

*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**

### **Submitted on Record**

#### **ODR File Number:**

25080-20-21

#### **Child's Name:**

J.I.

#### **Date of Birth:**

[redacted]

#### **Parents:**

[redacted]

#### **Counsel for Parents:**

Thomas M. Davis, Esquire  
1230 County Line Road  
Bryn Mawr, PA 19010

#### **Local Education Agency:**

Marple Newtown School District  
40 Media Line Road  
Newtown Square, PA 19073

#### **Counsel for LEA:**

Gabrielle C. Sereni, Esquire  
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Media, PA 19083

#### **Hearing Officer:**

Cathy A. Skidmore, Esquire

#### **Date of Decision:**

07/17/2021

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student, J.I. (hereafter Student),<sup>1</sup> is a mid-elementary school-aged student in the Marple Newtown School District (District) who currently is identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)<sup>2</sup> and has a disability entitling Student to protections under Section 504 of the Rehabilitation Act of 1973.<sup>3</sup> The basis of Student's eligibility is a Specific Learning Disability.

Student's Parents filed a Due Process Complaint against the District in June 2021 asserting a number of claims regarding Student's right to a free, appropriate public education (FAPE) under the IDEA, Section 504, and the Americans with Disabilities Act (ADA).<sup>4</sup> The instant matter has been expedited and involves Extended School Year (ESY) services only; all other issues have been bifurcated and will proceed under the standard timelines.

The parties through counsel and this hearing officer held a conference call at which the manner of proceeding was discussed. The District thereafter filed a Motion seeking to submit the matter on briefs and the record, which the Parents opposed. Following review of the relevant filings and the Parents' offer of proof, this hearing officer granted the District's Motion, concluding that an evidentiary hearing was unnecessary to decide

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<sup>1</sup> In the interest of confidentiality and privacy, Student's name, gender, and other potentially identifiable information are not used in the body of this decision. All personally identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

<sup>2</sup> 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300.818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

<sup>3</sup> 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

<sup>4</sup> 42 U.S.C. §§ 12101-12213.

the ESY issue.<sup>5</sup> The parties submitted exhibits and closing statements for consideration along with all of their previous filings.

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

## **ISSUES**

1. Whether the District's ESY program for 2021 is appropriate for Student under applicable standards; and
2. If the program is not appropriate for Student, whether the District should be directed to provide a different reading program to Student this summer?

## **FINDINGS OF FACT**

1. Student is mid-elementary school aged and is enrolled in the District. Student is eligible for special education based on a Specific Learning Disability in the area of Basic Reading. (S-32.)
2. The District conducted an initial evaluation of Student during the 2019-20 school year (Student's second grade year). Standardized assessment measures in the resulting Evaluation Report (ER) of January 2020 reflected a Specific Learning Disability in Basic Reading,

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<sup>5</sup> Hearing Officer Exhibit (HO-) 1. The District's Motion seeking to proceed on this claim on a non-expedited basis was opposed by the Parents and denied. The Parents' exhibits (P-1 through P-25), the School District Exhibits (S-3, S-7, S-13, S-15, S-16, S-17, S-18, S-32, and S-36), and HO-1 are hereby admitted. The parties were directed to submit documents separately, and they did so, but citations in this decision may not be to duplicative exhibits. Reference to the Parents will be made where it appears that one was acting on behalf of both.

a finding that was also supported by curriculum-based assessments. (S-32.)

3. The January 2020 ER identified needs with respect to reading strategies at the sound/symbol, word level(s). A suggestion was also made in the ER for the team to consider a screening for a “multisensory phonics based program” (S-32 at 19) to begin in the fall of 2020. (S-32.)
4. An Individualized Education Program (IEP) was developed in February 2020. This IEP repeated the suggestion for a screening for a multisensory phonics-based program. (P-6.)
5. The February 2020 IEP included annual goals addressing oral reading fluency, decoding of phonetically correct words, and reading sight words. Program modifications and items of specially designed instruction included reading and writing supports. Student’s program was one of itinerant learning support. (P-6 at 27-33, 38.)
6. The February 2020 IEP determined that Student was eligible for ESY services in 2020 addressing the same goals through a language arts learning support program. (P-6 at 34-36.)
7. Student’s IEP was revised in November 2020 to add occupational therapy services following an evaluation of those needs. Several other supports were also added including positive reinforcement. This IEP reflects that it would be implemented through November 2021. (P-10.)
8. Student’s IEP was revised in February 2021 to reflect that Student was again eligible for ESY services in 2021. The District proposed a language arts learning support program to address oral reading fluency and decoding. The Parents approved the Notice of

Recommended Educational Placement (NOREP) for the proposed ESY services. (P-11; P-12; S-17; S-18.)

9. Student's IEP was revised again in March 2021 following parental concerns for Student's transition from two days of in-person instruction each week to five days. Additional Parent concerns included behavior at home and Student's struggles with remote learning. The IEP maintained the specific ESY services for 2021 from February. (P-13; S-15.)
10. The Parents approved the NOREP for the March 2021 IEP while explicitly disagreeing with "some of the language" (P-13 at 4; S-15 at 4) indicating that sixty minutes of daily reading instruction was sufficient and that a two week period of in-person instruction was an appropriate period of time within which to determine whether the sixty minutes of daily reading instruction remained a sufficient support. (P-13 at 1-4; S-15 at 1-4.)
11. The District provided information to the Parents following the March 2021 NOREP reflecting the schedule for ESY services in 2021 to include transportation. No specific reading intervention was indicated. (P-24.)
12. In April and May 2021, the District conducted a number of reading assessments. (P-14; P-15; P-16; P-17.)
13. On June 8, 2021, following a meeting that included the Parents, the District noted that Student would begin a multi-sensory reading program in the fall of 2021 (fourth grade). The team planned to revise the IEP at the start of the 2021-22 school year to reflect that change. (P-20.)
14. On June 9, 2021, the Parents contacted the District and asked that the fall multi-sensory reading programming be implemented over ESY 2021. (P-20; S-36.)

15. The District denied the request to begin implementation of the multi-sensory reading programming for ESY 2021. (P-21; S-36.)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **General Legal Principle**

In this type of case, as in most legal disputes, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The Parents together as the filing party thus bear the burden of persuasion.

### **General IDEA Principles: Substantive FAPE**

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. Many years ago, in *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding that the FAPE mandates are met by providing personalized instruction and support services that are designed to permit the child to benefit educationally from the program and also comply with the procedural obligations in the Act.

The state, through its local educational agencies (LEAs), meets the obligation of providing FAPE to eligible students through development and implementation of an IEP which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted). As the U.S. Supreme Court has observed, an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.”

*Endrew F. v. Douglas County School District RE-1*, \_\_\_ U.S. \_\_\_, \_\_\_, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

An LEA is not obligated to “provide ‘the optimal level of services,’ or incorporate every program requested by the child's parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Rather, the law demands that the services are reasonable and appropriate in light of a child’s unique circumstances. *Endrew F., supra; Ridley, supra; see also Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

### **ESY Principles**

The FAPE requirement extends to provision of ESY services as necessary for the child. 34 C.F.R. § 300.106(a)(1). Pennsylvania sets forth a number of criteria that IEP teams must consider to ascertain whether a student is eligible for ESY; in essence, a determination must be made on whether ESY services are “required as part of a Student’s program.” 22 Pa. Code § 14.132(a). The criteria are:

- (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). Reliable sources of information on the student's needs, progress, test results, and recoupment potential should be considered in making the ESY determination. 22 Pa. Code § 14.132(b). Eligibility is established if the factors in Section 14.132(a)(2) "make it unlikely that the student will maintain skills and behaviors relevant to IEP goals and objectives." Pennsylvania Department of Education, Basic Education Circular, Extended School Year Eligibility (April 15, 2013). If the student is eligible, the team must also determine the services to be provided. 22 Pa. Code § 14.132(a)(1).

In determining whether a proposed ESY program is appropriate, the general principles applicable to special education must be applied, since ESY services must be provided in accordance with the child's IEP. 34 C.F.R. § 106(b). In addition, "a public agency may not ... [u]nilaterally limit the type, amount, or duration of [ESY] services." 34 C.F.R. § 106(a)(3).

Although not binding, the Bureau of Special Education and the Pennsylvania Training and Technical Assistance Network explain the ESY determination process this way:

The IEP team will determine which services and how much of these services will be provided during the extended school year. The team may decide that the student will continue all the services received during the regular school year, or it may decide that the student will only receive a portion of services or one specific service. This decision is based on the needs of each student.<sup>6</sup>

A fundamental premise for ESY services has generally been described as serving as a vehicle for preserving skills that the child has gained over the school year, rather than as a means for maximizing growth. “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 U.S. Dist. LEXIS 476 \*16 n.3, 2011 WL 13572 (E.D. Pa. 2011). As noted, FAPE does not require a maximization of programs or services, and ESY services are not an exception to that general principle.

### **The ESY Claim**

The findings of fact were made only as necessary to resolve the discrete issue presented on an expedited basis.<sup>7</sup> However, in reviewing the

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<sup>6</sup> Pennsylvania Bureau of Special Education, *Extended School Year in Pennsylvania*, 2019, available at <https://www.pattan.net/Publications/Extended-School-Year-Services-in-Pennsylvania> (last visited July 17, 2021).

<sup>7</sup> The arguments regarding the doctrines of laches and mootness are rejected as unnecessary given the disposition. This decision is not based on the undisputed fact that the ESY program is nearly over at this point in time.

record, the content of each admitted exhibit was considered, as were the parties' filings including their closing statements.

Succinctly stated, the ESY issue in this case is strictly one of legal interpretation. The Parents seek a directive to the District to immediately begin implementation of a particular multi-sensory reading program for Student's ESY services. The District counters that ESY services are but a continuation of the previous school year's programming.

The federal and state regulations both require ESY programming for students who need the services in order to be provided FAPE. Student's eligibility is not in question. The services proposed by the District are based upon the child's IEP. In this case, Student's spring 2021 IEP provided for ESY programming to address specific needs, where Student would continue to work on the IEP reading goals in language arts learning support. In essence, the District has proposed to continue the programming from the 2020-21 school year. That proposal is wholly consistent with the overarching premise for ESY services, despite the Parents' preference that Student be introduced to new and different programming that, in their view, would likely be better for Student. And, contrary to the Parents' contentions, the District's programming decision is not a limitation on the type of ESY services for Student (language arts learning support) in 2021. In sum, this hearing officer cannot find the ESY decision by the District to be legally flawed under the applicable standards.

Moreover, as the District observes, questions of methodology have typically been left to the discretion of the LEA. Longstanding case law fully supports this principle. *Tucker by & Through Tucker v. Calloway County Board of Education*, 136 F.3d 495, 506 (6th Cir. 1998); *Roland M. v. Concord School Commission*, 910 F.2d 983, 992 (1st Cir. 1990); *Lachman v. Illinois State Board of Education*, 852 F.2d 290, 297 (7th Cir. 1988); see also, e.g., *J.E. v. Boyertown Area School District*, 834 F.Supp.2d 240 (E.D.

Pa. 2011). Indeed, even the U.S. Supreme Court in *Rowley* acknowledged the deference owed to the agency on this type of programming decision. *Rowley, supra*, 458 U.S. at 208.

That does not mean, of course, that the District's special education programming decisions cannot be challenged. Here, the Parents' ESY claim is part and parcel of their more global denial of FAPE claim with respect to the District's programming for Student over the 2019-20 and 2020-21 school years. Consideration of that broader issue would certainly entail presentation of specific evidence on the programming provided over the course of the entire scope of their claims, matters that are properly left for resolution in the companion, bifurcated case. Notably, the District does not contest their ability to seek a remedy for all of their claims in that case.<sup>8</sup> The relief the Parents seek in this expedited matter, however, may not be granted.

## **ORDER**

AND NOW, this 17<sup>th</sup> day of July, 2021, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The Parents' expedited ESY claim is **DENIED** and **DISMISSED**.
2. Any pending claims not specifically addressed by this decision and order are DEFERRED for disposition in the companion case at ODR File No. 25126-20-21.

/s/ Cathy A. Skidmore \_\_\_\_\_  
Cathy A. Skidmore, Esquire  
HEARING OFFICER  
ODR File No. 25080-20-21

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<sup>8</sup> District Closing Statement at 6.