

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: 20495-17-18

Child's Name: J. G. **Date of Birth:** [redacted]

Date of Hearing:
4/26/2018

Parent:
[redacted]

Counsel for Parent
Pro Se

Local Education Agency:
North Penn School District
Educational Services Center
Lansdale, PA 19446-3961

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Hearing Officer: Cathy A. Skidmore, M.Ed., J.D. **Date of Decision:** 5/5/2018

INTRODUCTION AND PROCEDURAL HISTORY

Student (Student)¹ is a mid-teenaged student in the District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² based on Other Health Impairment. In early April 2018, Student's Parent filed a Due Process Complaint against the District asserting that its proposed extended school year (ESY) program for 2018 was not appropriate for Student.³

The case proceeded to a single-session expedited due process hearing⁴ at which the parties presented evidence in support of their respective positions. The Parent sought to establish that the District's proposal for ESY services is not individualized and would not meet all of Student's needs; she sought consideration of several local private programs that she had located. The District maintained that its ESY program, as offered, is appropriate for Student.

For the reasons set forth below, the Parent's claim must be denied.

ISSUES

1. Whether the District's proposed ESY program for Student for 2018 is appropriate for Student; and
2. If the proposed program is not appropriate, should the District be ordered to provide one or more programs suggested by the Parent?

¹In 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).

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 are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

³ The Complaint also raised various non-expedited claims that were bifurcated and will be heard at a future session (*see* Hearing Officer Exhibit (HO-) 2).

⁴ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number.

FINDINGS OF FACT

1. Student is mid-teenaged and is a resident of and attends the District. Student is eligible for special education under the IDEA on the basis of Other Health Impairment. (N.T. 26-27; S-2 p. 9)
2. The District issued an Evaluation Report (ER) in May 2016. Results reflected a number of educational strengths; academic weakness was noted in mathematics fluency. Social/emotional/behavioral assessment revealed some concerns with attention, depression, hyperactivity, social and study skills, some executive functioning skills (planning and organization), and peer relations and communication skills. A Section 504/Chapter 15 Service Agreement was recommended.⁵ (S-4)
3. The District conducted a Functional Behavioral Assessment (FBA) in May 2017. The identified behaviors of concern were being absent from/tardy to school and remaining off-task during academic demands. (P-6 pp. 1-16)
4. In an Independent Educational Evaluation (IEE) Report in June 2017, by which time Student was identified by the District as eligible under the IDEA, no cognitive or academic deficits were reported, but weaknesses in some executive functioning and fine motor skills were noted. A number of areas of concern in social/emotional behavioral functioning were revealed especially in parental ratings. The private evaluator concluded that Student fit the criteria for a child with an Emotional Disturbance, but not an Autism Spectrum Disorder, under the IDEA. (S-5)
5. Educational recommendations in the IEE report are for continuation of weekly counseling; regular education with accommodations (review of material; structure and support for assignment completion, study skills, time management skills, and self-advocacy skills; test and assignment accommodations; preferential seating; prompting and redirection; multi-sensory instruction; study guides; and support for taking notes); and a plan to address attendance. No related services were suggested. (S-5)
6. A separate private psychological evaluation in June 2017 made the following diagnoses: Autism Spectrum Disorder; Persistent Depressive Disorder; Attention Deficit Hyperactivity Disorder (ADHD); and Central Auditory Processing Disorder (CAPD), based at least in part on reported diagnoses from other evaluators. The only educational recommendation in that report is for support for the CAPD. (P-3 pp. 4-12)
7. Student attended, but did not find beneficial, the District's ESY program in 2017, except that it permitted Student to complete summer reading assignments. Student worked on maintaining use of coping skills including self-advocacy and executive functioning skills (organization, time management, and study skills), demonstrating the same or better

⁵ Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. The state implementing regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

performance as that at the end of the 2016-17 school year. (N.T. 29-34, 36-37; P-6 pp. 17-25)

8. Student's Individualized Education Program (IEP) team discussed ESY programming at a January 2018 meeting. (N.T. 92, 94)
9. The IEP developed in January 2018 notes Student's needs in the areas of executive functioning (including organizational skills, time management, study skills, and work completion), coping skills to manage behaviors when anxious or overwhelmed, self-advocacy skills, and occupational therapy consultation for sensory needs. (S-2)
10. Annual goals in the January 2018 IEP address assignment completion, improving executive functioning skills, and coping skills to include self-advocacy. Program modification/items of specially designed instruction are for: visual support of directions; check for understanding of directions; class notes; study guides; preferential seating; wait time for responses; test and assignment accommodations; remediation for skills assessed below 65%; a permanent pass for anxiety; weekly behavioral progress monitoring; positive reinforcement; prompting for focus as needed; opportunities for sensory breaks; and instruction in coping skills. Related services for counseling and occupational therapy consultation are provided. (S-2)
11. A Positive Behavior Support Plan (PBSP) is part of the January 2018 IEP. Annual goals for the PBSP address study skills and coping skills. (S-2 pp. 50-62)
12. The January 2018 IEP indicates agreement of the team that Student would be provided with ESY services to maintain skills and prepare for the transition to high school. Annual goals to be addressed during ESY are those for improving executive functioning skills and coping skills to include self-advocacy. (S-2 pp. 40-42)
13. The District's proposed ESY program provides emotional support and addresses executive functioning and social skills, and also provides individual and group counseling as well as physical education. (N.T. 97-98, 100, 109, 111; S-2 pp. 41-44)
14. The District's proposed ESY program for Student is two days per week, four hours per day, for a period of six weeks. (N.T. 97; S-2 p. 42)
15. All of the specially designed instruction in Student's IEP, with the exception of any not applicable because assessments were not anticipated, would be implemented in the ESY program. (N.T. 133-36)
16. The Parent did not approve the Notice of Recommended Educational Placement (NOREP) for the proposed 2018 ESY services. (S-3)
17. The Parent's concerns with the proposed ESY program include that it is too short in duration and that a lengthy lapse in programming will be difficult for Student; Student also needs to be motivated for ESY. (N.T. 42-43, 45)

18. Student is concerned that the ESY program not be too demanding and also provide opportunities for physical activities. (N.T. 32, 34, 37)
19. The Parent and Student are both concerned that Student be provided with support to complete tasks and assignments. (N.T. 43-44, 70)
20. The Parent located several alternative, local private programs by performing internet research. A combination of those programs would address Student's attention, memory, impulsivity, reading comprehension, mathematics fluency, and social and communication skill deficits as well as post-secondary transition needs. (N.T. 46-49, 51-52, 63-65; P-4)
21. The Parent is also concerned with Student making a successful transition to the high school in the fall of 2018, and that the ESY services prepare Student for that transition. (N.T. 58-59)
22. The District plans to schedule an IEP meeting this spring to discuss preparing Student for the transition to the high school. (N.T. 137)

DISCUSSION AND CONCLUSIONS OF LAW

GENERAL LEGAL PRINCIPLES

Broadly stated, the burden of proof consists of two elements: the burden of production and the burden of persuasion. 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).⁶ Accordingly, the burden of persuasion in this case rests with the Parents who requested this hearing. Nevertheless, application of this principle determines which party prevails only in 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. *J. P. v. County*

⁶ The burden of production, "*i.e.*, which party bears the obligation to come forward with the evidence at different points in the proceeding," *Schaffer*, 546 U.S. at 56, relates to the order of presentation of the evidence.

School Board, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also 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 each of the witnesses to be generally credible and the testimony as a whole on matters important to deciding the issues in this case was essentially consistent. The testimony of all witnesses and the content of each exhibit were considered for purposes of this decision.

IDEA PRINCIPLES

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). Local educational agencies (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 reaffirmed the “reasonably calculated” standard in *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017). The Court explained that, “an educational program must be appropriately ambitious in light of [the child’s] circumstances... [and] every child should have the chance to meet challenging objectives.” 137 S. Ct. at 1000, 197 L.Ed.2d at 351. This standard is not inconsistent with the above interpretations of *Rowley* by the Third Circuit.

As *Endrew*, *Rowley*, and the IDEA make clear, a student’s IEP must be responsive to his or her 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. *Endrew F., supra; Ridley School District. v. M.R.*, 680 F.3d 260, (3d Cir. 2012); see also *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989) (observing that the law demands “provision of an education that is ‘appropriate,’ not one that provides everything that might be thought desirable by ‘loving parents.’”)(citations omitted).

From a procedural standpoint, the family plays “a significant role in the IEP process.” *Schaffer, supra*, at 53. This critical concept extends to placement decisions. 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.116(b), 300.501(b); see also *Letter to Veazey*, 37 IDELR 10 OSEP 2001) (confirming the position of OSEP that local education agencies cannot unilaterally make placement decisions about eligible children to the exclusion of their parents). 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 proceedings entitle parents to participate not only in the implementation of IDEA's procedures but also in the substantive formulation of their child's 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). Full participation in the IEP process does not mean, however, that parents have the right to control it. *See, e.g., Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 657-58 (8th Cir.1999) (noting that IDEA “does not require school districts simply to accede to parents' demands without considering any suitable alternatives” and that failure to agree on placement does not constitute a procedural violation of the IDEA); *see also Yates v. Charles County Board of Education*, 212 F.Supp.2d 470, 472 (D.Md.2002) (explaining that “parents who seek public funding for their child's special education possess no automatic veto over” an LEA’s decision). In other words, an “equal opportunity to participate and offer input is not equivalent to block voting.” *Buser by Buser v. Corpus Christi Independent School District*, 20 IDELR 981 (S.D. Tex. 1994), *aff’d*, 51 F.3d 490, 493 (5th Cir. 1995), *cert. denied*, 516 U.S. 916 (1995). As has previously been explained by the U.S. Department of Education,

The IEP team should work towards a general agreement, but the public agency is ultimately responsible for ensuring the IEP includes the services that the child needs in order to receive a free appropriate public education (FAPE). It is not appropriate to make IEP decisions based on a majority "vote." If the team cannot reach agreement, the public agency must determine the appropriate services and provide the parents with prior written notice of the agency's determinations regarding the child's educational program and of the parents' right to seek resolution of any disagreements by initiating an impartial due process hearing or filing a State complaint.

Letter to Richards, 55 IDELR 107 (OSEP 2010); *see also* 64 Fed. Reg. 48 at 12472 (1999) (same).

The obligation of an LEA to provide FAPE extends to provision of ESY services as necessary for the child. 34 C.F.R. § 300.106(a)(1). Pennsylvania sets forth a number of criteria that IEP teams must consider to determine whether a student is eligible for ESY. 22 Pa. Code §

14.132(a)(2). If the student is eligible, the team must also determine the services to be provided. 22 Pa. Code § 14.132(a)(1). In determining whether a proposed ESY program is appropriate, the general principles applicable to special education must be applied. Public agencies may not unilaterally limit the type, amount, or duration of ESY services. 34 C.F.R. § 106(a)(3). However, ESY services must not be based on a desire or need for a program that “may provide educational benefit, [but] are not required to ensure the provision of a free appropriate public education.” 22 Pa. Code § 14.132(c)(3). Additionally, ESY services must be provided in accordance with the child’s IEP. 34 C.F.R. § 106(b). Like non-ESY services, special education programming beyond the normal school year, where necessary for FAPE, need not be optimal. *Cordrey v. Euckert*, 917 F.2d 1460, 1473 (6th Cir. 1990), *cert. denied*, 499 U.S. 938 (1991).

At the outset, it is somewhat concerning that the proposed ESY services were described at one point as “the emotional support program” (N.T. 101), which could suggest that it was not individualized for Student. Nonetheless, the record establishes that Student has a need to maintain certain skills over the summer of 2018 and to prepare for the transition to high school, and the IEP team met to discuss a program to meet those specific needs. When full consensus was not reached, the District issued a NOREP as it was required to do, notifying the Parent of the ESY program it was offering. The Parent’s disagreement with that NOREP led to the process in the IDEA for reviewing that recommended program and placement.

The ESY program is proposed to target executive functioning and coping skills (including self-advocacy), two of the three annual goals in the IEP; and the third goal related to assignment completion would be addressed as needed through program modifications and specially designed instruction. Student would participate in physical education allowing for gross motor activities that are desired by Student. Attendance at the District ESY program

would provide opportunities for Student to prepare for the transition to high school, and to ensure that any needed supports as determined by the IEP team at a meeting yet to be scheduled can be met before the first day of the 2018-19 school year. The timing of the ESY services includes a short break after the 2017-18 school year ends and another before the 2018-19 school year begins. In addition, Student would be provided with individual and group counseling to provide emotional support. In sum, the District's proposed ESY services are responsive to Student's identified summer programming needs and appropriately address them.

While it is apparent that the Parent believes a longer and more comprehensive program would be more beneficial for Student, the record does not establish that Student requires ESY services beyond those in the District's proposal in order to maintain the skills for which Student has summer programming needs. The Parent's concerns are understandable, and her dedication to and advocacy for Student are laudable, but the type of programming that she is seeking is that which "loving parents" desire for their children with a disability, rather than what the law requires. The family may, of course, make arrangements for Student to attend any or all of the private programs they have identified, but not at public expense.

It is important to recognize, however, that the decision relating to the remaining, non-expedited claims that have been bifurcated must be based on a complete record addressing those issues, and made independently of this decision. Nothing in this decision should be read to suggest that there will be anything less than full consideration of the issues yet to be heard.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District's proposed ESY program is appropriate for Student and that no remedy is warranted.

ORDER

AND NOW, this 5th day of May, 2018, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the District's ESY program proposed for Student for the summer of 2018 is appropriate, and the District is not required to take any action.

It is **FURTHER ORDERED** that any claims related to the expedited ESY 2018 issue not specifically addressed by this decision and order are **DENIED** and **DISMISSED**.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER
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