

*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 DUE PROCESS HEARING OFFICER**

CLOSED and EXPEDITED HEARING

ODR#8950/07-08 AS  
JA  
Eastern Lebanon County School District

For the Student:

For the School District:

Director of Pupil Services  
Eastern Lebanon County School District  
180 Elco Drive  
Myerstown, PA 17067-2604

Peggy M. Morcom, Esq.  
Marshal, Dennehey, Warner, Coleman & Goggin  
4200 Crums Mill Road  
Harrisburg, PA 17112

Date of Due Process Hearing Request:	June 6, 2008
Date of Resolution Meeting:	June 18, 2008
Date of Hearing:	July 3, 2008
Date Record closed:	July 3, 2008
Date of Decision:	July 5, 2008

Hearing Officer: Daniel J. Myers

## BACKGROUND

Student is a teen aged student with cognitive and psychological disorders in addition to various physical disabilities, attending a vocationally-oriented full-time life skills program during the regular school year. The parties disagree over whether or not Student is eligible for extended school year (ESY) services for this 2008 summer. For the reasons described below, I find that Student is entitled to ESY services for this 2008 summer in the area of math instruction, but not in the area of job coaching.

## FINDINGS OF FACT

1. Student, whose date of birth is xx/xx/xx, has been diagnosed over the years with borderline mental retardation (full scale IQ 62), attention deficit hyperactivity disorder (ADHD), Tourettes Syndrome, obsessive compulsive disorder (OCD), pervasive developmental disorder (PDD), anxiety disorder, mood disorder, reactive attachment disorder, post-traumatic stress disorder (PTSD), and 22q11.2 deletion, relating to the deletion of a portion of Chromosome 22 (also known as DiGeorge and Velocardiofacial Syndromes). Other medical conditions of Student include asthma, vocal cord polyps, scoliosis, lordosis, high levels of low density lipoproteins (LDL, also known as “bad cholesterol”), gastroesophageal reflux disease (GERD), allergies, and severe growth delay. (Testimony of Parent; SD4, p.2; P1) <sup>1</sup>

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<sup>1</sup> References to “SD” and “P” refer to the School District exhibits and Parent exhibits, respectively. Testimony presented at the July 3, 2008 due process hearing was recorded, and a transcript ultimately will be sent to all parties and included in the record of this case. The expedited nature of this case, however, required that I issue my decision before receiving the hearing transcript.

2. Reading is a relative strength for Student while math is a relative weakness. (SD4, p.8; Testimony of Special Education Director) Student also exhibits weaknesses in selective attention, sustained concentration, and alternating attention between two tasks. Student has executive functioning skills deficits, as well as severe short term memory and working memory deficits, all of which negatively impact Student's ability to learn math skills as well as vocational, or work, skills. (SD4, p.3; Testimony of Psychiatrist)
3. Student's psychiatrist for the last 11 years is a board certified child and adult psychiatrist who has practiced since 1979, and who has treated over 100 children with one of Student's particular conditions, i.e., the rare 22q11.2 chromosomal deletion. Student's psychiatrist testified that if Student does not continue to receive math instruction and job coaching during the summer, Student will lose skills in those areas. (Testimony of Psychiatrist)
4. Student has received specialized education services since preschool. (SD4, p.2) Since entering the public school system in kindergarten, Student has attended public schools except during the 2006-2007 school year, during which Student attended, apparently at private expense, a private school catering to children with special needs. (SD4, p.2; Testimony of Special Education Director)
5. The parties disagree over how many summers Student has received ESY services in the past. Student's parent believes Student has consistently received ESY services for many years, while the School District believes Student has only received summer ESY services once. (Testimony of Parent; Testimony of Special Education Director) Documentary evidence in the record indicates the following:

- a. Student did not receive ESY services in summer 2004. Student's May 2004 individualized education program (IEP) indicates that, based upon Student's "curriculum gains to date," summer 2004 ESY was not required. (SD1, p.5)
  - b. Student did receive ESY services in summers 2005 and 2006. Student's April 2005 and May 2006 IEPs indicate that, "due to difficulty retaining math concepts and procedures," ESY was required. (SD2, p.10; SD3, p.17)
  - c. Student did not receive ESY services in summer 2007. (Testimony of Special Education Director)
6. The summer 2006 ESY services focused on higher level math concepts such as division and multiplication. (SD4, p.2; Testimony of Parent)
  7. The School District's decision not to provide summer 2007 ESY services was based, not upon a determination that Student did not require such services, but because there was insufficient information from Student's private school upon which to base an ESY eligibility determination. (Testimony of Special Education Director)
  8. Despite the School District's decision not to provide summer 2007 ESY services due to insufficient information, the School District did provide to Student free math tutoring services during summer 2007. (Testimony of Special Education Director) This math tutoring lasted for 8-11 weeks and consisted of basic, or functional, math skills needed for checkbooks and job applications. (Testimony of Parent) Student's parent considers the summer 2007 math tutoring services to

constitute ESY, while the School District does not. (Testimony of Parent; Testimony of Special Education Director)

9. For the 2007-2008 school year, Student attended a vocationally-oriented full-time life skills program rather than an academically-oriented middle or high school program. (SD2, p.1; Testimony of Parent; Testimony of Special Education Director) This program is called the Basic Occupational Skills (BOS) program, designed to develop employability skills and functional academics related to adult living tasks such as banking, money management, acquiring a job, and meeting transportation needs. (SD10, p.5) Student's 2007-2008 IEP includes a functional reading goal, a functional math goal, and vocational/occupational community based instruction goals, including social skills needed to obtain, maintain and change employment. (SD10, pp.9-12)
10. Student's initial 2007-2008 IEP also states that Student is not eligible for ESY. (SD10, p.14) This IEP does not indicate why Student is not eligible for ESY, stating only that ESY eligibility assessments will be analyzed by March 2008 to determine ESY eligibility. (SD10, p.14)
11. On January 30, 2008, Student's IEP team met again. (SD10, p.39) That IEP's ESY section states that Student's end of second marking period curriculum based assessments indicate that Student is retaining information in spelling, vocabulary and math, and that further assessment at the end of a money skills unit will be discussed at the next IEP meeting. (SD10, p.54)
12. A minor revision to the IEP occurred on March 31, 2008, when the School District and parent agreed to change the IEP without convening an IEP meeting,

by adding a drivers education class as well as apparently related transportation to and from the class. (SD10, pp.19, 36)

13. The next actual IEP team meeting occurred on the last day of school, i.e., June 3, 2008. (Testimony of Parent; SD13, p.1) At that time, Student's present levels of academic achievement indicated 82% average in functional math, 83% accuracy in counting money up to \$100, and 82% accuracy in counting a cash box up to \$1,200 in cash and checks and in completing a deposit slip. Student was at a 6<sup>th</sup> grade instructional level in reading and spelling. (SD13, p.4) Student continued to need practice in math skills, often rushing through math assignments, and Student needed continued practice and support in completing vocational work assignments on time, with consistent quality, and independently. (SD13, p.4) Where ESY eligibility was concerned, the June 3, 2008 IEP listed pre-and post-test results of the Brigance Diagnostic Inventory of Essential Skills and Employability Skills, showing improvement in reading vocabulary, reading comprehension, employment-form reading, warning and safety sign reading, and whole number calculation. (SD 13, p. 13) The IEP did not change language from previous (January and March 2008) IEPs regarding retention of information in spelling, vocabulary and math, and the promise of further assessment and discussion at the end of a money skills unit. (SD10, p.34, 54; SD13, p.13) Finally, the ESY section of the June 2008 IEP states that seven ESY factors outlined at 22 Pa. Code §14.132(2) were reviewed and concludes that Student does not require ESY. (SD13, p.13)

14. Student's 2007-2008 progress reports and report cards indicate the following. Student exhibited progress in functional reading and writing, and Student exhibited relative consistency in basic employability and transition skills. (P3) Report cards indicate Student's workplace math scores over the November, January, April and June marking periods are 4.00, 4.45, 4.10 and 3.65, respectively. (P4-P7) More detailed progress reports of Student's math goals indicate that, over four quarters, Student received either no math instruction or demonstrated a reduction in progress in Student's math instruction. (P3, p.2; P4-P7; Testimony of Parent; Testimony of Special Education Director) Although the School District's Director of Special Education remembers that Student's math teacher reported progress in math instruction, the Director of Special Education could not remember how Student's math teacher reconciled Student's asserted progress with the apparent lack of progress indicated by the report cards and progress reports. (Testimony of Special Education Director)
15. On June 5, 2008 Student's parent wrote to the School District, noting that she had requested summer job coach/supported employment services and math tutoring for summer, and indicating that she is appealing the School District's decision to deny summer programming. (SD14, p.1) The record contains the parent's June 6, 2008 handwritten due process complaint notice (SD16), as well as a June 10, 2008 typed version of the due process complaint notice. (SD 19)
16. The June 2008 correspondence and due process hearing requests of Student's parent clearly reference her desire for ESY in the two areas of math and a summer job coach. Student's parent seeks continuity of programming for summer 2008.

(SD17; SD19) Student's parent argues that Student's failure to meet Student's IEP goals makes Student eligible for ESY. (P2)

17. On June 18, 2008, a job coach employed by the Intermediate Unit began providing job coach services on behalf of Student, presumably at the request of the School District and, presumably, intended by the School District to be a free non-ESY service for the Student. The job coach's function is to make telephone calls to prospective employers on Student's behalf, to assist Student in identifying potential employers, to help Student find transportation to and from job interviews, and to follow through on the status of job applications and interviews. The job coach is not a certified educator. (Testimony of Job Coach)
18. On Monday, June 30, 2008, Student's parent called the Office for Dispute Resolution (ODR) and left a message asking about the status of her due process hearing request. An ODR case manager called Student's parent back the same day, informed Student's parent that hearing notices had been sent the previous week, and stated that new hearing notices were being sent on June 30 due to a change in court reporters. Student's parent has never received a hard copy of any ODR hearing notices. The School District received its first ODR notice by email on Monday, June 30, 2008. (Testimony of Parent; Assertion of School District lawyer)
19. I conducted a due process hearing on the evening of Thursday, July 3, 2008. I had earlier denied the School District's request for a continuance to accommodate the schedules of its attorney and witnesses. The School District's new attorney renewed the request and suggested, in the alternative, that I hold the record open



to permit the inclusion of testimony from a particularly critical witness – Student’s 2007-2008 special education teacher and the drafter of Student’s 2007-2008 IEP and revisions. Since Monday, June 30 when the School District first learned of the July 3 hearing, it had been unable to locate that particular witness and arrange for her testimony, either in person or by phone. I denied the School District’s request because I believe that I must issue my decision by today, July 6, 2008, due to the expedited nature of this case. Both parties have been inconvenienced in presenting their cases, due to the brief notice they received of the hearing date.

20. At the hearing, the School District moved to dismiss this matter as moot because the School District has already arranged for the relief requested in this case, i.e., summer math tutoring three times per week for six weeks and job coach assistance. The School District has arranged for these services as part of a previous compensatory education award and not as ESY. (SD25) I denied the motion to dismiss because ESY, where appropriate, is part of a free and appropriate public education (FAPE), and compensatory education can only supplement, and cannot supplant, FAPE. In other words, while the service itself remains the same, whether it is considered ESY or compensatory education is a significant legal distinction that does not render this dispute moot.
21. At the hearing, the School District moved to preclude all of Student’s evaluations, recommendations, documentation and witness testimony because Student disclosed Student’s witness and exhibit list one day, rather than two days, before the July 3, 2008 hearing. (SD26) I denied the motion because I did not perceive

- specific prejudice to the School District regarding specific late-disclosed evidence, I did not perceive bad faith in the late disclosure, and I perceived that both parties were doing the best they could considering the exceptionally short time between their notice of the hearing date and the hearing itself.
22. At the hearing, the parties agreed to accept service of this decision via email, with a hard copy to follow in the mail. The parties understood and accepted the fact that, for purposes of appeal, the date of their receipt of my email (and not the date of their receipt of the mailed hard copy) will be considered the date of their receipt of my decision.
23. [sentence redacted to preserve confidentiality]

### **CONCLUSIONS OF LAW**

1. Student has met Student's burden of establishing entitlement to ESY services for summer 2008 in the area of math instruction.
2. Student has not met Student's burden of establishing entitlement to ESY services for summer 2008 in the area of job coaching.
3. The School District's provision of summer math tutoring and job coach assistance for this summer, in the form of compensatory education rather than in the form of ESY, does not render this dispute moot.
4. Neither party has been denied due process in the resolution of this dispute, despite the exceptionally short time between notice of the hearing date and the hearing itself, and despite the Student's one-day, rather than two-day, disclosure of witnesses and exhibits.

## DISCUSSION

The United States Supreme Court has held that, in an administrative hearing challenging a special education IEP, the burden of persuasion (which is only one element of the larger burden of proof) is upon the party seeking relief, whether that party is the disabled child or the school district. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); In Re J.L. and the Ambridge Area School District, Special Education Opinion No. 1763 (2006) Of course, where any party has produced more persuasive evidence than the other party (regardless of who seeks relief), then the evidence is not in equipoise, and the Supreme Court's ruling is not at issue – in that case I must simply find in favor of the party with the more persuasive evidence, and Schaffer does not come into play.

It is curious that the concept of ESY exists at all in the current educational environment that is so saturated with scientific phrases such as “data-driven decisions” and “evidence-based practices.” As best I can determine, ESY is simply an artificial invention or “patch” created to address flaws resulting from the equally artificial concept of “summers-off” education. I have never seen a pedagogical explanation as to why summers-off education is “best practice” when educating children. I suspect that ESY is simply the bureaucratic result when the rubber hits the road and the science of educational theory confronts the reality of a cultural bias as deeply engrained as summer vacation.

In any case, 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 Public schools often provide other types of summer programming that are not considered ESY, such as traditional summer school programs that typically are optional and voluntary, enrichment programs, remedial and reinforcement classes, and different types of camps. A significant difference between ESY and other, non-ESY summer programming is that one is an entitlement and a civil right (ESY), whereas the other types of programming typically are not.

Federal regulations provide that ESY services must be available as necessary to provide a free and appropriate public education (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) State regulations begin with a procedural requirement and then list substantive criteria to be considered in deciding whether or not a student is eligible for ESY services. 22 Pa.Code §14.132 The procedural requirement is that the IEP team consider eligibility and need for services “[a]t each IEP meeting... .” The substantive criteria for consideration are (with the caveat that “no single factor will be considered determinative”): whether the student’s difficulties with regression and recoupment make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives; 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) These factors can be 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 J.A. and the Eastern Lebanon County School District, Special Education Opinion No. 1123 (2001) Nevertheless, Appeals Panel decisions have made it clear that not every child entitled to FAPE is entitled to ESY, and the requirement for ESY is to be applied "restrictively" to school districts. Id.

The state regulation also contains 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, including: progress on goals in consecutive IEPs; 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) 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)

In In Re E.K. and the Easton Area School District, Special Education Opinion No. 1727 (2006), the record reflected only the belief of the student’s father that the student generally lost some ground over the summer and, therefore, that ESY services were necessary. In contrast, the school district presented contrary testimony from several of the student’s teachers. While the Appeals Panel appreciated the parents’ difficulty in presenting the requisite evidence, particularly given the school district’s apparent failure to properly assess the student’s eligibility for ESY services during the school years in question, the Panel nevertheless was compelled to conclude that the parent’s evidence on this claim was insufficient to meet his burden of proof. The Panel noted that, absent evidence of actual regression, the parents are required to establish that “[a student’s] progress would be significantly jeopardized in the absence of ESY services” and “the mere fact of likely regression is not a sufficient basis, because all students, disabled or not, may regress to some extent during lengthy breaks from school.” Id., citing M.M. v. School District of Greenville County, 303 F. 3d 523, 538 (4<sup>th</sup> Cir. 2002); see also Letter to Given (OSEP 2003)

In In Re K.H. and the Marple Newtown School District, Special Education Opinion No. 1494 (2004), it was determined that the mere fact that a school district had provided ESY one summer in an apparent effort to compromise with the parents was insufficient evidence that the child had been entitled to ESY for the previous summers. The child had made notable progress in language arts goals and objectives, although Student did not completely master them, and the rest of the evidence that the school

district knew or had reason to know at the time of the ESY determinations did not come close to what was required to establish ESY entitlement.

In William D. v Manheim Township School District, 2007 U.S. Dist. LEXIS 72657 (E.D. Pa. 2007), a hearing officer concluded, based upon credible testimony, tests, and reports, that the student was making substantial progress on his IEP goals. Noting a large body of countering evidence, including standardized testing and observational reports by home-based service providers, the hearing officer rejected the parent's argument that quarterly progress reports indicated that the child was not on track to reach his IEP goals.

In this case, there is no dispute that math is a relative weakness for Student. (SD4, p.8; Testimony of Special Education Director) Student's executive functioning skills deficits, short term memory and working memory deficits, and weaknesses in selective attention and sustained concentration, negatively impact Student's ability to learn math skills. (SD4, p.3; Testimony of Psychiatrist) In fact, Student received ESY math services in summers 2005 and 2006 expressly due to difficulty retaining math concepts and procedures. (SD2, p.10; SD3, p.17; SD4, p.2) While Student did not receive ESY services in summer 2007, this was not because the IEP team had determined that Student did not require such services, but rather because there was perceived to be insufficient information from Student's private school upon which to base an ESY eligibility determination.<sup>2</sup> (Testimony of Special Education Director) Even in summer 2007, the

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<sup>2</sup> While there is support for such a conclusion, see In Re H.L. and the Haverford Township School District, Special Education Opinion No. 1837 (2007), a Basic Education Circular in effect at that time states that a Notice of Recommended Educational Placement was, nevertheless, required if ESY services were requested and

School District still provided summer math tutoring to Student, albeit as a “freebie” from the School District rather than as an ESY entitlement. (Testimony of Parent; Testimony of Special Education Director)

The School District’s contention that Student does not need math-related ESY this summer because Student made sufficient progress in math instruction over the school year is not supported by the record. Evidence in the record indicates that Student has always been weak in math, has twice been determined by the IEP team to require ESY in past summers, has always received summer math instruction (whether via ESY or not) and Student’s treating psychiatrist credibly opined that Student continues to need math-related ESY services this summer. The only countervailing evidence in this record is the assertion of Student’s math teacher (conveyed through the Director of Special Education because of the math teacher’s unavailability to attend the hearing) that Student made progress in math this year. This assertion is not credible, however, in light of Student’s report cards indicating workplace math scores of 4.0, 4.45, 4.1 and 3.65, over the November, January, April and June marking periods, respectively, and in light of more detailed progress reports of Student’s math goals indicating that, over four quarters, Student received either no math instruction or demonstrated a reduction in progress in Student’s math instruction. (P3, p.2; P4-P7; Testimony of Parent; Testimony of Special Education Director) In other words, all evidence in the record except the statements of the math teacher at the IEP team meeting indicates that Student needs math-related ESY this summer. The math teacher’s statements are not credible in light of the contradicting



report cards and progress reports in the record. Accordingly, I conclude that Student is entitled to ESY services for summer 2008 in the area of math instruction.

With respect to job coaching ESY services, however, I find that Student has not met Student's burden of proof. The only evidence supporting Student's argument that Student needs job coaching ESY services is Student's mother's belief and Student's psychiatrist's opinion, which merely indicate that Student's weaknesses in selective attention, sustained concentration, and alternating attention between two tasks, as well as Student's executive functioning skills deficits and severe short term memory and working memory deficits, all negatively impact Student's ability to learn vocational, or work, skills. (SD4, p.3; Testimony of Parent; Testimony of Psychiatrist) Yet, vocational training is relatively new for Student. Thus, unlike Student's math-related needs, with which Student's parent and psychiatrist are quite familiar, Student does not have an extensive history of job-coaching needs, nor does Student have an annual history of receiving vocationally-related ESY and summer services. Further, the objective pre-and post-test results of the Brigance Diagnostic Inventory of Essential Skills and Employability Skills show improvement over the last school year in vocational-related reading vocabulary, reading comprehension, employment-form reading, warning and safety sign reading, and whole number calculation. (SD 13, p. 13)

In other words, in a sort of reverse image of the math-related issue, no evidence in the record, except the opinions of the psychiatrist and parent, indicates that Student needs job coaching ESY this summer, and the psychiatric and parental opinion evidence is contradicted by the objective Brigance Inventory results. Despite the parent's and psychiatrist's extensive knowledge of Student in general, I see no reason to give their

opinions regarding Student's vocational training needs any particular deference. (In contrast, because Student has been receiving math instruction for years, they have much deeper understandings of Student's math-related experiences and objective evidence supports their math-related opinions; therefore their math-related opinions are more credible than their job coaching-related opinions.)

Accordingly, because Student has not met Student's burden of proof on this issue, I conclude that Student is not entitled to ESY services for summer 2008 in the area of job coaching.

### **CONCLUSION**

Student has met Student's burden of proof with respect to Parents' claim for ESY services in the area of math instruction, but not in the area of job coaching. Parents have demonstrated sufficient evidence of Student's consistent need for math-related ESY services and the School District's evidence to the contrary is contradicted by documented evidence of Student's failure to progress in math-related IEP goals. With respect to job coaching, however, the general opinions of Student's parent and treating psychiatrist are not supported either by any historical data or by objective evidence and, in fact, are contradicted by objective Brigance Inventory data contained in the IEP. Accordingly, I will order that Student receive ESY services in the area of math instruction, but not in the area of job coaching.

**ORDER**

- The School District shall provide ESY services to Student for summer 2008 in the area of math instruction.
- The School District need not provide ESY services to Student for summer 2008 in the area of job coaching.

*Daniel J. Myers*

Daniel J. Myers  
Hearing Officer

Date Emailed to Parties: July 5, 2008

ODR#8950/07-08 AS  
Student  
Eastern Lebanon County School District