

Pennsylvania  
Special Education Hearing Officer

DECISION

Child's Name:

Date of Birth:

Date of Hearing: July 15, 2014

**CLOSED HEARING**

ODR Case # 15180-1314AS

Parties to the Hearing:

Representative:

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Date Record Closed:

July 15, 2014

Date of Decision:

June 25, 2014

Hearing Officer:

Jake McElligott, Esquire



## **ISSUES**

Was the District's proposed ESY program predetermined and/or did it lack individualization?

If so, is the student entitled to compensatory education?

If not, is the District's proposed ESY program appropriate?

## **FINDINGS OF FACT**

1. In November 2013, after attending a cyber charter school, the student entered the District under the terms of an individualized education plan ("IEP") drafted by the cyber charter school. (Parent Exhibit ["P"]-1; School District Exhibit ["S"]-8 at page 2; Notes of Testimony ["NT"] at 157-158).
2. The IEP from the cyber charter school indicated that the student was eligible for ESY programming. (P-1 at pages 23-25).
3. Shortly after enrolling, the District requested, and received, permission to re-evaluate the student so the District could draft its own IEP for the student. (S-5).
4. In December 2013, the District issued its re-evaluation report. (S-9).
5. In January 2014, the student's IEP team convened to consider the District's IEP. (S-13).

6. The January 2014 IEP indicated that the student was not eligible for ESY programming. The IEP team, however, discussed gathering more data related to the need for ESY programming. (S-13 at page 38; NT at pages 114-117, 135-137, 165-166, 201-202).
7. The student's parent largely approved the District's recommended educational placement through the January 2014 IEP, with certain explicit and detailed exceptions. (P-3).
8. Included in these exceptions was the removal of ESY eligibility. Parent included the following notation beside her approval: "I also do not approve of any proposal to remove ESY. ESY is in (the student's) current IEP and I wrote it back into this proposed IEP." (P-3 at page 1).
9. Prior to any further IEP meeting, a letter dated March 26, 2014 was sent to the parent regarding ESY programming. The letter read, in part, "At the time of your child's IEP meeting, it was determined that your son/daughter was eligible for the Extended School Year (ESY) Program." The letter then went on to detail the District's ESY program schedule (Tuesdays, Wednesdays, and Thursdays from 9 AM - 1 PM over July 1<sup>st</sup> through August 7<sup>th</sup>) and requested information about whether or not the student would attend and other student-specific information. (P-4).

10. By invitation dated April 9, 2014, the District invited the parent to an IEP team meeting to discuss ESY eligibility and programming. (S-16).
11. On May 5, 2014, the parent responded with availability on over the seven business days from Friday, May 9<sup>th</sup> through Monday, May 19<sup>th</sup>. (S-16).
12. A meeting was tentatively scheduled for May 16<sup>th</sup>, but parent's counsel (an individual who is not counsel of record for parent in this matter) was unavailable for the meeting. (S-20; NT at 178-179).
13. On June 5, 2014, the student's IEP team met to discuss ESY programming. (S-19; NT at 121-122).
14. The June 2014 IEP indicated that the student was eligible for ESY programming and included ESY goals. (S-21, S-22).
15. The IEP team meeting ended abruptly and the team was unable to have a substantive discussion of ESY programming without any consideration of the student's individual ESY program. (NT at 241-242).
16. Witnesses from the District testified credibly about their individual involvement with the student's ESY programming. Each testified consistently, though, that the District's 'ESY program' laid out in the March 26, 2014 form letter is not an IEP team decision

and is not subject to change. (NT at 85-90, 183-185, 202-205, 299-300).

### **DISCUSSION AND CONCLUSIONS OF LAW**

The provision of ESY services is governed by both federal and Pennsylvania special education law. (34 C.F.R. §300.106; 22 PA Code §14.132). Where the IDEA speaks generally to the availability of and qualification for ESY programming (34 C.F.R. §§300.106(a)(2), (b)), Pennsylvania special education regulations speak in detail about the provision of ESY services. (22 PA Code §14.132).

As such, to assure that an eligible child receives a FAPE (34 C.F.R. §300.17), an IEP must be “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.” Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982). ‘Meaningful benefit’ means that a student’s program affords the student the opportunity for “significant learning.” Ridgewood Board of Education v. N.E., 172 F.3d 238 (3<sup>rd</sup> Cir. 1999)), not simply *de minimis* or minimal education progress. (M.C. v. Central Regional School District, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996)). A vital component of FAPE is consideration by the student’s IEP team of the student’s individual needs and targeted programming to address those individual needs. (34 C.F.R. §§300.17, 300.320-324).

In this case, the preponderance of the evidence is that the IEP team's consideration of the student's ESY programming was predetermined to fit within the specific context of the District's ESY programming schedule rather than an individualized consideration of the student's needs with ESY programming designed to meet those needs. Every District witness supported this proposition. Certain District witnesses remediated this position upon follow-up questioning by District counsel with testimony that there would be individualization of the student's programming (e.g., NT at 241-242, 168-169). But the tenor and tone of District witnesses who testified by telephone, and the demeanor of the District witness who testified in person, lead this hearing officer to the conclusion that the District's approach to ESY programming for this student was a standard-program-first, rather than IEP-first, approach. And that supports the conclusion that, on this record, there was a lack of individualization for the student's ESY programming.

Added to these credibility-based determinations is the fact that the standardized ESY program information was supplied to the parent without any IEP meeting having been convened or any consideration of ESY eligibility/programming having been considered by the IEP team. This is a further indication that decisions were made by the District about ESY programming, and the applicability of its standard ESY program, without any input from the student's IEP team.

Accordingly, an award of compensatory education will follow.

### Compensatory Education

Where a school district has denied a student a FAPE under the terms of the IDEA, compensatory education is an equitable remedy that is available to the student. (Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992)). The right to compensatory education accrues from a point where a school district knows or should have known that a student was being denied FAPE. (Ridgewood; M.C.). The U.S Court of Appeals for the Third Circuit has held that a student who is denied FAPE “is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem,” (M.C. at 397).

Here, the student was denied FAPE for summer 2014 ESY programming. The compensatory education award will be crafted on basic principles that, in the experience of this hearing officer, represent an appropriate ESY program. Equitably, the student will be awarded 5 hours of compensatory education for every non-holiday Monday-Thursday over the period for the period of Monday, June 23<sup>rd</sup> through Thursday, July 31<sup>st</sup>. This totals 150 hours of compensatory education.

As for the nature of the compensatory education award, the parent may decide in her sole discretion how the hours should be spent so long



as they take the form of appropriate developmental, remedial or enriching instruction or services that further the goals of the student's current or future IEPs. These hours must be in addition to the then-current IEP and may not be used to supplant the IEP. These hours may occur after school, on weekends and/or during the summer months, when convenient for the student and the family.

There are financial limits on the parent's discretion in selecting the appropriate developmental, remedial or enriching instruction that furthers the goals of the student's IEPs. The costs to the District of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the hourly salaries and fringe benefits that would have been paid to the District professionals who provided services to the student during the period of the denial of FAPE.

### **CONCLUSION**

The District denied the student a FAPE in its handling of ESY programming for summer 2014. The student is entitled to compensatory education.

**ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the student is entitled to 150 hours of compensatory education. The nature and limits of the compensatory education are set forth above in the *Compensatory Education* section.

*Jake McElligott, Esquire*

Jake McElligott, Esquire  
Special Education Hearing Officer

July 25, 2014