

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania
Special Education Hearing Officer

DECISION

Child's Name: A Student in the
Freeport Area School District

Date of Birth: 00/00/0000

Dates of Hearing: 07/21/08

CLOSED HEARING

ODR No. **9015/07-08 AS**

Parties to the Hearing:

Representative:

Parents

Dr. Stan Chapp, Superintendent
Parent Attorney: None

Freeport Area
School District

John Vogel, Esq.
School District Attorney

Date Record Closed:

July 25, 2008

Date of Decision:

August 7, 2008

Hearing Officer:

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student is an eligible student with an identified disability, who is about to enter _ grade at __ School. At the end of the 2007/2008 school year, the District conducted a reevaluation of Student at the Parents' request. On May 8 and May 16, 2008, Student's IEP team convened to review the results of the reevaluation and develop a new IEP to cover the remaining few weeks of the 2007/2008 school year and most of the upcoming year. Based upon the reevaluation results and Student's grades during __ grade, the IEP team determined that Student was eligible for extended school year (ESY) services for math only. The District proposed its standard ESY program, an hour of one to one tutoring weekly for five weeks provided by a special education teacher obtained through the Armstrong Indiana Intermediate Unit (ARIN).

Parents requested that the District pay for Student to attend a summer day camp program that includes academic, social and career exploration components. Student attended that program during the summers of 2006 and 2007, entirely at Parents' expense, and found it very enjoyable. To address Student's ESY need as identified by the District, the requested summer day camp program offered one to

one math instruction by peer tutoring, and also provides social skills development/practice opportunities and work with computers/video production.

After the May 16 IEP meeting, the District and Parents had no further discussions concerning an ESY program for Student, and the District did not issue a NOREP for ESY. When Student began attending the requested summer program, the Parents submitted a due process complaint seeking reimbursement of their out of pocket costs for the program and the transportation they provided, contending that the summer day camp is an appropriate ESY program for Student, while the ARIN program proposed by the District did not address all of the IEP goals. A due process hearing on Parents' complaint was completed in a half-day session on July 21, 2008.

ISSUE

Should the Freeport Area School District be required to pay the costs associated with Student's attendance at the [] summer day camp as an ESY program for 2008, including the costs of Parent-provided transportation?

FINDINGS OF FACT

1. Student is a XX year old child, born 0-0-00. Student is a resident of the Freeport Area School District and is eligible for special education services. (Stipulation, N.T. pp. 16, 17).
2. Student has a current diagnosis of Asperger's, an autism spectrum disorder, in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. pp. 17, 18).

3. Student is enrolled at [] School, the same school Student would attend if not disabled, where Student will enter [] grade at the beginning of the 2008/2009 school year. (Stipulation, N.T. p. 18).
4. Student receives all academic instruction in the regular education setting, where, in [] grade, Student had the assistance of an instructional aide for English, and was placed in a math class taught by a regular and a special education teacher. Student was also in a learning support setting during one period, as well as the last ten minutes of each school day, for additional academic support and organizational assistance. (N.T. pp. 18 (Stipulation), 86; S-A).
5. Student's primary area of academic concern is math. The [] grade math grades ranged from 50 to 69, with a year-end average of 61, just above the minimum passing grade, while the remaining grades, except for one half-year course, were average or above. (N.T. pp. 86, 87, 91, 92, 108, 109; S-B, S-C).
6. Near the end of the 2007/2008 school year, Student's Parents requested a reevaluation in order to determine the current level of functioning. (N.T. p. 88; S-B).
7. Achievement testing and the Key Math-Revised Diagnostic Inventory, both conducted as part of the reevaluation, placed Student's math skills at the borderline range of functioning with respect to numerical operations, math reasoning, basic concepts and applications. (S-A, S-B).
8. Student's adaptive functioning in the areas of social skills and independent school functioning were also identified as areas of significant need, based upon an adaptive behavior checklist completed by the learning support teacher and teacher observations provided as part of the reevaluation process. Student's Mother reported that Student experienced worsening bullying and a decline in social coping skills during the 2007/2008 school year. (N.T. pp. 21, 89, 102, 103; S-B).
9. Student's IEP team met on May 8 and May 16, 2008 to review the reevaluation report and begin the process of developing a new IEP, to be implemented primarily during the 2008/2009 school year. (N.T. pp. 58, 59, 89, 90, 92; S-A).

10. The IEP developed at the May 16 meeting includes goals for math, for initiating and maintaining social exchanges (conversation) with peers, and for Student's participation in a TV production class to further the post-secondary career interest in becoming involved in the film industry. (N.T. pp. 91, 92; S-A).
11. At the May 8 and May 16 meetings, Student's IEP team discussed providing Student with ESY services during the summer of 2008, the first time Student was to receive ESY. The District's ESY proposal, for one to one math tutoring to be provided by the Armstrong Indiana Intermediate Unit (ARIN), was first discussed with the Parents at the May 8 meeting. At the same meeting, the director of the Parents' preferred program, [], presented a proposal for ESY to the District (N.T. pp. 92—95, 108; P-B, S-A)
12. The ARIN program would have provided Student with an hour of one to one tutoring in math by a special education teacher each week for a period of five weeks during the summer. Goals would have been developed by Student's IEP team upon Parents' acceptance of the proposal. Assuming that Student's participation in the ESY program would have been typical of the way that program generally operates with respect to District students, the ARIN teacher assigned to tutor Student would have been given the IEP and ESY goals, and from those materials, would have developed a specific plan of instruction, would have arranged a mutually agreeable time and location for meeting with Student, would have provided additional materials for Student to work on between tutoring sessions, and would have generated a report to the District concerning Student's progress at the end of the program. (N.T. pp. 97, 105, 106, 116, 122, 129, 130, 134)
13. Because the Parents rejected the District's proposal for the ARIN program, no ESY goals were developed for Student and no ESY NOREP was issued. (N.T. pp. 64, 65, 101, 109, 110, 120, 121, 125, 131)
14. The [] program requested by Parents provides one to one instruction in computer, technical and video production areas, as well as in math. Math instruction is provided to Student by a peer tutor under the supervision of a certified math specialist. The [] program also provides for social skills development by means of regular interaction with peers, including typical peers. Student has served as a facilitator for two small (4 students) social skills groups of younger children and participated in a social skills group meeting. Student also has structured and unstructured opportunities for

social interaction throughout the day. Student's IEP transition goals are addressed by career exploration activities including classes, site visits to observe people engaged in activities of interest and development of potential internship opportunities. (N.T. pp. 22—26; P-B)

15. Student is attending classes at [] approximately 14 hours/week during a six week period. It is located approximately 33 miles from Student's home. Student's Mother is providing transportation, for which she estimates a total cost of \$1,000.00, based upon one round trip per camp day. She remains in the area while Student attends the program. (N.T. pp. 35—37; P-C)
16. The out of pocket cost of the summer day camp program for Student's Parents is \$1500.00. Student received a discount from the full cost of the program because Student is serving as a staff intern for app. 3 hours/week, including training and staff meetings. Part of the remaining \$2,000.00 cost was covered by a \$500.00 mini-grant. (N.T. pp. 26,)
17. Student's Parents believe that an appropriate ESY program should include components to address and further all of the IEP goals. (N.T. pp. 20, 40, 53, 54, 127)
18. Student's Parents do not believe that the ARIN program proposed by the District was appropriate for Student, based upon the unsuccessful experience with math tutoring provided by the teachers during the 2007/2008 school year. The May 16, 2008 IEP provides for a peer tutor in math as part of the modifications/specially designed instruction (SDI) to be provided for Student. (N.T. pp. 21; 38, S-A, S-H)

DISCUSSION AND CONCLUSIONS OF LAW

Under the federal IDEA regulations, ESY services are to be provided to an eligible student if necessary to assure that Student receives a free, appropriate public education (FAPE). 34 C.F.R. §300.106(a)(2). Pennsylvania regulations provide additional guidance for determining ESY eligibility, requiring that the

factors listed in 22 Pa. Code §14.132 (a)(2) (i)—(vii) be taken into account.¹ In determining whether the District has offered an appropriate program, however, the proper standard is whether the proposed 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). *See also, In Re: The Educational Assignment of M. L.*, Special Education Opinion No. 1498 (July 1, 2004).

Here, eligibility is not an issue with respect to a summer program for math instruction. The District determined that Student is eligible for ESY based upon the significant needs and slow academic progress in numerical operations, math reasoning, basic concepts and applications, since Student is functioning at only a mid-fourth to early fifth grade level in all of those areas. (F.F. 7; S-B at pp. 8, 9) With respect to the ESY math program, the only issue to be determined is whether the District offered an appropriate program.

¹ The District suggested in its written closing argument that the version of 22 Pa. Code §14.132 in effect prior to July 1, 2008 applies here, since the facts underlying this case, particularly the ESY decisions, occurred while the former regulations were in effect. There are, however, no substantive differences between the two versions of §14.132. Moreover, Parents’ references to the legal requirements for ESY in their written closing argument were included in the ESY Eligibility Basic Education Circular (BEC), reflecting Pa. Dept. of Education ESY policy, which was in effect from April 1, 2003 to June 30, 2008. The additions to §14.132 which became effective on July 1, 2008 largely incorporated into the revised regulations policies originally found in the BEC concerning the timing of a school district’s ESY eligibility determination and issuing of an ESY NOREP. The applicable law, therefore, is the same prior to and after July 1, 2008.

There are, however, issues in dispute concerning Student's need for continuous programming, and, therefore, eligibility for ESY, in the areas of social skills, computer skills, and transition services, none of which were included in the District's ESY proposal, but are components of the [] program which the Parents requested as Student's ESY program.

Appropriateness of the District's ESY Program for Math

Although the District determined that Student is eligible for ESY due to the significant deficits/lack of academic progress in math, it did not actually propose an ESY program for Student to address those needs. Rather, the District offered five hours of tutoring through ARIN, but without developing any goals or objectives for such instruction. (F.F. 11, 12, 13) Since the District's proposed program is completely devoid of content, it is impossible to reach a reasoned conclusion that the District's proposal for ESY would have provided Student with "meaningful benefit," *i.e.*, the opportunity for "significant learning," as required by *Ridgewood*.

Having determined that Student was eligible for ESY services, the District was obligated to develop an ESY program for Student. *See In Re: The Educational Assignment of N.B.*, Special Education Opinion No. 1685 (Jan. 2006), in which the Appeals Panel upheld this hearing officer's conclusion that once a student is determined to be eligible for ESY services, the school district has a duty to develop

and provide an ESY program. The testimony of the District's school psychologist and special services coordinator acknowledged the need for ESY goals and objectives from Student's IEP team as the programmatic structure which the ARIN tutor would use to select the appropriate materials and design the specific instruction to be used for Student. *See, e.g.*, N.T. p. 105, l. 18—21: "I would feel that whomever would provide the ESY instruction would need to receive direction in terms of what those [ESY] goals would be."; N.T. p. 122, l. 12—16: "The program would be what we develop as an IEP team in terms of developing math reasoning skills, math calculation skills and then the District's recommendation is for ARIN ESY program to then deliver that service."

Without an actual proposed ESY program, the District cannot demonstrate that its ESY offer was appropriate, despite testimony from its witnesses concerning past successes with the ARIN program. (*See* N.T. pp. 98, 100, 115, 116). The witnesses were not actually testifying to the appropriateness of an ESY program for Student, having already acknowledged that no program had been developed for this student. They were, in reality, expressing their confidence that ARIN could appropriately implement any ESY program that might have been developed. Moreover, the District was unconvincing in its efforts to establish the appropriateness of its proposed means of delivering its inchoate ESY program. The District presented no testimony to refute Parents' contention that teacher

tutoring had been unsuccessful in improving Student's academic performance in math during the 2007/2008 school year. (F.F. 18) Both the evaluation results and Student's math grades support Parents' contention that one to one tutoring by an adult teacher did not make a significant difference in the acquisition of math skills. (F.F. 5, 7)

Despite acknowledging that Student's IEP team was responsible for developing the ESY program, and despite the lack of any real basis for believing that tutoring by a special education teacher would be beneficial to Student, and without knowing anything about how the unidentified ARIN tutor would instruct Student, the District failed to convene the IEP team to fashion an appropriate ESY math program because the Parents refused to accept the District's standard ESY provider and means of delivering an ESY program. The District appears to have taken the position that it fulfilled its ESY obligation to Student by proposing the barest suggestion of an ESY math program, "tutoring", and identifying a service provider, and that the Parents' rejection of teacher tutoring as the type of instruction and ARIN as the ESY provider relieved it of any further obligation to provide Student with ESY services. There is, however, no legal basis for that position, and the District cited no authority supporting its argument that Parents' "intransigence" in refusing the District's proposal for a service provider relieves it of the responsibility to propose a fully developed, appropriate ESY math program.

Having determined, however, that Student is eligible for ESY math instruction, the District was, and remains, obligated to provide Student with an ESY math program for 2008.

Unfortunately, Parents provided little information concerning the specifics of the math component of the program for which they seek reimbursement, other than noting that a peer tutor provides direct instruction under the supervision of a math specialist. (F.F. 14) Student's current IEP, however, provides for peer rather than teacher tutoring for math, indicating that the IEP team considers that to be an appropriate instructional technique for Student. (F.F. 18) Moreover, Parents are obviously satisfied with the math component of their requested program. (*See* N.T. pp. 21, 22, 66). Since the District is obligated to provide Student with an ESY program for math, but has not done so, and since Student is actually receiving math instruction in the summer program, and it would be virtually impossible for the District to develop and implement an appropriate ESY math program in the few remaining weeks of summer, the District will be ordered to pay for the hours of math instruction provided to Student by the summer day camp program.

Student's Eligibility for Additional ESY Services

Neither the Parents nor the District are entirely correct in their respective views concerning the purpose, scope and appropriateness of ESY services for Student other than math instruction. Under Pennsylvania special education

regulations relating to ESY eligibility, the Parents are correct that consideration of eligibility for ESY services should not be limited to regression and recoupment alone, as determinative factors. The remaining factors listed in §14.132(a)(2) must also be taken into account, as appropriate. Here, two of those factors support broader ESY eligibility for Student, specifically, “The extent to which a skill or behavior is particularly crucial for the student to meet IEP goals of self-sufficiency and independence from caretakers” and “Whether the student’s disability is severe, such as autism/pervasive developmental disorder, serious emotional disturbance, severe mental retardation, degenerative impairments with mental involvement and severe multiple disabilities.” In, addition, §14.132 also lists “Reliable sources of information regarding a student’s educational needs , propensity to progress, recoupment potential and year to year progress,” which include, “Reports by parents of negative changes in adaptive behaviors or in other skill areas,” “Observations and opinions by educators, parents and others,” and “Results of tests, including criterion-referenced tests, curriculum-based assessments, ecological life skills assessments and other equivalent measures.”

In determining the scope of Student’s ESY eligibility, the District should have, but did not, take into account the disability, and the recent reevaluation it conducted, which revealed serious deficiencies in Student’s adaptive behavior with

respect to independent school functioning, self-help skills and peer relationships. (F.F. 2, 8; S-B, p. 5).

The testimony of the District's witnesses who stated that Student's deficits in adaptive and social skills were not severe enough to warrant ESY services was unpersuasive in light of the reevaluation report, which discussed the deficiencies in adaptive and social skills in nearly as much detail as the deficits in math. The District witnesses also did not contradict Mother's testimony that Student experienced a decline in social skills and an increase in bullying during the 2007/2008 school year, which supports the need for additional training/practice in peer relationship and other social skills. (F.F. 8)

The District however, focused its ESY consideration only on Student's academic needs, which are limited to math in terms of a deficiency severe enough to warrant ESY services. Nevertheless, although the District used the terms regression/recoupment as a mantra when discussing its limited ESY eligibility determination for Student, neither factor was, in fact, the underlying reason for recommending ESY for Student in 2008. As the special education supervisor testified, the primary reason for offering Student ESY services in math was to give Student the opportunity to benefit from "intensive remediation and review of the skill deficit in math reasoning, in math calculation." N.T. p. 116, l. 3—5. The District's basis for determining that Student was eligible for ESY in math was, in

essence, to help “catch up” to grade level, as well as to preserve the skills Student had by not interrupting the math instruction for the entire summer. Both the reevaluation report and Student’s most recent IEP note that math has always been a weakness for Student, yet the District had never before been concerned about loss of math skills over extended breaks, since 2008 was the first time Student was to be provided with ESY services. (F.F. 7, 11; S-B). When the reevaluation report revealed significant deficits in math which placed Student far behind age and grade level expectancy, the District implicitly looked beyond regression and recoupment considerations, as the Pennsylvania regulations provide, to determine that Student was eligible for ESY for math.

The District, however, refused to apply the same standards to Student’s equally serious social and other adaptive deficiencies. The testimony of the District witnesses left the definite impression that to the District, the ARIN tutoring model and ESY were synonymous, at least as far as Student was concerned. The strong inference this hearing officer drew from the testimony of the District witnesses is that, for reasons not persuasively linked to Student’s specific and individualized needs, only ARIN services were considered for Student, and that the decision that Student should not receive social skills programming during the summer was driven not by the lack of need in that area, but by the probable absence of an ARIN tutor to address social skills deficits. That inference is

buttressed by the District's failure to take any additional steps toward developing an ESY program for Student in math when the Parents rejected ARIN tutoring for math, as discussed above.

Because the record strongly supports Student's need for developing and practicing adaptive skills in the areas of independent school functioning, self-help and peer relationships, and because the record, including Parents' testimony and the description of the components of the summer day camp program, established that it is addressing those needs for Student (F.F. 14), the District will also be required to reimburse Parents for those aspects of Student's current summer program.

On the other hand, however, neither the facts established at the due process hearing, nor the law relating to ESY eligibility, support the Parents' contention that Student is entitled to an ESY program to further the IEP transition goals. There is no evidence that Student has significant deficits in any areas related to those goals, or that summer programming in those areas is otherwise necessary for Student to receive FAPE. The Pennsylvania regulations concerning ESY eligibility are quite clear: "The need for ESY services will not be based on ...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." 22 Pa. Code §14.132(c)(3). The District will not, therefore, be required to reimburse

Parents for the hours Student is provided with direct instruction and/or is engaged in working alone on computer skills and video production at the summer program. Any hours in which Student is involved in group work with peers in those aspects of the program, however, are compensable as part of the adaptive and peer interaction skills for which Student needs instruction and practice opportunities to address the serious deficiencies as discussed above.

CONCLUSION

Based upon the evidence presented at the due process hearing in this matter, and the applicable law relating to ESY eligibility and appropriate programs and services, the Freeport Area School District will be required to reimburse Student's Parents for a substantial portion of the costs they incurred in providing the [] program for Student during the summer of 2008.

The District will be required to pay the Parents' out of pocket costs for the [] program, with the exception of that portion of the total number of hours attributable to direct instruction in, or solo independent work with, computers and video production. Those hours shall be deducted from the Parents' \$1500.00 out of pocket cost for Student's attendance at the []. In calculating the award to Parents, however, the District will be required to pay at least the amount it would have paid for its proposed ARIN math tutoring, since the District should not

benefit financially from its failure to develop and propose a program for Student that appropriately met all of the ESY needs.

In addition, because Student could not attend the program without transportation, Parents are also entitled to recover those costs. Parents, however, provided no evidence at the hearing concerning how they arrived at their estimate of \$1,000.00 as their out of pocket costs for transportation. Transportation reimbursement, therefore, will be limited to the same rate of mileage reimbursement the District provides to its own employees when traveling, or the \$1,000.00 reimbursement amount requested by Parent, whichever is less.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the Freeport Area School District is hereby **ORDERED** to take the following actions:

1. Reimburse Student 's Parents for their out of pocket costs for the summer day camp program Student attended, excepting from the amount paid by Parents the amount attributable to the total number of hours of direct instruction provided to Student in computer and video production skills, and the total number of hours which Student spent working independently and alone on computer and/or video production skills and tasks during the attendance at the program. The cost of those

hours shall be deducted from the \$1500.00 Parents paid for Student to attend the program.

The amount paid to Parents by the Freeport Area School for the program shall at least equal the amount the District would have paid the Armstrong Indiana Intermediate Unit for providing five hours of math tutoring to Student during the summer of 2008.

2. Reimburse Student 's Parents for the costs of transporting Student to the summer day camp, for each day of attendance, at the same rate of reimbursement the District provides to its own employees when traveling, or in the amount of \$1,000.00, whichever is less.

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

August 7, 2008