

This is a redacted version of the original decision. Select details have been removed from the decision to preserve the 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**

OPEN HEARING

ODR No. 29977-24-25

Child's Name:

P.A.

Date of Birth:

[redacted]

Guardian:

[redacted]

Local Education Agency:

Philadelphia City School District
440 N. Broad Street,
Philadelphia, PA 19130

Counsel for the LEA:

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Hearing Officer:

James Gerl, CHO

Date of Decision:

August 2, 2024

BACKGROUND

The parent filed a due process complaint alleging that the school district's offer of Extended School Year services (hereafter sometimes referred to as "ESY") denied the student a free and appropriate public education in two ways: first the location of ESY was at a public school rather than at the private school that the student had been attending; and second that the Notice of Recommended Educational Placement (hereafter sometimes referred to as "NOREP") constituted a procedural violation of IDEA because it included changes to the student's physical therapy as well as the ESY program. The district school denies any violation of IDEA. I find in favor of the school district concerning all issues raised by the due process complaint.

PROCEDURAL HISTORY

The portion of the due process complaint that deals with the ESY 2024 issue was treated as expedited. Other matters raised by the complaint have been placed on the regular timeline and will be heard separately at a later date.

The parent was advised prior to the hearing that parties to these cases have the right to hire a lawyer to represent them at the hearing and all prehearing and posthearing proceedings. The parent elected to proceed without being represented by a lawyer.

The hearing was concluded in one in-person hearing session. The parties did not agree to any stipulations of fact. Parent exhibits P-1 to P-16 were admitted into evidence. School District exhibits S-1 through S-8 were excluded on the basis of relevance. School District exhibits S-9 through S-40 were admitted into evidence. Four witnesses testified at the due process hearing.

Both parties submitted prehearing briefs. All arguments submitted by the parties have been considered. To the extent that the arguments advanced by the parties are in accordance with the findings, conclusions and views stated below, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain arguments and proposed findings have been omitted as not relevant or not necessary to a proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accordance with the findings as stated below, it is not credited.

To the extent possible, personally identifiable information, including the names of the parties and similar information, has been omitted from the text of the decision that follows. FERPA 20 U.S.C. § 1232(g); and IDEA § 617(c).

ISSUE PRESENTED

The expedited portion of the due process complaint presents the following two issues:

1. Whether the parent has proven that the school district denied the student a free and appropriate public education because its offer of extended school year services after the 2023 – 2024 school year was to be delivered at a public school rather than at the private school location preferred by the parent?
2. Whether the parent has proven that the school district committed an actionable procedural violation of IDEA by including changes to both physical therapy and the location of the ESY program in the same NOREP?

FINDINGS OF FACT

Based upon the evidence in the record compiled at the due process hearing, I have made the following findings of fact: ¹

1. The student is a [redacted] who makes friends easily. (NT 161-162; S-30)

2. The student's date of birth is [redacted] (P-2, P-3)

3. The student's [redacted] resides with the student and is the student's legal guardian and has educational decision-making authority for the student. The student's [redacted] is hereafter referred to as "parent" for purposes of this decision. (NT 123; S-30)

4. The student has attended an approved private school since approximately January 2024 pursuant to a school district IEP. A February 2, 2024 IEP team meeting occurred. The resulting IEP was implemented by the approved private school and provided for a full-time life skills support classroom with speech language therapy once per week for 30 minutes; speech language consultation once per month for thirty minutes; integrated skills for life and learning, including speech and occupational therapy twice per week for 40 minutes; and Wilson Language System twice per month for 40 minutes. The student's category of eligibility is intellectual disability. The IEP found the student to be eligible for extended school year services. (S-20; NT 76, 81-82)

¹ (Exhibits shall hereafter be referred to as "P-1," etc. for the parents' exhibits; and "S-1," etc. for the school district's exhibits; references to page numbers of the transcript of testimony taken at the hearing is the hereafter designated as "NT____").

5. The school district issued a NOREP on February 7, 2024 for the February 2, 2024 IEP and the parent approved the NOREP on February 15, 2024. (S-21; NT 81-82, 141, 144)

6. On May 3, 2024, the private school that the student had been attending sent the parent a letter stating that it would not be renewing its contract with the school district for the education of the student because the student had violated its code of conduct regarding recording devices. The school district does not have the power to require the private school to provide services to the student. (P-8; NT 90-91, 101-102, 144-145)

7. On May 31, 2024, the school district sent a NOREP and release of information form to the parent in order to begin the process of finding a new approved private school for the student for the next school year. When the parent did not return the release and NOREP, the school district sent follow-up emails on June 3, 2024, June 6, 2024 and June 10, 2024. The parent has not responded to the follow-up requests or signed the release. (S-27, S-31; NT 94-95, 146-147)

8. On June 6, 2024, the private school that the student had been attending sent a letter to the school district stating that the student's last day at the private school would be June 19, 2024. (S-28; NT 95)

9. When a child with an intellectual disability misses a substantial amount of extend school year services, there is a chance of regression. (NT 64)

10. After a previously scheduled meeting in May was cancelled because of the parent was ill, the student's IEP team met on June 18, 2024. The parent participated in the meeting virtually. After a discussion of a physical therapy evaluation which recommended consultative services 30 minutes once per month, the parent stated that she disagreed and would be

filing a due process complaint. The parent then abruptly terminated her participation in the IEP team meeting before the team discussed the student's ESY program. (S-30, S-31, S-26, P-13; NT 91-99, 145-146, 148, 56-57)

11. On June 25, 2024, the school district issued a NOREP to the parent listing changes to the IEP regarding physical therapy consultation once per month for 30 minutes and that the student would be assigned to a public school for the ESY program. (S-31, P-11; NT 99-102, 149-150)

12. On July 3, 2024, the school district case manager emailed the parent stating that because the student is not able to attend the approved private school for ESY, the student would be attending a specific public school for ESY. (P-10, S-32, S-34; NT 102-103, 151-153, 56)

13. On July 4, 2024, the parent rejected the NOREP stating that the student "needs PT services " and "... has an [redacted]," and that "student needs to attend ESY at APS school where transportation notice was sent from." (S-31; NT 101-102, 149-151, 153-154, 155-156)

14. On July 8, 2024, the school district case manager emailed the parent stating that transportation for the student's ESY program at the public school would be available beginning July 9, 2024. The email included the transportation route number. (S-33; NT 102-103, 156-158, 182, 119)

15. The student attended the ESY program at the public school for three days: July 9, 10 and 11, 2024. (NT 158, 171)

16. The ESY program at the public school consisted of the student working on the goals contained in the IEP that was in effect at the private school. The ESY program also provided for the related services that were provided in the IEP that was in effect at the private school. The student was in a life skills classroom taught by a life skills teacher for the ESY program. The ESY program was convened from June 24, 2024 through July 25, 2024.

The ESY program was held Monday through Thursday from 9:00 am to 1:00 pm, with breakfast provided at 8:30 am. (NT 169- 171; P-5)

17. On July 11, 2024, the parent contacted the ESY principal of the public school where the student was receiving ESY and stated that an adult staff member had intimidated the student by rolling their eyes and a by making a comment to the effect of "oh, hell no." The principal investigated the allegations and found them to be without merit. The principal telephoned the parent and informed her of the investigation and assured the parent that the student would be safe during ESY. The principal also put the medical form that the parent had requested in the student's bookbag. (S-35; NT 169-179)

18. The parent declined to send the student to the ESY program at the public school after July 11, 2024. (NT 178)

CONCLUSIONS OF LAW

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

1. A parent or a local education agency may file a due process complaint alleging one or more of following four types of violations of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq*, (hereafter sometimes referred to as "IDEA"): an identification violation, an evaluation violation, a placement violation or a failure to provide a free and appropriate public education (hereafter sometimes referred to as "FAPE"). IDEA §615(b)(6)(A); 34 C.F.R. § 300.507(a); 22 Pa. Code § 14.162.

2. The definition of "parent" under IDEA includes a guardian who has educational decision-making authority for a child. IDEA §602 (23); 34 C.F.R. § 300.30(a)(3).

3. The United States Supreme Court has developed a two-part test for determining whether a local education agency has provided a free appropriate public education (hereafter sometimes referred to as "FAPE") to a student with a disability. There must be: (1) a determination as to whether a local education agency has complied with the procedural safeguards as set forth in IDEA, and (2) an analysis of whether the individualized educational program is reasonably calculated to enable the child to make progress in light of the child's unique circumstances. Endrew F by Joseph F v. Douglass County School District RE-1, 580 U.S. 386, 137 S. Ct. 988, 69 IDELR 174 (2017); Board of Educ., etc. v. Rowley, 458 U.S. 178, 553 IDELR 656 (1982); KD by Theresa Dunn and Jonathan Dunn v. Downingtown Area School District, 904 F.3d 248, 72 IDELR 261 (3d Cir. 2018).

4. In order to provide FAPE, an IEP must be reasonable, not ideal. KD by Dunn v. Downingtown Area School District, *supra*; LB by RB and MB v Radnor Twp Sch Dist, 78 IDELR 186 (ED Penna 2021).

5. The appropriateness of an IEP in terms of whether it has provided a free appropriate public education must be determined at the time that it was made. The law does not require a local education agency to maximize the potential of a student with a disability or to provide the best possible education; instead, it requires an educational plan that provides the basic floor of educational opportunity. Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 281 (3d Cir. 2012); DS v. Bayonne Board of Education, 602 F.3d 553, 54 IDELR 141 (3d Cir. 2010); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 251, 52 IDELR 211 (3d Cir. 2009).

6. A parent cannot compel a local education agency to provide services at a specific location. A local education agency is generally afforded the discretion to select the location at which at which a student's IEP is

implemented. RB v Mastery Charter School, 762 F. Supp. 2d 745, 55 IDELR 282 (E.D. Pa 2012); See, A.W. v. Fairfax County School Board, 372 F.3d 674, 41 IDELR 119 (4th Cir. 2004); JL & JF ex rel CC v NYC Dept of Educ, 65 IDELR 137 (SDNY 2015); MA v Jersey City Bd of Educ, 63 IDELR 9 (DNJ 2014); KB by Brown v Dist of Columbia, 66 IDELR 63 (DDC 2015).

7. A local education agency must provide extended school year services to a child with a disability when necessary to provide a free appropriate public education because the benefits that the disabled child gains during the regular school year will be significantly jeopardized if he or she is not provided with an extended school year program. 34 C.F.R. § 300.106; 22 Pa. Code § 14.132; LG and EG ex rel. EG v. Wissahickon School District, 55 IDELR 280 @ n.3 (E.D. Penna. 2011); see, MM v. School District of Greenville County, 37 IDELR 183 (4th Cir. 2002).

8. For a procedural violation to be actionable under IDEA, a parent must show that the violation results in a loss of educational opportunity for the student, seriously deprives the parents of their participation rights, or causes a deprivation of educational benefit. Ridley School District v. MR and JR ex rel. ER, supra; IDEA § 615(f)(3)(E); 34 C.F.R. § 300.513(a).

9. A local education agency may not use a parent's refusal to consent to one service to deny the child any other service. 34 C.F.R. § 300.300(d).

10. The parent has not proven that the charter school's provision of extended school year services to the student after the 2022 – 2023 school year was a denial of a free and appropriate public education to the student or otherwise violated IDEA or state law.

DISCUSSION

1. Whether the parent has proven that the school district denied the student a free and appropriate public education because its offer of extended school year services after the 2023 – 2024 school year was to be delivered at a public school rather than at the private school location preferred by the parent?

It should be noted at the outset that the primary issue in this case is not eligibility for ESY or the nature of the ESY services offered. All parties agree that the student was entitled to ESY after the 2023-2024 school year. The primary dispute concerns the location where the student would receive the services. The parent wanted ESY to be provided at the private school that the student had attended for the 2023-2024 school year. The school district, however, had received correspondence from said private school declining to continue to provide any further services to the student. The school district then arranged to have the student's ESY program at a public school in the district instead.

The dispute here is focused upon the location where the student would receive the ESY program. The caselaw provides that the location at which services are provided is generally within the discretion of the local education agency. In this case, the parent has not proven that the selection of the ESY location violates IDEA.

The parent's prehearing brief contains argument concerning issues that were not raised by the expedited ESY complaint, and those arguments are not considered herein. Said brief does not explain why the parent believes the

location selected for ESY services violates IDEA. From the parent's testimony, it is assumed that the parent is arguing that the ESY program would be better at the private school location. The special education laws do not, however, require the school district to provide an ideal education for the student or one that maximizes the student's potential.

It is understandable that the parent would want an ideal education for her child. IDEA does not, however, require a local education agency to provide the best possible education for a child with a disability. Instead, IDEA requires that a child with a disability be provided with an IEP that is reasonably calculated to provide meaningful educational benefit given the individual circumstances of the student.

In the instant case, the record evidence shows that the ESY program offered by the school was appropriate. The ESY program was individualized to this student's unique needs; it was based upon the goals and related services that had been developed in the student's IEP at the private school. In fact, the student actually attended the ESY program at the public school location for three days.

Moreover, the parent's contention that the student should receive ESY at the private school that the student had been attending ignores the reality that said private school had refused to allow the student to continue attending the private school. The school district does not have the power to compel the private school to take the student. The parent's position is unreasonable.

The parent cites no case law, or statute or regulations in support of her argument. The parent's prehearing brief alleges a denial of FAPE, but it

contains no legal authority to support the parent's position. The argument is rejected.

The testimony of the school district staff witnesses was more credible and persuasive than the testimony of the student's parent concerning this issue. This conclusion is made because of the demeanor of the witnesses, as well as the following factors: the parent's testimony concerning whether she abruptly left the IEP team meeting before the team discussed ESY was evasive and inconsistent. The parent's testimony concerning her reasons for objecting to the ESY program at a public school location was inconsistent and frequently changed during her testimony. In addition, most of the parent's testimony concerning her reasons for objecting to the ESY program at a public school location was contradicted by the documentary evidence.

It is concluded that the parent has not proven that the ESY services offered by the school district after the 2023 – 2024 school year denied a free and appropriate public education to the student or otherwise violated IDEA.

2. Whether the parent has proven that the school district committed an actionable procedural violation of IDEA by including changes to the physical therapy that the student was to receive and the location of the ESY program in the same NOREP?

The parent contends that the school district committed a procedural violation of IDEA by including two items in the Notice of Recommended Educational Placement: changes to physical therapy and the ESY program. The school district asserts that this is not a procedural violation.

The parent cites no case law, or statute or regulation in support of her argument or argument that the inclusion of two items on the NOREP is a procedural violation. The parent has not shown that it is a procedural violation of IDEA to include two items in a NOREP. The argument is rejected.

The school district notes that the federal regulations explicitly permit a parent to reject one service offered by a local education agency and accept another service. Thus, the parent could have accepted only one of the items on the NOREP and rejected the other.

More importantly, there appears to be a logical flaw in the parent's argument. The parent's handwritten statements on the NOREP form clearly indicate that the parent was rejecting both of the changes listed on the NOREP. Thus, this is clearly not a case where a parent was confounded by a dilemma where the parent agreed with one change and rejected the other, but nonetheless had to accept both changes to receive the desired change. The parent was, therefore not harmed by the NOREP in any way.

Even if, assuming *arguendo*, the inclusion of two proposals on the NOREP did constitute a procedural violation of IDEA, it is clear that the violation was harmless. The inclusion of two proposals on the NOREP did not adversely affect the student's education or significantly impair the parent's participation rights. Accordingly, even if including two items on a NOREP were a procedural violation, it is clearly not actionable.

The testimony of the school district staff witnesses was more credible and persuasive than the testimony of the student's parent concerning this issue. This conclusion is made because of the demeanor of the witnesses, as well as the following factor: the parent's testimony concerning the NOREP form not permitting a parent to object to only one of two changes is

contradicted by the documentary evidence, including the handwritten statements on the NOREP by the parent that she was rejecting both proposals.

It is concluded that the parent has not proven that the inclusion of both physical therapy changes and the ESY program on the NOREP is a procedural violation.

It is concluded further that the parent has not proven that the ESY services offered by the school district after the 2023 – 2024 school year denied a free and appropriate public education to the student or otherwise violated IDEA or state law.

ORDER

Based upon the foregoing, it is **HEREBY ORDERED** that all relief pertaining to extended school year services requested by the due process complaint is hereby denied. The complaint, to the extent that it alleges violations concerning extended school year services, is dismissed.

IT IS SO ORDERED.

ENTERED: August 2, 2024

James Gerl

James Gerl, CHO
Hearing Officer