

*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:** 22253-18-19

**Child's Name:** A. P.

**Date of Birth:** [redacted]

**Parents:**  
[redacted]

*Counsel for Parent*  
Lorrie McKinley, Esquire  
McKinley & Ryan, LLC  
238 West Miner Street  
West Chester, PA 19382

**Local Education Agency:**  
Avon Grove School District  
107 Schoolhouse Road  
West Grove, PA 19390

*Counsel for the LEA*  
Jason Fortenberry, Esquire  
Sweet, Stevens, Katz & Williams  
331 E. Butler Avenue  
New Britain, PA 18901

**Hearing Officer:** Cathy A. Skidmore, M.Ed., J.D.

**Date of Decision:** 06/20/2019

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student, (hereafter Student),<sup>1</sup> is a primary elementary school-aged student in the District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA), under the classifications of Autism and a Speech/Language Impairment.<sup>2</sup> After a dispute arose over the Extended School Year program proposed for Student by the District for 2019, Student's guardians (Parents) filed a Due Process Complaint that proceeded to an efficient expedited hearing.<sup>3</sup> Specifically, the Parents claimed that the proposal was not in compliance with IDEA mandates for a free, appropriate public education (FAPE) for Student, and further denied them the opportunity to participate meaningfully in determining ESY services. The District maintained that the program as proposed met its obligations in all respects.

For the reasons set forth below, the claims of the Parents cannot be sustained.

### **ISSUES**

1. Whether the program proposed by the District for ESY services for 2019 was substantively appropriate for Student; and
2. Whether the Parents were denied the opportunity to meaningfully participate in developing that ESY program.

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<sup>1</sup> In the interest of confidentiality and privacy, Student's name and gender, and any other potentially identifiable information, are not used in the body of this decision. All personally identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with 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).

<sup>2</sup> 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified 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).

<sup>3</sup> References to the record throughout this decision will be to the Notes of Testimony (N.T.), Joint Exhibits (J-) followed by the exhibit number, and Parent Exhibits (P-) followed by the exhibit number. References to Parents in the plural will be made where it appears that one was acting on behalf of both.

## **FINDINGS OF FACT**

1. Student is primary elementary school aged and resides within the District where Student also attends school. Student is eligible for special education based on classifications of Autism and a Speech/Language Impairment. (J-1 at 1; J-6 at 1, 6; J-11 at 1, 21.)
2. Student has significant language delays both receptively and expressively. (N.T. 21, 132-33; J-11 at 2.)
3. Student entered the District in kindergarten in the fall of 2017 with an Individualized Education Program (IEP) developed in June of that year. (J-12.)
4. Student was evaluated by the District in the fall of 2017 and a Reevaluation Report (RR) issued in December (kindergarten). According to parental and other input into that RR, Student had been diagnosed with Autism and a Sensory Integration Disorder, and had significant language needs. Student also reportedly had been provided with early intervention services. Preschool special education services addressed cognitive delay and needs in the areas of speech/language, fine and gross motor skills, adaptive skills, and social/emotional functioning. (J-11.)
5. The December 2017 RR confirmed Student's strengths and needs following assessment of cognitive ability, executive functioning, academic ability, social/emotional functioning, speech/language, occupational therapy, and physical therapy. Results of the Verbal Behavior Milestone Assessment Placement Program (VB-MAPP) administered in September 2017 were also reported for this RR. Student had earned a score of 112.5 on that assessment out of a possible 170, which is an emerging Level 3 learner overall with some variability among levels for the specific skill areas. By contrast, Student was reportedly demonstrating most of those skills at a Level 2 in February 2017. (J-11; J-12 at 6-8.)
6. The December 2017 RR identified Student as eligible for special education on the bases of Autism and a Speech/Language Impairment. (J-11.)
7. Needs identified in the December 2017 RR were for increasing early reading, writing, and mathematics skills, and improvement in the following areas: attention, self-help, social skills, speech/language, and fine and visual motor skills. (J-11 at 21-22.)
8. Over the 2017-18 and 2018-19 school years, Student was provided a program of autistic support through a Verbal Behavior program implementing an Applied Behavioral Analysis (ABA) approach. (N.T. 20, 53.)
9. Student's autistic support program is based on assessments using the VB-MAPP administered twice each school year. The program focuses on language development of skills that typical children have acquired by approximately forty eight months of age. (N.T. 20-21, 53, 75.)

10. Students in the ABA program are provided with a variety of instructional activities, including intensive teaching (where students practice known skills as well as new targets). (N.T. 29-30.)
11. In addition to language support that has been an aspect of Student's program throughout the school day during the relevant time period, Student has also been provided with speech/language services during the 2018-19 school year. Language services have thus encompassed Student's entire school day. (N.T. 45, 77, 186-88, 194-95.)
12. Student's January 2018 IEP was developed during the kindergarten year and revised in October 2018. The original goals provided for Student to tact fifty different actions (noun-verb combinations) with fading prompts from a baseline of nine; to tact fifty features of objects presented from a baseline of not performed; to mand to peers spontaneously during play twice during a thirty minute period with fading prompts from a baseline of limited performance with prompting; to engage in intraverbal communication by answering forty personal information (WH) questions with fading prompts from a baseline of twenty; to copy a five-word sentence using five skills on a rubric from a baseline of not performing the skills; and to transition when directed without problem behavior. (J-3.)
13. As of the end of the third trimester of the 2017-18 school year, Student was demonstrating progress on the IEP goals as follows: tacting ninety different noun-verb combinations; tacting fifty-four features of objects; manding to peers an average of seven times in thirty minutes with a prompt and one time in thirty minutes without a prompt; engaging in intraverbal communication by answering twenty-nine personal questions; copying a five-word sentence using three of five skills on the rubric; and was transitioning when directed without problem behavior at near mastery level. (J-3 at 21-29.)
14. As of the end of October 2018, Student had mastered the goals to tact noun-verb combinations and to tact features of objects presented. Student made progress during the first marking period of the 2018-19 school year on the other goals (manding to peers an average of ten times in thirty minutes with a prompt and one time without; engaging in intraverbal communication by answering thirty-one personal questions; and copying a sentence using three to four of five skills on the rubric). (J-3.)
15. As revised from January 2018 due to Student's mastery of the two tacting goals, the October 2018 IEP revision provided for two new goals: tacting fifty actions (noun-verb combinations) of novel nouns with fading prompts from a baseline of twenty-seven; and tacting eighty-five features of presented objects with fading prompts from a baseline of sixty eight. A number of program modifications/items of specially designed instruction were included in this IEP. (J-3.)
16. The January/October 2018 IEP provided for speech/language therapy (thirty minutes/week individual and sixty minutes group); occupational therapy (sixty minutes individual); combined speech/language and occupational therapy (sixty minutes/month);

and a full time personal care assistant (PCA). Student's program was full-time autistic support, with Student participating with typical peers for recess. (J-3.)

17. Student was eligible for and attended ESY services in the summer of 2018. The then-current IEP provided for ESY goals addressing the tacting, intraverbal, and occupational therapy goals. Related services were specified as occupational therapy thirty minutes/week individual; speech/language therapy fifteen minutes/week individual and thirty minutes/week group; and combined speech/language and occupational therapy fifteen minutes/week; Student would have a full time PCA. The program was identified as four days per week for 3.5 hours/day over a period beginning June 25, 2018 and ending on August 2, 2018. (N.T. 61, 64; J-3 at 37-39; J-4.)
18. Student's progress on goals over ESY in 2018 reflected a score of four out of five on the occupational therapy rubric (an increase from three out of five at the end of the 2017-18 school year); and maintenance of progress toward the tacting and intraverbal goals from the end of the 2017-18 school year. (J-3 at 21-28; J-4.)
19. After the 2018 ESY program, the Parents observed that Student experienced difficulty returning to the usual school routine in the fall. They did not observe difficulties immediately after ESY ended. (N.T. 137-39.)
20. The VB-MAPP was administered again in October 2018. Student reportedly scored 139 of 170 possible points, suggesting that Student was a Level 3 learner on that measure with some variability among skills assessed. (J-6 at 6-8.)
21. The District collected data over the course of the 2018-19 school year to determine Student's ability to recoup skills after breaks. Student's main difficulty after breaks was resuming the level of stamina Student had for direct instruction in intensive teaching sessions that Student demonstrated before breaks. (N.T. 27-30, 65.)
22. A meeting of Student's IEP team convened in January 2019. Among other things, the team discussed Student's present levels as well as ESY eligibility and programming. (N.T. 55, 57-58.)
23. The new IEP for Student in January 2019 provided updated information on present levels of performance and functioning. This IEP contained annual goals addressing manding to peers five times independently from a baseline of ten with a prompt and one without a prompt; tacting features of one hundred fifty presented objects with fading prompts from a baseline of eighty-three; intraverbal communication answering forty-five personal information (WH) questions with fading prompts from a baseline of thirty-two; intraverbal communication answering one hundred WH questions involving personal information or feature/function/class with fading prompts from a baseline of thirty-two; identifying sight words from a list; adding and subtracting single digits independently; copying two age-appropriate sentences and writing first and last name from memory demonstrating five of six skills based on a rubric from a baseline of zero; increasing fine motor strength and coordination through demonstration of three of three specific skills based on a rubric from a baseline of zero; and demonstrating approximate behavior for

ten minutes when prompted to wait from a baseline of up to one minute. A number of program modifications/items of specially designed instruction were included in this IEP. (J-6.)

24. The January 2019 IEP provided for speech/language therapy (thirty minutes/week individual and sixty minutes group); occupational therapy (sixty minutes individual); combined speech/language and occupational therapy (sixty minutes/month); and a full time personal care assistant. Student's program was supplemental autistic support with Student participating with regular education peers during recess, lunch, homeroom, and a library period. (J-6.)
25. The draft IEP sent to the Parents prior to the January 2019 IEP meeting did not contain goals in the section for ESY but confirmed Student's eligibility based on "a measureable decrease in skills or behaviors which occur as a result of an interruption in educational programming." (J-13 at 2.) It did, however, specify the services by category and the duration of the program (June 24, 2019 through July 25, 2019) in full-time autistic support. (N.T. 32, 175-76; J-13.)
26. During the discussion of ESY for 2019 at the January 2019 IEP meeting, the team discussed Student's decrease in stamina over breaks. The team also discussed Student's most significant needs to be addressed during ESY but did not directly relate those needs to specific goals in the annual IEP. (N.T. 32-34, 38-40, 41-42, 60-61, 140.)
27. The District members of the IEP team concluded that Student did not need to practice the goals for intraverbal communication regarding personal information and tacting over the summer of 2019 because Student did not exhibit difficulty maintaining that skill over time. They did decide to continue with the goals for manding, and intraverbal communication related to feature/function/class, because those were still emerging skills and Student had continued needs in those areas. (N.T. 34-35, 38, 41, 66-68, 69-71.)
28. The District members of the IEP team concluded that Student did not need to work on the reading and mathematics goals during the summer of 2019 because Student had been working on related skills through the ABA program and had not demonstrated difficulty maintaining those skills, which were considered to be relative strengths for Student. (N.T. 35-36, 70-71.)
29. The District members of the IEP team concluded that Student needed the level of related services proposed for ESY 2019 based on skills demonstrated after prior breaks and current needs. (N.T. 189.)
30. The Parents expressed concern with the level of related services for ESY in 2019 as well as the length of the day and duration of services. The Parents asked for programming five days per week. (N.T. 32, 59, 105, 107, 118-19, 139, 143-44.)
31. The finalized January 2019 IEP provided that Student was eligible for ESY services in the summer of 2019. This IEP provided for ESY goals addressing manding; intraverbal communication answering WH questions involving feature/function/class; and occupational therapy. Related services were specified as occupational therapy thirty

minutes/week individual; speech/language therapy fifteen minutes/week individual and thirty minutes/week group; and combined speech/language and occupational therapy fifteen minutes/week; Student would have a full time PCA. The program was identified as four days per week for 3.5 hours over a period beginning June 24, 2019 and ending on July 25, 2019. (J-6 at 40-42.)

32. The District is able to provide more hours of ESY services than was offered to Student for the summer of 2019 if Student's needs warranted more time or services. (N.T. 47-48, 63-64, 72.)
33. The Parents did not approve the Notice of Recommended Educational Placement for the proposed ESY program that was sent to them on February 5, 2019, explaining that they did not believe the proposal met Student's needs particularly with respect to related services. They filed their Due Process Complaint on May 22, 2019. (N.T. 169; J-1; J-7.)
34. Although not available to the team at the time of the January 2019 IEP meeting, by the end of the second trimester of the 2018-19 school year, Student reportedly was making progress on the goals for manding to peers with independence; tacting features of presented objects; reading sight words; copying two sentences; and increasing fine motor strength and coordination. Student was maintaining performance on the goals for intraverbal communication answering WH questions involving personal information and answering WH questions involving feature/function/class; adding/subtracting; and demonstrating approximate behavior when prompted to wait. (J-10.)
35. The District regularly provides progress monitoring reports including that from ESY services to parents. (N.T. 49-50, 84, 124, 126.)
36. The first day of school for the 2019-20 school year is August 26, 2019. (N.T. 203.)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **GENERAL LEGAL PRINCIPLES**

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. At the outset of the discussion, it should be recognized that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case must rest with the Parents who requested this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those

rare cases where the evidence is evenly balanced or in “equipoise.” *Schaffer, supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also 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). This hearing officer found each of the witnesses who testified to be credible, and the few inconsistencies in the testimony are attributed to variations in memory and differing perspectives rather than any deception or untruth.

In reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered in issuing this decision, as were the parties’ closing statements.

#### GENERAL IDEA PRINCIPLES: FREE APPROPRIATE PUBLIC EDUCATION

The IDEA and the implementing state and federal regulations obligate local education agencies (LEAs) to provide a “free appropriate public education” (FAPE) to children who are eligible for special education. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services that are reasonably calculated to permit the child to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). LEAs



meet the obligation of providing FAPE to eligible students through development and implementation of an IEP that is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

Quite recently, the U.S. Supreme Court was called upon to consider once again the application of the *Rowley* standard, and it then observed that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Andrew F. v. Douglas County School District RE-1*, \_\_\_ U.S. \_\_\_, \_\_\_, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. This reflects the broad purpose of the IDEA[.]

*Andrew F.*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 349-50 (2017)(citing *Rowley* at 206-09)(other citations omitted). The Court thus 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.” 137 S. Ct. at 1001, 197 L.Ed.2d at 352. This standard is not inconsistent with the above longstanding interpretations of *Rowley* by the Third Circuit.

As *Andrew*, *Rowley*, and the IDEA make abundantly clear, the IEP must be responsive to the child’s identified educational needs. See 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. However, an LEA is not required to provide the “best” program, but rather one that is appropriate in light of a child’s unique circumstances. *Andrew F.*, *supra*; *Ridley*, *supra*; *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). In addition, an IEP must be judged “as of the time it is offered to the student, and not at some later date.” *Fuhrmann*

*v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993); *see also D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010) (same).

### ESY PRINCIPLES

This FAPE requirement extends to provision of ESY services as necessary for the child.

34 C.F.R. § 300.106(a)(1). Pennsylvania sets forth a number of criteria that IEP teams must consider to determine whether a student is eligible for ESY:

(i) Whether the student reverts to a lower level of functioning as evidenced by a measurable decrease in skills or behaviors which occurs as a result of an interruption in educational programming (Regression).

(ii) Whether the student has the capacity to recover the skills or behavior patterns in which regression occurred to a level demonstrated prior to the interruption of educational programming (Recoupment).

(iii) Whether the student's difficulties with regression and recoupment make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives.

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

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

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

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

22 Pa. Code § 14.132(a)(2). Nonetheless, these criteria are not exhaustive; they incorporate by reference, and state that these subparts are in addition to, the federal counterpart at 34 C.F.R. § 300.106. 22 Pa. Code § 132(a). If the student is eligible, the team must also determine the services to be provided. 22 Pa. Code § 14.132(a)(1). ESY services must be provided in accordance with the child's IEP. 34 C.F.R. § 106(b). Thus, the determination of eligibility for and provision of ESY services must be individualized. In addition, "a public agency may not ...

[u]nilaterally limit the type, amount, or duration of [ESY] services.” 34 C.F.R. § 106(a)(3).

Substantively, the question of whether not ESY services are appropriate for the student must be evaluated in accordance with the above generally applicable FAPE standards. However, “[t]he need for ESY services will not be based on [t]he desire or need for other programs or services that, while they may provide educational benefit, are not required to ensure the provision of a free appropriate public education.” 22 Pa. Code § 14.132(c)(3).

### PROCEDURAL FAPE

From a procedural standpoint, the family plays “a significant role in the IEP process.” *Schaffer, supra*, 546 U.S. at 53. Indeed, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2).

The IEP proceedings entitle parents to participate not only in the implementation of IDEA's procedures but also in the substantive formulation of their child's educational program. Among other things, IDEA requires the IEP Team, which includes the parents as members, to take into account any “concerns” parents have “for enhancing the education of their child” when it formulates the IEP.

*Winkelman v. Parma City School District*, 550 U.S. 516, 530 (2007). Full participation in the IEP process does not mean, however, that LEAs must defer to parents' wishes. *See, e.g., Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 657-58 (8th Cir.1999)(noting that IDEA “does not require school districts simply to accede to parents' demands without considering any suitable alternatives,” and that failure to agree on placement does not constitute a procedural violation of the IDEA); *see also Yates v. Charles County Board of Education*, 212 F.Supp.2d 470, 472 (D.Md.2002)(explaining that “parents who seek public funding for their child's special education possess no automatic veto over” an LEA's decision). As has previously been explained by the U.S. Department of Education,

The IEP team should work towards a general agreement, but the public agency is ultimately responsible for ensuring the IEP includes the services that the child needs in order to receive a free appropriate public education (FAPE).... If the team cannot reach agreement, the public agency must determine the appropriate services and provide the parents with prior written notice of the agency's determinations regarding the child's educational program and of the parents' right to seek resolution of any disagreements by initiating an impartial due process hearing or filing a State complaint.

*Letter to Richards*, 55 IDELR 107 (OSEP 2010); *see also* 64 Fed. Reg. 12406, 12597 (1999)

(same).

### THE PARENTS' CLAIMS

The sole issue in this case is whether the District's proposed program for ESY services in 2019 is appropriate for Student, both substantively and procedurally. The Parents aptly point out that ESY services are not simply about regression and recoupment. With respect to eligibility, they emphasize the terms in the ESY eligibility section of the January 2019 IEP that reflected regression following interruptions or breaks in programming. However, this hearing officer must agree with the District that, once ESY eligibility is determined, regardless of whether one or more of the criteria in the regulations are specified, the fact that other eligibility criteria may also be in play renders this contention moot. In any event, with neither party disputing Student's eligibility for ESY services,<sup>4</sup> the main issue to be decided is whether the proposal met the substantive standards for FAPE. That is a separate question entirely. Here, the Parents ultimately sought a five day per week, full day program equivalent to Student's school day with the full complement of related services as provided during the regular school year (N.T. 212), while the District sought confirmation that its proposal in the final January 2019 IEP (3.5 hours per day for a period of approximately 5.5 weeks) was appropriate for Student (*id.* at 220).

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<sup>4</sup> For purposes of this hearing, there was no assertion that the most recent IEP is inappropriate in any other respect.

The Parents accurately observe that services beyond the standard school year have long been recognized as necessary for appropriate special education services for children who need them. *See, e.g., Commonwealth v. Battle*, 629 F.2d 269 (3d Cir. 1980). Indeed, the position of the U.S. Department of Education has evolved from a previous stance that, “the purpose of the ESY program is to prevent regression and recoupment problems.” *Letter to Myers*, 16 IDELR 290 (OSEP 1989).<sup>5</sup> In 1999 and again 2006, the agency explained in promulgating the successive regulations implementing the IDEA, that

[t]he concepts of “recoupment” and “likelihood of regression or retention” have formed the basis for many standards that States use in making ESY eligibility determinations and are derived from well-established judicial precedents. States may use recoupment and retention as their sole criteria but they are not limited to these standards and have considerable flexibility in determining eligibility for ESY services and establishing State standards for making ESY determinations.

71 Fed. Reg. 46582 (2006)(citations omitted); *see also* 64 Fed. Reg. 12576 (1999) (substantially the same). But, again, this language relates to eligibility, not appropriateness.<sup>6</sup>

After careful review, this hearing officer must conclude that the program as proposed by the District is both individualized for Student, and appropriate based on Student’s needs for the intervening summer in 2019. While it is quite understandable that the Parents would prefer to have the District provide Student with the full complement of services during the summer that Student receives during the school year, its program need not be ideal; and, the evidence in the record supports the conclusion that existing information supports the proposal.

The best and only source of actual data to support Student’s ability to maintain progress toward IEP goals is that from the end of the 2017-18 school year and that in October 2018. By

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<sup>5</sup> Nonetheless, there are more recent court decisions that subscribe to this precept. *See, e.g., L.G. v. Wissahickon School District*, 2011 U.S. Dist. LEXIS 476 at \*16 n. 3, 2011 WL 13572 (E.D. Pa. 2011).

<sup>6</sup> As set forth above, the Pennsylvania regulations on eligibility for ESY services consider regression and recoupment in a majority of its criteria.

the end of the 2017-18 school year, Student had made significant progress toward the January 2018 IEP goals. Several of those goals were addressed during ESY 2018, with Student maintaining the same level of performance. By October 2018, Student had mastered two of the January 2018 IEP goals and had made progress over and above that at the end of the 2017-18 school year and ESY in 2018 on the other goals. Thus, Student maintained a trend toward goal mastery on all IEP goals even after the extended summer break that included a 2018 ESY program that was virtually the same as that proposed for 2019.

It is also important to keep in mind that Student's program includes, as a fundamental component, practice of known and mastered skills. Simply because certain IEP goals would not be monitored for progress over the 2019 ESY program does not mean that Student would not continue to work on necessary foundational skills. Rather, the evidence was more than preponderant that Student's language deficits have been addressed in a variety of ways through autistic support and the speech/language services that work in conjunction with each other. Likewise, the level of services for ESY 2019 should not be viewed as providing "portions" of the school year IEP; on the contrary, the program as proposed must be considered as a whole and in light of Student's unique presentation and the totality of the circumstances.

Student does not reportedly engage in significant behavior, even after breaks in programming. Student would have a break of one week before ESY in 2019 and for approximately four weeks after ESY. While the District's proposal does not evenly split that time between the 2018-19 and 2019-20 school years, there is no requirement that it do so provided the breaks that do occur are not unreasonable for Student. Furthermore, the Parents have failed to establish why their request for full day sessions five days each week for the same time period is necessary for Student in order to receive FAPE compared to the four day per

week, five weeks in duration ESY program of mornings only that is offered. While it is perfectly understandable and even commendable that the Parents would seek an expanded summer program to provide additional educational benefit, the regulations are clear that such is not a basis for ESY. Unfortunately for the Parents, it was their burden to establish that the District's 2019 ESY proposal was substantively inappropriate for Student by a preponderance of the evidence, and this they were not able to do.

The Parents' other contention regarding their inability to participate meaningfully in ESY decisions, resulting in a procedural violation, must also be addressed. It is quite apparent from the record that the ESY program was not predetermined prior to the January 2019 IEP meeting, although a proposed schedule of services (virtually identical to ESY in 2018) had been provided prior to the meeting. The Parents also did not understand that the discussion at that meeting regarding needs as they related to ESY services were, in essence, the guiding directive toward the goals that would be specified to target. In any event, that the District members of the IEP team differed in their perspective on Student's ESY programming needs in 2019 from those of the Parents does not mean that they were not able to meaningfully participate; rather, the NOREP proposed in February 2019 served to memorialize the District team members' proposal after "determin[ing] the appropriate services and provid[ing] the parents with prior written notice of [its] determinations" so that the Parents could pursue their right to a due process hearing. *Letter to Richards, supra*. While it is unfortunate that the parties could not reach a consensus, doing so is not always possible; here, the process culminated in the instant proceeding with a decision on the merits. It is this hearing officer's sincerest hope, however, that the parties may continue their collaborative team decision-making moving forward into ESY 2019 and beyond.

**ORDER**

AND NOW, this 20<sup>th</sup> day of June 2019, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the District's proposal for Student for ESY 2019 was appropriate both substantively and procedurally. The District is not ordered to take any action.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are DENIED and DISMISSED.

*Cathy A. Skidmore*

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Cathy A. Skidmore  
HEARING OFFICER  
ODR File No. 22253-1819KE