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Decision

Due Process Hearing for JN
Date of Birth: xx/xx/xx
File Number: 7716/06-07KE

Date of Hearing:
June 26, 2007

CLOSED HEARING

Parties:

Mr. and

Upper Dauphin Area School District
5668 State Route 209
Lykens, PA 17048-8414

Representative:

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Date Transcript Received:

June 29, 2007

Date of Decision:

July 6, 2007

Hearing Officer:

David F. Bateman, PhD

I. BACKGROUND

Student is a xx-year-old student eligible for special education and related services identified by the District as a student with specific learning disabilities, speech and language impairment, and visual impairment. During the 2006-2007 school year he received services through a Section 504 service agreement in his second grade classroom after the Parents rejected the District's Notice of Recommended Educational Placement (NOREP). The Parents requested the present due process hearing seeking extended school year (ESY) services for their son.

After the Parents filed the due process hearing request, the District held an IEP team meeting and as "a good faith effort" offered an ESY program for Student. The Parents were dissatisfied with the offer from the District and seek additional speech and language assistance, additional IEP goals and objectives, and a different location for the ESY services.

This hearing was delayed two times to allow the IEP team to meet to determine ESY eligibility, and a second time when it appeared a settlement had been reached.

It was clear a lot of animosity existed in this hearing.

II. FINDINGS OF FACT¹

A. Background

1. Student was born on xx/xx/xx. He is currently xx-years of age. (S-1; N.T. 15)
2. Student is a resident of the Upper Dauphin Area School District eligible for special education and related services identified by the District as having specific learning disabilities, speech and language impairment, and visual impairment. (S-1, p. 28)
3. During the 2005-2006 Student attended school in a different district. When he enrolled for the 2006-2007 school year the Parents did not provide a copy of all Student's educational records. (S-3, p. 3)
4. The District issued a Notice of Recommended Educational Placement (NOREP) on August 24, 2006. (S-2) The NOREP recommended a diagnostic program through the CAIU. The reasons listed why the action was proposed or refused: No current IEP, most recent neuropsych indicated multiple disability impact with subsequent need for special education services as well as other remedial services. The Parents rejected the NOREP, stating: "We want Student to have the opportunity to be successful in the regular education setting and review progress in 30 days."
5. After the Parents rejected the NOREP, the District issued a Chapter 15 service agreement on August 28, 2006. (S-4; N.T. 49-50) The service agreement

¹ References to notes of testimony will be designated "NT" followed by the relevant page number. References to District evidentiary exhibits will be designated "S" followed by the relevant exhibit number. References to findings of fact will be designated "FF" followed by the relevant fact number.

delineates Student will receive help with toileting, lunch assistance, recess assistance, transfer assistance to carpet for guided reading time, assisted PE as deemed necessary, aid and teacher will not intervene unless they would otherwise intervene for any non-disabled child, and teacher(s) and/or aide(s) will intervene if safety is a concern. The Parents checked they gave permission to proceed as recommended.

6. A previous due process hearing was held involving Student and the District with a decision issued in January 17, 2007 (S-3) and an appeal issued on February 26, 2007². (S-1, p. 1) The purpose of the hearing was to determine if the District had the right to evaluate the student to determine if he is in need of special education and related services. The decision of the hearing officer and the appeals panel supported the request by the District to complete a multidisciplinary evaluation of the student.
7. The District completed an evaluation report on May 9, 2007. (S-1) This evaluation report found Student eligible for special education and related services. Specifically, the District found him eligible in the category of multiple disabilities, also for specific learning disabilities, speech and language impairment, and visual impairment. The report also noted he appears to a child with a visual impairment and should be provided occupational therapy. (S-1, p. 28)

² *In Re Educational Assignment of J.N., Spec. Educ. Op 1801 (2007).*

8. During the 2006-2007 school year Student attended second grade in the District. (N.T. 15) Due to his performance in the 2006-2007 school year he will be repeating second grade in 2007-2008. (N.T. 69)
9. The District held an IEP meeting on June 15, 2007. (S-5). The ESY section of the IEP states he will receive: three 30 minute sessions of speech/language therapy; three 30 minute sessions of occupational therapy; three 30 minute sessions of physical therapy; visual support consult; and 14 small group instruction sessions at [redacted] Elementary School. The District offered the ESY services as a good faith effort to meet Student's needs. (N.T. 48)
10. There is no agreed upon IEP. (N.T. 55)

III. ISSUE PRESENTED

Is the extended school year program offered by the Upper Dauphin School District for the summer of 2007 appropriate for Student.?

IV. DISCUSSION AND CONCLUSION OF THE LAW

The Parents (hereinafter Parent) requested the present due process hearing as a result of a disagreement over the extended school year (ESY) services offered for the summer of 2007. When the due process hearing was requested, Student had not been determined to be eligible for extended school year services. After the due process hearing request, the District held an IEP team meeting and offered ESY as a “good faith gesture” to the Parents. The Parents did not attend the IEP meeting. (N.T. 50) The Parents were not satisfied with the offer by the District, seeking additional specificity in the goals and objectives in the IEP and a different location for services.

This hearing was delayed for four days because of what appeared to be a settlement of the claims. To move the process forward, the Parents participated in the due process hearing by teleconference. Additionally, when the Parents initially filed for a due process hearing multiple issues were included. To move toward resolution as quickly as possible on their claims related to ESY, the issues were bifurcated, with the other issues to be heard by a different hearing officer at a later date.

During the 2006-2007 school year Student did not receive special education and related services, despite when he entered the District in the fall of 2006 the Parents presented records to the District, though incomplete, indicated a potential need for special education. (S-3, p. 3) The District in turn issued a NOREP proposing a diagnostic program through the CAIU. (S-2) Other options that were considered included: life skills, part time special education, first grade regular education, one on one assistance, and inclusionary learning support. (S-4) The Parents rejected all special educational services in favor of allowing Student to succeed or fail socially, academically, physically, etc. in a regular education setting. (S-2)

After the Parents rejected the NOREP, the District did obtain permission from the Parents to provide a Chapter 15 service agreement on August 24, 2006. (S-4) The service agreement delineates Student will receive help with toileting, lunch assistance, recess assistance, transfer assistance to carpet for guided reading time, assisted PE as deemed necessary, aid and teacher will not intervene unless they would otherwise intervene for any non-disabled child, and teacher(s) and/or aide(s) will intervene if safety is a concern. The Parents checked they give permission to proceed as recommended.

This was not the first time these parties have been involved in a due process hearing this school year. In January 2007 at the conclusion of a due process hearing, Dr. Lynda Cook, Hearing Officer, ordered

Parent's refusal to sign consent for evaluation is overridden. The Upper Dauphin Area School District may proceed as soon as possible to schedule and conduct a comprehensive evaluation.

The Parents appealed the Order from the Hearing Officer. The Appeals Panel ordered in their decision:

AND NOW, this 26th day of February 2007, it is hereby ordered that the Decision and Order of the Hearing Officer are affirmed. Parents' Exceptions are denied and dismissed.

The District is ordered to:

1. conduct a multidisciplinary evaluation of Student which includes:
 - a. a psycho-educational assessment completed by a school psychologist;
 - b. a speech and language therapy assessment;
 - c. a mobility assessment;
 - d. an assistive technology assessment;
 - e. a physical therapy assessment; and
 - f. occupational therapy assessment.
2. District need not permit the parents to be present at the evaluation unless there is a viewing room with a two-way mirror that will allow the parents to view the evaluations without interfering with the evaluation. If the District does not have such a facility, this portion of the order is null and void.
3. Upon completion of the evaluation, the District will consider any evaluations the parents have funded which were performed by an independent evaluator who has the qualifications required by regulations.

In accordance with 22 PA Code § 14.162 (o) the parties are advised that this Order may be appealed to the Commonwealth Court of Pennsylvania or the appropriate federal district court.³

After the Order from the Appeals Panel, the District initiated a multidisciplinary evaluation that was completed on May 9, 2007. (FF: 7) There is no agreed upon IEP in place. (N.T. 53) There have been several IEP meetings, the latest being June 15, 2007. (S-5).

ESY Services

Special education is to be individualized. The principal hallmark of a need for ESY services is a well-founded prediction that, without such services, the student

³ *In Re Educational Assignment of J.N., Spec. Educ. Op 1801 (2007).*

will regress so far over a summer break, and the student will take so long to recoup the knowledge or skill that was lost, that the student will not progress over the course of years.

Quoting heavily from a recent Appeals Panel decision which described the components of the law:⁴

The IDEA statute does not mention ESY services, however, IDEA's regulations, the Pennsylvania Code (the "PA Code"), and the Pennsylvania Basic Education Circulars (BEC) provide authority and specific guidance for determining ESY eligibility, and general guidance for the development, content, and delivery of ESY programs. See 34 CFR § 300.309; 22 PA Code § 14.132; PA BEC Extended School Year Eligibility, April 1, 2003; see also *Armstrong v. Kline*, 476 F Supp. 583 (ED PA 1979) (establishing the mandate in PA for ESY programming).

The purpose of ESY services is to avoid the regression and poor recoupment experienced by some eligible students. If, inter alia, regression during program breaks, and subsequent recoupment makes it "unlikely the student will maintain the skills and behaviors relevant to IEP goals and objectives," then ESY is required, without which, the school year IEP would not provide FAPE. 22 PA Code § 14.132 (2) (iii).

Once the determination is made that ESY services are warranted, the programming must be designed and implemented based upon federal and state mandated principles. The federal regulations, stated in the negative, are as follows:

"In implementing the requirements of this section, a public agency may not

- (i) Limit extended school year services to particular categories of disability; or
- (ii) *Unilaterally limit the types, amount, or duration of those services.* 34 CFR § 300.309 (a) (3) (emphasis added).

Pennsylvania requires the following:

II. A. Timing – Target Group Students

...The IEP review meeting must occur no later than February 28 of each school year...the program specifics must be included in the IEP ...[and issued with a NOREP] no later than March 31....

II. B. Notice of Eligibility and Content of ESY Program

LEA notice to the parent concerning ESY eligibility or ineligibility must be by NOREP...

When ESY services are offered by the LEA, the IEP that accompanies the NOREP must contain the following:

⁴ *In re W.W. v. Scranton*, PA SEA 1490, June 20, 2004, page 6.

- Description of the type and amount of ESY service;
- Projected beginning dates and anticipated duration of service;
- Frequency;
- Location.

Of course, as with all IEP team decisions, the ESY components of the IEP must be individualized to meet specific child's needs, and must be developed with the participation of the parents at an IEP team meeting.

II. E. Types of ESY Programming

While many ESY programs are held during the summer, children eligible for ESY services can require weekend or even virtually continuous programming. It is also important to note that ESY programs are not limited just to self-help and basic skills. Academic and vocational goals can also be part of a child's ESY IEP if appropriate. All decisions regarding types of programming must be made on an individual basis by the IEP team. PA BEC, ESY Eligibility § I; II. A., B., E. (hereinafter referred to as "PA ESY BEC") (italicized emphasis added). See also 22 PA Code § 14.132 ESY.⁵

The Parents argued as a part of their case the District had a responsibility to make a determination regarding ESY services in February. However, in February the District had finally received permission from the Appeals Panel to commence an evaluation of Student (FF:6), and he had yet to begin receiving special education and related services.

Student was not found eligible for special education and related services until May 9, 2007. (FF:7; S-1)

As noted above, one of the main purposes of ESY is to avoid regression and poor recoupment during program breaks. There has been no programming break since the District has only recently completed an evaluation report on Student and there is no agreed upon IEP. (FF:10)

As noted above, the purpose of ESY services is to avoid the regression and poor

⁵ *In re W.W. v. Scranton*, PA SEA 1490, June 20, 2004, page 6.

recoupment experienced by some eligible students. If, inter alia, regression during program breaks, and subsequent recoupment makes it “unlikely the student will maintain the skills and behaviors relevant to IEP goals and objectives,” then ESY is required. The problem in this case is there is no agreed upon IEP for Student. The District has not had the opportunity to provide special education and related services to Student and therefore has not had been able to make a determination about whether he has specific problems with recoupment or regression.

The District realizing it did not have data on regression or recoupment offered the ESY services because of the severity and nature of the disability. (N.T. 55) The Parents rejected the offer from the District. (N.T. 56)

The District offered placement for ESY at Elementary School with other students. (N.T. 57) The Parents requested placement either in a camp or in their home. (N.T. 9, 29-30) A parallel goal of the IDEA is that children with disabilities be educated in classrooms with non-handicapped children "to the maximum extent appropriate." 20 U.S.C. §1412(5). The IDEA's mainstreaming requirement has been construed to "prohibit a school from placing a child with disabilities outside of a regular classroom if educating the child in a regular classroom with supplementary aides and support services can be achieved satisfactorily." *Oberti v. Board of Education*, 995 F. 2d 1204, 1207 (3d Cir. 1993). The IDEA requires states to "educate handicapped children with non-handicapped children whenever possible." See *Rowley*.⁶ Therefore, a school district is obliged to balance the goal of providing a student with some educational benefit with a goal of providing that benefit in the

⁶ *Board of Education v. Rowley*, 458 U.S. 176, 189 (1982)

least restrictive environment. *Hall v. Shawnee Mission Sch. Dist.*, 856 F. Supp. 1521, 1528 (D.Kan. 1994).

Factors to consider in determining whether this can occur are as follows:

- A. Steps taken by the school to try to include that child in a regular classroom.
- B. The comparison between the educational benefit the child would receive in a regular classroom --social and communication skills, etc.-- and the benefits the child would receive in a segregated classroom. Thus, a determination that a child would make greater academic progress in a segregated program may not warrant excluding that child from a regular classroom.
- C. Possible negative effect inclusion may have on the education of other children in the classroom.

Additionally, if placement outside of a regular classroom is necessary for the child to receive educational benefit, a school district may still be violating IDEA if it has not made sufficient efforts to include the child in school programs with non-disabled children whenever possible.

Finally, a school district must consider the whole range of supplementary aids and services and must also make efforts to modify the regular education program to accommodate a child. If a school has not given any consideration to including the child in a regular classroom with supplementary aids and services and to modifying the regular curriculum, then it has most likely violated the IDEA's mainstreaming directive. "The Act does not permit states to make mere token

gestures to accommodate handicapped students; its requirements for modifying and supplementing regular education is broad.” See *Oberti*.

Separate placements are among the most restrictive on the IDEA’s spectrum of placements. Given their restrictive nature, removal of a student with disabilities to a non-public school setting has only been held to comply with the LRE mandate in extremely limited situations for students with severe disabilities who prove themselves unable to function in a more mainstream environment.⁷

Clearly then, a separate placement can be consistent with the IDEA’s LRE requirement for some students with disabilities. However, the home placement sought by Student’s Parents violates the IDEA’s LRE requirement because it removes him to a more restrictive location.

As stated above, the ESY offer by the District is to include:

- Description of the type and amount of ESY service;
- Projected beginning dates and anticipated duration of service;
- Frequency;
- Location.

After reviewing the IEP the District the offer includes all the necessary components.

(S-5, p. 22)

Finally, the ESY goals and objectives must be individualized to meet the student’s specific needs and must be developed with the participation of the parents at an IEP team meeting. The IEP goals and objectives listed on the IEP (S-5, p. 24)

⁷ In *Carlisle*, the Third Circuit recognized: Residential placement at MSB is not, of course, the least restrictive educational environment. The least restrictive environment is the one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled.

are clearly individualized to Student. It is clear from the Chapter 15 service agreement he has needs related to maneuvering in his wheelchair, and the evaluation report offered by the District further delineates his needs. The District as a part of a pre-session hearing discussion offered to include math goals and objectives as a part of the ESY programming. (N.T. 25)

The IEP is also to be developed in conjunction with the Parents. The District attempted to hold a facilitated IEP meeting with the Parents in June 15, 2007, however there were problems in obtaining a facilitator. The District encouraged the Parents to bring and advocate and held the IEP meeting and the Parents did not show. (N.T. 51) To assist with Parent participation, the IEP meeting was recorded for the Parents. (N.T. 51)

In this case, there was no evidence offered indicating the District-described program and placement, memorialized in the ESY IEP document and supplemented by the rest of the record, would not afford Student the opportunity to retain progress made during the 2006-2007 school year.

A review of the ESY components of the IEP shows the District took the information from the evaluation report, developed a program based on needs demonstrated during the 2006-2007 school year and offered to provide those services to Student. It is individualized, based on Student's needs, and supplemented by the rest of the record, serves the purpose of working to help him retain his functioning.

V. ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** the extended school year program offered by the Upper Dauphin Area School District for Student for the summer of 2007 is appropriate.

Date

Hearing Officer