

*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: N.W.

Date of Birth: [redacted]

Date of Hearing: July 9, 2015

### **CLOSED HEARING**

ODR Case # 16497-1415AS

Parties to the Hearing:

Parent[s]

Penn Hills School District  
260 Aster Street  
Pittsburgh, PA 15235

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Pamela Berger, Esquire  
434 Grace Street  
Pittsburgh, PA 15211

Chelsea Dice, Esquire  
Bruce E. Dice & Associates, P.C.  
787 Pine Valley Drive  
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July 9, 2015

July 23, 2015

Jake McElligott, Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

[Student] (“student”)<sup>1</sup> is a [mid-teenaged] student who has been identified as a student with a specific learning disabilities. The student resides in the Penn Hills School District (“District”).

The parties do not dispute that the student is a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEA”).<sup>2</sup> The parties dispute centers on the student’s extended school year (“ESY”) program for the summer of 2015. The parent maintains that the District’s proposed ESY program is inappropriate because it is geared to credit-recovery for failed classes in the 2014-2015 school year and not in furtherance of the student’s individualized education plan (“IEP”) goals. The District maintains that the proposed ESY program it has offered is appropriate and, as such, has complied with its duties under federal and Pennsylvania law to offer the student a free appropriate public education (“FAPE”).

For the reasons set forth below, I find in favor of the parent with modifications related to parents’ claim for remedy.

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<sup>1</sup> The generic use of “student”, rather than a name and gender-specific pronouns, is employed to protect the confidentiality of the student.

<sup>2</sup> It is this hearing officer’s preference to cite to the implementing regulation of the IDEA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §14.132.

## **ISSUES**

Is the District's ESY program appropriate?

If not, is the student entitled to compensatory education?

## **FINDINGS OF FACT**

1. In November 2014, the student was evaluated and identified as a student with specific learning disabilities in mathematics calculation and written expression. (School District Exhibit ["S"]-7).
2. In December 2014, the student's initial IEP included three goals: one in geometry, one in narrative writing, and one in organization/task-completion. (S-9).
3. In early April 2015, the student's mother and the District entered into a mediation agreement that addressed various aspects of the student's programming. Included in the terms of the mediation agreement is the following statement: "The District office has offered ESY for this year, including transportation." (Parents' Exhibit ["P"]-1; S-18).
4. In late April 2015, at an IEP meeting, notes from the meeting taken by a District attendee indicated that the student was failing all classes. (S-19).

5. In May 2015, at an IEP meeting, notes from the meeting taken by a District attendee indicated that the District did not feel that the student qualified for ESY programming but that the District would be provided credit-recovery for failed classes as part of the District's ESY program. (S-22).
6. In June 2015, at an IEP meeting, notes from the meeting taken by a District attendee indicated that the student was failing three classes (algebra, geometry, and chemistry). (S-24).
7. Contemporaneously with the June 2015 IEP meeting, the parents sent a letter asking the District, among other things, to fund a private placement for ESY programming. The student's mother also indicated: "I am accepting the district's proposed ESY program for credit recovery for 10<sup>th</sup> grade failed classes." (S-25).
8. In the ESY program, the student would receive "direct instruction for credit recovery in Applied Chemistry and Geometry/Possibly Keystone Algebra." (S-29, S-30, S-31, S-32).
9. The credit-recovery would take place during the District's ESY program schedule, Monday-Thursday from 8:30 AM to 1:30 PM over June 29<sup>th</sup> - July 30<sup>th</sup>. (Notes of Testimony ["NT"] at 94).
10. As of the date of the hearing, the student had not attended any ESY session at the District or through a private placement. (NT at 103).

## **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 record in its entirety weighs in favor of parents’ claim that the District’s proposed ESY programming is geared to regular education credit-recovery and not the maintenance of progress toward

IEP goals. In other words, without an IEP, this student would engage in the same summer programming—earning academic credit from failed classes—as the District is offering. This renders the District’s ESY programming inappropriate.

Having said that, however, the District’s offer of ESY programming is not wholly inappropriate. While the five hours of ESY programming each day would be used for credit-recovery in algebra, geometry, and chemistry, the instruction in geometry would be geared toward maintaining progress on the student’s IEP goal in geometry. Likewise, the student’s goal in organization/task-completion would be addressed through the ESY programming. The ESY instructors’ testified that the student’s goal in written expression would be addressed through their instruction; this testimony was unpersuasive.<sup>3</sup>

Accordingly, an award of compensatory education will follow, but it will account for aspects of the ESY programming that was reasonably calculated to yield meaningful education benefit related to the student’s IEP goals.

#### 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.

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<sup>3</sup> NT at 128-161.

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 2015 ESY programming. The District’s ESY programming amounts to five hours per day. With instruction in three subject areas (algebra, geometry, and chemistry), only one-third of this time is dedicated to IEP goal-based instruction. Therefore, 3 hours and 20 minutes per day (2/3 of a 5-hour day) will be the starting point for calculating compensatory education.

Additionally, the student’s goal in organization/task-completion would be addressed in the course of these five hours of instruction. It seems reasonable, as a matter of equity, that an hour of instruction, accommodation, and/or modification would serve, each day, to maintain the student’s progress on that goal. Therefore, an hour per day will be considered as IEP goal-based instruction.

So for the twenty days of instruction (Monday-Thursday) over the five-week period of June 29<sup>th</sup> – July 30<sup>th</sup>, the student will be awarded 2

hours and 20 minutes of compensatory education, a total of approximately 47 hours.

As for the nature of the compensatory education award, the parents may decide in their 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 parents' 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 service, had it provided an appropriate ESY program. In this case, the District employs instructors for ESY programming at an hourly rate, documented in the record.<sup>4</sup> Therefore, any monetary value for the amount of the compensatory education is for an amount not to exceed 47 hours at the hourly rate of the District's ESY instructors.

An award of compensatory education will be made accordingly.

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<sup>4</sup> NT at 106.



## **CONCLUSION**

The District denied the student a FAPE in its handling of ESY programming for summer 2015. The student is entitled to compensatory education.

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## **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the student is entitled to 47 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 23, 2015