

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

DECISION

ODR No. 3242-1112 KE

Child's Name: C.B.

Date of Birth: [redacted]

Dates of Hearing: 6/21/12

CLOSED HEARING

Parties to the Hearing:

Parent
Parent

Representative:

Parent
Parent

School District
Downingtown Area
540 Trestle Place
Downingtown, PA 19335-2643

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Date Record Closed:

June 26, 2012

Date of Decision:

July 7, 2012

Hearing Officer:

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

The parties to this case agree that Student, who is enrolled in a District middle school, is eligible for both special education and ESY services.

On June 7, 2012 Parents filed a due process complaint to challenge the District's offer of an ESY program for this summer, contending that Student's participation in the same type of ESY program in 2011 was academically unsuccessful and socially/emotionally inappropriate because Student was bullied in that program. Based upon their interpretation of a recently completed private evaluation report, Parents are seeking an order requiring the District to fund Student's participation in a private school summer program that provides one to one reading instruction with Orton-Gillingham methods.

The due process hearing was conducted in one brief session on June 21. In accordance with the findings of fact and discussion below, Parents' request that the District fund a private ESY program is denied for several reasons: 1) The evidence in the record does not establish that the District's proposed ESY program is inappropriate for Student; 2) there is considerable evidence that the District's proposal will support language and social skills needs identified in all current evaluations of Student, including Parents' recently procured independent neuropsychological evaluation, and will meet Student's needs in reading; 3) the private program sought by Parents provides only reading instruction and does not directly address Student's language, social skills an behavior needs.

ISSUES

1. Is the ESY program the School District proposed for the summer of 2012 appropriate for Student? ¹

¹ Parents identified several sub-issues in the record reflecting the specific reasons they contend that the District's ESY proposal is inappropriate for Student. *See* N.T. pp. 21—26; P-22 p.2. Those issues are listed and addressed in the Discussion section below.

2. If not, should the School District be required to fund the private school summer program selected by Parents?

FINDINGS OF FACT

1. Student is a [teen-aged] child, born [redacted]. Student is a resident of the School District and is eligible for special education services, including ESY services. (Stipulation, N.T. pp. 17, 18)
2. Prior to the District's most recent reevaluation, Student's IDEA eligibility was based upon diagnoses of specific learning disabilities and speech/language impairment in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(10), (11); 22 Pa. Code §14.102 (2)(ii); (S-1, p. 1)
3. While enrolled in the District's 2011 ESY program, Student and another child in the ESY class were involved in several instances of aggressive physical contact. Student either reciprocated or initiated contact in two instances reported by the District staff. Student reported a third incident of unprovoked aggression by the other student that the ESY staff did not observe. (N.T. pp. 80—85, 87, 154—157, 179—182, 184)
4. Student did not like the 2011 ESY program because Student believed the teachers paid more attention to the peer involved in the aggressive incidents. (N.T. pp. 85, 88)
5. Student did not believe the 2011 ESY program was helpful because the academic material was a review and repetition of skills Student had learned during the prior school year. Student recognized that the purpose of the summer program was to assure that the skills and information learned during the prior school year would not be forgotten over the summer, and Student would not fall behind in the new school year. Student knew the material taught in the ESY program when school re-opened in 2011. (N.T. pp. 90-- 92)
6. In the fall and early winter of the 2011/2012 school year, the District reevaluated Student and issued a reevaluation report (RR) dated February 10, 2012. (S-1)
7. Based upon the results of individually administered standardized cognitive and achievement tests that showed no discrepancy between ability and academic achievement, as well as assessments of social/behavioral functioning derived from rating scales completed by Parents and teacher, observations by the school psychologist during administration of the assessments, and teacher reports of classroom behaviors, the RR recommended that Student's primary eligibility category be changed to autism, with speech/language impairment remaining as a secondary disability category. (N.T. p.125; S-1 pp. 18—20, 23—25)
8. A private speech/language pathologist who conducted an evaluation of Student in February 2012 concluded that Student has appropriate knowledge of vocabulary and grammar, but exhibits a significant pragmatic language disorder. Student lacks "the skills

necessary for functional social participation at school and within the community.” The evaluator recommended social language training and weekly speech/language therapy to increase Student’s knowledge of idioms and to develop/use more complex sentence structures. (N.T. p. 128; P-13 pp. 3, 4)

9. Student’s difficulties with receptive and expressive language and social skills were also noted in a 2006 letter report from the pediatric neurologist who continues to treat Student. (P-14 p. 2)
10. Although Parents disagreed with the change in Student’s eligibility category, the parties participated in an IEP meeting after the RR was issued. The proposed IEP was based upon needs identified in the RR and provided for Student to receive supplemental special education services in the areas of social skills and pragmatic language, as well as academic support for reading, writing and math. Parents did not approve the NOREP for a change in Student’s educational placement to supplemental autistic support services. (N.T. pp. 113, 114, 116, 119, 132; S-2 pp. 3, 37—45, S-3 pp. 1, 4)
11. Due to increased behavior difficulties related to frustration with academic tasks, an autistic support teacher began providing support for Student to develop coping strategies and social skills. The autistic support teacher observed Student engaging in repetitive and ritualistic behaviors. (N.T. pp. 187—190)
12. In the February 2012 IEP, the District proposed an ESY program for the summer of 2012 in the areas of reading, speech, social skills and behavior, focusing on eight (8) of the goals proposed in the February 2012 IEP. The ESY proposal provides for two days of academic instruction in reading and two days of instruction in behavior and social skills, as well as a half hour of speech/language services weekly. (N.T. pp. 126, 127; S-2 pp. 37, 38, 40, 41, 43, 44, 50—52)
13. The District’s ESY program is conducted over five (5) weeks for three (3) hours/day, four (4) days/week. (N.T. pp. 153, 175)
14. The reading instruction proposed for the ESY program is a continuation of the reading programs provided to Student during the 2011/2012 school year, focusing on word study, fluency, automaticity and comprehension. The ESY program would also provide support and check-ins for the summer reading/writing packet. (N.T. pp. 149, 150)
15. The ESY program proposed for the current summer is located in a social skills classroom at a different school building and with a different teacher than the 2011 ESY program. The peer with whom Student had problems during the 2011 ESY program is not assigned to the same class or the same bus with Student for the 2012 ESY program. (N.T. pp. 129, 135, 150, 157, 158, 176; S-2 p. 52)
16. The ESY classroom includes students with various disabilities who need summer social skills instruction. The curriculum is a continuation of the social skills program Student received during the school year, including developing coping skills, understanding and

- exploring emotions. Developing executive functioning skills, planning and organizing are also part of the curriculum, along with community-based instruction to practice and generalize the skills taught in the classroom. (N.T. pp. 150, 151)
17. Speech/language services would be provided in ten half-hour sessions, an increase over the February IEP proposal, and would also be part of the social skills curriculum, with an emphasis on social language skills and problem-solving. (N.T. pp. 151, 152)
 18. Parents obtained an independent neuropsychological evaluation of Student at their expense in April 2012, but did not have a written report to provide to the District until June 18, 2012. (N.T. pp. 48, 49; P-12)
 19. The independent evaluator conducted standardized assessments of attention, memory and learning; visual perception and visuo-spatial construction; language functioning; executive functioning and academic skills. (P-12, pp. 2—7)
 20. The evaluator reported that the District's February RR was not available for review, and she did not observe Student in the school setting, only in the course of conducting the assessments. (P-12, pp. 2, 3)
 21. The independent evaluator noted that during the evaluation, Student initially displayed verbally and physically disinhibited behaviors and made comments that were not socially appropriate for Student's age. The evaluator further observed that Student's behaviors markedly improved during the second session, after Student had taken medication. Student was much better focused and attentive to task, and made no impulsive responses. (P-12 pp. 2—4)
 22. The neuropsychological evaluation disclosed weaknesses in Student's higher-order language processing skills, including understanding nuances, implications and metaphors, as well as weaknesses in comprehension of passage-length material, even after accounting for inconsistent attention. (P-12 p. 6)
 23. The independent evaluator concluded that Student's academic skills were within normal limits on measures of reading, math and basic written expression. The evaluator noted inconsistent skills in the areas of short-term/delayed auditory/verbal memory, as well as higher order language comprehension, which adversely impacted Student's reading and written expression. (P-12 pp. 7, 8)
 24. Deficits were noted in Student's short-term/delayed visual memory, higher-order visual organization/planning and executive skills, as well as in sustained attention, which the evaluator considered confirming a prior diagnosis of Attention Deficit/Hyperactivity Disorder (ADHD). (P-12, p. 8, P-14)
 25. The independent evaluator also concluded that Student's profile is consistent with a mild cognitive dysfunction and that symptoms could worsen and/or additional

deficits/symptoms could emerge as Student's cognitive development continues and academic demands increase. (P-12 p. 8)

26. With respect to Student's needs in the area of reading, the evaluator recommended a strategy to increase reading comprehension. (S-12 p. 8)
27. As the alternative to the District's ESY proposal, Parents requested that the District pay for Student's enrollment in a private school summer program where Student receives intensive 1:1 instruction in a reading program based on Orton-Gillingham principles. (N.T. p. 77; P-20)

DISCUSSION AND CONCLUSIONS OF LAW

Legal Standards

Before explaining why the record in this case does not support Parents' claims, it is important to review the general and specific legal standards that must be applied to the assessment of the evidence.

1. FAPE

Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, *et seq.*, and in accordance with 22 Pa. Code §14 and 34 C.F.R. §300.300, a child with a disability is entitled to receive a free appropriate public education (FAPE) from the responsible local educational agency (LEA) in accordance with an appropriate IEP, *i.e.*, one that is "reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress." *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982). "Meaningful benefit" means that an eligible child's program affords him or her the opportunity for "significant learning." *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3RD Cir. 1999). Consequently, in order to properly provide FAPE, the child's IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. *Rowley; Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993). An eligible student is denied FAPE if his program is

not likely to produce progress, or if the program affords the child only a “trivial” or “*de minimis*” educational benefit. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3rd Cir. 1988).

Under the interpretation of the IDEA statute established by *Rowley* and other relevant cases, an LEA is not required to provide an eligible with services designed to provide the “absolute best” education or to maximize the child’s potential. *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3rd Cir. 1995).

2. ESY

An IDEA eligible student’s entitlement to ESY services derives from both federal and state special education provisions. Under the federal IDEA regulations, ESY services are to be provided to an eligible student if necessary to assure that s/he receives a free, appropriate public education (FAPE). 34 C.F.R. §300.106(a)(2). Pennsylvania special education regulations incorporate the federal ESY standard by reference, and in addition, provide explicit guidance for determining ESY eligibility and needs, as well as a timeline for finalizing eligibility and program decisions. *See* 22 Pa. Code §14.102(a)(2)(xi); §14.132 (a)(1), (2); (c), (d), (e). Pennsylvania ESY policies and procedures are further explained in a Basic Education Circular (BEC), Extended School Year Eligibility, issued in 2003.

In general, ESY is designed to reinforce and preserve skills that an eligible student gains during the school year: “An ESY program continues the goals and objectives of the IEP during the summer months, after the school year has concluded, so the student does not regress from one school year to the next.” *L.G. v. Wissahickon School District*, 2011 WL 13572 at *6 (E.D.Pa. 2011)

3. Tuition Reimbursement

In *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985), the United States Supreme Court established the principle that parents do not forfeit an eligible student's right to FAPE, to due process protections or to any other remedies provided by the federal statute and regulations by unilaterally changing the child's placement, although they certainly place themselves at financial risk if the due process procedures result in a determination that the school district offered FAPE or otherwise acted appropriately.

To determine whether parents are entitled to reimbursement from a school district for special education services provided to an eligible child at their own expense, a three part test is applied based upon the *Burlington School Committee* decision and a second Supreme Court case, *Florence County School District v. Carter*, 510 U.S. 7, 114 S.Ct. 361, 126 L.Ed. 2d 284 (1993). The first step is to determine whether the program and placement offered by the school district is appropriate for the child, and only if that issue is resolved against the school district are the second and third steps considered, *i.e.*, is the program proposed by the parents appropriate for the child and, if so, whether there are equitable considerations that counsel against reimbursement or affect the amount thereof. A decision against the parents at any step of that process results in a denial of reimbursement.

4. Burden of Proof

Parents asserted that the District in this case should bear the burden of proof. *See* Findings of Fact Prepared by Parents, p. 9. The law, however, does not permit that:

While the Court of Appeals initially placed the burden of proof on school districts, *see Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1219 (3d Cir.1993), the Supreme Court

held in *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), that “[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.” ... This was consistent with the decisions of several district courts placing the burden of proof on plaintiffs with cases pending at the time the Supreme Court decided *Schaffer*. See, e.g., *Fisher v. Stafford Twp. Bd. of Educ.*, No. 05–2020, 2006 WL 2534399, at *3 (D.N.J. Aug.31, 2006); *Greenwood v. Wissahickon Sch. Dist.*, No. 04–3880, 2006 WL 279085, at *1 (E.D.Pa. Feb.3, 2006); *Bay Shore Union Free Sch. Dist. v. T. ex rel. R.*, 405 F.Supp.2d 230, 238 (E.D.N.Y.2005).

L.G. v. Wissahickon School District, 2011 WL 13572 at *6, 7 (E.D.Pa. 2011)

It is important to understand, however, that the term “burden of proof” includes two components, the burden of persuasion (sometimes described as determining which party bears the risk of non-persuasion) and the burden of production, or of going forward with the evidence at various points in the hearing. The Supreme Court limited its holding in the *Schaffer* decision to allocating the burden of persuasion, explicitly not specifying which party should bear the burden of production. In other words, the *Schaffer* decision does not mean that the District had no obligation to produce evidence in support of its position, and the District certainly did so in this case.

On the other hand, the burden of proof analysis includes the common sense notion that the party with the burden of persuasion also bears a burden of production. Parents who initiate a due process hearing cannot prevail if they fail to produce sufficient evidence to support their claims. In other words, the party seeking relief also necessarily bears some responsibility for going forward with the evidence and providing a substantive basis for a decision in their favor on any claim raised in their due process complaint.

The *Schaffer* burden of proof analysis, however, actually affects the outcome of a due process hearing in terms of which party’s position prevails only in that rare situation where the

evidence is in “equipose,” *i.e.*, completely in balance, with neither party having produced sufficient evidence to establish its position.

Here, the question of which party bears the burden of persuasion does not affect the outcome. The record in this case contains substantial evidence that the District’s ESY program is appropriate for Student, including the discussion of Student’s needs in doctor and evaluation reports produced by Parents.

Parents’ Claims/Arguments

There is no dispute in this case that Student is eligible for ESY services, *i.e.*, needs a summer program in order to receive FAPE. The primary question, therefore, is whether the District’s summer program meets the IDEA standard for an appropriate program. Generally, Parents contend that Student’s primary need for a summer program is to increase academic skills, specifically reading. Parents, therefore, disagree with the emphasis in the District’s program on developing and practicing social skills. (FF 12, 16)

Parents further contend that they have located an ESY program at a private school that will appropriately meet Student’s needs in reading. (FF 27) At the time Parents filed the complaint, they requested an order that the District place Student in the private school program. Since that program began on June 25, however, just a few days after the June 21 hearing session, and the day before the parties submitted written closing arguments in this case, the placement remedy Parents originally requested became a claim for tuition reimbursement. *See* Findings of Fact Prepared by Parents, p 10.

The change in remedy, however, does not change the focus of the inquiry. As stated above, the first step in determining whether the District should be required to reimburse Parents for the private school summer program is to assess the appropriateness of the District’s ESY

program. The inquiry continues with an assessment of the private school program only if the District's proposal is found to be inappropriate, since the applicable legal standards require that if the District's program is appropriate, tuition reimbursement must be denied.

Since the legal standards require the District to provide Student with an appropriate program, not the best possible program, there is no inquiry into which summer program is better or more desirable for Student. If the District's program appropriately meets Student's need for an ESY program, tuition reimbursement must be denied.

Parents contend that the District's proposed ESY program is not appropriate for Student for several reasons:

1. The ESY program proposed by the District does not provide one-to-one tutoring with an appropriate reading specialist or teacher.
2. The District's ESY proposal does not provide a lab to support Student's completion of the District's summer reading program.
3. The District proposes the same ESY program as it provided for Student during the summer of 2011. Parents argue that the 2011 ESY program was academically unsuccessful, since Student needed tutoring during the 2011/2012 school year, and that the 2011 ESY program was socially/emotionally unsuccessful because Student was bullied in the District's program.

Underlying Parents' specific objections to the District's ESY proposal is their disagreement with the District's most recent evaluation of Student, particularly the recommendation that Student's primary eligibility category be changed to autism. (FF 2, 7, 10) Parents argue that the conclusions in the District's recent reevaluation report (RR) are a significant departure from conclusions and recommendations found in all prior evaluations of Student, as well as in private evaluations Parents obtained during the winter and spring of 2012.

Because the District's current ESY proposal encompasses goals proposed in an IEP based upon the RR that Parents consider fatally flawed, they believe that the ESY program is necessarily inappropriate.

Parents Objections to ESY Program Based upon the District's Evaluation Report

Parents' intention to assert only ESY claims in their due process complaint was confirmed in pre-hearing discussions, and the issues to which the parties agreed after their opening statements concerned ESY only. Nevertheless, Parents continually referred to their disagreement with the results of the District's February 2012 RR and the District's recommendation for autistic support services based on the RR. (FF 10) Although Parents' emphasis on their disagreement with the RR was justifiable to the extent that the IEP goals selected as the basis for the ESY program were, in turn, based upon the needs identified in the RR, (FF 12), it is important to note that neither the RR nor the autistic support services provided in the IEP were directly at issue in this case. The District's ESY proposal is not for autistic support services. (FF 15, 16) Moreover, this decision, based upon a limited record, draws no general conclusions concerning the appropriateness of the District's most recent RR or IEP proposal, except to the extent necessary to assess the appropriateness of the goals included in the ESY program the District offered Student. In this context, questions concerning the appropriateness of the District's recent evaluation were limited to assessing whether it is so flawed that the proposed ESY goals in the proposed IEP, and the instruction based upon those goals, are not reasonably calculated to meet Student's identified needs and to support the provision of FAPE to Student.

As noted above, Parents asserted that the District's RR is contrary to all other evaluations, particularly the independent neuropsychological evaluation that Parents obtained in

April 2012, because it includes new and unprecedented conclusions concerning Student's school functioning and primary needs, including the recommendation that Student's primary eligibility category be changed to autism. (FF 7) Parents' contentions concerning the differences between the conclusions and recommendations in the District RR and the reports of Parents' independent evaluators and Student's treating neurologist are not supported by the record, including the documents Parents admitted into the record.

Parents suggested, *e.g.*, that no prior evaluation had ever mentioned autism as a potential disability category for Student. In the Background section of the District's RR, however, there is a reference to that diagnosis having been considered at the time Student transitioned from early intervention to school-age programming, but was not pursued by the District due to Parents' opposition. (S-1, p. 2)

In addition, the pediatric neurologist who diagnosed Student's ADHD noted in a 2006 letter report to the District that Student had significant receptive and expressive language difficulties that he described as the source of Student's learning disabilities, and further noted increasing issues with social skills and sensory overload in the classroom. (FF 9, P-14 p. 2) The description of Student's various difficulties in the 2006 letter report is consistent with the IDEA definition of the autism disability category.² Special education services are based upon IDEA disability definitions, not medical diagnoses.

² The IDEA regulations describe the autism disability category as follows:

Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

34 C.F.R. §300.8(c)(1)(i)

Finally, the recent independent evaluation reports Parents obtained from a school psychologist and a speech/language pathologist noted that Student's receptive language deficits centered on understanding nuances and implied meanings, and that Student has significant difficulties with pragmatic language. (FF 8, 22) The independent neuropsychological evaluation noted Student's weakness in reading comprehension, and no other aspect of reading ability, attributing it to Student's higher order language comprehension difficulties, as well as attention/focus difficulties that were not entirely eliminated even with medication. (P-12 p. 7) The evaluator also remarked on Student's immature verbal and physical behaviors, but noted that those behaviors improved with medication. (FF 21) Although the independent evaluator did not observe Student in the school setting, her limited and short-term observations were consistent with information included in the District's RR and other District staff observations in the school environment. (FF 7, 11, 20)

Parents suggested that the results of the District's evaluation were compromised because testing was conducted at a time when Student had not taken prescribed medication to control ADHD symptoms. Parents further contended that Student's Father made errors in completing a rating scale. *See* P-16, pp. 9—11. Those contentions, however, do not call the District's evaluation results into question with respect to the appropriateness of the ESY services offered by the District. The conclusion of the District's RR concerning Student's social needs is not based on the results of standardized assessments of cognitive and academic functioning that might be affected by attention issues, but on observations and teacher input, as well as rating scales completed by teachers and Parents and an assessment administered to Student. (S-1, pp. 17—19) If an absence of medication significantly skewed all of those results, it is reasonable to infer that Student does not regularly take the prescribed medication while attending school. If

that is the case, Student was evaluated in the state in which Student generally attends school, and the results, therefore, are entirely valid for the school environment.

Finally, it is most important to note that special education services are to be recommended and provided based upon identified needs, not disability categories. Whether Student's primary or secondary eligibility categories are identified as autism, OHI based upon an ADHD diagnosis or speech/language impairment is far less important than identifying and addressing Student's needs. As noted, there is no real discrepancy between the academic, language, social and behavior needs identified in the District's RR and the private evaluations Parents obtained. It is most significant that neither the independent neuropsychological report nor the independent speech/language report presented by Parents recommend intensive reading services, or suggest that Student needs, or would even substantially benefit, from intensive reading instruction with an Orton-Gillingham type program, as Parents testified and argued. *See* N.T. p.71; P-12 pp. 8—10, P-13 pp. 3, 4. To the contrary, the neuropsychological evaluation report concludes that Student's reading difficulties arise from deficits in higher order language skills, and that Student needs strategies to increase comprehension when reading longer and more complex passages. (FF 22, 26) The evaluation report also cautions that Student's needs may change or increase as academic demands increase due to the effects of a mild cognitive dysfunction and continuing brain development. (FF 25) The neuropsychological report focuses on the higher order reasoning and comprehension skills compromised by Student's language impairment. (FF 22, 23, 24) It includes no recommendation for intensive academic instruction in decoding and fluency based on phonemic awareness.

The independent speech/language evaluation also focuses on Student's language deficits and recommends speech/language services, including specific instruction in social language

skills. (FF 8) There was no mention at all in that report of a need for reading instruction, much less intensive instruction based on Orton-Gillingham principles. (P-13)

The District's ESY Proposal

The ESY program proposed by the District is entirely consistent with the recommendations found in the independent reports that Parents produced, as well as the District's recent RR. The District's ESY proposal places equal emphasis on continuing Student's instruction in reading in order to maintain reading skills and support continued improvement, and on improving Student's language, social skills and on-task behaviors. (FF 12, 14, 16, 17) That combination of ESY services is amply supported by the independent neuropsychological report, which concluded that Student has age-appropriate academic skills, as well as the District's RR and the independent speech/language pathologist's report all of which cited Student's significant pragmatic/social language and social skills needs. (FF 7, 8, 9, 12, 22, 23, 24) There is no basis in the evaluation evidence produced by either Parents or the District for agreeing with Parents' argument that Student needs an academically intensive summer program. To the contrary, the evidence in the record overwhelmingly supports the conclusion that Student's overall academic progress will be better supported by improving Student's higher order and pragmatic language skills. In addition, a summer program that includes peers with similar social skills needs provides an excellent opportunity to learn and practice those skills, which can then be used by Student in school and other environments.

Parents' Objections to the District's 2012 ESY Program Based on the 2011 ESY Program

Similarity of the 2012 ESY Proposal to the 1011 ESY Program

Parents argued that the District's proposed ESY program is unlikely to be effective because it is identical to the prior program which was unsuccessful both academically and

socially. Parents asserted that Student did not want to attend the 2011 summer program because of bullying by another student and that Student began to struggle, academically, in the fall of the 2011 because the ESY program had been ineffective.

The basis for Parents' belief that the District's current ESY proposal is identical to the 2011 ESY program is unclear. The evidence established that the ESY program proposed for 2012 is located in a different building, taught by a different teacher. (FF 12, 15) In addition to reading instruction, it includes a social skills curriculum, speech/language services and a behavior goal. (FF 12, 14, 16, 17) There is no evidence that any of those components other than reading instruction were included in Student's 2011 ESY program.

Finally, regardless of similarities/differences between the 2011 ESY program and the District's proposal for 2012, Parents' conclusion that Student's academic struggles during the 2011/2012 school year are directly tied to an inappropriate ESY program is speculative at best. Parents produced no specific testimony or documents suggesting how the 2011 ESY program contributed to Student's academic difficulties during the following school year. Indeed, Student's testimony failed to support Parents' position. (FF 5) It is more reasonable to infer that Student began experiencing increased problems in the past school year due to the additional complexity of materials taught in the curriculum and Student's mild intellectual dysfunction, and/or the difficulties with higher order language comprehension skills identified by Parents' independent evaluator as areas of difficulty for Student. (FF 25) Whatever the reason for Student's increased academic difficulties during the 2011/2012 school year, there is no basis for connecting those difficulties to the District's 2011 ESY program.

Bullying

There was considerable testimony concerning Student's difficulties with a peer during the 2011 ESY program, and some conflict in the testimony concerning the nature and extent of the problem. (FF 3) Although Student expressed dissatisfaction with the 2011 ESY program, the primary basis for Student's dislike of the program was not fear of the other student involved in the conflict. (FF 4, 5)

Even if Parents were entirely accurate in their description and conclusion concerning the effects of the peer conflict on Student's satisfaction with the 2011 ESY program, however, District staff testified that the other student is not attending the same ESY program as Student this year. (FF 15) Parents had no objective basis for their suggestion that it is possible that the other student might be in the same ESY class again. Nothing in the words or demeanor of the staff member who testified that the students will not be in the same classroom or on the same bus suggested any reason not to accept that testimony as entirely factual and truthful.

Appropriateness of the Private School Placement

The conclusion that the District's proposed ESY program is appropriate for Student makes it unnecessary to consider the appropriateness of the private school summer program for which Parents request reimbursement as additional support for the decision that Parents' ESY claim must be denied. Nevertheless, Parents' argument that the independent evaluation reports they obtained supports Student's need for the type of instruction provided by the private summer school program in which they enrolled Student requires brief comment.

As discussed in some detail above, the independent evaluation reports do not actually support Parents' position, and, in fact, demonstrate that the private school program does not meet

the needs identified by the independent evaluators. Both of Parents' evaluators noted that Student's significant need to develop a better understanding of language in terms of recognizing nuances and implications. (FF 8, 23) The private school program, therefore, is not appropriate for Student, since intensive 1:1 reading instruction does not address Student's significant and broader receptive language deficits and there does not appear to be a language component in the private school program Parents selected for Student. Consequently, tuition reimbursement would not be an appropriate remedy in this case even if the District's ESY program had not been found appropriate.

CONCLUSION

Based upon the testimony and documents entered into evidence in this case, and for the reasons discussed in considerable detail above, the District's proposed ESY program is appropriate for Student, requiring that Parents request for reimbursement of costs of the private school ESY program and transportation by the District must be denied.

ORDER

In accordance with the foregoing findings of fact, discussion and conclusions of law, it is hereby **ORDERED** that Parents' claims in this matter are **DENIED**. The Downingtown Area School District need take no action to provide Student with an ESY program other than that offered in the February 2012 IEP, or reimburse Parents for the cost of the private school summer program they selected for Student.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed

July 7, 2012

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER