

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 Due Process Hearing Officer

Final Decision and Order

ODR No. 28175-22-23

CLOSED HEARING

Child's Name:

A.T.

Date of Birth:

[redacted]

Parent(s)/Guardians:

[redacted]

Pro Se

Local Education Agency:

Donegal School District 1051 Koser Road
Mount Joy, PA 17552

Counsel for the LEA:

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New Britain, PA 18901

Hearing Officer:

Brian Jason Ford, JD, CHO

Date of Decision:

06/23/2023

Introduction

This special education due process hearing concerns a child with disabilities (the Student). The Student's parents (the Parents) requested this hearing because the Student's public school district (the District) found that the Student is not eligible for Extended School Year (ESY) services in the summer of 2023. The Parents disagree with the District's determination and seek an order requiring the District to provide ESY for the Student.

This matter arises under the federal special education law, called the Individuals with Disabilities Education Act (IDEA),¹ and Pennsylvania regulations that implement the IDEA, called Chapter 14.²

Issue

The issue before me is narrow: Is the Student entitled to ESY in the summer of 2023 from the District?

No other issues, including the Student's receipt of a Free Appropriate Public Education (FAPE) to date, or the substance of the Student's IEP apart from the ESY eligibility determination, are presented.

Findings of Fact

I reviewed all evidence, both testimony and documents, that were presented by the parties. I make findings of fact, however, only as necessary to resolve the narrow issue before me. I find as follows:

1. There is no dispute that the Student is a child with a disability, as defined by the IDEA.³
2. The District determined that the Student qualified for ESY for the summer of 2022. The District's 2022 ESY program was a 19-day program. The Student attended 9 of those 19 days. S-5.
3. On January 26, 2023, the Student's IEP team met. S-6.⁴

¹ 20 U.S.C. § 1415.

² 22 Pa. Code § 14.

³ 20 U.S.C. § 1401. There is no formal stipulation as to this point, but the fact is not in dispute. *Passim*.

⁴ There is a dispute between the parties as to which of the Parent's children attended that meeting. There is a more important dispute between the parties about whether the IEP team discussed the Student's ESY eligibility during that meeting. Those disputes, and their ultimate irrelevance to the issue presented, are discussed briefly below.

4. The District brought a proposed IEP to the January 26 meeting. District personnel and the Parent signed that IEP to indicate their attendance at the meeting. S-6 at 2.
5. The IEP included an ESY eligibility determination. The District checked a box indicating that the Student was not eligible for ESY based on a review of “the 7 factors outlined in Chapter 14.132(2).” S-6 at 27.
6. The ESY eligibility determination in the IEP references a seven-factor review. That review is captured on an “Extended School Year Eligibility Checklist.” S-9. That checklist was completed by District personnel prior to the IEP team meeting.⁵ The checklist indicates that the Student met none of the ESY eligibility criteria. The District did not bring the checklist itself to the meeting. NT at 89-90.
7. At the conclusion of the IEP team meeting, the District issued the proposed IEP with a Notice of Recommended Educational Placement (NOREP). In this context, the NOREP is a form by which the Parent could approve or disapprove the proposed IEP. The Parent approved the IEP and signed the NOREP. S-7.
8. The Student’s prior IEP spanned the last two marking periods of the 2021-22 school year and the first two marking periods of the 2022-23 school year. The District collected data showing the Student’s progress towards IEP goals during that time. The progress data collected at the very start of the 2023 school year shows that the Student regressed in some domains after the summer of 2023. No evidence was presented concerning the statistical significance of that regression. S-4
9. The data next shows consistent improvement in nearly all domains, matching and then exceeding the Student’s progress during the 2021-22 school year. The Student mastered several goals as well. S-4. Data collected after the January IEP team meeting shows that progress continued, placing the Student above the mastery level or on a clear trajectory to meet most goals. S-8.
10. The most recent progress data was mostly, but not universally, positive. The Student’s progress in one goal was variable, and the

⁵ The checklist is dated February 1, 2023 – after the January IEP team meeting. Unrefuted testimony establishes that the checklist was completed prior to the IEP team meeting but finalized in the District’s system on February 1, 2023. See, e.g. NT at 89-90.

Student's trend line was flat in another. Progress towards all other goals was outstanding, often above mastery.⁶ S-8 at 6, 8.

11. Much of the progress data was taken by a teacher who educated the Student in the 2021-22 and 2022-23 school years. See, e.g. S-4.
12. Throughout the 2022-23 school year, the Student missed 28 days of school, mostly due to illness. The District does not challenge the legitimacy or legality of the Student's absences in these proceedings, but the District did convene a Student Attendance Improvement Plan meeting around the same time as the January IEP team meeting.⁷ S-12, S-13.
13. The record shows no correlation between gaps in the Student's program during the 2022-23 school year (either during holidays or absences) and the Student's progress. No data collected by the District during the 2022-23 school year shows regression, apart from the small dips in some of the start-of-school probes in comparison to the prior school year.⁸

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses."⁹ One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review.¹⁰

⁶ Questions about the appropriateness of the goals themselves, or whether mastery of any goal constitutes a meaningful educational benefit for the Student, are not before me.

⁷ There is conflicting testimony about whether the attendance meeting happened right after the IEP team meeting or a few days later. There is no dispute that the attendance meeting convened.

⁸ Again, the statistical significance of the change between some of the start-of-school probes in comparison to the prior year is not established by the record of this case. Subjectively, the change was small. Objectively, there can be no dispute that recoupment was fast nearly across the board.

⁹ *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003).

¹⁰ See, *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). See also, generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v. Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

All witnesses testified credibly. There are some discrepancies between the Parent's testimony and the testimony of the District's witnesses, all of whom are the District's employees. The discrepancies concern which of the Parent's children attended the January IEP team meeting, whether ESY was discussed during that meeting, and whether the attendance meeting happened right after or some time in February 2023. I find that all the discrepancies are the result of genuinely different recollections, not anything malicious. More importantly, as discussed below, none of the discrepancies alter the outcome of this case.

Applicable Laws

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief.¹¹ The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise (equal on both sides).¹² In this case, the Parent is the party seeking relief and must bear the burden of persuasion.

Extended School Year

Pennsylvania's Chapter 14 regulations implementing the IDEA establish seven ESY eligibility factors by expanding federal ESY regulations.¹³ Schools must consider all seven factors, but no single factor is determinative.¹⁴ Those factors are:¹⁵

1. 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).

¹¹ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

¹² See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004).

¹³ The federal regulations are found at 34 CFR 300.106, which establish a right to ESY when ESY is necessary for the provision of a FAPE. Pennsylvania's regulations are found at 22 Pa Code § 14.132, which expands the federal regulations by providing factors to determine if ESY is necessary for the provision of a FAPE.

¹⁴ 22 Pa Code § 14.132(2)

¹⁵ The list is taken verbatim from 22 Pa Code § 14.232(2)(i).

2. 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).
3. 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.
4. The extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted.
5. 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.
6. The extent to which successive interruptions in educational programming result in a student's withdrawal from the learning process.
7. 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.

Pennsylvania regulations also specify six forms of data that schools must consider when deciding if any of the seven eligibility factors are met. Those include:¹⁶

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.

¹⁶ The list is taken verbatim from 22 Pa Code § 14.132(b).

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.

Pennsylvania regulations also specify three factors that cannot be considered when deciding if a student is eligible for ESY. Only one of those factors is pertinent here: "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."¹⁷

Discussion

A fair reading of the Parent's due process complaint includes an allegation that ESY was not discussed at the January 2023 IEP team meeting and that the Parent was "mislead" by District personnel that ESY determinations were made in May. The Parent's testimony was consistent with this claim. However, the due process complaint does not raise claims concerning the Parent's right to meaningfully participate in the IEP development process. Rather, the Parent's only demand is that I order the District to provide ESY for the Student. Therefore, regardless of when the ESY determination was made (or should have been made), it is the Parent's burden to prove that the Student requires ESY to receive a FAPE. There is no preponderant evidence in the record to prove that ESY in the summer of 2023 is an essential component of FAPE for the Student and, for that reason, I am obligated to deny the Parent's request.

I have no doubt that the few days of ESY that the Student attended in the summer of 2022 were beneficial to the Student – especially from the Parent's perspective. As set forth above, however, that is not the standard. I must look to the record of this case to determine if ESY was an essential component of the Student's right to a FAPE when the IEP team made the ESY determination.

While testimonial accounts differ, there is no dispute that the District presented an IEP to the Parent at the January 2023 IEP team meeting. That document included an unambiguous ESY determination. The Parent signed that IEP and approved it by signing a NOREP. Whatever was or was not discussed at the IEP team meeting, the Parent had documentation of the District's ESY determination in January 2023. I find that the ESY

¹⁷ 22 Pa Code § 14.132(c)(3).

determination was made in January 2023 for the same reason, and so I look to the appropriateness of the District's determination at that time.

The first factor to consider is regression. The record establishes that, in January 2023, the District had no evidence that breaks in the Student's program resulted in a measurable decrease in skills or behaviors to a degree that regression was a serious concern. The only skills decrease of any note in the record was the relatively modest dip in some skills at the very start of the 2022-23 school year. Nothing in the record signals that this dip was statistically significant or concerning to the Parent or educators. Other gaps in programming like school holidays and illnesses did not result in regression. I find that the record does not support the regression factor.

The second factor is recoupment. There is no evidence of recoupment problems. In fact, the Student's progress reports show that the Student has the capacity to quickly recover skills to a level exceeding what was measured in the prior school year. The Parent's testimony includes an argument that the Student's quick recovery was a function of the Student's participation in summer 2022 ESY. While the Parent's belief is sincere, there is no evidence linking the Student's nine days of ESY, which ended on July 28, 2022, to the Student's significant progress as measured by data probes between the start of school and late September/early October. Similarly, no evidence links the Student's brief participation in summer 2022 ESY to the Student's consistently upward trajectory throughout the entirety of the 2022-23 school year. There is no evidence supporting the recoupment factor in this case.

The third factor considers reported parental concerns. There are none in the record of this case. Rather, the Parent signaled agreement with the District that the Student made progress during the 2022-23 school year.¹⁸

The fourth factor concerns skill mastery at the time of the break. No evidence or argument was presented about this factor, and the Student's progress reports do not indicate that ESY is necessary for the Student to attain IEP goals.

The fifth factor concerns self-sufficiency and independence from caretakers. There is no evidence of self-sufficiency or independence concerns in the record of this case.

¹⁸ The meaningfulness of that progress relative to the Student's circumstances is not a question presented in this case.

The sixth factor is withdrawal from the learning process. The Parent's closing statement indicated that disengagement from school was a concern. I do not doubt the Parent's sincere belief. However, the record indicates that a significant break between the Student's final day of ESY in the summer of 2022 and the start of the 2022-23 school year did not result in withdrawal. The same is true for breaks during the 2022-23 school year. The record paints a picture of a child engaged in education.

The seventh factor concerns children who qualify for special education under circumstances that are not present in this case.

Beyond the seven ESY eligibility factors, the record includes a preponderance of evidence that the District relied on the types of data required by Pennsylvania regulations, described above.¹⁹ Progress reports and input from educators who worked with the Student before and after breaks were the District's primary data source. Parental input is explicitly contemplated as a data source as well. On this point, the record is concerningly silent.

It is not clear that the District solicited parental input as a data source before completing the ESY Eligibility Checklist or the proposed IEP, and there is conflicting testimony about whether ESY was discussed at the January 2023 IEP team meeting. I must acknowledge, however, that it is the Parent's burden to prove that parental input was either not solicited or ignored, and there is no evidence of that in the record. Rather, the record indicates that sometime after the January 2023 IEP team meeting the District learned of the Parent's preference that the Student should receive ESY services, and that the Parent's rationale was that ESY would be educationally beneficial to the Student. This, without any indication that ESY was necessary for the provision of FAPE, and a growing amount of progress data illustrating that none of the ESY factors are met, not only justifies the District's lack of formal reconsideration but places the Parent's preference in the category of impermissible considerations described above.²⁰

I have no doubt that the Parent's concerns are legitimate, and her explanation of those concerns reflected a degree of frankness that I do not always see in due process hearings. The Parent acknowledged that the 2022-23 school year was a positive year for the Student both on its own and compared to past school years.²¹ The Parent recognized that the District's data does not support ESY eligibility and did not challenge the accuracy of

¹⁹ See 22 Pa Code § 14.132(b), detailed above.

²⁰ See 22 Pa Code § 14.132(c)(3), detailed above.

²¹ This is not an admission or concession on the Parent's part as to any issue not before me.

the District's data. Rather, the Parent did what is (or should be) natural for any parent: she pressed for what she believes is best for her child. As a hearing officer, however, I am constrained to the record before me and am obligated to reach conclusion by applying the law to that record.

The preponderance of evidence in this case supports the District's conclusion that the Student does not qualify for ESY in the summer of 2023 based on Pennsylvania's seven ESY factors.

Summary and Legal Conclusions

The only issue presented in this case is whether the District must provide ESY for the Student in the summer of 2023. The District determined that the Student did not qualify for summer ESY. The District made that decision in January 2023. Evidence available to the District at that time establishes that none of the seven ESY eligibility factors were present in January 2023.

There is conflicting evidence about whether the Student's IEP team discussed ESY during a January 2023 IEP team meeting. I find, however, that the District informed the Parent of its ESY determination in January 2023, through the issuance of an IEP that included that determination. The Parent signed that IEP to indicate attendance and signed an accompanying NOREP to indicate agreement with the IEP. Sometime later, the Parent made her desire for the District to provide ESY services known to the District. By then, the District had accumulated more data that was consistent with its original determination.

The record of this case does not establish that the Student is entitled to ESY services in the summer of 2023. Consequently, I must deny the Parent's demand for ESY.

ORDER

Now, June 23, 2023, it is hereby **ORDERED** that the Parents' demand for ESY services from the District in the summer of 2023 is denied.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford
HEARING OFFICER