

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

CLOSED HEARING

ODR No.29091-23-24

Child's Name:

H.S.

Date of Birth:

[redacted]

Parent:

[redacted]

Counsel for Parent

Pro se

Local Education Agency

Pittsburgh School District
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Hearing Officer:

Charles W. Jelley Esq.

Decision Date:

June 1, 2024

OVERVIEW OF THE DISPUTE

The Parents filed the pending Due Process Hearing Complaint alleging failures under the Individuals with Disabilities Education Act (IDEA) and state standards.¹ The Parents contend that the District failed to offer the Student a timely and appropriate Extended School Year (ESY) experience. The Parents now seek reimbursement for their out-of-pocket unilateral private summer school costs. The District, on the other hand, seeks a declaratory ruling that, at all times relevant, they procedurally and substantively complied with the IDEA. Applying the IDEA preponderance of evidence standard, and after reviewing the intrinsic and extrinsic evidence, I now find the Parents have met their burden of proof that the District failed to offer the Student an appropriate ESY program. I further find that the Parents' ESY experience was appropriate. Finally, I conclude that the equities favor the Parents. Accordingly, for all the reasons that follow, I now find in favor of the Parents, in part, and against the District. The District is now directed to reimburse the Parents for a reduced portion of their out-of-pocket expenses.

STATEMENT OF THE ISSUE

Did the District offer the Student an appropriate Extended School Year program? If not, are the Parents entitled to tuition reimbursement?

Finding of Fact²

1. The Parties agree that the Student is a person with multiple disabilities, including an intellectual impairment. The Parties further agree that in the Spring of 2023, the Student was enrolled in [redacted] grade. (P-1; P-2; P-

¹ All references to the Student and the family in the published Decision will remain confidential. Certain portions of this Decision will be redacted to protect the Student's and the Parents' privacy. The Parent's claims arise under 20 USC §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 CFR §§ 300.1-300. 818. The applicable Pennsylvania regulations, implementing the IDEA are set forth at 22 Pa. Code §§ 14.101-14.163 (Chapter 14).

² The findings of fact were made only as necessary to resolve the discrete issue presented on an expedited basis.

- 3). The Parties finally agree that the Student is eligible for extended school year services (ESY) as a member of the *Armstrong Kline* ESY class.³ *Id.*
2. On February 22, 2023, the special education teacher emailed the Parents a copy of the District's Extended School Year (ESY) eligibility checklist. The checklist data indicated that the Student qualified for ESY services. The ESY checklist was unsigned and failed to include prior written notice. (P-1; P-2; P-3).
3. On February 28, 2023, the teacher emailed the Parents a "Draft" of the proposed [redacted] grade 2023-2024 annual school-year individual education program (IEP). The Draft annual IEP included five (5) ESY summer 2023 IEP goal statements covering math, Speech, and executive functioning skills, such as time on task and following a schedule. (P-1; P-2; P-3 pp.71-75; NT pp.55). (P-1 p.107).
4. On March 18, 2023, the Parents made a 400.00 dollar deposit, reserving a summer camp slot for the Student and a sibling. The Draft ESY IEP noted that the Student attended the summer camp in the summer of 2022. In the previous summer, the Parents and the District shared the summer camp costs. In the summer of 2022, the Parents privately paid for the three weeks, and the District funded the Student's ESY experience at the same camp, for three weeks. (NT p.74; P-17).
5. On March 31, 2023, the teacher emailed the Parents a Notice of Recommended Educational Placement (NOREP). The NOREP stated that the Student was ESY eligible. (S-5 p.2 Box 4). In Box 7, the NOREP further stated that the District recommended that the Student receive "Supplemental Multiple Disabilities Support." (S-5 p.2 Box 7). The Mother approved the ESY eligibility determination. The Mother signed and returned the NOREP electronically on April 6, 2023. The NOREP did not identify the

³ *Armstrong v. Kline* 476 F. Supp. 583 (E.D. Pa. 1979) and the *Armstrong* Remedial Order No. 2 Guidelines.

frequency or duration of the proposed ESY push-in or pull-out specially designed instruction. The NOREP failed to offer related services, like speech services or specialized transportation, or state the location or duration of the ESY experience. (S-5 p.3).

6. On March 31, 2023, and again on April 20, 2023, the Parents received a District-wide email announcing a District-operated summer learning experience open to all District students. The District's marketing materials stated that a nearby elementary school would offer summer learning services for [redacted] children. (P-8).
7. On April 24, 2023, the District held and the Parents attended the annual IEP meeting to discuss the Student's 2023-2024 ESY and school year program. At the annual IEP meeting, the parties first discussed the Student's transition from [redacted] to grade –[redacted]- reviewed the existing progress monitoring data, and discussed the [redacted] grade school year IEP goals. (NT p.32; P-1; P-2; P-3). After reviewing the results of the District's ESY eligibility checklist, the staff discussed the proposed Draft ESY goal statements. *Id.*
8. The Parents and the IEP team members, including the special education teacher, a regular education teacher, and a local agency representative, agreed that the 2023 ESY IEP experience should include work on two math goals, two executive functioning goals - focusing on time on task and following a daily schedule - and one speech goal. Like the "Draft" March 2023 IEP, the April 2023 revision did not describe the location, frequency, or duration of the ESY experience. The IEP also omitted a description of the duration of the ESY school day schedule, a statement of the frequency and duration of push-in or pull-out supports, the necessary related services, transportation, or the proposed ESY specially designed instruction. (P-1; P-2; P-3).

9. Following the then-current school year IEP schedule of support, the Parents requested two periods a day of specially designed instruction. First, they asked for 45 minutes of push-in, specially designed instruction in Math. Second, they requested an additional 45 minutes of pull-out instruction daily to work on the two executive functioning goals. Third, although the IEP team discussed each request, due to the lack of administrative information, the team did not reach a consensus on how long the Student should receive daily push-in or pull-out special educational support. (NT pp.58-60). Fourth, the Parties agreed that the Student should receive daily transportation to and from the ESY experience, a one-on-one aide throughout the day, and 90 minutes of speech therapy each month. (S-4).
10. The Parties also discussed two (2) ESY locations. The first location was a behavior support program delivered in an all-handicapped setting. The staff and the Parents ruled out that option because it was too restrictive, and the Student had no behavioral goals. The second option presented was a District-wide summer regular education learning option at a nearby location. At the time of the IEP meeting, the team knew the District-operated summer option would begin on June 26, 2023, and end on July 28, 2023. They also knew the summer learning option would occur Monday through Friday from 8:00 am to 3:30 pm. The team was also aware that the summer option offered both participation in regular education classes and, at times, could support students who otherwise need specially designed instruction. No other options were offered or discussed. (S-4; NT p.57).
11. Due to the lack of administrative information, the local education agency (LEA) representative – Supervisor - at the meeting was not able to answer questions or commit District resources regarding substantive IEP topics like 1. the length of time the Student would receive push-in specially designed Math instruction, 2. the length of time the Student would receive pull-out executive functioning specially designed instruction, 3. if the Student would

be in class with [redacted] or [redacted] graders, 4. what the Student would do in the afternoon, 5. the expected class size, and 6. what curriculum materials - [redacted] or [redacted] grade - would the teachers use. (NT pp.58-61).

12. On May 2, 2023, the Mother received a partial response to her unanswered resource commitment questions. The special education teacher emailed, stating that the summer learning staff and the school year staff were working on the curriculum topic and that the learners would be grouped by grade. However, the class size was still undetermined, and a single special education teacher would be on-site at the location for all children. All other IEP-specific questions went unanswered. (P-7).
13. Also, on May 2, 2023, the Parent replied to the teacher's email asking again for additional clarification on the commitment of IEP resources. Confused about the District's actions, the Mother asked if there was a distinction between "ESY programming at [redacted location]" and the overall "[redacted location] regular education summer learning option" (P-7). No one ever responded to the email. *Id.*
14. On May 8, 2023, the Parties participated in a follow-up video conference. During the call, the Program Officer – LEA - corrected the alleged misinformation in the District-wide email marketing announcement. The LEA – Program Officer - confirmed that the discussed option would place the Student with other [redacted]-grade peers. When the meeting ended, however, the Mother did not understand, and the LEA supervisor did not commit to providing ESY push-in or pull-out math or ELA executive functioning support. The LEA supervisor did not answer questions about the special education class size, the curriculum, the afternoon schedule of activities, or whether the regular or special education teacher would progress in monitoring the identified ESY goals. (P-7; NT pp.54-60).

15. On May 12, 2023, the District emailed a third NOREP, confirming ESY eligibility. In Box 6, the NOREP offered transportation to and from the ESY option. The NOREP also offered one-on-one personal care support. In Box 7, the NOREP proposed that the Student receive "Extended School Year Services at [redacted]. The Location was [redacted name of school building], "Dates Monday, June 26, 2023 – Friday, July 28, 2023," "Time 8:00 am - 3:30 pm." (S-8 p.2). The email message also advised the Mother: "I [the administrator] also know that the deadline for the [redacted name of summer program] applications was yesterday, but if you agree to the placement, [redacted] will still have a spot." The Mother replied that same day and requested another updated ESY IEP. (P- pp.58-61). Neither the NOREP nor earlier March or April 2023 IEPs described the frequency or duration of the Student-specific push-in or pull-out ESY services, the daily schedule, or the proposed specially designed instruction. (S-8).
16. On May 17, 2023, the Parent, in an email, again asked for a copy of the 2023 ESY IEP describing the District's commitment to resources, a daily schedule, and specially designed instruction. The special education teacher replied that she could not send the IEP because she was still waiting for directions about how long the Student would receive push-in or pull-out services. (S-8).
17. On May 22, 2023, 10 days after the NOREP was issued, the Parent received a link to a copy of another IEP. The May 22, 2023, NOREP proposed that the District would provide "Speech, ... 90 minutes per month, 6/26/23 -7/28/23, Specialized Transportation ... 2 x per day, 6/26/23 - 7/28/23, and a Personal Care Assistant Support ... Daily for the duration of ESY minus a 30 min lunch." The Parent replied on the same day, requesting the daily schedule and the frequency and duration of the specially designed push-in or pull-out support. (S-8; NT pp.62-71).

18. The special education teacher replied on May 23, 2023. The teacher's email stated that the LEA supervisor - Program Officer - agreed that the Student would "be provided 45 minutes of ELA [English Language Arts] support and 45 minutes of Math support." (P-10 p.2; P-7; NT pp. 54-57; NT pp.134-135).
19. On May 24, 2023, another IEP was emailed to the Parent. This ESY IEP on page 76 states that the Student would receive "Support from a special education teacher in the general education class for Math and ELA for 45 minutes per day, from June 26, 2023, to July 28, 2023." Neither the IEP, the NOREP, nor the emails identified the frequency, duration, or time when the two (2) executive functioning/independence goals would be worked on. (NT pp.150-157; NT p.63; P-11 p.76).
20. On Friday, May 26, 2023, the Parent received a phone call from the Program Officer informing her that the 45 minutes a day in Math and ELA instruction would be removed from the IEP. The Program Officer – LEA Supervisor - went on to state that the frequency, duration, and location of the "ESY services "would be set by the regular education [redacted location of summer program] staff" and not the IEP team. The Program Officer then informed the Parent that if she wanted the Student to attend ESY, the online application for the summer services must completed as soon as possible. During the call, the Parent expressed her disagreement about the elimination of the 45 minutes of teacher time and the lack of a daily schedule of push-in and pull-out resources. The direction was the first time the Parent was told that completing an online application to register for the summer option was an ESY requirement. The Supervisor did not send another NROEP confirming the IEP changes. (NT pp.66-67; P- 12; P- 14; NT pp.70-71; P-15 pp.70-73; NT pp.63-65; NT pp.80-81).
21. The Parent completed the online summer application on Saturday, May 27, 2023. After completing the online application, the Parent received a follow-

up email stating that Student was "waitlisted." (NT p.66-67; P- 12; P- 14; NT pp.70-71; P-15 pp.70-73; NT pp.63-65; NT pp.80-81).

22. On May 30, 2023, the Parent signed and returned another NOREP expressing disagreement with the reduction in support and requesting an informal meeting. (NT p.104; NT p.154).
23. The informal meeting was held virtually on June 7, 2023. During the call, the Parent expressed concern that absent scheduled support from a special education teacher, the Student would not be able to access the curriculum, participate in the regular education class, or learn. Neither the Program Officer nor the administrator agreed to provide the previously offered 45 minutes of push-in or pull-out time. (NT pp.66-69).
24. The LEA Supervisor - Program Officer – also told the Parent the following: 1. if the Student was taken off the waitlist, 2. the summer staff, not an IEP team, would set the push-in and pull-out time; 3. the class size could be upwards of 30 students, 4. the Program Officer did not know what curriculum would be used, and 5. the District would provide a one-on-one aide. (NT pp.63-65; NT pp.66-69; NT pp.70-71; NT pp.80-81; P-15 pp.70-73; P- 12; P- 14).
25. The Program Officer next informed the Mother that if the Student was not accepted for the integrated summer experience, the Student could attend the District's ESY program at an all-handicapped school. The all-handicapped option would start at 8:00 am and end at 1:00 pm daily. The all handicapped option would run for three weeks, from July 10 - July 28, 2023. Although discussed, the LEA Supervisor – Program Officer - would not commit resources like specially designed instruction or knew the frequency and duration of related services support. (NT pp.70-73; P-12; P-13; P-14).
26. On or about June 13, 2023, the Parents asked, and the special education teacher emailed another "Draft" IEP. The record is clear that the Parties did not meet either virtually or in person to update the June 13 IEP. The record

is also clear that a regular education teacher did not review the IEP. (P-13 p.3). Beginning on page 71 and continuing through page 72, the IEP offered two math goals and a speech goal. On page 73, the IEP included the ESY executive functioning on-task goal; then, on page 74, the IEP included the second executive functioning goal. Finally, on page 75, the IEP included the speech goal. (P-13). On pages 76 and 77, the IEP included three (3) forms of specially designed instruction, a commitment to provide a one-on-one aide, door-to-door transportation, and Speech for 90 minutes a month. (P-13; NT pp.72-77). The proposed IEP deleted the commitment to provide two 45-minute session push-in sentences and also eliminated the 45 minutes of pull-out services. Although requested, the District omitted an updated NOREP. (P-13; NT pp.72-77).

27. On June 15, 2023, the teacher emailed another version of the June 2023 IEP. The June 15, 2023, version of the ESY included two math goals and a speech goal. (P-15 pp.75-77). The June 15, 2023, ESY IEP deleted the executive functioning goals and English Language Arts time. (P-15 pp.75-77). The June 15, 2023, IEP also included the one-on-one aide, specialized transportation, and 90 minutes of Speech. (P-15 p.78). Although someone outside the IEP team decided to remove the goal statements, the record is not clear on who made the decision. The teacher did not issue another NOREP. (P-15 72-78; NT pp.142-149).
28. After receiving the June 15, 2023, ESY IEP changes, the Parent asked the District for another NOREP describing the basis for the proposed actions, revisions, and denials of ESY services. When the NOREP did not arrive, the Parents made their own arrangements for the Student to attend summer camp for six (6) weeks. (NT p.74).
29. The Parents hired a full-time personal care assistant (PCA) and two teachers to support the Student at the summer camp. (NT p.82-85; P-17). The Parents arranged for the PCA to attend the summer camp from 8:45 am to

3:45 pm each day. (P-17, pp.2-10; NT pp.82-85). The Parent also arranged for eight (8) 45-minute one-on-one Math instruction and six (45) minute sessions of one-on-one executive functioning instruction. (P-17 pp.2-10; NT pp.83-85).

30. The Student attended the summer camp from June 26, 2023, to July 28, 2023. (P-17).
31. The Parents were not able to secure staff to work on the Speech goal. (P-17; NT p.83).
32. Parents now request reimbursement for all out-of-pocket costs for the summer camp, summer camp lunches, the executive functioning teacher, the Math teacher expenses, and the PCA costs. The Parents do not seek reimbursement for transportation to and from the camp. Furthermore, the Parents do not seek compensatory education for ESY speech services. (P-17; NT pp.82-85).

CONCLUSIONS OF LAW AND APPLICABLE LEGAL STANDARDS

THE MOVING PARTY SHOULDERS THE BURDEN OF PROOF

The burden of proof in an IDEA dispute comprises two considerations: the burden of going forward and the burden of persuasion. The burden of persuasion determines which of the two contending parties must bear the risk of failing to convince the finder of fact. In *Schaffer v. Weast*, 546 US 49 (2005), the Court held that the burden of persuasion is on the party that requests relief; in this case, the Parent. Whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion.⁴

CREDIBILITY AND PERSUASIVENESS OF THE WITNESSES' TESTIMONY

⁴ At all times, this hearing officer applied the preponderance of evidence standard when reviewing all claims. A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. See, *Comm. v. Williams*, 532 Pa. 265, 284-286 (1992).

During a due process hearing, the hearing officer is charged with judging witnesses' credibility, weighing evidence, and assessing the witnesses' overall persuasiveness.⁵ I found the Mother's testimony clear, persuasive, and organized. I found the teachers and the administrators' testimony lacking in clarity, persuasiveness, and organization. On several occasions described below, the staff misapplied the published ESY timelines, mismanaged the development of the ESY IEP, and failed to convene ESY IEP team meetings when they changed the Draft IEPs. The staff also failed to provide mandated procedural safeguards after proposing actions and refusing to act. This pattern of fundamental errors undermines the District witnesses' credibility. Therefore, I now find their testimony on *Rowley*, *Endrew*, FAPE standards, and the *Armstrong* ESY standards less persuasive.

THE IDEA SUBSTANTIVE FAPE STANDARD

In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 US 176 (1982), the Supreme Court held that districts violate the IDEA's FAPE mandate when they fail to follow the Act's procedural and substantive requirements. *Rowley* requires that IEPs must be reasonably calculated to enable the child to make meaningful progress. IEPs are crafted annually by a team that includes a representative of the local educational agency (LEA), the child's regular and special education teacher(s), the parents, and, in appropriate cases, the child. 20 U.S.C. § 1414(a)(5). Later, in *Endrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (U.S. 2017), the Supreme Court, applying *Rowley*, held that each "educational [IEP] program must be appropriately ambitious in light of [the child's] circumstances... [and] every child should have the chance to meet challenging objectives." *Id.*, 137 S. Ct. at 1000. The *Endrew* court's explanation of *Rowley* did not change the Third Circuit's long standard application of *Rowley's* procedural or

⁵ *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); *A.S. v. Office for Dispute Resolution*, 88 A.3d 256, 266 (Pa. Commw. 2014) (it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact); 22 Pa Code §14.162 (requiring findings of fact).

substantive requirements.⁶ Consistent with *Rowley* and *Endrew*, the phrase "free appropriate public education" now requires "significant learning" and "meaningful benefit." *Id.*

A procedural violation, on the other hand, occurs when a district fails to abide by the IDEA's or state-specific procedural standards and safeguards. Procedural violations cause a denial of a FAPE when any of the following situations occur: 1. the violation results in the loss of an educational opportunity, 2. the violation infringes on the parents' opportunity to participate in the IEP formulation, or 3. when the violation causes a deprivation of educational benefits.⁷ Therefore, not all procedural violations amount to a denial of a FAPE. *Id.*

THE IDEA INCLUDES THE OPTION TO AMEND AN ANNUAL IEP WITHOUT A FACE-TO-FACE MEETING

Once the parties agree on the content of the "annual IEP," a parent and a district can agree not to convene an IEP team meeting to make subsequent changes.⁸ However, when the parties agree on the District's changes or modifications, the District must develop a written document documenting the changes.⁹ Once the changes are documented, the District must inform the IEP team members.¹⁰ Once the changes are made, the District must provide the parents with a revised copy of the IEP if they ask for it.¹¹

PROCEDURAL DUE PROCESS REQUIREMENTS TO EXCUSE STAFF FROM ATTENDING SUBSEQUENT IEP MEETINGS

The IDEA describes two different procedures to excuse team members from IEP meetings when the teachers' content area is or is not being discussed at the meeting. First, at 34 CFR § 300.321(e)(1), the Parent and the District can "agree"

⁶ *Dunn v. Downingtown Area Sch. Dist.* 904 F.3d 248 (3d Cir. 2018) applying *Endrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (U.S. 2017); *Ridgewood Board of Education v. NE*, 172 F.3d 238, 247 (3d Cir. 1999).

⁷ 34 CFR § 300.513; *CH v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 66 (3d Cir. 2010).

⁸ 34 CFR § 300.324 (a)(4)(i).

⁹ 34 CFR § 300.324 (a)(4)(i).

¹⁰ 34 CFR § 300.324 (a)(4)(ii).

¹¹ 34 CFR § 300.324 (a)(6).

to excuse IEP team members whose area of service is "not" discussed. However, the Parent must "consent" to the excusal when the team member's area of service "is being discussed or modified."¹² The regulations note that the term "agreement" refers to an understanding between the Parent and the District.¹³ On the other hand, "consent" requires that the Parent is "fully informed of all information relevant to the activity for which consent is sought"; therefore, the "consent" requirement is a much more demanding requirement.¹⁴ Accordingly, districts should be careful to document procedural compliance when excusing an IEP team member's participation.¹⁵

IDEA AND PENNSYLVANIA-SPECIFIC ESY STANDARDS

The IDEA ESY eligibility standards differ from the Pennsylvania ESY eligibility and procedural safeguards standards. Under the IDEA, IEP teams must discuss and offer extended school year services "only if a child's IEP team determines, on an individual basis, . . . that the services are necessary for the provision of a Free Appropriate Public Education (FAPE) to the child."¹⁶ The IDEA defines the term ESY services to mean special education and related services that: "Are provided to a child with a disability: (i) Beyond the normal school year of the public agency; (ii) In accordance with the child's IEP; and (iii) At no cost to the parents of the child; that (2) Meet the standards of the state educational agency." "A public agency [school district] cannot (i) limit ESY services to particular categories of disability or

¹² 34 CFR § 300321 (e)(2); *Letter to Finch*, 59 IDELR 15 (OSEP 2012).

¹³ 71 Fed. Reg. 46,673 (2006).

¹⁴ 34 CFR § 300.9.

¹⁵ See, *Prince George's County Pub. Schs.*, 7 ECLPR 55 (SEA MD 2009) (district's excusal form failed to identify which individual was being excused from which meeting, therefore, the district did not obtain adequate parental consent for the excusal); *Dublin City Sch. Dist.*, 111 LRP 20334 (SEA OH 02/09/11)(failure to provide documentation of agreement to excuse any required IEP team members led to finding that the district violated the IDEA), *Anoka-Hennepin Independent School District #011*, 114 LRP 37490 (SEA MN 03/03/14) (early departure of two general education teachers from an IEP meeting without the parent's written consent violated the IDEA). *R.G. and C.G. v. New York City Dep't of Educ.*, 62 IDELR 84 (E.D.N.Y. 2013) (absence of any general education teacher at IEP team meeting impeded the student's right to FAPE); *B.B. v. Catahoula Parish Sch. Dist.*, 62 IDELR 50 (W.D. La. 2013)(general education teacher's input should have been sought before removing student from all general education classes).

¹⁶ 34 CFR § 300106(a)(2).

(ii) Unilaterally limit the type, amount, or duration of those services.¹⁷

Pennsylvania-specific ESY standards are rooted in the federal court decision in *Armstrong v. Kline* 476 F. Supp. 583 (E.D. Pa. 1979) and the *Armstrong* Remedial Order No. 2 Guidelines. The *Armstrong* Guidelines establish additional protections for students in Pennsylvania with autism/pervasive developmental disorder, serious emotional disturbance, severe intellectual disability, and degenerative impairment with mental involvement.

The Student here is a person with Multiple Disabilities and an Intellectual Disability; therefore, all of the *Armstrong* substantive and procedural requirements apply. The *Armstrong* Guidelines are codified at Pennsylvania Code 22 Pa. Code §14.132(a)(2). Pennsylvania Code 22 Pa. Code §14.132(a)(2) requires ESY teams to use multiple regression/recoupment criteria when making ESY eligibility and summer programming decisions. The Parties agree that the Student qualifies for ESY services.

Pennsylvania special education regulations include specific procedural timelines for districts to determine ESY eligibility, offer an ESY FAPE, and issue procedural safeguards and NOREPs. For students in the *Armstrong Kline* group, the ESY IEP team eligibility meeting must occur no later than February 28 of each school year. This February date may require the district to reschedule the annual IEP team meeting, or if necessary, the district must conduct a separate Extended School Year IEP team meeting.¹⁸

ESY NOREPs describing the ESY offer of a FAPE and the ESY determination must be issued to the parents no later than March 31 of each school year. The location, frequency, and duration of specially designed instruction and related must be included in the ESY IEP 22 Pa. Code § 14.132(d). These February and March timelines ensure that ESY disputes are resolved in an expedited manner.¹⁹

¹⁷ 34 CFR § 300.106.

¹⁸ 22 Pa. Code § 14.132(d).

¹⁹ 22 Pa. Code § 14.132 and 22 Pa. Code § 14.162 *et seq.*

School districts are not required to provide ESY services based upon "[t]he desire or need for ... respite care ... [or] 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."²⁰

APPROPRIATE RELIEF WITHIN THE MEANING OF THE IDEA

The IDEA allows hearing officers to award appropriate equitable relief. Appropriate relief can take many forms, including compensatory education, tuition reimbursement, and reimbursement for costs.²¹ The IDEA also permits the state compliance officers and hearing officers to award "monetary reimbursement" to remedy FAPE denials.²² The plain language of the Act also provides that "Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with the [Act's] procedural requirements under this section."²³ With these fixed legal principles in mind, I will now make Conclusions of Law.

OVERVIEW OF THE STUDENT'S FAPE CLAIMS

The Parents claim multiple procedural and substantive violations caused a denial of an ESY FAPE. To support these broad claims, the Parents rely on seventeen (17) exhibits, including multiple emails, IEPs, NOREPs, and testimony from several district witnesses. The Parents seek reimbursement for out-of-pocket expenses associated with their unilateral private ESY camp experience. The District counters these claims with 12 exhibits and additional testimony from multiple District administrators, program officers, and teachers. The District asserts that at all times relevant, they complied with the IDEA and Pennsylvania-specific ESY FAPE standards. Applying the

²⁰ 22 Pa. Code § 14.132(3).

²¹ Zirkel, P.A. 2013. "Adjudicative Remedies for Denials of FAPE under the IDEA." *Journal of the National Association of Administrative Law Judiciary* 33 (1): 214-241, Zirkel, Perry A. "The Remedial Authority of Hearing and Review Officers Under The Individuals With Disabilities Act" *Administrative Law Review*, vol. 58, no. 2, 2006, pp. 401-427.

²² "When a state has found a failure to provide appropriate services, the SEA must address: The failure to provide appropriate services, including corrective action appropriate to address the needs of the child (such as compensatory services or monetary reimbursement).

²³ 20 USC § 1415(f)(3)(E)(ii) (2017); *Letter to Zirkel*, 74 IDELR 171 (OSEP 2019).

applicable FAPE and ESY standards, I now conclude that the Parents prevailed in part.

SUBSTANTIVE VIOLATIONS CAUSED A DENIAL OF A FAPE

The District failed to follow the applicable state procedural and substantive ESY FAPE standards and timelines. The applicable standards require ESY eligibility, and IEP decisions must be made by February 28 of each school year. The teacher sent the Parents the ESY eligibility Checklist on February 22, 2023. The ESY Checklist was unsigned and did not clearly state that the Student was ESY eligible. On February 28, 2023, the teacher emailed the Parents a "Draft" annual IEP. The Draft February IEP addressed three topics: 1. the Student's 2023-2024 summer ESY experience; 2. the Student's 2023-2024 school year IEP goals; and 3. the Student's move to another building for [redacted] grade. The email explained that the proposed 2023-2024 ESY IEP included five (5) ESY goal statements. The teacher suggested one speech goal, two math goals, and two executive functioning goals. The Draft ESY IEP failed to identify the location, duration, and frequency of the specially designed push-in or pull-out instruction. On March 31, 2023, without the benefit of an IEP team meeting, the teacher sent the Parents an ESY NOREP confirming ESY eligibility and proposed a program of "Multiple Disabilities" support. Applying 22 Pa. Code § 14,132, I now find that the proposed ESY NOREP noting "Multiple Disabilities" supports absent an agreed-on ESY IEP was not an offer of a FAPE. I further find that issuing a NOREP before an IEP meeting or an agreed-on IEP is a substantive and procedural predetermination violation.²⁴

²⁴ *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840 (6th Cir. 2004)(A school has an unofficial policy of refusing to provide certain programs or services.) *Spielberg v. Henrico County*, 853 F. 2d 256 (4th Cir. 1988)(school staff decide a child's placement before an IEP meeting and without parental input); *H.B. v. Las Virgenes USD*, 239 Fed. Appx. 342 (9th Cir. 2007)("Predetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives."); *P.C. v. Milford Exempted Vill. Sch.*, 2013 U.S. Dist. LEXIS 7477 (S.D. Ohio 2013)(Although the term "decision" was never used in emails and pre-planning memos, the court held that school staff were not open minded and predetermined a child's 7th grade reading placement before the IEP meeting because they were committed to removing the student from his current placement).

The April ESY IEP discussed at an IEP meeting failed to include the location of the ESY program or the frequency and duration of the anticipated push-in or pull-out specially designed instruction. Due to the lack of administrative planning, the LEA – Program Officer- who was in attendance at the April IEP meeting, could not commit any regular or special education resources. From a regular education standpoint, the team lacked information about expected class sizes, the Student's class schedule, or the curriculum materials. When the discussions turned to the schedule of pull-out or push-in specially designed instruction, the need for a one-on-one aide, speech services, and specialized transportation, the LEA Supervisor – Program Officer - again sidestepped the questions, stating that she must check before committing District resources.

When the meeting turned to a discussion of a proposed ESY placement, the LEA and the team, again, lacked information about the District-wide continuum of options. When the April IEP meeting ended, the annual 2023-2024 school year IEP was unfinished, and the 2023-2024 ESY IEP was incomplete. Pursuant to 22 Pa. Code § 14.132, although the District was obliged to hold an ESY IEP meeting and offer a FAPE before February 28, that did not happen. I further find that each ESY IEP offered in May 2023 also failed to account for the Student-specific regression and recoupment circumstances identified in the February 2023 ESY checklist. Simply put, the ESY March, April, and May IEPs were insufficient, inadequate, and otherwise inappropriate.

The record is also preponderant that the June 13, 2023, IEP, like the April IEP, was incomplete. In one breath, the LEA supervisor offered push-in and pull-out services, and in the next, she withdrew the commitment. Then, on June 15, 2023, the LEA supervisor – Program Officer - informed the Parents that the executive functioning goals were no longer part of the ESY IEP. The June 2023 IEP modifications and changes occurred outside of the required ESY IEP meeting and *Armstrong*

timelines.²⁵ The reoccurring ESY timeline and procedural violations require me to conclude that the LEA Supervisor and other administrators unilaterally limited the type, amount, and duration of ESY services outside of the IEP process in violation of 34 CFR § 300.106, 22 Pa. Code § 14.132 and the *Armstrong* Remedial Order #2 Guidelines. Finally, I find that applying 22 Pa Code § 14.132 and the *Armstrong* Remedial Order #2 Guidelines, the June 15, 2023, ESY IEP arrived some 108 days late and well after the state-mandated February 28 ESY deadline. These recurring procedural violations caused a substantive denial of a FAPE.

THE DISTRICT FAILED TO PROVIDE PRIOR WRITTEN NOTICE

Moving on to the ESY procedural due process notice requirements, I further find that the District failed to provide adequate prior written notice, procedural safeguards, or legally sufficient NOREPs. Applying 22 Pa Code § 14.132 and the *Armstrong* Remedial Order #2, I now conclude that the District failed to meet the state-mandated ESY March 31 NOREP deadline. I also find that the District violated 22 Pa. Code § 14.162(a) prior written notice mailing requirement when it mistakenly chose to send the insufficient NOREPs by email. NOREPs for students with an intellectual disability must be sent by certified first-class mail with a return receipt.²⁶ The District's ongoing ESY procedural NOREP and notice violations interfered with the Parents' participation in the IEP process. Absent timely prior written notice, procedural safeguards, and NOREPs, the Parents were prevented from filing an expedited ESY complaint before the start of the June 2023 ESY experience. The above substantive conclusions of law do not end the analysis. Moving on to the

²⁵ 22 Pa. Code § 14,132; 34 CFR § 300.324 (a)(6); 34 CFR § 300.321 (e)(2); *Letter to Finch*, 59 IDELR 15 (OSEP 2012).

²⁶ 22 Pa. Code § 14.162. Impartial due process hearing and expedited due process hearing. (a) In addition to the requirements incorporated by reference in 34 CFR § 300504 (relating to procedural safeguard notice), with regard to a student who has an intellectual disability or who is thought to have an intellectual disability, a notice when mailed shall be issued to the parent by certified mail (addressee only, return receipt requested).

application of the remaining *Burlington-Carter* reimbursement criteria, I now find that the Parents are entitled to tuition reimbursement.

THE BURLINGTON – CARTER ANALYSIS FAVORS THE PARENTS

The remaining prongs of the *Burlington-Carter* test now require me to make three additional conclusions of law. First, I must determine if the Parents provided the District with 10 days advance notice of the unilateral placement. Second, I must determine if the Parents' placement is appropriate. Third, and finally, I must balance the equities in favor and against the reimbursement claim.

THE 10-DAY NOTICE REQUIREMENT

Courts and hearing officers may disregard the 10-day notice limitation found at 34 CFR § 300.148 (d) when the school is in some way at fault for the Parent's failure to provide the notice. The IDEA states that the cost of reimbursement must not be reduced or denied for failure to provide the notice if: 1. The school prevented the parents from providing the notice; 2 The parents had not received notice, pursuant to 34 CFR § 300.504, of the notice requirement in 34 CFR § 300.148 (d)(1); or 3. Compliance with paragraph 34 CFR § 300.148 (d)(1) would likely result in physical harm to the child. 34 CFR § 300.148 (e); and 20 USC § 1412 (a)(10)(C).

The IEP signature line memorializing the District's obligation to verify the Parents' receipt of the procedural safeguards in the record IEPs at P-1, P-2, P-3, P-9, P-11, P-13, P-15, and P-16 are unsigned and undated. This reoccurring pattern of procedural due process omissions causes me to find that the District never provided the mandated procedural safeguards and statement of parental rights. The record is also clear that in failing to provide the procedural safeguards, the District further failed to advise the Parent about the 10-day unilateral placement notice

requirement. Therefore, I now find that the Parents' failure to provide the 10-day notice is excused.²⁷

THE PARENTS' UNILATERAL PLACEMENT WAS APPROPRIATE

The evidence is preponderant that the Parents, on short notice, arranged for the Student to participate in an appropriate ESY experience. The evidence is clear that both teachers had special education experience. The record also demonstrates that the teachers used the ESY IEP goal statements as the basis for instruction. The summer camp offered an integrated experience similar to the ongoing discussions between the Parties about the need to provide contact with non-handicapped peers. The support from the one-on-one aide facilitated the Student's same-age and grade-level peer contacts. Accordingly, I now find that the summer camp, with supplemental aides and teacher support, was appropriate.

THE BALANCING OF THE EQUITIES FAVORS THE PARENTS

The District's failure to follow the applicable ESY standards cuts against their contentions that the reimbursement is overreaching, improper, and unfair. The failure to provide the NOREP when requested, coupled with the failure to provide the procedural safeguards and a timely ESY IEP, interfered with the Parent's procedural due process rights.

From February to June, the Parents regularly met, responded to, and communicated with the staff in a timely fashion. The \$18.00 an-hour rate for the aide and the teacher's \$65.00 an-hour rate are not on the high end. The \$2,500.00 cost of the all-day camp experience, under these circumstances, is otherwise reasonable. The District's assertion that the Parents' March 2023 camp deposit is evidence that the Parents either predetermined or sandbagged the team efforts lacks persuasive support. The Parents' explanation that she made the March 2023 deposit to ensure

²⁷ See, e.g., *C.D. v. Natick Pub. Sch. Dist.*, 78 IDELR 10 (D. Mass. 2020) (pointing out that the IDEA does not require a hearing officer to deny or reduce tuition reimbursement based on lack of notice; rather, it states that a hearing officer may deny or reduce the award in that circumstance).

that the Student and a sibling had a summer option outside of the expected District-operated ESY program is credible.

On June 15, 2023, the Parents requested a final NOREP, but when it never arrived, the Parents made the unilateral placement on June 24, 2023, at the summer camp. The fact that the Parents waited until June 24, 2023, to make the first camp payment undercuts the District's predetermination argument. The delay in making the payment, coupled with the Parents' continued willingness to work with the team, leads me to conclude that the Parents, at all times relevant, acted in good faith.

The Parents' request for reimbursement for lunch costs, on the other hand, is denied.²⁸ The record does not include any evidence that the Student requires a special diet or that the lunch expense is otherwise FAPE-related. Therefore, the lunch reimbursement expense is denied. Finally, after reviewing the Parties' actions, omissions, and inactions and balancing the equities, I conclude that the equities favor the parents. Therefore, a Final Order directing the District to reimburse the Parents for their out-of-pocket costs follows.

SUMMARY

After reviewing the totality of the circumstances, I now find that the District's actions, omissions, and inactions caused a denial of an ESY FAPE. Next, I find the Parent's program and placement was reasonably calculated to provide an ESY FAPE. Finally, I find the equities favor the Parents.

ORDER

And now, this June 1, 2024, I find in accordance with the preceding Findings of Fact and Conclusions of Law, it is hereby **ORDERED** as follows:

1. The Parents' claim for tuition reimbursement and reimbursement for out-of-pocket expenses in Exhibit P-17 in this matter is **GRANTED**.

²⁸ *L.K. v. New York City Department of Education*, 69 IDELR 90 (2d Cir. 2017)(unpublished)(hearing officers are permitted to reduce the award of tuition reimbursement).

2. The Parents' demand for reimbursement for lunch expenses in P-27 is **DENIED**.
3. The District is **ORDERED** to reimburse the Parents within 10 days of receipt of this ORDER.
4. All other claims, demands, and defenses are **DENIED**.

Date: June 1, 2024

Charles W. Jelley, Esq. LL.M
Special Education Hearing Officer
ODR FILE #29091-23-24