted from doing school work at the District's high school during the 2007-2008 school year, due to evaluations that pulled Student out of classes, and the degree of conflict created by numerous pending due process proceedings and truancy proceedings. (NT 70-73, 84-86.)
27. The Parent reports that Student is incapable of attending any school or any educational program in a school building. (NT 79-80.)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **BURDEN OF PROOF**

The United States Supreme Court has decided who has the burden of proof in the case of an administrative hearing on a challenge to a special education IEP. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). In Schaffer, the Court decided that the burden of proof is on the party asking a hearing officer to enter an order. In this case, that party is the Parent. However, the Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed "equipoise" – that is, where neither party has introduced more evidence than the other party. In such unusual circumstances, the burden of persuasion provides the rule for decision, and the party with the burden of persuasion will lose. On the other hand, whenever the evidence is clearly in

favor of one party – a preponderance<sup>1</sup>, or “preponderant” - that party will prevail.

## FREE APPROPRIATE PUBLIC EDUCATION

Not every child with a disability is entitled to special education and related services from a school district. The IDEA defines a child with a disability as “a child ... who, by reason [of his or her disability], needs special education and related services.” 20 U.S.C. §1401(3)(A)(emphasis supplied); accord, 34 C.F.R. §300.8(a)(1). Only a child who needs such services is considered eligible for them. 20 U.S.C. §1412(a)(1)(A). Thus, the need for services is the basis for identification of a child as a child with a disability. See generally, Mr. I v. Maine School Administrative District No. 55, 480 F.3d 1 (1<sup>st</sup> Cir. 2007).

When a child is identified with a disability, the District is obligated to provide a free and appropriate public education (“FAPE”), in accordance with an Individualized Education Plan (IEP) reasonably calculated to enable the child to receive meaningful educational benefit. Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982). “The education provided must be sufficient to confer some educational benefit upon the handicapped child.” L. E. v. Ramsey Bd. of Educ., 435 F.3d 384, 390 (3d Cir. 2006). Under the IDEA, a district must address “each of the child’s ... educational needs that result from the child’s disability ... .” 34 C.F.R. § 200.320(a). See, M.C. v. Central Regional School District, 81 F. 3d 389, 393-394 (3<sup>rd</sup> Cir. 1996). These needs include behavioral, social and emotional skills. Ibid. Thus, a district’s obligation is to provide those services that address the child’s individual needs. Mr. I, supra.

## ESY

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<sup>1</sup> A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810 (please note that the Manual was promulgated before the Supreme Court ruled in Schaffer v. Weast, at a time when the Local Educational Agency had the burden of persuasion in Pennsylvania and elsewhere in the federal Third Judicial Circuit. Thus, the first sentence of section 810, indicating that the LEA has the burden in most cases, is outdated and was effectively overturned by Schaffer).

ESY services are special education and related services that are provided to a child with a disability beyond the regular school year, including during the summer. 34 C.F.R. §300.106. The legal test of eligibility requires proof that the student needs ESY because he or she would not benefit from education without it. 34 C.F.R. §300.106; 22 Pa. Code §14.132. Thus, it is not enough to argue that ESY services would benefit a child; they must be necessary to ensure educational benefit.

IEP teams are required to consider and decide whether or not ESY services are appropriate for a child, and Pennsylvania regulations provide a list of factors that IEP teams must consider. 22 Pa. Code §14.132. The IEP team must consider the risk of regression and the likelihood and likely extent of recoupment. 22 Pa. Code §14.132(2)(i-iii). It must also consider whether that risk is enhanced due to the severity of the student's disability, 22 Pa. Code §14.132(2)(viii), and whether or not an important skill is at risk due to likely regression, such as a skill needed to enhance the student's self-sufficiency or independence. 22 Pa. Code §14.132(2)(iv-v). The team must also consider whether or not the Student is likely to withdraw from the learning process if not provided ESY services. 22 Pa. Code §14.132(2)(vi).

In the present matter, the District concedes that the Student needs ESY services based upon the last criterion above - that the Student is likely to withdraw from the learning process if not provided with ESY services. (FF 9.) The only issues are, as stated above, 1) whether the Student is unable to receive ESY services in a school setting because of Student's disability; and 2) whether Camp is an appropriate program to deliver ESY services.

#### INABILITY TO ATTEND SCHOOL BASED ESY PROGRAMMING

The Student testified that Student was unable to attend school based services – in fact Student stated that the very idea is “kind of a big joke.” (NT 79.) Student attested to Student's present level of anxiety, and that Student's anxiety had reached unbearable levels while Student was attending public school in the Fall of 2007. (FF 24-26.) Student stated that Student was not able to attend ESY in a school setting because of Student's anxiety. (FF 26-27.)



The Student was a persuasive speaker. Student was very articulate and communicated easily with adults. Student described Student's feelings clearly. However, Student did not display them in the hearing room. Thus, while Student stated that Student was experiencing extreme anxiety during the hearing, Student's body language was calm, Student's voice was clear, and there was no outward sign of inner turmoil. Student absented self without warning and did not return; this was the only outward sign of anxiety other than Student's statements to the hearing officer. The hearing officer concludes that the Student is sincere in describing Student's own view of what Student is experiencing, but that this view is highly subjective and cannot be relied upon as a full explanation of Student's educational need with regard to anxiety. Thus, it is not determinative as to whether or not the Student is able to attend a school based ESY program.

The District offers a different characterization of the Student's need. In its October 2007 NOREP, the District states that non-school-based services were considered in the form of home based services or a shortened school day; however, non-school based programming had been tried unsuccessfully in the past, and such programming would tend to reinforce school avoidant behaviors. (FF 13-14.) Thus, the District rejected this approach and offered an approach in which all educational and related services would be offered in the school setting. (FF 7-14.)

While the hearing officer cannot base his decision upon uncorroborated hearsay, he can give weight to the District's behavior, as well as to its statements of fact that are corroborated. The District's recommendation reveals that it considers the Student capable of entering a school building to receive ESY services, especially since the atmosphere at the District's high school in the summer would be fundamentally different from the atmosphere during the school year, because there would be very few students there. (FF 7-14.) This was corroborated by the testimony of the District's former Director of Student Services. (NT 160-161.) Considering all of the evidence, the hearing officer concludes that the Parent has failed to prove by a preponderance of the evidence that the Student is unable to attend ESY in a school setting.

#### APPROPRIATENESS OF CAMP FOR ESY PURPOSES

A preponderance of the evidence establishes that Camp does not offer any meaningful academic instruction. (FF 16-18.) Thus, the Student would

not be addressing academic needs at Camp. Rather, the Parent argued that Camp would provide educational benefit in the form of enhanced self esteem and social interaction. (FF 20-23.) However, a local educational agency is not obligated to provide a service under the ESY mandate simply because it may benefit the child. It must be shown that the service is necessary in order to provide meaningful educational benefit in light of the criteria of eligibility for ESY.

Both the Parent and the Student testified and argued strenuously that Camp is an appropriate placement for the ESY purpose of preventing the Student's withdrawal from the educational process. However, the hearing officer has some serious doubts about this argument. Both the Parent and the Student are so personally invested in the Student attending Camp that the hearing officer questions whether or not they can be objective about this. (P-16.) In addition, there is evidence that Camp has not sufficed to keep the Student engaged in learning in the past.

The Student's description of Student's feelings is not enough information to enable the hearing officer to determine Student's educational needs arising from Student's anxiety disorder. The hearing officer cannot reach a conclusion based upon this testimony. What the Student wants is very clear: Student wants to go back to summer camp. However, neither the Student's nor the Parent's judgment as to need is sufficient evidence in the absence of an expert's opinion to create a preponderance of evidence that Camp is necessary to keep the Student engaged in the learning process.

The Student's testimony was the key evidence on Student's behalf. The Parent testified, but addressed primarily the history of the child's case, and own interactions with the District in this matter. (FF 1-15.) Parent argued strenuously that Camp would help the child, but is not an educational expert and their testimony does not prove preponderantly that Camp is necessary to keep the child engaged in the learning process.

Indeed, the Student's testimony suggests that Camp would not serve that purpose. The Student admitted that, after a successful summer at Camp Student returned to public school in the Fall of 2007, and left after no more than four weeks. (FF 19-24.) Student failed all courses and was subjected to repeated truancy complaints for the rest of the school year. (FF 24-25.) Student testified unequivocally that Student is presently unable to attend classes in a school setting, even though there are very few children in the

school setting. (FF 27.) Thus, in the face of the Student's total withdrawal from the learning process, the evidence is not preponderant that Camp is able to help the Student to remain engaged in the learning process meaningfully. Taken as a whole, it is not proven to be an appropriate ESY program, because it does not serve the purposes of ESY as stated in the pending IEP.

The Parent argues that the Student left school because of the District's attempts to evaluate Student and the truancy actions. However, the Student testified that Student left because of Student's anxiety, which was exacerbated by the atmosphere of conflict surrounding Student's presence in school, including pull-outs for evaluation purposes and frequent due process hearings. (FF 26.) While this testimony is plausible, it does not help prove that Camp would help the Student to remain in school. Moreover, the truancy actions could only have been instituted after the Student left school, so they cannot be viewed as the sole or predominant cause of the Student's school avoidance, though they may have influenced the length of the period of absence.

### **CONCLUSION**

The Parent has failed to prove by a preponderance of evidence that the Student's anxiety makes it impossible for Student to attend ESY in a school setting. The Parent has failed to show that Camp is an appropriate or necessary program for ESY purposes. Therefore, the hearing officer will not order the District to pay for Camp this summer.

### **ORDER**

1. The Parent has failed to prove by a preponderance of evidence that the Student's school phobia prevents Student from benefiting from the school-based ESY program offered by the District for the summer of 2008.
2. The Parent has failed to prove by a preponderance of evidence that Camp is an appropriate ESY placement for the Student.

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

August 1, 2008