

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: L.P.

Date of Birth: [redacted]

ODR No. 1698-1011 KE

CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

Pro Se

Lower Merion School District
301 East Montgomery Avenue
Ardmore, PA 19003-3338

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Date of Mediation

April 29, 2011

Date of Hearing:

May 4, 2011

Record Closed:

May 7, 2011

Date of Decision:

May 12, 2011

Hearing Officer:

William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is an eligible elementary school student; Student at all relevant times resided within the Lower Merion School District (District). (NT 80-84.) Student is identified with Specific Learning Disability and Speech and Language Impairment under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 *et seq.* (IDEA). *Ibid.* Parents requested due process to challenge the District's offer and delivery of special education services and Extended School Year Services (ESY).¹ The District asserts that it has offered a Free Appropriate Public Education (FAPE) as required by the IDEA.

This matter is bifurcated; I will address only the Parents' challenge to the offered ESY services in my decision today. All other issues raised by parents' Complaint and request for due process will be addressed at a subsequent hearing, which is scheduled for June 7, 2011. In addition, the District has filed a Complaint seeking to defend its evaluation of Student in response to Parents' request for an independent educational evaluation. This issue also will be heard on June 7.

The hearing was conducted on an expedited basis and concluded in one session. The record closed upon receipt of transcripts. I conclude that the District has offered appropriate ESY services and that its offer is not a denial of a FAPE.

ISSUE

1. Was the District's offer of ESY services inappropriate so as to deny a FAPE to the Student?

¹ In a prehearing ruling, I ruled that the Parents were entitled to an expedited hearing concerning ESY services. (HO-1.) I also ruled that Parents could not require the District to convene a resolution meeting if mediation had occurred. (NT 20-34; HO-2.) In addition, Parents had requested information and documents regarding the offered ESY services. In a conference call, discussed at length on the record subsequently, I ordered the District to inform the Parents orally as to what skills would be addressed in ESY. (NT 45-70.)

FINDINGS OF FACT

1. In November 2010, Student displayed inconsistent attention and inefficiencies in auditory discrimination and spoken language skills. Student had educational needs in reading, writing and mathematics. (S-1.)
2. Student displayed difficulties with attention, hyperactivity, atypical and withdrawn behaviors, and difficulties with executive functioning and communication with others. (S-1.)
3. The District found that Student was not in need of direct occupational therapy services, and that Student's global speech and language skills were within national age norms. (NT 221-222; S-1.)
4. In November 2010, the District provided an IEP with goals that addressed language organization, word finding, vocabulary building, word associations, mathematics computation and fluency, reading fluency, reading comprehension, and word writing fluency. Base line data were taken at the beginning of the year and added to the goals in January. Placement was supplemental learning support with itinerant speech and language support. (NT 169-172, 213-214, 219; S-1, 2.)
5. The District provided an IEP with specially designed instruction that addressed auditory discrimination, language organization and word finding, sensory regulation, keyboard skills, attention, organization, and assessment of reading, writing and mathematics achievement. (NT 241-260; S-1.)
6. The District provided an IEP with related services including speech and language therapy, occupational therapy consultation, and teacher support through consultation with special education teachers. (S-1.)
7. At the IEP team meeting on November 30, 2010, the IEP team found that the Student did not need ESY because District staff determined that the Student had made progress in acquisition of academic skills. (S-1.)
8. District staff concluded that AIMSweb and other data for the 2010-2011 school year showed progress in comprehension, mathematics computation, concepts and applications, and written expression. (NT 110-160, 260-262; S-2, 5.)
9. In March 2011, the District found Student eligible for ESY due to recently acquired skills that needed to be consolidated and maintained over the summer recess. The District recognized that these skills include reading fluency, reading comprehension, writing fluency, writing content, mathematics computation and mathematics application, as well as speech and language skills. (NT 147-149, 152-158, 267-269; S-4, 5, 7.)

10. The ESY IEP created in March 2011 offered to provide six weeks of one to one tutoring in mathematics, reading, and writing, two hours per week for each subject. (S-5, 6, 7.)
11. The ESY IEP created in March 2011 offered to provide six weeks of one to one tutoring in speech and language skills, one-half hour per week. This represented a maintenance of the level of services provided in the IEP for the school year. (S-5, 6, 7.)
12. The Parents had requested more hours than originally offered and the District expanded the number of hours of instruction for the ESY program. (NT 149-152.)
13. Parents expressed concern over slurred speech and word omissions in sentences; however, the District's speech and language pathologist found no diction difficulties of clinical concern. (S-5.)
14. The District provided a NOREP that showed the services offered, the data upon which the eligibility determination had been made, and reason for finding Student eligible and the alternatives considered. District personnel explained the educational needs and skills to be addressed in ESY, as well as the services to be offered, repeatedly and thoroughly. (NT 153-158, 164-178, 235-236; S-6 p. 9 to 13, S-7.)
15. Parents asked for copyrighted assessment forms with the original data recorded on them and the District declined to provide them. Parents asked to see the kinds of mathematics problems the Student was learning to solve and these were provided. (NT 183, 229-231, 233-234.)
16. Parents disapproved the ESY IEP and NOREP on March 28, 2011, requesting both mediation and due process. (S-7.)

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.² The United States Supreme Court has addressed this issue in the case of an administrative hearing challenging a special education IEP. Schaffer v. Weast, 546 U.S. 49, 126

² 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).

S.Ct. 528, 163 L.Ed.2d 387 (2005). There, the Court held that the IDEA does not alter the traditional rule that allocates the burden of persuasion to the party that requests relief from the tribunal. Thus, the moving party must produce a preponderance of evidence³ that the District failed to fulfill its legal obligations as alleged in the due process Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

In Weast, the Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed “equipoise” – that is, where neither party has introduced a preponderance of evidence to support its contentions. In such unusual circumstances, the burden of persuasion provides the rule for decision, and the party with the burden of persuasion will lose. On the other hand, whenever the evidence is preponderant (i.e., there is greater evidence) in favor of one party, that party will prevail. Schaffer, above.

Based upon the above rules, the burden of proof, and more specifically the burden of persuasion in this case, rests upon the Parents, who initiated the due process proceeding with regard to ESY, the only issue addressed in this decision. If the Parents fail to produce a preponderance of the evidence in support of their claim, or if the evidence is in “equipoise”, the Parents cannot prevail.

OBLIGATION TO PROVIDE A FREE APPROPRIATE PUBLIC EDUCATION

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

³ 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.

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 benefits” 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 properly provide FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such related 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, under the Supreme Court’s interpretation of the IDEA in Rowley and other relevant cases, 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).

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).

LEGAL STANDARD FOR DETERMINING APPROPRIATENESS OF ESY SERVICES

The federal regulations implementing the IDEA require local educational agencies to provide ESY services to an eligible student if necessary to assure that he or she receives a FAPE. 34 C.F.R. §300.106. Pennsylvania special education regulations specify the criteria for determination of a need for ESY and the kinds of data that can be considered in making that determination. 22 Pa. Code §14.132. School districts must determine ESY services on an individualized basis and consider all components of a student's educational needs. Battle v. Pennsylvania, 629 F.2d 269 (3d Cir. 1980), cert. denied, 452 U.S. 968 (1981). The Pennsylvania Department of Education Basic Education Circular on Extended School Year services directs the IEP team to consider the extent to which students have mastered and consolidated specific skills. Further, the team must consider the extent to which a skill or behavior is particularly crucial for the student to meet the IEP goals of self-sufficiency or independence from caretakers. Basic Education Circular, Extended School Year Eligibility (April 1, 2003)(BEC). Thus, the purpose

of ESY in most cases is to prevent regression or other damage to the Student's ability to make meaningful educational progress on his or her IEP goals, caused by the normal breaks in schedule in a typical school year. See, 22 Pa. Code §14.132; BEC, Extended School Year Eligibility (recommending finding of eligibility if student's needs "make it unlikely that the student will maintain skills and behaviors relevant to IEP goals and objectives") The Pennsylvania regulation, 22 Pa. Code §14.132(a)(1), requires the "school entity" to both determine eligibility and "make subsequent determinations about the services to be provided."

Moreover, the District must provide written prior notice of any proposal to initiate services. 20 U.S.C. §1415(b)(3); 20 U.S.C. §1415(c). This should address the Student's eligibility and its basis, the kinds of assessments that the District relied upon in making that assessment, a description of other options and other factors considered, and the procedural safeguards and sources of information on parental rights that the law mandates. 22 U.S.C. §1415(c); 34 C.F.R. § 300.503. BEC, Extended School Year Eligibility, above.

In the present matter, the evidence is preponderant that the District complied with all applicable legal requirements for ESY services. The District provided individualized evaluation data that appeared to identify the Student's unique needs for educational services. (FF1-3.) The District provided an IEP with goals and specially designed instruction and related services that addressed the identified needs. (FF 4-6.) In March 2011, the District revised the IEP to find that the Student was eligible for ESY services, which would continue to teach according to the IEP goals. (FF 7, 9-11.) The District based this determination, not on regression or recoupment data – there was no such data – but upon the District's finding that the Student had been making progress and that it would benefit the Student to have summer services to maintain that progress. (FF 9.) This determination, deviating from the most frequent and routine criterion of regression

and recoupment, in itself showed an individualized assessment of ESY eligibility based upon the Student's unique circumstances.

The District also made the determination of services to be provided, as required by the Pennsylvania regulation. 22 Pa. Code §14.132(a)(1). Although the District had offered a lower level of services for reading, writing, mathematics and speech and language, the District increased the level of services when Parents indicated their opinion that the originally offered level of services was too low. (FF 12.)

Parents argue that the District did not fulfill its legal responsibilities because Parents came away from numerous meetings with questions yet unanswered about the needs to be addressed and the exact goals and how they would be implemented. This is not persuasive to me. I note that the District spent unusual amounts of time trying to answer Parents' questions and was still unable to answer them all; more questions kept arising in Parents' minds. (FF 13-15.) Indeed, the record will show that the same dynamic prevailed during the pre-hearing phase of this matter and even during the hearing. While the Parents are entitled to ask all the questions they want to ask, and the District is obligated to make a good faith and professional response, trying to answer the questions, the law does not obligate any agency to satisfy the Parents' subjective desire for more information. Nor are professionals required to disclose every detail of their professional actions while teaching. At some point, the law assumes that the parties will establish some minimal level of trust, such that educational professionals will be allowed to do the work delegated to them for the benefit of the children assigned to them.

Parents questioned the progress that Student had made, cogently pointing out that the AIMSweb data submitted in the record showed inconsistent scores that scattered slightly around the trend line. The witnesses refuted these arguments in the course of testimony; it was clear that

there is usually some scatter in data on a graph, but that the trend line is the key information to be observed, and in this matter the trend lines were upward in most areas of learning. (FF 8.) The parents provided no evidence that the professionals' interpretation of the data was erroneous. Thus, the evidence is preponderant that the District's finding of Student's progress during the 2010-2011 school year justified the eligibility category determined by the District – maintaining recent educational gains.

Parents testified that the Student slurred words and omitted words from sentences. (FF 13.) Thus Parents argued that the District should have expanded the scope of speech and language therapy offered in the ESY program. However, the District speech and language therapist did not observe these behaviors at a clinically significant level, *ibid.*, and I find no corroboration of Parents' allegations. Thus, the evidence is preponderant against Parents on this argument.

In making these findings and reaching these conclusions, I rely in part upon the credibility of witnesses. I found that the District's special education teacher and speech and language therapist were credible and reliable. Their demeanor throughout was professional. Their testimony in all significant respects is corroborated by the written record, and the logic of their actions and testimony was clear to me. Therefore, I accord greater weight to the testimony of the District's credible witnesses.

CONCLUSION

I conclude that the District's offer of ESY services was appropriate. Any claims regarding expedited issues that are not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The District's offer of ESY services was appropriate and did not deny a FAPE to the Student.

William F. Culleton, Jr. Esq.

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

May 12, 2011