

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

CLOSED HEARING
ODR File Number: 20972-18-19AS

Date of Hearing:
9/26/2018

Child's Name: L. D.

Date of Birth: [redacted]

Parent: [redacted]

Counsel for Parents: None

Local Education Agency:

North Pocono School District
701 Church Street
Moscow, PA 18444

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Date of Decision:

November 23, 2018

Hearing Officer:

James Gerl,
Certified Hearing Official

BACKGROUND

The parent requested a due process hearing challenging the decision by the district to deny the student extended school year services in previous school years. I find in favor of the District.

PROCEDURAL HISTORY

In e-mail correspondence with the hearing officer, the parent clarified that the due process complaint does not concern extended school year services for the current school year and, therefore, that the hearing did not need to be expedited. (See hearing officer Exhibit No. 1) A due process hearing was convened on September 26, 2018. At the outset of the hearing, the parent was advised that the parent had the right to proceed with an attorney, but parent chose to proceed without one during the due process hearing. The hearing was closed to the public.

Subsequent to the hearing, both parties filed written briefs and proposed findings of fact. The parent attached some documents to posthearing filings that were not introduced into the record at the due process hearing; such documents were not considered in reaching this decision. All proposed findings, conclusions and supporting arguments submitted by the parties have been considered. To the extent that the proposed findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and views stated below, they have been

accepted and to the extent that they are inconsistent, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues, as presented, and to the extent that the testimony of various witnesses is not in accord with the findings as stated below, it is not credited.

Personally identifiable information, including the names of the parties and similar information, has been omitted from the text of the decision that follows. FERPA 20 U.S.C. § 1232(g); and IDEA § 617(c).

ISSUES¹

1. Did the district improperly deny extended school year services to the student in previous years?
2. If the district improperly denied extended school year services to the student, is compensatory education owed to the student, and in what form and what amount?

¹ The parent attempted to raise other issues, including one pertaining to the student's math goals throughout the hearing. Because there was no issue with regard to math goals in the due process complaint, the hearing officer sustained objections to the relevance of such matters which clearly were not properly before the hearing officer. 34 C.F.R. § 300.511(d).

FINDINGS OF FACT

Based upon the evidence in the record compiled at the due process hearing, the hearing officer makes the following findings of fact:²

1. The Student is an elementary school age student who is eligible for special education under the category of specific learning disability. (T of mother; S-3).

2. The student is making adequate progress on student's IEP goals and student is functioning on grade level. (T of director pupil services; S-2; S-3; S-5)

3. The student was determined to be not eligible for extended school year services by student's IEP team in 2016, 2017 and 2018. (T of mother; P-2; P-4; P-5; S-2; S-3; S-6)

4. On February 18, 2016, the district issued a Notice of Recommended Educational Placement (NOREP) providing that the student would receive additional

² (Exhibits shall hereafter be referred to as "P-1," etc. for the parent's exhibits; "S-1," etc. for the school district's exhibits; "HO-1" etc. for Hearing Officer exhibits; references to testimony at the hearing is hereafter designated as "T" of _____).

time in the Learning Support Classroom in coordination with the regular education teacher to work on math skills. (P-6; T of mother)

5. On July 27, 2016, in response to a parent inquiry, the district's director of pupil services sent an e-mail to the student's parent with the Pennsylvania Department of Education requirements for extended school year services. Attached to the e-mail was a booklet from the Pennsylvania Department of Education explaining in detail Extended School Year and the seven factors outlined by the Pennsylvania statute for eligibility for extended school year services for a child with a disability. (T of director of pupil services; P-4)

6. The student's IEP team met on March 31, 2017. At this meeting, the principal of the student's school, who was chairing the IEP team meeting, instructed teachers not to answer questions by the mother concerning whether or not the student would benefit from extended school year services. On the same date, the district issued a notice of recommended educational placement (NOREP) related to the matters in the IEP. (S-2; T of mother)

7. The March 31, 2017 IEP for the student states that the team determined that the student was not eligible for extended school year services. (S-2)

8. By e-mail to the district director of pupil services on March 23, 2018, the student's parent requested extended school year services after the 2017 - 2018 school year. (S-6)

9. On March 26, 2018, the student's IEP team met. The IEP team again concluded that the student was not qualified to receive extended school year services. On the same date, the district issued a notice of recommended educational placement (NOREP) related to the matters in the IEP. (S-3; T of director pupil services)

10. On March 27, 2018, the district director of pupil services sent the parent an e-mail explaining that the student was not qualified to receive extended school year services. The director of pupil services included with the email another copy of the booklet by the Pennsylvania Department of Education explaining extended school year services and outlining the seven factors specified by the Pennsylvania statute concerning when a student with a disability is eligible for extended school year services. (S-6; T of director of pupil services)

11. The district offered the student tutoring after the 2017 - 2018 school year. Although the student was not eligible for extended school year services, the district offered the tutoring services to address the parent's concerns. The student did not attend the tutoring sessions. The district had offered similar tutoring during the previous summer, and the parent accepted the offer, but the student attended only two of the summer tutoring sessions. (S-6; P-2; T of director of pupil services; T of mother)

12. The district agreed to fund an independent neuropsychological evaluation of the student at the parent's request. The report of the neuropsychological evaluation of the student was issued on May 24, 2018. (S-4; T of director of pupil services)

13. The evaluator administered the WISC-V as a measure of intellectual functioning. The evaluator obtained a full-scale IQ of 88 for the student, placing student at the higher end of low average range and at the 21st percentile for student's age group. (S-4)

14. The evaluator administered the Woodcock-Johnson Test of Achievement – IV. The student's reading skills were found to be in the low average range. The student's math skills were found to be in the borderline range and the student's spelling/written language skills were found to be in the below average range. (S-4)

15. The evaluator made a number of recommendations concerning the student's educational program. The evaluator did not identify any issues for the student with regard to regression or recoupment. The evaluator did not recommend extended school year services for the student. (S-4; T of director of pupil services)

16. No decision has yet been made concerning extended school year services for the student for the summer of 2019. (T of director of pupil services)

17. The student does not have problems with regression after the summer or other breaks in educational programming. (T of director of pupil services; S-2; S-3; S-5)

18. The student does not have problems with recoupment of material after the summer or other breaks in educational programming. (T of director of pupil services; S-2; S-3; S-5)

19. The student does not have issues with self-sufficiency or independence from a caretaker; had not mastered and consolidated an important skill or behavior before a break in programming; does not withdraw from learning after breaks in programming; and the student does not have a severe disability. (T of director of pupil services)

20. The parent actively participated in the decisions by the student's IEP team concerning extended school year services. (record evidence as a whole)

CONCLUSIONS OF LAW

Based upon the arguments of the parties, including arguments made at the hearing and in their written closings, and upon all of the evidence in the record, as well as my own legal research, the hearing officer has made the following conclusions of law:

1. Extended school year services must be provided only if a child's IEP team determines, on an individual basis, that the services are necessary for the provision of a free appropriate public education. 34 C.F.R. § 300.106. Extended school year services are only necessary to provide a FAPE when the benefits a disabled child gains during the regular school year will be significantly jeopardized if he or she is not provided with an extended school year program. LG and EG ex rel. EG v. Wissahickon Sch. Dist., 55 IDELR 280 @ n.3 (E.D. Penna. 2011). See, MM v. School District of Greenville

County, 37 IDELR 183 (4th Cir. 2002); In re Student with a Disability, 108 LRP 25080 (SEA WV 2007).

2. The Pennsylvania extended school year services statute provides: In addition to the requirements incorporated by reference in 34 C.F.R. 300.106... a school entity shall use the following standards for determining whether a student with disabilities requires ESY as a part of the student's program:

- (1) At each IEP meeting for a student with disabilities, the school entity shall determine whether the student is eligible for ESY services and, if so, make subsequent determinations about the services to be provided.
- (2) In considering whether a student is eligible for ESY services, the IEP team shall consider the following factors, however, no single factor will be considered determinative:
 - (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 critical 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).

3. Under IDEA, a procedural violation is actionable only if it results in the loss of educational opportunity for the student, seriously deprives the parents of their participation rights or causes a deprivation of educational benefit. IDEA § 615(f)(3)(E)(ii); Ridley School District v. MR and JR ex rel. ER, 680 F. 3d 260, 58 IDELR 271 (3d Cir. 2012)

4. Services are not categorical under IDEA; IDEA does not concern itself with labels, but whether a student with a disability is receiving a free appropriate public education; the IEP of a child with a disability must be tailored to the unique needs of that particular child. 34 C.F.R. § 300.106(a)(3)(i); Heather S v. State of Wisconsin, 125 F. 3d 1045, 26 IDELR 870 (7th Cir. 1997); Fort Osage R-1 School District v. Sims ex rel. BS, 841 F. 3d 996, 56 IDELR 282 (8th Cir. 2011). The child's identified needs and not the child's disability category determine the services that must be provided to the child. Maine Sch. Administrative Dist No. 56 v. Ms. W ex rel. KS, 47 IDELR 219 (D. Maine 2007). See also, analysis of comments to proposed federal regulations 71 Fed. Register 156 at page 46586, 46588 (OSEP August 14, 2006); In re Student with a Disability, 52 IDELR 239 (SEA WV 2009); Sch. Dist. of Philadelphia v. Post, et al., 262 F. Supp. 3d 178, 70 IDELR 96 (E.D. Penna. 2017).

5. The student was not qualified or eligible to receive extended school year services after the 2015 – 2016, 2016 – 2017, or 2017 – 2018 school years. The district did not improperly deny extended school year services to the student.

6. Any procedural violations by the school district in instructing teachers at IEP meetings to not talk or failing to issue a prior written notice (or NOREP) were harmless procedural violations because they did not result in educational harm to the child or a substantial impairment of the parent’s right to participate.

7. The school district did not violate the special education laws or regulations by failing to provide extended school year services to the student after previous school years.

DISCUSSION

The student was not qualified to receive, and did not need, extended school year services after the 2016, 2017 and 2018 school years.

Extended school year services are defined as special education and related services that are provided beyond the normal school year of the school district. 34 C.F.R. § 300.106(b)(i). The main purpose of extended school year services for children with disabilities is to ensure that the student does not substantially regress from one school year to the next and to ensure that they are able to recoup skills learned without substantial difficulty. LG and EG ex rel. EG v. Wissahickon Sch. Dist., 55 IDELR 280

(E.D. Penna. 2011); In re Student with a Disability, 108 LRP 25080 (SEA WV 2007).

This helps to ensure that students with a disability receive a free and appropriate public education. 34 C.F.R. § 300.106.

In the instant case, the parent's argument is essentially that the student should be provided with extended school year services after the 2018 - 2019 school year as an equitable remedy for past extended school year violations by the district. It is not controverted that the decision for extended school year services at the end of the current school year has not been decided.

There is no evidence in the record that the student has any significant problems with regard to regression. The student does not revert to a lower level of functioning after breaks in school programming.

There is also no evidence in the record that the student has trouble with recoupment. The student has the capacity to recover skills after a break in educational programming.

Thus the parent has not shown that the student has problems with regression or recoupment- the two primary factors in determining the need for extended school year services.

Similarly, there is no evidence in the record that the student meets any of the other requirements that the Pennsylvania statute identifies as relevant to the extended school year eligibility analysis. The parent has not shown that the student had mastered an important skill before a break in programming. It is uncontested that the student does not have does not have issues with self-sufficiency or independence from a caretaker. No evidence in the record suggests that the student withdraws from the learning process after breaks in educational programming. The student does not have a severe disability. In short, none of the seven factors outlined by the Pennsylvania statute concerning extended school year services applies to this student. Clearly, the student was not eligible or qualified to receive extended school year services after the relevant school years.

The record does show that the parent made a number of requests for extended school year services for the student. After these requests, the director of pupil services replied stating that the student was not qualified for extended school year services. On two occasions, the director supplied the parent with a publication by the Pennsylvania Department of Education that explains in detail the eligibility criteria for extended school year services. In addition, although the student was not eligible for extended school year services, the district offered to provide summer tutoring to the student after two school years in order to address the parent's concerns.

The parent's primary argument in this case is that the student needs the extended school year services because all children with a specific learning disability need extended school year services. The parent's argument misses the point because it relies upon stereotypical thinking about children with disabilities. Services are not categorical under IDEA; IDEA does not concern itself with labels but whether a student with a disability has an IEP tailored to the unique needs of that particular child. Heather S v. State of Wisconsin, 125 F. 3d 1045, 26 IDELR 870 (7th Cir. 1997); Fort Osage R-1 School District v. Sims ex rel. BS, 841 F. 3d 996, 56 IDELR 282 (8th Cir. 2011); See, Sch. Dist. of Philadelphia v. Post, et al., 262 F. Supp. 3d 178, 70 IDELR 96 (E.D. Penna. 2017); Maine Sch. Administrative Dist No. 56 v. Ms. W ex rel. KS, 47 IDELR 219 (D. Maine 2007); analysis to comments pertaining to proposed federal regulations, 71 Fed. Register 156 at page 46586, 46588 (OSEP August 15, 2006); In re Student with a Disability, 52 IDELR 239 (SEA WV 2009). Indeed, the federal regulations specifically forbid school districts from using the category of disability as a basis for determining eligibility for extended school year services. 34 C.F.R. § 300.106(a)(3)(i). The parent's argument that all children with a specific learning disability require extended school year services is expressly rejected.

The parent does raise some additional matters that must be addressed in this decision. The parent testified that at an IEP team meeting, the school principal instructed some teachers not to speak during the meeting. The teachers had begun to

answer parent questions concerning whether the student would benefit from extended school year services. Although none of the teachers or the principal testified at the hearing, this is a very troubling allegation. It is highly irregular for an IEP team leader to instruct participants not to speak. This in itself would appear to be a procedural violation of IDEA. Procedural violations, however, are actionable only if they result in a loss of educational opportunity for the student or seriously deprive the parent of their participation rights. IDEA § 615(f)(3)(E)(ii); Ridley School District v. MR and JR ex rel. ER, 680 F. 3d 260, 58 IDELR 271 (3d Cir. 2012).

In the instant case, the procedural violation did not harm the student inasmuch as the student is clearly not qualified for extended school year services. Also, the procedural violation did not seriously deprive the parent of participation rights, as the parent continued to participate in the IEP team meeting and to express her concerns, by email and otherwise, regarding extended school year services. Moreover, the standard for extended school year is not whether a student would benefit from such services; many if not all students would benefit from additional services. It is concluded therefore that this procedural violation was harmless.

The parent also argues that the school district violated IDEA by failing to issue a notice of recommended educational placement (NOREP) (or prior written notice) after the parent requested in writing that the student receive extended school year services. The district issued a NOREP after each IEP for the student, but not after the

later request by the parent. To the extent that failure to issue a separate NOREP may be a procedural violation of IDEA, it is once again harmless. There was no loss of educational opportunity for the student because the student was clearly not eligible to receive extended school year services. Moreover, the parent's participation rights were not substantially impaired, as the parent continued to meaningfully participate by asserting the claim that the student was entitled to extended school year services. This procedural violation was harmless.

CONCLUSION

It is concluded therefore that the decision by the school district to not provide extended school year services to the student was correct and consistent with all legal requirements. Accordingly, it is concluded that the district decisions to deny extended school year services to the student did not violate IDEA or the federal regulations or the Pennsylvania statutes and regulations concerning special education. The parent is not entitled to compensatory education or any other relief.

ORDER

Based upon the foregoing, it is HEREBY ORDERED that all of the relief requested in the due process complaint is hereby denied. The complaint is dismissed.

ENTERED: November 23, 2018

James Gerl

James Gerl, Esq. CHO
Hearing Officer