

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: J.C.

ODR #15167 / 13-14-AS

Date of Birth:
[redacted]

Date of Hearing:
July 8, 2014

OPEN HEARING

Parties to the Hearing:
Parent[s]

Representative:
Jason Fortenberry, Esquire
Sonja Kerr, Esquire
Public Interest Law Center of Philadelphia
1709 Benjamin Franklin Parkway
Philadelphia, PA 19103

School District of Philadelphia
440 N. Broad Street
Philadelphia, PA 19130

Brian Subers, Esquire
Fox Rothschild
10 Sentry Parkway, Suite 200, PO Box 3001
Blue Bell, PA 19422

Date Transcript Received:

July 10, 2014

Date of Decision:

July 21, 2014

Hearing Officer:

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

Background

Student¹ is a [beyond teenaged] student who is eligible for special education pursuant to the Individuals with Disabilities Education Act [IDEA] and Pennsylvania Chapter 14 under the classification of Autism and Intellectual Disability.

The current matter concerns an expedited due process request from the Parents who disagree with the District's proposed Extended School Year [ESY] program for summer 2014, alleging that it is inappropriate on procedural and substantive grounds. They are requesting compensatory services in the form of reimbursement for a two-week summer program they unilaterally chose for Student for part of the summer. They intend to send Student to the District's ESY program for the remaining weeks ESY is offered.

Issue²

Is the ESY program the District offered to Student for summer 2014 procedurally and substantively appropriate?

If the ESY program the District offered is not appropriate, is Student entitled to compensatory education services, specifically in the form of reimbursement to the Parents for the summer program they chose for Student, or in any other form?

Findings of Fact

1. Student is an eligible student and resides with the Parents within the boundaries of the District. Student attends a District public high school and will enter 12th grade in the fall.³
2. Student's IEP team met on February 19, 2014. Parents⁴ were provided a copy of the Procedural Safeguards. [NT 30-33, 83; S-2]
3. Student has been attending ESY programming since age six. [NT 64]
4. The IEP indicated that Student was eligible for ESY for summer 2014. [NT 84-85; S-2]
5. The ESY portion of the IEP addressed the following annual goal: Given real world functional and informational reading activities including written job directions,

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

² The issue of ESY for summer 2014 was one of several issues addressed in the Parents' complaint filed June 23, 2014. The hearing was bifurcated because current ESY issues are handled through an expedited process whereby a hearing must be held and a decision rendered in 30 calendar days. The remainder of the issues in the complaint will be addressed on a subsequent date. The new case number for that hearing is assigned ODR #15210/13-14-AS.

³ [Footnote redacted to remove potentially personally identifiable information]

⁴ "Parents" is used throughout because even though Student's mother was the principal participant she acted on behalf of Student's father as well.

- Student will read the selections and follow out directives with indirect verbal cues. Student will read job directions and follow through on directives with indirect verbal cues and 1 physical model. Student will demonstrate the who, what, when, and where of the task at hand with mastery on 5 out of 5 trials at 70% by 02/23/15. [S-2]
6. The ESY portion of the IEP addressed the following annual goal: Given real world functional math situations encountered on a daily basis such as purchasing food items, clothing, and/or CDs and other items of interest, Student will use money to make purchases by completing the following steps: read the amount total on the cash register; take out appropriate money and use the round up to the nearest dollar method. Student will then read the amount of money due to Student stated on the cash register with mastery on 5 out of 5 trials at 80% by 02/23/15. [S-2]
 7. The ESY portion of the IEP addressed the following annual goal: Given classroom and vocational training environments in which additional information is needed, Student will indicate a problem, request clarification and/or assistance from the appropriate individuals, given a gradual reduction of models and direct and indirect verbal prompts, which will enable Student to make progress toward Student's goal of increased independence in post-secondary opportunities with mastery on 3 consecutive trials at 70% by 02/23/15. [S-2]
 8. Speech/language services provided for in the proposed ESY program are incorporated into the ESY school day rather than being a pull-out service. [NT 56-57, 61; S-2]
 9. At the February IEP meeting the ESY portion of the IEP was not specifically discussed. [NT 64-65]
 10. An accompanying Notice of Recommended Educational Placement [NOREP] for the February IEP was provided to the Parents. The Parents signed the NOREP without indicating approval or disapproval. [NT 32-33, 85; S-2]
 11. In mid-March the Parents wrote to the teacher in the home/school communication book asking the teacher to send a copy of Student's ESY paperwork⁵ because the family needed to plan for the summer and wanted to be sure there was not a scheduling conflict. The teacher wrote a note to the Parents saying that summer school was from July 1, 2014 to August 7, 2014. [NT 28-29, 68; S-15, S-16, P-8]
 12. On March 11, 2014 Student's teacher sent a note to the Parents in the communication book asking about approval of the IEP. On March 16, 2014 the Parents responded that they had concerns about the reading schedule, instruction and who was delivering it. There was no mention of a problem with ESY. [NT 88-89; S-16]
 13. On March 17th the Parents wrote and thanked the teacher for answering most of their questions, and said they still did not understand what AIMSweb is about.

⁵ By paperwork the Parents were referencing the form issued by the District on which parents indicate whether or not their child will be attending ESY. [P-8]

- They asked when they had to sign and return the IEP. Again there was no mention that the Parents were concerned about ESY. [NT 89-90; S-16]
14. The Parents returned the NOREP on March 18, 2014 indicating disapproval. The reason for disapproval was written as follows: “Everything we discussed at the IEP (Before [*sic*] and during) meeting wasn’t in [Student’s] current proposal. Everybody can review all conversations and written comments before next meeting”. There was no indication that the disapproval was based on the ESY portion of the IEP. [NT 35-36; S-3]
 15. Following the Parents’ March 18th, 2014 rejection of the NOREP, Parents and the District agreed to hold a meeting to address the Parents’ concerns. The meeting was held on April 30th, 2014. Attorneys for the Parents and the District were present. [NT 36; S-6]
 16. At that meeting, the School District agreed to retain JEVs Career Strategies to conduct a transitional assessment of Student, the Parents signed a Permission to Evaluate, and the District did retain JEVs. The JEVs evaluation was scheduled between the Parents and JEVs and it is ongoing.⁶ [NT 36-37, 94-96; S-8]
 17. At the April 30th meeting the Parents did not discuss any disagreement with the ESY program offered in the February 19th IEP. There was no discussion of ESY at the April 30th meeting. [NT 38, 67, 72-73, 75]
 18. The Parents did not discuss any disagreement with the ESY program with the Special Education Liaison for the building where Student’s proposed ESY program was to be held. [NT 37-38]
 19. Following the April 30th meeting, on May 2, 2014 counsel for the Parents sent a letter to counsel for the District listing “IEP Issues/ Highlights”. There were 11 items. Item number 10 was titled “ESY”. Unlike items that were more specifically described in the letter, the ESY item stated: “Parents objected that ESY was not appropriate. District stated that, like all children, student would be offered ESY services for the summer, but offered no details.” [NT 26-27; P-4]
 20. At the time of the April 30th meeting the Parents had the ESY eligibility information from the February 19th IEP including goals and objectives, and had the dates, days and times of the ESY program. [S-2, P-8, P-16]
 21. As per discussions at the April 30, 2014 meeting, the District prepared a revised IEP dated May 12, 2014. The ESY portion of the IEP was the same as that in the February IEP. The goals for Student’s ESY program were taken directly from the goals in the body of the IEP for the 2014 – 2015 school year. Not all of the goals were selected from the total number of goals provided in the IEP for the regular school year. The

⁶ The Parents, with no objection from the District, subsequently asked the hearing officer for a later date [specifically late September/early October] than the one established in August for the second part of the bifurcated matter in order for the JEVs evaluation to be completed and considered. This request was granted.

- goals that were chosen for ESY relate to academic subjects such as functional reading and functional mathematics, both applied to real-world vocational and purchasing situations, as well as a goal for self-advocacy applicable to various situations including a workplace. [NT 37-38, 72, 94; S-11/P-6; P-4]
22. Following the issuance of the NOREP that accompanied the May 12th IEP, on May 20, 2014 the Parents returned the NOREP, not signed as approved, and requested an informal meeting to discuss the recommendation. Specifically, the Parents wrote: “We agree with some of Student’s goals. Ms. K[]⁷, we would like an informal meeting with you. We also want to discuss how you arrived at some of the percentages”. [NT 92; S-14]
 23. On that NOREP the Parents did not express any specific concerns or problems with the ESY program described in the May 12th IEP which the NOREP accompanied. [NT 92; S-14]
 24. The informal meeting was not held for reasons that are not in the record. [NT 92-93]
 25. When the Parents filed their due process complaint on June 23, 2014 they included the issue of dissatisfaction with the offered ESY program among other issues.
 26. The Parents want ESY to work on money skills and travel training. Between February 19th and the day of the hearing the Parents did not tell the District that they wanted travel training to be part of Student’s ESY program for summer 2014. [NT 77-79]
 27. The Parents approve of the money goal in the IEP, and they also approve of the self-advocacy and reading goals if they are worked on at a job in the community. [NT 98-100]
 28. On July 1, 2014, the first day ESY programming began, Student’s mother went to the school where Student was assigned for ESY and spoke to the ESY coordinator indicating that Student would be attending a summer camp for two weeks and then commence attending the District’s ESY program. The mother again visited the ESY building on July 3rd. On neither occasion did she discuss concerns about the ESY program with the ESY coordinator. [NT 112]
 29. From June 22nd through July 3rd the Parents sent Student to [redacted], a residential program at [Redacted] College. Students are taught how to cook, how to clean, how to shop - skills for independence. The program cost twenty-seven hundred dollars [\$2,700]. [NT 81-82]
 30. Student worked in the vegetable garden at the program and they taught the students how to catch a train. [NT 97]
 31. Student is attending the District’s ESY program for the remainder of the term. [NT 83]

⁷ Student’s autistic support teacher.

32. Student is placed in an autistic support class for students at the high school level. [NT 104]
33. Baselines for weekly progress monitoring are collected by the ESY classroom teacher at the beginning of the ESY program. [NT 119-121]
34. At breakfast and lunch, both of which are provided for children attending ESY, communication skills are addressed, and if needed, eating skills. [NT 123-124]

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). In this matter there were no credibility issues – all witnesses appeared to be testifying honestly and candidly.

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 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]. FAPE is "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). As such, to assure that an eligible child receives FAPE an IEP must be "reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress."

Rowley. ‘Meaningful benefit’ means that a student’s program affords the student the opportunity for “significant learning.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999).

However, under the case law 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: 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. ESY services are meant to keep students’ acquired skills up during the period between the close of school in June and beginning of school in August or September.

Neither party in this matter disputes Student’s qualification for ESY programming. The dispute between the parties centers on the appropriateness of Student’s summer 2014 ESY program. The substance of an ESY program, as is under consideration here, is judged by the standards of appropriateness and FAPE that would govern any aspect of a special education program. In determining whether a district has offered an appropriate ESY program, the proper standard is the same as for a program during the school year - whether the proposed program is reasonably calculated to confer meaningful educational benefit – that is, does an eligible student’s program afford him or her the opportunity for “significant learning.” *Rowley*; *Ridgewood*.

In the 2004 revisions to the IDEA, Congress affirmed its position that *de minimis* procedural violations do not constitute a deprivation of FAPE. The implementing regulations of the IDEA provide that “in matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies (1) impeded the child’s right to a FAPE; (2) significantly impeded the parents’ opportunity to participate in the decision making process...; or (3) caused a deprivation of educational benefits.” 34 C.F.R. § 300.513(a)(2)

Discussion

Parents through counsel explained that their opposition to the District’s ESY program rested on several issues. First, they argue that the type, amount, duration, and programming for Student’s ESY were not discussed at any IEP meeting in any

meaningful way thus denying the Parents meaningful participation. The Parents attended an IEP meeting in February 2014; ESY eligibility and goals for ESY were addressed in the 38-page IEP. Although the Parents maintain that ESY was not discussed at the IEP meeting, there is no indication in the record that they shared any objections to the proposed ESY program with the District. Indicating disagreement with the proposed IEP in March, the Parents offered no additional clarification, only stating that everything that had been discussed before and during the IEP meeting was not in the IEP. Student's mother testified in fact that the ESY portion of the IEP was not discussed. A summary of a subsequent meeting at the end of April, prepared by the Parents' attorney who was in attendance, noted only that "Parents objected that ESY was not appropriate". This statement supplied no further guidance to the District as to Parents' objections, and indeed there is no indication that any discussion of objections the Parents may have had to the proposed ESY program was held given Student's mother's testimony that ESY was not discussed in that April 30th meeting at which the Parents' attorney was present. There is no evidence that any specific objections to the ESY program were ever transmitted to the District before Student's mother testified at the hearing.

The Parents argue that by proposing an ESY program of three days a week for four hours each day within a specific calendar period the District has failed to individualize the plan for Student's ESY services. It is perfectly reasonable for any school district, particularly a large district with a substantial special education population, to establish time parameters for delivery of ESY services over the summer. Availability of buildings, teachers, support staff, and transportation must be established in such a way that every child who is entitled to ESY receives it. The Parents' argument that by offering specific dates, days and times is a "cookie cutter" approach to Student's ESY is rejected – the ESY schedule is no more of a cookie cutter approach than establishing a school year calendar with opening and ending dates, hours of the school day, and holidays or breaks. What individualizes an ESY program are the goals and objectives in the ESY portion of the IEP.

Because the daily program includes providing breakfast and lunch for the children the Parents argue that Student is not being offered the full amount of hours indicated in the plan. Given that proper nutrition is important for learning, and given the high likelihood that many of its children may not receive regular meals during the summer, the District is to be commended rather than criticized for providing food for its children. The District's witness credibly testified that socialization and communication are built into the ESY program as a part of mealtimes. Student requires work in both these areas, and mealtimes are a natural real world situation to acquire and practice these skills that Student will utilize on lunch breaks in future employment situations.

Parents make much of the District's error regarding ESY dates in that the IEP had start and end dates different by a week from the actual start and end dates. The Parents and the classroom teacher cleared this up shortly after the February IEP was issued. I find this a regrettable but harmless error on the part of the District.

Finally the Parents argue that the ESY program fails to address their concerns about individual vocational and transition goals, because a transitional assessment was not completed prior to designing Student's ESY program. The parties agreed to have an outside agency conduct a vocational assessment and this is being done. Although the results of the assessment may be incorporated into a revised IEP, the goals and objectives of the ESY program offered to Student are appropriate as they stand even without the JEVS assessment being completed. Student's IEP goals, objectives and specially designed instruction are based upon the needs Student has demonstrated through assessment and through observation of Student's functional skills. The ESY program is reasonably calculated to assist Student to maintain functional reading skills, functional math skills and concrete self-advocacy skills acquired during the previous school year and prepare Student to deepen these skills in the coming school year.

Conclusion

After considering all testimonial and documentary evidence, for the reasons put forth above I find that the summer 2014 ESY program offered to Student by the District is substantively and procedurally appropriate and I cannot find for the Parents in this matter. Student was not denied FAPE and therefore no relief in any form is due.

Order

It is hereby ordered that:

1. The District's summer 2014 ESY program is appropriate for Student.
2. The Student is not owed compensatory education or any other form of relief for summer 2014.

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

July 21, 2014

Date

Linda M. Valentini, Psy.D., CHO

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