

*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

EXPEDITED DECISION

Child's Name: [REDACTED]

Date of Birth: XX/XX/XX

Date of Hearing: March 24, 2009

CLOSED HEARING

ODR No. 9790/08-09 LS

Parties to the Hearing:

Parents:  
[REDACTED]

Parent Representative:  
Mark Painter, Esq.  
63 Malsbey Road  
Royersford, PA 19468

School District:  
Leigh Ann Ranieri, Director of Special  
Education  
Wilson School District  
2601 Grandview Boulevard  
West Lawn, PA 19609

School District Attorney:  
Thomas C. Warner, Esq.  
Sweet, Stevens, Katz & Williams  
331 Butler Avenue, P.O. Box 5069  
New Britain, PA 18901-5069

Date of Hearing: March 24, 2009

Date Transcript Received: March 27, 2009

Date Record Closed: March 29, 2009

Date of Decision: April 1, 2009

Hearing Officer: Daniel J. Myers

## **INTRODUCTION AND PROCEDURAL HISTORY**

[REDACTED]<sup>1</sup> (Student) is an elementary school student with autism who contests the Wilson School District's (School District) proposed extended school year (ESY) program. While all parties agree that Student requires ESY programming, there is a large discrepancy between the quantity of ESY programming proposed by the School District and that sought by Student. I conducted an expedited due process hearing on March 24, 2009, and I closed the record on March 29 with receipt of the parties' written closing arguments. After conducting a two-step ESY sufficiency analysis described herein, and based upon the severity of Student's need for ESY, I order an amount of ESY programming that falls in between the positions of the parties. I find that while Student requires more ESY programming than the School District proposes, Student requires less ESY programming than Student seeks.

### **ISSUES**

- Whether the School District's ESY programming is appropriate?
- If the School District's ESY programming is not appropriate, what is the appropriate ESY programming for Student?

### **FINDINGS OF FACT**

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<sup>1</sup> All future references to [REDACTED] will be generic and gender-neutral. These impersonal references to Student are not intended to be disrespectful but rather to respect his/her privacy.

1. Student, whose date of birth is XX/XX/XX, has been diagnosed with autism and attention deficit hyperactivity disorder (ADHD.) (SD1; SD4; NT 37)<sup>2</sup> Student engages in parallel play but does not take turns or interact with peers in a socially acceptable manner, and Student often isolates or prefers adults to peers. (SD6,p.8-10) Other stereotypic behaviors include echolalia, scripting, perseveration and difficulty with transitions. (NT 23) Student is very routine-oriented and lack of structure can result in increased anxiety, which often manifests in compulsive behavior as well as tantrums that include biting, blowing mucous on others, and throwing self to ground. (SD6,p.10; P1; P2; P4; NT 20, 22, 47, 57)
2. Student receives, from a mental health provider, therapeutic support services (TSS) for 20 hours per week at school and 20 hours per week at home. The purpose of the TSS is to increase Student's attention during instruction, reduce problematic behaviors, improve social interactions with peers, improve transition tolerance, increase verbal behavior, and increase impulse control. (P1,pp.5-7; NT 61)
3. Student received early intervention services for 3 hours per day, 5 days per week, for an unspecified period of time in 2006-2007. (24, 25-26) In 2007-2008, Student attended kindergarten for 3 hours per day. (NT 24, 27) Toward the end of the school year, kindergarten services were increased to 4 hours per day. (NT 28) While receiving both the ½ day early intervention and ½ day kindergarten services, Student exhibited anxiety and tantrums both at home and in school. (NT

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<sup>2</sup> References to "P," "SD," and "HO" are to the Parent, School District, and Hearing Officer exhibits, respectively. References to "NT" are to the transcript of the due process hearing session.

- 44, 45) During a one week gap between the early intervention and kindergarten services, Student exhibited increased aggression and tantrums at home. (NT 49)
4. For summer 2008, the School District offered a 6 week ESY program of 2.5 hours per day, for 3 days per week. (NT 30) Student's parents rejected that ESY offer and chose instead to send Student to the [REDACTED] Socialization Therapeutic Camp (Private Camp) for the summer. (NT 31; SD6,p.4) Private Camp was a 10 week, 6 hour per day, 5 days per week program for autistic children. (NT 31, 63-64)
  5. In September 2008, Student transitioned well from full-day Private Camp to the School District's full-day 1<sup>st</sup> grade autistic verbal behavior classroom. (NT 50, 60) This 2008-2009 school year, Student exhibits occasional noncompliance and some, but not much, anxiety. (NT 119-120) Student exhibits no aggressive behavior at school and no mucous blowing. (NT 119) There is no disagreement between the parties that Student's current IEP is appropriate. (NT 131; SD6, p.34)
  6. Before and after the two week 2008-2009 winter break, Student's teacher recorded regression and recoupment data regarding the activities she and Student were working on at the time. Those data demonstrated regression in receptive, self-care, social and requesting skills, as well as recoupment of those skills one month later. (NT 113-115; SD20) After the break, Student's teacher also observed an increase in Student's lack of attention, but no increase in anxiety. (NT 121) Generally, Student's teacher has observed more fidgeting and attention issues for the second semester (after winter break) than in the first semester. (NT 135)

7. The 2008-2009 school year ends on June 10, 2009 and the 2009-2010 school year begins on August 30, 2009. (NT 83, 88, 90, 94-95, 101) There is no dispute that Student is entitled to Summer 2009 ESY services. (NT 131; SD6, p.34)
8. In early March 2009, the School District offered a 6 week ESY program for 2.5 hours per day (8:15-10:45 a.m.), 3 days per week, from June 23 to July 30, 2009. (SD6, p.34; NT 19, 76, 101) This proposed ESY program would involve intensive teaching of four of Student's academic goals by a speech therapist and an autistic support teacher. (NT 80, 84-85) Included within the 3 days per week is one day per week of interaction with typically developing peers. (NT 80, 87)
9. Student's teacher believes that 2.5 hours per day constitutes appropriate ESY services because the teacher currently spends about 30 minutes per day on each of the four IEP goals that would be addressed during the ESY program. (NT 121, 139) Student's teacher cannot explain why the proposed program is only 3 days per week, noting only that the School District runs a 3 day per week ESY program. (NT 140) Student's teacher also doesn't know whether the ESY proposal considered the severity of Student's autism. (NT 124)
10. On March 4, 2009, Student's parents rejected the School District's ESY offer and requested due process, seeking full-day ESY programming. (NT 77-79) As a proposed resolution, Student's parents asked the School District to fund the 10 week, 6 hours per day, 5 days per week [REDACTED] ESY program (Private ESY). Private ESY is operated by the same organization that operates Private Camp, and Private ESY will implement Student's IEP, but Private ESY is available only to students who have their school districts' approval. (NT 34)

Private Camp, which is same full-day summer camp that Student attended last year and is available to autistic children regardless of school district approval, provides socialization and structure but does not implement IEPs. (P3; NT 21, 32-33) If the School District does not offer an ESY program acceptable to Student's parents and does not approve Private ESY, Student's parents intend to enroll Student in Private Camp at private expense. Student's parents believe that, regardless of the academic nature of the summer program, Student requires at least 10 weeks of full day, 5 days per week structured activity to avoid anxiety and behavioral tantrums. (NT 32)

11. On or about March 11, 2009, the School District added to its ESY offer 9 weeks of 1.5 hours per week of related services (30 minutes each of speech services, occupational therapy (OT) and social work services). (SD7; SD22; NT 79, 81)  
On or about March 17, Student's parents approved the additional 9 weeks of related services, but continued to reject the total ESY offer, contending that Student requires more total ESY services. (SD7,p.3)
12. On or about March 18, 2009, the parties conducted a mediated resolution session, after which the School District added to its ESY offer 9 weeks of 1 hour per week of 1:1 academic reinforcement. (SD22; NT 37, 83)
13. The School District's final ESY offer constitutes:
  - a. 6 weeks of 10 hours per week from June 23 to July 30, comprised of
    - i. the original 7.5 hours (2.5 hours per week x 3 days per week), plus
    - ii. 1 hour per week of 1:1, plus
    - iii. 1.5 hours per week of related services; and

- b. 3 weeks of 2.5 hours per week from August 3 to August 21, comprised of
  - i. 1 hour of 1:1, plus
  - ii. 1.5 hours of related services.

(NT 83, 88, 90, 94-95, 101)

14. Student's mental health behavioral specialist consultant (BSC), who has worked with Student for three years, has a masters degree in counseling and special education as well as applied behavioral analysis (ABA) training. (NT 42) For winter break, the BSC recorded regression data regarding Student's aggression, tantruming and perseverative requests at home, for the purpose of continual justification of Student's TSS and BSC services. (NT 51, 65; P5) The BSC observed increased anxiety, more frequent and severe tantrums, and more self-stimulating behaviors over the break, and elevated levels of these behaviors after the break in comparison to before the break. (NT 23, 52-53) The BSC believes that full-day instruction is very important to provide consistency to Student and to assist in maintaining Student's behavioral and mental health. (NT 54-56)
15. I conducted an expedited due process hearing on March 24, 2009. Parent Exhibits P1- P4 were admitted into the record over the School District's objection, and P5 and P6 were admitted with no objection. (NT 68) School District exhibits SD1, SD6, SD7, SD10, SD20, SD21, and SD22 were admitted no objection. (NT 154-155) Both parties submitted well-written, quite helpful, post-hearing briefs on March 29, 2009, at which time the record in this matter was closed.

## **DISCUSSION AND CONCLUSIONS OF LAW**

The United States Supreme Court has held that, in a special education administrative hearing, 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); L.E. v. Ramsey Bd. Of Education, 435 F.3d 384 (3d Cir. 2006); In Re a Student in the Ambridge Area School District, Special Education Opinion No. 1763 (2006) If the evidence is not in equipoise, but rather one party has produced more persuasive evidence than the other party (regardless of who seeks relief), then 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. In this case, Student bears the burden of persuasion because Student contends that the School District's ESY offer is inappropriate. L-B.M. v. East Penn School District, Special Education Opinion No. 1795 (2007)

There is a difference between determining that a child is eligible for ESY and determining the ESY services necessary for a child. K.R. v Philadelphia School District, Special Education Opinion No. 1506 (2004) Of course, in this case, there is no dispute between the parties over Student's eligibility for ESY services. (NT 131; SD6, p.34) There is little guidance, however, to assist in determining what ESY services are necessary once a child has been determined to be eligible for ESY. The Appeals Panel suggests that ESY-sufficiency analysis involves two steps: 1) whether the ESY was individually designed; and 2) how severe is the child's eligibility for ESY. K.R. v. Philadelphia School District, supra.

### **The Proposed ESY Offer is Individualized**

Student argues that the School District's preprinted ESY form (SD 21, p.2) offering only "Class-based Instruction 2.5 hours 3x per week for 6 weeks," with no provision on the form for different hours, sessions or weeks, demonstrates that the School District's offer is a pre-existing "one size fits all" summer ESY program. The School District offers no argument regarding this issue.

Student is correct that the School District's original offer was consistent with a preprinted form, suggesting that it was offering a pre-packaged ESY program. (SD6, p.34; NT 19, 76, 101) Similar indicia are the facts that the School District offered the same 6 week ESY program for summer 2008 (NT 30), and Student's teacher cannot explain why the proposed program is only 3 days per week, noting only that the School District runs a 3 day per week ESY program. (NT 140)

The School District's final ESY offer, however, is different from the apparent pre-packaged ESY program that it originally offered. On March 11 and March 18, the School District revised its original ESY proposal offering, respectively, an additional 9 weeks of 1.5 hours/week of related services, and an additional 9 weeks of 1 hour per week of 1:1 academic reinforcement. Because these revisions to the original offer are based upon Student's particular needs for related services and academic reinforcement, the final ESY proposal cannot be considered pre-packaged or one-size-fits all.

Accordingly, I conclude that the School District's final ESY offer does meet the first step of a two-step ESY sufficiency analysis. The School District's final ESY proposal is individually designed, based upon Student's particular needs.

**The Proposed ESY Program Does Not Appropriately Consider the  
Severity of Student's Need for ESY**

State regulations list seven factors to be considered in determining eligibility for ESY services, with no single factor considered determinative. 22 Pa. Code §14.142(a)(2); T.G. v New Hope-Solebury School District, Special Education Opinion No. 1759 (2006) Those seven factors are: 1) regression; 2) recoupment; 3) the likelihood that the student will maintain the skills and behaviors relevant to IEP goals and objectives; 4) the student's mastery of an important skill or behavior at the point when educational programming would be interrupted; 5) the particularly crucial nature of a skill or behavior to self-sufficiency and independence from caretakers; 6) the student's withdrawal from the learning process as a result of successive interruptions in educational programming; and 7) the severity of the student's disability. 22 Pa. Code §14.132(a)(2) Reliable sources of ESY information may include reports by parents of negative changes in adaptive behaviors or in other skill areas, and observations and opinions by educators, parents and others. 22 Pa. Code §14.142(b)

Student argues that the School District does not know whether severity of autism was considered in the ESY determination (NT 124), and Student further argues that Parent and BSC testimony establishes the severity of Student's disability. The severity at issue in this ESY sufficiency analysis, however, is the severity of the Student's need for ESY, not the severity of the disability itself. K.R., supra. Theoretically, then, a severely disabled student with few regression and recoupment problems might not have a severe need for ESY.<sup>3</sup>

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<sup>3</sup> I am aware that severity of the disability is one of the seven ESY eligibility factors. I think this simply means that, in determining how severe a child's ESY need is, one of several factors to consider is the severity of the disability itself. It does not mean that a severe disability automatically equates to a severe need for ESY.

Parents argue that Student's ESY needs are too extensive to be appropriately addressed in a 2.5 hour day. Parents note Student's smooth transition last summer from full-day Private Camp to the School District's full-day 1<sup>st</sup> grade autistic verbal behavior classroom. (NT 50, 60), and Parents compare that to the anxiety and tantrums experienced at home and school the summer/fall before when Student transitioned between the ½ day early intervention and ½ day kindergarten services. (NT 44, 45, 49) Parents also note that Student's most recent 16 calendar winter break resulted in regression and months-long recoupment both at home and in school, indicating that Student's ESY needs are severe. The School District argues that Parent and BSC evidence demonstrates only that Student regresses during extended breaks, but it does not demonstrate why Student needs more ESY than has been proposed. The School District also argues that there is no evidence that the School District's proposal will fail.

I find neither party's argument persuasive. The record indicates to me that, while Student's need for ESY services is not so severe as to require 10 weeks of six hour per day, full week programming, it is severe enough to require more than the School District's proposed ESY program of 6 weeks of 10 hours per week plus 3 weeks of 2.5 hours per week.

When reviewing the seven factors to be considered for determining a child's severity of ESY need, I conclude that the severity of Student's need for ESY programming is such that, to ensure that Student receives meaningful benefit from Student's IEP (K.R. v Philadelphia School District, Special Education Opinion No. 1506 (2004)), Student requires 6 weeks of daily, ½ day ESY programming in the IEP goal

areas identified by Student's teacher, as well as the additional 3 weeks of related services and 1:1 academic reinforcement. I reach this conclusion as follows.

At school, Student regresses in receptive, self-care, social and requesting skills, as well as attention and fidgeting, but not anxiety. (NT 113-115, 121, 135; SD20) At home, Student regresses in increased anxiety, more frequent and severe tantrums, and more self-stimulating behaviors (NT 23, 52-53). Student's request for 10 week, full day, full week ESY programming is designed to reduce Student's home-based behaviors. But addressing such behaviors is not required to ensure that Student receives meaningful benefit from Student's IEP because the home-based behaviors are not exhibited at school. The regression experienced at school, not the regression experienced at home, determines the amount of Student's ESY programming. (Factor 1)

With no programming over the winter break, Student reasonably recouped at school within a month (NT 121, 135) and also recouped, but at a slower rate, at home (NT 23, 52-53). Thus, it is reasonable to conclude that some ESY programming will recoup the skills needed to ensure that Student receives meaningful benefit during the school year. (Factor 2) The fact that Student recouped within a month with no ESY over the winter break indicates that Student does not require 10 weeks of full day, full week ESY (which is nearly the equivalent of regular school year programming.)

Similarly, I conclude that, with some ESY programming during summer 2009, Student can reasonably be expected to maintain relevant skills and behaviors during the 2009-1010 school year (Factor 3), and Student can reasonably be expected to master important skills and behaviors next year. (Factor 4) This is based upon the fact that there is no disagreement between the parties that Student's current IEP is appropriate. (NT 131;

SD6, p.34) In other words, the school year programming is appropriate and the question here is what lesser amount of ESY programming will ensure that Student receives meaningful benefit from the appropriate IEP during the school year. Thus, there is no reason to believe that, for ESY, Student needs nearly the equivalent of regular school year programming.

The School District's proposed ESY program addresses receptive, self-care, social and requesting skills. (NT 113-115; SD20) This satisfies the factor requiring programming in IEP goals that are particularly crucial to self-sufficiency and independence from caretakers. (Factor 5)

The record indicates that Student is not likely to withdraw from the learning process if Student receives an appropriate amount of ESY programming over the summer. (Factor 6) This is based upon the facts that, with no programming over the winter break, Student reasonably recouped skills at school within a month (NT 121, 135) and also recouped, but at a slower rate, behavioral skills at home. (NT 23, 52-53)

Finally, the record indicates that the severity of Student's autism manifests differently at home and at school. Student's parallel play, echolalia, scripting, perseveration, difficulty with transitions, and need for routine and structure manifest both at home and at school. (SD6,p.10; P1; P2; P4; NT 20, 22-23, 47, 57) Student's anxiety and more severe behaviors are exhibited at home rather than at school. (NT 119-120, 131; SD6, p.34) The School District's ESY proposal is appropriately based upon the severity of Student's autism (Factor 7) as manifested at school, rather than at home.

The analysis above leads me to conclude that, based upon the seven factors of ESY need, some appropriate amount of ESY programming is required. Unfortunately,

simply listing the evidence relevant to the seven factors above does not answer with precision the more immediate question - what amount of ESY is appropriate?

The School District anticipated that, in answering that question, I might reject both Student's request for a 10 week, full day, full week argument and the School District's proposal of 6 weeks, 10 hours per week plus 3 weeks, 2.5 hours per week. The School District argues that IDEA 2004's notice pleading process prevent me from raising new issues without the parties' concurrence. The School District argues that, if I fashion an ESY remedy rather than simply pick either the School District's proposal or the Student's requested relief, I am considering a "sua sponte issue" over which I lack jurisdiction. I disagree. The issue in this case has always been what is the appropriate amount of ESY programming for Student. When the School District argues that appropriate amount is X, and the Student argues that appropriate amount is Y, I am not raising a "sua sponte" issue when I decided that the appropriate amount is >X, or <Y, or even Z.

As I noted above, the difficult question in this case is what amount of ESY is the appropriate amount. I find guidance in the Appeals Panel's decision in K.R., supra. There, a child with behaviors that differed between home and school, similar to Student's, was offered an appropriately tailored the ESY program, but that program was then plugged into a pre-existing 6 week, 4 hours per day, 3 days/week schedule without any particularized justification. Noting that the child's behaviors were not particularly severe in school, as contrasted with behaviors in the home, the Appeals Panel concluded that the school district's proposed six-week, four hours per week program was largely sufficient but five days/week frequency was required to ensure FAPE, or meaningful

benefit, from the child's IEP. K.R. v Philadelphia School District, Special Education Opinion No. 1506 (2004)

I reach a similar conclusion in this case. First, although I may refer in this decision to the School District's proposal as 6 weeks of "½ day" ESY programming, the School District's 2.5 hours per day (8:15-10:45 a.m.) proposal actually is closer to 1/3 than ½ day programming. Second, the School District is proposing only 3, rather than 5, days per week of ESY programming with no explanation for such a schedule. Based upon the seven factors considered above, I conclude like the Appeals Panel in K.R., that Student's behaviors are not particularly severe in school, as contrasted with behaviors in the home, and consequently Student needs only 6 weeks of ESY programming for 4 hours per day, 5 days per week to ensure FAPE, or meaningful benefit, from Student's IEP. Six weeks of truly ½ day programming, while not as intense as 10 weeks of full day programming, along with the regularity and consistency of 5 days per week, will ensure that Student receives FAPE from the IEP. Because the School District has offered an additional 3 weeks of 2.5 hours per week in related services and 1:1 programming, which the Student has accepted and consequently is not at issue, the School District shall be required to provide it as well.

### **CONCLUSION**

Having considered the two-step ESY sufficiency analysis, I find that while the School District initially offered a non-individualized ESY program, it subsequently revised that offer in light of Student's individual needs. I further conclude that, based upon the severity of Student's need for ESY, Student does not require 10 weeks of ESY

programming for 6 hours per day, 5 days per week, but Student does require more ESY programming than is contained in the School District's ESY proposal.

## **ORDER**

The School District's final ESY offer is inappropriate.

The School District shall provide ESY to Student as follows:

- a. 6 weeks from June 23 to July 30, comprised of
  - i. 4 hours per day
  - ii. 5 days per week, plus
  - iii. 1 hour per week of 1:1 academic reinforcement, plus
  - iv. 1.5 hours per week of related services; and
- b. 3 weeks of 2.5 hours per week from August 3 to August 21, comprised of
  - i. 1 hour of 1:1 academic reinforcement, plus
  - ii. 1.5 hours of related services.

*Daniel J. Myers*

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HEARING OFFICER

April 1, 2009