

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
Final Decision and Order

OPEN EXPEDITED HEARING
ODR File Number: 20830 1718

Child's Name: S.C. Date of Birth: [redacted]

Date(s) of Hearing:
June 25, 2018

Parent:
[redacted]

Counsel for Parent
Pro Se

Local Education Agency:
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Hearing Officer: Linda M. Valentini, Psy.D.
Certified Hearing Official

Date of Decision: June 28, 2018

Background and Procedural History

Student¹ is an early elementary school aged student who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA) and PA Chapter 14 under the classification of specific learning disability.²

The Parent requested this due process hearing, asserting among other things that the District's offer of Extended School Year (ESY) services is inappropriate. The matter was bifurcated, and this decision addresses only the ESY portion of the Parent's complaint; the other non-expedited issues are scheduled to be heard in early August.

Based upon the preponderance of the evidence before me I find in favor of the District.

Issue

Did the District offer Student an appropriate ESY program, and if not, what remedy is due?

Findings of Fact

1. Student first enrolled in the District in the 2017-2018 school year, Student's 2nd grade year. [S-3]
2. A District psychologist assessed Student's cognitive ability and academic achievement, and authored an evaluation report (ER) dated June 1, 2018. [NT 26; S-3]
3. Student's cognitive ability was assessed to be in the Low Average Range, although variability among subtest scores suggested that this estimate may not be accurate. [S-3]
4. Student demonstrated deficits in literacy skills in the areas of phonological processing, decoding, sight word recognition, fluency and comprehension. [NT 29-30; S-3]

¹ In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. The identifying information appearing on the cover page or elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

² 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are set forth in 34 C.F.R. §§ 300.1 – 300.818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14) 29 U.S.C. § 794.

5. Student was found eligible for special education under the classification of specific learning disability. [S-3]
6. Based on the data from the ER as well as on a discussion with Student's regular education classroom teacher, a special education teacher with a graduate degree in special education and six years' teaching experience in the District, drafted Student's initial IEP for implementation at the start of 3rd grade. [NT 20, 25]
7. The IEP team met on June 8, 2018. The District members of the IEP team discussed that they did not find Student eligible for ESY as this was Student's first IEP and Student had not received special education previously. ESY eligibility is decided on, among other things, Student's regression/recoupment after breaks in instruction as well as examining certain questions the State requires to be considered. [NT 23-24, 27, 49, 55-56, 60-61; S-4, S-7]
8. The Parent disagreed, and filed for a due process hearing on the ESY eligibility issue among other issues. The parties held a Resolution Meeting at which the District offered to change its determination and find Student ESY-eligible; the special education director revised the IEP to include ESY. [NT 42, 56]
9. Through District counsel a Notice of Recommended Educational Placement (NOREP) dated June 18, 2018 offering ESY was prepared and given to the Parent a few days before the resolution meeting. The Parent did not sign the NOREP. [NT 58; S-5]
10. Some previous experiences the Parent had with the District earlier in the year led to his not trusting that the District could address Student's needs. [N 41]
11. The Parent believes that the District did not take into account the family's plans, for example for vacation and camp, when it "rushed" to issue the revised IEP offering ESY on June 20th. [NT 42]
12. The Parent is concerned that the ESY goals in the IEP are the same goals, or "cookie-cut" from the goals in the IEP for 3rd grade. [NT 21]
13. Since Student has never received special education before, the literacy goals for the pre-3rd grade summer ESY are the same as the goals for 3rd grade. [NT 21]
14. The first ESY goal addresses improving Student's sight word recognition using the Dolch word list. The second ESY goal addresses Student's comprehension using "wh" questions based on sentences and passages. The IEP goals are the same as the initial IEP goals given the unusual situation of providing ESY prior to any special education instruction. [NT 36-38]
15. Student's ESY program also includes counseling as a related service. [NT 51-52]

16. The ESY program offered to Student is delivered a total of 17 days (Tuesday, Wednesday and Thursday excluding July 4th) from 8:30 to about 1:00 (including time for breakfast and lunch). Student would receive instruction in a group of eight to ten children (although attendance often is about half that), targeting Student's IEP goals from a certified special education teacher aided by a teaching assistant. In addition to academic instruction Student would receive some specials such as art, music, and gym to enhance the ESY experience. [NT 49-50, 53-55]

Legal Basis

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). In this case the Parent asked for the hearing and thus assumed the burden of proof.

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); The District Court "must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion." *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014); *see also generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017). None of the three witnesses presented with credibility issues.

Standards for a Free Appropriate Public Education: Student is entitled by federal law, the Individuals with Disabilities Education Act 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). 'Special education' is defined as specially designed instruction...to meet the unique needs of a child with a disability. 'Specially designed instruction' means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child's disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. C.F.R. §300.26.

A child's special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (*Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982)). FAPE "consists of educational instruction specifically designed to meet the unique needs of the handicapped child supported by such services as are necessary to permit the child to benefit from the instruction." *Ridley School District v. M.R.*, 680 F.3d at 268-269, citing *Rowley*. The Third Circuit has ruled that special education and related services are appropriate when they are reasonably calculated to provide a child with "meaningful educational benefits" in light of the student's "intellectual potential." *Shore Reg'l High Sch. Bd. f 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 (3d Cir. 2009) (citations omitted).

Last year the U.S. Supreme Court concluded that "the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas Cnty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017) This standard is consistent with the above interpretations of *Rowley* by the Third Circuit. See also *E.D. v. Colonial School District*, No. 09-4837, 2017 U.S. Dist. LEXIS 50173, at *36 (E.D. Pa. Mar. 31, 2017); *Brandywine Heights Area School District. v. B.M.*, 2017 U.S. Dist. LEXIS 47550, at *29 n. 25 (E.D. Pa. Mar. 28, 2017)

Local Educational Agencies [LEAs] need not provide the optimal level of service, maximize a child's opportunity, or even set a level that would confer additional benefits; the child must be offered a basic floor of opportunity. See *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), cert. denied, 488 U.S. 925 (1988); *Ridley Sch. Dist. v. MR*, 680 F.3d 260, 269 (3rd Cir. 2012). The IDEA entitles Student to an appropriate educational opportunity, but an IEP is not required to incorporate every program, aid, or service that parents desire for their child. *Mary Courtney T; Ridley*. An eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement, as noted in several federal district court decisions. See, e.g., *J. L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). *Endrew F.* did not disturb this standard, which entitles a child to what is reasonable, not to what is ideal.

ESY: Acknowledging that some students may require programming beyond the regular school year, the federal legislature deemed that Extended School Year services are to be provided to an eligible child if necessary to assure that the child receives a free, appropriate public education (FAPE). 34 C.F.R. §300.106(a)(2). Pennsylvania regulations provide additional guidance for determining ESY eligibility, requiring that factors listed in 22 Pa. Code §14.132 (a)(2) (i)—(vii) be taken into account. Because ESY services are meant to keep students' skills up during the period between the close of school in June and beginning of school in August or September the goals of an ESY program are necessarily based upon the goals of the IEP for the previous year as the service is meant to *extend* the previous school year.

Discussion

Although Student does not currently meet the criteria for ESY, in an effort to resolve the Parent's concerns the District offered an ESY program for summer 2018. This was an unusual offer, since as of June 2018 Student had not yet begun special education services. Nevertheless, in order to establish Student's ESY program the District used the IEP goals that were to be addressed in 3rd grade when the newly created IEP would have begun to be implemented. This was appropriate given the circumstances. The schedule for Student's ESY program is likewise appropriate. Given attention to Student's targeted needs in a 17-day program, Student could reasonably be expected to make progress and get a head start on the 3rd grade year.

The Parent is clearly a concerned and loving father, and it is not difficult to see how his child's being new to special education created some misunderstanding about the function of ESY as well as how goals for ESY are determined. Further, although the Parent indicated that the family had some summer plans with which ESY may conflict, this does not render the ESY program offer inappropriate. The Parent did not adduce any evidence that an original offer on June 8th would have presented any fewer conflicts than the good-faith offer ten days later, and even if he had it is unlikely that the conclusions drawn in this decision would have been different.

Order

It is hereby ordered that:

The District offered Student an appropriate ESY program and therefore no remedy is due.

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

Linda M. Valentini, Psy.D., CHO

June 28, 2018

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