

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

EXPEDITED DUE PROCESS HEARING

Name of Child: A.F.

ODR #3283/11-12-KE

Date of Birth:
[redacted]

Date of Hearing:
June 29, 2012

CLOSED HEARING

Parties to the Hearing:
Parents

Representative:
Pro Se

Norristown Area School District
401 N. Whitehall Road
Norristown, PA 19403

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Date Transcript Received:

June 30, 2012

Date of Decision:

June 30, 2012

Hearing Officer:

Linda M. Valentini, Psy.D., CHO
Certified Hearing Official

Background

Student¹ is an elementary-school-age child who is eligible for special education pursuant to the Individuals with Disabilities Education Act [IDEA] under the classification of Autism, and consequently a protected handicapped individual under Section 504 of the Rehabilitation Act of 1973 [Section 504], as well as the federal and state regulations implementing those statutes.

The current matter concerns an expedited due process request from the Parents who disagree with the District's proposed Extended School Year [ESY] program, believing that Student requires six to eight weeks of ESY rather than the District's proposed four weeks.

Issue²

Is the ESY program the District offered Student appropriate?

Findings of Fact

1. Student resides with the Parents within the boundaries of the District and attends Student's neighborhood school. There is no dispute about Student's eligibility for ESY programming. [NT 12]
2. For summer 2012 the District offered an ESY program that is four weeks long, starting July 2, 2012 and ending July 27, 2012. The proposed program runs from 9:00 am to 1:00 pm five days per week except for July 4th. Transportation to and from the proposed program would be provided. [NT 35, 97; S-15]
3. The District's ESY programming would start out with social skills instruction within the first 30 minutes to foster relationships between peers and the adults through discussion of social stories, opportunities to discuss what happened with the children over the weekend or during the previous day, getting more of their personal interests involved and also setting the structure of the day for the children. [NT 93]
4. The District has received a 21st Century grant, so for approximately 2 1/2 hours of the day children will have access to programming working on their individual IEP goals using information from the Smithsonian Institution. Teachers will be providing direct instruction to students; skills will be reinforced by the paraprofessionals. [NT 94, 102-103, 105]

¹ This decision is written without further reference to the Child's name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.

² The parties have been discussing ESY since January 2012 and have made ongoing attempts to resolve their differences. The Parents addressed some difficulties during this process, including scheduling and mailing of documents; these issues are not germane to this Decision as at the time the Parents filed for this hearing the difficulties were moot. [NT 14-15; P-10, P-11]

5. There will be some snack time, approximately about a half an hour, and then time for the children to play socially with each other on a playground or doing activities inside the classroom. [NT 94]
6. Agencies such as the YMCA and the Girl Scouts will be coming into the schools during the week to offer an opportunity to generalize the skills that the children are learning through academics and social skills. There will be some dance and art and theatre groups and a traveling zoo. [NT 95]
7. The last portion of the day will be a wrap-up and then planning for what the children are going to be able to be doing the next day. [NT 95]
8. During the course of the ESY week Student would receive OT and Speech/Language services as per the proposed ESY IEP dated June 8, 2012 and received by the Parents on June 14, 2012.³ [NT; S-15]
9. The proposed program will be located in Student's present school building, with Student's current classmates, and the assigned ESY teacher is familiar with Student having served as a substitute teacher in the autistic support classroom among other assignments in the school building during the past year. The teacher:pupil ratio would be 1:2. [NT 96, 113, 129-131, 133-135; S-20]
10. In an effort to resolve the matter without litigation the District offered Student one full hour of one-to-one instruction on goals of the Parents' choosing every day the ESY program is in session [and Student attends] after the set program end time, extending Student's ESY program to five hours per day. The teacher assigned to the proposed ESY classroom would also provide the individual instruction for the additional hour. Transportation home would be provided after the extra hour. The Parents rejected the June 8th NOREP which they received on June 14th, and filed for Due Process on June 16th. [NT 26, 65-69, 97-100, 106, 11-11; S-1, S-15]
11. Student attended ESY in the District last summer. Data was collected and produced.[S-5]

³ During the course of the hearing the Parent raised concerns/confusion about the number of 30-minute Speech/Language sessions offered in the proposed ESY IEP and ESY NOREP, believing that there was a discrepancy among three NOREPs issued [regular school year IEP, first ESY IEP, amended ESY IEP that included the extra hour per day of one-to-one instruction]. The District's witness, who testified by telephone from her vacation location, seemed confused as well. At the hearing the District offered to honor the higher number of sessions, with the caveat that the extra half-hour per week Speech/Language session would be provided for half that day's one-to-one session. My reading of the NOREPs was that the lower number of sessions was being offered for ESY and therefore, although the District suggested that the higher number could be put into the Order, I declined to do so, suggesting that if the District prevailed in this case the Parents and the District could decide whether to substitute one extra Speech/Language session for part of one of the individual instructional sessions once per week. [NT 141-146, 155; S-9, S-12, S-15]

12. Regression/Recoupment data collected at the beginning of the school year and during the winter break established that Student's time for recoupment was not longer than expected. [NT 108, 125-126; S-6]
13. Beginning in January 2012 the Parents have requested eight-week ESY programming. They continue to believe that the District's ESY offer is not appropriate. Their basis for this belief is solely the length of the District's program given regression in skills and behavior at home over breaks.⁴ [NT 20, 40-41, 45, 50-51, 56-59, 62-63, 92, 149-150; P-1]
14. The Parents produced documents from Student's Behavioral Health Rehabilitative Services [BHRS - also known as "wraparound" services] providers, the Behavior Specialist Consultant [BSC], the Therapeutic Staff Support [TSS] addressed observations in the home and community. [NT 13, 22; P-2, P-3]
15. The Parents provided documents from the private Speech/Language Therapist and the private Occupational Therapist, wherein they opined that Student requires continuity of services through the summer months. [NT 13, 22-23; P-4, P-5]
16. On one occasion last summer Student was seen for an emergency psychiatric consult due to increasing agitation and pursuant to this consult one of Student's medications was changed. [NT 24-25, 80-81; P-8]
17. The Parents' proposed placement for ESY is the Variety Club camp which has a six week session [June 25 to August 3, 2012] and an eight-week session [June 18 to August 10, 2012]. The camp runs from 9:00 am to 3:00 pm five days per week with the exception of July 4th. The teacher:pupil ratio would be 1:3. [S-22, P-9]
18. The camp schedule includes a half-hour for lunch and an hour and a half for swimming. [S-22, P-9]
19. Student has not started at the Variety Club camp.⁵ [S-22, P-9]

⁴ Although Student's mother stated several times that the ESY IEP was inappropriate, and I specifically invited her to explain the basis for this, she did not offer anything other than the length of the program and, only under cross-examination and without reference or explanation in her case in chief, that the social goal was not appropriate. [NT 34, 39, 78]

⁵ So that Student would not lose educational programming opportunity, the District offered at the hearing to have Student begin in the District's ESY program for however many days it took for this Decision to be issued, and then continue or release Student depending on the outcome. [NT 154] The Decision Due Date, given the Pennsylvania timelines governing ESY hearings, would have been July 18, 2012. Because of the urgency of this matter, and with the much appreciated assistance of the court reporting agency [Gravinese Court Reporting] which emailed the transcript on Saturday morning at 10:10 am, less than 16 hours after the 4:40 pm end of the Friday afternoon session, I am issuing this Decision significantly earlier than required.

Discussion and Conclusions of Law

In November 2005, the U.S. Supreme Court held the sister burden of proof element to the burden of production, the burden of persuasion, to be on the party seeking relief. However, this outcome-determining rule applies only when the evidence is evenly balanced in “equipoise,” as otherwise one party’s evidence would be preponderant. *Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. *L.E. v. Ramsey Board of Education*, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). Thus, the party bearing the burden of persuasion must prove its case by a preponderance of the evidence, a burden remaining with it throughout the case. *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Here, the Parents requested this hearing and were therefore, assigned the burden of persuasion pursuant to *Schaffer*, and in this matter the Parents accepted the burden of production even though case law does not clearly assign same to either party.

Credibility

During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”. *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); See also generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009).

Two witnesses testified at the hearing. The mother is clearly an ardent advocate for her child and did a commendable job preparing exhibits and articulating her position. She was in the difficult position of having lost legal counsel before the hearing [NT 10], and although she was accompanied by an advocate [who does not specialize in special education advocacy] the mother did not, nor would she be expected to, grasp the standard for appropriateness put forth in case law related to the IDEA. Although the Parents produced documents from Student’s wraparound providers [BSC and TSS⁶] and private OT and Speech/Language providers, these individuals’ opinions did not establish why the District’s offer of ESY was inappropriate. The behavioral data generated by the wraparound team did not address Student’s in-school academic or behavioral functioning and accordingly could not be given significant weight. The private Speech/Language and Occupational Therapy providers’ knowledge of what the District was offering for ESY for Summer 2012 was not established on the record. The District’s witness, the Acting Special Education Supervisor, testified by telephone and at various times the connection was interrupted [NT 86]. This individual was clear in articulating the District’s position [with the exception of the number of Speech/Language sessions as addressed above] and

⁶ Notably the TSS is authorized to provide Student with 8 hours per week of one-to-one home/community services during which, presumably there would be direct emphasis on behavioral and social functioning. [NT 41]

her testimony regarding the District's offered ESY program and her understanding of the Variety Club's camp program gleaned from a conversation with the camp director [NT 33, 109-112, 133-135], was reliable and accorded due weight.

Legal Basis:

Having been found eligible for early intervention special education, the Student is entitled by federal law, the Individuals with Disabilities Education Act as Reauthorized by Congress December 2004, 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; and provided in conformity with an Individualized Educational Program (IEP). A child's special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (*Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. PA. 1996)). Local Educational Agencies [LEAs] need not provide the optimal level of service, maximize a child's opportunity, or even set a level that would confer additional benefits. What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

Acknowledging that some students may require programming beyond the regular school year, the federal legislature deemed that Extended School Year services are to be provided to an eligible child if necessary to assure that the child receives a free, appropriate public education (FAPE). 34 C.F.R. §300.106(a)(2). Pennsylvania regulations provide additional guidance for determining ESY eligibility, requiring that the factors listed in 22 Pa. Code §14.132 (a)(2) (i)—(vii) be taken into account.

22 Pa. Code § 14.132(a)(2) (i)—(vii) provides in relevant part:

(a) In addition to the requirements incorporated by reference in 34 CFR 300.106 (relating to extended school year services), school entities shall use the following standards for determining whether a student with disabilities requires ESY as part of the student's program:

(1) At each IEP meeting for a student with disabilities, the school entity shall determine whether the student is eligible for ESY services and, if so, make subsequent determinations about the services to be provided.

(2) In considering whether a student is eligible for ESY services, the IEP team shall consider the following factors; however, no single factor will be considered determinative:

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

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

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

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

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

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

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

(b) Reliable sources of information regarding a student's educational needs, propensity to progress, recoupment potential and year-to-year progress may include the following:

(1) Progress on goals in consecutive IEPs.

(2) Progress reports maintained by educators, therapists and others having direct contact with the student before and after interruptions in the education program.

(3) Reports by parents of negative changes in adaptive behaviors or in other skill areas.

(4) Medical or other agency reports indicating degenerative-type difficulties, which become exacerbated during breaks in educational services.

(5) Observations and opinions by educators, parents and others.

(6) Results of tests, including criterion-referenced tests, curriculum-based assessments, ecological life skills assessments and other equivalent measures.

(c) The need for ESY services will not be based on any of the following:

(1) The desire or need for day care or respite care services.

(2) The desire or need for a summer recreation program.

(3) 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.

In determining whether the LEA has offered an appropriate ESY program, as is the case for determining whether an LEA has offered an appropriate IEP, the proper standard is whether the proposed program is reasonably calculated to confer meaningful educational benefit. *Rowley* “Meaningful benefit” means that an eligible student’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).

Discussion:

The IDEA and Pennsylvania law are very clear on what ESY is supposed to accomplish. ESY is provided to prevent a child from losing educational ground over a long break in schooling, such as during the summer.

The District has offered a five-day per week program for four weeks. Four hours per day are designed to address Student’s specific IEP goals in the neighborhood school with six pupils who are Student’s classmates during the regular school year and a teacher who, although not Student’s regular school year classroom teacher, is familiar with Student and with whom Student is familiar. One additional hour per day is being offered for one-to-one instruction with a certified special education teacher who will work with Student on any goals the Parents select as important. The District has presented credible evidence that Student’s participation in a District ESY program last summer prevented appreciable regression on IEP goals and curtailed recoupment time when school resumed in September.

The Parents favor an ESY program that is longer [since that program started two weeks ago and Student did not attend it [NT 74-75] Student’s total number of weeks would be six if Student started on Monday July 2nd]. Although the ESY program runs for six hours per day, two of those hours are devoted to lunch [30 minutes] and swimming [90 minutes]. In addition, there is no indication that Student would receive one-to-one instruction in that program. Finally, I note that although the camp brochure provides for related therapies, those are provided at additional cost over and above the camp fee.

The IDEA’s standard for “appropriateness” is put forth above. The issue is not which ESY program is more appropriate, but whether the District’s proposed program is in and of itself appropriate. In some cases families favor a private program that is actually better than the public agency’s program; in these cases, if the public program meets the appropriateness standard, then the parent cannot prevail. In deciding this case I weighed quantity and quality of the programs, and given the structure of the District’s proposed program tailored for Student I find that the District has offered far superior quality and if group and individual instruction were carefully parsed out with regard to the schedules of each ESY program [which I will not do given my desire to issue this decision for immediate implementation] I strongly suspect that the District would prevail in quantity of instruction as well.

Conclusion

Based upon the evidence presented at the expedited due process hearing in this matter, and the applicable law relating to ESY eligibility and appropriate programs and services, I conclude that the District has offered an appropriate ESY program for Student.

Order

It is hereby ordered that:

The ESY program the District offered Student is appropriate and should be implemented as of July 2, 2012 or, given the date of this Order, as soon as transportation can reasonably be arranged but no later than July 5, 2012.

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

June 30, 2012

Date

Linda M. Valentini, Psy.D., CHO

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