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Pennsylvania
Special Education Hearing Officer

DECISION

Child's Name: Student

Date of Birth: xx/xx/xx

Date of Hearing: September 1, 2009

OPEN HEARING

ODR Case # 00026-09-10-KE

Parties to the Hearing:

Freeport Area School District
P.O. Box C
Freeport, PA 16229

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Pro Se

John Vogel, Esq.
Tucker Arensberg
1500 One PPG Place
Pittsburgh, PA 15222

September 21, 2009

October 6, 2009

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student (“student”) is a teen-aged student with autism residing in the Freeport Area School District (“District”) who, parents claim, was not provided, in the summer of 2009, with an appropriate extended school year (“ESY”) program as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)¹. As a result, parents allege that they were forced to provide an appropriate ESY program at their own expense and seek reimbursement for that program. The District maintains that it offered an appropriate ESY program to the student and, as such, has complied with its duties under federal and Pennsylvania law to offer the student a free appropriate public education (“FAPE”).

ISSUES

Did the District offer an appropriate ESY program to the student for the summer of 2009?

If not, are parents entitled to reimbursement for the privately funded ESY program and, if so, in what amount?

¹ It is this hearing officer’s preference to cite to the implementing regulation of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §14.132.

FINDINGS OF FACT

1. The student is a teen-aged student and has been diagnosed with autism. (School District Exhibit ["S"]-5, S-6).
2. The student has identified needs in mathematics instruction (although no diagnosis of a specific learning disability) and social skills. (S-5, S-6).
3. In February 2009, the student's individualized education plan ("IEP") team met to discuss the student's ESY programming for the summer of 2009. (S-2; Notes of Testimony ["NT"] at 26, 167).
4. At the February 2009 IEP meeting, the District proposed 6 hours of ESY programming per week over four weeks, taking place in two 3-hour sessions per week. The ESY program would be delivered at the District's middle school. (S-2 at page 15).
5. The February 2009 IEP contained two ESY goals, one in mathematics and one in social skills. (S-2 at page 15).
6. The first goal reads as follows: "Currently, when given 10 (2 digit multiplication or division of fractions) problems, [the student] needs at least 3 verbal prompts to complete the task of solving the above problems during class. [The student] will be able to solve multi-step word problems containing multiplication and/or

- division of fractions with at least 80% accuracy with no more than 2 verbal prompts per 10 problems solved over four consecutive weeks.” (S-2 at page 15).
7. The second goal reads as follows: “Currently, [the student] has shown improvement in the initiation of social exchanges with peers by initiating a conversation 2 of 5 times per week with 0 teacher prompts. During support class, [the student] will independently initiate an appropriate social exchange with a peer at least 1 time daily during every support period with no teacher prompts for a total of 5 times per week for four consecutive weeks.” (S-2 at page 15).
 8. The District program would be taught by two District special education teachers utilizing specially designed instruction. (NT at 172-173, 182-183, 188).
 9. The student’s parents did not sign a notice of recommended educational placement (“NOREP”) at that time, indicating that they were not comfortable doing so and that the parents had a preference for the private placement for ESY programming. (Parents’ Exhibit [“P”]-6; NT at 174).
 10. Parents had concerns over the lack of details about the District’s ESY programming that lay outside the IEP, such as a course description, an activities list, a syllabus, a daily schedule, a

roster of fellow ESY students, and the teachers who would teach the ESY program. (NT at 26-28.)

11. The student planned to attend a local vocational-technical school in the 2009-2010 school year. In March 2009, the parents met with an administrative team from the District about concerns the District had regarding math instruction at the vo-tech school. Because this was an area of weakness for the student, the District felt the need to share information its concerns about the vo-tech school. While the March 2009 meeting was not an IEP meeting, the District asked the parents to return the NOREP issued in February. (NT at 177-178).
12. In April 2009, the student was re-evaluated in anticipation of Student's transition to the vo-tech school in the 2009-2010 school year. (S-6).
13. In May 2009, the IEP team met again. The May 2009 IEP team included the student's mother, District personnel, personnel from the vo-tech school, and a teacher from the private program preferred by parents. The teacher from the private program explained the program to the IEP team. District-based members of the IEP team did not feel it was an appropriate ESY program based on what was shared at the meeting. The student's mother felt that the private program was the appropriate program for the student. (P-5; NT at 181-185).

14. On the date of the May 2009 IEP meeting, the student's mother returned the NOREP from February indicating that parents did not agree with the District's recommendation for ESY programming in the summer of 2009. (P-6).
15. The student attended the private program beginning on June 29, 2009 and continuing through August 7, 2009. (P-1).
16. The private program consisted of a schedule of varying activities, labeled on a schedule, in pertinent part, as social time, social skills group planning, and math. (Hearing Officer Exhibit ["HO"]-1).
17. Although the schedule of activities was offered to explain the student's participation in the private program, and a program proposal was shared at the May 2009 IEP meeting, the number of hours of instruction in math and social skills, as well as any explanation of the nature of that instruction, does not clearly identify how the private program would address the student's needs. (HO-1; P-1; NT at 92-108, 120-133, 139-142, 144-157).
18. The student's ESY programming in the summer of 2009 was provided entirely at the private program. (47-48).
19. Parents' out-of-pocket costs for the private program amounted to \$2,100 plus transportation of approximately 50 miles per day in round-trip travel. (NT at 48).

DISCUSSION AND CONCLUSIONS OF LAW

The provision of ESY services is governed by both federal and Pennsylvania special education law. (34 C.F.R. §300.106; 22 PA Code §14.132). Where the IDEIA speaks generally to the availability of and qualification for ESY programming (34 C.F.R. §§300.106(a)(2), (b)), Pennsylvania special education regulations speak in detail about the provision of ESY services. (22 PA Code §14.132).

Neither party disputes the student's qualification for ESY programming. The dispute between the parties centers on the appropriateness of the student's summer 2009 ESY program. In Pennsylvania, however, the regulations speak mostly to the evaluation/qualification of students for ESY programming, and consideration of specific factors and data in making these determinations. (22 PA Code §§14.132(a)(2), (b)). The substance of an ESY program, as is under consideration here, is judged by the standards of appropriateness and FAPE that would govern any aspect of a special education program.

As such, to assure that an eligible child receives a FAPE (34 C.F.R. §300.17), an IEP must be "reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress." Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982).

‘Meaningful benefit’ means that a student’s program affords the student the opportunity for “significant learning.” Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999).

In this case, the District has proposed an ESY program that is reasonably calculated to yield meaningful education benefit to this student. The IEP met in a timely fashion (22 PA Code §14.132(d)(2)), and the District’s offer of an ESY program of specific, measurable goals in the areas of the student’s needs frames is at the heart of an appropriate program. (FF 3, 4, 5, 6, 7). The goals themselves incorporated baseline data (FF 6, 7), and the District stood ready to provide specially designed instruction to achieve these goals as delivered by qualified special education teachers. (FF 8). In short, the District has offered an appropriate ESY program.

There is no doubting the sincerity of the parents’ belief that the private program is, in their eyes, appropriate, preferred, and excellent. (FF 9, 13, 16). While the exact nature of the program is not clear (FF 17), the question of whether parents should be reimbursed for their out-of-pocket expenditure (FF 19) need not be considered. As in any case involving a claim for reimbursement of private programming, long-standing case law and the IDEIA provide for the potential for private school tuition reimbursement if a school district has failed in its obligation to provide FAPE to a child with a disability 34 C.F.R. §300.148; 22 PA Code §14.102(a)(2)(xvi); Florence County District Four v.

Carter, 510 U.S. 7 (1993); School Committee of Burlington v. Department of Education, 471 U.S. 359 (1985).

The first step of this three-step Burlington-Carter analysis, which has been incorporated implicitly in IDEIA (34 C.F.R. §§300.148(a),(c),(d)(3)), involves a determination of the appropriateness of the school district's program. Where, as here, the school district's program is found to be appropriate, the analysis ends, and there is no need to consider the second step (gauging the appropriateness of the private program) or the third step (weighing the equities between the parties in the determination of a reimbursement remedy).

Parents' major concerns, aside from a clear preference for the private program, involved programmatic matters that lay outside the provision of a FAPE through an IEP. (FF 10). While course materials, precise schedules and specific teachers are important to instruction, and perhaps of major importance to parents, the lack of details in such programmatic matters does not render an IEP document, or a special education program generally, inappropriate. In this case, the District proposed an appropriate ESY program in its February 2009 IEP for the student for the summer of 2009. Accordingly, there is no reimbursement owed to the parents for the out-of-pocket costs paid by parents for the private placement.

CONCLUSION

The District offered an appropriate ESY program to the student in the IEP of February 2009. Because the District offered an appropriate program, parents are not entitled to reimbursement for their out-of-pocket costs in securing a private educational program for the student.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the Freeport Area School District does not owe reimbursement to the parents for their out-of-pocket costs in providing a private ESY program to the student in the summer of 2009.

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

October 6, 2009