

Pennsylvania
Special Education Hearing Officer

DECISION

Child's Name: [REDACTED]

Date of Birth: [REDACTED]

Date of Hearing: June 2, 2010

CLOSED HEARING

ODR Case # [REDACTED]

Parties to the Hearing:

Ms. [REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

Representative:

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[REDACTED]
[REDACTED]

Date Record Closed:

June 2, 2010

Date of Decision:

June 11, 2010

Hearing Officer:

Jake McElligott, Esquire

FINDINGS OF FACT

1. The student has been diagnosed with an emotional disturbance and a specific learning disability in reading. (School District Exhibit ["S"]-5, S-6).
2. The beginning of the 2009-2010 school year was difficult for the student. Following serious behaviors that put the student's health in jeopardy, in December 2009 the student began attending a full-time alternative therapeutic placement. (Parent's Exhibit ["P"]-6; S-4, S-6 at page 5, S-9, S-10; Notes of Testimony ["NT"] at 56).
3. The student's individualized education plan ("IEP") team met in January 2010. (S-16).
4. At the January 2010 IEP meeting, there was no discussion of ESY programming, and the IEP indicates that the student is not eligible for ESY programming. (S-16; NT at 39-40).
5. On May 12, 2010, parent filed a complaint seeking, among other things, compensatory education for not offering an ESY program for summer 2010. (Parent's Complaint at page 3).
6. On May 19, 2010, the IEP team met to discuss the student's IEP. There was no discussion of ESY programming at that meeting. (NT at 42-43, 57, 68).

7. On May 27, 2010, the District unilaterally issued a notice of recommended educational placement (“NOREP”) offering ESY programming. (P-4; NT at 57-60, 92-93).
8. In the period between the May 19th meeting and the May 27th NOREP, the student was invited to attend a wrestling camp/invitational tournament for nationally-ranked wrestlers. The camp/invitational takes place between July 10 - August 1, 2010. (NT at 71-72, 87-88).
9. Wrestling is a significant activity in the student’s life and is highly valued by the student. (NT at 57, 72-73, 76-77, 161-162).
10. The District proposes an ESY program at the alternative therapeutic placement which the student has attended since December 2009. (P-4).
11. The ESY program at the alternative therapeutic placement runs from July 5 - August 12, 2010 from 9 am - 1 pm. The ESY program includes academics, individual and group therapeutic support, social skills training, and field trips. (NT at 65).
12. Personnel from the alternative therapeutic placement testified credibly that the ESY program at that placement would be appropriate for the student. (NT at 50-51, 66-67, 155-158).
13. The District offers a direct ESY program to students. The District’s ESY program is offered on an itinerant basis where students receive individualized services on a schedule that varies

depending on the schedules of the teacher, parent, and student. There is no site location for the District's ESY program; the location is at the student's home or in a community setting, again depending on the individualized scheduling. (NT at 137-141).

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 IDEIA 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 (3rd Cir. 1999).

In this case, the District has proposed an ESY program that would be substantively appropriate. (FF 11, 12). Three factors, however, weigh against such a finding. First, the procedural violations in the months prior to the hearing are prejudicial. The District did not comply with the

timeline mandates of Pennsylvania special education regulations for the consideration of, and recommendation concerning, ESY programming. This mandate requires that, in every school year, the IEP team meet by February 28th to discuss ESY issues and the NOREP regarding ESY programming be issued by March 31st. (22 PA Code §§14.132(d)(2-3)). This is not mere *prima facie* non-compliance, though, and leads to the second factor regarding the District's denial of a FAPE. Second, and more importantly, the District failed to provide a FAPE when it unilaterally offered an ESY program without, at any time, IEP team discussion or consideration. (FF 4, 6, 7). The provision of special education programming, including ESY programming, must be collaborative and team-based, a team that explicitly includes the parent of the student. (34 C.F.R. §§300.321, 300.322). Regardless of the substance of the ESY program offered by the District, the procedural flaws clearly lead to a conclusion that the ESY programming belatedly offered by the District is rendered inappropriate.

A finding that the District's proposed ESY program is rendered inappropriate due to prejudicial procedural flaws then requires a determination of what form of ESY programming is appropriate. Here, the record supports a determination that the District can provide an appropriate ESY program through its own offerings. The District's ESY program is highly individualized, allowing each student to receive the services he or she requires at a time and place convenient to the family

and District teacher(s). (FF 13). Also, the student, already grappling with significant emotional issues, has an opportunity to engage in a significant wrestling experience which unarguably would provide emotional rewards to the student. (FF 1, 2, 8, 9). The District, through its own programming, can provide an appropriate ESY program that accommodates the student's scheduling needs.

Accordingly, an order will be entered to reflect the details of ESY programming to be offered to the student.

CONCLUSION

The District, through prejudicial procedural violations, has denied the student a FAPE in the offer of ESY programming for summer 2010. The District must provide ESY programming to accommodate the student's schedule.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the [REDACTED] District shall provide an ESY program to the student in summer 2010.

Within 10 calendar days of the date of this order, the IEP team shall meet to design an ESY program that provides appropriate academics, emotional support, and/or social skills training for the student's needs. The program shall be delivered by District employees and/by contract, as determined by the IEP team.

The exact number of such hours, and the scheduling of those hours, are left to the discretion of the IEP team. To accommodate the student's attendance at the wrestling camp/invitational tournament from July 10 – August 1, 2010, the services shall be scheduled, as determined by the IEP team, any time from the day following the IEP team meeting through July 9, 2010, and from August 2, 2010 through the day before the first day for students in the 2010-2011 school year in the [REDACTED] District. Any unused hours of the total hours of services determined by the IEP team that are not used as a result of the student's or parent's absence or unavailability

are forfeited and shall not carry over or be owed to the family.

Jake McElligott, Esquire

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June 11, 2010