

Pennsylvania
Special Education Hearing Officer

DECISION

ODR No. 1744-10-11AS

Child's Name: [REDACTED]

Date of Birth: [REDACTED]

Dates of ESY Hearing: 5/25/11

OPEN HEARING

Parties to the Hearing:

Parents

[REDACTED]
[REDACTED]
[REDACTED]

School District
Philadelphia

Date ESY Record Closed:

Date of ESY Decision:

Hearing Officer:

Representative:

Parent Attorney

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May 25, 2011

May 27, 2011

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student, who resides in the District and attends one of its elementary schools, is IDEA eligible due to autism. There is no dispute that Student is eligible for extended school year (ESY) services under federal and state standards, and is in the ESY “target group” under Pennsylvania special education/ESY regulations and policies.

Parents filed a due process complaint in April 2011 asserting numerous procedural and substantive FAPE violations by the District with respect to Student’s program during the 2010/2011 school year, the District’s proposed program and placement for Student during the 2011/2012 school year and the District’s ESY proposal for this summer.

In accordance with Pennsylvania special education/ESY regulations and policies, an expedited hearing to determine the ESY issues only was held on May 25, 2011. The hearing record established that the District failed to comply with all required Pennsylvania procedures, and has not yet offered Student an ESY program that comports with appropriate procedural and substantive standards. The District, therefore, will be ordered to convene Student’s IEP team to fully develop an appropriate ESY program and issue a NOREP that constitutes a final offer of the ESY program for Student. If need be, additional evidence will be taken and an additional order detailing Student’s ESY program will be issued no later than June 26, 2011.

ISSUES

1. Did the School District violate procedural requirements for developing and offering an ESY program for Student for the summer of 2011?
2. Did the School District offer a substantively appropriate ESY program for the summer of 2011, in terms of developing appropriate goals, offering appropriate instructional methods, specifying and providing all necessary and appropriate services in an appropriate location?
3. Did the School District violate Parents’ right to participate in developing an appropriate ESY program?

FINDINGS OF FACT

1. [REDACTED] (Student) is [REDACTED] child, born [REDACTED]. He is a resident of the School District of Philadelphia (SDOP) and is eligible for special education services. (Stipulation of the Parties on the record¹)
2. Student has a current diagnosis of autism in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(1); 22 Pa. Code §14.102 (2)(ii). (Stipulation of the parties on the record)
3. During the 2010/2011 school year, Student's placement was an autistic support (AS) class, with some inclusion in regular education classes. (Stipulation of the parties on the record; J-6, pp. 1, 3²)
4. According to Student's most recent reevaluation report (RR), dated 11/11/2010, Student is cognitively able to participate in grade level instruction with peers in the regular education curriculum with 1:1 instruction and support. (J-6, pp. 3, 5; Testimony of Autistic Support Teacher)
5. An IEP proposed in November 2010 confirmed Student's eligibility for ESY during the summer of 2011. Student's autistic support teacher identified two of Student's IEP goals, those relating to effective communication and to developing work skills, as the individualized focus of Student's ESY program. The teacher expected the goals to be implemented in the course of reading and math instruction in accordance with her understanding of the District's ESY program "model." (J-7, p. 1; Testimony of Autistic Support Teacher)
6. In addition to identifying ESY goals in the IEP, the AS teacher prepares a folder of information concerning each student for the ESY staff, including progress reports and reading and math levels/materials each student had reached at the end of the school year. It is a general District practice for teachers to compile such folders for each student who is expected to participate in the District's standard ESY program. The teacher was in the

¹ This decision concerns only Student's ESY program for 2011. Under Pennsylvania regulations and policies, ESY cases are heard on an expedited basis, with a decision sent to the parties no later than thirty (30) days after the complaint is filed. 22 Pa. Code §14.132(3)(e); Dispute Resolution Manual, §1403 (Update Effective 3/12/09). The ESY decision due date in this case was 5/27/11. Scheduling the ESY hearing in sufficient time to comply with the decision timeline was challenging. The only date/time available to all necessary participants between the filing date of the complaint and the decision due date was 5/25 beginning at 3:00 p.m. As the parties and counsel were informed from the outset, the transcript of the testimony could not be made available for specific page references between the hearing session and the decision date. For that reason, while the decision, including the enumerated findings of fact, specifically references the documents admitted into evidence at the expedited hearing, citations to the testimony of the witnesses with specific page references was not possible, and, therefore, references to the testimony of the witnesses are general, based upon the recollection of the hearing officer.

² Commendably, the parties agreed to joint exhibits in this matter. Specific exhibits will be designated by the letter "J" followed by the exhibit number.

process of gathering that information for Student at the time of the ESY due process hearing. (Testimony of Autistic Support Teacher, District ESY Consultant)

7. The ESY portion of the November 2010 IEP did not specify an ESY location, or describe the content of the proposed program other than as “autistic support.” In addition to the goals, the IEP provided beginning and ending dates (7/6—8/17/11) and the amount of time for the ESY program (900 minutes/week). Thirty minutes/week of speech/language therapy was also offered. The beginning and ending dates for the ESY program were the AS teacher’s estimates based upon her understanding of the period in which the District’s ESY program is usually offered. (J-7, p. 2; Testimony of Autistic Support Teacher)
8. Soon after the November 2010 IEP meeting, Student’s Mother expressed significant concerns about the District’s ESY program, as she understood it from conversation at the IEP meeting, and from incidents described to her by parents of other children who attended the ESY program. Parents’ concerns were conveyed to the District in a letter from her counsel to District’s counsel, and those concerns continue. (J-8, p. 2; Testimony of Parent)
9. In the November 2010 letter, Parents requested that the IEP team develop an ESY program suited to Student’s individual needs, including specific tutoring, rather than the District assigning Student to an established ESY program. (J-8, p. 2; Testimony of Parent)
10. At the due process hearing, Parent requested that Student’s school year program be duplicated through the summer as an ESY program. (Testimony of Parent)
11. After the November 2010 IEP meeting, there was no IEP meeting at which the District’s ESY program, or any alternative ESY program for Student was discussed, but Student’s Mother and autistic support teacher informally discussed options for summer programming, including camps. (Testimony of Autistic Support Teacher, Parent, District Coordinator of Autism Services)
12. An IEP proposed in March 2011 included an ESY program identical to the ESY provisions in the November 2010 IEP. (J-7, pp. 1, 2; J-10, pp. 42, 43)
13. A NOREP dated April 11, 2011 included a provision that Student’s IEP team would meet on or before May 18, 2011 to “consider options for [Student]’s ESY and transition models.” (J-10, p. 58)
14. The District offers an annual ESY program for students with severe disabilities at regional centers located in school buildings selected for suitability as summer programming sites based upon factors such as size, air conditioning and other factors that will provide a comfortable environment for students. (Testimony of District ESY Consultant)

15. Students are assigned to an ESY center based on geographic proximity, with the goal of placing each participant in the ESY program at the center closest to home, which is also usually closest to the school the student regularly attends. The assignment of each expected participant to a specific ESY location is made by the transportation department, based on bus routes, in collaboration with the centralized administrative staff that selects the ESY sites and oversees the program. (Testimony of District ESY Consultant)
16. Site selection for the ESY program was completed by the end of March to the beginning of April for the summer of 2011, after which the transportation and ESY program staff began the process of determining the ESY location for each student. The process is finalized by sending assignment letters to the families. The assignment letters were in preparation for mailing beginning May 23. Student is expected to be assigned to the regional center located at Hackett, an elementary school building. (Testimony of District ESY Consultant, Elementary School Principal)
17. The ESY program staff consists of approximately 200 teachers and aides experienced in teaching students with the severe disabilities served by the ESY program, including autism. Students are assigned to particular ESY classes based upon similarity of needs as discerned from the folders provided for each student by his/her special education teacher. Working on the specific IEP ESY goals for each participant provides the basis for individualizing the ESY program. (Testimony of District ESY Consultant, District Executive Director for the Office of Specialized Services)
18. The District's ESY program will be held over three days/week (Tuesday, Wednesday, Thursday), from 7/5/11 to 8/11/11 for approximately 4.5 hours/day. (Testimony of District ESY Consultant, Elementary School Principal)
19. In addition to the District-wide ESY program, the District offers a regular education summer program, S.L.A.M. (Summer Learning and More). That program will also be provided at regional centers. It will be held daily between 7/5 and 7/28 and will consist of reading and math instruction from 8:00 a.m. to 12:30 p.m., followed by afternoon enrichment activities such as art, music, science, dance, sports, math from 12:30 to 2:30 p.m., along with breakfast and lunch. If participating in that program, Student would be assigned to Webster School. There may be special education teachers staffing the S.L.A.M. program(J-15; Testimony of Elementary School Principal)
20. The elementary school that Student attended during the school year will also provide a summer program, to be held Monday through Thursday mornings (8:30 a.m. to 12:30 p.m.) between 7/5 and 7/28. The principal expects that the program will be divided into classes of 12-15 children, and that a special education teacher will be part of the summer staff. The goal of the summer program is to provide the core curriculum in a "fun" format that will assure a successful experience for all of the students. (Testimony of Elementary School Program)

DISCUSSION AND CONCLUSIONS OF LAW

A. ESY General Legal Standards

An IDEA eligible student's entitlement to ESY services derives from both federal and state special education provisions. Under the federal IDEA regulations, ESY services are to be provided to an eligible student if necessary to assure that s/he receives a free, appropriate public education (FAPE). 34 C.F.R. §300.106(a)(2). Pennsylvania special education regulations incorporate the federal ESY standard by reference, and in addition, provide explicit guidance for determining ESY eligibility and needs, as well as a timeline for finalizing eligibility and program decisions. *See* 22 Pa. Code §14.102(a)(2)(xi); §14.132 (a)(1), (2); (c), (d), (e). Pennsylvania ESY policies and procedures are further explained in a Basic Education Circular (BEC), Extended School Year Eligibility, issued in 2003.

B. ESY Procedural Issues

Since there is no question of Student's ESY eligibility, the specific regulations and policies applicable here concern developing an IEP for ESY and making a final ESY program offer by means of Prior Written Notice, *i.e.*, a NOREP. The regulatory provision primarily at issue is 22 Pa. Code §14.132(d):

Students with severe disabilities such as autism/pervasive developmental disorder, serious emotional disturbance; severe mental retardation; degenerative impairments with mental involvement; and severe multiple disabilities require expeditious determinations of eligibility for ESY services to be provided as follows:

- (1) Parents of students with severe disabilities shall be notified by the school entity of the annual review meeting to encourage their participation.
- (2) The IEP review meeting must occur no later than February 28 of each school year for students with severe disabilities.
- (3) The Notice of Recommended Educational Placement shall be issued to the parent no later than March 31 of the school year for students with severe disabilities.

The policy provisions of the ESY BEC specifically applicable in this case explain the District's ESY obligations in further detail:

II. Policy on Timing and Method of ESY Determinations

A. Timing

Target Group Students

The timing of an ESY determination is dependent on whether the student is a member of the "target group" [as defined by the Armstrong guidelines]. Students in the "target group" are those students with a severe disability, such as:

- Autism/pervasive developmental disorder
- Serious emotional disturbance
- Severe mental retardation
- Degenerative impairments with mental involvement
- Severe multiple disabilities

The parents must be notified by their LEA of the annual review meeting in order to ensure their participation. For purposes of an extended school year eligibility determination, the LEA must make the determination of the need in a timely manner so that children with disabilities who require ESY services in order to receive FAPE can receive the necessary services. The IEP review meeting must occur no later than **February 28** of each school year for the "target group" (as described above). This date may require the LEA to reschedule the annual IEP review, or conduct a separate ESY IEP meeting for this review.

Notice of Recommended Educational Placement (NOREP), containing the IEP team's determination regarding ESY eligibility, is to be issued to the parent in a timely manner. If the child has been determined to be eligible, the program specifics must be included in the IEP. This is to be done no later than **March 31** of the school year for students in the target group.

...

B. Notice of Eligibility and Content of ESY Program

LEA notice to the parent concerning ESY eligibility or ineligibility must be by NOREP. The NOREP only needs to be issued if the LEA is:

- Proposing to add ESY services to an IEP that previously did not have it.
- Proposing to delete the provision of ESY services from an IEP.
- Refusing to initiate the provision of ESY services requested by the parent.
- Proposing or refusing to change the provision of the ESY program.

When ESY services are offered by the LEA, the IEP that accompanies the NOREP

must contain the following:

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

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

...

D. Criteria for Eligibility and Reliance Upon "Other" Factors

...

The IEP team must make its decision concerning ESY eligibility and program content at the time of the IEP meeting, and in accordance with the timelines set out in Section II of this BEC. Doing otherwise leads to indefinite delays in decision making, so that due process is no longer a meaningful procedure for the parent seeking to challenge an LEA/IEP team's determination regarding eligibility and program.

E. Types of ESY Programming

While many ESY programs are held during the summer, children eligible for ESY services can require weekend or even virtually continuous programming. It is also important to note that ESY programs are not limited just to self-help and basic skills. Academic and vocational goals can also be part of a child's ESY IEP if appropriate. All decisions regarding types of programming must be made on an individual basis by the IEP team.

Review of the evidence produced at the hearing in light of the above standards establishes that the District did not fully comply with all Pennsylvania regulatory and policy requirements. Although the contours of an ESY offer by the District were included in the IEP offered in November 2010, Parents raised concerns about the program that were never addressed through the IEP process. (FF 5, 8, 9, 11, 12) An IEP meeting was held prior to the March 31 deadline, and the proposed IEP and NOREP included the District's ESY proposal, but those documents were sent to Parents on April 11, approximately two weeks after the deadline. (FF 13; J-10; 22 Pa. Code §14.132(d)(3)) Moreover, despite Parents' concerns, expressed months before, and the BEC provisions describing the contents of an ESY NOREP, the March 2011 IEP and NOREP

were no more specific than the November ESY proposal with respect to the location, frequency, projected beginning date, duration, and specific type of services (beyond the general term “autistic support”). (FF 7, 12; ESY BEC §II B)

Contrary to the suggestion of Parents’ counsel in the content and tone of questions directed to District witnesses at the ESY due process hearing, developing a District-wide ESY program specifically intended to serve students in the ESY target group is not, in itself, an IDEA procedural violation. School districts maintain autistic support, emotional support, learning support and other types of special education classrooms designed, generally, to serve eligible students with certain types of needs. Despite the general nature of such classrooms, IDEA eligible students can receive appropriate services via proper implementation of IEPs that meet each student’s specific needs. In addition, as the Executive Director of Specialized Services noted, school districts provide regular education programs in accordance with general a general school year calendar. There is no reason that the District cannot similarly provide an ESY program with a calendar.

There are, however two substantial problems with the District’s procedures, in general, that are highlighted by this case. First, despite Pennsylvania special education regulations and the policies described in the ESY BEC, none of the important details of the District’s ESY program are apparently shared by March 31 with parents of a child expected to participate in the program for the first time. Although the District needs to be given some leeway in terms of identifying the precise center a particular child will attend, and may not be able to finalize that piece of an ESY NOREP by March 31, it is difficult to understand why the District cannot develop a fairly specific description of its “target group” ESY program to include in the first IEP that determines ESY eligibility and identifies goals for a student in the ESY target group. Since

the District has a general program model that has been followed for many years, a description of the ESY program as elicited in some detail at the due process hearing could be provided, especially to first time parents, who would then know early on that the program is held 3 days per week over a period of approximately 6 weeks, includes experienced staff, is center-based and can determine some understanding of how/why a particular student will be assigned to a center. (FF 14, 15, 16, 17, 18) Moreover, it is important for parents to know that each child's teacher provides a portfolio of additional information about the child for the ESY staff, and that reading and math instruction is generally included in the ESY program, even if the proposed ESY goals do not explicitly include academics. (FF 5, 6; Testimony of Autistic Support Teacher) Such general description might also include information concerning when the details, such as center and class assignment are expected to be finalized. Although the general description outlined above may not be sufficient to withstand due process challenges to the sufficiency and appropriateness of a specific student's ESY IEP/NOREP, providing something similar would certainly be an improvement over the very limited information the District provided Parents in this case prior to the ESY due process hearing.

The second significant problem illustrated by this case is the obvious belief of Student's AS teacher that she was not free to suggest any deviations from the District's general ESY program to meet Student's particular needs. (Testimony of Autistic Support Teacher) That belief flies in the face of IDEA principles requiring individualized services based on each student's unique needs. It may well be that the substantive ESY needs of most students in the ESY target group can be met via the District's program, but all members of each student's IEP team must be fully cognizant of the right and obligation to fully discuss why and how the District's program will meet the student's needs. In addition, IEP team members, including

parents and teachers, who are most familiar with students' needs, must be free to suggest minor "tweaks," major changes or an entirely different program if warranted by a particular child's needs. *See* ESY BEC § II B:

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

Emphasis added.

Although the District's procedural deficiencies in developing Student's ESY program are serious and must be corrected, the procedural issues have not impeded Student's right to FAPE, significantly impeded Parents' right to participate in decision-making or caused a deprivation of educational benefit to Student with respect to the summer of 2011, since there is still sufficient time to provide Student with an appropriate ESY program. *See* 34 C.F.R. §513(a).

C. Substantive Appropriateness of the District's ESY Proposal

Since there is no dispute in this case that ESY services are necessary for Student to receive FAPE, and setting aside the District's procedural violations that will need to be corrected going forward, the essential question at this point is whether the District's proposed ESY program will support Student's right to FAPE, *i.e.*, will substantively contribute to assuring that Student's special education program is reasonably calculated to confer meaningful educational benefit. *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982). "Meaningful benefit" means that an eligible student's program affords him or her the opportunity for "significant learning." *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999).

From the limited information produced at the ESY hearing concerning Student's academic, language and social skills needs, it appears that Student is academically successful in the regular education curriculum with 1:1 support for instruction. (FF 4; J-10, p. 23) There is

also a suggestion that Student might benefit from small group instruction after new concepts are introduced on a 1:1 basis, as long as Student's need for a small structured environment is met. (J-10, pp. 23, 30) Student's teacher testified that Student responded well to interactions with typical peers in the regular education classroom, but is still uncertain about how to approach a group to join in conversation or play. (Testimony of Autistic Support Teacher) The teacher also expressed concerns about Student's reaction to the greater academic demands of the next grade level, noting that Student needs to improve compliance with school routines as the foundation for continued academic success successful inclusion with typical peers. (Testimony of Autistic Support Teacher) Similar concerns were expressed in the IEP proposed in March 2011 in terms of Student's language skills, processing difficulties and frustration if unable to immediately grasp a new concept. (J-10, p. 23)

Parents also expressed concerns about Student's difficulties with new situations, citing that as one of the reasons Parents are unwilling to accept the District's current ESY proposal. (Testimony of Student's Mother) Understandably, Parents would like Student's summer program to mirror the school year program. (FF 10) That, however, is unrealistic, and, indeed, impossible. The District cannot, *e.g.*, require the autistic support teacher to provide educational services to Student during the summer. Moreover, assuming that the District had the power to recreate Student's school year program, no evidence was presented by Parents to support Student's need for such extensive ESY services in order to receive FAPE overall. In accordance with *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), Parents in this case bear the burden of proving their claims. *See also Ridley School District v. M.R.*, 2011 WL 499966 at *7 (E.D. Pa. 2011). Without explicit testimony or documents to support such an extensive need for ESY services, Parents cannot meet their burden of proving that a 5 day/week,

school day-length ESY program is necessary. The District is not required to provide Student with the “absolute best” possible ESY program. *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 251 (3rd Cir. 2009); *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3rd Cir. 1995).

On the other hand, there was certainly no convincing evidence produced by the District to support a reasoned conclusion that the ESY program so sketchily described in the November 2010 and March 2011 IEP proposals, if implemented, would provide Student with an appropriate ESY program.

It is, or should be, obvious that with very little substantive information about Student available from the ESY hearing record, I cannot order a specific ESY program at this point. The parties, therefore, must reconvene Student’s IEP team for a thorough discussion of Student’s ESY needs and the options available to meet them, including the District’s proposed ESY program, with all details fully presented to Parents, the S.L.A.M. program and the summer school program to be provided at Student’s current school—or some combination of those programs. Parents and Student’s AS teacher must, of course, be thoroughly involved in such discussions, and Parents must be prepared to accept a reasonable, not ideal, option in terms of the nature of the services and the total amount of time Student will receive ESY services.

Although the substantive evidence at the ESY hearing was limited, the record nevertheless suggests that it may be worthwhile for Student’s IEP team to consider building an ESY program around the home school summer program. Student was described as close to or on grade level with many math and reading skills, and as responding well to inclusion opportunities with typical peers. (FF4; Testimony of Autistic Support Teacher) A summer program built around grade level core curriculum and delivered with 1:1 support in a small group of typical

peers might be a productive way for Student to experience additional inclusion opportunities for academic instruction and practice skills needed for more effective interaction with typical peers in a smaller and more relaxed setting than is generally available during the regular school year. Student's IEP team might also gather valuable information concerning future programming needs and strategies from such a program. It must be noted, however, that just having Student sign up for the home school summer program will not be sufficient. Student needs an ESY IEP, including goals, which may very well be the same as the currently proposed goals, and at least a general description of the academic instruction Student would receive. It also appears from the evaluation report and proposed IEPs in the record that Student would need to have the support of a special education teacher and 1:1 aide to be successful.

Although it is the responsibility of Student's IEP team to develop a final, appropriate ESY program, in the event the parties are unable to agree upon an ESY IEP and NOREP by the date of the next scheduled hearing session on June 23, I will return to the ESY aspect of Parents' complaint in order to take additional evidence and issue a final ESY order before the first week of July. Recognizing that the next hearing session is expected to be the opening hearing session for the remaining claims asserted in the complaint, and that it is likewise important to have those issues resolved before the next school year opens, a final resolution of the ESY program must be accomplished first.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the School District of Philadelphia is hereby **ORDERED** to reconvene Student's IEP team in order to develop a final ESY IEP and issue an ESY NOREP no later than June 23, 2011.

It is **FURTHER ORDERED** that if the ESY IEP is not finalized and an ESY NOREP issued, or if Parents reject the District's proposed NOREP, the ESY record shall be reopened for additional evidence on June 23, 2011, and a final order specifying Student's ESY program for 2011 will be issued no later than June 30, 2011.

It is **FURTHER ORDERED** that the undersigned hearing officer retains jurisdiction of the ESY claims asserted in the due process complaint until such time as an ESY NOREP is offered by the District and approved by Parents, or until an additional order is entered.

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

May 27, 2011