

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: K.B.

Date of Birth: [redacted]

Date of Hearing: 6/3/2015

CLOSED HEARING

ODR File No. 16286-14-15-AS

Parties to the Hearing:

Representatives:

Parent

Parent Attorney

Parent[s]

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Date Record Closed:

June 3, 2015

Date of Decision:

June 12, 2015

Hearing Officer:

William Culleton Esq., CHO

INTRODUCTION AND PROCEDURAL HISTORY

The Student¹ is an eligible resident of the respondent District. (NT 9, 13-14.) The District has identified Student with Autism and Speech or Language Impairment. (NT 14; S-15.) Parent asserts procedural violations under Chapter 14 of the Pennsylvania Code, 22 Pa. Code §14.132, and that the District has failed to offer Student appropriate Extended School Year services (ESY) for the summer of 2015, and thus has failed to provide the Student with a free appropriate public education (FAPE), as required by the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). Parent also contends that the District did not provide Parent with an appropriate opportunity to participate in the planning for Student's ESY program for this summer. Parent seeks an order that the District provide an appropriate program². The District asserts that its Individualized Education Program (IEP) offered appropriate ESY services.

The hearing was concluded in one session. The parties waived written summations, and the record closed on the day of the hearing. I conclude that the District committed procedural violations of Chapter 14, but did not deprive Student of a FAPE and did not significantly impair Parent's ability to participate in the development of the offered ESY program for Student.

ISSUES

1. Did the District fail to comply with the procedural requirements of the IDEA and chapter 14 of the Pennsylvania Code for ESY determinations?

¹ Student, Parent and the respondent District are named in the title page of this decision; personal references to the parties are omitted in order to guard Student's confidentiality.

² Parents also requested other relief that will be considered at a future due process hearing; as the present hearing was expedited, only the issues concerning the appropriateness of the offered ESY services will be considered in this decision.

2. Did the District fail to provide Parent with an appropriate opportunity to participate in the planning for ESY services for the summer of 2015?
3. Did any such failure to comply with the procedural requirements for planning ESY services, including the requirement for parental participation, cause a deprivation of appropriate services to Student or impede parental participation in the planning of ESY services for the summer of 2015?
4. Did the District fail to offer appropriate ESY services to Student for the summer of 2015?
5. Should the hearing officer order the District to provide appropriate ESY services for the summer of 2015, and if so, should the hearing officer order the District to enroll Student in a private ESY program or a program offering comparable services?

FINDINGS OF FACT

1. Student is in the upper grades of grade school. Student has a history of developmental delay and is classified with Autism and Speech and Language Disorder. Student also is diagnosed with a physical disorder [in Student's lower limbs] and has a history of other muscular difficulties secondary to this and the developmental delay. (S 12, 15.)
2. Student's cognitive ability is in the Borderline range. Student demonstrates weaknesses and delays in working memory, inhibition, sustained attention, and divided attention. Student struggles with communication and social skills. Student has deficits in receptive and expressive language, language content and structure and language pragmatics. Student has adaptive skills deficits and low cognitive ability, in the borderline range. Student exhibits some perseverative behaviors, and has a history of behavior regulation needs and some resistance to directions. (S 15.)
3. Student's overall reading skills are significantly below average and reflect difficulties with reading comprehension. Student's overall mathematics skills are also significantly below average. Student struggles with writing, and has fine motor difficulties. (S 12, 15.)
4. Student's rate of acquisition of new material is developmentally below average. (S 12 17.)
5. Student was on homebound instruction from October 2013 to February 2014. (NT 165.)
6. In June 2014, Parent notified District personnel that Parent wanted to discuss placing Student in ESY for the next year in a classroom that did not have peers who were nonverbal and who had behavior problems, because Parent was concerned that Student would learn inappropriate behaviors from such peers. (NT 54-56, 119-125.)
7. Parent obtained an independent educational evaluation from a private evaluator, with a report dated October 17, 2014. The evaluator made numerous recommendations for Student's education. These included one-to-one instruction and small group instruction in

a self-contained learning support setting for academic content areas, as well as small group explicit instruction for social skills. The evaluator opined that this should be delivered in a private special-education environment. (S 12.)

8. The evaluator recommended the full range of related services, including occupational therapy, physical therapy and speech/language intervention, as well as assistive technology. (S 12.)
9. The evaluator recommended research-based instruction techniques, as well as social skills support, adaptive skills instruction and independent living skills instruction, and specialized instruction in study skills and general organization strategies. (S 12.)
10. The evaluator further recommended assessment and intervention with regard to behavioral self-regulation and social behavioral deficits. The evaluator recommended the provision of regular progress monitoring reports to Parent. The evaluator recommended numerous techniques of specially designed instruction, and accommodations. (S 12.)
11. Evaluator recommended an educational program that would extend to 12 months per year, with full academic days, and also recommended ESY services. (S 12.)
12. In February 2015, Parent requested an IEP meeting to be scheduled on February 26, 2015. The District was unable to schedule the meeting for this time, because of staff unavailability. Neither party mentioned the District's obligation to address ESY services in February of the academic year. (P 9, 10.)
13. The District did not hold an IEP meeting and offer ESY services for summer 2015 in or before February 2015, nor did it provide Parent with a Notice of Recommended Educational Placement (NOREP) for ESY services by March 31, 2015. (NT 52; S 16, 18.)
14. In March 2015, the District sent a form to Parent, indicating Student's eligibility for ESY services for the summer of 2015, based upon regression and recoupment needs. District personnel believed that Student's regression was moderate and could be overcome without extraordinary measures. (NT 144-145, 272-273; P 14.)
15. The District issued a re-evaluation report dated March 2, 2015, based upon a review of the private evaluation report. The District report recommended continuation of Student's placement in autistic support for reading fluency and comprehension, mathematics problem-solving, mathematics computation, writing and written expression, with inclusion in regular education for special area subjects. It also recommended instruction in study skills and organizational strategies. (S 15.)
16. The District report found Student eligible for speech and language therapy to address receptive and expressive language, understanding language, and interpersonal communication skills. It recommended provision of social skills support through explicit instruction in a small group setting for specified social coping skills. (S 15.)
17. The District report included an occupational therapy report recommending school-based occupational therapy to assess Student's sensory processing abilities in relation to

classroom activities and to provide adaptive materials as needed. The report found no need for physical therapy. (S 15.)

18. The District report recommended ESY services based upon Student's risk of regression, as well as retrieval or recoupment difficulties. It recommended regular progress monitoring. (S 15.)
19. The District had data that it interpreted to show that Student was making progress in academics and social skills. In offering ESY services, District personnel reasoned that the Student had made progress in their view after the summer of 2014 ESY program, and therefore that the same program, adjusted to account for current needs, would contribute in the same way to Student's opportunity to receive meaningful educational benefit. (NT 76-101, 215-218, 247-261, 268-274; S 19-23.)
20. The District scheduled an IEP team meeting for March 25, 2015, but it was postponed at the request of Parent's counsel to April 15, 2015. (NT 52, 178-180; S 16.)
21. On March 25, 2015, the Student's special education teacher prepared a draft IEP revision to provide ESY services. The draft offered to place Student in an autistic support classroom taught by a certified special education teacher. This was a small group with a 4:1 ratio of students to staff. The program would be available three days per week, 9 AM to 1 PM, for six weeks. (NT 202-203; S 17.)
22. The program was designed to teach Student academic skills - reading and mathematics - utilizing research based programs, and Student would be placed at Student's instructional level in those programs. Reading instruction would address Student's needs in the area of reading comprehension; mathematics instruction would address computation and mathematics facts. Instruction would include community-based instruction, and the teacher was expected to address other areas of need, such as social skills. The program was designed to utilize the same programs of academic instruction that Student received during the school year, to be based upon data, and it was designed to provide Student's teachers with feedback for their use in instruction at the start of the following school year. (NT 203-210, 229, 233-234, 241-243; S 17.)
23. The IEP offered ESY goals addressing expressive and receptive language, vocabulary, language structure and comprehension, pragmatic communication, functional mathematics, life skills, reading comprehension, and mathematics computation. There was no specific goal for social skills, but it was contemplated that the ESY program would address this throughout the time spent at school. (NT 65-67; S 17.)
24. The life skills goal was to order food from a menu in the community, with fading supports. This was the same goal that Student had worked on in the summer of 2014, and it was the same goal that Student was working on during the 2014-2015 school year. This addressed not only a life skill but also practical reading and mathematics skills. The Student's special education teacher determined that Student continued to need to work on these skills. (NT 56-58; S 17.)

25. ESY related services consisted of 15 minutes of speech language therapy per week and 30 minutes of occupational therapy. The draft mistakenly stated that the 15 minutes of speech and language therapy would be for the full six weeks, but the intent was to offer this service for 15 minutes per week. (NT 68, 107; S 17.)
26. Parent did not receive progress reports from the teacher of the 2014 summer ESY program. (NT 128; P 4.)
27. The draft ESY goals did not address all areas of Student's educational needs as reflected in the annual IEP; in particular, it did not address Student's needs with regard to written expression. (S 17.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.³ In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence⁴ that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006).

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called

³ The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

⁴ A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

“equipoise”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parent, who initiated the due process proceeding. If the Parent fails to produce a preponderance of the evidence in support of Parent’s claims, or if the evidence is in “equipoise”, the Parent cannot prevail.

DUTY TO OFFER A FAPE

The IDEA requires that a state receiving federal education funding provide a “free appropriate public education” (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan (“IEP”). 20 U.S.C. § 1414(d). The IEP must be “reasonably calculated” to enable the child to receive “meaningful educational benefits” in light of the student's “intellectual potential.” Shore Reg'l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir.1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3rd Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

“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, 247 (3d Cir. 1999). In order to 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. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied FAPE if his or her program is not likely to produce progress, or if the program affords the child only a “trivial” or “de minimis” educational benefit. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3rd Cir. 1996), cert. den. 117 S. Ct. 176 (1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir. 1988).

However, a school district is not necessarily required to provide the best possible program to a student, or to maximize the student’s potential. Rather, an IEP must provide a “basic floor of opportunity” – it is not required to provide the “optimal level of services.” Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995). An IEP is not required to incorporate every program that parents desire for their child. Ridley Sch. Dist. v. M.R., 680 F.3d 269 (3d Cir. 2012).

The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit. Carlisle Area School v. Scott P., 62 F.3d 520 (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544(1996)(appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) Its appropriateness must be determined as of the time it was made, and the reasonableness of the school district’s offered program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010).

ESY SERVICES

ESY services may be required as part of the District's obligation to offer and provide Student with a FAPE. The federal regulations implementing the IDEA require that a District provide ESY services "as necessary to provide FAPE... ." 34 C.F.R. §300.106(a)(1). Necessity for such services must be determined by the IEP team in accordance with the procedures for IEP teams. 34 C.F.R. §300.106(a)(2); 22 Pa. Code §14.132(a)(1)(during IEP meetings, school entities must determine the services to be provided).

The District may not limit its ESY services arbitrarily by category of disability or "unilaterally" limit the type, amount or duration of services available to fulfill its obligation to provide a FAPE as discussed above. 34 C.F.R. §300.106(a)(3). The determination must be based upon the child's individual needs and what is necessary to provide a FAPE. 34 C.F.R. §300.106(a)(2). Therefore, the appropriateness of the District's offer for Student must be determined in light of the scope of the District's obligation to provide a FAPE, as discussed above, and in consideration of the Chapter 14 state regulation's criteria for determining eligibility. See generally, William D. V. Manheim Twp. Sch. Dist., 2007 WL 2825723 (E.D. Pa. 2007). These criteria are:

- (i) Whether the student reverts to a lower level of functioning as evidenced by a measurable decrease in skills or behaviors which occurs as a result of an interruption in educational programming (Regression).
- (ii) Whether the student has the capacity to recover the skills or behavior patterns in which regression occurred to a level demonstrated prior to the interruption of educational programming (Recoupment).
- (iii) Whether the student's difficulties with regression and recoupment make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives.

(iv) The extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted.

(v) The extent to which a skill or behavior is particularly crucial for the student to meet the IEP goals of self-sufficiency and independence from caretakers.

(vi) The extent to which successive interruptions in educational programming result in a student's withdrawal from the learning process.

(vii) Whether the student's disability is severe, such as autism/pervasive developmental disorder, serious emotional disturbance, severe mental retardation, degenerative impairments with mental involvement and severe multiple disabilities.

22 Pa. Code §14.132(a)(2).

PROCEDURAL VIOLATION

Parent asserts that the District violated IDEA procedures with regard to its offer of the ESY services in three ways. First she argues that the District failed to conduct an IEP meeting for the purpose of establishing eligibility and an appropriate ESY program for Student before the February 28 deadline set in Chapter 14 of the Pennsylvania Code. 22 Pa. Code §14.132(d)(2). Second, she argues that the District failed to provide a notice of educational placement to offer an ESY program and placement for Student prior to the March 31 deadline set forth in Chapter 14. 22 Pa. Code §14.132(d)(3). Third, she argues that the District failed to provide her with an appropriate opportunity to participate in the development of the ESY program for Student for this summer. I conclude that the Parent has presented preponderant evidence of the first two alleged procedural violations, but has not proven the last.

The District admits, and there is no factual question on this record, that it failed to conduct the IEP meeting to determine eligibility within the time lines required under Chapter 14. Student

is classified with autism, and thus is a “Studen[t] with [a] severe disability[y]” under 22 Pa. Code §14.132(d). It follows that Chapter 14 requires the District to provide an IEP meeting to determine eligibility by February 28 of the school year. The District, failing to do this, violated Chapter 14.

Similarly, there is no dispute that the District failed to provide Parent with a NOREP for ESY services by March 31, as required by Chapter 14. 22 Pa. Code §14.132(d)(3). Again, the regulation is explicit and unambiguous, with no exceptions specified. Thus, the District violated the Chapter 14 procedural requirement.

I conclude, however, that these procedural violations did not create a substantive denial of a FAPE. The IDEA regulation provides that a procedural violation deprives a Student or Parent of a FAPE only if the violation “impeded” the child’s right to a FAPE; “significantly impeded” the parent’s opportunity to participate in the decision-making process; or caused a deprivation of educational benefit. 34 C.F.R. §300.513(a)(2). I conclude that Parent has failed to show any of these consequences of the District’s violations by a preponderance of the evidence⁵.

PARENTAL PARTICIPATION

The record fails to show preponderantly that the District’s late offer of ESY services “significantly impeded”, 34 C.F.R. §300.513(a)(2)(ii), Parent’s opportunity to participate in the ESY planning process. I reach this conclusion because, when the District belatedly offered to discuss ESY with Parent – after the IEP meeting scheduled originally for March 25 had been postponed at the request of Parent’s attorney, and then extended to another, later date due to time limitations – the Parent refused to discuss the IEP at all. Parent’s ostensible reason for this refusal

⁵ As discussed below, Parent has failed to prove that the Student was deprived of a FAPE or of any educational benefit.

was that the IEP for this IEP year was the same as that for the previous IEP year; however, Parent also admitted that, by the time of the continued IEP meeting in May, she did not want Student to attend a District ESY program at all. Thus, the cause of Parent's exclusion from the planning for Student's ESY was her own refusal to participate when offered the opportunity to do so, albeit belatedly⁶. Consequently, the District's procedural violations did not in and of themselves impede Parent's participation. In sum, the procedural violations did not create a substantive deprivation of a FAPE.⁷ The District did not exclude Parent from appropriate participation.

APPROPRIATENESS OF THE OFFERED ESY SERVICES

As noted above, neither the IDEA regulation on ESY nor the Chapter 14 regulation on ESY contains detailed standards for the content of ESY programs. The only standard of appropriateness is that the District must provide ESY services "as necessary to provide FAPE." 34 C.F.R. §300.106(a)(1). The federal regulation adds that ESY services must be "in accordance with the child's IEP... ." 34 C.F.R. §300.106(b)(1)(ii). This phrase appears to mean that the District must offer ESY services that are not disengaged from or inadvertent to the Student's present levels of academic and functional performance, educational needs, goals, specially designed instruction, placement and related services as embodied in the annual IEP. Yet, the terse phrases in the regulation do not appear to mandate replication of the annual IEP for ESY purposes. Nowhere is it said that the ESY program must offer all of the goals – or even address all of the needs – set

⁶ There was no evidence that the lateness of the District's offer would interfere with the provision of anything offered in the draft IEP.

⁷ Parent suggested that the Student's special education teacher developed the ESY program by himself, without consulting anyone; however, this is true only because the IEP meeting was delayed repeatedly. The teacher testified that he intended to propose his draft of the IEP to Parent at the IEP meeting, but this never happened, because of the delays and Parent's ultimate refusal to discuss the IEP in May. (NT 55-57.)

forth in the annual IEP, as long as the ESY services will prevent regression, and address the factors listed in the Chapter 14 regulation, sufficient to enable the student to receive a FAPE for the year.

The evidence is preponderant that the proposed ESY program was in accordance with the Student's annual IEP. It was based upon the central educational needs set forth in the annual IEP, and was to be delivered in a small group, special education setting by a certified special education teacher, as was the annual IEP's specially designed instruction. The Student's ESY goals were a continuation of those in the annual IEP, and the Student's special education teacher selected a life skills goal (ordering from a menu) for repetition because Student continued to need to work on the pragmatic reading and mathematics skills that the exercise entailed, as well as to need to generalize such skills beyond the classroom.

Reading and mathematics instruction would be delivered through the same research-based programs that the Student was using during the regular school year, and Student was to be assessed at the start of ESY to determine at what instructional level Student would begin to receive instruction. There was to be feedback to the regular school year teacher for the coming year to provide baselines for the future. Again, these aspects of the program were "in accordance with" Student's annual IEP.

The ESY teacher was qualified to, and expected to, employ appropriate techniques of specially designed instruction that would tailor the program to Student's needs. The plan was consistent with, and even based upon, the Student's annual IEP. Parent introduced no evidence beyond skepticism to show that this program would not deliver what it promised.

I conclude that the Parent has failed to show that the proposed ESY program's alleged deficiencies are likely to deprive Student of a FAPE. Parent has failed to show by a preponderance of the evidence that the District's offered ESY program was not reasonably calculated to support

Student's receipt of a FAPE for the 2014-2015 school year and beyond. Parent's evidence consisted of her opinions on the appropriateness of the offered program, and cross-examination of the District's witnesses. Parent also offered the IEE report, which did not offer any opinions concerning the District's offered ESY program, as it was delivered well before the District developed its ESY offer. None of Parent's evidence raises an inference that the ESY program as proposed would have failed to prevent educational regression to such an extent that the Student's receipt of a FAPE would have been negated, or that any of the other considerations set forth in Chapter 14 and quoted above would have been implicated.

That the offered 2015 ESY program was essentially the same as the 2014 program does not in itself show a lack of individualization. It is beyond cavil that a child may not be forced into a "one size fits all", "cookie-cutter" program that does not meet the child's needs. Yet, the set nature of a program does not prove that this has happened. Where a set program is able to meet the child's individual needs, there is nothing in the IDEA or in Chapter 14 to impeach its utilization for the child in question.

This is the case in the present matter. The evidence is preponderant that the set program of the District for ESY could and would provide all of the services that Student needed. Moreover, the evidence is preponderant that the ESY reading and mathematics instruction was to be individualized to account for Student's present instructional levels, and that the program was designed to deliver the specially designed instruction techniques and accommodations that the Student needs as determined in the Student's annual IEP. Related services were offered, also in accordance with the annual IEP – in particular, speech and language services were to address the same needs as identified in the annual IEP, according to the only credible testimony concerning this issue.

Regarding speech and language services, the evidence showed that the facially inadequate level of service stated in the IEP (15 minutes of services for six weeks) was a mistake, and that the intended offer was 15 minutes per week. Parent introduced no evidence that this was inadequate. Rather, Parent argued that I should ignore testimony about the services that was not embodied within the four corners of the ESY section of the IEP, since the Parent's choices were based upon the draft IEP language, not the unstated intent of its drafters.

However appropriate this principle may be for tuition reimbursement cases, it is not applicable here. Here, Parent has not spent money for private services, and is not seeking reimbursement; Parent asks the hearing officer to order the District to pay for such services prospectively. Thus, the Parent has not taken a risk based upon the language of the IEP. Moreover, here, Parent had the opportunity to discover and correct the error by participating in a discussion of the offered ESY services, albeit belatedly, in May 2015; Parent declined to participate, and cannot be heard now to complain about that easily correctable error in language.

In this matter, the hearing officer's role is to determine the appropriate program of the Student going forward. This should turn on the reality of the offered program, not the accident of incorrect language in an IEP. Moreover, it should not be limited artificially, as Parent suggests, to the language of the offer as frozen at any point in time. Thus, amendments and corrections to the offer will be considered to be part of the offer for purposes of determining its appropriateness.

Parent's testimony about the deficiencies of the ESY offer does not amount to preponderant evidence that the offer fell below the limited standard set forth in the IDEA. The Parent believed that the 2014 ESY services did not teach Student anything, and that Student was harmed in 2014 by being exposed to children who were non-verbal and exhibited inappropriate behaviors. Parent concluded that Student would come to imitate such behaviors.

Parent's conclusions about the District's program in 2014 were not based upon sufficient evidence to be accorded evidentiary weight. They were based upon very limited observation of the program in 2014, and Parent asserted that she received no data on Student's progress in that program. Parent testified that her conclusions about the inadequacy of the 2014 program were based largely upon her conversations with her child, so that the Parent's opinions about the 2014 program were based upon unspecified utterances of the Student at unspecified times, in response to unspecified questions by a Parent who, although admittedly an expert with regard to the needs her child, does not have any professional expertise in education that would inform her inquiry or conclusions. Therefore, I accord no weight to these opinions.

Even if I were to accord weight to these opinions, they do not raise an inference that the 2015 ESY program is fated to repeat any inadequacies of the past. On the contrary, the District introduced credible testimony through the Student's special education teachers that the District's ESY program in 2014 contributed to Student's academic progress in the 2014-2015 school year, and that a similar program would be reasonably calculated to have the same beneficial effect in the future. There was no evidence that the 2015 program would expose Student to non-verbal or behaviorally challenging peers.

I am not persuaded by the Parent's argument that the offered ESY program did not address all of the needs set forth in the annual IEP. There is nothing in the IDEA regulations or Chapter 14 that requires all ESY services to be structured as in the annual IEP; not every service must have goals and progress monitoring reports in order to be appropriate under the general "necessary to provide FAPE" standard. 34 C.F.R. §300.106(a)(1). The regulations do not specify any standards regarding the selection of educational needs to be addressed in ESY programs. Parents introduced

no evidence to show that, in failing to address certain educational needs, the offered ESY program failed to assure the provision of a FAPE to Student.

As to the factors listed in the Chapter 14 regulation and quoted above, Parent did not introduce preponderant evidence of deficiencies regarding the Student's mastery of an important skill; the development of crucial skills needed for independence; the risk of withdrawal from the educational process; or how the offered ESY services would address Student's severe disabilities. 22 Pa. Code §14.132(a)(2). Thus, the record does not show any deficiencies in the offered ESY services regarding these factors.

The IEE did not establish that the ESY offer was inappropriate. Although the ESY offer did not address all of the myriad recommendations in the IEE report, the report did not opine that everything it recommended must be reflected in the ESY program. Moreover, it is unclear whether or not the IEE recommendations were intended to prescribe the essential services necessary to meet the less demanding IDEA FAPE standard, or were a list of ideas intended to describe the ideal program for this child. The rather exceptional IEE recommendation of year-round instruction without breaks is in conflict with the credible, live testimony of District witnesses that the Student was making meaningful progress⁸ based upon the 2014 ESY program that Student had attended. There was no in-person explanation or opportunity for exploration of the conflict between the IEE and the teachers' credible live testimony. Therefore, I accord greater weight to the live testimony.

⁸ Parents' complaint regarding the District's alleged failure to provide a FAPE will be heard after this decision. It is sufficient for resolution of the narrow issues before me presently to note that the record before me on the ESY issue preponderantly shows that the District reasonably believed that Student had made some progress. I do not reach a conclusion as to whether or not the District offered or delivered a FAPE to Student.

CONCLUSION

I conclude that the Parent's proofs failed to demonstrate by a preponderance of the evidence that the District failed to offer a FAPE because of the procedural violations or because of the limits of the ESY services offered for the summer of 2015. Therefore, I will not order the District to provide additional ESY services.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the requests for relief are hereby DENIED and DISMISSED. It is FURTHER ORDERED that any claims that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

William F. Culleton, Jr. Esq.

WILLIAM F. CULLETON, JR., ESQ., CHO
HEARING OFFICER

June 12, 2015