

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

DECISION

DUE PROCESS HEARING

Name of Child: Student
ODR #00902/09-10 AS

Date of Birth:
Xx/xx/xx

Date of Hearing:
May 7, 2010

CLOSED HEARING

Parties to the Hearing:

Representative:

Parents

Hollie John, Esquire
Connolly, Jacobson & John
188 North Main Street
Doylestown, Pennsylvania 18901

School District

North Penn School District
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Lansdale, PA 19446

School District Attorney

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Date Record Closed: May 17, 2010

Date of Decision: June 1, 2010

Hearing Officer: Deborah G. DeLauro, Esq.

Background

Student (“Student”)¹ is an elementary school aged fourth grade student who resides in the North Penn School District with Student’s parents, (“Parents”). Student is eligible for special education services under the Individuals with Disabilities Education Act (“IDEA”) pursuant to the classification of Autism. During the 2009-2010 school year, Student participated with non-disabled children in the regular education class for all but social skills instruction one time a week for 30 minutes. Contending that the District failed to offer an appropriate placement for the 2010 extended school year (“ESY”), Parents filed a due process complaint on April 1, 2010 seeking placement at Camp [redacted] (“Camp”), a private summer camp, at public expense.

Specifically, Parents submit that the district failed to identify four goals in Student’s Individual Education Plan (“IEP”) that need to be addressed through ESY, and that the District failed to offer an appropriate placement for the implementation of the ESY program and failed to even consider the least restrictive environment (“LRE”).

The District responded to the Parents’ complaint on April 7, 2010 disputing both the Parents’ characterization of Student’s progress during the 2009-2010 school year and their claim that the District ignored parental input when developing its ESY offer. The District also claimed that the Pennsylvania and Federal regulations concerning ESY do not impose a mandate to place Student in the least restrictive environment (“LRE”) when school is not in session.² Finally, the District put forward its argument that the Parents are not entitled to funding for Camp even if they can prove programmatic deficiencies in the ESY offer.

The due process hearing was commenced and completed on May 7, 2010. The parties submitted brief written closing statements on May 17, 2010. For the reasons explained below, the Parents have met their burden by a preponderance of the evidence.

Therefore, based on the record compiled during the hearing and the arguments of counsel, the District must locate an appropriate program for Student which includes participation with non-disabled peers, either Camp or something similar to it.

Issues

1. Whether the ESY program offered by the District is appropriate?
2. Whether Camp is an appropriate ESY program?

¹ The name, age, gender and current school of the Student are not used in the body of this decision in order to preserve the Student’s privacy.

² Those regulations are: 22 Pa. Code § 14.132 and 34 CFR 300.106

Findings of Fact

1. Student is an elementary school aged fourth grade student who resides in the North Penn School District. [HO-1; N.T. pp. 14, 18]³
2. Student qualifies for special education services as a student with autism pursuant to the IDEA.⁴ [HO-1]
3. For the 2006-2007 school term, [Student] participated with non-disabled children in the regular education class for all but social skills instruction two times per week, 30 minutes per session, and Occupational Therapy one time per week for 30 minutes. [HO-1; P-2]
4. On February 28, 2007, the District issued a Notice of Recommended Educational Placement (“NOREP”) for Extended School Year (“ESY”) services proposing “the 9 week, Camp program 5 days a week to focus on maintenance of social skills.” [HO-1; P-3]
5. The parties agree that this action was proposed in 2007 because “[t]he IEP team determined that [Student] requires a structured extended school year program that can meet Student’s social skills program.” [HO-1]
6. The parties agree that other options considered were in 2007 the “District low incidence ESY program” and “District academic ESY program.” These options were rejected because “[Student] requires an ESY program that will focus on maintenance of social skills and provide a program with access to typical peers.” [HO-1]
7. The parents approved the recommendation via letter dated March 1, 2007.[HO-1]
8. The District funded Camp for the summer of 2008. [HO-1; P-4]
9. The District reimbursed the parents for the cost of Camp for the summer of 2009 pursuant to a settlement agreement. [HO-1; P-4]
10. The Parties agree that if a decision is issued by the end of the 2009-2010 school term, this Hearing Officer does not need to address the pendency issue. [HO-1;P-7]
11. For the 2009-2010 school term, Student participated with non-disabled children in the regular education class for all but social skills instruction one time per week for 30 minutes. [HO-1; P-5; P-6]

³ References to “HO” “SD” and “P” are to the Hearing Officer, School District, and Parent exhibits, respectively. References to “N.T.” are to the transcript of the hearing conducted in this matter.

⁴ Individuals with Disabilities Education Act, 20 U.S.C. §1400 et seq. and Chapter 14 of the PA Code.

12. For the 2009-2010 school term, Student received social skills support in the regular education class one time per week for 30 minutes. [HO-1; P-5; P-6]
13. On or about January 26, 2010, the District issued a Notice of Recommended Assignment for ESY proposing, “. . .the North Penn School District Center based ESY social skills program from June 28th through August 5th 2010. The program will run Tuesday through Thursday from 9:00-11:30 a.m. . . .” [HO-1; P-6]
14. The action was proposed because “the review of [Student’s] progress in relation to the 7 factors of ESY eligibility⁵ as listed in the Chapter 14 regulations.”⁶
15. The educational placement noted on the NOREP for ESY was “Autistic Support,” “Full-time,” at [redacted] Elementary School from 6/28/2010 through 8/05/2010. [HO-1; P-6]
16. Other options considered were, “No ESY.” This option was rejected because “[t]his option would not allow Student to maintain Student’s IEP skills.” [HO-1; P-6]

⁵ (2) In considering whether a student is eligible for ESY services, the IEP team shall consider the following factors; however, no single factor will be considered determinative:

(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.

⁶ PA regulations found at 22 Pa. Code §14.132(a)(2)(i)-(iv).

17. On April 6, 2010, counsel for the parents forwarded to counsel for the District a letter from Ms. G, Educational Consultant⁷, also dated April 6, 2010, which set forth her opinion regarding Extended School Year Services for Student. [HO-1; P-9].
18. Ms. G identified five goals which she recommended to be included in Student's ESY program:
- 1) Facilitation and generalization of reciprocal conversational skills. Though Student has made progress Student's current data sheets show a 32% frequency (3/10/10).
 - 2) Consistently following one and two step directives. Student's baseline was 86% (12/4/09) and was just assessed at 68% (3/10/10).
 - 3) Participating cooperatively in small group settings using effective perspective taking skills. Student's frequency was 77% at baseline (12/4/09) and remains the same (3/10/10).
 - 4) Participating cooperatively during gross motor activities, such as would be needed during a physical education class (this could easily be implemented at camp). Student's baseline was 64% (12/4/09) and is now only at 69%. (3/10/10).
 - 5) Participate only when appropriate within a classroom setting, able to share attention with others. Student's baseline was 64.7% (12/4/09) and is now only 65%.
19. The District initially identified the only one goal to be addressed in ESY: "Beginning at a baseline of 29%, in a 10 minute conversation in the small group setting, [Student] will demonstrate interest in others by making comments or asking them questions in 50% of Student's utterances . . ." [P-6, p. 22, 28]. The goal was identified for ESY because of a lack of acquisition of the skill. [P-6, p. 23]. Specifically, [Student] progressed from a baseline of 29% in November, to 24% in December, and to only 32% in March. [P-19, p. 2-3]
20. Ms. G has worked with Student for the last six years, including preparing Student for ESY programs. [N.T. pp. 35-36].
21. Ms. G was familiar with Student's IEPs, and had reviewed the data collected by the District, including regression and recoupment data, and the progress reports issued by the District. [N.T. pp. 35-38, 56].
22. Ms. G testified that in addition to the one goal identified by the District, the four additional goals set forth above need to be addressed during ESY. [P-9, N.T. pp. 40-47].

⁷ The Parties stipulate that Ms. G is an expert in Aspergers Syndrome. [HO-1; P-10; N.T.pp.18, 33-34]

23. Ms. G testified that the following four IEP goals, which correspond to the goal areas recommended in Ms. G's letter, should be identified for ESY programming because they are necessary for independence and self-sufficiency. [N.T. pp. 43, 45-46].
1. "From a baseline to be established in November 2009, Student will, within Student's classroom, follow a first directive within 30 seconds 80% of the time . . ." On this particular goal, [Student] went from a baseline of 86% in November, to 79.7% in December, and to 68% in March. [P-19, p. 1].
 2. "In small working groups within Student's classroom, [Student] will positively participate by initiating discussion, turn-taking, asking questions, sharing materials, and sharing attention with peers achieving a rubric score of 75% or higher. . ." On this particular goal, [Student] went from a baseline of 77.8% in November, to 80% in December, to 77% in March. [P-19, p. 3].
 3. "From a baseline to be determined in November 2009, in Student's physical education class, [Student] will interact positively with Student's peers 80% of the time as evidenced by making only nice or neutral comments throughout the entire session . . ." On this particular goal, [Student] went from a baseline of 64% in November, to 64% in December, to 69% in March. [P-19, p. 3].
 4. "In the classroom, from a June 2009 baseline of 76%, [Student] will speak only with teacher permission or at appropriate times 80% of the time . . ." On this particular goal, [Student] went from a baseline of 64.7% in November, to 63.8% in December, to 65% in March. [P-19, p. 4].
24. Ms. G testified that that since these goals impact academic functions and self-sufficiency, they need to be taught through direct instruction and then need to be generalized in a real setting. [N.T. pp. 44-46]
25. Ms. G stated further that if Student were to be placed in a more restrictive setting, there would be no forum for Student to practice these goals, and there would be regression. [N.T. pp.44-46].
26. Ms. G opined that ESY should be provided to Student at Camp where Student would have neuro-typical peers as role models and staff would be able to facilitate Student's IEP. [N.T. pp. 47-49]
27. Ms. G has never observed at Camp; her understanding of the camp is based on conversations with Parents and Student and from Camp's website. [N.T. p. 37]
28. Ms. G testified that since Student has been included with regular education peers it would make a huge difference to Student to be placed in an ESY program with no neuro-typical peers. Ms. G stated that Student would feel as though Student had failed in the LRE because it is very important to Student that Student looks like others. [N.T. p. 48]

29. Ms G consults with numerous school districts on various issues, including ESY and has appeared on behalf of both Parents and School Districts at due process hearings. [N.T. pp. 33-34]
30. Ms. G stated that LRE is to be considered always looking at individual needs of the child. [N.T. p. 50]
31. Ms. G testified that she would not recommend Student for a center-based ESY program like the one the District is offering because Student's level of functioning is too high and would not warrant it, and secondly, because it would not be appropriate to address Student's goals. [N.T. pp. 50-51]
32. Ms. G never visited the District's proposed ESY program nor did she speak with District employees before making her recommendations. [N.T. pp. 54-55]
33. Ms. G stated that it was her opinion that LRE applies to ESY programming. [N.T. p. 57]
34. Student's mother ("Parent") testified that she agreed with Ms. G regarding the additional goal areas that should be addressed during ESY. [N.T. pp. 63-64].
35. Parent stated that she was not asked for her input about which goals she thought should be addressed during ESY. [N.T. p. 64]. Parent clarified her testimony when she stated further that she believed that Student needed to work on the other four IEP goals during the ESY, as well as the one identified by the District on the January 26, 2010 NOREP. [N.T. pp. 62-64; P-5; P-6]
36. Parent was not denied the opportunity to provide input concerning the District's ESY offer, but when Parent expressed her preference for Camp, she understood the District's response to be "That's all we have to offer." [N.T. pp. 62-65]
36. Parent testified that her concern with the District's ESY program is that Student needs typical peers to model up to and when Student has been with students with whom Student cannot converse or who have more acting out behaviors, Student becomes very anxious.⁸ [N.T. pp. 65-66]
37. Parent testified further that if Student is placed in the District's proposed ESY program, Student will be with other kids who have social communication needs, and that's not what Student needs to practice. Student needs to practice with other typical kids. [N.T. pp. 66-67]

⁸ In addition, Parent testified that Student would be devastated if Student was pulled into a more restrictive setting for ESY. [N.T. p. 67].

38. Parent testified that typically she meets with the camp director, the psychologist and a behavior specialist from the Intermediate Unit (“IU”) before the camp starts and they determine what skills Student needs to work on after reviewing the IEP drafted by the District’s IEP team. [N.T. pp. 73-75]
39. Parent testified that all camp staff who have worked with Student have been certified teachers. [N.T. pp. 75-76]
41. Ms. L, the Supervisor of Special Education, testified that the District offered six-week ESY program meets three days per week for two hours per day. Ms L testified further that the program was targeted to students who are on the high functioning end of the Autism spectrum, some of whom carry a diagnosis of Asperger’s Syndrome. The program would address perspective-taking, social skills training, and reciprocal conversation. [N.T. p. 85]
42. Ms. L’s opinion is that a student’s IEP need not identify the components of a program that are provided to all students who participate in the program. The fact that other things⁹ may happen that are part and parcel to the program itself need not be expressed in the student’s IEP. [N.T. pp. 85-86]
43. Ms. L, testified that lack of progress was the reason for the identification of the sole goal identified by the District. [N.T. pp. 92-93]. However, she later agreed that, based upon that very same analysis, the other four goals should also have been identified for ESY programming. [N.T. pp. 93-97]. The data that Ms. L was considering under cross-examination was generated after the District made its ESY offer. [N.T. p. 106; P-6; P-19]
44. Ms. L agreed that Camp had been appropriate to meet Student’s needs in the past. She also agreed that it is a less restrictive placement than the District’s ESY offering. [N.T. pp. 97-98]
45. Ms. S, an autistic support teacher, developed the ESY program that is being offered to Student. [N.T. p. 107]
46. Ms. S testified that the program would address Student’s difficulty tolerating and accepting others and Student’s tendency to monopolize groups.¹⁰ [N.T. pp. 112-113]
47. Ms. S testified that the District’s offered ESY program is “highly appropriate” for Student. [N.T. p. 114]

⁹ This Hearing Officer understood the counselor’s reference to “things” to mean perspective taking, social skills training and reciprocal conversations. [N.T. pp. 85-86]

¹⁰ This would be accomplished by group work and environmental sabotage. [N.T. pp. 112-114].

48. Ms. S testified that all of the goals, including the four additional goals, could be addressed in the District's offered ESY program, despite the fact that they weren't listed on the ESY IEP. [N.T. p. 118].
49. The District's ESY IEP and NOREP developed in January, 2010 recommends "Full Time Autistic Support," whereas Student's 10/13/2009 IEP, effectively in place until 10/13/2010, provided autistic support services on an "Itinerant" Level. [P-6; P-5]
50. Ms. S testified that some of the other students who would attend the District's ESY program with Student are more advanced, verbally, than Student is. Other students are less advanced, verbally. All are verbal, but one is more reluctant to participate. [N.T. pp. 124-125]
51. On cross examination, Ms. S acknowledged that of the only two children of Student's same age, one is non-verbal. [N.T. pp. 125-126].
52. Ms. D'Ortone, the director of Camp, provided testimony over the telephone. She stated that Camp's program features a small camper-to-counselor ratio, with most of the counselors being certified teachers, and some being certified in special education. [N.T. pp.133-136].
53. Ms. D testified that the campers follow a routine schedule and participate in field activities, miniature golf, campsite activities, archery, swimming, arts and crafts, drama, nature instruction, high ropes, low ropes and an equestrian program. Campers also have opportunities to develop social skills as they participate in the camp program, sometimes in competitive settings. [N.T. pp.135-137].
54. Ms. D testified that the camp is open for eight weeks, with students attending for one or more weeks. She explained further that there are no more than 15 children per week and they are divided into two groups: up to seven males in one group and up to seven females in the other group. Each group will have a counselor and an assistant who sometimes is also a certified teacher. Sometimes there will be four adults per group depending on the activity. [N.T. pp. 133-134]
55. Ms. D stated that there are six 40 minute periods a day and there is a structured schedule for each day. [N.T. pp. 134-135]
55. Ms. D explained that approximately 25% to 30% of the campers have IEPs. *N.T.* at 137. Particular to Student, Ms. D testified that her program is appropriate because the "main benefit for Student is that Student's in a group of 15 [same gender campers], they are typically the same [campers] throughout the summer. Student's able to form a relationship with these [campers]. Student's able to, I guess, develop new skills and strengthen in areas where Student needs to strengthen, on a given day." [N.T. p. 138]

56. Ms. D provided testimony about how Camp implements IEPs – whatever they may contain. [N.T pp. 144-145].
57. Ms. D was asked questions from Ms. G’s letter recommending five goals which Student needed to be addressed during the ESY. For each goal that Ms. G recommended, Ms. D was asked how Camp would effectuate the goal. [See N.T. pp. 149, 154, 155, 157].
58. With regard to the first suggested goal addressing the facilitation and generalization of reciprocal conversation skills, Ms. D testified that there are ample opportunities at Camp for Student to converse, and for those conversations to be monitored. *See* [N.T. pp. 149-154].
59. Testimony was similar regarding Ms. G’s second proposed goal for following two step directions. *See* [N.T. pp.154-155]. In sum, Student would be given two-step directions and data would be collected. If Student could not complete two-step directions, Student’s parents would be contacted. Again, this illustrates how Camp could collect data.
60. It was difficult for Ms. D to answer the questions about each of the goals Ms. G had recommended since she did not have the letter in front of her and had never seen the goals. [N.T. pp. 149-152]
61. Ms. D did provide testimony about how Student’s goals would be implemented at Camp and why she thought Camp was appropriate for Student.[N.T. p.159]

Credibility of Witnesses

Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the hearing.¹¹ Quite often, testimony – or documentary evidence – conflicts; this is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the Hearing Officer is to assign weight to the testimony and documentary evidence concerning a child’s special education experience. Hearing Officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”.

¹¹ Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

*Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at *28 (2003).*

This is a particularly important function, as in many cases the hearing officer level is the only forum in which the witnesses will be appearing in person.

Ms. G, a noted expert in the field of Autism and specifically Aspergers Syndrome, provided credible testimony not only regarding the Student's individual education needs and appropriate goals to address those needs but also the types of programs which would be most effective in implementing Student's IEP. Although, the fact that Ms. G did not speak to District personnel about the District's proposed ESY program or the Camp Director was problematic, it was not fatal to her ability to persuade this hearing officer regarding the efficacy of her recommendations.

On the other hand, the Special Education Director, Ms. L did not impress this hearing officer with either her knowledge of special education or her understanding of the Student's individual needs. Consequently, this hearing officer was not able to give much weight to her testimony. For example, the credibility of Ms. L's testimony was diminished when she first testified that lack of progress was the reason for the identification of the sole goal identified by the District, then later agreed that, based upon that very same analysis, the other four goals should also be identified for ESY programming. Remarkably, Ms. L then stated that it wasn't necessary to include every goal addressing Student's needs in the IEP; that those skills and services would simply be provided as part and parcel of the program.

Similarly, the autistic support teacher/case manager, Ms. S, provided inconsistent testimony and was evasive when being asked about her actual knowledge of Student's past ESY IEPs and NOREPs, about how much time she actually spent teaching Student or whether she provided direct instruction or not. Moreover, this hearing officer found Ms. S's testimony that all of Student's goals, including the four additional goals, could be addressed in the District's offered ESY program, despite the fact that they weren't listed on the ESY IEP to lack credibility. Finally, the fact that she was part of the IEP team that changed Student's level of service/program from "Itinerant Autistic Support" to "Full-Time Autistic Support" for the specific purpose of placing Student in the center-based

program that the District was offering this summer caused this hearing officer to seriously question her credibility.

Ms. D, the Camp Director, testified over the telephone without the benefit of having reviewed any documents. Ms. D provided credible testimony about Camp, how it's structured, the kind of campers who attend, and a description of the staff. She indicated that about 20% to 30% of the campers have IEPs and explained how she and her staff implement them. Finally, she testified credibly that she believed that Camp was an appropriate ESY program for Student. Nevertheless, because there was no need to determine the appropriateness of her camp program, this hearing officer did not give her testimony much weight.

Student's mother testified credibly and sincerely but this hearing officer was not able to give her testimony much weight as she was clearly invested in Student attending Camp.

Legal Basis, Discussion and Conclusions

Burden of Proof

The United States Supreme Court has decided who has the burden of proof in the case of an administrative hearing on a challenge to a special education IEP. [*Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 \(2005\)](#). In [*Schaffer*](#), the Court decided that the burden of proof is on the party asking a hearing officer to enter an order. In this case, that party is the Parents. However, the Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed "equipoise" – that is, where neither party has introduced more evidence than the other party. In such unusual circumstances, the burden of persuasion provides the rule for decision, and the party with the burden of persuasion will lose. On the other

hand, whenever the evidence is clearly in favor of one party – a preponderance¹², or “preponderant” - that party will prevail.

In the instant case, because Student’s Parents challenge the District’s proposed ESY program and seek District funding for a private placement, they bear the burden of persuasion. However, after careful review of the evidence taken in conjunction with the totality of the testimony, this hearing officer finds that Parents have met their burden by a preponderance.

Whether the District’s proffered ESY program was appropriate?

First, entitlement to ESY services derives from both federal and state special education provisions. Under the federal IDEA regulations, ESY services are to be provided to an eligible student if necessary to assure that s/Student receives a free, appropriate public education (FAPE). 34 C.F.R. §300.106(a)(2). Pennsylvania special education regulations provide additional and more specific guidance for determining ESY eligibility, explicitly requiring that the factors listed in 22 Pa. Code §14.132 (a)(2) (i)—(vii)¹³ be taken into account. Nevertheless, ESY eligibility does not rise and fall solely

¹² A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810 (please note that the Manual was promulgated before the Supreme Court ruled in Schaffer v. Weast, at a time when the Local Educational Agency had the burden of persuasion in Pennsylvania and elsewhere in the federal Third Judicial Circuit. Thus, the first sentence of section 810, indicating that the LEA has the burden in most cases, is outdated and was effectively overturned by Schaffer).

¹³ (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 the 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 the successive interruptions in educational programming result in a student’s withdrawal from the learning process.

on those criteria. In §14.102(a)(2)(xi) and §14.132(a), the Pennsylvania special education regulations incorporate by reference the federal ESY regulation referenced above, and §14.132(a) states that the seven factors are to be considered “in addition” to the requirements of the federal regulation. Consequently, the Pennsylvania factors provide neither exhaustive nor exclusive criteria for determining a need for ESY services. Rather, an IEP team must also consider a more global question: Are ESY services necessary for a given student to receive FAPE? Expanding that term, a district must consider whether ESY services are needed to assure that the student’s program is reasonably calculated to confer meaningful educational benefit. *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982). “Meaningful benefit” means that an eligible student’s program affords Student or her the opportunity for “significant learning.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999).

In determining the need for ESY services, school districts can, and do, consider factors such as significant deficits, slow progress and functioning considerably below grade level in a given area to determine whether ESY services are needed for a student to receive FAPE. *See, e.g., In Re: A Student in the Freeport Area School District*, ODR #9015/07-08 (August 7, 2008) at 7, 8. ESY services are not to be based on the desire or need for day care or respite care services, a summer recreation program, or services that are not required to ensure FAPE. 22 Pa. Code §14.132.

In the instant matter, both the District and the Parents agree that Student is eligible for ESY and requires programming to maintain social skills which are needed to promote independence and self-sufficiency. To that end, however, the District’s proposed

(vii) , where the student’s disability is severe, such as autism/pervasive developmental disorder, serious emotional disturbance, severe mental retardation, degenerative impairments with that mental involvement

ESY program initially was based on only one goal focused to address Student's lack of progress in the area of social skills. At the hearing, however, the District acknowledged that the four additional goals also reflecting lack of progress in social skills which were identified in Student's current IEP should also have been included on the District's ESY IEP.

A review of the testimonial and documentary evidence therefore establishes that the four additional goals should have been identified for ESY programming. In fact, both parties appear to be in agreement on the issue, particularly because the District acknowledges that its offer was made before data from the second and third marking periods was available. Accordingly, this hearing officer directs the District to incorporate the four additional goals into the District's ESY IEP dated January 26, 2010.

As noted above, the applicable standard for ESY, once eligibility is established, is whether the services are necessary for the individual child's FAPE, as established by the rest of the child's IEP. In other words, analogous to the subordinate, necessity-based nature of related services,¹⁴ the key question is whether the extent, in terms of duration and scope, of the proposed ESY services is required to ensure the meaningful benefit of the IEP. One of the component criteria is whether the District designed the ESY program individually in relation to the child's IEP.¹⁵ *In re the Educational Assignment of K.R., A Student in the Philadelphia City School District, Special Education Opinion No. 1506.*

Almost 30 years ago, in *Battle v. Pennsylvania*, 629 F.2d 269 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981), the federal courts declared unequivocally that school districts must determine ESY services on an *individualized* basis and consider all

and severe multiple disabilities.

¹⁴ 34 C.F.R. § 300.324(a).

components of a student's educational needs. The Pennsylvania Department of Education Basic Education Circular on Extended School Year services specifically directs the IEP team to consider the extent to which students have mastered and consolidated specific skills. Further, the team must consider the extent to which a skill or behavior is particularly crucial for the student to meet the IEP goals of self-sufficiency or independence from caretakers.

Here, the documentary and testimonial evidence reveals that in preparation for the summer of 2007, the District issued what is the last agreed upon NOREP for ESY, which proposed "the 9 week, Camp program 5 days a week to focus on maintenance of social skills." The District rejected other center-based ESY programs because "Student requires an ESY program that will focus on maintenance of social skills and *provide a program with access to typical peers.*" The record confirms that the District funded Camp for the summer of 2008, and then reimbursed the Parents for the cost of Camp for the summer of 2009 pursuant to a settlement agreement. Parents argue, and I agree, that there is nothing that has changed the fact that Student requires access to non-disabled children for maintenance of Student's social skills.

Specifically, as Parents point out, the District's offered ESY program removes Student from real life participation and places Student in a contrived, de-contextualized setting with disabled peers that all have difficulties with social communication just because the District developed the program. A further review of the record indicates that there was little consideration given to the fact that some of the children who would be in the District's proposed ESY program are working on speaking more often and participating verbally, or that some have behavioral issues. In fact, of the only two

¹⁵ The child's IEP is the ultimate vehicle for FAPE. *See, e.g.*, 34 C.F.R. § 330.13(d).

children of Student's same age, one is non-verbal. Therefore, it is clear that the District's proposed ESY program was not sufficiently individualized to provide a group of non-disabled peers or appropriate peers necessary for Student to maintain Student's social skills; nor would it offer an appropriate forum for the District to implement Student's IEP goals, which in fact, focus on Student's social ability within groups of non-disabled peers.

Next, the District argues that LRE does not apply to ESY, and even if it does, that Student does not *require* access to non-disabled peers to address the goals identified for ESY programming. The Parents disagree and assert that LRE does apply to ESY, and also, that the inquiry is not whether a child "requires" access to non-disabled peers, but rather, the District must *ensure* that, to the maximum extent appropriate, Student is educated with students who are not disabled. I agree with the Parents.

The court in *Travis G. v. New Hope Solebury School District, (E.D.PA)* stated that it is axiomatic that under the mainstreaming component of the IDEA¹⁶, a disabled child is "required to be placed in the least restrictive environment (LRE) that will provide Student with a meaningful educational benefit." *L.E. v. Ramsey, 435 F. 3d at 390, quoting T.R. v. Kingwood Township Board of Education, 205 F.3d 572, 578 (3rd Cir. 2000).*

Notwithstanding, the District claims that LRE does not apply to ESY, and even if it does, that Student does not *require* access to non-disabled peers to address the goals

¹⁶ Specifically the Act provides:

"To maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are to be] educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. §1412(a)(5)(A).

identified for ESY programming. The Parents disagree and assert that LRE does apply to ESY, and also, that the inquiry is not whether a child “requires” access to non-disabled peers, but rather, the District must *ensure* that, to the maximum extent appropriate, Student is educated with students who are not disabled. I agree.

As discussed in the LRP publication, “What to do When...The Answer Book on Special Education, the 2006 IDEA regulations at 34 CFR 300.106 addressing school districts’ obligation to offer ESY programming when required to provide FAPE do not explicitly direct compliance with the LRE requirements at 34 CFR 300.114-300.120. Nonetheless, the discussions accompanying the 1999 regulations, affirm that ESY services must be provided in the LRE. 64 Fed. Reg. 12577 (1999). In fact, the comments specifically stated that “. . .ESY services must be provided in the LRE . . .” There is no reduction or softening of the requirement. For example, the hearing officer followed suit in *Butler Area Sch. District, 37 IDLER 228 (SEA PA 2002)* holding that there was no support in the law for a position that LRE did not apply to ESY, and further holding that a resource level of support for ESY did not meet LRE requirements where the child had been placed in a general education classroom during the school year.

Therefore, it is clear that the LRE mandate does apply to ESY. Accordingly, Student was entitled a presumption that Student would receive Student’s ESY programming with non-disabled peers, but instead, the only other option considered was “No ESY.” In this case, a review of the evidence supports the Parents’ contention that the District simply presumed that because they opened a full-time Autistic Support program, the Student should be placed there. Accordingly, this hearing officer disagrees and finds that Student is entitled to consideration of placement in the regular education

environment first, and that Student requires such an environment in order to maintain Student's social skills.

Finally, with regard to the District's argument that this Hearing Officer cannot find the District's offer to be inappropriate even if it would fail the LRE mandates that are in place during the school year, I respectfully disagree.

In Re: A Student in the Upper Merion Sch. Dist., 109 LRP 56708 (Hearing Officer Decision 10033/09-08 LS), the Hearing Officer considered the appropriateness of the District's ESY offering, but not in the context of LRE. In fact, in that case the Parents were seeking a continuation of a more restrictive setting, the student's residential placement, and the Hearing Officer agreed with the Parents.

In fact, the Hearing officer ***In Re: A Student in the Upper Merion Sch. Dist.,*** determined whether the District offered an appropriate ESY program and found that it did not, stating as follows:

“What the District failed to do, and the reason that its ESY offer is inappropriate for xxxx is take into consideration this Student's individualized situation of having spent several years in residential programming and Student's need for a more lengthy and intense period of summer day programming to allow for Student's transition difficulties and address Student's skill maintenance needs. By failing to consider this factor the District far undershot its estimate of the appropriate length and intensity of an ESY program for Student. Additionally and equally as important the District offered a one-size-fits all ESY program that was inappropriate because it underemphasized social skills, communication skills, community integration improvement, and consistent instruction, all of which xxxx does need. Rendering its proposed ESY program even more inappropriate, its meager offer of three hours once a week for five weeks of socialization was intended to be carried out with peers who are cognitively impaired and thus not a true peer group for xxxx.”

This case decision is clear on point with the instant matter.

Nevertheless, the District argues that the evidence and testimony presented by the Parents during this Due Process Hearing does not prove that Camp will offer an appropriate ESY program for Student this summer. Similarly, the evidence and testimony does not show how Camp will implement an ESY program developed either by the District or by Ms. G. For these reasons, the District asserts that Camp is inappropriate, even if it is less restrictive than the District's offer.

However, analogous to tuition reimbursement cases,¹⁷ the issue is not whether the parents' program is superior to the District's, but whether the District's program is appropriate.¹⁸ Thus, this hearing officer need not, and does not, determine whether the program at Camp is appropriate, much less more appropriate. *Special Education Opinion No. 1498, In Re the Educational Assignment of Matthew L., A Student in the Lower Merion School District.*

Therefore, after careful review of the testimonial and documentary evidence as well as the credibility of the witnesses, this hearing officer finds that since the District's proposed ESY program must be individualized and provide Student with a FAPE in the LRE, the District's offered ESY program is not appropriate. Parents have met their burden by a preponderance of evidence.

Accordingly, since a preponderance of the evidence indicates that the ESY program proposed by the District was not appropriate, this hearing officer directs the District to locate an appropriate program for Student which includes participation with non-disabled peers, either Camp or something similar to it.

¹⁷ *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359 (1985).

¹⁸ *See, e.g., Krawitz v. Commonwealth*, 408 A.2d 1202 (Pa. Commw. Ct. 1979).

ORDER

It is hereby ordered that:

1. The four additional goals must be incorporated into the Student's ESY IEP.
2. The ESY program recommended by the District for the summer of 2010 is inappropriate in that it was not designed to confer meaningful educational benefit and does not provide Student with a FAPE.
3. Within twenty days the District must locate an appropriate program for Student which includes participation with non-disabled peers, either Camp or something similar to it.

June 1, 2010
Date

Deborah G. DeLauro
Deborah G. DeLauro, Hearing Officer