

*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:**

23420-19-20

**Child's Name:**

[redacted]

**Date of Birth:**

[redacted]

**Parent:**

[redacted]

*Counsel for Parent*

Pro Se

**Local Education Agency:**

Lower Merion School District  
301 E. Montgomery Avenue  
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*Counsel for the LEA*

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**Hearing Officer:**

Charles W. Jelley Esq.

**Date of Decision:**

06/05/2020

## PROCEDURAL HISTORY

The Student<sup>1</sup> is a rising [redacted] school-aged child residing in and attending school in the Lower Merion School District (District). The Parties agree that as a result of multiple disabilities, the Student is otherwise eligible to receive an individualized education program (IEP) and specially-designed instruction (SDI) in the least restrictive environment (LRE). The Parties also agree the Student is otherwise eligible for Extended School Year summer services (ESY). The Student receives speech and language therapy support, occupational therapy support, physical therapy support, and itinerant vision support.

The Parties disagree about the overall length, duration and content of the ESY summer school day. The Parents also contend the Student needs a no-break continuous 12-month ESY program. In short, but for holidays, the Student should receive a continuous program of instruction every day.

On multiple occasions, the Parents rejected the District's ESY offer of a free appropriate public education (FAPE), spelled out in the Student's IEP and accompanying described in the Notice of Recommended Educational Placement (NOREP). The District contends that all times it complied with all substantive and procedural regulations and requirements.

<sup>1</sup> In order to provide confidentiality and privacy, Student's name, gender, and other personal information are not used in the body of this decision to the extent possible. All potentially 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). 2 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, implementing the IDEA are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14). References to the record throughout this decision will be to the Notes of Testimony (NT p.), Parent Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number. The hearing was delayed, by agreement of the Parties, due schedule conflicts and the COVID 19 school closing.

After a two day hearing and reviewing all of the testimony of multiple witnesses and reviewing over 35 lengthy exhibits, I now find in part in favor of the Parent and in part for the District.<sup>2</sup> A Final Order granting appropriate relief follows.

## **ISSUE**

1. Whether the District's proposed offer of a free appropriate public ESY program is appropriate and meets this Student's individualized needs and/or circumstance? If the District failed to offer a free appropriate public education, is the Student entitled to a 12 month school year? (NT pp.28-29).

## **FINDINGS OF FACT**

### **THE STUDENT'S MULTIPLE MEDICAL DIAGNOSES**

1. In 2013, the Student was in the [redacted] and had many friends. On April 26, 2013, [redacted], the Student had a 30-second seizure while in bed. Dad observed the generalized seizure and, when it stopped, immediately drove the Student to the hospital. Between the parking lot and the hospital entrance, the Student had an additional 30-second seizure. Once in the hospital, the Student had a third 30-second seizure. While in the emergency room, the Student continued to have clusters of seizures despite increasing dosages of Keppra. The Student was found to be hypoxic during the seizures with low pulse oximetry that improved once the seizure stopped. (P-7).

<sup>2</sup> After carefully considering the record of this hearing in its entirety I now find that I can now draw inferences, make Findings of Fact and Conclusion of Law. Consequently, I do not reference portions of the record that are not factually relevant to the single issue in dispute.

2. The Student then went into status epilepticus, was diagnosed with febrile infection-related epilepsy syndrome (FIRES).<sup>3</sup> After that, the Student was placed into a pentobarbital coma for 55 days. During the coma, the Student was given high dosages of Keppra. The Student was also put on a ketogenic diet. In June of 2013, the Student needed to have a g- tube placed along with a tracheostomy (trach later removed in August 2013). The Student was also trialed on a Ketamine induced coma and began seizing again while weaning off of the phenobarbital infusion. The Student was then trialed on hypothermic 34 degrees Celsius wrap intervention to decrease core body temp. Parents report that seizures decreased. (P-7).
3. The Student was airlifted to Children Hospital of Philadelphia (CHOP) intensive care unit (ICU) on July 4th [redacted] and started rehab in the Seashore House at CHOP on July 11, 2013. Parents then lived at the Ronald McDonald house until they found local housing. (P-7).
4. The Student was eventually transferred to Nemours DuPont day program rehab, as mom and dad did not feel that CHOP rehabilitation was beneficial. (P-7).

<sup>3</sup> Febrile infection-related epilepsy syndrome (FIRES) is a form of [epilepsy](#) that affects children three to fifteen years old. A healthy child that may have been ill in the last few days or with a lingering fever goes into a state of continuous [seizures](#). The seizures are resistant to seizure medications and treatments, though [barbiturates](#) may be administered. Medical diagnostic tests may initially return no clear diagnosis and may not detect any obvious swelling on the brain. The syndrome is very rare: it may only affect 1 in 1,000,000 children. *van Baalen, A; Häusler, M; Plecko-Startinig, B; Strautmanis, J; Vlaho, S; Gebhardt, B; Rohr, A; Abicht, A; Kluger, G; Stephani, U; Probst, C; Vincent, A; Bien, CG (August 2012). "Febrile infection-related epilepsy syndrome without detectable autoantibodies and response to immunotherapy: a case series and discussion of epileptogenesis in FIRES". Neuropediatrics. 43 (4): 209–16. doi:10.1055/s-0032-1323848. PMID 22911482. https://pubmed.ncbi.nlm.nih.gov/22911482/*

5. The Student's physical skills returned, such as walking, toileting, eating and playing one game on the computer. However, cognition and speech have been the most difficult aspect of rehabilitation. Currently, the Student is essentially non-verbal, but, in 2013, the Student did say occasional words/phrases. Currently, the Student does not always follow one-step directions. (P-7).
6. More recently, the Student has been having episodes of rage like hitting other people 1-2 times a month. On one occasion, the Student got up from the seat on the bus to school and began hitting the bus driver. The Student has also hit other students and staff. Subsequently, the District offered and the Parents agreed to add a safety harness to the Student's s bus seat, which, for the most part, has worked very well. (P-7, S-19, S-12, S-5).
7. To date, the Student has been unable to learn a picture exchange communication system (PECS) and is currently unable to learn how to operate a communication device. (P-7, S-19, S-12, S-5).

### **THE CURRENT SCHOOL YEAR PROGRAM**

8. The Student is currently in [redacted] grade and resides with the Parents in the District. (S-19).
9. The Student has medical diagnoses of FIRES, intractable seizures, epileptic encephalopathy, insomnia, and cortical vision impairment. In school, the Student is supported by two (2) personal care assistants (PCAs) and a private duty nurse throughout the school day. (S-19, NT. p.?).

10. Student meets the eligibility requirements for special education supports, delivered through an IEP under the IDEA disability categories of Intellectual Disability, Other Health Impairment (Acquired Brain Injury and Epilepsy), and Speech and Language Impairment. During the school year, the Student receives the related services of speech and language therapy support, occupational therapy (OT) support, physical therapy (PT) support, and itinerant vision support. (S-19).
11. As a consequence of the multiple disabilities, the Student communication, social, emotional, executive functioning, self-management, cognitive, achievement, and adaptive skills like dressing, eating, toileting and bathing skills are adversely affected. The Student requires full hand-over-hand physical prompting to complete all tasks in school and the home. (S-19, S-5, P-7 NT. pp.150-152).
12. The current IEP is a 93-page document. The IEP includes present levels of functional performance, the results of a recent assistive technology evaluation, speech testing, along with recent cognitive and achievement testing. The standardized evaluation and assessment testing place the Student in the "extremely low range." The IEP further notes social, behavioral, emotional, and self-help deficits. (S-19, S-12, S-5, S-7).
13. The current school year IEP calls for the Student to receive full-time life skills instructional support at the high school. (S-19).
14. The Student attends school for seven (7) hours a day five (5) days a week for a total of 35 hours per week. (S-19, NT p.139).
15. The IEP includes the following related services:
  - a. Speech and language therapy, individual, four (4) times per week for 30 minutes per session;

- b. Speech and language therapy, group, one (1) time per week for 30 minutes per session;
  - c. Occupational therapy (OT), two (2) times per week for 60 minutes per session;
  - d. Physical therapy (PT), individual, two (2) times per week for 30 minutes per session;
  - e. PT consultation, one (1) time per week for 30 minutes per session;
  - f. Vision support consultation, one (1) time per month for 45 minutes per session;
  - g. Special Transportation, two (2) times/per day to and from school; Curb-to-curb with a 1:1 aide; Assistance on and off the bus; Individualized transport to allow sufficient time to board the bus; Use of an easy-on vest to ensure safety; Consistent routine, to the extent possible, so the Student is familiar with the vehicle and staff; and,
  - h. 2 Personal Care Assistants (PCAs), daily across all school settings (420 minutes each) each school day. (S-19).
16. The Student follows a modified high school schedule. (S-19, NT p.252).
17. The Student requires a highly structured and predictable daily schedule. The classroom teacher collects "Availability," "Unavailability," and behavior data every five (5) minutes throughout the seven-hour (7) school day. The Student current daily schedule includes the following activities:

**Morning Activities**

Arrive / Unpack  
Bathroom  
Morning Binder  
Delivery (Main Office)

Classroom  
Job Box  
Brush Teeth  
Treadmill

### **Lunch**

### **Afternoon**

Break  
Stack Identification  
Emotions  
Sensory break  
Job Break  
Brush Teeth Wash Hands  
Pack Up

### **Bathroom Schedule**

7:45am 9:00am 10:30am, 12:45pm 2:00pm  
(S-19, NT pp. 113-116, NT pp.207-271).

18. Audiological testing indicates that while the Student can access all sounds in the environment; however, it is believed that the Student cannot process or interpret or properly respond to the sounds. (S-19 pp.10-11).
19. The Student does not demonstrate functional reading skills or understand the place value of numbers. (S-19).
20. While the Student can hold a pencil, the Student does not display any written expression skills. (S-19).
21. The Student requires the support of two (2) full-time aides to assist with walking and traveling throughout the high school. At times when descending stairs, the Student misses a step, the PCAs also ensure the Student does not fall or act aggressively as at times. (S-19 NT pp. 131-133, NT pp.330-333).



22. The Student's gross motor, fine motor and balance skill set limits many routine activities of daily living like walking, toileting and recreational activities. (S-19, NT pp.330-332, NT pp.337-338, NT pp.384-386).
23. The IEP notes that the Student's adaptive physical education (APE) swimming teacher reports that the Student is at the beginning stages of adapting to the water. The teacher also reports, the Student is responding appropriately to the pool environment and situations. At the current time, the adaptive physical education teacher reports that the Student no longer relies on a swimming vest to participate in an adaptive swimming class (S-19 pp.20-25, NT pp.294-308). The Student meets with the Student three times per a four-day cycle. (S-19). At times during swimming, the APE teacher has been called on to manage the Student's seizure activity in the pool. The APE teacher reports that with the help of the nurse and the PCAs, he is able to support the Student in the pool. (S-19 pp.20-25, NT pp.294-308).
24. The IEP present levels include medical information from the Student's multiple medical providers. (S-19, P-7).
25. The IEP includes multiple sources of anecdotal speech and language reports and some limited objective testing data and progress monitoring. (S-19, S-12, S-5, P-7, P-8).
26. The speech data indicates the Student has few reliable expressive or receptive skills. (S-19, NT pp.).
27. During the fall of the 2019-2020 school year, the Student began to use a high tech and some low tech communication devices. (S-19, NT pp. 570-573). Prior to the fall of 2019, the Student was trialed on low tech supports/devices. (S-19).
28. The Student's current 2019-2020 physical therapist after working with the Student for one 30-minute session and without administering any

- assessments/evaluations concluded the Student no longer needs physical therapy (PT) during the school day. The IEP team rejected the therapist's recommendation; therefore, the Student continues to receive physical therapy during the school day. (S-19 NT pp.389-442).
29. The occupational therapist (OT) reports that the Student has difficulty completing bimanual tasks, using eating utensils, and completing activities of daily living like eating, dressing, buttoning, and bathing. (S-19). The Student's OT goals currently target bimanual activities. (S-19).
  30. If the Student misses an OT session due to a seizure, the OT will either see the Student later in the day or the next day. At times, when she cannot see the Student, the OT will provide OT activities for the PCAs or the classroom teacher. (NT pp.433-438).
  31. The IEP includes prevocational skill development like sorting, folding, stacking objects. (S-19, NT p. 87, NT p.175-176, NT p.192, NT pp.454-455).
  32. The OT and the special education coordinate prevocational skill training and development. (S-19, NT p.175-176, NT p.192, NT pp.454-455).
  33. As a consequence of the almost constant seizure activity, the Student has limited ability to self-regulate and monitor behavior. (S-19 NT *passim* all ESY staff testimony and Parent testimony).
  34. The school year IEP includes transitional services and calls for the Office of Vocational Rehabilitation to coordinate transition services and the use of assistive technology. (S-19)
  35. The school year IEP and the summer ESY IEP includes one speech goal, a social skills goal, several self-help goals, a goal to increase on task performance, a goal to improve activities of daily living like tooth brushing, a goal to address behaviors that interfere with learning, an

- OT goal, and a prevocational goal. The classroom teacher, the OT and the speech therapist each include short term instructional objectives, which at times break down the goal into smaller tasks/chunks. (S-19).
36. The school year IEP and the summer ESY IEP includes a positive behavior support plan (PBSP) calling for the use of a variety of positive reinforcers. The PBSP also calls for the use of full physical prompting/graduated guidance to teach all tasks. (S-19). The PBSP addresses "Unavailability," elopement, noncompliance, aggression and inappropriate public behavior. (NT. pp.127-128).
37. The school year IEP and the summer ESY PBSP notes, at times, as a last resort, the staff may use a variety of crisis prevention physical management strategies to otherwise manage random acts of aggression. (S-19).
38. The school year IEP and the summer ESY PBSP also includes multiple first response seizure management techniques. (S-19, P-7).
39. The school year IEP and the summer ESY IEP include upwards of 50 forms of specially-designed instruction (SDIs). (S-19, S-12, S-5). Oddly, adaptive physical education, a direct service, is included in the list of SDIs. (S-19).
40. School staff receives ongoing support and information from the Student's private medical providers. The teaching staff also receive consultative support from the OT, PT, a vision therapist, the PBSP team, along with input from the intermediate unit (IU) BrainSTEPS, brain injury school-based consultant services. (S-19, NT pp.261-294).

### **THE MARCH 2020 SUMMER ESY IEP**

41. The March 2020, summer ESY IEP calls for the following supports, services, accommodations, SDIs and related services:
- (a). The IEP team proposed the Student receive summer ESY services for six (6) weeks from June 23, 2020, through July 30,

2020 (No ESY Services on July 3, 2020). The ESY program would take place at a different high school in the District.

(b).The IEP calls for the Student to receive Life Skills Support from 9:00 am to 1:00 pm, Monday through Friday.

(c). PT one time per week for 30 minutes.

(d). OT, three times per week for 30 minutes per session

(e) Speech and language therapy, individual, four (4) times per week for 30 minutes per session.

(e) Speech and Language therapy, group, one (1) time per week for 30 minutes per session.

(f) 2 Personal Care Assistants daily during the hours of 9:00 am to 1:00 pm Monday through Friday.

(g) Special transportation daily two (2) times per day to and from ESY; Curb-to- curb with 1:1 aide; Assistance on and off the bus; Use of easy- on vest to ensure safety and a consistent routine, to the extent possible, so the Student is familiar with the vehicle and staff. (S-20, S-12, S-13, P-7, NT p.121, NT 123-126).

42. The special education teacher targeted ESY goal areas based on the Student's regression, recoupment or momentum in learning the goal. (S-19, S-20, NT pp.124-126). The special education decided the Student should not participate in a 55-minute social skills group. *Id.*

43. On or about March 26, 2020, after the Resolution Session, the District offered to include additional summer ESY service in August. The revised IEP and NOREP offered 10 hours of direct one-on-one special education instruction from August 3, 2020, and August 14, 2020. The 10 hours of life skills instruction would continue working on the life skills ESY IEP goals. (S-20). The revised IEP and NOREP also offered 10 hours of one-to-one speech instruction from August 17, 2020, and

August 28, 2020. The speech therapy sessions would continue working on speech-related IEP goals. (S-19, S-20, NT pp. 121-123, NT pp.250-254). The revised IEP and NOREP now cumulatively provide for ten (10) weeks of summer ESY services. As offered, the Student would not receive ESY services for one week in June and one week in August. (NT pp.90-91, S-12, S-13, S-14)

44. The District members of the IEP team, each testified that they did not believe the August in-home special education or speech therapy services were needed to provide a FAPE. The August services were offered to avoid the instant litigation. (NT p.120-123, NT p.335, NT p.580, NT p.702, NT pp.721-724, NT p.254, NT p.294).

#### **BEHAVIORS AND SKILLS THAT WERE ONCE STRENGTHS ARE NOW NEEDS**

45. The Student's 2013 RR notes the following list of Strengths and Needs:

##### **Strengths**

- a. Student pays attention to visual detail, i.e., Pokémon cards.
- b. The Student is Capable of verbalizing sentences, although inconsistent
- c. The Student is interested in technology.
- d. The Student has a functional pencil grasp.
- e. The Student can independently form of upper and lower case letters without a model.
- f. The Student has age-appropriate bimanual fine motor dexterity skills.
- g. The Student is able to walk without physical assistance.
- h. The Student is able to complete basic ADLs with supervision.
- i. The Student is interested in sports, Pokémon cards, and chess.
- j. The Student remembers the names of peers from the previous school.
- k. The Student is affectionate with family members.
- l. The Student attends for long periods of time to self-directed activities.

##### **Academic, developmental, and functional needs related to student's**

## **disability**

### **NEEDS**

- a. The Student needs to increase communication of wants and needs, help, 'finished, accept, reject, like, don't like
  - b. The Student needs to increase verbal comprehension and expression.
  - c. The Student needs to increase connections between verbalizations mind what [redacted] is seeing/ doing
  - d. The Student needs to increase attention to materials and to others when task or activity is not self-directed
  - e. The Student needs to improve awareness of safety and physical limitations within activities
  - f. The Student needs to improve independent task initiation and completion in directed activities
39. The 2019 RR list of Strengths and Needs notes the following list of Strengths and Needs

#### **Strengths**

- a. The Student forms positive relationships with some adults.
- a. The Student allows staff to direct him physically much of the time.
- b. Incidents of disruptive behavior have decreased.
- c. The Student shows some improvement ability to follow simple 1-step directives.
- d. The Student has increased the amount of time he can remain in classes outside his primary classroom.
- e. The Student has increased the amount of time engaged in purposeful tasks.
- f. The Student independently navigates the classroom environment.
- g. The Student demonstrates higher level gross motor skills.

- h. The Student functional fine motor skills for prevocational tasks are a strength.
- i. The Student self feeds and manipulates utensils (with supervision for safety). (S-19, S-5, P-7, NT pp.110-113, NT pp.130-131).

**Academic, developmental, and functional needs related to student's disability**

**NEEDS**

- a. The Student needs to increase independent task completion and reduce reliance on prompts for simple directives.
  - b. The Student needs to increase expressive communication through speech, manipulatives, or device.
  - c. The Student needs to increase receptive communication for responding to questions and following directions.
  - d. The Student needs to increase pragmatic language.
  - e. The Student needs to increase engagement with the environment.
  - f. The Student needs to improve performance on basic ADLs - grooming, hand washing, toileting, dressing, and daily routines and general visual-motor skills.
  - g. The Student needs to improved gross motor activities integrated into the daily program
  - h. The Student needs to increase attention to prevocational tasks.
  - (i). The Student needs to increase social activities. (S-19, S-5, P-7, NT pp.110-113).
46. After comparing the Strengths and Needs listed in the reevaluation reports, I now find the following 2013 "Strengths" are now 2019-2020 "Needs." For example,

- a. The Student no longer has age-appropriate bimanual fine motor dexterity skills (See, P-4, P-5, P-6, P-7, S-19, S-12, S-20, 2019-2020 ESY OT goal).
- b. The Student cannot independently form of upper and lower case letters without a model. (See, handwriting present levels P-4, P-5, P-6, P-7, S-19, S-12, and S-20).
- c. The Student is no longer interested in technology. (See, Speech progress report, Speech goals, P-4, P-5, P-6, P-7, S-19, S-12, S-20, S-19, S-5, S-10, and P-7).
- d. The Student is no longer able to walk without constant supervision up or down steps without the support of the 2:1 PCAs. (See P-4, P-5, P-6, P-7, S-19, S-12, and S-20),
- e. The Student needs 2:1 PCA 420 minutes a day (to prevent falling on stairs and to reduce random acts of physical aggression).
- e. The Student is no longer able to complete basic ADLs without hand over hand guidance and supervision. (See OT goal and classroom teacher goal, *i.e.*, the Student needs hand over hand guidance, tooth brushing 5% independence, dressing 35.5% independence, washing hands 27.7% independence. (P-4, P-5, P-6, P-7, S-19, S-12, S-20).<sup>4</sup>
- f. The Student is can no longer say the names of peers from the previous school (See, IEP present levels speech. (P-4, P-5, P-6, P-7, S-19, S-12, and S-20).
- g. The Student can no longer attend for long periods of time to self-directed activities. (See, progress monitoring in the social group, attention limited to 8 minutes, S-10, S-5, S-19, P-7, NT pp.110-113, P-4, P-5, P-6, P-7, S-19, S-12, S-20).

<sup>4</sup> The percentage of independence is a measure of the average type of physical prompt that the instruction must use to support the Student when completing the task. (See S-19 p.60-1. Full Physical Prompt 2. Partial Physical Prompt 3. Gestural Prompt 4. Independent) utilizing a scale from 0-4 for each item on a task analysis).



## **THE SUMMER OF 2019 ESY PROGRAM DATES AND TIMES**

47. The 2019 ESY program offered and provided by the District, included the following ESY services:
- a. Between 6/25/19 and 8/1/19 (no services on 7/4/19), Monday through Friday, from 9 am to 1 pm, at [redacted] High School in-district ESY program.
  - b. PT, one (1) time per week, for 30 minutes.
  - c. OT, two (2) times per week for 60 minutes.
  - e. Speech and language therapy, individual, two times per week for 30 minutes per session.
  - d. Two (2) Personal Care Assistants daily during hours of ESY.
  - e. Special transportation daily two (2) times per day to and from ESY. Curb-to-curb with 1:1 aide; Assistance on and off the bus; Use of easy - on vest to ensure safety; Consistent routine, to the extent possible, so the Student is familiar with the vehicle and staff.
  - h. Between 8/6/19 and 8/15/19, Tuesday through Thursday, at a mutually convenient time between 8:00 am and 7:00 pm in the home, five (5) hours per week of direct instruction from a special education teacher related to IEP goals. (S-2).

## **THE GENERAL REGRESSION AND RECOUPMENT DATASETS**

48. Rather than keep the regression and recoupment data as a separate standalone data set, the classroom teacher and the related service staff aggregated the return to school regression and recoupment data with the Student's First Marking Period and the Second Marking data. (P-4, P-5, P-6, P-7, S-19, S-12, S-20, NT pp.40-163, NT pp.327-349, NT. pp.360-440, NT pp.501-545, NT pp.569-662).

49. The classroom teacher and all staff use the following definitions to collect data. The staff take data, every five (5) minutes, to determine if the Student's is either "Available" or "Unavailable" for instruction.

Available	Unavailable
<p><b>Non-verbal social cues</b>-smile, hugging</p> <p><b>Learning readiness</b>-allowing 2 adults to be guided to task at hand, sitting in chair, sitting with peers</p> <p><b>Minor aggression</b>-blocking, making contact with minimal force, elbowing</p> <p><b>Minimal avoidance of task</b>-pacing, trying to leave classroom, head down on the table, requesting bathroom</p>	<p><b>Sleep</b>-lack of sleep from previous night, drowsy</p> <p><b>Heightened aggression</b>-increased force with blocking, making physical contact, and elbowing and not allowing 2 people to guide him to a learning task</p> <p><b>Medication changes:</b> Parents will notify staff following medication changes so that staff is aware that there may be a</p>

(S-9, NT pp.133-135).

50. The Student's 2018-2019 and 2019-2020 behavioral data indicates it takes upwards of two marking periods to return to the previous school year end of year functional present level of performance for "Unavailability." (Compare and contrast 2018-2019 First Marking Period "Unavailable" data to Third and Fourth Making period data across school years).

#### 2018-2019 Behavior Data

Marking Period 1				
Aggression	Non Compliance	Elopement	Inappropriate Public Behavior	Unavailable
2.0%	5.7%	3.8%	1.4%	38.0%
Marking Period 2				
Aggression	Non Compliance	Elopement	Inappropriate Public Behavior	Unavailable
1.4%	4.4%	3.0%	0.6%	31.9%
Marking Period 3				
Aggression	Non Compliance	Elopement	Inappropriate Public Behavior	Unavailable

0.6%	3.2%	1.1%	1.1%	30.5%
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Marking Period 4				
Aggression	Non Compliance	Elopement	Inappropriate Public Behavior	Unavailable
0.2%	1.7%	1.4%	0.3%	28.9%

2019-2020 Behavior Data

<b>Marking Period 1</b>				
<b>Aggression</b>	<b>Non Compliance</b>	<b>Elopement</b>	<b>Inappropriate Public Behavior</b>	<b>Unavailable</b>
1.3%	1.8%	2.2%	0.6%	35.4%
<b>Marking Period 2</b>				
<b>Aggression</b>	<b>Non Compliance</b>	<b>Elopement</b>	<b>Inappropriate Public Behavior</b>	<b>Unavailable</b>
0.5%	1.9%	3.0%	0.6%	28.1%
<b>Marking Period 3</b>				
<b>Aggression</b>	<b>Non Compliance</b>	<b>Elopement</b>	<b>Inappropriate Public Behavior</b>	<b>Unavailable</b>
0.3%	2.6%	5.5%	1.5%	27.9%
<b>Marking Period 4</b>				
<b>Aggression</b>	<b>Non Compliance</b>	<b>Elopement</b>	<b>Inappropriate Public Behavior</b>	<b>Unavailable</b>
0.2%	1.7%	1.4%	0.3%	28.9%

(S-19, NT pp.113-116, NT pp.135-138).

2019-2020 Behavioral Data

<b>Marking Period 1</b>				
<b>Aggression</b>	<b>Non Compliance</b>	<b>Elopement</b>	<b>Inappropriate Public Behavior</b>	<b>Unavailable</b>
1.3%	1.8%	2.2%	0.6%	35.4%
<b>Marking Period 2</b>				
<b>Aggression</b>	<b>Non Compliance</b>	<b>Elopement</b>	<b>Inappropriate Public Behavior</b>	<b>Unavailable</b>
0.5%	1.9%	3.0%	0.6%	28.1%
<b>Marking Period 3</b>				
<b>Aggression</b>	<b>Non Compliance</b>	<b>Elopement</b>	<b>Inappropriate Public Behavior</b>	<b>Unavailable</b>
0.3%	2.6%	5.5%	1.5%	27.9%

(S-19, NT pp.113-116, NT pp.135-138).

51. The ESY and school year OT data from the 2018-2019 and the 2019-2020 progress monitoring along with the goal statements indicate that the Student is doing the same OT activities initiated during the 2018-2019 school year, with the same degree/level of hand-over-hand guidance, under the same conditions and at the same level of achievement. For example, the Student is sorting utensils in the cafeteria. Although the 2014 RR references bimanual skills as a strength, by 2019-2020, the OT listed bimanual skill development as a "Need." To address the bimanual skill regression, the OT now has the Student push a book cart, with full supervision/physical guidance, in the library. When the Student arrives at the designated shelf, the OT physically prompts the Student to pick up the book and place it on a shelf. (S-19, NT pp. 441-452). This activity is a carryover from the previous school year and the ESY program. *Id*

52. The ESY annual speech goal is a 65-word sentence that includes multiple varying *conditions*, identifies multiple behaviors – skill sets, like developing expressive and receptive language, with and out high tech and low tech support in one goal statement. (S-19).
53. The ESY speech goal states that "with verbal and visual prompts at least twice weekly sampled for a marking period," the therapist will collect data. The speech therapist's schedule to collect data is not an objective measure of the Student's level of achievement or mastery towards an objective goal statement/performance. (S-19 pp.53-55).
54. If the Student is not able to participate in speech class while in school, due to "Unavailability," the speech therapist reserves another time in the day to provide speech; if on the second attempt, the Student is still "Unavailable" the Student does not receive speech that day. (NT pp.612-617). Therefore, although the Student is in school, the Student does not always receive the frequency and duration of speech services listed in the school year IEP. *Id.*
55. The ESY speech goal stated in the ESY IEP lacks measurable criteria for performance. The ESY speech goal, as stated, is otherwise vague and immeasurable. (S-19 pp.53-55).
56. The ESY speech goal fails to comply with the minimal Pennsylvania Department of Education IEP goal writing guidelines set out in the Pennsylvania Assistance Training Assistance Annotated IEP, referenced in the Student's IEP.<sup>5</sup> (S-19, pp.53-55).
57. The Student meets the six (6) criteria to take the alternative statewide assessment aligned to the Pennsylvania Alternate Eligible Content for students with the most significant cognitive disabilities. Therefore, the speech therapist, the OT and the classroom teacher

<sup>5</sup> ANNOTATION: Annual Goal. Annotated IEP page 32 of 50, <https://www.pattan.net/getattachment/Forms/INDIVIDUALIZED-EDUCATION-PROGRAM-IEP-ANNOTATED/Annotated-IEP/Annotated-IEP-Feb-2020.pdf?lang=en-US&ext=.pdf>

write short term instructional objectives for each goal statement. The Student's ESY short term instructional objectives, in speech, unlike the OT and classroom teacher short term instructional objectives, lack measurable criteria for performance. The ESY speech short term instructional objectives, as stated, are also otherwise vague and immeasurable. *Id.*

58. The speech short term instructional objectives fail to comply with the Pennsylvania Department of Education IEP goal writing guidelines set out in the Pennsylvania Assistance Training Assistance Annotated IEP, referenced in the Student's IEP. <sup>6</sup> (S-19, pp.53-55).
59. The related service of physical therapy and vision do not include annual goals or short term instructional objectives. (S-19, 53-55, p. 36. P. 82, p.89).
60. The Student demonstrates variable levels of self-dressing. At times, the Student has demonstrated times of frustration and has engaged in noncompliance when attempting to participate in dressing skills. Currently, the Student requires a full physical prompt to support self-dressing, tooth brushing, completing laundry tasks like folding and all prevocational skills. (S-19).
61. The staff failed to explain how the IEP team determined how much time the Student would participate in the summer ESY program. (NT *passim*, S-19).
62. Although the staff testified, the proposed 2019-2020 ESY IEP meets the Student's ESY needs. The staff also testified that the

<sup>6</sup> ANNOTATION: Short-term objectives/benchmarks provide a mechanism for determining whether the student is progressing during the year to ensure that the IEP is consistent with the student's instructional needs, and if appropriate, to revise the IEP. The team may indicate the expected level of achievement, using for example, a percentage score, number of correct responses, etc. The method of evaluation may also be indicated on the IEP by listing specific ways achievement will be measured. Short-term objectives/benchmarks should include the same components as an annual goal: • Condition • Student's name • Clearly defined behavior and a • Performance criteria. Annotated IEP age 33 of 50, <https://www.pattan.net/getattachment/Forms/INDIVIDUALIZED-EDUCATION-PROGRAM-IEP-ANNOTATED/Annotated-IEP/Annotated-IEP-Feb-2020.pdf?lang=en-US&ext=.pdf>

additional 10 hours of life skills support and speech support were not needed to provide an ESY FAPE. The staff failed to explain why they initially eliminated the 10 hours of ESY Life Skills provided by the District in the summer of 2018-2019. The staff also failed to explain how, if at all, the currently offered six (6) week ESY program supported their statements that after completing the summer 2018-2019 ESY program, the Student was "read to learn" upon returning to school. (NT, pp. S-19, S-20, S-4, S-5, NT pp.433-436).

## **DISCUSSION ANALYSIS 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 US 49, 62 (2005); *LE 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 Parent who requested this administrative hearing. Nevertheless, the 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 US at 58. The outcome is much more frequently determined by the preponderance of the evidence, as is the case here. 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.<sup>7</sup>

### **CREDIBILITY AND PERSUASION ANALYSIS**

<sup>7</sup> See, *TE v. Cumberland Valley School District*, 2014 US Dist. LEXIS 1471 \*11-12 (MD Pa. 2014), *AS v. Office for Dispute Resolution* (Quakertown Community School District), 88 A.3d 256, 266 (Pa. Commw. 2014).

This hearing officer found all of the District witnesses who testified to be credible. At the same time, I also find, in certain instances, that the testimony was not clear, convincing or cogent on relevant points in dispute. For example, the teacher and the related service staff did not know the practical difference between the state seven (7) ESY eligibility criteria at 22 PA Code 142.132 as opposed to the applicable IDEA ESY regulations that call for the staff to make an individualized determination about the length of, the scope of, and duration of the ESY program is in the hands of the IEP team. Equally curious was the witnesses' surprised look when the topic of ESY services during school year breaks was discussed. I now find that this lack of practical day-to-day understanding contributed, in part, to a predetermination of the Student's ESY program. Unlike a predetermination based on preplanned team agreement, before an IEP conference, the team here acted on an unspoken predisposition that ESY services only occur in the summer and not during the school year. This working assumption, coupled with an unspoken reliance on the administration to set the limits and duration of the ESY program, interfered with this Student's ESY IEP process. At times, and this is may well be one on those times, as the record is unclear, ESY services may be provided, if needed, during the school year. As a group, each witness testified to the best of his or her recollection from his or her perspective. Therefore, with this first-hand assessment of the testimony, I can now make the following findings about the witnesses' credibility and persuasiveness.

First, I find the testimony of the District staff was credible as to the Student's ESY eligibility. Second, while the testimony is consistent, for all of the following reasons, I now find the testimony is insufficient, concerning the ESY actions taken, and/or those actions not taken, to provide a FAPE.

Therefore, I will give less weight to the testimony of certain individuals who, in designing and making determinations about the length of the duration of



or the necessary content for the Student's ESY program, lost sight of the IDEA mandate that an ESY IEP must be both individualized and appropriate. Finally, I will also give less weight to the testimony of certain witnesses that failed to cogently provide a sound ESY reason about how they determined the length of the content and duration of the four-week August extension of the ESY IEP. Granted, while a ten (10) week program with two weeks off may on the surface seem appropriate, for this one in a million Student, the witnesses' testimony did not support their overly broad opinions.

### **THE IDEA ESY STANDARD AND THE PENNSYLVANIA ELIGIBILITY CRITERIA**

At times the IDEA requires that students with disabilities receive special education and related services beyond the typical school day, the typical school year calendar and the typical ESY summer program when those services are necessary to provide the student with FAPE. These instances are often referred to as "year-round" schooling or a "52 week" program.

The IDEA defines the term ESY services to mean special education and related services that: Are provided to a child with a disability: (i) Beyond the normal school year of the public agency; (ii) In accordance with the child's IEP; and (iii) At no cost to the parents of the child; that (2) Meet the standards of the state educational agency. A public agency cannot (i) limit ESY services to particular categories of disability; or (ii) Unilaterally limit the type, amount, or duration of those services. 34 CFR § 300.106

Pennsylvania regulations provide additional guidance for determining a child's eligibility for ESY services, setting forth seven specific factors for the IEP team to consider. 22 Pa. Code § 14.132(a). School districts are not required to provide ESY based upon "[t]he desire or need for ... respite care ... [or] the 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).

Districts must ensure that ESY services are made available as necessary to provide FAPE. 34 CFR §300.106 (a)(1). Simply stated, Districts must provide year-round ESY services when the child's IEP team determines that the services are necessary for the provision of FAPE. 34 CFR §300.106. *Battle v. Pennsylvania*, 551 IDELR 647 (3d Cir. 1980), *cert. denied*, 111 LRP 66770, 452 U.S. 968 (1981).

ESY services, like school year services, must be reasonably calculated to confer a meaningful educational benefit to the student regardless of the parents' demands.<sup>8</sup> The specific determination about whether a student requires ESY services, like the determinations here over the duration, frequency, location, goals, short term instructional objectives, related services, SDIs and general content of the IEP are left up to the IEP team, subject to state standards, and not the district's administrators. The IDEA merely requires that the ESY IEP team base its determination on the individual needs of the student.<sup>9</sup> Therefore, I find nothing in the statute, the regulations or existing case law which would preclude a school district, or a hearing officer or court, from determining, that the team is otherwise limited, but for a student-specific need.

<sup>8</sup> *Wyoming Valley W.*, 55 IDELR 213 (SEA PA 2010), *Wallingford-Swarthmore Sch. Dist.*, 114 LRP 47646 (SEA PA 10/20/14).

<sup>9</sup> *See, William D. v. Manheim Twp. Sch. Dist.*, 48 IDELR 247 (E.D. Pa. 2007), *School Dist. of Philadelphia*, 114 LRP 38246 (SEA PA 07/25/14), *See, also, Reusch v. Fountain*, 872 F. Supp. 1421, 1433-34 (D. Md. 1994) (the district "must make individualized determinations of the number of weeks, days per week, and hours per day that each student receiving ESY should be provided." *Id.* at 1438. *Mansfield Public Schools Massachusetts State Educational Agency*, 66 IDELR 59 115 LRP 35934 (SEA MA July 28, 2015) (although the ESY program that left two weeks uncovered for an 8-year-old student with autism child specific difficulties arising after breaks justified extending ESY services until the start of the new school year), *In re: Student with a Disability*, 45 IDELR 137 (SEA VA 2005)(the student needed ESY FAPE services in the spring, summer and winter months). *Cordrey v. Euckert*, 17 IDELR 104 (6th Cir. 1990), *cert. denied*, 110 LRP 38027, 499 U.S. 938 (1991), *Glynn County Sch. Dist.* 114 LRP 4669, 8 GASLD 83 (SEA GA 2014). IEP teams, since 1999, have had the flexibility to determine the duration of and the length of ESY services. *See, IDEA regulation then 34 CFR § 300.309 at 64 Fed. Reg. 12,576 (1999)*, and IDEA 2004 regulations now at 34 CFR § 300.106, **Federal Register**/Vol. **71**, No. 156/Monday, August 14, **2006/Rules and Regulations**. p.46582 <https://www.govinfo.gov/content/pkg/FR-2006-08-14/pdf/06-6656.pdf>.

In determining whether this District's proposed program is appropriate, the general principles applicable to special education must be applied. Simply stated *Bd. of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982) and *Endrew F. v. Douglas County School District RE-1*, \_\_\_ U.S. \_\_\_, \_\_\_, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017) control the outcome here. These principles are embodied in the long-standing Third Circuit case law. See, *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988), *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999) (the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA). The IDEA and the case law provide that the Student's ESY IEP must, of course, be responsive to the child's identified educational needs and circumstances. *Id.* 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

#### **THE ESY 2020 OFFER OF A FAPE IS NOT APPROPRIATE**

I now find the intrinsic and extrinsic evidence provides preponderant proof that the proposed ESY IEP is not appropriate. There appears to be no dispute over the following facts. First, the Student's day-to-day "Availability," "Unavailability," and overall progress, in general, is at best variable. Second, over the years, the Student's physical, behavioral, social and communication skills have regressed. Third, over the years, the Student has not been able to recoup many of the lost skills. Fourth, skills that were once "Strengths" are now "Needs." Fifth, the frequency of the Student's seizures impacts "Availability" and creates times of "Unavailability." Sixth, the frequency, duration and intensity of the seizures, at times, create a comorbid constellation of interfering behaviors, like aggression, fatigue and an impaired ability to focus/communicate, all of which, individually and collectively, adversely affect learning. I now find it is evident that since 2014, the Student has lost and not regained important skills leading towards

self-sufficiency. The Parties should be aware, for purposes of this Decision, I did not lose sight of the evidence of the Student's inconsistent performance. This factor did play a central part in my Decision. At the same time, I was struck by the lack of a coherent explanation of how the ESY IEP team reached its determination on the content of, the duration of and the frequency of the ESY summer services. I was also taken back, that 41 years after *Armstrong v. Kline*, 476 F. Supp. 583 (E.D. Pa. 1979) remanded on other grounds *sub nom. Battle v. Pennsylvania*, 629 F.2d 269 (3<sup>rd</sup> Cir. 1980) and 21 years after the IDEA ESY regulations, in 1999, the ESY team members did not know they could, and should, when otherwise appropriate, develop an ESY program to address breaks in FAPE services during the August to June school year and the summer months.

After a careful review of the extrinsic and intrinsic evidence, the record is preponderant that the ESY IEP team's lack of knowledge about the scope and breadth of its ESY FAPE roles and responsibilities fostered a closed mind and smacks of predetermination. Accordingly, in this limited instance, I now find the team was working under a self-imposed limitation as to what they could or could not offer. Therefore, it is axiomatic that I now find that for this particular Student, this self-imposed ESY limitation interfered with the Parents' participation in the IEP process. I also find that this self-imposed limitation resulted in a fundamentally flawed ESY summer IEP and an inappropriate offer of a FAPE.

The Parties are reminded that "A handicapped student is entitled to an education program in excess of 180 days per year if regression caused by an interruption in educational programming, together with the student's limited recoupment capacity, renders it impossible or unlikely that the student will attain the level of self-sufficiency and independence from caretakers that the student would otherwise be expected to reach in view of his/her handicapping condition. *See, Armstrong v. Kline*, No. 78-172(E.D. Pa. Sept.

5, 1979) (Remedial Order No. 2). The evidence is preponderant and no one disagrees that the Student, despite a five (5) day a week, seven (7) hour school day totaling 35 hour school week the Student is slowing losing skills and that the Student's overall rate of recoupment is not improving. The evidence is preponderant that the ESY IEP team members could not clearly explain how a five (5) day week, four (4) hour a day program, is reasonably calculated to maintain the Student's skill set. Although the District increased the duration of the program by adding 10 hours of life skills support and 10 hours of speech therapy, all of the staff testified that the increase in time was unnecessary. That said, and including the 20-hours into this ESY FAPE analysis, no one could explain how the ESY IEP team arrived at the ESY services hours or the program content for the six (6) week program. I find it no curious coincidence that the team stayed with and continues to advocate for the ESY six (6) week program designed by someone, unknown to the team, and most likely in the administration.

Likewise, no one could cogently explain how the aquatics program and the 55-minute social skills program while the intertwined bundle of school year services was taken out of the mix. Either these services meet a need during the school year, or they don't; if they do, how can they now be severed from this Student's ESY FAPE mix.

As discussed in more detail below, the discontinuation of the aquatics APE program is equally troubling in and of itself.

The ESY team's lack of understanding of ESY program requirements and their unclear knee-jerk defense of the six (6) week program when probed further supports my finding that the determination about the scope, content and duration of the ESY program was and maybe unbeknownst to the staff, tacitly predetermined.

I also find the staffs' testimony that the additional 20 hours of services were unnecessary was equally confusing and otherwise inconsistent. No one

addressed the fundamental fact that even though the previous 2018-2019 ESY summer program, included 10 hours of one-on-one support from the life skills teacher, in the home, when the Student returned to school the rate of "Unavailability" of 35%, was not much different from the previous year rate of 38.5%. Equally true, when the "Availability" and "Unavailability" data across the 2018-2019 and 2019-2020 school year is compared each year, the evidence is preponderant that it took upwards of two "Marking Periods" to get back to the end of the 2018-2019 school year "Unavailability." The fact that it took so long to return to the mid-20% level should have prompted the team to reconsider if repeating the same six (6) week program was reasonably calculated. The evidence is conclusive that if this particular Student continues to return to school each fall at the mid 30% level of "Unavailability," the Student will never have an equal opportunity to make meaningful progress towards self-sufficiency. Let me explain.

In practical terms, assume the school hours from September 2019 to June 2020, total 1200 hours, if the Student is "Unavailable" for upwards of 25% to 35% of the school day, the ESY IEP team is knowingly planning on the Student missing upwards of 300 hours of instruction if the Student is "Unavailable" for 25% of the school year. Assume for a moment the data holds and the Student is "Unavailable" for 35% of the school year, the Student will miss upwards of 420 hours of instruction. I now find this naturally occurring expected reduction in instructional time, when coupled with the continuous loss of once mastered skills, the team's decision to provide a six (6) week program, knowing the Student's rate of regression and rate of recoupment, the offer as designed was not reasonably calculated to provide meaningful benefit. Absent a change in the content of and duration of the ESY IEP; the Student is otherwise denied the promise of a FAPE. As offered and designed, the ESY summer program falls far short of the *Rowley* and *Endrew* standard of a reasonably calculated program with

"challenging objectives" and "ambitious goals" that are likely to lead to "significant learning." Simply stated, this ESY IEP, in light of the existing circumstances, as a whole, is not reasonably calculated to address this Student's needs/circumstances, as evidenced by the Student's downward regression-recoupment trajectory. Accordingly, a final ORDER granting narrow appropriate relief follows.

### **THE ESY SPEECH GOAL IS NOT MEASURABLE**

The single 2020 summer ESY speech goal is a 60-word jumble that calls for the Student to use high tech and or low tech strategies to improve a variety of expressive and receptive language skills is vague and not measurable. The team appears to have lost sight of the fact that the Student was once verbal and is now nonverbal. Rather than target an objective measure and include an expected level of performance, the goal calls for the therapist to collect data "at least twice weekly sampled for a marking period."

Data sampling is not an objective measure of the Student's expected level of achievement. Data sampling "twice-weekly" for this Student, who everyone acknowledges changes from moment-to-moment is not an appropriate form of data collection for this Student. When the speech data sampling schedule is compared to the classroom teacher's schedule of every five (5) minutes, the flaw is obvious. This Student needs frequent, precise and objective data collection. Moreover, without an expected level of achievement, the Student's instructional time is otherwise lost.

In 2014, after being in a coma for 55 days, the Student could speak and play on a computer game. Six years later, in 2020, the Student is non-verbal, requires full physical prompting and is somewhat disinterested in the high tech speech device. Even assuming *arguendo* the goal and the short term objectives are measurable, and they are not, the two speech therapist could not convincingly explain how the number of ESY speech sessions or the ESY goal would address the Student's growing communication needs. Therefore,

I now find the "twice-weekly" data sampling rubric coupled an otherwise vague goal, with no criteria for performance in either the goal statement or the short term objectives, is not reasonably calculated to provide meaningful benefit.

I also find this type of vague, overly broad goal statement interferes with the team's and the Parents' ability to effectively participate in the ESY IEP process. Absent objective data, the Parents and the team lack sufficient information to make an informed judgment if the level of services and instructional content is reasonably calculated to offer "significant learning." Absent intensive measurable speech supports/interventions, assistive technology, SDIs and objective measures of progress monitoring, neither the Parents nor the team can track, graph, or understand the Student's present levels. Accordingly, I now find as written the ESY Speech goals and short term instructional objectives are fundamentally flawed.<sup>10</sup> An appropriate ORDER now follows.

### **ADAPTIVE PHYSICAL EDUCATION IS NOT AN SDI**

Contrary to the ESY team decision, "Adapted Physical Education" is not an SDI. Adaptive physical education (APE) is physical education (PE) instruction designed for students whose disabilities prevent safe or successful participation in regular PE. 34 CFR §300.39 (a)(1); and 34 CFR §300.39 (b)(3). If specially designed PE is needed, in a child's IEP, the district must either provide the services directly or make arrangements for those services to be provided through other public or private programs. 34

<sup>10</sup> IEPs that lack legally sufficient measurable educational goals and objectives are fatally flawed. *See, Susquenita Sch. Dist. v. Raelle S.*, 25 IDELR 120 (M.D. Pa. 1996) (parents were entitled to two years' reimbursement at a private school because the student's IEP lacked meaningful educational goals and, as a result, also lacked adequate short-term objectives, criteria for measuring progress, and adequate programming or services to address the student's identified problem areas) and *Conemaugh Twp. Sch. Dist.*, 23 IDELR 1233 (SEA PA 1996)(recognizing that no program can appropriately address a student's needs without first defining the measurable goals and objectives the student is expected to achieve).



CFR §300.108 (c). Physical education or APE must be made available to every child with a disability unless the district does not provide physical education services to children without disabilities in the same grades. 34 CFR §300.108 (a)-(b).<sup>11</sup>

After listening to the APE swimming instructor and reviewing the record, the evidence is preponderant that this Student needs specially designed physical education. The APE swim instructor is knowledgeable and committed to working with the Student. His careful description of how he works with the Student in the pool and the accomplishment of getting this Student to learn how to float without a vest is a clear indicator that the Student can learn. The APE instructor's discussion of how he manages the Student's seizure activity, in the pool, while unnerving, is proof positive that despite the FIRES diagnosis, the Student, when accommodated, by a highly trained individual, can participate in aquatics. I fully understand that as it stands now, swimming is not a goal; that said, the record is preponderant that the IEP team, to date, has not yet completed a comprehensive assessment of the Student's needs in the PE curriculum. The team is reminded that "aquatics" is included in the IDEA definition of specially-designed instruction. It strikes me as odd, after reading the 93-page IEP, that the one place in the school that the Student seems to be doing well was consciously left out of the ESY program. Make no mistake; I understand the testimony to reflect the fact that the ESY summer location does not have a pool. I further understand the fact that the pool at the Student's high school, is operated by an outside agency, and is closed, by contract, in the summer months. These curious facts, when coupled with the error in classifying APE as an SDI, further

<sup>11</sup> The IDEA defines physical education as: i. The development of (A) physical and motor fitness; (B) fundamental motor skills and patterns; and (C) skills in aquatics, dance, individual and group games, and sports (including intramural and lifetime sports); and ii. Includes special physical education, adaptive physical education, movement education, and motor development. 34 CFR 300.39 (b)(2).

support my previous finding that the ESY team, may have without knowing, predetermined the duration of and the content of the Student's ESY program. Therefore, knowing the frequency and the duration of the APE aquatics program, the District is now ORDERED to provide the Student with an ESY aquatics program. I fully comprehend the fact that the pool is closed; therefore, in light of the current COVI19 pandemic, I do not expect the District to provide the Student with an ESY aquatics program. I do, however, expect and will ORDER that at a mutually convenient time during the school year; the District will prospectively provide this ESY service. That said, my Final ORDER will direct the District to conduct a comprehensive assessment of the Student PE needs. After that, I leave to the team to decide what, if any, APE or specially-designed PE the Student should receive. In the interim, my ORDER will also direct the District to continue to provide APE swimming when the Student returns in the fall. The ESY aquatic program should be provided as set out in the school year IEP, three times per week in a four-day cycle. An appropriate ORDER follows.

Accordingly, after careful consideration of the entire, for all of the reasons set forth above, I am compelled to conclude that the District's 2020 ESY offer of a summer FAPE is insufficient, inadequate and otherwise inappropriate. An appropriate Final ORDER granting appropriate relief follows. Before I move on to the appropriate relief, I must finish the analysis of the Parents' ESY school year claim.

**THE PARENTS FAILED TO PROVE THE STUDENT NEEDS YEAR ROUND ESY SERVICES**

While the Parents met their burden of proof on the ESY summer program claim, they failed to meet there a burden of proof on the ESY no break "52 week" school year demand. The record is devoid of any documents or testimony as to if the regular school year breaks over the winter holidays or in the spring interfere with the Student's learning, or causes regression that is not otherwise recouped in a reasonable time.

The Parents, for this claim, failed to muster any data, testimony or documentary evidence to support their beliefs that the Student needs ESY services during the school year; therefore, the claim, as stated, is denied.

### **CONCLUSION**

The above described substantive and procedural violations denied the Student a FAPE. When viewed as a whole, the District staff failed to cogently explain how or why the proposed program listed in the IEP and the NOREP was individualized and otherwise reasonably calculated to enable this particular Student to receive a FAPE. After carefully reviewing the record as a whole, the evidence described above is preponderant; the District failed to offer an appropriate ESY program. An appropriate ORDER granting prospective compensatory education now follows.<sup>12</sup>

### **ORDER FOR PROSPECTIVE COMPENSATORY EDUCATION AS APPROPRIATE RELIEF**

**And now** this June 5, 2020, I now find in accordance with the preceding findings of fact and conclusions of law, it is hereby **ORDERED** that Parents' claim for a longer summer session ESY program is **GRANTED** and the Parents addition claim for ESY services is denied. The District affirmative defense is rejected.

1. The School District is **ORDERED** to provide the Student with a thirty (36) session ESY aquatic's program sometime during the 2020-2021 school year. The sessions can occur either before or after school, during school breaks or on the weekends. The length of the individual sessions is equal to the duration of an APE swim class during the school year. I leave it to the Parties

<sup>12</sup> I now find the extrinsic and intrinsic evidence now allows me to applying equitable principles to calculate an award of appropriate relief. See, Perry Zirkel, Compensatory Education under the Individuals with Disabilities Education Act: The Third Circuit's Partially Mis-Leading Position, 110 Penn St. L. Rev. 879 (2006). For the prevailing two approaches for determining the appropriate amount of this remedy, which are generally referred to under the rubrics of "quantitative," "qualitative, and equitable." See Perry A. Zirkel, Two Competing Approaches for Calculating Compensatory Education under the IDEA, 257 EDUC. L. REP. 550 (2010). 10 20 U.S.C. § 1415(f)-(j) (2006); 34 C.F.R. §§ 300.507-300.518 (2012).

to agree on the dates and the session times. In the alternative, the District can fund an out of District ESY aquatics program selected by the Parents. In either event, if the program occurs at a time when transportation is not provided, and the District elects not to provide transportation, the District is directed to reimburse the Parents for all travel costs to and from the aquatic's program.<sup>13</sup>

2. The Parent is directed to keep a detailed mileage log documenting travel to and from the ESY aquatics program. The Parent is further directed to provide the mileage log to the District every week. After that, the District is direct to pay all transportation reimbursement costs within 10-calendar days of receipt of the mileage log.
3. The District is further **ORDERED** to complete a comprehensive curriculum-based assessment of the Student's present levels of functional performance in the District's physical education curriculum. After that, the IEP team should meet to review what, if any specially designed instruction the District should otherwise provide, if any.
4. Beginning on June 15, 2020, and ending on August 28, 2020, the District is directed to provide the Student with a 20 hour a week of ESY services. The program will include the following frequency and duration as follows:
  - a. The ESY program will take place at a location selected by the District.

<sup>13</sup> IRS-2018-251, December 14, 2018, the Internal Revenue Service today issued the 2019 optional standard mileage rates used to calculate the deductible costs of operating an automobile for business, charitable, medical or moving purposes. Beginning on Jan. 1, 2019, the standard mileage rates for the use of a car (also vans, pickups or panel trucks) will be: 58 cents per mile driven for business use. <https://www.irs.gov/newsroom/irs-issues-standard-mileage-rates-for-2019>

- b. The Student will receive up to four (4) hours of Life Skills Support each day, assuming, the District meets all applicable health, safety and social distancing requirements required. The program should take place from Monday through Friday.
- c. The Student will receive PT one time per week for 30 minutes.
- d. The Student will receive up to OT three times per week for 30 minutes per session.
- e. The Student will receive speech and language therapy, individual, up to four (4) times-per-week for 30 minutes per session.
- f. The Student will receive one (1) speech and language group therapy session, one (1) time per week for 30 minutes per session.
- g. The District will provide two (2) Personal Care Assistants daily during the Monday through Friday life skills program, or at any time agreed to by the parties.
- h. The District will provide special transportation daily two (2) times per day to and from the ESY program, including curb-to-curb with a 1 to 1 aide; assistance on and off the bus. During the transportation, the Student will use an easy - on vest to ensure safety and a consistent routine, to the extent possible, so the Student is familiar with the vehicle and staff.

3. Due to the COVID19 pandemic, the above appropriate relief is otherwise suspended, until the District has demonstrated to the Parents that it has met all applicable school district-specific social distancing/health/safety requirements established by the Pennsylvania Department of Health, the Pennsylvania Department of Education, the

Department of Labor and Industry, the Center for Disease Control, and/or any other health, safety or licensing requirements, required by any local, federal, state or county-wide governing body, otherwise required for the school District to safely operative an individual or group based ESY program.

4. In the event, the District is not otherwise allowed to operative a face to face program, during the dates set forth herein, the District and the Parents can agree to provide the above services during the school year. For example, the Parties could agree to extend the school day, provide services after school, during breaks or at other agreed upon times or places. In the alternative, the District can fund the Student's attendance at a program selected by the Parents to provide the above services provided that the services are provided by a licensed and credentialed highly qualified professionals at the rate set forth by the Parent selected provider. Parents may not select a provider based on "[t]he desire or need for ... respite care ... [or] the 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).

5. Due to the uncertainty of the current times, in the unlikely event, the Parties can not otherwise agree to the date and time of the ESY summer program, once the District meets all safety and social distancing requirements, the aggrieved party should file an action, in an appropriate forum, for appropriate relief. While I do not anticipate a delay, I also realize that reasonable minds will differ in these uncertain times. That said, the Parties should realize "time is of the essence" for this Student.

It is further **ORDERED** that any claims or affirmative defenses not specifically addressed by this Decision and Final Order are otherwise **DISMISSED WITH PREJUDICE.**

Date: June 5, 2019

Charles W. Jelley, Esq. LL.M  
Special Education Hearing Office