

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

Closed Hearing

ODR No. 28077-22-23

Child's Name:

A.P.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents

Pro se

Local Education Agency:

Lower Merion School District
301 E. Montgomery Avenue
Ardmore, PA 19003-3338

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Hearing Officer:

Joy Waters Fleming, Esq.

Date of Decision:

June 14, 2023

INFORMATION AND PROCEDURAL HISTORY

The Student¹ is [redacted] in the District. The Student is eligible for special education and related services, under the Individuals with a Disabilities in Education Act (IDEA),² under the disability categories of Intellectual Disability, Other Health Impairment [redacted]³, Speech and Language Impairment and Autism.

The Parents⁴ filed this due process Complaint and requested an expedited hearing, challenging the appropriateness of the proposed extended school year (ESY) programming offered to the Student for implementation during the summer of 2023. As relief, they sought an extension of the Student's summer program because the school team refused to implement ESY in a manner consistent with the last decision from a due process hearing and other relief. In response, the District contended the offered ESY programming was in line with the prior ODR decision, past ESY and current programming and offered a FAPE.

¹ 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). 2 20 U.S.C. §§ 1400-1482.

² 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).

³ [redacted]

⁴ Although a reference is made to one Parent throughout this decision, both parents filed the due process Complaint. References to one Parent are attributed to the Parent that advocated for the Student during this due process hearing.

As a preliminary matter, before this expedited hearing commenced, the Parent was advised that any concerns regarding the implementation of ODR decision AP- 23420-19-20, issued by Hearing Officer Jelley on June 5, 2020, were outside the scope of this due process hearing. Both parties agreed that this determination would focus only on the issues below.⁵ The findings of fact were made only as necessary to resolve the discrete issues presented on an expedited basis.

Based on the evidence presented, and for the following reasons, the Parent has not established by a preponderance of evidence that the District's proposed programming for ESY summer 2023, failed to offer a FAPE. As such, no relief is due.

ISSUES

1. Has the District proposed a free appropriate public ESY program for 2023 that is appropriate and meets this Student's individualized needs and circumstances?

2. If the District failed to offer an appropriate ESY program, what, if any, remedy is appropriate?

FINDING OF FACTS

1. [redacted] (S-22, p. 2)

⁵ On the hearing record, the parties agreed to the issues as stated. (N.T. 15-16)

2. In April 2013, the Student experienced multiple seizures that resulted in a diagnosis of [redacted] that necessitated placement in a medically induced coma, followed by treatment and rehabilitation. (S-22, p.2)
3. In the fall of 2013, the Parents enrolled the Student [redacted] in the District. (S-22, p.2)
4. An initial evaluation in November 2013 attempted cognitive and academic assessments and speech/language, physical therapy (PT) and occupational therapy (OT) evaluations. The ER concluded that the Student qualified for special education under the disability category of OHI because of medical conditions [redacted], intractable seizures, and epileptic encephalopathy. (S-22, p. 2)
5. The Student was reevaluated by the District in December 2014, April 2016, April 2018, and September 2019. (S-22)
6. On June 5, 2020, after a due process hearing, the Hearing Officer granted the Parents' claim for an extended ESY program, an aquatics program and other relief. Additional claims for ESY services were denied. The Parents did not appeal the June 5, 2020, Order. (ODR File Number: 23420-19-20)
7. In February 2021, the District reevaluated the Student. The RR observed that despite years of intensive educational support and programming, the Student's acquisition rate of previously learned and novel skills in all developmental areas was slow. In addition, there was evidence, supported by data, that skills evident during and immediately following recuperation were no longer present in the Student's repertoire. The RR further indicated that if present, skills were demonstrated with considerable inconsistency and variability, making predictable baselines for ongoing remediation and daily

availability for instruction and practice less predictable day-to-day. (S-22)

8. The 2021 RR recommended a residential placement to support the Student's development of adapted living and vocational skills, support potential independence, provide intensive repetition and practice in a contextual setting, and facilitate the development, acquisition and retention of basic skills. The Parents have been unwilling to discuss placement or sign releases to consider residential options. (S-22, p. 19; N.T. 91-92)

2022-2023 School Year

9. In August 2022, during in-home ESY programming, the Student experienced seizures that resulted in hospitalization. Because ESY programming was interrupted, the team had incomplete data on whether regression or retention of skills occurred. (P-7, P-8, S-24, S-26; N.T. 57, 76, 79-80)
10. During the 2022-2023 school year, the Student was enrolled in the [redacted] grade in the District.⁶ After hospitalization, the Student returned to school in mid-September. After returning to school, the Student experienced near-daily seizures, necessitating a Vagus Nerve Stimulator (VNS), which could slow down or stop seizure activity when activated.⁷ (S-8, S-9, S-18, S-22; N.T. 123)
11. During [the school year], the Student received direct instruction in functional academics within a full-time, life skills setting with 2:1 support, integrated speech/language services, OT, PT, daily nursing care when medical needs arose, and transportation to and from school

⁶ The last day of school for students in the District is June 16, 2023.

with a bus aide. The implemented IEP provided seven goals designed to address behavior, functional routines, prevocational skills, functional academics, and activities of daily living (ADL). (S-10, S-13, S-16, S-20, S-22, p. 16, S-24, p. 53-76, 107-108)

12. During the school year, the Student received 30 minutes of individual speech/language support four times a week; 30 minutes of group speech/language services; 60 minutes of OT two times a week; 30 minutes of PT two times a week; 45 minutes of monthly consultative vision support; 15 minutes of weekly behavior specialist support; 20 consultative hours per school year from the IU BrainSTEPS program. (S-22, p. 16)
13. The implemented IEPs included eight pages of SDI. The Student also received adapted physical education (APE) three times per four-day cycle. For two days, the Student participated in swimming at the District pool. (S-24, p. 88; N.T. 59, 209)
14. In November and December 2022 and again in January 2023, the District issued permission to reevaluate the Student. The Parents declined to consent to the reevaluation. (S-22, p. 16; N.T. 126, 368-369)
15. During the school year, the IEP team met, including the Parents, every six weeks, discussed the Student's progress and reviewed the data collected by the Student's special education teacher and the assigned PCA. The data was used to determine whether the Student made progress toward goals and included in the present levels for each IEP revision. (S-7, S-11, S-14, S-17, S-19, S-21, S-24, S-27, S-30, S-32; N.T 111-113)

16. Collected data indicated that the Student made progress and maintained when medically stable. Periods of regression correlated with hospitalizations or medical interventions. After winter and spring breaks, the Student did not experience large-scale regression and was able to quickly recover any skills lost. (S-7, S-11, S-17, S-19, S-21, S-27, S-30, S-32; N.T. 43, 90-91, 133, 143, 154-155, 237-239)
17. Although the Parents' refused to consent to testing, the District's school psychologist conducted a records review that resulted in the issuance of a RR in February 2023.⁸ (S-22)
18. The District school psychologist assigned to complete the RR has a Ph.D. in school psychology, has worked in the field for nineteen years, holds certifications in school psychology, and is a diplomate in school neuropsychology, a subspeciality earned by completing clinical assessments of neuro-developmental concerns in children. (S-36; N.T.365)
19. The school psychologist was familiar with the Student and completed the RR in February 2021 that included evaluations and assessments of discrete functional daily living skills and adapted functioning (S-22, p. 13)
20. For inclusion in the RR, the school psychologist reviewed data collected by the IEP team, teachers, related service input, reference materials related to the [redacted] diagnosis, and the five evaluations completed

⁸ The Parent objected to the introduction of S-22, the District's February 1, 2023, RR on grounds that no consent was given to perform a reevaluation. S-22 consisted of only a review of records. The Parent's objection was overruled.

between 2013 and 2021. Although requested, the Parents declined to provide input and consent for direct contact with Student's medical providers. (S-22; N.T. 371-372, 396-397)

21. For inclusion in the 2023 RR, the school psychologist reviewed the Student's Vineland scores from 2014 through 2021.⁹ By the 2021 RR, the Student's scores declined from the 40s and 50s to 20, which the school psychologist regarded as the lowest standard score available, representing a significant loss of functioning. (S-22; N.T. 376-377, 385)
22. After a review of progress monitoring, the school psychologist determined that the Student continued to demonstrate stagnant growth and inconsistent performance. (N.T. 381-383)
23. The RR concluded that Student's decline in functioning and lack of progress was attributable to the [redacted] diagnosis and uncontrollable seizure activity. (S-22, p. 2-14; N.T. 373-379, 387-388, 409-410, 416)
24. The RR again recommended that the IEP team consider alternative placement in a residential setting. (S-22, p. 43; N.T. 381-382)
25. The RR determined that despite the increased comprehensive and intensive educational supports, both during and outside the school year, the Student was not showing gains in the current setting. (S-22, p. 41)

⁹ The Vineland is a standardized assessment tool that allows for the evaluator to gather observational data from multiple participants about discrete skills that are hierarchal or reflect development. (N.T. 384)

26. The RR concluded that the Student continued to be eligible for special education under the classifications of ID, OHI, Speech/Language Impairment, and Autism. (S-22)

Proffered ESY Programming

27. On February 16, 2023, the IEP team met to review the Student's educational programming. The team determined that the Student required ESY. (S-24, S-25, S-26; N.T. 56-57, 76, 145-151)
28. On March 6, 2023, the District issued a NOREP that proposed extended school-year services. The District offered life skills support from June 27, 2023, through August 3, 2023 (no services July 4) from 8:00-3:00, Monday through Thursday at the District. Related services included PT, one time a week for 30 minutes, OT, three times per week for 30 minutes; speech (individual), four times a week for 30 minutes; speech (group), one time a week for 30 minutes; two personal care assistants (PCA), daily transportation with a 1:1 aide, an adjusted pick up times due to medication disbursement. (P-6, S-26, S-28; N.T. 87-88, 117-118)
29. On Fridays, from June 27 to August 3, 2023, during District closure, the Student would receive in-home life-skills programming from 8:00-12:00. A teacher and one PCA would be present along with scheduled related service providers. (S-28; N.T. 89)
30. In addition to the related services, the District offered the Student adapted physical education (APE) through participation in daily Fit Club with physical education, support, and activities. Fit Club does not incorporate swimming because the District's pool is closed during the

summer. The Student does not require a summer aquatics program, and IEP goals can be targeted through the Fit Club. (P-1, p.1; N.T. 66, 204-205, 361)

31. The District also proposed ESY from August 7, 2023, to August 25, 2023, with direct services in the home from 9:00-3:00, Monday through Friday. Life skills support was proposed with the support of one PCA, PT once a week for 30 minutes, OT three times a week for 30 minutes, and Speech therapy (individual) five times a week for 30 minutes. (S-28)
32. The ESY proposal offered to schedule related services at a time mutually agreed upon by parents and therapist with make-up sessions if Student was unavailable because of medical needs. Any related services not made up would be banked and provided during the 2023-2024 school year. (S-28, pg. 2).
33. Decisions about the development of ESY programming were made by the IEP team led by the Student's special education teacher and case manager. Other team members included the Parents, the Student's OT, PT, Speech therapist, a transition coordinator, the school nurse and a LEA. (P-6, S-24, S-26; N.T. 68-70, 159, 195, 210, 224)
34. To develop the ESY programming, the District reviewed the Student's current progress data, team members' observations of the Student's needs and the limited available data from the in-home programming implemented during ESY 2022. (S-24, p. 97-102; N.T. 76- 80)
35. The IEP team discussed the Student's recoupment and regression potential. Based on data collected before and after the spring and

winter breaks during the school year, the team determined that a one-week break at the beginning and end of ESY was appropriate for the Student. (S-43; N.T 56-57, 99, 173, 180, 237, 392)

36. On March 14, 2023, the Parent rejected the District's proposed ESY programming. (S-28, p. 6, S-29)
37. On April 20, 2023, the IEP team met to review the Student's programming. Although invited, the Parents did not attend. (S-43)
38. On April 28, 2023, the District received responses through the Parent from Student's neurology provider that indicated that Student's seizures start from multiple brain areas and are generalized throughout the brain. She also indicated that there was no specific unaffected area that the team could build from and that the medical team could not determine what the Student perceived through the senses. Finally, the physician confirmed that the increase in the frequency of seizures most likely interfered with the retention of learned skills and routines. (S-31)
39. On May 19, 2023, Parents filed for due process. (P-1, P-2, P-3, P-52, S-33)
40. On May 25, 2023, the Parent requested that the District provide two aides to support the Student during in-home ESY and the provision of ESY during the weeks of June 19 and August 28. (S-47)
41. The May 26, 2023, NOREP issued by the District rejected both of the Parent's requests but clarified the terms of make-up ESY sessions. The District also offered reimbursement for 36 hours of a summer aquatics

program for the Student and transportation mileage. (S-47, p. 10-11; N.T. 120, 336-337)

42. The Parents did not approve the recommended ESY programming offered to the Student through the May 26, 2023, NOREP. (N.T. 362)

DISCUSSION

General Legal Principles

In general, the burden of proof may be viewed as consisting of two elements: the burden of production and the burden of persuasion. 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). Accordingly, the burden of persuasion, in this case, must rest with the Parents who filed for this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in "equipoise." *Schaffer, supra*, 546 U.S. at 58.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. See *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); see also *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). This hearing officer found each of the witnesses who testified to be generally credible as to the facts. In the relatively few instances that there were contradictions, those are attributed to lapses in

memory or recall, or to differing perspectives, rather than an intention to mislead; and in any event, credibility was not determinative on any issue.

The weight accorded the evidence, however, was not equally placed. The documentary evidence was persuasive, particularly where memories were not definitive, except as otherwise noted. The findings of fact were made as necessary to resolve the issues; thus, not all of the testimony and exhibits were explicitly cited. However, in reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered, as were the parties' closing statements.

Substantive FAPE

The IDEA requires 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. 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 procedural obligations in the Act.

States, through local educational agencies (LEAs), meet the obligation of providing FAPE to eligible students through the 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). The U.S. Supreme Court has confirmed that 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*, 580 U.S. 386, 400 (2017). Individualization is, thus, the central consideration for purposes of the IDEA. And while 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), the law demands services are reasonable and appropriate in light of a child's unique circumstances. See *Endrew F.* at 400-401; *Ridley* at 269. See also *Tucker v. Bay Shore Union Free Sch. Dist.*, 873 F.2d 563, 567 (2d Cir. 1989). A proper assessment of whether a proposed IEP meets the above standard must be based on information "as of the time it was made." *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010).

Procedural FAPE

From a procedural standpoint, the family plays a meaningful role in special education. *Schaffer, supra*, 546 U.S. at 53. Consistent with these principles, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2). Procedural deficiencies may warrant a remedy if they result in "significant impediment" to parental participation or a substantive denial of FAPE. 20 U.S.C. § 1415(f)(3)(E).

Extended School Year (ESY)

The FAPE requirement extends to the 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.¹⁰

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).

¹⁰ Pennsylvania Bureau of Special Education, Extended School Year in Pennsylvania, 2020, available at <https://www.pattan.net/Publications/Extended-School-Year-Services-in-Pennsylvania> (last visited June 14, 2023).

Parents' Claims

This Student's eligibility for ESY is not in question. In their Complaint, the *pro se* Parents contended that the proposed ESY programming offered for implementation did not align with the Student's current IEP, failed to conform to the ODR decision from 2020, was of insufficient length, and was decided without consultation by the IEP team. Based on the evidence adduced at the hearing, the Parents have failed to meet their burden of proof. The record evidence was clear that the proposed ESY programming was reasonably calculated for this Student to achieve meaningful educational benefit. *Andrew F.*, 137 S. Ct. 988 (2017)

The Parent's first contention that the proposed ESY programming offered by the District failed to align with the Student's current educational programming is unsupported by the record. The Student's current IEP includes seven goals and eight pages of specially designed instruction (SDI), which will be implemented during the summer ESY program. Through the intended programming, the Student would receive nearly identical hours of related services (PT, OT, Speech) as provided during the 2022-2023 school year. The changes that resulted in a reduction of PT from two to one time a week and an increase of OT from two to three times a week were not disputed by the Parents. Additionally, during the in-District portion of ESY, the Student would retain 2:1 PCA support. However, during in-home ESY programming, the team determined that one instead of two PCAs was adequate. This modification, to which the Parent disagreed, was justified because during in-home programming, in addition to a PCA, the assigned special education teacher and possibly a related service provider would also be present. The Parent failed to offer preponderant evidence that this adjustment rendered the offered ESY programming deficient. The District's ESY proposal also appropriately addressed the Student's adapted PE needs. During ESY, the

Student would participate in the District's land-based adapted PE program, Fit Club. During Fit Club, the Student would receive daily supported physical education. Although Fit Club does not include swimming because of the District's summer pool closure, the evidence and testimony supported the determination that the Student did require an aquatics program to receive a FAPE. During testimony, the school psychologist concluded that the Student did not present with needs that required an aquatics program. Likewise, the Student's special education teacher/case manager determined that the Student's adapted PE needs could be met through land-based physical activities during ESY. Even though access to swimming is not required to provide the Student with a FAPE, the District indicated its willingness to provide reimbursement for thirty-six hours of an aquatics program during ESY, which shall be required.

Next, the Parent contended that the District's ESY programming denied Student a FAPE because it offered ESY for six weeks in the school, followed by selectively sending therapists to the home during non-school days. From June 27 until August 3, 2023, the District's proposed ESY program offered the Student in-District programming from 8:00-3:00, Monday through Thursday, an extra two hours of instruction beyond the regular ESY day. On Fridays, when no ESY programming is conducted in-District, the Student would receive four hours of life skills instruction from a special education teacher in-home. From August 7 until August 25, 2023, when no ESY programming is offered in-District, the Student would receive in-home instruction from 9:00-3:00, Monday through Friday. In sum, the Student would receive 32 hours of ESY programming per week during the in-District portion of ESY, and 30 hours of in home programming per week, in August, when in-District ESY is not in session. The evidence has established that the team carefully considered the available; that after school-year breaks, the Student did not experience large-

scale regression and was able to regain skills quickly. Thus the small break from ESY after the school year ended and before the start of the 2023-2024 school year, would not detrimentally impact this Student. Although the appropriateness of the offered ESY programming versus the quantity of service hours should be the issue, the Parent has focused on the latter without providing persuasive evidence or explanation to support the contention that the District failed to offer Student a FAPE. Based on the evidence of record, the District's ESY-offered programming was appropriate.

Last, the Parent contended that the ESY determination was made administratively and not by the IEP team. This allegation is also unsupported by the evidence. Because of the complexity of the Student's needs, this IEP team met roughly every six weeks to discuss educational programming. The Parent was invited to and participated in these meetings. After the disputed NOREP was issued, the Parent was unwilling to discuss summer programming. However, the Parent did participate in attempts at resolution, where the final offer of FAPE was offered and a NOREP issued. The District witnesses testified at length about the IEP team's approach to developing the proposed ESY program and that the severity of the Student's needs supported a recommendation for additional hours of ESY instruction, both in the District and at home, and their consideration of the necessary factors that warranted ESY programming. To determine the overall length of the Student's ESY program, the school team reviewed progress data to evaluate the likelihood of regression and the amount of time needed for in-home ESY programming. The Student's special education teacher/case manager credibly testified that he reviewed the data from August 2022 to determine whether instructional time should be increased or reduced. However, the data was incomplete because of Student's hospitalization. Lacking conclusive data from this period, the school team appropriately recommended that in-home services remain the

same as ESY 2022. The discussion with the Parent included consideration of the collected data, input and observations of the IEP team, which resulted in the determination that a ten-week ESY program with one-week breaks after the current school year ended and before the start of the 2023-2024 school year was appropriate to address this Student's needs. The Parents were afforded the full opportunity to participate in educational decision-making concerning their child and have failed to establish any facts of record that support a different conclusion. No procedural FAPE denial occurred.

The overarching contention implied by the Parent during the hearing was that the Student is losing skills because of inadequate educational programming as opposed to the complex constellation of medical diagnoses. As the party with the burden of proof, the Parent had an obligation to present preponderant evidence. No medical testimony or evaluative data was introduced, the Parents refused to consent to a school-based reevaluation or provide access to Student's treatment providers, and the medical information eventually supplied to the District came through the Parent. The District offered the school psychologist as an expert in school psychology and neuropsychology. During *voir dire*, the Parent agreed that the school psychologist could provide testimony in the areas of school psychology and neuro-development but objected to the offering of testimony as a specialist in the Student's condition. As a Ph.D. level school psychologist with certification and a demonstrated background in neuropsychology, a previous evaluator with familiarity with the Student and the [redacted] diagnosis, this witness was qualified to provide testimony about the Student's progress and the impact of the medical diagnoses on educational needs.

This Student has tremendous needs for which the Parents tirelessly and passionately advocate. However, this District was not obligated to provide this

Student with every IDEA service requested. Instead, it must ensure that the Student was offered special education and related services needed to confer meaningful educational benefit. *Wyoming Valley W.*, 55 IDELR 213 (SEA PA 2010); *In re: Student with a Disability*, 62 IDELR 160 (SEA ND 2013); and *Wallingford-Swarthmore Sch. Dist.*, 114 LRP 47646 (SEA PA 10/20/14). Despite the Parents' contentions, the District's ESY proposal is wholly consistent with the overarching premise for ESY services. In sum, this hearing officer cannot find the ESY determination legally flawed under the applicable standards. The Parent failed to carry the assigned burden of proof that the ESY programming offered for implementation during the summer of 2023 was deficient, resulting in a FAPE denial.

ORDER

And now, on this 14th day of June 2023, in accordance with the preceding findings of fact and conclusions of law, the District's offered ESY programming for the summer of 2023 is appropriate.

The District shall provide ESY educational programming consistent with the NOREP issued on May 26, 2023, which includes reimbursement for thirty-six hours of a summer aquatics program for the Student and transportation mileage. The length of the individual sessions is equal to the duration of an APE swim class during the school year.¹¹

The Parent is directed to keep a mileage log documenting travel to and from the ESY aquatics program. The Parent is further directed to provide the mileage log to the District weekly. The District is directed to pay all

¹¹ 65.5 cents per mile (<https://www.irs.gov/newsroom/irs-issues-standard-mileage-rates-for-2023-business-use-increases-3-cents-per-mile>) (last visited June 14, 2023).

transportation reimbursement costs within ten calendar days of receipt of the mileage log.

It is **ORDERED** that any claims not specifically addressed by this decision and order are DENIED and DISMISSED.

/s/ Joy Waters Fleming, Esquire

Joy Waters Fleming

HEARING OFFICER
ODR File No. 28077-22-23