

*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.*

IN THE PENNSYLVANIA OFFICE FOR DISPUTE RESOLUTION

**FINAL DECISION AND ORDER**

ODR File Number 2036-1011 KE

CLOSED HEARING

Child's Name: J.T.

Date of Birth: [redacted]

Hearing Date: July 19, 2011

Parties to the Hearing:

Representative:

Parent[s]

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Record Closed: August 2, 2011

Date of Decision: August 9, 2011

Hearing Officer: Brian Jason Ford

**Introduction and Procedural History**

This due process hearing was requested by the Parents, on behalf of their child (Student) against the Perkiomen Valley School District (District). The Parents claim that the extended school year (ESY) services offered to the Student for the summer of 2011 are inappropriate and, indirectly, demand reimbursement for the summer program they have funded in lieu of that offer. More specifically, the Parents claim that the District's ESY offer is inappropriate because it does not continue to provide the same applied behavior analysis (ABA) program that the Student received during the prior school year. That ABA program is delivered by private providers in the Student's home and is referred to herein as the "Home Program."

The Parents were *pro se* when they initiated this hearing, but later retained counsel. The Parents' Complaint, however, was not amended.<sup>1</sup> The District challenged the sufficiency of the Complaint, but I determined that the Complaint was sufficient and that the District's alleged failure to offer a home program was properly plead. *See* H-2.

### **Issues and Demanded Relief**

The following issues were presented for adjudication:

1. Did the Student's IEP team fail to consider the Home Program for ESY?
2. Is the District's ESY offer inappropriate for its failure to provide the Home Program?

### **Stipulations**

The parties submitted joint stipulations, which were made part of the record of this hearing at Exhibit H-3. The first five stipulations specify the Student's name, the Parents' identity, the Student's date of birth, the Student's address and that the District is the Student's local educational agency (LEA). The sixth stipulation is that the Student is qualified to receive special education and related services as a student with autism.

The seventh stipulation is restated here with names omitted:

On June 21, 2011 the Supervisor of Special Education ... sent [the Father] a NOREP for ESY. Although this ESY NOREP was sent on June 21, 2011 it was incorrectly dated April 14, 2011. On June 24, 2011, [the Father] rejected this ESY NOREP. No relief is sought for this procedural error.

That final stipulation resolves a procedural issue that was raised in the Complaint.

Although not specifically stipulated, both parties clearly agree that the student is entitled to receive ESY in the summer of 2011, as explained below.

### **Findings of Fact**

#### **Background**

1. The Student received a diagnosis of autism at an early age and received Early Intervention services from the local Intermediate Unit. P-1.
2. The District became the Student's LEA when the Student turned school-aged, and disagreements between the Parents and the District about the Home Program (or versions of it) started right away. *See* P-2; ODR No. 01547-1011 JS (McElligott, Oct. 13, 2010).
3. Prior disputes about the Home Program prompted the Parents to request a due process hearing. As part of that hearing, Hearing Officer McElligott determined that the Student's pendent placement included the Home Program. *Id.*

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<sup>1</sup> The Complaint was filed in the form of a rejected notice of recommended educational placement.

4. After the pendency determination was made, the Parties entered into a settlement agreement under which the Student received the Home Program in the 2010-2011 school year. *See* N.T. at 276-277.

### **Program and Placement – 2010-2011 School Year**

5. The Home Program consists of 30 hours per week of in-home ABA services provided by Personal Care Assistants (PCAs) with 16 hours per month of consultation provided by a Board Certified Behavior Analyst (BCBA). N.T. at 188.
6. The BCBA designs all aspects of the Student's home program. She helps select the PCAs, trains them, develops goals and objectives for the program, creates data collection instruments, drafts lesson plans and determines how the PCAs implement ABA protocols. N.T. at 188-189. The BCBA also directly observes the PCAs work with the Student. N.T. at 189-190.
7. Both the Student's parent and the Home Program BCBA testified that the Student made meaningful progress in the Home Program. *See, e.g.* N.T. at 42, 196.
8. During the 2010-2011 school year, in addition to the home program, the Student also attended a half-day kindergarten program in the District. This in-school program will be referred to as the School Program. There, the Student attended an Autistic Support (AS) class, taught by a masters-level teacher with certificates in both elementary and special education. N.T. at 95, 97. Previously, the Student's teacher worked as an ABA therapist in both home and school settings. *Id.*
9. The School Program was provided pursuant to an Individualized Education Plan (IEP) that was modified at various points during the school year. *See* S-2.
10. The School Program convened for 15 hours per week, including time spent engaged in related services. *See* N.T. at 99, 108. During that time, the Student received some instruction in groups with other similarly-autistic students and some instruction from teachers and aides one-to-one (1:1). *See* N.T. at 99-100; S-2. There were seven other students in the class with five adults (the teacher, two classroom assistants, an aide specifically assigned to the Student and another aide assigned to a different student). N.T. at 100-102.
11. Excluding related services, the Student received all instruction in the School Program from the classroom teacher and the aide specifically assigned to the Student. N.T. at 102.
12. ABA principles such as errorless teaching and prompt hierarchies were used in the School Program. N.T. at 104-105. The School Program was also structured to encourage and provide opportunities for communication throughout the day. *See* N.T. at 100.
13. The Student's teacher and aide also consulted with a District-employed BCBA (District's BCBA) regarding teaching and prompting procedures. N.T. at 105-106. This consultation occurred for two hours per month during the school year. N.T. at 140.
14. The District's BCBA testified that the development of consistent teaching procedures is an essential characteristic of ABA. In the context of home programs, BCBAs provide this consistency because in the home setting the BCBA creates the program. However, in the school environment, the District's BCBA believes that a classroom teacher might serve the same function. N.T. at 146-148, 152.

15. The District's BCBA consulted with the Student's teacher and aide, but not with other professionals providing related services to the Student in school. N.T. at 140-141.
16. During the School Program, the Student's teacher monitored the Student's progress toward IEP goals. N.T. at 110-111. The teacher collected data, but that data was not graphed. *Id.* Prior to May of 2011, the District's data collection did not distinguish between prompted and unprompted mands.<sup>2</sup> N.T. at 124. This distinction is important, according to the District's BCBA. N.T. at 143.
17. The District's BCBA reviewed some of, but not all of, the progress data collected by the Student's teacher during consultation time. N.T. at 142. The District's BCBA also observed the Student in the classroom as part of a Functional Behavior Analysis (FBA). N.T. at 153, S-20.
18. Consultation with the District's BCBA was beneficial to the teacher because it helped ensure correct implementation of ABA procedures. N.T. at 107. The District's BCBA modeled ABA procedures for the teacher. N.T. at 141.
19. The Student's teacher received monthly progress reports from the Home Program BCBA but otherwise had no contact with any of the individuals implementing the Home Program. *See* N.T. at 111-112. The teacher did review the Home Program progress reports and was able to determine that the Student was working on similar skills in both the Home Program and School Program. *See* N.T. at 111-114.
20. The Student's work in the School Program was modified based on the Home Program reports "to a degree." N.T. at 114. Although lesson plans were adjusted based on information sent in from home, the School Program focused on IEP goals.
21. A District-employed Behavior Specialist (not a BCBA) provided social skills instruction to the Student and made suggestions about the use of ABA methodology within the classroom. N.T. at 157-160. The Behavior Specialist helped develop and implement a positive behavior support plan, but believes that such a plan is no longer necessary. *Id.*

### **ESY – Eligibility Determination and Program**

22. The Student's teacher examined progress data before and after breaks in programming to determine the Student's eligibility for ESY under a regression-recoupment model. Attainment of IEP goals was not specifically considered as a factor for ESY eligibility. N.T. at 120-122, 132-133.
23. The Student's IEP team convened on May 12, 2011. N.T. at 250. The focus of that meeting was the Student's programming for the upcoming 2011-2012 school year. A draft IEP was presented at that meeting, and that draft IEP contained a section for ESY programming. ESY, however, was not discussed during the May 2011 IEP team meeting because, after approximately four hours, the team had only managed to discuss the Student's present education levels and goals.<sup>3</sup> N.T. at 114-115

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<sup>2</sup> In ABA therapy, a "mand" is a request prompted by a deprivation and followed by a reinforcer. For example, a therapist may withhold a preferred item from a student, leading the student to use language by requesting the item. The reinforcer for that use of language then is the item itself.

<sup>3</sup> This Hearing Officer can think of no better example of a situation that cries out for IEP facilitation – a free service offered by ODR. More information regarding IEP facilitation can be found online, here: <http://odr-pa.org/early-dispute-resolution/iep-facilitation/>.

24. The IEP team convened again on June 7, 2011. Prior to that meeting, the District's Supervisor of Special Education sent a draft IEP to the Parents. N.T. at 251. Again, the meeting lasted about three and a half hours and focused on programming for the 2011-2012 school year. N.T. at 250. There was, however, roughly a ten minute conversation about ESY as the meeting was ending. N.T. at 47, 119.
25. The Student's School Program teacher coordinated with the teacher who would have instructed the Student under the District's ESY proposal to provide continuity in data collection. N.T. at 117.
26. The Student's teacher examined progress data before and after breaks in programming to determine the Student's eligibility for ESY under a regression-recoupment model. Attainment of IEP goals was not specifically considered as a factor for ESY eligibility. N.T. at 120-122, 132-133.
27. The ESY program offered by the District is designed to more closely approximate a typical school day than the half day program that the Student attended during the 2010-2011 school year. In the teacher's opinion, the offered ESY program will help the Student transition to a full-day in-school program like the program that the District has offered for the 2011-2012 school year.<sup>4</sup> N.T. at 134. The teacher is also of the opinion that the offered ESY program will enable the Student to generalize already mastered skills by applying those skills with different teachers in a different physical setting. N.T. at 135.
28. The Supervisor of Special Education's opinions regarding the offered ESY program are consistent with the teacher's. *See* N.T. at 253-255.
29. The District's BCBA would not have any role in the ESY program offered by the District, but believed that the offered program included BCBA consultation. N.T. at 140, 148-149, 154-156. Similarly, the District's BCBA had no role in developing the ESY program offered by the District and knew very little about how the ESY program would have been implemented, had the Student attended.<sup>5</sup> *See* N.T. at 143-146. However, the District's BCBA understood that the function of the offered ESY program was to prevent regression, as opposed to making progress towards IEP goals. N.T. at 146.

### **ESY – Offer**

30. The actual ESY offer is contained in several documents. Exhibit S-32 is an IEP that the District either has proposed or plans to propose for the 2011-2012 school year.<sup>6</sup> This document is substantively identical to Exhibit P-3, and was the document considered by the IEP team on June 7, 2011. On page 52 of S-32, the IEP says that the Student "is eligible for extended school year services for math, reading, social skills, behavior, speech and language, occupational therapy. Extended school year services will also support [the Student's] transition to full-day school programming in September 2011."

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<sup>4</sup> The appropriateness of the District's offer for the 2011-2012 school year is the subject of a due process hearing requested shortly after the hearing session in this case but before this Decision and Order was issued. *See* ODR No. 2157-1112 KE.

<sup>5</sup> The District's BCBA testified that she had no role in "proposing" the ESY program. N.T. at 143. In context, the District's BCBA was referring to ESY program development. In this case, it was the District-employed members of the IEP team that proposed the ESY program. The District's BCBA is one of those members.

<sup>6</sup> The record does not specify whether S-32 was actually offered to the Parents in its entirety via a NOREP.

31. S-32 at 52 goes on to say that “IEP goals to be addressed during ESY are marked with \*\* in the body of *this* IEP.” (emphasis added). That statement is incorrect. Instead, District staff examined the Student’s progress under the then-current IEP, which is Exhibit S-2 (this is the IEP that was operative during the 2010-2011 school year). *See* N.T. at 278.
32. Exhibit S-2 also includes a statement that the Student is eligible for ESY services, but different areas are to be addressed. S-2 at 47. Specifically, the statement at S-2, page 47 does not indicate that reading or math will be addressed during ESY, but does indicate that the Student will receive physical therapy during ESY. *Id.* Otherwise, the statements are the same. *Cf.* S-32 at 53.
33. Exhibit S-2 also indicates goals marked with asterisks are the goals that will be implemented during ESY. These include behavioral goals (S-2 at 19, 25, 26, 27, 28) speech goals (S-2 at 29, 30, 31, 32) occupational therapy goals (S-2 at 33, 34) and physical therapy goals (S-2 at 35, 36). Reading and math goals are listed in the IEP, but are not designated for ESY.
34. Testimony regarding use of the goals in S-2 during the ESY program is inconsistent. The District’s Behavior Specialist testified that the marked goals in S-2 were the ESY goals for the summer of 2011. The Supervisor of Special Education was less specific. She agrees that ESY goals come from the IEP that was in place during the school year (S-2) but that the particular goals to be addressed would be agreed upon by the 2010-2011 classroom teacher and the 2011 ESY teacher. N.T. at 258-260. The teachers come to an agreement about goals at the end of the school year. *Id.*
35. ESY goals, according to the Supervisor, are not provided to parents absent a request. *Id.*
36. This hearing officer finds that the Supervisor of Special Education was more knowledgeable than the Behavior Specialist about the District’s practices concerning the development of ESY goals. The Supervisor’s testimony that goals are agreed to between the school year and ESY teachers – but not shared with parents absent a request – was credible, and I find that the District’s practice is what the Supervisor described.
37. Goals in S-32, including reading and math goals, are designated for ESY, but all of the testimony indicates that the Student would work on goals in the IEP at S-2, not S-32, as agreed to between the school year and ESY teachers. *See* N.T. at 146-175, 258.b
38. After the June 7, 2011 IEP team meeting, the Parents asked the District to issue a NOREP for ESY programming. The District complied on June 21 by issuing the NOREP at S-1 pages 2-5.<sup>7</sup> The statement of the areas that will be addressed during ESY are consistent with, but not identical to, the statement at S-32 page 52. The word “behavior” is included in S-32 but not in S-1. It is clear, however, that behavior would be a primary focus of the offered ESY program.
39. Consistent with the testimony described above, the NOREP at S-1 indicates that the purpose of the ESY program was to help the Student maintain skills gained during the school year and support transition to full-day school programming in the 2011-2012 school year.
40. The NOREP further indicates that the Home Program was considered as an option for ESY but was rejected because it is not the least restrictive environment.
41. The NOREP explains that the offered ESY program will run Mondays through Thursdays from 8:15 a.m. to 2:00 p.m. between June 29, 2011 and August 3, 2011.

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<sup>7</sup> The date printed on the NOREP is April 14, 2011 but the parties stipulate that the NOREP was sent on June 21, 2011.

42. The Parents rejected that NOREP and have not sent the Student to the District's ESY program. The Student has attended the Home Program this summer at the Parents' expense.

## **Discussion and Conclusions of Law**

### **The Burden of Proof**

In this case, the Parents are the party seeking relief. As such, they must bear the burden of persuasion by establishing entitlement to the relief they seek under a preponderant evidence standard. *See Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). If the Parents fail to meet that standard, or if the evidence rests in equipoise, the Parents cannot prevail.

### **Free Appropriate Public Education**

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to all students who qualify for special education services. 20 U.S.C. §1412. This requires the provision of individualized special education and related services, in accordance with the IDEA's procedural requirements, that are reasonably calculated to confer a meaningful educational benefit that is more than trivial or *de minimis*. *See Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982); *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

Special education services must be provided pursuant to a procedurally sufficient IEP that is responsive to the Student's educational needs – as assessed at the time of the document's creation – and serves as the blueprint for the educational program. 20 U.S.C. § 1414(d); 34 C.F.R. §300.320(a); 20 U.S.C. § 1414(d); 34 C.F.R. §300.324; *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

The IDEA further requires that eligible students be educated in the least restrictive environment which permits them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000).

### **Extended School Year**

Under both federal and Pennsylvania regulations, LEAs must provide ESY services (meaning special education and related services beyond the school year) when necessary for the provision of FAPE. *See* 34 C.F.R. § 300.106; 22 Pa Code § 14.132. The Pennsylvania regulations enhance the federal regulations by providing a comprehensive set of factors that must be considered in making ESY eligibility determinations.

## Compensatory Education and Tuition Reimbursement

Compensatory education is a remedy for the denial of FAPE. Generally, this remedy becomes available when a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). As the name implies, this remedy compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. *Id.* More recently, some courts have turned away from this “hour for hour” approach, choosing instead to determine the “amount of compensatory education reasonably calculated to bring [the child] to the position that he would have occupied but for the school district’s failure to provide a FAPE.” *B.C. v. Penn Manor School District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) (awarding compensatory education in a case involving a gifted student); see also *Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir.2005) (explaining that compensatory education “should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.”)) Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

In this case, the Home Program has continued in the summer of 2011, and so the Student has received the services that the Parents claim are appropriate. Yet the Parents still claim that FAPE has been denied – not because the ESY program has been inappropriate, but because it has not been *free*.

Without question, *free* is a component of FAPE. By definition, FAPE refers to special education and related services that are provided at public expense. *See* 20 U.S.C. § 1401(9)(A). At the same time, courts have been careful to not confuse the remedies of compensatory education and tuition reimbursement. In fact, “compensatory education is not an available remedy when a student has been unilaterally enrolled in private school.” *P.P. ex rel. Michael P. v. West Chester Area School Dist.*, 585 F.3d 727, 739 (3<sup>rd</sup> Cir, 2009). Quoting from one of the former Pennsylvania Appeals Panels, the Court said:

Tuition reimbursement and compensatory education are two distinct remedies. They are not interchangeable. Tuition reimbursement is a remedy to parents who have unilaterally placed their child in a private school when a district offers their child an inappropriate educational placement and the proposed IEP was inappropriate under the IDEA thereby failing to give the child FAPE. In contrast, compensatory education is a retrospective and in kind remedy for failure to provide an appropriate education for a period of time.

*Id.* at 739-740 quoting *In re The Educational Assignment of J.D.*, Spec. Educ. No. 1120, at 14 (Pa. Spec. Educ. Appeals Panel 2001).

The circumstances of the *P.P.* case are somewhat similar to the circumstances in this case. In *P.P.*, the family claimed that their LEA offered inappropriate IEPs for the summer of 2005 and the 2005-2006 school year. The family enrolled the student in a private school for this period of



time, and demanded tuition reimbursement. That demand was denied because all tribunals determined that the District had actually offered FAPE. *Id* at 739. In the alternative, the family demanded compensatory education that allegedly accrued between the 2002-2003 school year and the 2004-2005 school year. The family intended to use that compensatory education to offset the cost of the private school. Although the family was not entitled to compensatory education for other reasons, the Third Circuit would not have permitted the particular form of compensatory education that the family requested. *Id* at 739-740.

In this case, the Parents do not seek compensatory education for violations in the past, but are attempting to use compensatory education as tuition reimbursement. This was touched on in pre-hearing motions and discussed on the record. The Parents' demand to maintain the home program at the District's expense during the summer of 2011 is clearly presented in the Complaint. *See* H-2. The Parents' attorney further explained their position during the due process hearing, leading to the following discussions:

THE HEARING OFFICER: You also then couched the relief in terms of reimbursement. The student currently receives what during ESY?

MR. STANCZAK: [The Student] currently receives 30 hours a week of one-to-one ABA service and supervisory services from Ms. [redacted]. I believe that's six hours a month.

[PARENT]: Sixteen.

MR. STANCZAK: Sixteen hours a month, I'm sorry.

THE HEARING OFFICER: Provided where?

MR. STANCZAK: Provided in the home setting.

THE HEARING OFFICER: At whose expense?

MR. STANCZAK: Well, at this point at the Parents' expense. We are asking that they be reimbursed because --

THE HEARING OFFICER: So this is a reimbursement claim.

MR. STANCZAK: It is. Well, in a sense, it's a compensatory education claim. We're asking if the ESY program that was proffered was not appropriate, then the Parents would be entitled to compensatory education as a remedy for the failure to offer an appropriate ESY program in the form of reimbursement for the home program because that's what's being provided instead of what was proposed.

...

THE HEARING OFFICER: [T]he District's alleged failure to provide a home program for ESY this summer that really presumes that the home program is, in fact, necessary and lacking from the District's ESY offer. So the way that I understand it ... is that I'm here to find out if a home program is necessary for ESY and, if so, order that home program.

...

THE HEARING OFFICER: I do think that the issue of reimbursement is pled because the Parents have told the District what they want. They have gone out

and gotten it. And if that is, in fact, what student needs and the Parents are out of pocket for that, that's well within the scope of this hearing.

N.T. at 21-30. Both parties confirmed their understanding that reimbursement was an issue. N.T. at 30-31. In sum, the Parents argue that the Home Program is an essential component of FAPE; that the District's failure to include the Home Program in the ESY offer rendered the offer inappropriate, and that the Parents are entitled to reimbursement for the Home Program.

It is not entirely clear, however, whether the Parents seek compensatory education in the form of tuition reimbursement or if they seek tuition reimbursement outright. In light of the foregoing discussions during the hearing, I find that these claims were sufficiently plead in the alternative. But I must reject the argument that the Parents are entitled to compensatory education in the form of tuition reimbursement. Such relief is not allowed under *P.P. v. West Chester*. The Parents' demand shall be examined under the ordinary tuition reimbursement standard.

### **Tuition Reimbursement – Legal Standard**

Tuition reimbursement is explicitly authorized as a remedy in the IDEA at 20 U.S.C. § 1412(a)(10)(C).<sup>8</sup> This authorization is a codification of well-established jurisprudence on tuition reimbursement.

Applicable jurisprudence establishes a three part test for tuition reimbursement under which the Parents must prove 1) that the offered ESY program would not provide FAPE; 2) that the Home Program is appropriate and 3) that equitable factors favor reimbursement. *See Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359 (1985); *Florence County Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7 (1993). It is particularly important to note that parentally-selected programs must be appropriate, but need not satisfy the same FAPE standard that LEAs must meet when designing and implementing IEPs. This lower standard of appropriateness is articulated in the Third Circuit as follows:

A parent's decision to unilaterally place a child in a private placement is proper if the placement "is appropriate, i.e., it provides significant learning and confers meaningful benefit...." *DeFlaminis*, 480 F.3d at 276 (internal quotation marks and citation omitted). That said, the "parents of a disabled student need not seek out the perfect private placement in order to satisfy IDEA." *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 249 n. 8 (3d Cir.1999). In fact, the Supreme Court has ruled that a private school placement may be proper and confer meaningful benefit despite the private school's failure to provide an IEP or meet state educational standards. *Florence County Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 14-15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993).

*Mary T. v. School Dist. of Philadelphia*, 575 F.3d 235, 242 (3<sup>rd</sup> Cir. ,2009).

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<sup>8</sup> The Supreme Court has interpreted this section to allow tuition reimbursement for students who have not attended public schools. *See Forrest Grove Sch. Dist. v. T.A.*, 129 S.Ct. 2484.

Both under the statutory construction and as an equitable factor, information provided by the Parents to the District about their intent to start (or, in this case, continue) a private program at public expense is relevant. *See* 20 U.S.C. § 1412(a)(10)(C)(iii).

### **The District Did Not Consider the Home Program for ESY**

The entire discussion of ESY programming occupied ten minutes or less of the very end of a two-session, seven and a half hour IEP meeting. To the extent that ESY was discussed at all, it is clear that the District had no intention of continuing the Home Program during the summer of 2011. Simply noting the Home Program as a rejected option in a NOREP does not, in and of itself, demonstrate that a continuation of the Home Program was genuinely considered by the IEP team. In short, the District predetermined that the Student should not receive the Home Program as an ESY program in the summer of 2011.

This is not to say that the District predetermined what program the Student *should* receive in the summer of 2011. In fact, taken as a whole, the testimony reveals that the District would have determined ESY goals *ad hoc*, and not as a part of the IEP team meeting. The testimony further reveals that those goals would not be shared with the Parents, absent a particular request. This procedure is inconsistent with the regulations at 34 C.F.R. § 300.106 (requiring that ESY services be provided in accordance with the child’s IEP and in accordance with 34 C.F.R. §§300.320 through 300.324 – which establish the IEP development preprocess). Further, District employees either understood or assumed that the ESY program would include BCBA oversight, but this is not reflected in the documentation.

The foregoing issues are procedural in nature. Hearing Officers may find a denial of FAPE when a procedural violation impedes the child’s right to FAPE or “significantly impeded the parents’ opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents’ child” 20 U.S.C. § 1415(f)(3)(E)(ii)(I),(II). The remedy for a denial of FAPE is compensatory education. However, as explained above, to the extent that the Parents demand compensatory education, they demand it in the form of reimbursement, which is impermissible. This Hearing Officer is unaware of any decision that supports the notion that tuition reimbursement is an appropriate remedy for a denial of parental participation in the IEP process. Simply put, although the Parents’ proved that the Home Program was not considered for ESY, that violation does not give rise to the remedy they seek.

### **The Parents are Entitled to Tuition Reimbursement**

The remaining issue is that the offered ESY program is inappropriate for its failure to include the Home Program. The Parents demand reimbursement for the Home Program to remedy this failure. Again, considered under above-described test for tuition reimbursement, the Parents must first establish that the District failed to offer an appropriate ESY program.

The Parents have satisfied the first prong of the test. As described above, the ESY offer was procedurally deficient. Those procedural deficiencies actually impeded the Student’s right to

FAPE. Even assuming that the Student should only work to maintain educational levels over the summer, it is not possible to determine from the documents what goals were targeted for maintenance or what services and supports the Student would receive to maintain those goals.

These issues are more than procedural. Whatever progress has been achieved is the result of the Student's participation in highly organized, carefully planned programs both in school and at home. The offered ESY program represents a significant deviation from both programs. This is not to say that an appropriate ESY program must mirror the school year program. Rather, the District proposes to shift to maintenance only summer program without first determining what services are required to maintain the Student's levels.

As importantly, Pennsylvania regulations list seven factors to consider when determining ESY eligibility. *See* 22 Pa Code § 14.132(a)(2). The regulation instructs that "the IEP team shall consider the following factors; however, no single factor will be considered determinative." *Id.* The District considered two of those seven factors – regression and recoupment. The District's reliance on more than a single factor misses the point. By failing to "consider the factors" specified in the regulation, the IEP team overlooked important items like the Student's progress towards independence and whether the ESY program should endeavor to bring the Student to mastery in any targeted area.

The replacement of successful, structured programs with an informal, virtually undrafted program, combined with a lack of thoughtful consideration of the Student's potential ESY needs render the ESY offer inappropriate when it was offered. As such, the Parents have satisfied the first prong of the tuition reimbursement test.

Next, the appropriateness of the Home Program must be examined. The Student's Parent and the Home Program BCBA both testified that the Student has made meaningful progress in the Home Program. That testimony was not refuted by any witness – including the District-employed witnesses who had received progress reports from the home program. The only testimony suggesting that the Home Program is inappropriate is the few comments in the record and in the ESY NOREP about the Home Program's restrictiveness. The District's position is that it is obligated to offer programming in the least restrictive environment, and that the ESY offer is less restrictive than the Home Program.

In the context of a reimbursement claim, the District's argument is not persuasive. Actual appropriateness notwithstanding, strict application of the LRE standard in tuition reimbursement cases would create an impossible standard for parents. Instruction in special schools and in the home is, by definition, more restrictive than programs provided in District facilities. *See* 34 C.F.R. § 300.551. Moreover, as explained above, in the second prong of the reimbursement test, the parentally-selected program does not need to meet the FAPE standard of appropriateness.

Finally, equitable considerations must be weighed. The Student has a long-standing history (relative to the Student's age) in the Home Program and similar home programs. Disputes between the Parents and the District concerning the Home Program are similarly long standing, and have been the subject of previous hearings and agreements. The Parents did not explicitly reject the District's ESY offer at an IEP meeting and may not have sent a letter in conformity

with 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb). This Hearing Officer is convinced, however, that the Parents have been clear in their desire to continue the Home Program in the summer of 2011 at the District's expense and that the District was well aware of this desire. The District knew what the Parents wanted and was unwilling to acquiesce; but the District's own effort to craft an ESY program was incomplete at best. This incomplete effort resulted in an ambiguous program that was poorly communicated to the Parents. For these reasons, equitable factors favor reimbursement.

### **Dicta**

The concerns expressed herein regarding ESY factors that were not discussed in IEP meetings should not be taken as a signal that longer or more IEP meetings are necessary. To the contrary, the parties are encouraged to find ways to make IEP meetings efficient and effective. ODR facilitation may be one means to that end.

The conclusion herein that the Home Program is appropriate for purposes of the second prong of the reimbursement test should not be misconstrued as a determination that the Home Program is an essential component of FAPE for the Student. This Hearing Officer declines to make any determination about that particular dispute at this juncture. Resolving that dispute is unnecessary for the adjudication of this hearing. It is likely, however, that issue will be front and center in the due process hearing that was recently requested by the Parents concerning the proposed program for the 2011-2012 school year, 2157-1112 KE.

### **ORDER**

And now, this 9<sup>th</sup> day of August, 2011, it is hereby ORDERED that the District shall reimburse the Parents for the cost of the Home Program (described in the accompanying decision) that was provided after the last day of the 2010-2011 school year but before the start of the 2011-2012 school year.

It is further ORDERED that any claims not specifically addressed in this Decision and Order are denied and dismissed.

Brian Jason Ford  
Hearing Officer