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: C.H.

ODR #15129/13-14 AS

Date of Birth:
[redacted]

Date of Hearing:
July 1, 2014

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent[s]	Elizabeth Kapo, Esquire 2123 Pinehurst Road Bethlehem, PA 18018
Governor Mifflin School District 10 South Waverly Street Shillington, PA 19607	Kathleen Metcalfe, Esquire Sweet, Stevens, Katz and Williams 331 Butler Avenue New Britain, PA 18901
Date Transcript Received:	July 3, 2014
Date of Decision:	July 4, 2014
Hearing Officer:	Linda M. Valentini, Psy.D., CHO Certified Hearing Official

Background

Student[1] is an early-teen aged child who is eligible for special education pursuant to the Individuals with Disabilities Education Act [IDEA] and Pennsylvania Chapter 14 under the classification of Specific Learning Disability.

The current matter concerns an expedited due process request from the Parents who disagree with the District's proposed summer program [hereinafter summer transition program] and instead request that the District reimburse them for the summer program offered by the private school in which they propose placing Student [hereinafter Proposed Private School] for the 2014-2015 school year.[2]

The District filed a Motion to Dismiss upon which a ruling was deferred pending receipt of the Parents' Answer and fact-gathering at the hearing session. The Motion to Dismiss is discussed below.

The Parents objected to the admission of exhibit J-14 on the basis of relevance and I deferred making a ruling at the hearing. I now agree that J-14 is irrelevant to the discrete issue before me and hereby exclude that exhibit from the record.

Issue

Is the summer transition program the District offered to Student for summer 2014 appropriate?

Should the District be required to provide tuition and transportation for the program offered by the Proposed Private School for summer 2014.[3]

Findings of Fact

1. Student resides with the Parents within the boundaries of the District and attended public school in the District until midway through 5th grade, at which time Student began attending a private school for children with learning disabilities [hereinafter Former Private School] where Student remained through 7th grade, the end of the 2013-2014 school year. [J-11[4]]

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[1] 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.

[2] This issue was one of several other issues included in the Parents' complaint which has been bifurcated to accommodate the need to hold an expedited hearing and complete a decision within 30 days of the filing of the complaint. The remaining issues in the complaint will be addressed at a hearing scheduled for a later date under a different case number.

[3] The issue as stated by the hearing officer at the outset of the proceedings characterized the Proposed Private School's program as an "ESY" program. As with the District's offered summer program this characterization is inaccurate as will be explained below.

[4] Counsel are commended for producing Joint exhibits which contributed greatly to the streamlining of this expedited matter.

2. Student's tuition at the Former Private School was publicly funded by the District pursuant to a settlement agreement. Although the settlement agreement covered just the 5th and 6th grades, the parties mutually entered into an extension of the settlement agreement [hereinafter new settlement agreement] for another year to include 7th grade.[5] [J-5]

3. The Former Private School conducted a reading evaluation utilizing the Woodcock Reading Mastery Tests Revised Normative Update Form H on November 11, 2011 and another on April 23, 2013. The respective results expressed in standard scores [percentile ranking[6]] were as follows: Word Identification 76 [6th] vs 81 [10th], Word Attack 77 [6th] vs 91 [28th], Word Comprehension 93 [32nd] vs 97 [41st], Passage Comprehension 82 [11th] vs 93 [32nd], Basic Skills Cluster 74 [4th] vs 84 [15th], Reading Comprehension Cluster 86 [17th] vs 94 [35th], Total Reading Cluster 80 [9th] vs 89 [23rd] . [J-2, J-3]

4. On June 3, 2013 the Parents[7] wrote to the District noting that the timelines for the evaluation of Student and producing an IEP had passed. The letter noted that Student made progress at the Former Private School but still remained below grade level. The Parents stated that they believed student "will benefit from an additional year at [Former Private School]". [NT-45; J-4]

5. In that same June 3, 2013 letter the Parents informed the District that they had hired a tutor who specialized in the Orton-Gillingham approach to reading to work with Student over the summer to help maintain Student's progress. The Parents requested that the District pay for the summer tutor who was to work twice per week with the student. The Parents did not characterize this summer program as an ESY program. [NT 46; J-4]

6. Clause 1a of the new settlement agreement executed on August 19 [School Board] and August 27 [Parents] specifically addresses "… services provided by the District for the student from the *conclusion* of the 2012-2013 school year through the *conclusion* of the 2013- 2014 school year". [Emphasis added] [J-5]

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[5] The Parents and the District presented differing accounts of why the original settlement agreement was extended for one year. The conflict revolves around whether deadlines imposed on the District in the original settlement agreement for a reevaluation and an IEP were missed, thus triggering the Parents' request for another year at the Former Private School, or whether the deadlines were not met because the Parents and the District had been discussing keeping Student at the Former Private School for another year. For purposes of this decision, the distinction is moot. [NT 45, 83-85]

[6] A standard score of 100 would be at the 50th percentile. This is true of IQ scores as well, so for purposes of comparison an IQ of 100 would be at the 50th percentile. Student's Full Scale IQ has been recorded in 2008 and in 2009 as 97 [no percentile given] and 99 [47th percentile], while Student's Nonverbal IQ was recorded in 2009 as 94 which is at the 34th percentile.

[7] When the term "Parents" is used, even when Student's mother acted alone, it is understood that she was acting on behalf of herself and Student's father. Student's father was present at the hearing.

7. Clause 1b of the new settlement agreement addresses services for the *summer of 2013 only*, and specifies the District will "fund the Student's private reading tutor in an amount not to exceed $1600 for summer 2013 tutoring services". This tutoring is not characterized as an ESY program. [J-5]

8. On September 9, 2013 the Parents wrote to the District, providing the 16 dates the tutor met with Student over the summer and noting that the tutor's rate was $100.00 per hour. Total cost of the summer program that the Parents requested the District reimburse was $1600. The District reimbursed the Parents for their chosen summer program as per the new settlement agreement. [NT 76; J-4, J-6]

9. Clause 4 of the new settlement agreement states "Nothing in this agreement should be construed to suggest that the District will pay for costs for the Student to attend [Former Private School] beyond the conclusion of the 2013-2014 school year. Further nothing about this agreement shall be construed to mean that pendency attaches to [Former Private School] and the Parents hereby acknowledge and agree that under no circumstances does pendency attach to [Former Private School]". [J-5]

10. Clause 3 of the new settlement agreement provides "In the event that a dispute arises between the District and Parents over the appropriateness of the proposed program and/or placement for the Student, the parties agree that pendency shall be the program and placement offered by the District, unless or until a due process hearing officer renders a decision regarding an appropriate program and placement for the student." [J-5]

11. Because they were becoming dissatisfied with the services at the Former Private School the Parents began looking at other options. As early as March 2013, several months before the original settlement agreement was due to expire, Student's mother and aunt visited the Proposed Private School. [NT 47-48, 62; J-18]

12. On or about February 1, 2014[8] the parents submitted an application to the Proposed Private School. [NT 60-61]

13. After reviewing the application, the Proposed Private School invited Student and Parents to visit for one day on or about March 25, 2014. [NT 27-28, 63]

14. Student was accepted into the Proposed Private School on April 3, 2014 with the proviso that Student was required to attend its summer program. The Proposed Private School believed that without its summer program Student's weaknesses were too significant for Student to benefit from its program in 8th grade,

[8] The Director of Admissions at the Proposed Private School testified that the application was marked February 20th. This could have been the date it was reviewed or processed at the school. [NT 29]

particularly as there was only one more year to prepare Student for an upper school curriculum. [NT 22-23, 26, 30-31, 38-39; J-16[9]]

15. On April 8, 2014, after Student had been accepted into the Proposed Private School the Parents wrote a letter to the District stating that they had explored options other than the Former Private School for Student for 8th grade.[10] The letter also stated that acceptance into the Proposed Private School's fall program was contingent on Student attending the summer school program offered at that institution. The Parents requested that the District provide public funding for Student's summer tuition at the Proposed Private School and 8th grade tuition at the Proposed Private School, as well as transportation to that school. [NT 47; J-11]

16. However, given the fact that the new settlement agreement would terminate at the end of the 2013-2014 school year, the District was proposing to bring Student back into public school for 8th grade, the 2014-2015 school year. Pursuant to the new settlement agreement, on April 3, 2014 the District issued a Permission to Evaluate form. The Parents signed the form on April 4, 2014 but the form was not received in the District until April 10, 2014. The Parents dropped off the signed PTE about the same time they submitted the April 8, 2014 letter. [NT 65; J-7, J-11]

17. The reevaluation was completed on April 28, 2014 and provided to the Parents on April 29, 2014. The District and the Parents met to discuss the results of the evaluation on April 29, 2914. [NT 66; J-7]

18. For purposes of the reevaluation the District psychologist, among other procedures, conducted a record review. Cognitive testing completed privately in 1st grade in February 2008 and by the District in January 2009, both utilizing the Wechsler Intelligence Scale for Children Fourth Edition [WISC-IV], found Full Scale IQs of 97 and 99 respectively which are in the Average range.[11] [J-7]

19. Academic achievement testing in the February 2008 private evaluation and an April 2009 Independent Educational Evaluation [IEE], both utilizing the Wechsler Individual Achievement Test Second Edition [WIAT-II], yielded the following respective standard scores: Word Reading 98 vs 83, Reading Comprehension 109 vs 99, Pseudoword Decoding 97 vs 85, Numerical Operations 99 vs 86, Math Reasoning 98 vs 97, Spelling 109 vs 91, Written Expression 92 vs 92. [J-1, J-7]

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[9] It is noted that J-16 is an email dated June 24, 2014 from the Assistant Director of Admissions of the Proposed Private School. Given the date it appears to have been composed for litigation purposes.

[10] Since the new settlement agreement covered only the 7th grade year, the Parents seem to have been assuming that Student's attendance at a private school would continue to be supported through public funding despite clear clauses relating to pendency that did not support that conclusion. [J-5]

[11] Cognitive testing administered for an Independent Educational Evaluation completed in April 2009 utilizing the Wechsler Nonverbal Scale of Ability [WNV] resulted in a Full Scale score of 94 at the 34th percentile which is also considered Average range. [J-1]

20. Academic achievement was assessed in the January 2009 District evaluation and in an October 2013 evaluation, both utilizing the Woodcock Johnson III Tests of Educational Achievement [WJ-III] but apparently different versions. Standard scores that were reported and can be roughly compared were respectively as follows: Letter-Word Identification 91 vs Word Reading 76, Passage Comprehension 95 vs Reading Comprehension 86, Reading Fluency 96 vs Oral Reading Fluency 81, Broad Reading Skills 92 vs Total Reading Score 79, Calculation 101 vs Numerical Operations 74, Applied Problems 103 vs Math Problem Solving 97, Broad Math 99 vs Total Math 84. [J-7]

21. For purposes of the April 2014 reevaluation the District psychologist utilized the Woodcock-Johnson III Tests of Achievement, Form B, Normative Update. Standard scores were as follows: Broad Reading 83 at the 12th percentile, Broad Math 86 at the 17th percentile, Math Calculation 76 at the 5th percentile, Broad Written Language 82 at the 11th percentile, Written Expression 84 at the 14th percentile, Academic Skills 79 at the 8th percentile, Academic Fluency 79 at the 8th percentile, Academic Applications 90 at the 26th percentile. [J-7]

22. Comparisons of the 2009, 2013 and current 2014 WJ-III scores in reading and math are as follows: Broad Reading 92/79/83, Broad Math 99/84/86.[12] [J-7]

23. The District's reevaluation resulted in the conclusion that Student continued to be eligible for special education under the classification of specific learning disability. [J-7]

24. The District's special education director, the District's psychologist and the Parents[13] met on April 29, 2014 to discuss the evaluation results. The District's special education director, the District's psychologist and the District's assistant superintendent met with Student's mother and aunt on May 5, 3014 to discuss the

[12] Both Student's mother and Student's aunt questioned the District's WJ-III test results, asserting that they seemed too high. It may be that the mother was confusing standard scores with percentages [for example, she may have interpreted a standard score of 88 as 88 out of 100 rather than as a place on the lower side of the bell-shaped curve] [NT 67-68]. Given the aunt's testimony that she is familiar with psychological testing it was surprising that she agreed with the mother, and also seemed not to understand the percentile ranks that accompanied the standard scores [NT 129-134]. In any event, it is here noted that the standard scores obtained by the District are essentially equivalent to those obtained in 2013 and considerably lower than those reported in the IEE of 2009. Given the number of times Student has been evaluated and the number of reports of standard scores that Parents and Student's aunt have seen, the claim that the scores were too high and somehow possibly incorrect was curious. Student's mother and Student's aunt also were concerned that the District did not provide them with grade equivalency scores in addition to standard scores and percentile rankings. [NT 144-145] It is important to recognize that grade-equivalency scores are a type of developmental score that must be interpreted cautiously and carefully, as they can be misleading for many reasons. Although the district psychologist testified that in her experience grade equivalency scores were not useful beyond first or second grade, she could not point to any literature beyond her own experience. Her attention is hereby drawn specifically to the following: Salvia, J., Ysseldyke, J., & Bolt, S., *Assessment in Special and Inclusive Education* (11th ed. 2010) at 40-41; Sattler, J. M., *Assessment of Children: Cognitive Applications* (5th ed. 2008) at 104-106.

[13] Student's aunt attended some if not all the meetings as well.

Parents' concerns. The Parents summarized these meetings in a letter to the District dated May 19, 2014. [J-8]

25. Extended School Year [ESY] services were discussed at the April 29th and the May 5th meetings. Although the District personnel acknowledged that they did not have an ESY program for Student, other options were discussed, with the understanding that funding for the Proposed Private School's summer program was a possibility. The District did not commit to fund the private program; none of the District staff at these meetings had the authority to commit District resources. The Parents understood that funding approval for a summer program would have to go before the School Board. [NT 50, 70, 81-82, 126-127; J-8]

26. Based on the evaluation results, the District drafted an IEP and convened an IEP meeting on May 16, 2014 with the intent of discussing a District program for the 2014-2015 school year. The draft IEP did not contain a proposal for Extended School Year [ESY] services; the IEP was written to begin in August 2014 when the school year resumed. ESY for summer 2015 was touched upon briefly; neither the District nor the Parents raised the question of ESY for summer 2014 at the meeting. [NT 50-51, 53, 126; J-8]

27. In a May 19, 2014 letter the Parents rejected the NOREP that proposed a District program for 2014-2015 and requested that the District fund the summer program and the upcoming year's tuition, including transportation, at the Proposed Private School. [NT 50; J-11]

28. The District provided a response by letter dated May 27th, declining to fund Student's 2014-2015 school year at the Proposed Private School but offering as a compromise a settlement agreement to fund the summer program at the Proposed Private School. [NT 51; J-11]

29. The Parents filed for due process on June 12, 2014, raising among other issues the concern that the District had not proposed an ESY program for summer 2014 and therefore asking for public funding for the summer school program provided by the Proposed Private School by whom Student had been accepted as well as for transportation to that program.[14] [J-11]

30. On June 13, 2014 the District sent out an invitation to the Parents to attend a Resolution Meeting on June 16, 2014; in proposing the date the District was following the timelines for expedited hearings. [J-12]

31. Following the May 16, 2014 IEP meeting, because Student would need support in transitioning from the Former Private School to the District's middle school should Student return to the District, and hearing the Parents' concerns at the IEP meeting, the District had begun planning a program of summer transition services to include individual work on reading and math and written expression, on assistive technology,

[14] The complaint also sought prospective tuition and transportation for the Proposed Private School for the 2014- 2015 school year.

and on executive functioning skills. The District designed its plan in light of the reevaluation results, information obtained from the Former Private School, and the May 16th IEP meeting discussions with the Parents around their concerns. It took about a month to put together the proposed summer program, involving the director of special education discussing it with her superiors as well as building administrators in the middle school. Teachers and the District psychologist were approached and asked if they would provide summer services to student and they had accepted the proposal as had an IU assistive technology specialist. [NT 88-91, 106-109]

32. At the Resolution Meeting, held on June 16, 2014, given that the expedited portion of the due process complaint addressed summer services, the District discussed the elements of the summer transition plan in the District including the types of services Student would receive and the providers of these services. As the District LEA representative at the Resolution Meeting did not have power to commit the District's resources[15], the plan was not shared in writing at the Resolution Meeting.

33. At the School Board meeting held later on June 16, 2014 approval was given to fund the proposed District summer transition program for Student. Board approval was needed because the proposed summer transition plan involved allocating fiscal resources to pay the staff who would provide the services. The written plan for Student's summer transition program was provided to the Parents on June 17, 2014 after the School Board's approval. Although a greater level of detail about the summer transition program was provided at the hearing, the information provided to the Parents in written form on June 17, 2014 contained all the major provisions of the plan. [NT 111-112; J-11]

34. The District revised the May 16, 2014 IEP based upon the Parents' letter of May 19, 2014 and discussions at the Resolution Meeting and sent the Parents a copy of the revised IEP on June 17, 2014. In the ESY section of the revised IEP the District provided that 'In lieu of a typical Extended School Year program for summer following the 2013-2014 school year, [Student] will be provided a transition program to prepare [Student] to return to the [District] for the school year beginning August 2014…". [J-13]

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[15] A recent case from another circuit, and therefore instructional but not binding in this circuit, suggests that school districts that do not confer decision-making power to the LEA representative at Resolution Meetings may be committing a procedural violation. See LEA Authority at Resolution Meeting: *J.Y. v. Dothan City Board of Education*, 2014 U.S. Dist. LEXIS 43687 (M.D. Ala. 2014), finding a procedural violation of IDEA regarding resolution meeting agreement attended by superintendent, which required board approval: "The Superintendent or some other administrator satisfies the statutory requirement only if he or she, in fact, has the authority — by express delegation or otherwise — to make the decision about what the LEA will or will not do to resolve the issues presented in the IDEA complaint. The statute clearly contemplates the resolution session as just that — a meeting at which the LEA and the complainant(s) can reach a resolution because those with the authority to decide are participants." The court did not, however, find a substantive violation denying FAPE on that basis.

35. A "typical" ESY program is based upon a student's goals and progress during the school year that ended just prior to the summer . Student, having been in a private school for three years, did not have an IEP and therefore there were no goals to work from. [NT 113-114]

36. The District's proposed summer transition plan for Student consists of one-to-one instruction in reading, math and written expression from July 8, 2014 to August 7, 2014, a period of five weeks, three days per week, three hours per day. The instruction would be provided by the teachers who would be Student's middle school teachers should Student enter the District's middle school in August. Each of these teachers is Orton Gillingham certified and each of these teachers is also a certified special education teacher. [NT 99-105, 115, 118-119; J-13]

37. In addition to the one-to-one academic instruction the District proposed to provide four hours of one-to-one executive functioning training through a certified school psychologist. This service was proposed because Student's executive functioning was noted to need strengthening by teachers at the Former Private School and because this also was a concern raised by the Parents. [NT 99-105, 147-148; J-13]

38. Finally, in addition to the one-to-one academic instruction and instruction in executive functioning, the District's summer transition plan included one-to-one work with Student on assistive technology. Student would be provided with a laptop and various assistive technology programs would be trialed to see which ones best met Student's needs. This instruction was to be provided by an IU assistive technology specialist. [NT 99-105, 116-119; J-13]

39. Student's District summer transition program would be provided for a total of 45 hours at the middle school. That location was chosen so that Student could become familiar with the building should Student enroll for 8th grade. Transportation was to be provided. [NT 114-115; J-13]

40. It was envisioned that while working with Student the teachers would be establishing baseline data for reading, writing and math to be used in monitoring Student's progress during the coming school year. [NT 99-105].

41. On June 23, 2014 the parents paid the Proposed Private School approximately 50% of the tuition for the summer program that the Proposed Private School was requiring Student to attend in order to enter its 8th grade class in the fall. [NT 60-61; J-15]

42. The summer program at the Proposed Private School consists of four 50 minute periods per day. These periods include a 1:1 language arts period with a tutor who has completed training in the Orton Gillingham approach to reading, a math class with 6 to 7 students, an arts class [specifically clay and ceramics], and a technology class. The program runs for five weeks from June 30 through August 1, 5 days per week, with the exception of July 4 for a total of 24 days. Exclusive of the 50 minute art period, the Proposed Private School's program provides 150 minutes per day of academic/technology instruction consisting of 50 minutes of 1:1 language arts and 100 minutes of group instruction [math and technology] totaling 20 hours of 1:1

instruction [language arts] and 40 hours of group instruction [math and technology]. [NT 17-21, 35-38; J-19]

43. The 1:1 language arts summer tutor at the Proposed Private School would not be Student's teacher in the fall should Student attend there. The tutor would be hired just for the summer program. [NT 34]

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 (3rd Cir. 2012). In this case the Parents asked for the hearing and thus bore the burden of proof. As the evidence was not equally balanced the Schaffer analysis was not applied.

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).

Witnesses in this hearing were the Director of Admissions at the Proposed Private School, Student's Mother, Student's Aunt, the District's Director of Special Education and the District's Psychologist. All witnesses appeared to be testifying truthfully and no major credibility issues arose. The testimony of the District's Director of Special Education was given considerable weight for two reasons. First, she answered all questions forthrightly and did not appear to be couching her responses to cast a favorable light upon the District; and second, she provided logical reasons supporting how the elements of the District's summer transition plan for Student were constructed. I could not credit Student's Mother's testimony with significant weight. First, it is notable that while successfully using the terms of the first settlement agreement to her advantage by calling the District to task for not complying with the timelines, she proceeded to arrange for Student's transfer to another private school without regard for the very specific time limits of the new settlement agreement and the clearly emphasized language regarding pendency. Additionally, given that the Parents carried the burden of proof in this

proceeding, her only supports for wanting Student to attend the Proposed Private Program's summer program other than that it was a prerequisite for attending that school in the fall was that the program was "established" and teachers were "ready to go". She believed that she had not been given enough information about the District's summer transition plan which she thought had been put together too quickly and just came about because of the due process hearing. [NT 55-58]. The Director of Admissions at the Proposed Private School was able to provide factual information about the school's summer program, but when asked to explain further why Student's needs were such that attendance in that program was required she faltered, failing to add weight to the Parents' arguments.

Standards for a Free Appropriate Public Education: Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, *et seq.*, and in accordance with 22 Pa. Code §711.1 *et seq*. and 34 C.F.R. §300.300, *et seq.* a child with a disability is entitled to receive a free appropriate public education (FAPE) from the responsible local educational agency (LEA). A FAPE is "an educational instruction specially designed . . . to meet the unique needs of a child with a disability, coupled with any additional 'related services' that are 'required to assist a child with a disability to benefit from [that instruction].'" *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Winkelman ex rel. Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 127 S. Ct. 1994, 167 L. Ed. 2d 904 (2007)* (citing *20 U.S.C. § 1401(29)*); see also *20 U.S.C. §§ 1401(9), (26)(A)*. Under the interpretation of the IDEA statute established by *Rowley* and other relevant cases, an LEA is not required to provide an eligible student with services designed to provide the best possible education to maximize educational benefits or to maximize the child's potential. *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 251; *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3rd Cir. 1995). 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).

ESY and Motion to Dismiss: 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 factors listed in 22 Pa. Code §14.132 (a)(2) (i)—(vii) be taken into account. Because ESY services are meant to keep students' skills up during the period between the close of school in June and beginning of school in August or September the goals of an ESY program are necessarily based upon the goals of the IEP for the previous year as the service is meant to *extend* the previous school year.

On June 20, 2014 the District filed a Motion to Dismiss on the grounds that the new settlement agreement provided for services to Student only through the end of the 2013-2014 school year. Given the short timelines I allowed the Parents to file their answer on the day of the hearing. Looking carefully at the terms of the new settlement agreement, in

particular Clauses 1a and 1b, [wherein 1a provides for distinct school years and 1b specifically carves out the summer of 2013 which falls between these two years], I find that the terms agreed upon by the parties do not obligate the district to provide ESY services for summer 2014. If by a significant stretch, which I fail to reach, provision of the funding for the Parents' unilaterally chosen summer tutoring program in 2013 somehow is construed as obligating the District to then provide or fund a program for summer 2014, such a program would definitely not be formal ESY. Further, the fact that in accord with the new settlement agreement the District was to propose an IEP for Student's 8th grade, [to begin on August 25, 2014], did not create an obligation to provide ESY for the extension of 7th grade.

Any criticisms of the District's proposed summer transition program because it was not ESY proper in that it did not include specific goals based upon Student's 7th grade year are moot as the District was not obligated to provide ESY. Accordingly, I could grant the District's Motion to Dismiss, but the parties would then still be left with two competing summer programs, conviction on both sides, and a remaining need for an independent decision maker to intervene. This would not serve anyone's best interests, and certainly not the child's given that the Parents' favored program will have already operated for four days as of the date of this decision and the District's proposed program is scheduled to begin a few days after the date of this decision. Therefore while I find that the new settlement agreement does not require the District to provide or fund ESY for summer 2014, I will not dismiss the case. Instead, I will accept the offer District counsel made in her closing statement to essentially disregard the Motion to Dismiss [NT 162] and decide the case on the merits of the District's program.

Summer Transition Program: In determining whether an LEA has offered an appropriate program, 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 (3RD Cir. 1999).

I find that the District's summer transition program is well thought out and reasonably calculated to provide Student the opportunity for significant learning for several reasons. First, it provides exclusively 1:1 instruction in the core areas of Student's disability – reading, mathematics and written expression. Reports from the Former Private School based on day to day functioning support the provision of 1:1 instruction, and results of standardized testing support that the need is in the three areas targeted. Second, the teachers who would be working with Student over the summer are Orton-Gillingham trained and will provide Student with multisensory instruction which both parties, as well as the Former and Proposed Private schools, agree Student requires. Third, should Student enroll in the District for the fall, working intensively during the summer with the very teachers who would be Student's teachers in the academic year allows Student to become familiar with them and they with the Student and provides the opportunity to identify learning strengths and needs, establish fresh baselines, and plan for interventions throughout the school year. Fourth, having the sessions take place in the middle school building will allow Student to become acclimated with the physical plant and with the

building administrators and support personnel. Fifth, taking into consideration concerns about Student's executive functioning expressed by the Parents and the Former Private School, the provision of four hours of 1:1 instruction in this area by a certified school psychologist is a valuable addition to Student's successful transition to a new school setting. Sixth, providing Student with a laptop and having Student work 1:1 with an assistive technology specialist to try various programs and practice with the selected programs will give Student a jump start in accessing technology in 8th grade. It is anticipated that this portion of Student's summer transition program will allow for information sharing among the AT specialist and Student's summer teachers who would become Student's teachers in 8th grade.

Based on all the above factors, I find that the District has proposed a summer transition program that more than meets the standard of appropriateness. Further, should it turn out that Student attends the District's summer program but then goes on to attend the Proposed Private School in the fall, it is my belief that the programming the District is offering should more than satisfy the requirements of the Proposed Private School.

Given that I have found the District's proposed summer transition program to be appropriate it is not necessary for me to address the appropriateness of the Proposed Private School's summer program.

I do not find any equitable considerations that would alter my findings above.

Resolution Meeting: The Parents argue that in meetings held prior to the Resolution Meeting the District signaled it would fund the summer program at the Proposed Private School and characterize the District's statements as a "verbal agreement". These meetings were not Resolution Meetings, as there was not yet an active due process complaint, and the staff from the District involved in these discussions did not have the authority to enter into any agreements that involved committing fiscal resources.

I will also now address the Parents' belief expressed in their closing statement that the District developed the summer transition plan solely because they had filed for a due process hearing and that this was somehow underhanded. Although I do not believe this to be the case, as the Director of Special Education testified credibly that she had been working on the summer transition plan for about 30 days, I draw the Parents' attention to the fact that the IDEA 2004's requirement for a Resolution Meeting, which was a brand new provision in the reauthorization, intends that LEAs hear parents' concerns and then attempt to rectify the problem. The mandated Resolution Meeting is meant to encourage the parties to meet to see if the dispute can be resolved without the need for a hearing. Toward that end, "the (school district) must convene a meeting with the parent and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the due process complaint that includes a representative of the public agency who has decision-making authority on behalf of that (school district)…." 34 C.F.R. §300.510(a). In the instant matter, although the LEA representative at the Resolution

Meeting did not have decision-making authority, the fact that the entity that did have the authority [the School Board] made its decision literally that same day served to avoid a procedural violation and did not cause any prejudice to the Parents. The Parents considered the District's offered summer transition plan for five or six days before choosing to send their check to the Proposed Private School in partial payment for the summer program there.

Order

It is hereby ordered that:

1. The District's Motion to Dismiss is moot.

2. The District was not required to offer an ESY program to Student for Summer 2014.

3. The District's Summer Transition Plan is appropriate for Student.

4. The District is not required to reimburse the Parents for the summer program at the Proposed Private School.

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

July 4, 2014
Date

Linda M. Valentini, Psy.D., CHO

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