

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

ODR No. 15255-1415AS

Child's Name: Y.K.

Date of Birth: [redacted]

Date of Hearing: 9/12/14

CLOSED HEARING

Parties to the Hearing:

Parents
Parent[s]

Representative:

Parent Attorney
None

School District
Wallingford-Swarthmore
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Date Record Closed:

October 1, 2014

Date of Decision:

October 20, 2014

Hearing Officer:

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student and a younger sibling, both identified as IDEA eligible due to an autism spectrum disorder and speech/language impairment, were also eligible for ESY for the summer of 2014. Parents approved the ESY NOREP in the early spring of 2014, and Student began attending the District ESY program in early July. Student's ESY program consisted of academic instruction in the morning, followed by lunch and an afternoon session focusing on social skills instruction and practice. Student was also to be provided with occupational therapy (OT) and speech/language therapy during the ESY program. The morning session for academic instruction was open to non-disabled peers who needed additional practice in reading, writing and math skills, but the afternoon session (extended day program) was provided only to IDEA eligible students for whom social skills instruction was part of their ESY program.

Because Parents were dissatisfied with the transportation the District provided to the ESY program, and with the social skills component delivered during the extended day program, particularly the peer group, they withdrew Student from the District ESY program after three days and substituted a private summer program that included academic instruction and the opportunity for peer social contacts through recreational activities.

After the District refused Parents' request for reimbursement for the summer program they selected, Parents filed a due process complaint to recover their cost. Because Parents produced insufficient evidence that the District's ESY program was inappropriate for Student, rather than less desirable than the private program, and because the private summer program did not include formal social skills instruction, identified as an ESY need for Student, Parents' reimbursement claim must be denied.

ISSUES

1. Did the District fail to offer an appropriate ESY Program for Student in that:
 - a. there was insufficient contact with peers with whom Student could practice appropriate social skills, and
 - b. the transportation provided by the District was inappropriate
2. Did the District fail to sufficiently permit and consider Parent input into selecting the ESY program?
3. If the District ESY program was inappropriate, should the District be ordered to reimburse Parents for the private summer program that they selected and substituted for the District ESY program?

FINDINGS OF FACT

1. [Student], a [pre-teenaged] child, born [redacted], is a resident of the School District and is eligible for special education services. (Stipulation, N.T. p. 18)
2. Student has been identified as IDEA eligible in the autism and speech/language impairment disability categories, in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(1), (11); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p. 19)
3. In March 2014, Student's IEP was revised to include ESY services during the summer of 2014. All speech OT and social goals were selected for ESY. (S-36 pp. 1, 29, 30)
4. The District proposed an ESY program consisting of the three hour elementary summer program for academic instruction in the morning followed by a two hour (extended day) afternoon session. (S-36 p. 30)
5. Student was also to receive one 30 minute session/week of speech/language and 30 minutes/week of OT services during the ESY program. Parents signed a NOREP approving the ESY program on April 1, 2014. (S-36 p. 30, S-37 p. 3)
6. The District's elementary summer program, conducted only in the morning, includes both IDEA eligible students receiving ESY and other District students who needed extra academic instruction and support. (N.T. p. 327)
7. The District's extended day summer program is directed toward social skills instruction and development. The District also operates a separate life skills program in the afternoon for students whose ESY programs include those services. Because the ESY afternoon sessions are reserved for students whose IEPs provide for ESY social skills or life skills services, no non-disabled peers participated in afternoon summer sessions or transportation following the afternoon programs. (N.T. pp. 328, 329, 342, 343)

8. Before the 2014 ESY program began, Parents notified the District of their dissatisfaction with the ESY transportation plan, which provided for the students attending just the morning summer session, including both IDEA eligible and non-disabled students, to be transported to and from the sessions in a separate bus from the students who also participate in the afternoon summer programs, all of whom were eligible for ESY, and therefore, are IDEA eligible. Parents considered the separate bus transportation to be stigmatizing, did not consider the peer group on the bus to be appropriate for Student, and were concerned that another sibling rode a different bus. (N.T. pp. 25, 48, 49, 253, 254, 316, 329, 330)
9. The District's rationale for the separate transportation arrangements was logistical, arising from timing concerns once the busses arrived at the school where ESY services are provided. There are also separate drop-off and pick-up instructions for students who are transported by car and those transported by bus, since car traffic is directed to only one entrance for all children attending either the morning session or both the morning and afternoon sessions. (N.T. pp. 328, 329, 335—338; P-25)
10. When Student began attending the District ESY program on July 7, 2014, Student was again assigned to the bus for ESY eligible students only. (N.T. p. 21; S-17)
11. When Parents contacted the District about the bus situation, the District changed the bus assignment immediately. The next day, Student rode the same morning bus as the children in the morning program only. (N.T. pp. 254, 331; S-17)
12. On the days Student attended the District ESY program, Student received instruction in reading, writing, math and a "special" during the morning session. In terms of both content and peer group, the morning ESY session was similar to the instruction Student receives in a regular education classroom during the school year. (N.T. pp. 119—127; S-46)
13. Parents acknowledged that Student's inclusion in the morning session of the District's ESY program was appropriate for Student. (N.T. p. 96)
14. The extended day afternoon session focused on social skills, which was taught by a special education teacher using strategies based on the Michelle Garcia Winner social skills curriculum, and also addressed individual student social skills needs. Activities that fostered social skills development included recreational activities (crafts, games and swimming) and community-based activities, such as a trip to a local supermarket for a "behind the scenes" tour. (N.T. pp. 207, 210, 240—242; S-24)
15. Parents were immediately dissatisfied with the afternoon program. Parents were primarily concerned about the absence of non-disabled peers in the class. (N.T. p. 53)
16. The afternoon teacher and other District staff considered Student to be on a similar level as the other children in the extended day class with respect to social skills needs based

upon the social skills goals of the children in the class, as well as the ability of all the children to participate in the class. Parents did not observe the afternoon class. (N.T. pp. 92, 229, 230, 293, 342, 343, 345)

17. In April 2014, Parents had learned about a private school summer program that they believed would also meet Student's academic and social skills ESY need. Because of their dissatisfaction with the District extended day program, they requested that the District pay for that program, but the District did not agree that it would meet Student's needs and refused to fund it. (N.T. pp. 352, 353; S-17)
18. Parents considered having Student attend the District ESY program for the morning session only, but speech/language and OT services were scheduled to be provided during the afternoon sessions of the District ESY program. (N.T. p. 96)
19. When Parents requested that Student's related services be provided in the morning, the District's ESY Program Director informed Parents that he believed that the schedule change would not be possible due to the therapists' schedules. (N.T. pp. 97, 249, 250)
20. After Parents' request was presented to the therapists, however, they determined that they could rearrange their schedules and provide both OT and speech/language services to Student in the morning. (N.T. pp. 250, 251, S-19)
21. After the related services schedule change was arranged with the therapists, the ESY director informed Parents by both e-mail and voice mail message, followed by a second phone call on Monday of the second week of the ESY program (N.T. pp. 97—99, 251, 252; S-19)
22. On the previous Friday, Parents had enrolled Student in the private school program and paid for it. Student began attending the private school program the following Monday, which was also the beginning of the second week of the District ESY program. (N.T. pp. 252, 353, 359; P-27)
23. The private school program included academic instruction in reading and writing. The instruction did not follow Student's IEP. There was no formal social skills instruction. Parents believed that Student derived a significant benefit from the program, particularly with respect to engaging with peers. (N.T. pp. 94, 95, 354, 361, 362; P-30)

DISCUSSION AND CONCLUSIONS OF LAW

Legal Standards

Before explaining why the record in this case does not support Parents' claim for reimbursement for the summer program they provided to Student, it is important to review the general and specific legal standards that must be applied to the assessment of the evidence.

1. FAPE

Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, *et seq.*, and in accordance with 22 Pa. Code §14 and 34 C.F.R. §300.300, a child with a disability is entitled to receive a free appropriate public education (FAPE) from the responsible local educational agency (LEA) in accordance with an appropriate IEP, *i.e.*, one that is “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.” *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982). “Meaningful benefit” means that an eligible child’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). Consequently, in order to properly provide FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. *Rowley; Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993). An eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a “trivial” or “*de minimis*” educational benefit. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3rd Cir. 1988).

Under the interpretation of the IDEA statute established by *Rowley* and other decisions, however, an LEA is not required to provide an eligible with services designed to provide the

“absolute best” education or to maximize the child’s potential. *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3rd Cir. 1995).

2. ESY Legal Standards/Nature of the Dispute

An IDEA eligible student’s entitlement to ESY services derives from both federal and state special education provisions. Under the federal IDEA regulations, ESY services are to be provided to an eligible student if necessary to assure that s/he receives a free, appropriate public education (FAPE). 34 C.F.R. §300.106(a)(2). Pennsylvania special education regulations incorporate the federal ESY standard by reference, and in addition, provide explicit guidance for determining ESY eligibility and needs, as well as a timeline for finalizing eligibility and program decisions. *See* 22 Pa. Code §14.102(a)(2)(xi); §14.132 (a)(1), (2); (c), (d), (e).

In this case, however, where there is no dispute with respect to Student’s eligibility for ESY services, or with respect to whether the District followed the procedural requirements for determining ESY eligibility and offering an ESY program, there is no need to explore those matters.

The issues in this case are centered on whether the District ESY program met the substantive requirements for an appropriate ESY program for Student. In general, ESY is designed to reinforce and preserve skills that an eligible student gains during the school year: “An ESY program continues the goals and objectives of the IEP during the summer months, after the school year has concluded, so the student does not regress from one school year to the next.” *L.G. v. Wissahickon School District*, 2011 WL 13572 at *6 (E.D.Pa. 2011) Under Pennsylvania law, school districts are not required to provide ESY based upon “The desire or need for other programs or services that, while they may provide educational benefit, are not required to ensure the provision of a free appropriate public education.” 22 Pa. Code §14.132 (c)(3).

Although this case concerns the specific ESY program the District offered to Student, as well as its implementation, the dispute is fairly narrow, since Parents were dissatisfied with only the afternoon social skills component of the District ESY program. Parents acknowledged that the morning session of the District's ESY program was appropriate for Student. (FF 14)

3. Tuition Reimbursement

To determine whether parents are entitled to reimbursement from a school district for special education services provided to an eligible child at their own expense, a three part test is applied based upon *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985) and *Florence County School District v. Carter*, 510 U.S. 7, 114 S.Ct. 361, 126 L.Ed. 2d 284 (1993). The first step is to determine whether the program and placement offered by the school district is appropriate for the child, and only if that issue is resolved against the school district are the second and third steps considered, *i.e.*, is the program proposed by the parents appropriate for the child and, if so, whether there are equitable considerations that counsel against reimbursement or affect the amount thereof.

4. Burden of Proof

The IDEA statute and regulations provide procedural safeguards to parents and school districts, including the opportunity to present a complaint and request a due process hearing in the event special education disputes between parents and school districts cannot be resolved by other means. 20 U.S.C. §1415 (b)(6), (f); 34 C.F.R. §§300.507, 300.511; *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3rd Cir. 2009)

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion. Consequently, in this case, because Parents

have challenged the appropriateness of the District's ESY program for Student, they were required to establish that the District's program was not reasonably calculated to meet Student's ESY needs.

The Supreme Court limited its holding in *Schaffer* to allocating the burden of persuasion, explicitly not specifying which party should bear the burden of going forward with the evidence at various points in the proceeding. The burden of persuasion analysis affects the outcome of a due process hearing only in that rare situation where the evidence is in "equipoise," *i.e.*, completely in balance, with neither party having produced sufficient evidence to establish its position. *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012)

In this case, although the District took the lead in producing the evidence by questioning most of the witnesses first, the District was not required to prove that its ESY program was better than the program selected by the Parents, or even that it was appropriate. Rather, it was the Parents who were required to prove that the District's program was not reasonably calculated to meet Student's ESY needs, or that a flaw in the delivery of the ESY services or the setting made it inappropriate for Student. Since the legal standards require the District to provide Student with an appropriate program, not the best possible program, there is no inquiry into which summer program is better or more desirable for Student. If the District's program was reasonably calculated to meet Student's need for an ESY program, tuition reimbursement must be denied.

Appropriateness of the District's ESY Program

1. Morning ESY Session/Transportation

Since Parents did not argue that the morning session of the District's ESY program was inappropriate for Student, but challenged only the setting for and content of the social skills component, the question whether Parents were justified in withdrawing Student from the entire

ESY program centers on whether bus transportation on the first day of the 2014 ESY program made the entire program inappropriate for Student.

Before the 2014 ESY program began, Parents informed the District that they disagreed with transportation provided on a separate bus. Although Student was initially assigned to the bus that transported only students who attended the District's afternoon ESY program, when Parents again complained about the transportation, the District agreed that for the morning transportation, Student would be assigned to the same bus as children who attended only the morning session. Nevertheless, the bus transportation on the first day was the initial reason for Parents' dissatisfaction with the District's ESY program, based on their contention that the peer group on the bus was inappropriate. The District, however, acted immediately to change the bus assignment. A situation that lasted, at most, for a brief period on a single day is an insufficient basis for concluding that the District did not provide an appropriate ESY program for Student.

It is not entirely clear whether Parents' claim with respect to transportation also rests on the contention that the afternoon bus transportation was inappropriate for Student because there was no alternative to riding a bus that included only children with disabilities, which resulted in Parents providing Student's afternoon transportation. Regardless, however, such additional claim also would not support a conclusion that the District's ESY program was inappropriate for Student based upon Parents' disagreement with the transportation. They could not reasonably expect the District to provide separate transportation for Student and Student's sibling for the trip home after the extended day program, which was provided only to children with disabilities. Moreover, such an expectation could not support a decision against the District on the appropriateness of the ESY program because it is far beyond what the law requires.

Because Parents have not challenged the content of or the peer group for the morning portion of the District's ESY program, and the transportation issue did not make the program inappropriate for Student, Parents would not be entitled to reimbursement for that aspect of the District's ESY program even if Parents had established that the afternoon ESY services were inappropriate.

2. Extended Day Program/Social Skills Instruction

Parents were dissatisfied with the afternoon social skills component of the ESY program, because unlike the morning program, it did not include non-disabled peers. Parents contended that limiting Student's interactions in the afternoon program to children with disabilities did not provide an appropriate opportunity for Student to practice social skills. Parents also argued that the peer group was inappropriate. Parents, however, never visited and observed the extended day program, and, therefore, had no firsthand knowledge of the other children who were participating in the program. District witnesses, however, were familiar with the other children in the afternoon program, as well as with Student, and testified that Student's social skills and needs were similar to those of the other children in the class. (FF 17)

Parents also argued that Student did not need social skills instruction as part of the ESY program, just the opportunity to practice social skills, for which the private school was better suited because of the inclusion of non-disabled peers for the entire day. There were, however, social skills components to the speech/language goals in Student's IEP on which the ESY program was based. (S-36 pp. 23, 24) The social skills component of the ESY program, therefore, was related to Student's IEP goals. Moreover, if Student did not need a structured social skills program order to maintain appropriate progress in that area of need, Student would likely not have been eligible for the extended day program for social skills development. As

Parents acknowledged, the morning ESY session provided the informal opportunity to practice social skills. The record, however, establishes that the reason for the District's ESY offer of the extended day program, as reflected in the NOREP Parents signed, was to work on Student's IEP goals related to social skills in a more structured setting as well, which the strategies included in the District's extended day program provided. There was no evidence supporting a conclusion that only unstructured opportunities to practice social skills would have met Student's needs.

Parents also contended that riding the bus on the first day of ESY, and participating in the program caused Student to exhibit significant anxiety symptoms. Although Parents asserted that their contention is supported by a September 5, 2014 social worker's report. (P-10) The social worker, however, had no direct knowledge of the reason for Student's symptoms. She simply reported the information she had received from others. Parents' beliefs, whether stated directly or in a report that cannot be objectively confirmed, and no matter how sincerely held, do not provide sufficient evidence that the extended day program was inappropriate for Student.

Although Parents were certainly free to change their minds regarding Student's need for a formal social skills program between the time the NOREP was signed and the ESY program began, or after the program began, Parents' decision does not obligate the District to provide a private program without that component. As noted above, the summer program that Parents selected may have been desirable, but if there is no evidence that it was necessary for Student to receive an appropriate education, the District is not required to fund the private program Parents substituted for the District's ESY services. Parents are, of course, free to provide a summer program they consider better or more desirable, but it must be at their own expense.

Parents also argued that the District's delay in granting their request for Student's related services to be moved from the afternoon to the morning ESY session should be considered a failure or refusal to "release" Student from the extended day program. Parents, however, were free to continue the morning ESY program but remove Student from the afternoon ESY session at any time they concluded that the social skills program was not appropriately meeting Student's needs as, indeed, they did after Student attended the program for three days. Parents' argument suggests that the District's initial refusal to provide Student's speech/language and OT services during the morning session somehow prevented Student from leaving after the morning session of the ESY program and, therefore, supports reimbursement for the private summer program. That argument, however, does not support Parents' claim for reimbursement for the private summer program for several reasons.

First, changing the time of the related services was a contingency created by Parents because they wanted to assure that Student could conveniently receive the speech/language and OT services, which is certainly understandable, but in no way prevented Student from either attending only the morning program, or from receiving the OT and speech services during the summer. In fact, that is what eventually occurred when Student stopped attending the District ESY services entirely. The District reimbursed Parents for their costs to provide the related services. *See S-26.*

Moreover, although the District initially informed Parents that it could not change the time of the related services, by the beginning of the second week of ESY, it had arranged to provide both the speech/language and OT services during the ESY morning session, unaware that Parents had already decided to place Student in the private program. Parents noted that they "repeatedly" asked for the time change, but the entire issue arose and was resolved in less than a

week. The District acted to accommodate Parents' request quickly, and certainly within a reasonable time, especially since there was no evidence that changing the time for the related services was necessary for Student to receive appropriate an ESY program.

3. Parent Participation

It is not uncommon for parents of eligible children to believe that the participation in determining placement and services provided in the IDEA provides far greater control to parents than is actually the case. Numerous court decisions have noted, however, that although parents are members of the IEP team and entitled to full participation in the IEP process, they do not have the right to control it. *See, e.g., Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 657-58 (8th Cir.1999) (noting that IDEA “does not require school districts simply to accede to parents' demands without considering any suitable alternatives” and that failure to agree on placement does not constitute a procedural violation of IDEA). *See also Yates v. Charles County Board of Education*, 212 F.Supp.2d 470, 472 (D.Md.2002) (“[P]arents who seek public funding for their child's special education possess no automatic veto over a school board's decision”); *Rouse v. Wilson*, 675 F.Supp. 1012 (W.D.Va.1987); 34 C.F.R. Pt. 300 App. A, at 105 (“The IEP team should work toward consensus, but the public agency has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive [a free appropriate public education].” *Quoted in Tammy S. v. Reedsburg School Dist.*, 302 F.Supp.2d 959, 976 (W.D.Wis. 2003).

In this case, the basis for Parents' issue concerning participation was not entirely clear, but appeared to be somewhat broader than lack of participation in the process of determining ESY services for Student. The record, in any event, does not support such a claim. Parents engaged in discussions with the District after the initial ESY offer that resulted in the addition of

OT services during the summer. There is no reason to conclude that Parents could not have questioned the need for social skills instruction or how the District's proposed program would be delivered at the time ESY services were initially discussed or at any time before the NOREP was signed.

To the extent that Parents' participation issue was based upon the District's refusal to agree to fund the summer program they selected once they expressed dissatisfaction with the extended day program, that aspect of the claim must also be denied, since the entitlement to public funding depends entirely upon meeting the reimbursement standards. As explained above, Parents did not provide sufficient evidence to establish that the District's ESY program was inappropriate for Student, and, therefore, did not meet the first criterion for reimbursement.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that Parents' claims in this matter are **DENIED**. The School District need take no action to reimburse Parents for the cost of the ESY services they provided to Student during the summer of 2014.

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

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

October 20, 2014