

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
DUE PROCESS HEARING

Name of Child: J.F.

ODR #15531/14-15 AS

Date of Birth:
[redacted]

Date of Hearing:
December 1, 2014

OPEN HEARING

Parties to the Hearing:

Parent[s]

Representative:

Jason Fortenberry, Esq. and Sonja Kerr, Esq.
PILCOP
1709 Benjamin Franklin Parkway, 2nd Floor
Philadelphia, PA 19103

School District of Philadelphia
Office of General Counsel
440 N. Broad Street, 3rd Floor
Philadelphia, PA 19130

Judith Baskin, Esq.
Office of General Counsel
440 N. Broad Street, 3rd Floor
Philadelphia, PA 19130

Date Record Closed:

December 16, 2014

Date of Decision:

December 23, 2014

Hearing Officer:

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

Background

Student¹ is a teenaged student in 8th grade who is eligible for special education pursuant to the Individuals with Disabilities Education Act [IDEA] and Pennsylvania Chapter 14 under the classifications of autism and intellectual disability; Student also has speech/language and motor deficits. Student receives autistic support programming in a District school. The Parents filed this complaint with regard to the Extended School Year program that had been proposed for summer 2014, alleging that the District denied Student a free, appropriate public education [FAPE] on procedural and substantive grounds by denying them meaningful participation in developing their child's ESY program and by proposing an inappropriate ESY program. The Parents are requesting reimbursement for the substitute programs and services they unilaterally procured for Student in summer 2014.

Issue[s]

1. Did the School District of Philadelphia [District] commit a procedural error by significantly impeding the parents' opportunity to participate in the decision making process regarding ESY for summer 2014?
2. Was the ESY program offered to Student for summer 2014 substantively appropriate?
3. Must the District reimburse the Parents for the programs and services they unilaterally procured for Student in summer 2014 in lieu of accepting the District's ESY program?

Findings of Fact²

1. Student is a member of the Armstrong group³ and must have an IEP team review meeting for ESY no later than February 28 of each school year and receive a NOREP containing the IEP team's determination no later than March 31 of the school year. [P-5]

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 testimony of every witness, and the content of each exhibit, was considered in issuing this decision, regardless of whether there is a citation to particular testimony of a witness or to an exhibit.

³ The federal court decision in *Armstrong vs. Kline* (476 F. Supp.583 E.D. Pa. 1979) established the mandate in Pennsylvania for ESY programming for children with any type or severity of disability who meet the court's eligibility standard. According to court guidelines, each LEA must consider ESY programming for students in the Armstrong "target groups" at the time of the annual review of the IEPs. "Target groups" consist of those students with severe emotional disturbance, autism, moderate and severe levels of intellectual disability or multiple disabilities. [P-5: "Extended School Year Services in Pennsylvania" published by the PA Department of Special Education]

2. An IEP had been developed for Student on May 13, 2013, for the period of May 13, 2013 [the end of the 2012-2013 school year], through May 14, 2014 [the majority of the 2013-2014 school year]. A new IEP was due to be in place as of May 15, 2014. [NT 116-117; J-7]
3. During the summer of 2013 ESY programming was provided pursuant to Student's IEP goals. Student's IEP goals were implemented, related services were provided, and progress monitoring was conducted during the summer of 2013. The Parents did not have Student attend the full 18 days of ESY in summer 2013. [S-1]
4. The Parents first requested a meeting on February 25, 2014, to discuss details for ESY during summer 2014⁴. There was never a question about Student's eligibility for ESY services; Student's then-current IEP contained ESY goals and services as had all previous IEPs. [NT 93, 131, 195; J 3, Jp4, J-5, J-6, J-7]
5. On an undetermined date, that may have been prior to or on February 28 2014, but certainly was prior to March 27, 2014, the District issued a form letter that required a response from the Parents as to their intentions regarding enrolling Student in the District's ESY program which was scheduled to run from July 1, 2014 through August 7, 2014 on Tuesdays, Wednesdays and Thursdays from 9:00 am to 1:00 pm.⁵ [J-9]
6. The Parents signed the form, ambiguously indicating both that Student would attend and would not attend; however the Parents also endorsed that Pick Up and Drop Off should be at their home address. The Parents signed the form on March 27, 2013 noting, "By signing this I am not approving the SD ESY program as appropriate for [Student]". [NT 134-135; J-9]
7. The District learned that the Parents' advocate, who was planning to accompany them to the meeting, is an attorney; therefore the District needed to arrange for one of its attorneys to be present so the requested meeting did not take place until May 2, 2014. Although not a formal IEP meeting, participants were both parents, a family friend, the special education liaison, the special education director, and the Network 6 Special Education Director. The Parents presented and the group discussed a proposal for ESY for summer 2014. [NT 28, 30, 96, 137-138, 179-181; S-2]
8. The Parents' proposal outlined their vision of Student's ESY program with regard to four factors: 1) Needs: academic retention of math and English, social skills, community activities and support, speech and AT device usage, occupational therapy; 2) Goals: social skills and community activities - do not need goals

⁴ The Parents wanted to start the process early. They had filed Complaints with the PDE/BSE in June 2012 regarding the summers of 2011 and 2012, and again in September 2013 regarding the summer of 2013. [NT 129-130; J-3, J-4, J-6.]

⁵ Student did not attend all 18 days of ESY in summer 2013.

- “because the parents will be fully responsible for them”, mathematics and English – continue IEP goals, Speech and OT – continue as per the IEP; 3) Program characteristics and providers: Individual tutoring in math and English in the home “provided by those knowledgeable in teaching children with Autism who best learns like [Student] such as the Youth Advocacy Network, speech and OT provided in the home by Youth Advocacy Network or school district, whichever is most conducive for [Student’s] benefit and the least disruptive to [Student’s] summer program environment (adults and students), provide a snapshot of what [Student’s] day will look like in the summer; 4) decide on final program, location, providers, time frame and data collection to determine success of program at the end of the summer. [S-2]
9. An IEP meeting convened on May 13, 2014. The draft IEP contained the District’s proposal for ESY during summer 2014, however, this portion of the IEP was not discussed because the team started reviewing the draft IEP from the beginning of the document and did not get through it all.⁶ [NT 138-140; J-7]
 10. Because the IEP team decision on ESY had not been reached, another IEP meeting was scheduled for June 4, 2014; the Network 6 Special Education Director participated by phone and explained what was being offered. The Parents did not raise any concerns about the appropriateness or inappropriateness of the District’s ESY proposal contained in the IEP. [NT 145-148]
 11. The District’s ESY offer as proposed in the May 13, 2014/June 4, 2014 draft IEP was as follows: Provided with Autistic Support services in a special education classroom for 620 minutes a week for 6 weeks, Student will work on the following Goals: Add/subtract whole numbers [multi-digit problems] with use of direct instruction and a research-based math program; Read with accuracy and fluency to support comprehension – will read text orally and answer questions at a third grade reading level; Know the relationship of the components of a simple spending plan and how that relationship allows for managing expenses and savings; Examine the impact of decisions on personal safety, relationships and group interactions; Given a communications opportunity will demonstrate increased pragmatic language skills. [J-9, J-14]
 12. The District’s ESY offer addresses the needs that were identified in Student’s last evaluation which was completed in May 2013. [NT 62-65; J-5]
 13. Related Services to be provided during the ESY period were as follows: Occupational Therapy 30 minutes per week; Speech/Language Therapy 30 minutes per week; Physical therapy 30 minutes per month; 1:1 Assistance 620 minutes per week. Student would receive ESY in the school where Student’s current 1:1 Assistant is assigned. [J-9, J-14]

⁶ Additionally the Network 6 Special Education Director was not present to discuss the ESY program.

14. The Parents had begun signing Student up for private services where preregistration was required. On May 10, 2014 they paid for a week of full days at a horseback riding summer camp, and on June 3 and June 27, 2014 they paid for four 5-day weeks at [Redacted] Camp, where they had sent Student in 2011, 2012 and 2013. [NT 184; P-1]
15. There was no substantive discussion about Student's individual needs related to ESY programming and what the District would offer other than the discussion of the Parents' proposal on May 2, 2014. At the June 4, 2014 IEP meeting the Network 6 Special Education Director "explained to the Parents about ESY". [NT 45, 146-148]
16. Student's IEP team would not, or could not, engage in any meaningful discussion of alternatives for summer ESY programming, instead deferring to the Special Education Director. [NT 97-98, 125, 131-132]
17. The Parents' wrote the Special Education Director on June 13, 2014, to "understand how we got to where we got." No one from the District responded to the Parents' questions. [NT 148; J-12]
18. The District's final IEP proposal contained in the draft IEP of May 13, 2014/June 4, 2014 was delivered to the Parents on June 19, 2014. [J-9, J-14]
19. Receiving no answer to their June 13, 2014 letter, the Parents wrote the Special Education Director on June 19, 2014, rejecting the District's ESY proposal and stating that they would seek private services at private expense, for which they would seek reimbursement. [NT 150; J-15.]
20. By letter dated June 20, 2014 the Special Education Director informed the Parents that the District believed its ESY offer was appropriate and denied reimbursement for the Parents' unilateral programming. [J-16]
21. The Parents secured the following services for Student to serve as an ESY program for summer 2014: 1 week of horseback riding camp, 4 weeks of camp at a community recreation center, 21 "units"⁷ of tutoring in unspecified subject[s] over a 7-day period by a former teacher who is now a TSS worker, and four sessions of occupational therapy services. The total out-of-pocket costs for the parent-provided services totaled \$2,425. [NT 151-159, J-1, P-1, P-2]

⁷The amount of time comprising a "Unit" is not defined. It appears that 3 units per day of tutoring were provided for seven days. This could translate to 3 hours per day, three 30-minute periods per day, three 15-minute periods per day, etc.

Legal Basis and Discussion

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); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). I found no significant credibility issues in the sworn testimony offered at this hearing, but cannot give credence to the mother's testimony that she did not know prior to receiving the letter at J-9 that Student would be eligible for ESY in the summer of 2014 [NT 160] as Student is a member of the Armstrong class and has had ESY every summer.

FAPE: School districts and other LEAs provide a free appropriate public education [FAPE] by designing and implementing a program of individualized instruction set forth in an Individualized Education Plan (IEP). 20 U.S.C. § 1414(d). The IEP must be "reasonably calculated" at the time it was created to enable the student to receive "meaningful educational benefit", a principle established by 30 years of case law. *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. PA. 1996); *T.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182, 184 (3d Cir. 1988); *Shore Reg'l High Sch. Bd. of Ed. v. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004) (quoting *Polk*); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3rd Cir. 2009); *Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 587 F.3d 176, 182 (3d Cir. 2009); *Rachel G. v. Downingtown Area Sch. Dist.*, WL 2682741 (E.D. PA. July 8, 2011) *aff'd*, 2013 U.S. App. LEXIS 11091 (3d Cir. 2013).

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 FAPE). 34 C.F.R. §300.106(a)(2). 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 procedural and substantive appropriateness of Student's summer 2014 ESY program.

Procedural: 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). See also, *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 565 (3d Cir. 2010) (citing *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 525-526 (2007)).

Congress provided that the parents of students with disabilities would be equal partners in the development of their educational program. To that end, districts must ensure parental participation in the entire IEP process. The record in this matter shows that starting on February 25, 2014 the Parents sought to meet with the District to discuss ESY for summer 2014. The record also shows that the District did not convene a meeting until May 2, 2014 but while participants discussed the Parents' proposal there was no discussion of an ESY program the District was offering. At the May 13, 2014 IEP meeting the team did not get as far in the IEP as the ESY section, but had this not been the case the absence of the Network 6 Special Education Director precluded meaningful discussion in concert with the Parents' proposed program. Finally, when the IEP team reconvened on June 4, 2014, with the Network 6 Special Education Director participating by telephone, her contribution was to basically tell the Parents what's what, with, again, no meaningful IEP team discussion. While all procedural violations do not automatically require a finding of denial of FAPE, violations, as in this case, that significantly impeded the Parent's opportunity to participate in the decision-making process regarding the provision of FAPE clearly result in the denial of FAPE. Although as will be seen below I found the District's substantive offer of FAPE appropriate, and although I found the Parents' proposal inappropriate, there should have been a genuine in-depth IEP team discussion of Student's precise needs for summer programming in terms of targets in areas where regression could most likely be expected to occur and in terms of how those goals would be addressed. I do not mean to imply that the District had to adopt the Parents' proposal, which was decidedly inappropriate, but I do mean that the District had the obligation to conduct a full and meaningful discussion of the child's ESY needs with the Parent. I therefore find that the District did commit a procedural violation in that they denied the Parents meaningful participation in planning their child's ESY program for summer 2014.

Substantive: The substance of an ESY program, as is under consideration here, is judged by the standards for FAPE that would govern any aspect of a student's program and placement. 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*. An ESY program is intended to meet a student's needs in accordance with the goals and interventions in the student's IEP during the school year.

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).⁸

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 Student's ESY services. As I have held in previous matters⁹, I find that it is perfectly reasonable for any school district, but particularly a large district with a substantial special education population qualifying for ESY services, to establish time parameters for delivery of ESY 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. I cannot accept the Parents' argument that offering specific dates, days and times is a “cookie cutter” approach to Student's ESY – the proposed 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 in light of the child's educational needs. However, this is not to be construed as meaning that a school district should not consider adding additional days or hours or weeks to a student's ESY program if the needs of the student warrant such additions in order for the student to receive FAPE.

⁸The Parents have previously filed complaints with the Pennsylvania Department of Education (“PDE”) with regard to ESY. They have previously requested that they be permitted to provide special instruction and therapies at the neighborhood recreation center with typical peers, and they have sought compensatory education as a result. PDE has previously found that no compensatory education was owing as the District provided an appropriate ESY program affording services pursuant to the student's IEP. (J-3, J-4). The distinguishing factor in this matter is the Parents' specific allegation that they were denied meaningful participation in planning the summer 2014 ESY program.

⁹ (ODR #15167-13/14 AS; ODR #14530-13/14 AS)

In reading the total IEP carefully, concentrating on Student's present levels of academic, social, speech/language, motor and life skills functioning I find that the ESY portion dovetails with Student's needs and offers an appropriate program to maintain and advance skills over the summer.

Potential Remedy: When parents reject a program/placement offered by an LEA and seek reimbursement through a due process hearing for their unilaterally chosen program/placement, they not only have to show that the program offered by the LEA was inappropriate, they also have to show that the program they unilaterally chose to substitute for the LEA's proposed program was appropriate. In this case, given the serious procedural violation, even though the District's ESY proposal was substantively appropriate, I would be inclined to provide the remedy of reimbursement in the form of tuition/fees and transportation. However, the Parents' choice of services and providers were for the most part a clearly inappropriate substitute for the District's ESY program. The horseback riding camp was not a therapeutic equestrian camp and on the application the Parents did not note that the child had special needs; the neighborhood rec center camp did not provide educational services that addressed the goals of Student's IEP; the credentials of the tutor the Parents selected are unclear, but the Parents adduced no evidence that she held special education credentials [NT 175-176]. The occupational therapy services represent the only services that I can conclude were likely to have addressed Student's needs, but I do not know if the therapist was following an educational model or a clinical model.

I therefore am choosing to exercise my authority to fashion an equitable remedy for the District's serious procedural error. I am awarding the child compensatory education not to exceed the amount of \$2425.00. This ceiling amount does not represent reimbursement for the services the Parents obtained in summer 2014, rather it is a compensatory education award which may be used at the Parents' discretion up to Student's 21st birthday for any developmental, therapeutic, educational, socialization/recreational or other related services that contribute to the Student's reaching current or future IEP goals.

Order

It is hereby ordered that:

1. The School District did commit a procedural error by significantly impeding the Parents' opportunity to participate in the decision making process regarding ESY for summer 2014.
2. The ESY program offered to Student for summer 2014 was substantively appropriate.
3. The horseback riding camp, the recreation center camp and the tutoring the Parents unilaterally procured for Student in summer 2014 as a substitute for the District's ESY program were inappropriate.
4. As an equitable remedy for the District's having committed a serious procedural violation Student is awarded compensatory education services, the total cost of which may not exceed two thousand four hundred twenty five dollars [\$2425.00].

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

December 23, 2014

Date

Linda M. Valentini, Psy.D., CHO

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