

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

Student's Name: S.K.

Date of Birth: [redacted]

ODR No. 13459-12-13-AS

CLOSED HEARING¹

Parties to the Hearing:

Representative:

Parents

Frederick M. Stanczak, Esquire
179 North Broad Street, 2d Floor
Doylestown, PA 18901

Upper Moreland Township School District
2900 Terwood Road
Willow Grove, PA 19090-1431

Jane M. Williams, Esquire
Sweet, Stevens, Katz & Williams LLP
331 Butler Avenue
New Britain, PA 18901

Dates of Hearing:

None; Record Stipulated

Record Closed:

March 26, 2013

Date of Decision:

April 9, 2013

¹ This matter was decided on a stipulated record; no hearing was convened. Nevertheless, in order to protect Student's privacy, I will treat this as a closed hearing and request that the Office for Dispute Resolution treat it as a closed hearing by redacting this decision.

Hearing Officer:

William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

The student named in the title page of this decision (Student) is an eligible resident of the school district named in the title page of this decision (District), and attends an Approved Private School (School) pursuant to a placement by the District. (FF 1-4.)² Student is [approaching] 21 years of age. (FF 5.) At an IEP meeting in December 2012, the IEP team declined to determine whether or not Student is eligible for Extended School Year services (ESY) pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA), because the School's ESY services begin on July 8, 2013, after Student attains age 21, and the District is of the opinion that Student at that time will no longer be eligible for special education under the IDEA and state law. (FF 5, 11.)

Parents named in the title page of this decision (Parents) requested due process, alleging that the District failed inappropriately to find Student eligible for ESY services, requesting an order establishing Student's eligibility, directing the IEP team to provide ESY services through the Student's IEP, and directing that Student not graduate until completion of appropriate ESY services.

The matter is decided on a stipulated record, and the record closed upon receipt of stipulated findings of fact and written summations.

ISSUE

² My findings of fact, below, are referenced here as "FF".

1. Is Student eligible for ESY services to be provided in the summer of 2013, and commencing after Student attains 21 years of age and before the beginning of the 2013-2014 school term?

FINDINGS OF FACT³

1. Student is a high school-aged student who resides in the District boundaries with her parents, [redacted].
2. Student currently attends, and has attended since the 2008-2009 school year, [Redacted], an Approved Private School (APS), which provides educational services to students with disabilities who have learning and/or emotional needs.
3. Placement at [the APS] has been through NOREP/PWN by the District.
4. Student is eligible for special education by reason of autism and an intellectual disability. Student also has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). Student was identified as eligible for speech and language therapy and occupational therapy before the age of two based upon delays in language, social skills, and mental development. Student began to receive special education upon entry to pre-school.
5. Student, whose date of birth is [redacted], turns twenty-one (21) on [redacted].
6. The first day of the school term for [the APS for] 2012-2013 is Tuesday, September 4, 2012, and the last day is Thursday, June 13, 2013.
7. The first day of the school term for the District 2012-2013 is Tuesday, September 4, 2012, and the last day is either June 14, 17, 18 or 19, 2013, dependent upon use or non-use of four (4) emergency days.
8. Student's IEPs have included, among other areas, transitional services plans to assist [Student] in achieving [Student's] post school goals of being able to obtain and maintain employment and to be able to function in the community, including learning how to use public transportation.
9. Student has received Extended School Year (ESY) services as a part of [Student's] IEP since [Student's] enrollment at [the APS].
10. During the 2012 summer break, from July 9, 2012 through August 17, 2012, Student's ESY services included speech and language therapy, reading therapy, occupational therapy, autistic support Monday through Friday, 9 a.m. to 3 p.m.

³ The parties submitted these findings to the Hearing Officer by stipulation. (HO 1.) They constitute the sole record of this matter and I hereby adopt them as my findings of fact.

11. The ESY program at [the APS] in the summer of 2013 begins on Monday, July 8, 2013 and ends on Friday, August 16, 2013.
12. Student's IEP team met on December 20, 2012, to revise [Student's] IEP for the remainder of the school year. The Parents and District are in agreement with regard to the placement and programming for the remainder of the 2012-2013 school year.
13. The IEP team determined that Student is not eligible for ESY services for [Student's] 2012-2013 summer break. The reason given on the IEP is "Student is graduating June 2013."
14. Based on the fact that Student will reach the age of 21 on [redacted], the IEP team determined that [Student's] eligibility for special education services ends as of the end of the school year and therefore determined that [Student] is not eligible to receive ESY services.
15. For that reason, the IEP team did not consider whether Student would be eligible to receive ESY services under the criteria set forth at 22 Pa Code section 14.132.
16. The Parents believe that Student continues to need ESY services during the 2013 summer break to address [Student's] need for transitional services, academic instruction and behavioral programming.
17. The Parents rejected the proposed IEP, NOREP/PWN(s) of December 21, 2012 and January 15, 2013 only insofar as it fails to offer ESY services to Student for the 2013 summer break.
18. The Parents assert that Student will not fully meet the criteria for graduation as of the end of the school year in June, 2013.
19. The District is not a first class school district.

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is on the Parents as the moving party in this matter. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). However, as the record is stipulated, I have not engaged in the weighing of evidence and my conclusions merely apply the law to the facts as stipulated; thus, the burden of proof does not influence my conclusions in this matter.

THE DISTRICT'S OBLIGATION TO PROVIDE ESY SERVICES

The IDEA requires all states to ensure that a FAPE is available to all children with disabilities residing in the state “between the ages of 3 and 21, inclusive” 20 U.S.C. §1412(a)(1)(A). Repeatedly, the Court of Appeals for the Third Circuit has interpreted this language to obligate school districts to provide special education services until a child reaches 21 years of age. Lauren W. v. DeFlaminis, 480 F.3d 259, 272 (3d Cir. 2007) (“Under the IDEA a disabled student is entitled to a FAPE until age 21.”); Carlisle Area Sch. v. Scott P., 62 F.3d 520, 536 (3d Cir. 2007) (“IDEA requires school districts to provide [FAPE to children] until they reach the age of 21. An award of compensatory education extends the disabled student’s entitlement to the free appropriate education beyond age twenty-one to compensate for deprivations of that right before the student turned twenty-one”); Ferren C. v. School Dist. of Philadelphia, 612 F.3d 712, 716 (3d Cir. 2010) (“Under the IDEA, a school district’s obligations to provide and a student’s right to receive a FAPE both terminate when the child reaches the age of twenty-one.”) (citing Lauren W., above); accord, G.S. v. Cranbury Twp. Bd. Of Ed., 450 Fed. Appx. 197 (3d Cir. 2011)(per curiam, submitted per Third Circuit LAR 34.1).

I am bound by this consistent interpretation of the IDEA by the Third Circuit Court of Appeals. Parents forward a contrary interpretation in the Ninth Circuit, based upon the word “inclusive” in the above quoted statutory language. While this interpretation is plausible, it is not adopted in this Circuit, and I am not free to adopt it.

I also have considered whether or not the above quotations are mere dicta, not binding within the Circuit. I conclude that, especially regarding Ferren C., above, the interpretation of

the IDEA as limiting the right to special education services by age was integral to the holding. There, as in previous decisions, the Court held that an order that a school district provide an IEP and serve as the student's local education authority was authorized as equitable relief. The Court carefully described the relief as equitable in nature only because it had concluded that legal relief was not available under the IDEA, due to the limitation of the right to a FAPE to children under the age of 21.

Thus, Ferren C. is determinative of the issue in this matter. Parents sought District funding for the School's summer program as a form of ESY service, and Student has attended that program previously as provided in Student's IEP. (FF 9, 10.) However, that program starts on July 8, 2013, well after Student's 21st birthday. (FF 11.) Based upon Student's birth date, the IEP team in its December 2012 meeting (over Parents' objection) decided that Student is not eligible and therefore did not offer the School's summer program as an ESY service. (FF 13, 14.)⁴ Based upon the Third Circuit's interpretation of the IDEA's language giving Student the right to a FAPE, Student's eligibility ends on Student's birthday, which is before the School's program starts. I therefore conclude that Student is not eligible for ESY services provided by the School that would commence after June 23, 2013.⁵

Parents argue that eligibility must be determined with attention to state law or practice, 20 U.S.C.§1412(a)(1)(B). I disagree. This provision is an exception to the obligation to provide a FAPE; it does not expand the FAPE obligation of the District set forth in the previous subparagraph, 20 U.S.C.§1412(a)(1)(A), quoted above. Its effect is to allow states to restrict eligibility for special education services to exclude children in age groups below the age of 21,

⁴ The parties' stipulation states that the IEP team found Student ineligible as of the end of the school term in June 2013. This appears to be based upon the Pennsylvania statute providing eligibility to attend public school. 24 P. S. §13-1301; 22 Pa. Code §11.12. While my conclusion rests upon federal law ineligibility as of the 21st birthday, the IEP team's alternate state law basis for its decision is in harmony with the federal law analysis.

⁵ The IEP team did not consider the enumerated criteria set forth in 22 Pa. Code §14.132. (FF 15.)

when consistent with the state's treatment of all children in a given age group. I conclude that this provision is inapplicable in this matter.

Parents argue that state law extends the District's obligation to provide special education services (and thus ESY services) to Student, because a state regulation in Chapter 14 delineates eligibility for ESY services and requires it to be determined during the school term⁶ prior to the provision of such services. 22 Pa. Code §14.132. Parents advance the theory that ESY is in effect an extension of the services to be provided during the school term prior to the provision of ESY services. While I have considered this carefully, I find no judicial authority for this interpretation of Chapter 14, and I find nothing in the plain language of the regulation in question that suggests a conscious state policy to expand the rights of children beyond the limits of the IDEA itself. Thus, I do not adopt Parents' interpretation of the state ESY eligibility regulation.

CONCLUSION

I conclude that Student is not eligible for ESY services to be provided after Student's 21st birthday, and consequently I will not order the District to provide them.⁷

Any claims regarding issues that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

⁶ I also note that the District and the School end their terms in June, before Student reaches age 21.

⁷ This decision should not be interpreted to preclude Student eligibility for any services beyond the ordinary school day or school week that the IEP team might determine to be necessary in order to provide the Student with a FAPE. I note that the prevailing Basic Educational Circular on the provision of ESY advises Districts that "[w]hile many ESY programs are held during the summer, children eligible for ESY services can require weekend or even virtually continuous programming. ... All decisions regarding types of programming must be made on an individual basis by the IEP team." Basic Education Circular, Extended School Year Eligibility (April 1, 2003).

ORDER

1. Student is not eligible for ESY services to be provided in the summer of 2013, after Student attains 21 years of age and before the beginning of the 2013-2014 school term.

William F. Culleton, Jr. Esq.

WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

April 9, 2013