

*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

EXPEDITED DUE PROCESS HEARING

Name of Child: A.K.

ODR #13604/12-13AS

Date of Birth:  
[redacted]

Date of Hearing:  
March 18, 2013

CLOSED HEARING

Parties to the Hearing:  
Parents

Bethlehem Area School District  
1516 Sycamore Street  
Bethlehem, PA 18017

Date Transcript Received:

Date of Decision:

Hearing Officer:

Representative:  
Elizabeth Kapo, Esquire  
2123 Pinehurst Road  
Bethlehem, PA 18018

Lucas Repka, Esquire  
King, Spry, Herman, Freund  
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One West Broad Street Suite 700  
Bethlehem, PA 18018

March 20, 2013

March 21, 2013

Linda M. Valentini, Psy.D., CHO  
Certified Hearing Official

## Background

Student<sup>1</sup> is an elementary-school-age child who is eligible for special education pursuant to the Individuals with Disabilities Education Act [IDEA] under the current classification of specific learning disabilities, and consequently a protected handicapped individual under Section 504 of the Rehabilitation Act of 1973 [Section 504], as well as the federal and state regulations implementing those statutes.

This matter concerns an expedited due process request from the Parents who disagree with the District's proposed Extended School Year [ESY] program, believing that it is inadequate to meet Student's needs.

## Issue

Is the ESY program the District offered to Student for summer 2013 appropriate?

## Findings of Fact

1. Student resides within the boundaries of the District and attends 3<sup>rd</sup> Grade in the neighborhood school. As per an Individualized Education Plan [IEP] written in January 2013, Student was deemed eligible for ESY services. [S-7]
2. On the Scholastic Reading Inventory administered at the beginning of this school year Student scored a Zero, where a score below 400 indicates the need for further assessment and placement into a specialized reading program. [NT 105]
3. In December 2012 the general education teacher, the special education teacher and the school counselor collaborated on a Teacher Observations and Input document. Although the document noted Student has average cognitive ability: "[Student] is currently reading at a beginning first grade level. [Student] is only getting 45% correct on first grade sight words. [Student] also has a heavily modified Math curriculum with multiple times to retake test 1:1....[Student] has made limited academic progress since qualifying for special education services two years ago while in grade 1." [NT 67-68; P-6]
4. As of January 14, 2013 Student's score on the Slosson Oral Reading Test [SORT], a reading assessment, placed Student at the end-of-Kindergarten level. [NT 67-72, 116-117; P-7]
5. The January 2013 IEP records under Present Levels for Reading: "The assessments of [Student's] DRA reading level have been inconsistent"; "From

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<sup>1</sup> This decision is written without further reference to the Child's name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.

August until now, [Student's] performance on the Dolch list of high frequency sight words has also been inconsistent". [S-7]

6. Student's report card for the first two marking periods of the current academic year [to the middle of January 2013] reveals that Student showed "inadequate" or "marginal" academic performance in all areas of writing and math, and in the areas of reading strategies and vocabulary development. In contrast, Student made "satisfactory" academic progress in reading comprehension, response to literature and speaking/listening skills. [NT 90; S-11]
7. Starting on December 14, 2012 Student received the System 44<sup>2</sup> reading program for 60 minutes daily. System 44 is delivered through a half hour of small group [4 children] instruction and a half hour of computer instruction. Although an initial placement test on System 44 put Student at the 4.1 level<sup>3</sup> and Student progressed to beginning the 4.3 level in March, a subsequent placement re-test on March 7<sup>th</sup> yielded a score that found Student to be at an earlier level, 1.1. Student's instruction then started back at the beginning of the program. [NT 105-107; S-7; P-3]
8. The January 2013 IEP records under Present Levels for Math: "[Student] has difficulty following along with whole class instruction". Grades on modified Third Grade math Assessments were all below 73% and down as low as 33%. [S-7]
9. The general education teacher noted that Student was recommended for ESY because of inconsistencies in demonstrating skills in reading, mathematics and writing. [NT 60]
10. The general education teacher described that, not during breaks, but from day to day, Student is "not regressing, just staying at the same level, being able one day to do something on a harder level and the next day not to continue that level but to go back to reading the level [Student] was at the day before". [NT 60, 62-63]
11. The special education teacher noted that because of Student's inconsistencies she could not document actual regression but she recommended ESY because of the inconsistencies. She believed it would be difficult for Student to maintain skills because of the inconsistencies – "[Student] could read a certain DRA level one day and two days later could not...sometimes [Student would] know a word, the exact same word, on Page 2, 3, 4 and 5, came to Page 6 and could not read that

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<sup>2</sup> Student received the Wilson reading program in a group of four children during the previous school year but Wilson instruction was not continued in the current school year because the Wilson-trained teacher was moved to another school building. [NT 97-98]. Student was not instructed by a reading specialist in a research-based reading program until mid-December of the current school year. Before that Student received reading instruction from the general education teacher or the special education teacher. [NT 108]

<sup>3</sup> NB. This is not a grade equivalency level. It is a numerical level associated with the System 44 sequence.

- word with the short term memory issues, the auditory memory issues”. She did not believe that Student has mastered and consolidated reading skills. [NT 78]
12. The special education teacher further testified to Student’s inconsistencies, saying that “things Student will know one day, I can’t get [Student] to be able to do another day. And I wish I knew why and I do not know why”. [NT 98-99]
  13. The reading specialist testified that Student’s reading level has stayed the same since she began working with Student in December. [NT 114]
  14. The reading specialist noted that Student’s “inconsistence is inconsistent” whereby words recognized one day are not recognized the next day. [NT 115]
  15. The reading specialist explained that Student does not have automaticity. Student is not retaining reading skills from one day to the next and does not have rapid recall of “basic, basic, early, early phonics skills, which is hindering Student from remaining consistent and progressing further”. [NT 115]
  16. The current Occupational Therapist began working with Student in September 2012 and attended the January 2013 IEP meeting. She believes that Student continues to require occupational therapy. [NT 29, 33]
  17. The January 2013 IEP records under Present Levels for Writing: “[Student’s] handwriting is often illegible”; “[Student] skips words when writing, reverses letters and letter order.” [S-7]
  18. Student’s handwriting [printing] is difficult to read as acknowledged by the Occupational Therapist when reviewing Student’s Daily Planner. [NT 47; P-2]
  19. The Occupational Therapist did not see a significant lag or regression over the summer 2012 break in the skills the previous therapist was addressing as specified in OT progress monitoring. Student did not show regression or recoupment difficulties in handwriting after the December 2012-January 2013 winter break. [NT 30, 35-37, 39-40, 51; S-12]
  20. The Occupational Therapist does not believe that Student requires Occupational Therapy services over the summer. [NT 34, 40]
  21. According to the Director of Special Education the District does not do specific testing to determine ESY eligibility but bases the decision upon a child’s progress on IEP goals as gauged through progress within the classroom and progress monitoring within the IEP. [NT 16-17]
  22. Student’s eligibility for ESY, as noted on the ESY Evaluation Qualification Student Checklist was based on: “Whether the student has difficulties with regression and recoupment that will make it unlikely that the student will maintain

- the skills and behaviors relevant to IEP goals and objectives” and “The extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted”. [S-8]
23. According to the Director of Special Education [who has not been involved in Student’s programming or IEP development this academic year] the number of hours of ESY is based upon a child’s individual needs as assessed by the IEP team, and she believes that there is no set minimum number of hours. [NT 19-20, 22]
  24. Student’s mother testified unequivocally that the number of hours Student should receive ESY was not discussed at the IEP meeting. [NT 139]
  25. Although Student’s general education teacher was part of the IEP team that determined Student was eligible for ESY, the general education teacher was not part of the decision-making regarding the number of hours of ESY instruction to be offered to Student. [NT 53-54, 59, 64]
  26. Although the special education teacher was part of the IEP team that determined Student was eligible for ESY, the special education teacher was asked by a central office administrator to submit all the data she used to help determine ESY eligibility. The special education teacher did not make the decision regarding the number of hours of ESY instruction to be offered to Student. [NT 72-73; S-7]
  27. The special education teacher had never before qualified a child to receive ESY services. [NT 81]
  28. The decision about how many hours of ESY instruction Student would be offered was made by the central office administrator who was not part of Student’s IEP team. [NT 81-82]
  29. The general education teacher supports the District’s ESY offer because “ESY is to continue to keep [Student] where [Student] is... so [Student] doesn’t regress over the summer...” and to keep Student “at the maintenance level”. [NT 61, 64]
  30. The general education teacher opined that the offered amount of ESY over the summer to cover reading, mathematics and written expression is sufficient “because it’s one-on-one, [Student] is consistently right now staying where [Student] is, not regressing and progressing, but I believe that one-on-one should definitely keep [Student] where [Student is] at”. [NT 61-62]
  31. The District offered an ESY program for summer 2013 that in its entirety would consist of 10 hours of one-to-one instruction<sup>4</sup> to cover the areas of reading,

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<sup>4</sup> The IEP does not specify one-to-one instruction but a reasonable inference can be made that one-to-one was what was intended. [NT 65, 83; S-7]

writing and mathematics; the 10 hours were to be apportioned among the three areas by the ESY instructor[s] and the Parents. [NT 87; S-7]

### Discussion and Conclusions of Law

**Burden of Proof:** The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3<sup>rd</sup> Cir. 2012). In this case the Parents asked for the hearing and thus assumed the burden of proof.

**Credibility:** During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at \*28 (2003); See also generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009).

The Parents called a series of school district staff, and one occupational therapy consultant, to testify in this matter. The school principal had no direct involvement in making the decisions regarding ESY and hence could contribute little. The Director of Special Education has had no involvement with Student this school year, and no input into Student's IEP, but did testify as to the District's method of determining whether ESY is warranted. She emphasized that the amount of ESY to be provided was an IEP team decision made on the basis of the child's individual needs, with no set minimum or maximum. The witnesses that followed her, however, demonstrated that the substantive content and form of Student's ESY program was not in fact an IEP team decision, and in light of their descriptions of Student's academic functioning and in light of documents referenced it was clear that Student's individual needs could not possibly have driven the design of the ESY program. Each of the witnesses who actually worked with Student stayed close to the District's central message – that 10 hours of academic instruction over the course of the summer was appropriate in that this maintained Student at Student's present level[s] of functioning. Other than reiterating this central message, however, the testimony of the District staff did not develop a coherent picture of the District's position. On the one hand, staff testified that regression and recoupment was one reason Student was deemed ESY-eligible, but on the other hand considerable testimony was elicited to suggest that there was no regression over breaks. On the one hand, staff members were committed to having Student maintain skills and consolidate progress, while on the other

hand documents and testimony established that in almost all areas progress was minimal at best and that inconsistency was the hallmark of Student's performance. The notions of keeping a child where the child is, when where the child is in the zone of no progress, and maintaining a child's skill levels when those levels are well below grade level expectations and inconsistent at best, are not representative of FAPE. The totality of the testimony from the District staff in this matter served to strengthen the Parents' position and although given great thought and considerable weight, the weight was stacked on the Parents' side of the scale. The Parent testified credibly and straightforwardly.

Legal Basis: Having been found eligible for special education, the Student is entitled by federal law, the Individuals with Disabilities Education Act as Reauthorized by Congress December 2004, 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; and provided in conformity with an Individualized Educational Program (IEP). A child's special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (*Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. PA. 1996)). Local Educational Agencies [LEAs] need not provide the optimal level of service, maximize a child's opportunity, or even set a level that would confer additional benefits. What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

Acknowledging that some students may require programming beyond the regular school year, the federal legislature deemed that Extended School Year services are to be provided to an eligible child if necessary to assure that the child receives a free, appropriate public education (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.

22 Pa. Code § 14.132(a)(2) (i)—(vii) provides in relevant part:

(a) In addition to the requirements incorporated by reference in 34 CFR 300.106 (relating to extended school year services), school entities shall use the following standards for determining whether a student with disabilities requires ESY as part of the student's program:

(1) At each IEP meeting for a student with disabilities, the school entity shall determine whether the student is eligible for ESY services and, if so, make subsequent determinations about the services to be provided.

(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.

(b) Reliable sources of information regarding a student's educational needs, propensity to progress, recoupment potential and year-to-year progress may include the following:

(1) Progress on goals in consecutive IEPs.

(2) Progress reports maintained by educators, therapists and others having direct contact with the student before and after interruptions in the education program.

(3) Reports by parents of negative changes in adaptive behaviors or in other skill areas.

(4) Medical or other agency reports indicating degenerative-type difficulties, which become exacerbated during breaks in educational services.

(5) Observations and opinions by educators, parents and others.

(6) Results of tests, including criterion-referenced tests, curriculum-based assessments, ecological life skills assessments and other equivalent measures.

(c) The need for ESY services will not be based on any of the following:



- (1) The desire or need for day care or respite care services.
- (2) The desire or need for a summer recreation program.
- (3) 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.

In determining whether the LEA has offered an appropriate ESY program, as is the case for determining whether an LEA has offered an appropriate IEP, the proper standard is whether the proposed program is reasonably calculated to confer meaningful educational benefit. *Rowley*. “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 (3<sup>RD</sup> Cir. 1999).

Discussion: The IDEA and Pennsylvania law are very clear on what ESY is supposed to accomplish. ESY is provided to prevent a child from losing educational ground over a long break in schooling, such as during the summer. The District is proposing a total of ten hours of one-to-one instruction to cover reading, writing and mathematics. The Parents assert that this proposal does not represent ESY FAPE and ask me to order an “appropriate amount” of ESY services in the academic areas and also to order OT services over the summer.

The IDEA’s standard for “appropriateness” is put forth above. The issue is not which ESY program is more appropriate, but whether the District’s proposed program is in and of itself appropriate. As is the case in all matters involving the provision of FAPE to a child, the IDEA places emphasis on the “individual” child. In deciding this case I first looked at Student as an individual learner, and then weighed quantity and quality of the District’s proposed program.

Although Student demonstrates deficits in reading, writing and mathematics, the most salient deficit is in reading. Student is a learner with what appears to be a heretofore intractable and seemingly atypical memory deficit that significantly interferes with Student’s ability to remember sight words and phonemes – intractable in that the deficit has been present over a considerable period of time in the presence of some specially designed instruction, and atypical in that Student’s retention of certain reading skills ebbs and flows in that one day Student knows the material and the next day Student does not know the material. District general education and special education teachers and the reading specialist working with Student uniformly characterize Student’s abilities in reading as consistently inconsistent. They also uniformly testified that Student has made slow if any progress in reading.

The District acknowledges that Student has made slow progress, and that Student is consistently inconsistent. The District also forcefully argues that as ESY is intended to keep intact the skill level a child attained during the school year, its proposed program is appropriate because it does not have to further Student’s skills, only maintain the status quo. It is difficult to understand that what the District seems to be arguing is that in order

to be appropriate, all its ESY program must do is keep Student in the same state of minimal progress with inconsistent demonstration of skills that Student currently shows. I reject this position.

The District attempted to show that Student does not demonstrate regression with limited recoupment over breaks. What it seems to have failed to apprehend is that Student's daily, weekly and monthly course in reading has been a cycle of regression and recoupment and regression again. This is not a status quo that we would want maintained. Furthermore, the District also seems to have glossed over consideration of "*The extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted*" and "*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*". Contrary to the District's position, I do not hold that this consideration is confined to the population of severely developmentally delayed children. It is indisputable that this Student with average intelligence is very far from mastering reading skills at anywhere approaching grade level, and it is likewise indisputable that reading is a skill that is particularly crucial for meeting the goal of self-sufficiency and independence.

I find that ten hours of instruction, albeit one-to-one, that is to address severe reading deficits, and significant written expression and mathematics deficits, is not appropriate. The Parents asked that I order "an appropriate amount of ESY" without defining what this amount would be. Given no further guidance as to what the Parents believe is an "appropriate amount" of ESY, I shall exercise my broad equitable authority and, based upon the information provided at the hearing, will establish what is an appropriate amount of ESY.

As for Occupational Therapy, while the weight of the evidence does not support a finding that direct therapy services are required for FAPE over the summer, I will order that the teacher[s] providing the academic ESY to Student be afforded OT consultation over the course of the summer to guide them in assisting Student to use the handwriting strategies learned over the course of the school year, and that the Parents also receive OT consultation in anticipation of their doing some homework with Student over the summer based upon ESY assignments.

### Conclusion

Based upon the evidence presented at the expedited due process hearing in this matter, and the applicable law relating to ESY eligibility and appropriate programs and services, I conclude that the District's proposed ESY program is not appropriate.

## Order

It is hereby ordered that:

The ESY program the District offered Student is not appropriate.

The District shall provide, procure or fund a total of 50 hours of one-to-one academic instruction for Student during summer 2013.

The instruction shall be allocated as follows: 30 hours of reading instruction, 10 hours of writing instruction, and 10 hours of mathematics instruction.

The reading instruction must be provided by a certified reading specialist using a research-based, systematic, multi-sensory reading program that is delivered with fidelity.

The District shall provide a total of 60 minutes of Occupational Therapy consultation to the teacher[s] providing the ESY program to Student to support them in assisting Student to maintain handwriting skills over the summer.

The District shall provide a total of 30 minutes of Occupational Therapy consultation to the Parents to support them in assisting Student to maintain handwriting skills when completing ESY assignments and engaging in skills practice over the summer.

Any claims not specifically addressed by this decision and order are denied and dismissed.

March 21, 2013

Date

*Linda M. Valentini, Psy.D., CHO*

Linda M. Valentini, Psy.D., CHO  
Special Education Hearing Officer  
NAHO Certified Hearing Official