

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

ODR No. 01137-0910 KE

Child's Name: C.M.

Date of Birth: [redacted]

Date of Hearing: 6/18/10

CLOSED HEARING

Parties to the Hearing:

Parents
Parent[s]

School District
Wyoming Valley West
450 N. Maple Ave.
Kingston, PA 18704

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Parent Attorney
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June 22, 2010

June 26, 2010

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student is a [preteen-aged] resident of the Wyoming Valley West School District [District] who is eligible for IDEA special education services, including ESY, due to severe autism.

For several years, the District funded a YMCA summer camp, selected by Parents, as Student's ESY program. This year, in response to Parents request that the District fund a similar program at a different camp, the District refused and offered a school-based ESY program. As a compromise, the District offered to pay for the educational component of the camp program, which is to be provided by the private agency that provides Student's wrap around services.

Although Parents agree that the District is not required to fund a purely recreational summer program, they contend that the social aspects of the camp will meet Student's significant needs for socializing with typical peers. Parents, therefore, rejected the District's offer of reimbursement for academic services only.

Because Parents, who have the burden of proof in this matter, did not establish that the District failed to propose an appropriate ESY program for Student, and also did not establish that the summer camp program they are seeking is an appropriate ESY program, their request for an order compelling the District to pay for the camp program must be denied.

ISSUES

1. Has the School District proposed an appropriate Extended School Year (ESY) program for [Student] for the summer of 2010?
2. If not, should the School District be required to pay for the summer day camp program Parents selected for [Student] as [Student's] 2010 ESY program?

FINDINGS OF FACT

1. Student is a [preteen-aged] child, born [redacted]. [Student] is a resident of the School District and is eligible for special education services, including ESY. (Stipulation, N.T. pp. 14, 88)
2. Student has a current diagnosis of autism in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(1)(i); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p. 14).
3. Student's primary deficits arising from [Student's] disability are in the areas of speech, auditory processing, social skills and fine motor skills. (N.T. pp. 17, 61)
4. Student has great difficulty with conversational speech and socializing with peers. Student has only recently begun recognizing, acknowledging and naming peers. (N.T. pp. 18, 62—64, 67)
5. Despite progress over the past year in developing social skills, Student cannot engage in peer social interactions without adult facilitation and support. (N.T. p. 62)
6. Student has an IEP goal for socializing with peers. (N.T. p. 53)
7. For the past several summers, at Parents' request, Student's ESY program has consisted of attending a "camp within a camp" conducted at a local YMCA camp by the agency that provides behavioral services to Student. The District funded Student's participation in the program, which included applied behavior analysis (ABA) academic instruction for part of the day, and the opportunity to engage in recreational and social activities with typically developing children. (N.T. pp. 42, 43, 51, 52, 95, 98)
8. The camp program requested by Parents for the current school year is not identical to the camp Student attended for the previous three summers. Because the YMCA camp was no longer willing to continue the previous arrangement, the behavioral health services agency located a different camp. (N.T. p. 55)
9. Based upon a written description of the program, including the representation that 5.5 hours of the camp day will be spent in social activities. Parents expect that the camp experience for Student will be the same as the YMCA camp, including approximately 2.5 hours/day of academic instruction provided by Student's behavioral health agency. (N.T. pp. 22, 27, 35, 36, 38, 42, 54, 56)
10. For the 2010/2011 school year, at Parents request, Student will move from a District full-time life skills class to an autistic support class operated by the local Intermediate Unit (IU) in a neighboring school district. (N.T. pp. 44, 75)
11. The ESY program offered by the District is similar to the ABA-based IU program Student will enter in the upcoming school year and includes academic instruction, speech/language, occupational and physical therapy services and adapted physical education. (N.T. pp. 50, 76—78; S-5)

DISCUSSION AND CONCLUSIONS OF LAW

ESY Legal Standards

Under the federal IDEA regulations, ESY services are to be provided to an eligible student if necessary to assure that s/he receives FAPE. 34 C.F.R. §300.106(a)(2). Pennsylvania regulations provide additional guidance for determining ESY eligibility, requiring that the factors listed in 22 Pa. Code §14.132 (a)(2) (i)—(vii) be taken into account. Those factors are:

(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.

School districts are not required to provide ESY based upon "The desire or need for other programs or services that, while they may provide educational benefit, are not required to ensure the provision of a free appropriate public education." 22 Pa. Code §14.132 (c)(3).

The Pennsylvania special education regulations incorporate by reference the federal ESY regulation referenced above, and provide that the seven factors are to be considered "In addition" to the requirements of the federal regulation. 22 Pa. Code §§14.102(a)(2)(xi), 14.132(a).

Consequently, the Pennsylvania factors provide neither exhaustive nor exclusive criteria for determining either a need for ESY services or the type of ESY service appropriate for a particular child. Rather, an IEP team must also consider more global questions: 1) Are ESY

services necessary for an eligible student to receive FAPE? 2) Are the proposed ESY services 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 him or her the opportunity for “significant learning.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999).

Under the interpretation of the IDEA statute established by *Rowley* and other relevant cases, a school district is not required to provide an eligible student with services designed to provide the “absolute best” education or to maximize the child’s potential. *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 251 (3rd Cir. 2009); *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3rd Cir. 1995). Since entitlement to ESY services derives from an eligible Student’s right to FAPE, it follows that a District is likewise not required to provide the best or most desirable ESY services.

Burden of Proof

The IDEA statute and regulations provide procedural safeguards to parents and school districts, including the opportunity to present a complaint and request a due process hearing in the event special education disputes between parents and school districts cannot be resolved by other means. 20 U.S.C. §1415 (b)(6), (f); 34 C.F.R. §§300.507, 300.511; *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3rd Cir. 2009)

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion. Consequently, in this case, because Parent has challenged the appropriateness of the District’s proposed ESY program, Parents were required to establish that the District’s proposal is not reasonably calculated to assure that Student will receive a meaningful educational benefit from the proffered ESY services.

Legal Standards Applicable to Public Funding for a Parent-Selected Program

Although this case does not involve a request by Parents for reimbursement of the costs of a private school due to an alleged failure of the School District to provide FAPE, the legal principles underlying claims for tuition reimbursement are applicable, since Parents seek public funding for a private placement, albeit limited to a summer ESY program.

To determine whether parents are entitled to reimbursement from a school district for special education services provided to an eligible child at their own expense, a three part test is applied based upon *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985) and *Florence County School District v. Carter*, 510 U.S. 7, 114 S.Ct. 361, 126 L.Ed. 2d 284 (1993). The first step is to determine whether the program and placement offered by the school district is appropriate for the child, and only if that issue is resolved against the School District are the second and third steps considered, *i.e.*, is the program proposed by the parents appropriate for the child and, if so, whether there are equitable considerations that counsel against reimbursement or affect the amount thereof.

Appropriateness of the District's Proposed ESY Program

Parents' disagreement with the ESY services proposed by the District has little or nothing to do with the quality of the specific program and whether it is reasonably calculated to provide meaningful educational benefit by supporting Student's entitlement to FAPE. Parents presented no basis for rejecting the District's proposed program on the merits. Parents referred to unsuccessful past attempts to place Student in Intermediate Unit classes, yet requested an IU autistic support placement for Student for the next school year. (N.T. pp. 21, 25, 26; FF 10) The District presented uncontradicted evidence that the ESY program it proposes is closely related to the program Student will enter in the fall. (FF 11) Even fully crediting Parents' testimony that other IU programs proved unsuccessful for Student at unspecified times in the past, such

testimony provides no reasonable basis for concluding that the District's ESY proposal for this summer is not appropriate for Student. To the contrary, a reasonable inference to be drawn from the record in this case is that the District's proposed ESY program will help orient Student to the program [Student] will enter in the new school year. It can be further inferred that participating in the IU ESY program may reduce the time needed for Student to become familiar and comfortable with the routines of the new classroom, thereby better supporting progress toward [Student's] IEP goals when the new school year begins.

Parents' description of the benefits they expect Student to receive from the summer camp program compared to the District's proposal was not persuasive in terms of proving that the District's program for Student is inappropriate. The testimony of Parents and their additional witness established that Student has only recently begun to recognize and acknowledge peers, and that [Student] cannot yet engage in independent reciprocal social interactions. (FF 4, 5) Student, therefore, is not likely to derive concrete or immediate benefit from unstructured, incidental contact with typical peers in the camp setting. On the other hand, the District's proposed ESY program provides for explicit social skills training, which will support Student's IEP goal of increasing socialization with peers. (FF 6)

In the absence of evidence by Parents establishing that the District's ESY program is inappropriate for Student, there is no legal basis for ordering the District to fund the camp program, even fully crediting Parents' sincere belief that their choice would provide an enriching experience for Student. (N.T. p. 25) The District is not required to fund a summer enrichment program as ESY, or assure that Student can participate in activities that are unavailable during the school year. Although Parents' disappointment in the District's refusal to continue a program it provided in the past is understandable, there is no entitlement to continued public funding of a private program, and no basis for finding the District's ESY proposal inappropriate

simply because the District's unwillingness to continue providing the program is based on financial considerations. The only essential issue is whether the District's proposed ESY program is appropriate. If so, the Parents are not entitled to the private program, even if it is better or more desirable than the District's ESY proposal. The District's motive in offering a school-based program instead of continuing to fund the camp program is entirely irrelevant to the legal/factual analysis of the appropriateness of the District's proposed ESY program.

Appropriateness of the Parents' Requested Program

The conclusion that the District is offering Student an appropriate ESY program is a sufficient basis for denying Parents' claim, making it unnecessary to consider the appropriateness of the Parents' requested program. Nevertheless, it should be noted that Parents provided so little detail concerning how the camp they are requesting would further Student's entitlement to FAPE that it could not be found appropriate under the second prong of the *Burlington/Carter* test even if the District had not offered an appropriate ESY program. Parents are assuming that the camp program will be beneficial to Student because of their trust in the agency that would provide academic services. (N.T. pp. 28, 35, 36) There was no testimony, however, specifically describing how Student would participate in the social aspects of the camp for 5.5 hours each day, or how, if at all, that part of the camp program differs from the purely recreational activities expected at any summer day camp. In addition, there was no testimony describing how the expected peer interactions would be structured, or were structured during the past three years. As noted, the evidence established that Student does not engage in spontaneous social interactions. There was also no testimony describing any noticeable social skills benefits Student derived from the past 3 years of participating in a purportedly similar program. According to the testimony of Parents' witness, much of Student's limited progress in social interaction occurred over the past year. (FF 5)

Finally, even if it is assumed that some of Student's recent social skills progress can be attributed to the prior summer camp experiences, Parents cannot say with certainty that the camp program this year will be the same as in prior years, since it is in an entirely new setting. Parents could only rely on promises and assurances from the camp director and the director of behavioral services agency that it will be the same program. Even assuming that the camp program for the preceding three years could and would have been considered appropriate as ESY services, it would be speculative to conclude on the basis of the limited and equivocal evidence in the hearing record that the new setting will duplicate the previous program. Parents, therefore, also failed to establish that the program they seek meets the second requirement for public funding of a private program.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the claim asserted in Parents' due process complaint is **DENIED**, and the School District is not required to pay for [Student] to attend the summer camp requested by Parents as ESY services for the summer of 2010.

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

June 26, 2010