

*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: E.C.

ODR #16000/14-15 KE

Date of Birth:  
[redacted]

Date of Hearing:  
May 18, 2015

OPEN HEARING

Parties to the Hearing:  
Parent[s]

Representative:  
Jeffrey Ruder, Esquire  
Michelle Kline, Esquire  
429 Forbes Avenue Suite 450  
Pittsburgh, PA 15219

Montour School District  
225 Clever Road  
McKees Rocks, PA 15136

Aimee Zundel, Esquire  
Weiss Burkardt Kramer  
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Decision Due Date:  
Date of Decision:  
Hearing Officer:

June 2, 2015  
May 24, 2015  
Linda M. Valentini, Psy.D., CHO  
Certified Hearing Official

## Background

Student<sup>1</sup> is currently in 2<sup>nd</sup> grade and is eligible for special education pursuant to the Individuals with Disabilities Education Act [IDEA] and Pennsylvania Chapter 14 under the classifications of Autism and Speech/Language Impairment. Student is also an individual with a disability as defined under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. The Parents filed this complaint with regard to the Extended School Year [ESY] program that the District proposed for summer 2015, alleging that the proposed ESY program denies Student a free, appropriate public education [FAPE] because it violates the requirement that children with special needs be educated in the least restrictive environment [LRE] appropriate for them and because the District committed a procedural violation, predetermination of Student's placement, that denied the Parents meaningful participation in their child's educational planning. The Parents want Student to attend the inclusive summer program for children with autism and related disorders [hereinafter inclusive summer program] at which the IEP team placed Student for the past two summers.

Because this matter concerns a dispute over Student's ESY services the hearing was initially scheduled under the expedited timeline for ESY hearings, which mandates a period of 30 calendar days from the date of the filing of the Complaint to the issuing of the Decision. The Parents, unopposed by the District, requested a postponement of the original March 23, 2015 hearing date because they were in the process of retaining counsel; they were given the option of "un-expediting" the case which they chose to do. Counsel for the Parents asked permission to file an amended complaint and permission was granted.

Despite this no longer being an expedited matter, the hearing itself was conducted under the protocol for expedited hearings and this decision is being issued as quickly as possible given the need to establish Student's summer programming.

## Issues

1. Is the ESY program the District offered to Student for summer 2015 appropriate?
2. Is the inclusive summer program proposed by the Parents appropriate?

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<sup>1</sup> 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.

## Findings of Fact<sup>2</sup>

### Relevant Student Characteristics

1. Student has been enrolled in the District since Student's 2012/2013 kindergarten school year. [NT 112; P-6]
2. Student's school year placement is in an autistic support classroom but Student is in a regular education setting for 27% of the school day. Student is in the regular education classroom for homeroom, calendar, lunch, recess, science and social studies, and for special events such as field trips, assemblies and parties. [NT 142; P-2]
3. All work is adapted for Student and Student receives one-on-one assistance. According to the May 2014 IEP, when Student is in Computer class using Student's iPad Student is at the same level of skill with the iPad as grade level peers. [P-2]
4. Student takes Student's iPad to science and social studies and according to [Student's] teacher has given presentations with it and has interacted with peers on it." [NT 181]
5. Student is given a half-hour social skills training once a week where students are interacting with peers and learning how to interact in a regular environment. [NT 143]
6. According to the May 2014 IEP Student does not demonstrate behaviors that impede Student's learning or that of others. [P-2]
7. Atypical for some children with autism, Student makes good eye contact, expresses emotion, wants physical contact and is very patient. [NT 112-113]
8. In addition to being on the autistic spectrum Student has verbal oral apraxia whereby deficits in oral motor skills affect speech sound production. [NT 114]
9. Student also has dyspraxia in hands and feet such that intricate motor planning is difficult. [NT 114]
10. Student finds it difficult to go up to peers and initiate a conversation and tends to be quiet. As a result peers tend to gravitate towards Student because Student is quiet and well-behaved. [NT 115]

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<sup>2</sup> The testimony of every witness, and the content of each exhibit, as well as the arguments in the parties' written closing briefs were considered in formulating this decision, regardless of whether there is a citation to particular testimony of a witness or to an exhibit.

11. Student is well-liked by peers in the regular education social studies class. [NT 115-116]
12. Student tends to model behavior of the peers with whom Student is interacting. [NT 117]
13. After conducting a Re-Evaluation a District psychologist issued a report on May 29, 2014 stating the finding that Student's most problematic areas of skill development are related to Communication and Social Skills. [P-6]
14. The District psychologist recommended that social skills should be fostered by direct instruction and teaching Student how to interact through social stories, modeling and role-playing. [P-6]
15. The V-B MAPP Master Scoring Program shows, as of 5-7-15, that Student has two gaps in Play at Level 1 and has mastered only two steps in Play at Level 2. On the Social scale Student has four gaps at Level 1 and has not mastered any Level 2 steps. [S-14]

Predetermination/Parental Participation

16. In a late January or early February<sup>3</sup> text message to Student's teacher, Student's mother asked when she could expect a copy of Student's IEP which she needed for the application to the inclusive summer program which was the previous two years' ESY placement. The teacher indicated that she was "sorry that [she] had not called about ESY yet" noting "we are still waiting on answers from pupil services". [NT 120; S-21]
17. In the next text message in evidence the teacher wrote, "I will send home the IEP today; however, we have a new leaders [sic] in the special education department and we do not know their position on ESY services. That having been said, I cannot guarantee that [the inclusive summer program] will be approved by the District. [S-21]
18. The teacher's next message read, "We have been given the following statement about ESY services this year: If the child is educated in a classroom within the school district the child should participate in our ESY program. Our students need to attend our program." [S-21]
19. The sentence directly following reads, "The rest of the team will probably deny anything else." It is not clear if that last sentence was part of the "statement" the teachers were given or an opinion expressed by the teacher. [S-21]
20. There are children receiving out-of-district 2015 ESY placements but these children also are placed out-of-district for the regular school year with the

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<sup>3</sup> The screen shots of the text messages were not all dated but they are arranged on the page in sequential order.

exception of one or two children who attend District schools but will attend out-of-District ESY programs. [NT 76, 105]

21. The Co-Director of Special Education testified that the “statement” the teacher provided to the Parent was not a policy, that he was not familiar with the “statement” that had been given to the teacher, and that he had not seen the “statement” until he asked to see prior communications after a February 26<sup>th</sup> IEP meeting. [NT 23-24]
22. The Co-Director of Special Education noted that the other Co-Director’s name was referenced in the text, assumed that the teacher’s communication had been with the other Co-Director, and commented that he and his Co-Director were not together every day and that the other could have issued the “statement” without his knowledge. [NT 25]
23. Although an IEP meeting was scheduled for an earlier date it was postponed because of inclement weather and the IEP team met on February 26, 2015. Participants were the mother [by phone], the father, the special education teacher, the regular education teacher and the Co-Director of Special Education who testified at the hearing. [NT 33-36, 121-122; P-3. P-4]
24. At the February 26<sup>th</sup> IEP meeting for ESY, according to the Co-Director of Special Education the Parents presented their case for the inclusive summer program and, “we heard them out. I extended to them what we were doing here that was new and that we wanted to provide a program for [Student] at [the District], we felt it was more appropriate because I remember explaining to them that [the inclusive summer program] was a summer camp and not an Extended School Year program. And that was a concern of mine. So that was the discussion. And we presented the NOREP, to make a long story short, and the Parents refused to sign it.” [NT 83]
25. The Parents had no input before or during the February 26<sup>th</sup> IEP meeting about their child’s 2015 ESY goals. [NT 125, 182]
26. The Parents’ desired goals for their child for 2015 ESY are communication, socializing with peers, interacting, participating, and listening. [NT 125]
27. The [local] Intermediate Unit [IU] provides an ESY Resource Brochure that listed the inclusive summer program, among other listings.<sup>4</sup> [P-8]
28. The father at the February 26<sup>th</sup> IEP meeting asked if there were other programs the District would consider. The District did not consider or offer any of the summer programs for typical children referenced by the IU that could, for example, also implement a child’s IEP and/or address needs of children who are autistic. [NT 43-47, 127; P-9, P-11]

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<sup>4</sup> [Website redacted.]

29. At the February 26<sup>th</sup> IEP meeting the District presented the Parents with a prepared Notice of Recommended Educational Placement [NOREP] that noted Student's eligibility for ESY services and that the services will be "at [the] School District". The IEP also noted that the only other Option Considered and rejected was "No ESY Services". [NT 42-43; P-4]
30. The Parents did not approve the District's recommendation for ESY services and requested mediation and a due process hearing. [NT 126-127; P-4]

#### The District's ESY Program

31. The District maintains that any ESY program that does not utilize the Verbal Behavior [V-B] approach is not appropriate for Student because Student needs to continue to work on the V-B goals addressed during the school year. [NT 48-49]
32. The District is not yet certain who would be teaching Student in its proposed 2015 ESY program, although it is likely to be a V-B trained teacher. However, even if a V-B trained teacher is not hired for the program the Co-director of Special Education believes that the District could still offer FAPE because it could still help Student master the ESY goals. [NT 101]
33. Student's goal for attention/following directions<sup>5</sup> as set out in the May 2014 IEP which governed most of the school year just ending was: During structured therapy activities Student will listen actively and respond to others by following directions of increasing complexity with 70% accuracy over 3 sessions [objectives were pointing to pictured items, matching similar pictured items, giving requested pictures pointing to named pictures]. [P-2]
34. Student's goal for listening, attending and responding to others as set out in the May 2014 IEP was: During therapy activities Student will listen and respond to others with 70% accuracy over 3 sessions [objectives were responding to social greetings and farewells, indicating preferences from an array of activities/items, maintain attention to tasks presented in the speech room]. [P-2]
35. Student's goal for handwriting as set out in the May 2014 IEP was: Student will copy first and last name given verbal cues in three of four opportunities [objective was imitation of first and last names]. [P-2]
36. Student's goals for fine motor skills as set out in the May 2014 IEP were: Student will cut out an irregular shape within ½" of the guidelines in three out of four opportunities [objective was cut out irregular shape within 1/2" of guidelines given hand-over-hand assist]; Student will engage the zipper on a coat in three out of four opportunities [objectives were engaging the zipper given fading hand-over-hand assist and visual and verbal cues, and engaging the zipper given fading verbal and visual cues]. [P-2]

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<sup>5</sup> The hearing officer discerned the purposes of and labeled the goals.

37. Student's goal for literacy as set out in the May 2014 IEP was: Independently identify uppercase and lowercase letters of the alphabet with 75% accuracy across three consecutive sessions [objectives were identify uppercase letters from a choice of 6, match lowercase letters, identify lowercase letters from a choice of three, identify lowercase letters from a choice of 6]. [P-2]
38. Student's goal for communication as set out in the May 2014 IEP was: Use sign language to communicate wants and needs for 10 different items without prompting for three consecutive occurrences across two days [objectives were use sign language to communicate wants and needs (bathroom, eat, drink), use sign language to communicate if hurt, use sign language if help needed]. [P-2]
39. Student's goal for number skills as set out in the May 2014 IEP was: Identify numbers 1-20 with 75% accuracy across three consecutive sessions [objectives were identify numbers 1-20 from a choice of 3, identify numbers 1-20 from a choice of 6, count to 20 using concrete objects from a choice of three]. [P-2]
40. Student's goal for gross motor skills as set out in the May 2014 IEP was: With supervision perform 2 out of 3 gross motor activities/warm up exercises in areas of coordination and ball skills to enhance PE participation [objectives were to dribble a basketball with control, braid with weaving pattern of legs, and performing coordinated jumping jacks]. [P-2]
41. Student's goal for vocabulary and concept formation as set out in the May 2014 IEP was: Match non-identical objects from a messy array of 10 for 25 items with 100% accuracy for three consecutive probes [objectives were to match non-identical items from messy array for 6 to 25 items and match identical objects or pictures in a messy array of 8 containing three similar stimuli for 25 items]. [P-2]
42. Given the array of goals addressed during the current school year, the District chose to address only two goals during Summer 2015 ESY: 1) Student will be able to use sign language to communicate wants and needs: bathroom, eat, drink; more or finished; being hurt; needing help, wanting 10 different items; 2) Student will match non-identical objects or non-identical pictures in a messy array of 10, for 25 items. [P-3]
43. Student is soon to receive a Dynavox device which will assist in "verbally" communicating wants, needs, feelings, etc. A Dynavox is a text-to-speech communication device that vocalizes in response to touching a picture. [NT 180]
44. The District's proposed 2015 ESY program runs from July 7 through July 30, and operates on Tuesday, Wednesday and Thursday from 8:30 am to 11:30 am. [S-7]

45. The teacher that seems most likely to teach in the proposed 2015 ESY program is a Life Skills Support teacher who has V-B training. She has been trained on the Dynavox and has used it with a two students four years ago. [NT 187-189]
46. Student's current teacher believes that in the District's ESY program Student would receive "at least one or two" intensive teaching sessions and the same number of manding sessions daily [later revised to "two or three" of each], for a total of 40 or 60 minutes per day addressing the ESY goals, with the rest being recreational activities. [NT 165-166]
47. In addition to academic goals there is an opportunity for recreation at the District's program such as swimming one or two days a week, arts and crafts, and Zumba. [NT 94]
48. The children who will attend the District's 2015 ESY program are all disabled and have varying exceptionalities, such as specific learning disabilities, intellectual disabilities, autism, developmental disabilities, and multiple disabilities. Student would be interacting exclusively with these disabled children. [NT 94]
49. At the February 26<sup>th</sup> meeting the District mentioned that in its program Student would be with some peers who were not severely disabled. [NT 123]
50. Although the Parents were willing to hear about the District's ESY program at the February 26<sup>th</sup> IEP meeting, the content/description of the program was not discussed; the mother believes this is because the program was still in the development stages. [NT 122-123]

#### The Inclusive Summer Program

51. In his research the Co-Director of Special Education found that the inclusive summer program is an inclusive summer camp for children with disabilities as well as typical children. [NT 84]
52. The inclusive summer program's brochure notes that it is "an inclusive therapeutic summer camp program for children with autism and related disorders. The program emphasizes teaching social skills within a typical camp summer camp environment by using capable peers in naturalistic settings." [S-20]
53. The IEP team placed Student in the inclusive summer program for ESY during the summers of 2013 and 2014. [NT 60-61, 118]
54. The District acknowledges that Student could receive some educational benefit from the inclusive summer program. [NT 48; S-B]
55. A Notice of Recommended Educational Placement [NOREP] issued for ESY for Summer 2014 notes that, "The IEP team determined that [student] would benefit



- from a program that emphasizes teaching social skills within a typical summer camp environment, using capable peers in naturalistic settings”. Student attended the inclusive summer program pursuant to this NOREP. [P-1]
56. During the 2012-2013 school year Student’s progress on various IEP goals was reported as being from Limited Progress to Moderate Progress. <sup>6</sup> [S-1]
  57. During the 2014-2015 school year Student’s progress on various IEP goals was reported as being Limited Progress, Inconsistent Progress, and Moderate Progress with a few goals Mastered. [S-7, S-19]
  58. During ESY 2013 the inclusive summer program addressed the following goals: Expressive Communication, Self-Help Skills, Play Skills, Motor and Sensory Deficits, and Safety. [S-2]
  59. ESY 2013 progress monitoring reports from the inclusive summer program indicate that on various goals over three monitoring periods Student made from No Progress, to Minimal Progress, to Partial Mastery, to Near Mastery. [S-3]
  60. During Summer 2014 ESY at the inclusive therapeutic program Student worked on expressive and receptive language skills, social skills, and emotional regulation and expression. The current teacher testified that these were important areas of need for Student to work on during ESY and that all these needs could be addressed in an inclusive environment. [NT 179-180; S-9]
  61. A comparison of progress reports from Student’s in-district placement during the school year and Student’s progress reports from the summer inclusive summer program shows that Student made slow progress in both settings. [NT 134; S-1, S-3, S-7, S-9, S-19]
  62. When Student returned to school after the 2014 ESY program the teacher reported to the Parents that Student had a “fantastic day” and remembered most of Student’s targets from the previous year. [NT 119, 124, 175]
  63. Student attended the inclusive summer program during summer 2014. Data graphed for Receptive Items shows that on objects already mastered from the first probe taken in September of the 2014-2015 school year Student took three days to come back to where Student had been in May 2014 at the end of the 2013-2014 school year and progressed slowly but without regression for the rest of the graph. [NT 167-173; S-16]
  64. Data graphed for Receptive-Task Completion shows that following Student’s return to school Student took four days to come back to where Student had been at the end of the 2013-2014 school year, [NT 167-173; S-17]

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<sup>6</sup> An exhibit providing Progress Reporting for the 2013-2014 school year was not in evidence.

65. The expected time for recoupment is three days. [NT 168]
66. At the February 26<sup>th</sup> meeting Student's teacher brought up for the first time that the District believed Student had regressed after attending the inclusive summer camp. The Parents were shocked as this was the first time they had heard about any regression. [NT 125-126]
67. The teacher said that the time it took for Student to initiate sign language was her major concern.<sup>7</sup> [NT 174]
68. The 2015 inclusive summer program runs from mid-June to mid-August for 8 weeks, Monday through Friday, from 9:00 am to 4:00 pm. [S-20]

### 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 (3<sup>rd</sup> 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). The Co-Director of Special Education's testimony presented no issues of credibility, although it largely supported the Parents' case. The mother's testimony was deemed to be credible – she presented information in a simple and unembellished manner, and remained courteous but unshaken under cross-examination. Student's current teacher's testimony presented credibility issues in terms of her demeanor, her assessment of Student, and her recall of information. She spoke in an exceptionally quiet tone of voice, persisting at this low volume even

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<sup>7</sup> As the record will show this hearing officer questions the value of an emphasis on sign language for Student; however, the District's methodology was not at issue in this hearing.

though she was asked numerous times to speak more loudly, and gave the impression of being unsure of her own testimony. Her description of Student's skill acquisition during the 2014-2015 school year as leading to her being "astounded by [Student's] progress" and her testimony that Student made "great progress" did not at all match the documentary evidence showing Student's slow progress. [The reader should compare NT 148-149 with S-7 and S-19]. Finally, remarking that the IEP meeting held three months previous to the hearing "was a long time ago" the witness had significant difficulty with recall, for example she was not sure if she provided a draft of the ESY portion of the IEP to the Parents at the February 26<sup>th</sup> meeting [NT 159], she was not sure if she discussed the ESY goals she had drafted with the Parents at the IEP meeting although she stated she "feel[s] as though I would have presented the goals to them during the meeting" [NT 159-160], and she first said she prepared a draft document naming the District's ESY program as the placement for Student, then she said she could not recall if she put this information in before or after the meeting [NT 182-184].

Substantive Appropriateness of the District's Proposed ESY Program:

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 (3<sup>rd</sup> 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).

Section 504: The Third Circuit has confirmed that there are "few differences, if any, between IDEA's affirmative duty" to provide FAPE and Section 504's prohibition of discrimination<sup>8</sup>; both statutes require schools to educate disabled students with their non-disabled peers to the maximum extent appropriate to their needs. *See W.B. v. Matula*, 67 F.3d 484, 493 (3d Cir. 1995). Under the IDEA, the LRE is the placement "that, to the greatest extent possible, satisfactorily educates disabled children." *Carlisle Area Sch. v. Scott P. By and Through Bess P.*, 62 F.3d 520, 535-36 (3d Cir. 1995) (citing 20 U.S.C. § 1412(5)(B)). Section 504's inclusion mandate is "virtually identical" to the LRE requirement of the IDEA, such that "[s]chool districts must provide whatever placements

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<sup>8</sup> "No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." 29 U.S.C. § 794.

are necessary to provide FAPE in the [LRE].” *Letter to Williams*, Office of Special Education Programs (21 IDELR 73 1994)<sup>9</sup>.

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 the beginning of the next school year in August or September.

The appropriateness 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. However, an appropriate program must also be evaluated in other dimensions: LRE and parental participation.

Least Restrictive Environment: There is a strong and specific preference in the IDEA articulated in its implementing regulations that to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. §300.114(a)(2).

A plethora of case law supports IDEA’s mandate that education must occur in the least restrictive environment appropriate for the individual child. The least restrictive environment is defined in several ways – distance from a child’s home, amount of contact with typical peers, and positioning of the proposed placement within a well-defined hierarchy of educational placements. The expectation of least restrictive environment is so rigorous that the courts have held, for example, that a school district is prohibited from placing a child with disabilities outside of a regular education classroom if educating the child in the regular classroom with supplementary aids and support services can be achieved satisfactorily. *Oberti v. Board of Education*, 995 F.2d 1204, 1215 (3d Cir. 1993).

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<sup>9</sup> The Office of Special Education Programs (“OSEP”) is an office of the U.S. Department of Education and is “the principal agency in the Department [of Education] for administering and carrying out [the IDEA] and other programs and activities concerning the education of children with disabilities.” 20 U.S.C. §1402(a). Policy letters issued by OSEP have persuasive, though not binding, authority, meaning that courts give deference to the agencies’ interpretations of the regulations.

If the district fails to offer the student a program and placement which occurs in the least restrictive environment, it has failed to offer FAPE. The two concepts (LRE and FAPE) are inextricably intertwined. Children who are not provided with educational services in the LRE appropriate to their needs are not provided FAPE. *Millersburg Area School District v. Lynda T.*, 707 A.2d 572 (1998).

The requirement for educating a child in the least restrictive environment holds for ESY programming as well as school year programming. The Second Circuit recently answered this question in *T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist.*, 752 F.3d 145 (2d Cir. 2014). Specifically, the Second Circuit held that: “[T]he IDEA's LRE requirement is not strictly limited by the range of ESY programs that the school district chooses to offer. Instead, the LRE requirement applies in the same way to ESY placements as it does to school-year placements. To meet that requirement, a school district first must consider an appropriate continuum of alternative placements; it then must offer the disabled student the least restrictive placement from that continuum that is appropriate for his or her needs”. While not controlling, the Second Circuit’s holding is persuasive and supported by the plain language of the IDEA and Section 504, and is consistent with Third Circuit jurisprudence. *See for example D.F. v. Red Lion Area Sch. Dist.*, No. 1:10-CV-1558, 2012 WL 175020, at \*4 (M.D. Pa. Jan. 20, 2012). Additionally, the Pennsylvania Training and Technical Assistance Network [PaTTAN]<sup>10</sup> provides guidance, explaining that ESY “is always provided in the [LRE] that is appropriate for the student.” [P-7]

The record is clear and unequivocal that the District made no attempt to consider a placement for Student in the LRE, that is, a placement where opportunities for communication, socialization, and modeling with non-disabled peers were provided. The District’s claim that being in ESY with children with *different* disabilities than Student’s fulfilled its responsibility to provide Student with the opportunity for an ESY program with non-disabled peers is summarily rejected.

#### Procedural Appropriateness of the District’s Proposed ESY Program:

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); *C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 67 (3d Cir. 2010)

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<sup>10</sup> PaTTAN is an arm of the State Board of Education, established by the General Assembly, which is the principal administrative regulatory body for elementary/secondary and higher education in the Commonwealth. In addition to promulgating regulations, the Board has the statutory authority to “adopt broad policies and principles and establish standards governing the educational program of the Commonwealth.”

(citing 34 C.F.R. § 300.513(a)(2)); *see also Centennial Sch. Dist. v. Phil L. ex rel. Matthew L.*, 799 F. Supp. 2d 473, 490 (E.D. Pa. 2011) (applying these principles to Section 504).

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, including ESY planning. The record in this matter shows that the District decided to place Student in its ESY program well before it involved the Parents in discussion, decided upon goals for the ESY program with absolutely no parental input, and considered no other options for ESY even when requested to do so.

Parents' Preferred Placement – Inclusive Summer Program:

For reasons not entirely clear the Parents resisted an examination of the appropriateness of their preferred summer placement even though that summer placement was specifically sought through their complaint and their amended complaint, and they petitioned this hearing officer to declare that summer placement pendent which petition was denied as the matter was soon to be resolved through this hearing. Nevertheless I have reviewed the Parent's preferred summer placement and find that it is appropriate. Over the past two summers it has provided an ESY program that had permitted Student to socialize with and learn alongside typically developing peers. Moreover, when Student returned to school in September 2014, after having attended that placement, Student showed virtually no regression in concepts/skills gained through the previous school year.

Particularly disingenuous was the District's attempt to discredit the ESY program in which it had placed Student for the past two years, claiming belatedly that the inclusive summer program was inappropriate because it had not allowed Student to make sufficient progress. This claim contradicted the teacher's observations relayed to the Parents upon Student's return to school in September 2014, and was contradicted by the data charted for recoument. A review of Student's progress as reflected in IEP progress monitoring during the school year shows that Student's progress has been slow in the District's school year program, and that the amount of documented progress in the ESY program provided in 2013 and 2014 was entirely consistent with the amount of progress reported periodically by the District in its own program.

Conclusion

The ESY program the District offered to Student for Summer 2015 is substantively inappropriate given LRE considerations, as well as being procedurally inappropriate given the District's predetermination of Student's ESY placement and disregard for the Parents' rights to have meaningful participation in planning their child's ESY program. The inclusive summer program the Parents have proposed for their child's Summer 2015 ESY is appropriate.

## Order

It is hereby ordered that:

1. The ESY program the District offered to Student for summer 2015 is not appropriate.
2. The program requested by the Parents for summer 2015 is appropriate.

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

May 24, 2015

Date

*Linda M. Valentini, Psy.D., CHO*

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