

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.

DECISION

COVER SHEET

DUE PROCESS SPECIAL EDUCATION HEARING

FILE NUMBER: 3306/11-12AS

RESPONDENT/SCHOOL DISTRICT (LEA): Midd West School District

SCHOOL DISTRICT COUNSEL: Sharon O'Donnell, Esquire

STUDENT: E.S.

PARENT: [Parents]

COUNSEL FOR STUDENT/PARENT Phillip Drumheiser, Esquire

INITIATING PARTY: Parent/Student

DATE OF DUE PROCESS COMPLAINT: June 22, 2012

DATE OF HEARING: July 17, 2012

PLACE OF HEARING: Midd West High School

OPEN vs. CLOSED HEARING: Closed

STUDENT PRESENT: No

RECORD: Verbatim-Court Reporter

DECISION TYPE: Electronic

DUE DATE FOR DECISION: July 22, 2012

HEARING OFFICER: James Gerl, Certified Hearing Official

DECISION

DUE PROCESS HEARING

File No.: 3306/11-12AS

PRELIMINARY MATTERS

This due process hearing was an expedited hearing concerning an extended school year services issue pursuant to the Pennsylvania special education rules. No extensions of the decision deadline are permitted in these cases. The decision herein shall be issued within thirty days of the filing of the complaint, on July 22, 2012.

A prehearing conference by telephone conference call was convened for this matter on June 29, 2012. As a result of said conference, a prehearing conference order was entered herein. Said order is incorporated herein by reference.

On July 6, 2012, counsel for the parties filed a joint prehearing memorandum. Said memorandum contained numerous stipulations of fact, and it defined the issue presented for purposes of this due process hearing. Said memorandum also contained information concerning exhibits and witnesses. The parties' joint prehearing memorandum is incorporated by reference herein.

Because of the expedited nature of this hearing, both parties filed written briefs and proposed findings of fact prior to the hearing. In addition, counsel for each party made a brief oral closing argument at the end of the due process hearing. All proposed findings, conclusions and supporting arguments submitted by the parties have been considered. To the extent that the proposed findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and views stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

Personally identifiable information, including the names of parties and similar information is provided on the cover sheet hereto which should be removed prior to distribution of this decision to the public. FERPA, 20 U.S.C. § 1232(g) and IDEA § 617(c).

ISSUE PRESENTED

The sole issue presented in this due process hearing, as identified by the parties in the prehearing conference and as confirmed in their joint prehearing memorandum, is as follows:

1. Is the extended school year services program proposed by Respondent for the summer 2012 for the student appropriate?

FINDINGS OF FACT

Based upon the parties' stipulations of fact as contained in their joint prehearing memorandum, the hearing officer has made the following findings of fact:

1. The student's birth date is [redacted]. (Stip-A). (References to stipulations of fact in the parties' joint prehearing memorandum are hereby referenced as "Stip-A," etc.).
2. The student's primary eligibility for special education services is based upon a medical condition [redacted]. The categories of eligibility are other health impairment and speech language impairment. (Stip-B)
3. The student is in 4th grade in the educational program for the 2011-2012 school year, a combination of tutoring in the home and school classroom attendance. (Stip-C)

4. The Respondent issued a Notice of Recommended Educational Placement for extended school year services dated June 1, 2012. (Stip-D)

5. The student utilizes [redacted] [a] communication device [redacted]. (Stip-F)

Based upon the evidence in the record, the hearing officer has made the following findings of fact:

6. The [medical condition] has a significant impact upon [the student's] functional motor skills. [The student] also has a number of other physical and medical concerns [redacted]. The student is severely disabled. (P-1; P-2) (References to exhibits shall hereafter be referred to as "P-1," etc. for the Petitioner's exhibits; "R-1," etc. for the Respondent's exhibits and "HO-1," etc. for the hearing officer exhibits; references to testimony at the hearing is hereafter designated as "T".) (NOTE: Respondents exhibits are marked as "SD-1," etc instead of "R-1", etc., and the exhibit numbers correspond to sequential page numbers and not to separate exhibits)

7. The student is able to communicate by using the [communication] device. The student [redacted] [and the device] also facilitates social interactions with non-disabled peers and others. The student has only recently begun using the [communication] device. (T of student's mother)

8. The student's last agreed upon IEP is dated September 29, 2011. Said IEP contains a number of academic and related services goals. The IEP also includes the related services of occupational therapy, speech and language, physical therapy and vision support, as well as an instructional assistant/personal care aid and parent provided transportation for which the school district pays mileage. The IEP states that the student is eligible for extended school year services. The IEP includes no extended school year services goals. (P-7)

9. The student received a psychological evaluation on June 9 and 21, 2011, and the report of the evaluation was prepared on July 8, 2011. Said evaluation recommends inclusion and consideration of least restrictive environment concerns with regard to placement. Said evaluation is silent concerning the student's regression and/or recoupment after school breaks, and it does not address [the student's] needs during extended school year programming. (P-2)

10. An addendum to the psychological evaluation referred to in the last paragraph was issued by the same evaluator on July 15, 2011. The supplemental evaluation makes no recommendation regarding extended school year services, and it does not address the student's regression/recoupment needs. (R-27)

11. On August 10, 2011, an occupational therapist who had been working with the student recommended that the student continue to receive occupational therapy services. The evaluator recommended that the student needs the best

learning environment possible in order to successfully reach [the student's] maximum potential. (P-3)

12. On August 19, 2011, a physician requested a homebound placement for the student and thereafter respondent provided homebound services to the student. (P-4, T of student's mother.)

13. A physician and a physical therapist working with the student drafted documents on behalf of the student recommending that the student would be best served by having as short a trip to school as possible. (P-4, P-5)

14. The student's mother and Respondent arranged to have an SAS tool kit meeting on April 17, 2012 concerning the student. (R-22, R-21)

15. On one occasion, Respondent's extended school year services teacher observed the student in her classroom. (T of Respondent's ESY teacher)

16. On May 2, 2012, the student's mother sent an e-mail to Respondent's special education director noting that the student's family wanted the student to have a summer program that would allow [the student] to continue to progress in [the student's] communication and social skills with age appropriate peers. The parent requested that speech therapy, as well as academics, be included in the extended school year services program for the student. The e-mail expressed the desire to have the student continue moving forward with [the student's] academic progress. (R-12 and R-13)

17. The special education director for Respondent responded to the mother's e-mail with an e-mail noting that extended school year programs are about regression, that is "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" and recoupment, that is "whether the student has the capacity to recover skills or behavior patterns in which regression occurred to a level demonstrated prior to the interruption of educational programming" and whether the student's difficulties with regression or recoupment make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives. The special education director noted that extended school year services is about not falling back, rather than continuing to move forward with academic progress. The e-mail also mentioned that Respondent was going to attempt to provide a more inclusion oriented setting for the student's academic program. Accordingly, the life skills program at Respondent was selected for the extended school year services program. (R-8)

18. On May 30, 2012, the student's mother emailed the special education director for Respondent and argued that the student would regress with regard to [the student's] communication skills if [the student] does not receive speech therapy over the summer. (R-2, R-1)

19. On May 31, 2012, the special education director for Respondent e-mailed the student's mother noting that the speech therapist of Respondent had informed him that the best thing for the student the summer would be to practice with the [communication] device with the assortment of people [the student] would be interacting with. The e-mail offered to discuss the speech therapy issues at the IEP team meeting scheduled for that day. (R-1; T of Respondent's Special Education Director)

20. The IEP team for the student met on May 31, 2012 to discuss extended school year services. Respondent prepared a draft IEP for said meeting, but the IEP was never adopted. Said draft IEP does not include any goals concerning the proposed extended school year services program. The academic components of the extended school year program proposed by Respondent were discussed at the IEP team meeting. The purpose of extended school year services in terms of limiting regression and promoting recoupment was discussed at the meeting. (P-8; T of Respondent's special education director; T of student's mother)

21. The extended school year services program for the summer of 2012 offered by Respondent was a full inclusion program to be offered in the life skills classroom of Respondent from June 26, 2012 through July 26, 2012. The program was offered two days a week from 8:00 to 11:00 a.m. Each summer school day would begin with a bathroom break followed by an outdoor pledge of allegiance, a group

activity involving the calendar and the weather, and then intensive academic instruction based upon their IEP goals, for this student the academic instruction would have been in mathematics and English, followed by lunch, recess, and another bathroom break before dismissal. (T of Respondent's ESY teacher)

22. Respondent's extended school year services teacher was in a position to be able to provide specialized instruction to the student while the student was utilizing [the communication] device. (T of Respondent's ESY teacher)

23. The student was a good fit for the extended school year services program offered by respondent. (T of Respondent's ESY teacher)

24. The student's mother refused transportation services at the extended school year services IEP team meeting on May 31, 2012. (T of student's mother; T of Respondent's special education director)

25. The student's parents rejected the extended school year services program offered by Respondent, and Respondent issued a Notice of Recommended Educational Placement, or a prior written notice, on June 1, 2012. The parents wanted the extended school year program delivered in their home, they wanted speech as a related service during extended school year, and they wanted a program designed to permit the student to continue to make progress during the summer. (T of student's mother; P-9)

26. The student did not need speech language therapy as a related service over the summer in order to prevent regression or to promote recoupment. (R-1; T of Respondent special education director)

27. The extended school year services program proposed by Respondent appropriately addressed the student's extended school year needs. (Record evidence as a whole)

28. Respondent's extended school year services program was reasonably calculated to confer meaningful educational benefit. (Record evidence as a whole)

29. Respondent failed to meet the Pennsylvania deadlines of conducting an IEP meeting for extended school year services for seriously disabled students by February 28 and by not issuing a Notice of Recommended Educational Placement prior to March 31. (T of Respondent's special education director; T of student's mother; P-8; P-9)

30. The student's parent meaningfully and actively participated in the IEP process. (Record evidence as a whole)

31. No adverse educational effect or loss of educational opportunity was suffered by the student as a result of Respondent's failure to conduct an IEP meeting by February 28th or issue a Notice of Recommended Educational Placement by March 31st. (Record evidence as a whole.)

CONCLUSIONS OF LAW

Based upon the arguments of the parties, both before and during the hearing, and upon all of the evidence in the record, as well as my own legal research, I have made the following conclusions of law:

1. The United States Supreme Court has established a two part test for determining whether a school district provides a free and appropriate public education to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et. seq. (hereafter sometimes referred to as “IDEA”) and an analysis of whether the individualized educational plan (hereafter sometimes referred to as “IEP”) is reasonably calculated to enable a child to receive some meaningful educational benefit. Bd. of Educ., etc. v. Rowley 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); LE & ES ex rel MS v. Ramsey Bd. of Educ., 435 F.3d 384, 44 IDELR 269 (3d Cir. 2006).

2. IDEA does not require a school district to maximize the potential of a child with a disability or to provide the best education possible; rather, it requires that an IEP be reasonably calculated to confer some educational benefit. Bd. of Educ., etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); Ridley School

District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. March 3, 2012).

3. Extended school year services must be provided only if a child's IEP Team determines, on an individual basis, that the services are necessary for the provision of FAPE. 34 C.F.R. §300.106. Extended school year services are only necessary to provide a FAPE when the benefits a disabled child gains during the regular school year will be significantly jeopardized if he or she is not provided with an extended school year program. See, M.M. v. School District of Greenville County, 37 IDELR 183 (4th Cir. 2002); LF by Ruffin v. Houston Independent Sch Dist 55 IDELR 10 (SD NY 8/4/2010); MCE by TQA v. Bd of Educ of Frederick County 57 IDELR 44 (D Md 7/11/2011) In re Student with a Disability, 108 LRP 25080 (SEA WV 11/12/ 2007); 22 Pa. Code §14.132(a)(2).

4. The Pennsylvania Special Education Rules provide as follows:

(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.

22 Pa. Code §14.132(a)(2)

5. Under IDEA, a procedural violation is actionable only if it results in a loss of educational opportunity for the student, seriously deprives the parents of their participation rights or causes a deprivation of educational benefit. IDEA § 615(f)(3)(E)(ii); Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. March 19, 2012).

6. In the instant case, the extended school year services program offered to the student by Respondent constituted an appropriate extended school year services program and offered a free and appropriate public education to the student.

7. The procedural violations committed by Respondent herein were harmless and not actionable.

DISCUSSION

Merits

Issue No. 1: Whether the program for extended school year services proposed by Respondent was appropriate.

The sole issue in this case is whether the extended school year program offered by Respondent was appropriate for the student. The parents contend that the program offered was not appropriate. Respondent contends that its extended school year services program was appropriate.

All parties agree that the student was eligible for extended school year services. That question is not an issue in this case. The only issue was whether the extended school year services program proposed by Respondent was appropriate.

In order for an extended school year services program to be appropriate, it must be sufficient to confer some meaningful educational benefit upon the student. Bd. of Educ., etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (U.S. 1982); LE & ES ex rel MS v. Ramsey Bd. of Educ., 435 F.3d 384, 44 IDELR 269 (3d Cir. 2006); 34 C.F.R. § 300.106. A school district is not required to maximize the potential of a student, but only to provide the basic floor of educational opportunity. Bd. of Educ., etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (U.S.

1982); Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. March 3, 2012). The legal standard for extended school year services requires that the services be sufficient to prevent substantial regression. 34 C.F.R. § 300.106; 22 Pa. Code §14.132(a)(2); See, M.M. v. School District of Greenville County, 37 IDELR 183 (4th Cir. 2002); LF by Ruffin v. Houston Independent Sch Dist 55 IDELR 10 (SD NY 2010); MCE by TQA v. Bd of Educ of Frederick County 57 IDELR 44 (D Md 2011) In re Student with a Disability, 108 LRP 25080 (SEA WV 2007); 22 Pa. Code §14.132(a)(2).

There is no evidence in the record that the extended school year services program offered by Respondent was insufficient to prevent substantial regression by the student during the summer. There was no evidence presented that the student had any previous problems with substantial regression after school breaks or that the student could not substantially recoup gains made at school after school breaks. Instead, the student's mother phrased her disagreement with the program in terms of wanting more progress for the student in both speech and academics during the extended school year session. This misses the point. The purpose of the extended school year requirement is to prevent regression, not to permit continued progress. While it is admirable that a parent would want what is best for the student, the special education laws do not require the school district to provide the best possible education.

Rather, the evidence in the record reveals that the extended school year services program offered by Respondent in this case was properly designed to address the student's academic subjects in a manner that was reasonably calculated to prevent substantial regression of skills and to promote recoupment of skills. Regression and recoupment are the cornerstones of extended school year programming under the Pennsylvania special education rules. The extended school year services program offered by Respondent included intensive instruction in the students areas of academic need. This instruction was reasonably calculated to prevent regression and to promote recoupment.

The parents' concern that the student needed speech therapy over the summer is ill-founded. Respondent's speech therapist informed the special education director, who in turn informed the student's mother, that what the student needed now in terms of speech/language needs was practice with [the student's] assistive technology device and not specific speech language therapy. The student could have gained valuable practice with [the communication] device in the extended school year program offered by respondent. Accordingly, it is concluded that the extended school year services program developed by Respondent for the student for the 2012 summer was reasonably calculated to provide meaningful educational benefit. Respondent offered FAPE to the student.

There are no substantial disagreements between the testimony offered by the parties, except as to the ultimate question of whether the extended school year services program offered by Respondent was appropriate. To the extent that the testimony of various witnesses may be deemed to conflict, however, the testimony of the witnesses offered by the Respondent was more credible and persuasive than the testimony of the witness called by the parent.

Counsel for Petitioner correctly points out in closing argument and in his prehearing brief that Respondent has violated certain procedural requirements under Chapter 14 of the Pennsylvania special education regulations. Specifically, counsel points to three violations: 1) that the school district failed to hold an extended school year services IEP meeting by February 28, 2012; 2) that Respondent failed to issue a Notice of Recommended Educational Placement for extended school year services by March 31, 2012, and 3) that the IEP form which was prepared in draft for the extended school year services meeting did not include specific goals concerning extended school year services. See 22 Pa Code §14.132(d)(2) & (3).

A procedural violation is actionable, however, only if it results in the loss of educational opportunity for the student, seriously deprives the parents of their participation rights or causes a deprivation of educational benefits. IDEA §

615(f)(3)(E)(ii); Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. March 3, 2012).

In the instant case, the procedural violations are not actionable. The student's mother actively participated in the IEP process, and Respondent considered, although it did not adopt, her input and suggestions. Moreover, the extended school year services program developed by Respondent for the student was appropriate and, therefore, the student suffered no loss of educational opportunity or deprivation of educational benefit as a result of the violations. The procedural violations are, therefore, harmless and not actionable.

Accordingly, the record evidence does not establish any violation of IDEA or the federal regulations, or the Pennsylvania statutes or regulations concerning special education.

ORDER

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

ENTERED: July 22, 2012

James Gerl

James Gerl, Certified Hearing Official
Hearing Officer

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served the foregoing DECISION
by emailing a true and correct copy thereof to the following:

Phillip Drumheiser, Esquire
[redacted]

and

Sharon O'Donnell, Esquire
[redacted]

on this 22nd day of July, 2012.

James Gerl
James Gerl, Certified Hearing Official
Hearing Officer

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