

*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

Child's Name: T.S.

Date of Birth: [redacted]

Dates of Hearing: May 16, 2014

CLOSED HEARING

ODR File No. 14950-1314KE

Parties to the Hearing:

Representative:

Parent[s]

Mark W. Voigt, Esquire  
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Hamburg Area School District  
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Date Record Closed:

May 19, 2014

Date of Decision:

May 24, 2014

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student<sup>1</sup> is a high school student in the Hamburg Area School District (hereafter District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).<sup>2</sup> Student's Parents<sup>3</sup> filed a due process complaint against the District challenging its proposed extended school year (ESY) program.

The case proceeded to an expedited due process hearing that convened in a single session, at which the parties presented evidence in support of their respective positions. The Parent sought to establish that the District's proposed ESY program does not provide Student with a free, appropriate public education (FAPE) under the IDEA, and they sought a determination that Student should be provided with a specific private program, funded by the District, over the course of the summer. In response, the District maintained that its proposed ESY program is appropriate for Student.

For the reasons set forth below, I find that the District's program is appropriate to a degree but will direct the IEP team to reconvene to address specific portions of the program for Student.

### **ISSUES**

1. Whether the District's proposed ESY Program for the summer of 2014 is appropriate for Student; and
2. If the District's proposed ESY program is not appropriate, is the Student entitled to a specific private program over the summer at District expense?

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<sup>1</sup> In the interest of confidentiality and privacy, Student's name and gender are not used in the body of this decision.

<sup>2</sup> 20 U.S.C. §§ 1401 *et seq.*

<sup>3</sup> The term Parents is used, although Student's mother took the active role in proceeding with the due process complaint.

## **FINDINGS OF FACT**

1. Student is of an age of IDEA-eligibility, is a resident of the District, and is eligible for special education. Student's last year of eligibility under the IDEA will be the 2014-15 school year. (Notes of Testimony (N.T.) 21, 23, 25; Parent Exhibit (P-) 6 pp. 1, 11; School District Exhibit (S-) 1 p. 23)
2. Student has several post-secondary interests. Specifically, Student's first interest is in computer graphics/animation, web design, and/or computer programming. Student is also interested in cabinetmaking. (N.T. 29, 70, 79, 108-11; P-4 p. 27; S-1 p. 32, S-2 p. 27)
3. In previous school years, Student was able to participate in job shadowing with the information technology team in the District. Student also had a class in web design, with which Student struggled, but Student did enjoy that course. (N.T. 108-11, 113-14)
4. The District conducted a re-evaluation of Student in the fall of 2012 and issued a Re-evaluation Report (RR) in December 2012. This RR includes a summary of Student's previous cognitive and academic achievement testing, current classroom-based assessments, a classroom observation, and teacher recommendations. The District school psychologist also conducted a number of cognitive, achievement, and behavioral assessments; and the speech/language pathologist conducted a speech/language evaluation. Student was determined to be eligible for special education on the basis of a specific learning disability and a speech/language impairment. Recommendations for Student included direct instruction in reading decoding and math problem solving, as well as social skills and speech/language therapy. (S-1)
5. For several years until the end of the 2012-13 school year, Student was provided a research-based reading program that focused on phonemic awareness in addition to decoding, reading comprehension, vocabulary, and writing. Student mastered the skills taught through that particular reading program, and is able to decode materials at an eighth grade reading level. (N.T. 87-89, 91-92, 105-06, 120, 149-51, 173; P-1, P-6; S-6)
6. Student was evaluated privately in June 2013 by a certified school psychologist who issued an Independent Educational Evaluation (IEE) Report. With respect to Student's cognitive functioning, this evaluator reviewed Student's previous assessments: a full-scale IQ in the borderline range (with significantly better non-verbal than verbal skills) on the Wechsler Preschool and Primary Scale of Intelligence – Revised, in May 1999; a Verbal IQ of 73 and a Performance IQ 119 on the Wechsler Intelligence Scale for Children – Third Edition (WISC-III), in April 2001; a Full Scale IQ of 71 on the Fourth Edition of the WISC (WISC-IV), in fifth grade;<sup>4</sup> average range standard scores on the Kaufman Brief Intelligence Test (KBIT) and Test of Non-Verbal Intelligence – Third Edition in March 2005 by this same private evaluator; a Full Scale IQ of 74 (borderline range) and a Global Ability Index score of 87 (low average range) on the Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV) in

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<sup>4</sup> There is no date provided for this administration of the WISC-IV, but the record suggests this assessment was conducted in approximately late 2004 or early 2005. Student's Index Scores were 81 in Verbal Comprehension, 86 in Perceptual Reasoning, 56 in Working Memory, and 75 in Processing Speed. (P-4 p. 7; S-2 p. 7)

May 2010; and a Verbal IQ of 90, a Nonverbal IQ of 86, and a Total IQ of 87 (high end of the low average range) on the Stanford-Binet Intelligence Scales – Fifth Edition, in December 2012. She also reported a subsequent administration of the WAIS-IV in December 2012 as follows: Verbal Comprehension Index 96, Perceptual Reasoning Index 104, Working Memory Index 66, and Processing Speed Index 65, with a Full Scale IQ of 82 (low average range). (P-4 pp. 5-15; S-2 pp. 5-15)

7. For this June 2013 IEE, the private evaluator administered the WAIS-IV again, and reported that Student achieved scores as follows: Verbal Comprehension Index 87, Perceptual Reasoning Index 109, Working Memory Index 66, and Processing Speed Index 79, with a Full Scale IQ of 84 (low average range) and a General Ability Index Score of 98 (average range). (P-4 pp. 2,16; S-2 pp. 2, 16)<sup>5</sup>
8. The private evaluator also administered the Wechsler Individual Achievement Test – Third Edition (WIAT-III). Student scored in the Below Average range on the Word Reading, Pseudoword Decoding, Oral Reading Fluency, Oral Expression, Essay Composition, Mathematics Problem Solving, and Math Fluency-Multiplication Subtests; in the Low Average range on the Math Fluency-Subtraction, Sentence Composition, and Spelling Subtests; in the Low range on the Math Fluency-Addition Subtest; and in the Average range on the Listening Comprehension, Reading Comprehension, and Numerical Operations Subtests. Student’s Oral Language Composite was in the Low Average range, and scored in the Below Average range on the Basic Reading Skills, Reading Comprehension/Fluency, Total Reading, Math Fluency and Mathematics Composites, with an overall Total Achievement also in the Below Average range. (P-4 pp. 3, 23-26; S-2 pp. 3, 23-26)
9. The private evaluator included a comparison of Student’s scores on the WIAT-III between June 2010 and June 2013, including the District’s administration in December 2012. Student’s standard scores increased on most subtests and composites with the exception of Math Fluency-Addition, Math Fluency-Subtraction, Sentence Composition, Essay Composition, and Written Expression. The most significant decline was in Essay Composition (lower by 15), whereas the others were lower by 4 - 7. (P-4 p. 32; S-2 p. 32)
10. The IEE report includes a number of recommendations for Student’s educational program, including strategies to address Student’s needs in the areas of working memory, receptive and expressive language, basic reading skills, reading comprehension, spelling and written expression, math reasoning and calculation, transition skills, and social skills. The Visualizing and Verbalizing<sup>®</sup> program was among the many recommendations. (P-4 pp. 33-39; S-2 pp. 35-39)
11. Student’s Individualized Education Program (IEP) for the time period December 2013 through December 2014 summarized Student’s Present levels of Academic Achievement and Functional Performance; strengths were noted in the areas of phonemic awareness, gross and fine motor skills, behavior, organizational skills, social and communications skills, and self help skills; with needs indicated in the areas of reading fluency, reading comprehension,

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<sup>5</sup> The private evaluator also noted the possibility of practice effects due to the short passage of time between the WAIS-IV administrations in December 2012 and June 2013. The evaluator concluded, however, that practice effects did not significantly affect the cognitive testing in the IEE. (P-4 p. 15; S-2 p. 15)

algebra skills, following written or verbal directions, and improving pragmatic language skills. (P-6 pp. 11-19)

12. Student's current IEP provides for transition programming toward a goal of competitive employment in the cabinetmaking field. There are also provisions for attending the career center vocational-technical program and completing transition skill "packets." Other annual goals address reading fluency, reading comprehension, solving algebraic equations, and improving pragmatic language skills. This IEP includes a number of program modifications and items of specially designed instruction related to, among other things, testing accommodations, instructional strategies, and instruction on and practice with following directions. Speech/language therapy is included as a related service. (P-6)
13. With respect to Student's reading program, Student is currently provided direct instruction to address reading fluency, reading comprehension, and vocabulary in the learning support classroom for one period each day. Student also is in a regular education English class and receives learning support for that class as needed. (N.T. 74-77, 84, 86-87, 89-90, 94-95, 106-08, 118, 121, 123)
14. Student is currently in a regular education Algebra I class. Student receives learning support for that class as needed. (N.T. 90-91)
15. Student receives speech/language therapy in a small group for forty minutes once during each six-day cycle. The speech/language pathologist currently works with Student on social and pragmatic language needs, including perspective taking and responding appropriately to feedback from others. (N.T. 127-33, 140; P-6 p. 34)
16. Student attends the county career center in a vocational-technical program for half of the school day where Student is learning cabinetmaking. The IEP team has determined that for the 2014-15 school year, Student will continue to attend the same career center vocational-technical program for the entire school day in order to master more skills in the cabinetmaking field. (N.T. 97-98, 102-03, 112, 120)
17. Student's IEP team met in February 2014 to discuss Student's ESY program. The District proposed that Student's 2014 ESY program would address transition (employment) skills; mathematics remediation related to Student's vocational-technical program (measurement and conversion of measurements, and creating a reference guide); reading fluency, reading comprehension, and vocabulary; and speech/language therapy once per week focused on pragmatic/social language skills. The District also offered Student a paid employment opportunity during the summer but not as part of Student's ESY program. The nature of the paid employment opportunity would depend on the District's needs at the time. (N.T. 26-29, 84-86, 96-102, 116-17, 119, 131-32, 139-40; P-6 pp. 35-37; S-4 p. 2)
18. Student's prior ESY programs included paid employment opportunities performing work such as cleaning out lockers, stocking books, making photocopies, and unpacking boxes and categorizing their content. (N.T. 78-80)
19. Student's Parents would like Student to use the summer to attend a private learning center located approximately one hour and fifteen minutes from Student's home. (N.T. 34-37)

20. The District provided a Notice of Recommended Educational Placement (NOREP) for the proposed ESY program on or about February 12, 2014. This form indicated that the team considered but did not propose the private learning center programs. The Parents did not approve the NOREP. (P-7; S-4)<sup>6</sup>
21. Student has difficulty sounding out new, difficult words with multiple syllables, but is generally able to do so. At times Student finds it necessary to re-read materials with difficult words in order to understand the passage. (N.T. 71-72)
22. Student has never attended any programs at the private learning center, although Student has been tested there on several occasions beginning in 2010. (N.T. 38, 50-51; P-8, P-9)
23. The Director of the private learning center where Student has been tested recommended an intensive, 160-200 hour program for Student over the summer of 2014. She suggested two specific, research-based programs that would focus on phonemic awareness and symbol imagery to address word attack, word recognition, spelling, and reading rate, accuracy, and fluency; as well as on reading comprehension to include vocabulary, verbal expression, and critical thinking and writing. (N.T. 55-59; P-10)
24. The recommended private learning center programs would not address social skills, except to the extent that Student's expressive language and listening comprehension skills would be addressed. (N.T. 60-61)
25. The recommended private learning center programs would not address math needs, except to the extent that Student's reading comprehension and symbol imagery skills might improve basic math skills. (N.T. 61-62, 65-66)
26. Student is willing to attend the private learning center programs daily this summer, including the amount of travel time in each direction. (N.T. 35-37, 39, 73)

## **DISCUSSION AND CONCLUSIONS OF LAW**

Broadly stated, the burden of proof consists of two elements: the burden of production and the burden of persuasion. The burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).<sup>7</sup> Accordingly, the burden of persuasion in this case rests with the Parents who requested this hearing. Nevertheless, application of this principle determines which party

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<sup>6</sup> For reasons unclear on the record, there are two NOREP forms for the 2014 ESY program signed by one of the Parents, one dated February 21, 2014 (S-4) and one dated May 13, 2014 (P-7). Both indicate parental disapproval.

<sup>7</sup> The burden of production, "i.e., which party bears the obligation to come forward with the evidence at different points in the proceeding," *Schaffer*, 546 U.S. at 56, relates to the order of presentation of the evidence.

prevails only in cases where the evidence is evenly balanced or in “equipose.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers, as fact-finders in these administrative proceedings, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). This hearing officer found each of the witnesses to be generally credible and the testimony as a whole on matters important to deciding the issues in this case was essentially consistent. Everyone agrees that Student is eligible for ESY services, and the disagreement is limited to the parties’ views on whether the proposed ESY program proposed is appropriate to meet Student’s individual needs.

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to children who are eligible for special education. 20 U.S.C. §1412. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary*

*Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). This FAPE requirement extends to provision of ESY services as necessary for the child. 34 C.F.R. § 300.106(a)(1). Pennsylvania sets forth a number of criteria that IEP teams must consider to determine whether a student is eligible for ESY. 22 Pa. Code § 14.132(a)(2). If the student is eligible, the team must also determine the services to be provided. 22 Pa. Code § 14.132(a)(1). In determining whether a proposed ESY program is appropriate, the general principles applicable to special education must be applied. Public agencies may not unilaterally limit the type, amount, or duration of ESY services. 34 C.F.R. § 106(a)(3). However, ESY services must not be based on a desire or need for a program that “may provide educational benefit, [but] are not required to ensure the provision of a free appropriate public education.” 22 Pa. Code § 14.132(c)(3). Additionally, ESY services must be provided in accordance with the child’s IEP. 34 C.F.R. § 106(b).

In the proposed ESY program, the IEP team determined that Student demonstrates needs relating to transition skills, mathematics remediation, reading fluency, reading comprehension, vocabulary, and pragmatic/social language skills. These needs are well documented in the record, and are logical areas for Student to continue to maintain, or work toward improving, in anticipation of the programming proposed for the 2014-15 school year. The IEP itself includes goals to be addressed during the ESY program that specifically target maintenance of skills for each of those identified needs. (P-1, P-6; S-6) Viewed in the context of the record as a whole, including the plan for Student’s educational program in the final school year of eligibility, the District’s ESY program appears to be reasonably calculated to provide meaningful educational benefit to Student, although the transition portion of the program is further addressed below.



The Parents' concern with the proposed ESY program is that it is not intensive enough to allow Student to improve Student's reading ability to a much higher grade level than Student currently demonstrates. (N.T. 23-26, 34-36, 181-85) The Parents, as well as Student, are clearly convinced that the suggested rigorous private program where Student has been tested several times over the course of the past few years will provide the targeted and individualized instruction that will enable Student to read higher level materials in the final public school year and beyond. Student must be commended for Student's willingness to devote the summer to completing the suggested private learning center program.

The Director of the private learning center testified to the recommended program that includes a significant number of hours over the course of the summer to address word attack, word recognition, and spelling; reading rate, accuracy, and fluency; and reading comprehension to include vocabulary, verbal expression, and critical thinking and writing. She suggested that this program would begin with phonemic awareness skills, in essence taking Student back to the very basics of learning how to read.

One major difficulty with this recommendation, however, is that while Student might indeed benefit from this intensive reading program, the record does not support a conclusion that Student needs a program that will begin with acquisition of phonemic awareness skills. The evidence presented by the District persuasively establishes that Student does not have this need. Moreover, even the private evaluator who conducted the IEE in June 2013 did not indicate that Student lacks phonemic awareness skills and requires a program to teach them. Although this evaluator did recommend one of the programs proposed by the Parents and private learning center for this summer (P-4 p. 35; S-2 p. 35), she did not imply that this program was the only one that would meet Student's needs; indeed, this evaluator made a number of other

recommendations for Student. (P-4; S-2) Furthermore, and again recognizing that it might be beneficial for Student to attend the private program, it is also possible that Student will not improve Student's reading abilities, particularly to the level which the Parents would like to see, even with this specific intensive intervention.<sup>8</sup> Simply put, it would be speculative to conclude that Student's reading abilities would significantly improve<sup>9</sup> by attending the proposed private program rather than the District's ESY program.

Even more critically, the private program proposed by the Parents will not address other areas that are important for Student to maintain over the summer as Student approaches this final school year, including mathematics remediation,<sup>10</sup> transition skills, and social/pragmatic language. These omissions are particularly concerning in light of the well-documented evidence relating to Student's continuing weaknesses in social and pragmatic language skills. Based on the description of the private program (N.T. 55-56), Student would have little opportunity for interactions with anyone other than the one-on-one instructor. For all of these reasons, this hearing officer will not order the District to fund the private program for Student as provision of ESY for the summer of 2014.

There are, nevertheless, concerns with the ESY program proposed by the District. The record as a whole, including Student's own testimony, compels the conclusion that Student is settling for, rather than making an informed choice of, a transition plan with a goal toward employment in the cabinetmaking field. Student is unquestionably convinced that Student's

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<sup>8</sup> Much of the testimony related to grade-equivalent scores on various assessments Student has taken. It is important to recognize that grade-level scores are a type of developmental scores that must be interpreted cautiously and carefully, as they can be misleading. Salvia, J., Ysseldyke, J., & Bolt, S., *Assessment in Special and Inclusive Education* (11<sup>th</sup> ed. 2010) at 40-41; Sattler, J. M., *Assessment of Children: Cognitive Applications* (5<sup>th</sup> ed. 2008) at 104-106. However, the Parents' concerns with Student's weaknesses on many of the assessments conducted by the private learning center are supported by other derived scores on those measures.

<sup>9</sup> It merits mention that, overall, Student's performance can be, and has been, variable and inconsistent over time.

<sup>10</sup> The testimony regarding the possible effect of the private program on Student's basic mathematics facts (N.T. 61-62, 65-66) does not establish that this area of need would be addressed to a meaningful extent.

reading and mathematics skills are not sufficiently developed to permit a possible occupation in the field of computer animation, graphics, or programming; and that with intensive intervention, Student could develop those requisite skills. Despite the varying explanations given for why Student's transition plan does not even tangentially relate to the computer field, there is a significant disconnect between Student's goals for post-secondary life and Student's current transition plan. Thus, the portions of the District's ESY program which relates to Student's vocational-technical program skills and mathematics remediation are, at best, premature. Student is about to enter Student's last year of public school which, as of this writing, will be devoted entirely to a field that Student does not appear certain Student wishes to pursue.

This is not to suggest that school districts are required to provide transition programming that is directed toward a student's main interest, or to ensure employment experiences that are solely related to a student's first choice. Many employment skills are easily transferable across settings and environments. However, in this case, and as the Parents correctly point out, this summer will be the last opportunity for Student to be provided with any academic instruction, or any transition programming outside of the vocational-technical cabinetmaking program. The computer field is vast and ever-changing, and the record does not establish that Student has been provided with an opportunity to meaningfully explore that primary interest in developing the plan for Student's transition to post-secondary life. The IEP team will, therefore, be directed to reconvene with Student and Student's Parents to determine a plan for permitting Student the opportunity to fully explore and consider transition programming related to computer-related skills, including employment and post-secondary education; as well as to determine whether Student's current transition and mathematics goals are appropriate, and, if necessary, to revise

those portions of the ESY program. The team should further consider whether revisions should also be made accordingly to the IEP for the 2014-15 school year.

### **CONCLUSION**

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District will be required to convene a meeting of the IEP team to revisit Student's transition and mathematics programming for the summer of 2014. The District will not be ordered to fund Student's attendance at the private program.

### **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. Within ten days of the date of this Order, a meeting of Student's IEP team, including Student and Student's Parent(s), shall convene to reconsider Student's transition and mathematics goals consistent with the above, and to make appropriate revisions, if necessary, to the 2014 ESY program.
2. The District is ordered to take no further action.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed.

*Cathy A. Skidmore*

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Cathy A. Skidmore  
HEARING OFFICER

Dated: May 24, 2014