

*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**  
**Final Decision and Order**

**CLOSED HEARING**  
**ODR File Number: 22289-18-19**

**Child's Name:** A. H.                      **Date of Birth:** [redacted]

**Parent:**  
[redacted]

*Counsel for Parent*

**Local Education Agency:**  
Pittsburgh School District  
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Pittsburgh, PA 15212

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**Hearing Officer:** Charles W. Jelley Esq.

**Date of Decision:** 6/29/2019

## PROCEDURAL HISTORY

The Student<sup>1</sup> is a rising sixth grade school-aged child residing in and attending an elementary school within the Pittsburgh School District (District). The Parties agree the Student is a person with an Other Health Impairment (OHI), within the meaning of the Individuals with Disabilities Education Act (IDEA). The Parties further agree that as a result of an OHI, the Student is otherwise eligible to receive an individual education program (IEP) and specially-designed instruction (SDI) in the least restrictive setting (LRE). In December 2018, the Parent believing the Student was not learning asked for an IEP meeting to discuss retaining the Student in fifth grade. The Parent also asked the District, at the same time, to determine if the Student was otherwise eligible for Extended School Year services (ESY). Although the District refused to retain the Student, in fifth grade, the District did agree to evaluate the Student, in all areas of suspected ESY needs, to determine if the Student should receive ESY services during the summer of 2019.

The Parent contends as a result of multiple procedural and substantive violations, the District's offer of ESY services is not appropriate or free. The District at all times argues it complied with all substantive and procedural regulations and requirements. On March 3, 2019, and then again on May 9, 2019, the District provided the Parent with prior written notice of its offer of a free appropriate public education (FAPE). After reviewing all of the testimony and the exhibits I now find in favor of the Parent.<sup>2</sup> A Final Order granting appropriate relief follows.

<sup>1</sup> In order to provide confidentiality and privacy, Student's name, gender, and other personal information are not used in the body of this decision to the extent possible. All potentially identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2). 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300.818. The applicable Pennsylvania regulations, implementing the IDEA are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14). References to the record throughout this decision will be to the Notes of Testimony (NT p.), Parent Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number.

<sup>2</sup> After carefully considering the record of this hearing in its entirety I now find that I can now draw inferences, make Findings of Fact and Conclusion of Law. Consequently, I do not reference portions of the record that are not relevant to the single issue in dispute.

## ISSUE

1. Whether the District's proposed offer of a free appropriate public ESY program is appropriate and meets this Student's individualized needs and/or circumstance? If the District failed to offer a free appropriate public education is the Parent entitled to tuition reimbursement and other appropriate relief?

## FINDINGS OF FACT

1. The Student is a rising sixth grader, who resides with the Parent in the District. The Student attends a regular elementary school in the District and is a person with an OHI. The Parties agree as a result of the OHI the Student is IDEA eligible. The Parties further agree as a result of the OHI the Student should receive specially-designed instruction (S-1, NT *passim*).
2. The Parties also agree the Student is eligible for ESY summer special education services (S-8, S-9, NT *passim*).
3. In December 2018, the Parent requested and the District agreed to schedule and participate in an individual education program (IEP) meeting to review the Student's year to date progress. At the December 2018 IEP meeting, the Parent made two requests. First, believing the Student was not making progress, the Parent asked and the District refused to retain the Student in fifth grade (NT p.36). Second, the Parent asked and the District agreed to evaluate the Student to determine if the Student was eligible for ESY services (NT pp.36-37, S-6, S-9).
4. On March 9, 2019, the IEP team met and reviewed the math teacher's ESY data/checklist. After completing the District's ESY eligibility checklist the special education math teacher concluded the Student had a regression and recoupment problem in math that interfered with the Student mastering the fourth grade math goal (S-2, S-5, S-6, NT pp.2-35).
5. During the IEP meeting the special education writing/reading teacher, who did not collect any ESY data, also concluded that the Student should participate in an ESY writing program. The testimony is unclear why, although the District agreed to assess the Student for ESY eligibility and the Parent requested ESY reading supports, the reading/writing teacher did not evaluate the Student's eligibility for ESY reading services (S-2, S-6). The record is, however, clear the ESY IEP team did not discuss the Student's ESY eligibility for summer reading services (NT *passim*).

6. Contrary to the ESY eligibility checklist data, the proposed ESY IEP states as follows: “Existing data does not indicate significant regression of skills occurring. Further, it is likely that retention and maintenance of skills relevant to established goals will continue without significant regression. Therefore, eligibility criteria for ESY services has [sic] not been met.” (S-6 p. 30).
7. During the March 2019, ESY IEP team meeting the Parent told the team that she enrolled the Student in a private summer program and then made the first of multiple requests for reimbursement for a private summer program (NT pp.12-20). Since the local education agency (LEA) representative was not in attendance at the ESY IEP meeting, none of the staff in attendance could either agree or refuse the Parent’s request (S-6, NT *passim*).
8. The Parent told the District that if she did not learn about the District’s response to her tuition reimbursement request before March 31, 2019, she could not withdraw the Student from the summer program without a financial penalty (NT *passim*).
9. The Parent’s proposed private summer program was scheduled to begin on June 17, 2019, and end on or about August 6, 2019. The private program started at 9:00 am and ended at 4:00 pm each day. The private program offered two plus hours, each day of academic instruction, in the morning, followed by lunch and then three to four hours of group recreational activities. The academic instruction and the recreational program would take place in an integrated school like environment, with typical sixth grade peers (NT *passim*).
10. During the first week of the academic instruction, the Student would take a series of pretests after which all of the sixth grade students would be placed into instructional groups by level. The Parent agreed to transport the Student to and from the program each day. The total cost to attend the program was \$2000.00 plus out of pocket transportation costs (NT pp.12-19, NT 96-105, S-6, S-7, S-8, and S-9).
11. The ESY IEP team discussed the private program and then had general discussions about a District sponsored ESY summer camp program. Although the ESY team members present knew the name of the District sponsored summer ESY camp program, at the time of the ESY IEP conference, the ESY IEP team members did not know the location of the program, when the program would begin, the length of the instructional day, the instructional group, the age of the students, or the number of weeks or days the ESY program would operate (NT *passim*).

12. Generally speaking, the discussed ESY camp program offered two hours of academic instruction each day, followed by lunch and then several hours of community based recreational activities. The Student previously attended the discussed District ESY camp program, at private expense. The Parent told the team that, in the past, when the Student attended the program, privately, the instructional group size ranged from 20 to 25 students. The Parent expressed her displeasure with the program and described the program as “day care” (S-11, NT pp.96-110).
13. The Parent rejected the discussed program/placement and then asked if the District could reimburse her for the private summer program. None of the staff in attendance could either agree to or deny the reimbursement request (NT *passim*).
14. At the conclusion of the ESY IEP meeting, the District issued a NOREP, indicating the team discussed three options, 1. “Continued Speech and Language services without special education (Learning Support services.”), 2. Dismissal from Learning Support Services and Speech and Language Support: and the 3. “Student is not Eligible for ESY.”
15. The Student’s then current IEP does not contain a speech or language goal. The Student’s then current IEP does not indicate the Student has a communication or an assistive technology need. The present levels of educational performance, in the then current IEP, do not identify a speech or a language need. The SDIs, in the then current IEP, do not list or identify any speech or language SDIs or any supports for personnel. The then current IEP does not list speech or language supports as a related service (S-6).
16. On March 5, 2019, two days after the ESY IEP meeting, a District administrator/program officer, contacted the private provider about the summer program and the private provider’s ESY policy. The private provider, in an email response, the same day, stated that they do not offer ESY services (S-7, NT pp.66-69). The private provider did not refuse to implement the ESY IEP. Although aware of the possibility the Parent could incur a financial penalty, the administrator/program officer did not inform the Parent about the email (S-7, NT pp.66-89).
17. On May 1, 2019, another District administrator informed the Parent that ESY guidelines do permit students to participate in summer recreational services/supports. (S-9 pp.1-4). Upon receiving the email, the Parent asked the private provider and the private provider agreed to issue two summer program invoices. The first invoice covered the cost of the morning academics services and the second invoice covered the cost of the afternoon recreational program. The Parent then withdrew her request for full ESY reimbursement for both the academic and recreational ESY services.

Thereafter, the Parent submitted the modified invoice for the academic costs (NT *passim*).

18. On May 9, 2019, without the benefit of an ESY IEP meeting, the District issued a second ESY NOREP. The second NOREP proposed placing the Student at an all handicapped ESY program. The all handicapped ESY program was not discussed at the March 3, 2019, IEP meeting. The May 9, 2019, NOREP recommended that the Student attend a Monday through Thursday program, in a “Grade K-5 ESY program” at building in the District. The proposed program was set to begin on July 9, 2019, and end on August 1, 2019. The NOREP stated the ESY program would provide five hours of services per day. The Student would spend the first two hours each day in academics, followed by lunch and then spend three hours in recreational activities. The Student’s school year IEP and the ESY IEP do not note a need to participate in recreational activities. The May 9, 2019, NOREP notes that the IEP team considered two options. First, the NOREP notes the ESY IEP team considered not providing ESY services and second the team considered summer services at the private location (S-8). From March 3, 2019, through the date of the due process hearing on June 7, 2019, the ESY IEP team never met to discuss the all handicapped summer setting. The staff testified that the District would provide transportation to and from the ESY program (NT *passim*).
19. At the time of the March 3, 2019, ESY IEP team meeting, due to the outstanding teacher union arbitration action with the District, the teachers in attendance at the March 3, 2019, ESY IEP conference were not aware of and could not describe any of the essential components of the ESY integrated ESY camp program or the all handicapped placement (NT p.75, p.81, p.87, pp.87-90).
20. Once the teachers’ union-District ESY arbitration action was resolved, the District never scheduled another IEP meeting to discuss the reason why it recommended either District ESY program or why the District rejected the private placement (NT *passim*).
21. The District staff testified cogently that the Student would benefit from an integrated ESY program. The District staff did not testify cogently how or why the Student would benefit from an all handicapped ESY program (NT *passim*).

22. The ESY integrated summer camp program typically services students with average ability and intelligence. The all handicapped ESY program typically serves a student with below average intelligence (NT p.70, p. 71, p.74).
23. The District's LEA, the person charged with the authority to commit District resources to implement the ESY IEP did not attend the March 3, 2019, IEP meeting (NT *passim*, S-2, S-3, S-4, S-5, S-6, S-7, S-8, S-9).

## **CONCLUSIONS OF LAW GENERAL LEGAL PRINCIPLES**

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. At the outset of the discussion, it should be recognized that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion, in this case, must rest with the Parent who requested this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in "equipoise." *Schaffer*, *supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence, as is the case here. Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. See, *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found all of the witnesses who testified to be credible, testifying to the best of his or her recollection from his or her perspective. The testimony overall was essentially consistent on factual matters. This hearing officer now finds the District's witnesses and the Parent's testimony credible and essentially consistent with respect to the actions taken or not taken by the team in evaluating, instructing and designing the Student's ESY program. I will, however, as explained below when and if necessary, give less persuasive weight to the testimony of certain witnesses when the witness fails to provide a clear, cogent and convincing explanation of how he/she evaluated the Student's ESY eligibility, designed the Student's ESY IEP, or participated the preparation of the prior written notice or NOREP.

## **FREE APPROPRIATE PUBLIC EDUCATION**

The IDEA and the implementing state and federal regulations obligate local education agencies (LEAs) to provide a "free appropriate public education" (FAPE) to children who are eligible for special education. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by

providing personalized instruction and support services that are reasonably calculated to permit the child to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). Districts/LEAs meet the obligation of providing FAPE to eligible students through development and implementation of an IEP that is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Recently, the U.S. Supreme Court was called upon to consider once again the application of the *Rowley* standard, and it then observed that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Andrew F. v. Douglas County School District RE-1*, \_\_\_ U.S. \_\_\_, \_\_\_, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017). The IEP must aim to enable the child to make progress. The essential function of an IEP is to set out a detailed individualized program for pursuing academic and functional advancement in all areas of unique need. *Andrew F.*, 137 S. Ct. 988, 999 (citing *Rowley* at 206-09) (other citations omitted). The *Andrew F.* court thus concluded that “the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” 137 S. Ct. at 1001, 197 L.Ed.2d at 352. The *Andrew F.* standard is not inconsistent with the above longstanding interpretations of *Rowley* by the Third Circuit. As *Andrew*, *Rowley*, and the IDEA make abundantly clear, the IEP must be responsive to the child’s identified educational needs. See 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. However, an LEA is not required to provide the “best” program, but rather one that is appropriate in light of a child’s unique circumstances. *Andrew F.*. In addition, an IEP must be judged “as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993)).

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, U.S. 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)). An IEP is a comprehensive program prepared by a child's "IEP Team," which includes teachers, school officials, the local education agency (LEA) representative and the child's parents, an IEP must be drafted in compliance with a detailed set of procedures. 20 U.S.C. § 1414(d)(1)(B).



An IEP must contain, among other things, "a statement of the child's present levels of academic achievement," "a statement of measurable annual goals," and "a statement of the special education and related services to be provided to the child." Id. § 1414(d)(1)(A)(i). When formulating an IEP, a school district "must comply both procedurally and substantively with the IDEA." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 206-07, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982)). A FAPE, as the IDEA defines it, includes both "special education" and "related services." Id. § 1401(9). "Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child . . . to benefit from" that instruction. Id. §§ 1401(26), (29). A school district must provide a child with disabilities such special education and related services "in conformity with the [child's] individualized education program," or "IEP." Id. § 1401(9)(D).

A school district may violate the IDEA in two different ways. "First, a school district, in creating and implementing an IEP, can run afoul of the Act's procedural requirements." *Rowley*, 458 U.S. at 206). "Second, a school district can be liable for a substantive violation by drafting an IEP that is not reasonably calculated to enable the child to receive educational benefits." *Fresno Unified*, 626 F.3d at 432 (citing *Rowley*, 458 U.S. at 206-07); See also, *Andrew F.*, 137 S. Ct. at 999.

Violations of the IDEA are categorized either as procedural or substantive. A procedural violation occurs when a district fails to abide by the procedural requirements. Procedural violations do not necessarily amount to a denial of a FAPE. See, e.g., *L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 909 (9th Cir. 2009). A procedural violation constitutes a denial of a FAPE where it "results in the loss of an educational opportunity, seriously infringes the parents' opportunity to participate in the IEP formulation process or causes a deprivation of educational benefits." *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 953 (9th Cir. 2010).

A substantive violation occurs when an IEP is not "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," *Andrew F.* 137 S.Ct. 1001, but the IDEA does not guarantee "the absolutely best or 'potential-maximizing' education." *Rowley, Andrew F., Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987).

## **THE BURLINGTON AND CARTER TUITION REIMBURSEMENT TEST**

To determine whether parents are entitled to reimbursement for their unilateral placement of a child in a private school after refusing a public school's offered IEP, courts apply the three part *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985) (hereafter *Burlington-Carter*) test. See, e.g., *Benjamin A. through Michael v. Unionville-Chadds Ford Sch. Dist.*, No. 16-2545, 2017 U.S. Dist. LEXIS 128552, 2017 WL 3482089, at \*15 (E.D. Pa. Aug. 14, 2017) (applying the "*Burlington-Carter* test" to private school tuition reimbursement case).

Under the *Burlington-Carter* test, the party seeking reimbursement relief must show: (1) The public school did not provide a FAPE; (2) Placement in a private school was proper; and (3) The equities weigh in favor of reimbursement.

The parent must establish each of the three prongs of the *Burlington-Carter* test to prevail. Thus, failure on any one of the prongs is fatal to a demand for reimbursement. Indeed, if the plaintiff fails to establish the first prong of the test, then the reviewing court may immediately end its analysis. See, e.g., *Benjamin A.*, 2017 U.S. Dist. LEXIS 128552, 2017 WL 3482089, at \*17 (stopping analysis after concluding that aggrieved student/parents had not established the first prong of the *Burlington-Carter* test); *N.M. v. Central Bucks Sch. Dist.*, 992 F. Supp. 2d 452, 472 (E.D. Pa. 2014) (same). To prove the first prong of the test—that the public school did not provide a FAPE—the party seeking relief must show that the public school failed to "offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F.*, 137 S. Ct. 999.

## **IDEA AND STATE EXTENDED SCHOOL YEAR PRINCIPLES**

The IDEA's FAPE requirement extends to the provision of ESY services as necessary for the child to make progress 34 C.F.R. § 300.106(a)(1). IDEA ESY services include special education and related services that: Are provided to a child with a disability: Beyond the normal school year of the public agency: i. In accordance with the child's IEP; ii. At no cost to the parents of the child; and iii. Meet the standards of the state educational agency. 34 CFR 300.106 (b).

Districts/LEAs must provide ESY services that are reasonably calculated to confer a meaningful educational benefit to the student regardless of the parents' demands. *Wyoming Valley W.*, 55 IDELR 213 (SEA PA 2010), *Wallingford-Swarthmore Sch. Dist.*, 114 LRP 47646 (SEA PA 10/20/14). The specific analysis that an IEP team will use to determine whether a student requires ESY services is left up to the states to determine. However, the IDEA requires that the district make the determination based on the individual needs of the child. *Id.*

## **PENNSYLVANIA ESY STANDARDS**

Pennsylvania sets forth a number of criteria that IEP teams must consider to determine whether a student is eligible for ESY: (i) Whether the student reverts to a lower level of functioning as evidenced by a measurable decrease in skills or behaviors which occurs as a result of an interruption in educational programming (regression). (ii) Whether the student has the capacity to recover the skills or behavior patterns in which regression occurred to a level demonstrated prior to the interruption of educational programming (recoupment). (iii) 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. (iv) The extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted. (v) 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. (vi) The extent to which successive interruptions in educational programming result in a student's withdrawal from the learning process. (vii) 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(a)(2).

If the student is ESY eligible, the team must also determine the scope of and duration of the ESY services 22 Pa. Code § 14.132(a)(1). Since ESY services must be provided in accordance with the child's IEP, in determining whether a proposed ESY program is appropriate, the general principles applicable to special education must be applied. 34 C.F.R. § 106(b). In addition, "a public agency may not ... [u]nilaterally limit the type, amount, or duration of [ESY] services." 34 C.F.R. § 300.106(a)(3).

## **THE NOTICE OF RECOMMENDED EDUCATIONAL PLACEMENT**

From a procedural standpoint, the family plays "a significant role in the IEP process." *Schaffer*, supra, 546 U.S. at 53. Indeed, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2). The IEP process entitles parents to participate not only in the procedural aspect of the IDEA's procedures but also in the substantive formulation of their child's individualized educational program. Among other things, IDEA requires the IEP team, which includes the parents as members, to take into account any "concerns" parents have "for enhancing the education of their child" when it formulates the IEP. *Winkelman v. Parma City School District*, 550 U.S. 516, 530 (2007).

In this instance, the Parent's concern about the financial penalty for withdrawing the Student from the private summer program should have been factored into the timing of the prior written notice of the ESY offer. For purposes of an ESY eligibility determination, the District must make the determination of the need in a timely manner so that children can receive the necessary FAPE services. For students in the *Armstrong v. Kline*, 476 F. Supp. 583, 586 (E.D.Pa.1979) targeted group the IEP team review meeting must occur no later than February 28 of each school year for the Armstrong group (as described above). This date may require the LEA to reschedule the annual IEP team review or conduct a separate ESY IEP team meeting for this review (See, 22 Pa. Code § 14.132). For students in the *Armstrong Kline* group, the IEP determination and NOREP must be provided no later than March 31 of the school year the ESY determination was made. For all other students, the NOREP/PWN containing the IEP team's determination regarding ESY eligibility must be issued to the parents in a timely manner.

Assuming the student is eligible for ESY services, the ESY IEP and the prior written notice/ NOREP when viewed as a whole must include the following; (1) a description of the ESY target goals, (2) all related services need to provide a FAPE, (3) the projected beginning dates and anticipated duration of the ESY services, (4) the frequency of the services, (5) the length of the ESY school day, (6) the instructional group, and (7) the location of the services. As with all IEP team decisions, the ESY components of the IEP must be individualized to meet the specific child's needs/circumstances and must be developed with the participation of the parents, the LEA representative and the teachers at an IEP team meeting.<sup>3</sup>

When parents and educators disagree about what a child's IEP or ESY IEP should include, the parties may turn to dispute resolution procedures established by the IDEA. See 20 U.S.C. §§ 1415(e). If mediation fails to produce an agreement, the parties may proceed to what the IDEA calls a "due process hearing" before a state or local agency. Id. §§ 1415(f)(1)(A). In Pennsylvania, the Office for Dispute Resolution conducts IDEA due process hearings. See, 22 Pa. Code §14.162. At the end of the administrative process, the losing party may seek redress in state or federal court. 20 U.S.C. § 1415(i)(2)(A).

<sup>3</sup> See, Extended School Year Eligibility 22 Pa. Code § 14.132.  
<https://www.education.pa.gov/Pages/Codes%20and%20Regulations/Basic-Education-Circulars.aspx>

## **COMPENSATORY EDUCATION AS APPROPRIATE RELIEF**

Compensatory education is an appropriate remedy where the LEA knows or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990). Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. The first method is called the "hour-for-hour" method. Under this method, students receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*, arguably, endorses this method. More recently, the hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. See *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005). These courts conclude that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. This more nuanced approach was endorsed by the Pennsylvania Commonwealth Court in *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) and, more recently, the United States District Court for the Middle District of Pennsylvania in *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014). It is arguable that the Third Circuit also has embraced this approach in *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid* and explaining that compensatory education "should aim to place disabled children in the same position that they would have occupied but for the school district's violations of the IDEA.").

With the above principles in mind, I will now turn to the analysis of the Parent's claims and the District's response.

## **DISCUSSION, CONCLUSIONS OF LAW AND LEGAL ANALYSIS**

### **THE PARENT'S CLAIMS**

The Parent claims the District's ESY FAPE offer was untimely, incomplete and substantively insufficient. The Parent further contends that by the time the District did make the May 9, 2019, ESY offer, it was too late for her to recoup her out of pocket costs for the private placement; therefore, the Student's education is not free. The District, as expected, contends that at all times it complied with the IDEA and all state requirements. I disagree with the District; therefore, as described herein, I now find in favor of the Parent.

## **THE ESY ELIGIBILITY EVALUATION WAS INCOMPLETE**

After completing the ESY eligibility checklist, the special education math teacher concluded the Student was ESY eligible for summer math services. During the ESY IEP meeting, the special education reading/writing teacher, who did not collect any ESY data, also concluded that the Student should participate in an ESY writing program. The testimony is unclear why, although requested by the Parent, the writing/reading teacher did not evaluate the Student's eligibility for ESY reading services. Although the record notes that the Student, is a rising sixth grader, the school year IEP states and the reading teacher confirmed the Student, at the end of fifth grade, is currently reading at the third grade level. The reading teacher did not evaluate the Student; therefore, the team did not discuss the Student's eligibility for ESY reading services. I now find it very troubling that in light of the Parent's request to retain the Student, coupled with the failure to collect any reading data and the lack of discussion about the Student's reading needs the team glossed over this obvious procedural and substantive red flag. Accordingly, I now find the failure to conduct a complete evaluation in all areas of suspected ESY eligibility substantially interfered with the Parent's right to participate and at the same time denied the Student an ESY FAPE in reading.

## **THE LEA DID NOT ATTEND THE IEP MARCH IEP MEETING**

The LEA is a required member of the IEP team. The LEA is the single district representative who has the authority to commit district resources. The LEA must also ensure the District can implement the ESY IEP in the LRE. Moreover, the LEA is charged with the responsibility that the District's offer of a FAPE and the prior written notice are substantively correct and issued in a timely fashion. 71 Fed. Reg. 46,670 (2006). In this instance, the LEA did not attend the ESY IEP meeting. The failure of the LEA, a mandated member of the IEP team, to attend the IEP conference was a substantive and procedural violation that interfered with the Parent's participation. The failure of the LEA to attend the meeting directly contributed to the ESY IEP team's inability and failure to discuss the variety and continuum of available ESY placements. Without the LEA, the IEP team members were not able to discuss, decide upon and describe to the Parent the Student's research based ESY curriculum. Without the LEA the start date, the duration of the program, the length of the instructional day, the instruction group [class size, integrated vs. segregated placement] and the location were never discussed. Absent this mandated data and information the Parent and the ESY IEP team members were essentially shut out of the ESY IEP planning process. Simply stated, without the LEA, the ESY IEP team could not develop and offer an individualized ESY program in the LRE setting. Moreover, absent the data/information, the Parent could not make an informed decision to opt out of the private program without a

financial penalty. In short, the March 3, 2019, ESY IEP meeting was a nullity. I now find the evidence is preponderant that the failure to include the LEA was a procedural and substantive violation that substantially interfered with the Parent's opportunity to participate in the formulation of the ESY IEP.

**THE DISTRICT'S PROR WRITTEN NOTICE AND NOREP WERE  
FUNDEMENTALLY FLAWED**

**THE MARCH 2019 NOREP WAS FLAWED AND INSUFFICIENT**

Although the Parent asked the District to reimburse her for all out of pocket costs, the March 3, 2019, NOREP lacks any discussion of the request. In the box that describes the discussion about the Parent's request the NOREP states, "None at this time." This odd statement is contrary to the teachers' and the Parent's testimony about the open and frank discussions about the Parent's request for ESY reimbursement. Equally curious is the statement in the NOREP about the options the team did discuss. Page two of the NOREP states that the team discussed "Dismissal from Learning Support services and Speech and Language Support" it is an uncontested fact this Student does not now and has not ever received Speech and Language Support. Likewise, the ESY discussion box in the IEP, at Section E states, "Existing data do not indicate significant regression of skills occurring. Further, it is likely that retention and maintenance of skills relevant to established goals and will continue without significant regression. Therefore, eligibility criteria for ESY services has [sic] not been met."

The NOREP and IEP statements are in direct conflict with the Math teacher's assessment describing this Student's present levels. The program officer who did not attend the IEP meeting testified that as a consequence of the teachers' union ESY arbitration action challenging how the District would staff the ESY programs, the Student's ESY IEP team could not adequately discuss the ESY placement options. The District's March 3, 2019, NOREP offer of an "Extended School Year services to be held at a "[School District] Site to be determined" smacks of administrative convenience and predetermination.

Absent an individualized discussion about the Student's needs, the ESY start date, the duration of the ESY program, the length of the school day, the frequency of the services, the location of the program or the instructional group the District's offer of a FAPE set out in the March 3, 2019, IEP is insufficient, inadequate and inappropriate. In this particular instance, these cumulative failures rise to a substantive violation of the Student's FAPE rights. The above described violations also substantially inhibited and interfered with the Parent's procedural due process rights.

Accordingly, after hearing the testimony and studying the exhibits, I now find the March 3, 2019, NOREP is substantively and procedurally flawed. The NOREP failed to provide the Parent with timely and sufficient prior written notice of the District's proposed action and/or refusal to act; these violations individually and cumulatively denied the Student a FAPE.

### **THE MAY 9, 2019, NOREP IS INCOMPLETE AND INAPPROPRIATE**

On March 5, 2019, two days after the March 3, 2019, NOREP aware of the Parent's request for reimbursement, a program officer, who did not attend the IEP meeting, emailed the private provider to inquire about the private provider's summer program. The private provider responded that same day stating that they did not participate in ESY services per se. None of the District's witnesses could cogently explain why it took the District sixty-nine days to issue the second NOREP on May 9, 2019. None of the District witnesses could cogently explain why the team rejected the Parent's request for reimbursement in an integrated setting.

While in one breath the May 9, 2019, NOREP ruled out the private integrated placement, in another breath the NOREP May 2019, assigned the Student to a four day a week all handicapped setting. The May 2019 NOREP failed to note the date, time and place of the IEP meeting when a team of knowledgeable people discussed why and how the proposed segregated setting could implement this Student's personalized IEP in the LRE. The NOREP failed to discuss what evaluations, data, or observations support the all handicapped restrictive placement. The evidence is preponderant that the District never held an IEP team meeting to discuss the May 9, 2019, NOREP. The testimony is equally preponderant that the group of people who knew the Student felt strongly that the Student's ESY program should be delivered in an integrated setting.

While, at the hearing, the teachers and the administrators hewed and hawed about how and why the all handicapped program was appropriate; based on the current record, I do not find this testimony persuasive or reliable. Neither the teachers nor the administrators could cogently describe the Student's instructional group, the size of the instructional group, the research based curriculum in use at the ESY setting, or how the all handicapped ESY setting could meet the Student's needs. On the other hand, when the same witnesses were asked how an integrated program could serve the Student, the discussion was robust, the answers were clear and the testimony was focused.



I now find, the 69-day delay in issuing the NOREP, the failure to hold an IEP meeting, and the NOREP/prior written notice violations described above interfered with the Parent's participation in developing the IEP. This series of substantive violations also denied the Student a FAPE. This finding that the District's program was not appropriate does not end the *Burlington-Carter* tuition reimbursement analysis and discussion.

### **THE PARENT'S PROGRAM IS PROPER AND APPROPRIATE**

The Parent's program begins in June and ends in August; therefore, the Parent's program offers more instruction than either of the District's ESY programs. The private program offers two hours per day of direct instruction in math and writing from certified teachers, for a total of 60 hours of direct instruction. Therefore, on its face, the private program offers a greater amount and intensity of targeted services. The evidence is also preponderant that all of the private instructors have a teaching degree. Furthermore, the instructor of record will administer a pretest and then group the Student with similar peers. The Student will have nightly homework and at the end of the summer, the provider/instructor of record will issue a summary of performance. The private program resembles the type of ESY program and setting the ESY IEP team discussed and the Student's teachers supported. Consistent with the teachers' testimony and the Student's experiences in school to date, the Student would and does benefit from being educated with non-handicapped peers. Granted, while this hearing officer has concerns that the teaching staff at the private program may not be special education teachers, no one from the District commented negatively about the private academic program or the teaching staff. As the record stands, this hearing officer has grave concerns that the District's all handicapped placement will either harm the Student or not provide meaningful benefit. Taking into consideration the entire record, I now find the Parent's program is proper and appropriate.

In light of the above described substantive and procedural violations, in this instance, I also find the equities favor the Parent. The pervasive, ongoing nature of the District violations coupled with the financial penalty the Parent would incur as a result of the District's 69-day failure to give the Parent timely prior written notice favors the Parent; therefore, I now find the equities favor of the Parent. Accordingly, the District is Ordered to reimburse the Parent for all of her out of pocket ESY costs.

## **COMPENSATORY EDUCATION IS APPROPRIATE RELIEF**

The District's failure to assess the Student in all areas of ESY eligibility and the Student's spotty reading progress caused a denial of a FAPE. To remedy this substantive and procedural violation, I will now award one hour per day of compensatory education reading instruction totaling 30-hours of compensatory education. The District is now Ordered to pay a reading provider selected by the Parent, at the provider's then current rate. In the alternative, at the Parent's election, the District is Ordered to reimburse the Parent for her out of pocket compensatory education reading costs. The Parent is free to select a private reading provider. The District is further Ordered to reimburse the private provider, or the Parent, within 10-calendar days of receipt of the compensatory education invoice.

## **APPROPRIATE RELIEF INCLUDES REIMBURSEMENT FOR TRANSPORTATION**

The staff testified that had the Student attended the District's program, the District would transport the Student to and from the ESY program. Therefore, absent reimbursement for ESY transportation services provided by the Parent, the Student's education would not be free; therefore, the District is also Ordered to pay the Parent for any and all mileage costs to transport the Student to and from the ESY program. The District is further Ordered to pay the Parent for transporting the Student to and from the 30-hours of compensatory education reading services. The rate of compensation for transportation should equal and not exceed the then published Internal Revenue Services (IRS) travel reimbursement rate for the year in which the travel occurs.<sup>4</sup> The Parent is directed to keep a detailed mileage log, for each day the Student attends either service, documenting the actual travel to and from the ESY program and/or the compensatory education reading program. The Parent is further directed to provide the mileage log to the District on a weekly basis. Thereafter, the District is directed to pay all transportation reimbursement costs within 10-calendar days of receipt of the transportation log.

<sup>4</sup> IRS-2018-251, December 14, 2018, the Internal Revenue Service today issued the 2019 optional standard mileage rates used to calculate the deductible costs of operating an automobile for business, charitable, medical or moving purposes. Beginning on Jan. 1, 2019, the standard mileage rates for the use of a car (also vans, pickups or panel trucks) will be: 58 cents per mile driven for business use. <https://www.irs.gov/newsroom/irs-issues-standard-mileage-rates-for-2019>

## CONCLUSIONS

The failure to assess the Student in all areas of ESY eligibility, along with the failure to include the LEA as a member of the IEP team, the failure to hold an IEP meeting to discuss the pros and cons of each proposed setting and the failure to provide timely and complete prior written notice/NOREP substantially interfered with the Parent's procedural due process rights to be part of the IEP team process. The above described substantive violations also denied the Student a FAPE.

When viewed as a whole, the District staff failed to cogently explain how or why the proposed program listed in either NOREP was individualized and otherwise reasonably calculated to enable this particular Student to receive a FAPE in the least restrictive setting. After reviewing the preponderant evidence as described above, I now find the District failed to offer an appropriate ESY program. I also find the Parent's program is proper and appropriate.

Finally, I find the equities favor of the Parent; therefore, this hearing officer will **GRANT** Parent's request for tuition reimbursement. A Final Order awarding the Student appropriate relief including directing the District to reimburse the Parent for all of her out of pocket costs including transportation costs and compensatory education now follows.

## ORDER

**And now** this June 29, 2019, I find in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that Parent's claim for tuition reimbursement in this matter is **GRANTED**.

1. The School District is **ORDERED** to reimburse the Parent for the cost of the private ESY academic program/services provided to Student during the summer of 2019. The Order of reimbursement also includes any interest paid by the Parent to finance the ESY program.
2. To remediate the denial of an ESY FAPE in reading, the Student is awarded 30 hours of compensatory education. The District is Ordered to pay the full market rate costs charged by the reading provider for the Student to participate in a compensatory education reading program. The Parent is free to identify, select, or substitute additional future providers as she deems necessary to provide the compensatory education.

3. The District is directed to pay the prevailing full market rate cost for any and all compensatory education services within 10-calendar days of receipt of the invoice. The rate of reimbursement should not exceed the prevailing rate in the community or location where the compensatory education services are provided. To prevent any error in the calculating the account balance of hours remaining after payment for compensatory education services, the District is Ordered to notify the Parent in writing four times a year about the number of remaining unused hours.
4. The District is Ordered to reimburse the Parent, at the IRS rate, described above, for any and all mileage necessary to transport the Student to and from the ESY summer program and/or to and from the compensatory education reading program.
5. The Parent is directed to keep a detailed mileage log documenting travel to and from the ESY program and/or the compensatory education reading program for each day the Student attends either service. The Parent is further directed to provide the mileage log to the District on a weekly basis. Thereafter, the District is directed to pay all transportation reimbursement costs within 10-calendar days of receipt of the transportation log.

It is further **ORDERED** that any claims not specifically addressed by this decision

Date: June 29, 2019

Charles W. Jelley, Esq. LL.M  
Special Education Hearing Officer