

STATE OF NEW HAMPSHIRE

DEPARTMENT OF EDUCATION

IDPH-FY-05-05-079 and Barrington School District

DECISION OF THE HEARING OFFICER

I. Introduction

A request for a due process hearing was received from the Parents on May 25, 2005 and notice was sent by the Department on May 27, 2005. A pre-hearing conference was held on June 13, 2005 and the Pre-Hearing Conference Report and Order were issued that same day. The Parents appeared *pro se* and Tamara Drozin, Director of Special Education for the Barrington School District (School District) was represented by Grant Rees, Esq. An agreement was signed by the parties to accommodate later hearing dates, while allowing Student to begin the ESY program offered by Barrington prior to a decision. A hearing was scheduled for July 8 and 12, 2005 leading off with the Parents' case. The decision date was amended to July 25, 2005.

II. Procedural Violations

There was no specific enumeration of Procedural Violations.

III. Issue

The sole issue for decision is eligibility of Student for extended year services (ESY).

IV. Discussion

A. Background

Student, who is now six years of age, was identified as eligible to receive special education services while attending preschool in Pembroke provided by the Deerfield School District. Student was identified as developmentally delayed with speech and language impairments. In addition, there were behavior issues. ... received extended year services between preschool and kindergarten based on a statement in ... IEP (B-34) that regression in skills was noted when the Student returned from vacations.

After ... family moved, ... attended afternoon kindergarten in Barrington during the 2004-05 school year. This half-day program, three days per week, was the only program available to Barrington students. On advice that ... would benefit from a full day of kindergarten (P-EV 59), Parents arranged for ... to attend two full days of kindergarten and a half day one day per week at the Live and Learn kindergarten in Lee for the remainder of the year. ... IEP called for a one : one aid, speech and language therapy, occupational therapy and counseling through the Barrington program. Student's IEP for the 2004-2005 school year showed defined goals and measurement of progress (B-46-83).

Student received a comprehensive evaluation at the Seacoast Child Development Clinic in Durham on April 15, 2004. the report is in the file (EV 34-54). Cognitively, ... was found average or above average (EV-51). It was noted that student had difficulty maintaining focus and exhibited anger (P EV 35). A clearly defined, consistently adhered to behavior plan and minimization of daily transitions were among the recommendations given (EV-52), that ... be in a small heterogeneous class (EV-54). ... was seen by Margaret Dawson, Ed. D., for a psychological evaluation on August 4, 2005 (EV-60-67). Unlike the Seacoast examiners, she found indicators of ADHD and, for educational purposes, other health impaired code (OHI) to accurately describe ... behaviors that are likely to interfere with educational progress (EV-65). Dawson, as did the Seacoast Clinic, noted unspecified difficulties with transitions and made recommendations (EV-66-67).

B. Hearing.

The hearing on this matter was convened on July 8, 2005. Mr. Andrew Fishbein and Ms. Rachael Fishbein were in attendance. After preliminary discussion, electronic recording was begun and evidence marked. Parents' Exhibits were examined and Parents' Exhibits LL-1 through 36; EV 1 through 84; B 1 through 86; DS 1 through 72; CL 1 through 15 were accepted into evidence. School District's Exhibits 1 through 194 were accepted into evidence.

Parents first called Elizabeth Mary Bolduc who had been Student's preschool teacher at The Learning Connection (TLC) in Pembroke, the school provided by the Deerfield School District, where the District had no suitable program for Student. Also, she has been employed by Parents to assist them with behavioral issues in the home.

Ms. Bolduc was sworn and was examined by Ms. Fishbein. She testified in relevant part that Student attended TLC five mornings and three afternoons per week during the 2003-04 school year. ... had attended the Jewish Federation preschool program for part the week more than one half of the year but she learned that ... was asked to leave because of behavioral issues. Ms. Bolduc had observed Student in February in that setting in order to help with tactics in response to ... behaviors (EV 24-33) and suggested methods of rewards and consequences but to no avail.

She noted that Student had difficulty complying with adults' requests and desired to be in charge. When frustrated, ... became physically aggressive with staff and peers. ... is intelligent, but to learn, ... needs a highly structured program with immediate consequences and rewards. She found that ... responded to the structure and progress was noticeable toward the end of the preschool year. She has advised others who worked with Student and were not having success and she accompanied Student and family to ... testing at Seacoast Child Development Center with the intention that she would intervene and keep Student on task.

She reviewed the data sheets (DS 1-58) on which were recorded Student's behavior incidents for the kindergarten year at Barrington and agreed that there were an unusual number and that there could be a correlation between the dates of the incidents and the dates of vacations. On cross examination, she noted that Student behaves differently in different settings. ... has not yet learned to generalize and transfer ... learnings from one setting to another. She agreed that there was no real pattern of incidents that in relation to vacations.

Rachel Fishbein, Student's mother testified that she is a teacher who is degreed and works in the field of special education for the Raymond School District. She referred to her statement of facts submitted prior to hearing as her testimony as to the background of this case. She stated that her ...'s emotions and behavior fluctuate so that one minute ... can be loving and enjoyable and the next minute ... can be destructive. ... was not invited back to the Live and Learn Early Learning Center at the end of the preschool year (LL-1). TLC determined that Student's behaviors were not safe for ...self or others and required a 1:1 aid before they would consider inviting ... back.

Parents provided ESY that year at their own expense. That autumn, ... transferred to Barrington for the first of the next year with a behavior plan, as well as the IEP in place. On at least five occasions during the year, ... was sent to the principal's office, though this was not a matter of discipline but behaviors adjunct to ... learning problems (CL 1-15). The Parent finds sees a correlation between outbursts and dates of vacations. Deerfield provided the Seacoast Clinic evaluation that states that Student needs a full-time program, consistency and adult direction and notes difficulty with transitions.

On cross-examination, the witness agreed that family life could have an influence on Student's behavior. Parent agreed that she signed SD 12-29, Student's behavior plan and SD 28 contains reference to sending Student to the principal's office in certain circumstances. Ms. Fishbein had stressed that notes from Student's teacher, Amy Criswell, (see CL-11) supported her statements about difficulties with transitions but did not refute that there is no statement suggesting that Student made no progress.

Student has had two experiences where ... has not been allowed to continue because of behavior problems and ... difficult behavior has continued at Barrington.

Heidi Jordan, Student's one on one aid; Amy Criswell, Student's kindergarten teacher; Diane Messer, case manager and special education teacher at Barrington were sworn and testified to Student's experiences in kindergarten this past year. All agreed that the Student needed a consistent structured program, that Student displayed aggressive, disruptive behaviors, but none suggested that Student experienced regression of ... learning over vacation or offered the opinion that, without a summer program, Student would lose what ... had learned over the school year.

B. Analysis

This matter is heard pursuant to IDEA, 20 U.S.C. 1400 et seq., as revised in 2004, H.R. 1350, Sec. 615 (f) and RSA Chapter 186-C. The matter to be decided is whether the Student shall receive extended school year services (ESY) requested by the Parents.

The Barrington School District, relying on the IEP team's determination, has decided that Student is not entitled to ESY. In such a case, the burden of proof rests with the party challenging the administrative decision - here, Student's Parents. See Hampton School District v. Dobrowolski, 976 F.2d 48, 54 (1st Cir. 1992); Roland M. v. Concord School Comm, 910 F.2d at 991 (1st Cir. 1990). The Parents must show that such services are necessary in order to provide Student with a free and appropriate public education (FAPE). H.R. 1350, Sec. 615 (f) (E).

In reviewing the Parents' challenge under the IDEA, the examination is twofold: whether the school district "complied with the procedures of the Act, and whether the IEP, absent extended year services (ESY), developed through those procedures is 'reasonably calculated to enable the child to receive educational

benefits.” Kathleen H. v. Mass. Dep’t of Educ., 154 F.3d 8, 11 (1st Cir. 1998) (quoting Board of Educ. v. Rowley, 458 U.S. 176, 206-07 (1982)). There is no charge of procedural violation and so our examination focuses on the second step. The question is whether the IEP, without ESY, is designed to enable the child to receive educational benefit.

H.R. 1350, Section 601, (9) defines free appropriate public education to mean special education and related services:

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 614(d).

H.R. 1350, Section 614 (d)(1)(A)(i)(iv) makes clear that an IEP is to include a statement of special education and related services and supplementary aids and services specific to that child. But the regulation interpreting IDEA, Educational Amendments of 1997, that remain in effect, CFR §300.309 (Extended school year services) has been amended to specify that (1) ESY services must be provided only if a child’s IEP team determines, on an individual basis, that the services are necessary for the provision of FAPE to the child.

The Rowley decision elaborates on FAPE stating that the standard is met when a student makes some educational progress and takes some benefit from the special education and other services provided under an IEP. If, over the summer, the child is likely to lose critical skills or fail to recover these skills within a reasonable time upon returning to school, an IEP team must offer ESY to retain the benefit of education. It is the likelihood of substantial regression of critical life skills caused by the school break and a failure to recover those lost skills in a reasonable time following the school break that signals the requirement of ESY.

Applying the well developed case law to the matter at hand, no witness has testified and neither of the two recent reports of examination cited above has revealed any suggestion that Student experienced regression in learning related to transitions or vacations. Without proof of regression or an expert opinion stating that regression will likely occur, a hearing officer is not at liberty to extrapolate that difficulty with transitions and the need for consistency and structure mean the Student will experience severe regression over summer vacation. Cordrey v. Euckert, 917 F.2d 1460, 1472 (6th Cir. 1990).

V. Findings of Fact and Rulings of Law

- A. Parents: Parents have submitted closing statements for Student numbered 1 through 63. None refers to regression.
- B. School District’s Findings:

Granted: 1, 2, 3, 4, 5, 5a, 8, 9, 10, 11, 12, 13, 17.

Neither granted nor denied: 6, 7, 14, 15, 16,

- C. District’s Rulings of Law

Granted: 1, 2, 3, 5, 6, 7,
Neither granted nor Denied 8
Denied 4,

VI. Conclusion

A careful review of the testimonial and documentary evidence leads to the conclusion that Parents have not shown a likelihood of regression in learning over this summer and so a denial of FAPE. Student has benefited from special education and there is no evidence that ... will lose that benefit without ESY. ESY is not the responsibility of the Barrington School District. The School District prevails.

VII. Appeal Rights

If either party is aggrieved by the Decision of the Hearing Officer as stated above, either party may appeal this Decision to a court of appropriate jurisdiction. The Parents have a right to a copy of the tapes or a transcription of the proceedings through the Department of Education. The School District shall notify the Commissioner of Education should either party seek judicial review of a Decision.

SO ORDERED,

Dated: July 25, 2005

Gail C. Morrison, Hearing Officer