

Pennsylvania
Special Education Due Process Hearing Officer

DECISION

Child's Name: A [REDACTED] T [REDACTED]

Date of Birth: [REDACTED]

Dates of Hearing: June 12 and 19, 2009

OPEN HEARING

ODR No. 10110/08-09 LS

RECEIVED
JUN 25 2009
BY: M.W.

EXTENDED
SCHOOL
YEAR

Parties to the Hearing:

[REDACTED]
[REDACTED]
[REDACTED]

Representative:

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Date Record Closed: June 24, 2009

Date of Decision: June 25, 2009

Hearing Officer: Daniel J. Myers

INTRODUCTION AND PROCEDURAL HISTORY

A [REDACTED] T [REDACTED] (Student)¹ is a [REDACTED] year old resident of the Lake-Lehman School District (School District) who has been diagnosed with Aspergers Disorder and Speech and Language Impairment. Although the parties agree that Student is eligible for extended school year (ESY) services for summer 2009, they cannot agree to the particular programs to be used. Student wants to receive Wilson Reading and Saxon Math because the parties have already agreed those will be the programs offered during the upcoming 2009-2010 school year. The School District wants to offer SRA Corrective Reading and Houghton-Mifflin Math Steps during summer 2009 ESY because those are the programs available at this time. As discussed below, I reject the School District's argument that it generally enjoys the right to determine which specific methodology will be used in this case. Not only is Student's evidence more persuasive, but because the School District has not yet developed any IEP at all, it has failed to offer a free and appropriate public education (FAPE). Student is entitled to an equitable compensatory education award requiring the reading and math programs preferred by Student.

ISSUE

Whether Student's ESY program should consist of SRA Corrective Reading and Houghton-Mifflin Math Steps or Wilson Reading and Saxon Math?

¹ All further references to Aaron will be impersonal and gender-neutral. This is intended not to be disrespectful, but rather to ensure Student's confidentiality.

FINDINGS OF FACT

1. Student, whose date of birth is [REDACTED] is a resident of the School District who has been diagnosed with Asperger's Disorder and a speech and language impairment. (P1; P2) ² Student has significant skill deficits in basic reading skills, reading fluency and reading comprehension, spelling and written expression, mathematics reasoning and calculation. (NT 24, 28) Student also has a crucial need for consistency. (NT 52) Student was extremely anxious when he was in public schools several years ago, Student had good experience at private school recently, and Student's return to the public schools requires consistency and a seamless transition. (NT 53)
2. On November 22, 2008, a special education due process hearing officer ordered the School District "to offer an appropriate program and placement for the Student forthwith...." The hearing officer then listed specific actions that the School District was required to follow, including comprehensive evaluation report at public expense, an IEP meeting within ten days of the date of the evaluation report, and development of a program and placement addressing all of Student's educational needs, including research based programs providing explicit academic instruction. (P1) On January 13, 2009, the Appeals Panel denied the School District's appeal and affirmed the Hearing Officer's order. (P2)

² References to "P," "SD," and "HO" are to the Parent, School District, and Hearing Officer exhibits, respectively. References to "NT" are to the transcript of the due process hearing sessions

3. On February 25, 2009, the School District paid Dr. K to conduct an independent educational evaluation. (N.T. 23, 56)
4. Over the course of the remaining 2008-2009 school year, Student was evaluated and the parties met several times to develop an appropriate program and placement for Student. (P5; P6; P8) A draft IEP has been developed, but not finalized. (S12)
5. On or about May 30, 2009, Student filed a request for due process hearing, complaining that the School District had not yet offered to Student an appropriate ESY program for summer 2009.
6. Student requires ESY for summer 2009. (NT 23) The School District proposes using SRA Corrective Reading and Houghton-Mifflin Math Steps for summer 2009 ESY, while Student wants Wilson Reading and Saxon Math for summer 2009 ESY. (S1; S2)
7. Both Wilson Reading and SRA Corrective Reading are research-based, very highly structured, explicitly taught, reading programs based on teaching reading decoding, phonemic awareness and phonics. (NT 27, 44, 115) SRA is teacher-scripted, whereas Wilson reading doesn't have teacher scripts. (NT 115) Both the independent evaluator as well as the School District's psychologist believed that either program, by itself, could meet Student's reading needs. (NT 40, 116, 144)
8. There is no reason why Wilson Reading cannot be used for Student's summer 2009 ESY program, except that the present ESY classroom uses SRA. (NT 143-144)

9. The independent evaluator believes that Wilson is a more appropriate ESY reading program for Student because it will provide continuity into the school year. The School District intends to use Wilson for the 2009-2010 school year, and has already administered the Wilson Diagnostic assessment in preparation for 2009-2010. (NT 25) In addition, while SRA can accomplish some of the same objectives as Wilson, Student's reading baseline is in Wilson, the parties have agreed to Wilson, and there is no draft IEP with present education levels in SRA and no explanation of how SRA will be implemented or measured. (NT 40-41)
10. The School District's psychologist believes SRA is more appropriate for summer 2009 ESY because it would help Student become familiar with a very highly structured, very organized approach to reading, which would then be "a nice ebb and flow" into Wilson in the fall, which also is very highly structured. (NT 117)
11. SRA was never discussed with parents during IEP meetings this spring. (NT 124)
12. Saxon Math is a very sequential, very systematic and very practice oriented math curriculum that the independent evaluator believes would be a good fit to advance Student's progress in math. (NT 28) The School District's psychologist was not familiar with Saxon Math and could not speak to its appropriateness for Student. (NT 144)
13. The School District had agreed that Saxon math would be the basis for Student's math instruction. The District had ordered Saxon math, but when the materials came in, they were for high school students and not for Student's grade or functional level. (NT 28)

14. The independent evaluator does not believe Houghton Mifflin's Math Steps will offer FAPE to Student because it is not consistent with what will be provided during the school year, and it seems to be offered primarily because it's on the shelf in the School District as opposed to designed to meet Student's needs. (NT 30)
15. On or about June 10, 2009, in response to my request during a conference call with the parties' lawyers, both parties articulated in writing the specific ESY program they want. (S1; S2; P16):
16. The School District proposed (S1):
 - a. 45-60 minute instructions either in one-to-one or small group settings, three times a week in a systematic, sequential, research-based multisensory program such as SRA Corrective Reading;
 - b. 45-60 minute instructions either in one-to-one or small group settings, three times a week in a systematic, sequential, research-based multisensory program such as Houghton Mifflin's Math Steps;
 - c. 45-60 minute instructions, three times a week in a small group setting focusing on social skills and pragmatic language. The District intends to secure the input of Dr. Kay regarding the form of the instruction;
 - d. The total hours of ESY will be at least nine hours a week;
 - e. instruction will be delivered at a particular elementary school from July 7, 2009 through August 18, 2009;
 - f. orientation one on one with a counselor in the week prior to the start of the 2009-2010 school year up to 5 days.

17. The Student proposed (S2; P16):

- a. the Wilson Reading System three periods per week during tutorial sessions no shorter than 45-60 minutes and two periods per week for 45-60 minutes using Wilson Fluency Readers and through a fully-qualified Wilson specialist
- b. the Saxon Math Curriculum five periods per week with small group or one-to-one tutorial sessions ranging from 45 to 60 minutes for each session.
- c. keyboarding skills during ESY 2009 30 minutes per day/three days per week and with training in the use of Kurzweil 3000 2 days/week for 30 minutes each session.
- d. instruction will be delivered at the junior high school from Monday, June 29, 2009 until Wednesday, August 5, 2009.
- e. transportation to/ from home and school each ESY day
- f. a one-week orientation program during August, 2009 to familiarize student with the junior high school that Student will be attending during the 2009-2010 school year.

18. Over the complaints of both parties concerning inconvenience and unavailability of witnesses, I conducted expedited due process hearing sessions on June 12 and June 19, 2009. Exhibits P-1 through P-9, P-11 through P-14, P-16 and P17 were admitted into the record. P-10 and P-15 were not admitted. (NT 151) Exhibits SD-2, SD-12 and SD-14 were admitted into the record without objection, SD-3

through SD-10 were admitted over Student's objection. SD-13 was not admitted.

(NT155)

DISCUSSION AND CONCLUSIONS OF LAW

State regulations require that parents who disagree with a school district's ESY recommendation will be afforded an expedited due process hearing. 22 Pa. Code §14.132(e)

The United States Supreme Court has held that, in a special education administrative hearing, the burden of persuasion (which is only one element of the larger burden of proof) is upon the party seeking relief, whether that party is the disabled child or the school district. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); L.E. v. Ramsey Bd. Of Education, 435 F.3d 384 (3d Cir. 2006) If the evidence is not in equipoise, but rather one party has produced more persuasive evidence than the other party (regardless of who seeks relief), then the Supreme Court's ruling is not at issue – in that case I simply find in favor of the party with the more persuasive evidence.

Here, Student bears the burden of persuasion because Student contends that the School District's ESY offer is inappropriate. Because the evidence in this case is not in equipoise, however, Schaffer's burden of persuasion discussion has no bearing upon the ultimate decision.

In this case, there is no dispute between the parties over Student's eligibility for ESY services. The underlying dispute between the parties concerns the particular brand names of the reading and math programs to be used this summer. Under the IDEA, parents do not have a right to compel a school district to provide a specific program or employ a specific methodology in educating a student. Greenwood v. Wissahickon

School District, 571 F.Supp.2d 654 (E.D. Pa 2008); M.M. v. School Board of Miami-Dade County, Florida, 437 F.3d 1085 (11th Cir. 2006); Lachman v. Illinois Bd. of Educ., 852 F.2d 290 (7th Cir. 1988) Decision-making authority regarding methodology has been delegated by Congress under the IDEA to the states, rather than to parents, although parents have a right to participate in the process. Case v. Allegheny IU, 49 IDELR 34, 107 LRP 69059 (W.D.Pa. Nov. 29, 2007)

In this case, however, there is ample evidence that Wilson Reading and Saxon Math are more appropriate in meeting Student's ESY needs than SRA Corrective Reading or Houghton-Mifflin's Math Steps.

Both the independent evaluator as well as the School District's psychologist believed that either reading program, by itself, could meet Student's reading needs. (NT 40, 116, 144) The independent evaluator's opinion was more persuasive than the School District psychologist's opinion, however, regarding why Wilson Reading would be a more appropriate ESY choice than SRA.

Student has a crucial need for consistency and seamless transition into the school year. (NT 52-53) The School District intends to use Wilson for the 2009-2010 school year, and has already administered the Wilson Diagnostic assessment in preparation for 2009-2010. (NT 25) These are good reasons for requiring Wilson for the summer.

The School District's psychologist, on the other hand, recommends SRA simply because it would help Student become familiar with a very highly structured, very organized approach to reading, which would then be "a nice ebb and flow" into the Wilson program in the fall. (NT 117) The School District's psychologist gave no other reason for preferring SRA over Wilson. I reject this opinion because the independent

evaluator's opinion is more persuasive and convinces me that an even "nicer" ebb and flow into the Wilson program in the fall would be the Wilson program this summer.

Regarding the math program, Saxon Math is a very sequential, very systematic and very practice oriented math curriculum that the independent evaluator believes would be a good fit to advance Student's progress in math. (NT 28) The School District's psychologist was not familiar with Saxon Math and could not speak to its appropriateness for Student. (NT 144) The independent evaluator does not believe Houghton Mifflin's Math Steps will offer FAPE to Student because it is not consistent with what will be provided next school year, and it seems to be offered primarily because it's on the shelf in the School District as opposed to designed to meet Student's needs. (NT 30) I note again that Student has a crucial need for consistency and a seamless transition. (NT 52-53) In light of the School District's agreement that Saxon Math would be the basis for Student's 2009-2010 math instruction (NT 28), Saxon Math is the more appropriate summer 2009 ESY program.

Finally, in addition to the substantive comparison of reading and math programs described above, there is another, equitable, basis for my conclusions in this case. The School District was ordered in November 2008 to evaluate Student and to develop an IEP, which Order was affirmed by the Appeals Panel in January 2009. (P1; P2) By May 30, 2009, however, the School District still had not issued an IEP and NOREP for summer 2009 ESY. In addition, I consider it significant that SRA was never discussed with parents during IEP meetings this spring. (NT 124) Both the delay in compliance with the Hearing Officer and Appeals Panel's Order, as well as the School District's apparent bait-and-switch, constitute procedural FAPE violations. Procedural compliance

is as essential to FAPE as substantive compliance. Hendrick Hudson School District v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982)

Courts have broad discretion in awarding relief under IDEA. F.C. v Philadelphia, 595 F.Supp. 566 (E.D. Pa 2009) The compensatory education analysis employed by administrative hearing officers has been recognized to constitute an equitable remedy. In Re Interboro School District, Pennsylvania Special Education Appeal No. 1431 (2004) Where a School District has failed to offer or provide FAPE, however, I believe it is within a hearing officer's equitable power for the hearing officer, rather than the School District, to choose the methodology that will constitute compensatory education.

Exercising equitable authority is not an easy task because compensatory education should be shaped according to the specific facts of each case. The exercising authority must balance the interests of finality, efficiency and use of the School District's resources with the compelling needs of Student and family. F.C. v Philadelphia, 595 F.Supp. 566 (E.D. Pa 2009)

In this case, finality is essential because summer 2009 is here and there is no more time to dispute which reading and math programs will be employed. Where efficiency is concerned, Wilson Reading and Saxon Math are available, well-known, and the School District will be using these programs during the 2009-2010 school year. Thus, requiring their use during the summer 2009 ESY program will not drain School District resources. Finally, Student's substantive need for Wilson Reading and Saxon Math during the summer 2009 ESY program is based upon the fact that Student has difficulties with transition, and while the use of the same programs during summer and fall 2009 is not

essential, it is sufficiently compelling under the circumstances. Based upon this equitable analysis, I will award the relief sought by Student.

CONCLUSION

A School District ordinarily has the right to determine the methodology to be used in implementing an IEP. In this case, however, the evidence persuades me that Wilson Reading and Saxon Math are more appropriate to meet Student's summer 2009 ESY needs than SRA Corrective Reading and Houghton-Mifflin Math Steps. In addition, the procedural FAPE has been denied through the School District's failure even to discuss SRA with parents as well as its failure to offer an IEP and ESY NOREP. Under the circumstances of this case, I conclude that the relief requested by Student constitutes both appropriate ESY as well as appropriate compensatory education.

ORDER

The School District shall provide to Student:

- the Wilson Reading System three periods per week during tutorial sessions no shorter than 45-60 minutes and two periods per week for 45-60 minutes using Wilson Fluency Readers and through a fully-qualified Wilson specialist;
- the Saxon Math Curriculum five periods per week with small group or one-to-one tutorial sessions ranging from 45 to 60 minutes for each session;
- keyboarding skills during ESY 2009 30 minutes per day/three days per week and with training in the use of Kurzweil 3000 2 days/week for 30 minutes each session;
- instruction will be delivered at the junior high school from Monday, June 29, 2009 until Wednesday, August 5, 2009;

- transportation to/ from home and school each ESY day;
- a one-week orientation program during August, 2009 to familiarize student with the junior high school that Student will be attending during the 2009-2010 school year.

Daniel J. Myers

HEARING OFFICER

June 25, 2009