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Pennsylvania
Special Education Hearing Officer

DECISION

IN RE: A STUDENT IN THE
SCHOOL DISTRICT OF PHILADELPHIA

Date of Birth: [Redacted]

Date of Hearing: 04/24/09

CLOSED HEARING

ODR No. 9900/08-09 KE

Parties to the Hearing:

Representative:

Parent
[Redacted]

Parent Attorney
None

School District
Philadelphia

School District Attorney
Kimberly Caputo, Esq.
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440 North Broad Street, 3rd Floor
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Date Record Closed:

April 29, 2009

Date of Decision:

April 30, 2009

Hearing Officer:

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student is currently a high school student at the [REDACTED] School pursuant to an agreement between Parent and the District. After a re-evaluation by the District in August 2008, Student was found to be IDEA eligible in the categories of emotional disturbance (ED) and other health impairment (OHI), based upon an ADHD diagnosis. In prior evaluations, Student had not been identified by the District as IDEA eligible, but had received services since 2002 under a §504 Service Agreement.

There has been a long-standing contentious relationship between Parent and the District, resulting in a number of due process complaints under both IDEA and §504, several of which are currently pending. In this case, jurisdiction of the hearing officer is based upon the IDEA statute and the federal and state implementing regulations, specifically those relating to extended school year (ESY) services. 34 C.F.R. §300.106; 22 Pa. Code §14.132. At the time this case was filed, Parent's complaint centered on the District's failure to determine Student's ESY eligibility by February 28, 2009. Just prior to the April 24, 2009 hearing date, however, Student's ESY eligibility was discussed at an IEP team meeting. Based upon information provided by Student's case manager at School, the District concluded that Student does not need ESY to receive FAPE, in that Student did not meet the criteria for ESY found in the Pennsylvania regulations. The focus of the hearing and the decision, therefore, is whether the District's decision is correct, and if not, the ESY services Student should receive.

At the close of the evidence, Parent requested the opportunity to submit a written closing argument and additional time to supply copies of the exhibits admitted into the April 24 hearing record. The District elected to close on the record and did not offer any exhibits.

ISSUES

1. Does Student need ESY services for the summer of 2009 in order to receive a free, appropriate public education (FAPE) from the School District of Philadelphia?
2. If ESY is necessary for Student to receive FAPE, what type of services and or/ what ESY program would be appropriate?

FINDINGS OF FACT

1. Student is a [] year old child, born []. Student is a resident of the Philadelphia School District and is eligible for special education services. (Stipulation, N.T. p. 16; P-10 pp. 5,6¹).
2. Student has a current diagnosis of emotional disturbance (ED) and other health impairment (OHI) in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(4), (9); 22 Pa. Code §14.102 (2)(ii); (N.T. p. 85; P-3).
3. Student has been IDEA eligible since all parties accepted the District's Reevaluation Report (R.R.) dated September 24, 2008 following a re-evaluation conducted in August 2008. (N.T. p. 21; P-3)
4. Beginning in 2002, Student received services pursuant to a §504 Service Agreement as a qualified handicapped student under §504 of the Rehabilitation Act of 1973. (N.T. pp. 103; P-1)
5. By agreement of the parties, Student is currently attending [REDACTED] School, an approved private school (APS) as a [] grade student. (Stipulation, P-10, p. 5; P-1)
6. Student's IEP for the 2008/2009 school year was developed between October 2008 and December 2008 with District, Parent and Student participation only, since Student was not yet enrolled at School, and School had not yet been selected as the location for delivery of Student's special education program. School is currently implementing an IEP dated December 18, 2008. (N.T. pp. 21, 22; P-3)
7. Student's current IEP includes academic goals for writing and math, behavioral goals and a behavior support plan. (N.T. pp. 117; P-2)

¹ The exhibit marked and admitted as P-10 is the transcript of a due process hearing held on March 23, 2009 involving the same parties but different legal/factual issues. The transcript was admitted to avoid having to repeat basics background information about the Student that is both undisputed and common to all pending complaints. To distinguish references to that transcript from references to the transcript of the April 24, 2009 hearing session, references to the March 23 transcript will be designated "P-10, p." while references to the current transcript will be designated "N.T. p."

8. Student began attending classes at School on February 16, 2009. Shortly thereafter, on February 22, 2009 Student was hospitalized. Student returned to classes on March 5, 2009. (N.T. pp.14, 76—78, 158)
9. In March 2009, School administered a Gray Oral Reading Test (GORT), as is usual with new students. Student's scores placed Student at the fourth grade level for reading rate, first grade level for reading accuracy, late second grade level for reading fluency and late 8th grade level for reading comprehension. (N.T. pp. 33—37, 69, 70; P-4, p. 6)
10. The GORT reading assessment scores are consistent with the results of standardized achievement tests administered in the course of the District's re-evaluation in August 2008, which placed Student at a third grade level for reading decoding, qualitatively described as a very weak skill area. The standardized test results were repeated in the current performance levels in the December 2008 IEP. (N.T. pp. 63, 65, 66; P-2, pp. 7, 14; P-3, p. 8)
11. Student's School case manager noted that Student's performance in class and particularly on the reading program used at School is at grade level. Student's text books for other academic subjects, such as science are at the appropriate grade reading level and Student is succeeding in those classes. (N.T. pp. 79, 82, 83)
12. The District's September 2008 RR and the current IEP noted Student's strength in reading comprehension and the ability to use context clues to derive meaning from text. (P-2, P-3)
13. Student received a third quarter report card which indicated academic and behavioral progress based upon Student's limited (16 school days) experience at School. Student's grades and reports of progress toward the IEP goals were based upon class participation, class work, homework assignments and a few tests and quizzes, and observations/interactions with teachers. (N.T. pp. 42, 71, 76, 84; P-7)
14. Parent filed a due process complaint dated April 1, 2009, in which she asserted that Student's IEP team had not met to consider the need for ESY services by February 28, 2009. (N.T. p. 13; P-1)
15. Student's IEP team, including teachers from School, District representatives, (School Psychologist, Regional Director of Special Education), Parent and Student met on April 23, 2009 to begin developing the IEP for the 2009/2010 school year. At that meeting, the IEP team also considered Student's need for ESY services. (N.T. pp. 50, 98)
16. The first draft of the proposed IEP for the 2009/2010 school year adds a goal for increasing Student's reading fluency and comprehension, spelling, test-taking written response to text and vocabulary skills by means of a specific program, READ 180. The draft IEP also includes goals for math, written expression and behavior. (N.T. p. ; P-4, pp. 18, 19)

17. Based in part upon the School teachers' limited experience with Student, as well as evidence of progress in Student's major academic areas and no indication of regression/recoupment issues, either behaviorally or academically, after Student's hospitalization and after the school's spring break (April 7-15), the School teachers concluded there was no data to support Student's need for ESY services. At the April 23, 2009 IEP meeting, the School group recommended that the District find Student not eligible for ESY services. (N.T. pp. 37—40, 46, 50—61, 75; P-4, P-5)
18. The District accepted the School recommendation and denied Parent's request for ESY services. The District offered its own summer school program if Student's Mother believes that there is a need for additional instruction during the summer. (N.T. pp. 99, 101, 105)
19. Since the fourth marking period began, Student took a test in government class on which Student initially scored 36%. On re-test, Student's score improved to 71%, resulting in a final grade of 54% for that test. Student admitted to the teacher that Student had not studied for either test. The original test was given a few days after spring break ended and the re-test was given approximately a week later. (N.T. pp. 40—47; P-6A, 6B)
20. Student's behaviors that were previously identified as interfering with Student's education and that of others, including difficult peer relationships, lack of cooperation with staff, inability to remain on task and angry outbursts, are the primary reason for Student's School placement. Such behaviors, although still significant issues, have been less of a problem at School than in prior educational settings. (N.T. pp. 84, 86, 96; P-3, P-4, P-7)
21. Student has been able to utilize therapeutic supports in place at School to gain control over troublesome behaviors. (N.T. pp. 85, 86)
22. There were two specific behavioral incidents in April 2009 at School which resulted in minor disciplinary actions against Student. (N.T. pp. 89—91, 93—95; P-8, P-9)
23. Student's current IEP provides for adjustment counseling to provide support to deal with transition and change. Student has not used that service. (N.T. pp. 106, 107, 133—135, 170; P-2)

DISCUSSION AND CONCLUSIONS OF LAW

The disagreement between Parent and District in this case is fundamentally over Student's eligibility for ESY services in general terms. Because the parties were divided so completely over that threshold issue, they never reached the point of discussing whether Student may have some, but not all of the ESY needs Parent identified, much less any other possible

ESY needs and the type and level of ESY services that might be appropriate for Student. It is unfortunate that Parent and District are so deeply distrustful of each other, and that both are so adamantly convinced that the other is completely wrong with respect to virtually every issue on which there is no immediate consensus. That mindset leads both parties to take global positions resulting in their mutual failure or refusal to examine the components of the issues on which they so automatically and vehemently disagree. It is rare that one party or the other is completely right or completely wrong about a given issue, and this case is no exception to that general rule. Both Parent and the District are partially right and partially wrong with respect to Student's need for ESY services.

First, entitlement to ESY services derives from both federal and state special education provisions. Under the federal IDEA regulations, ESY services are to be provided to an eligible student if necessary to assure that s/he receives a free, appropriate public education (FAPE). 34 C.F.R. §300.106(a)(2). Pennsylvania special education regulations provide additional and more specific guidance for determining ESY eligibility, explicitly requiring that the factors listed in 22 Pa. Code §14.132 (a)(2) (i)—(vii) be taken into account. Nevertheless, ESY eligibility does not rise and fall solely on those criteria. In §14.102(a)(2)(xi) and §14.132(a), the Pennsylvania special education regulations incorporate by reference the federal ESY regulation referenced above, and §14.132(a) states that the seven factors are to be considered “In addition” to the requirements of the federal regulation. Consequently, the Pennsylvania factors provide neither exhaustive nor exclusive criteria for determining a need for ESY services. Rather, an IEP team must also consider a more global question: Are ESY services necessary for a given student to receive FAPE? Expanding that term, a district must consider whether ESY services are needed to assure that the student's 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).

In determining the need for ESY services, school districts can, and do, consider factors such as significant deficits, slow progress and functioning considerably below grade level in a given area to determine whether ESY services are needed for a student to receive FAPE. See, e.g., *In Re: A Student in the Freeport Area School District*, ODR #9015/07-08 (August 7, 2008) at 7, 8.²

Here, Parent cited academic concerns in terms of regression/recoupment, maintenance and consolidating skills, using the few examples of class work and tests available after only a few weeks of Student’s attendance at School. Parent also referred to the need for Student to maintain behavioral progress. (N.T. pp. 160—163) Parent did not, however, cite specific areas of academic concern other than reading, and proposed neither a specific ESY program nor a general description of appropriate ESY services.

The District, rather offhandedly, suggested that if Parent had academic concerns, Student could attend the District’s summer school program, available to all District residents, or at least to its enrolled students. (N.T. p. 99) The District, however, was clearly not proposing an individualized ESY program with goals and objectives and was certainly not considering an appropriate educational setting and/or accommodations to address behavior, focus and emotional

² 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 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)

Decision at 7, 8. The subject of the due process hearing was a high school student placed primarily in regular education classes with special education supports. Decision at 2, 3.

issues arising from Student's identified disabilities. The District's witness noted only that special education teachers are available to provide support and services to students in the summer school program. (N.T. p. 100)

Nevertheless, there is sufficient evidence in the record, consisting of the most recent District R.R., Student's current and proposed IEPs, and the GORT results from School's initial testing, to conclude that Student needs ESY services in reading, focused particularly on Student's very poor decoding skills, reading rate, accuracy and fluency. (F.F. 9, 10) Student's intellectual potential in the area of verbal reasoning abilities is in the high average range, and Student's reading comprehension and math reasoning skills are strong. (P-3, p. 8) Student is, however, functioning at only a 3rd grade level in decoding. Based upon the District RR and confirmed by the initial GORT results, Student needs substantial and intensive remediation for poor reading decoding and fluency skills, in particular, in order to make meaningful educational progress consistent with Student's intellectual abilities over the long term.

The District's evidence of strong reading skills in the classroom, including success in subjects which utilize grade level text books, and performance on assessments based upon the reading program Student is using at School do not undermine this conclusion. (F.F. 11) There was no specific evidence provided by the District with respect to the reading skills assessed in the classroom, other than reading comprehension which is noted to be a strength for Student. (F.F. 12) In addition, the current and proposed IEPs establish that Student's significant weakness in reading decoding, in particular, have not been and will not be specifically addressed through regular reading instruction at School. (F.F. 7, 16)

The District, therefore, will be ordered to convene Student's IEP team to develop ESY goals and fashion an appropriate ESY program directed particularly toward improving Student's

reading decoding skills, and to consider how an ESY reading program and services can target areas of concern in reading, such as reading rate, reading fluency and phonics. The IEP team should also determine where, how and for how long the reading instruction should be delivered, provided that ESY reading services will be provided within the District's geographical boundaries unless Parent agrees otherwise. The order, however, will not permit the IEP team to simply place Student in a District summer school program. Although the available evidence indicates that Student has made considerable behavioral progress at School, Student will have attended that program for barely three months by June 2009. There is absolutely no evidence that Student has sufficiently overcome oppositional behaviors and aggression to permit Student to be successfully placed in a regular educational setting. In addition, in order to receive FAPE, Student needs intensive instruction in reading, focused on decoding, which Student will not likely receive in a class that is larger than Student's classes at School, and/or without similar behavior supports in place, since Student's severe weakness in reading decoding was attributed to emotional factors in the District's most recent RR. (P-3). Consequently, if there is no District program or private program that the District identifies that can meet Student's needs for intensive instruction and significant behavior supports, the District will arrange one to one tutoring for Student in reading, focused on decoding, reading rate and fluency.

In the highly likely event, therefore, that Parent and the District, along with the School members of Student's IEP team, cannot agree upon an existing reading program or another means and method of delivering reading instruction and/or cannot agree upon the frequency and length of the services, the District will be ordered to provide one to one tutoring for Student for a number of hours comparable to the District's summer school program in reading. In other words, if a Philadelphia student who enrolls in summer school for reading receives an hour a day

of instruction, Monday through Friday for four weeks, Student's ESY program shall consist of 20 hours of direct one to one instruction between the end of the 2008/2009 school year and the beginning of the 2009/2010 school year. Student's summer reading instruction, however, will be capped at 40 hours, even if the District's summer reading program would provide a regular summer school student with more than 40 hours of total instruction over the duration of the program. Because Student is likely to receive one to one instruction, Student's program will be more intense and focused than the instruction available to other students in the program, who will be in larger classes.

In addition, Parent and Student must be both flexible and consistent in making Student available for the reading instruction. The schedule cannot change from week to week or day to day. At the outset, the instructor, Parent and Student should agree to a time of day, between the hours of 9:00 a.m. and 3:00 p.m., the days of the week, and the weeks during which the instruction will be delivered. Once a schedule is established, changes may be made only by agreement of the person delivering the instruction. In the event Student misses a session, or is not available for instruction when a session is scheduled, the time can only be re-scheduled if the person delivering the instruction agrees, and any such misses will not result in additional hours added during a week of ESY or after the agreed weeks of ESY instruction end.

There is no evidence in the record establishing any other academic deficit or weakness as significant as Student's reading decoding skills. Consequently, there is no basis for providing ESY in any other academic area.

With respect to behavior issues, the District was correct in pointing out that there is no basis for providing an ESY program based upon the Pennsylvania ESY criteria, and I found no evidence to support a conclusion, generally, that any type of behavior/emotional support program

during the upcoming summer is necessary for Student to receive FAPE. Parent's own testimony establishes that she wants to assure that the gains Student has demonstrated in behavior while at School are not dissipated over the summer. (N.T. pp. 160—163) Although that is certainly understandable, there is no evidentiary basis for concluding that Student will revert to lower levels of functioning upon returning to school in the fall or that Student will have significant difficulty getting back on track, behaviorally, when school resumes after the summer break. Parent's testimony about her concerns and fears put this issue squarely into the category of reasons for which ESY is not provided, "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 evidence establishes that Student willingly accepted and took full advantage of the aspects of the School program that provide behavior support and other services to manage anger and aggression despite being away from a structured school program from May 2008 through the middle of February 2009, an absence of approximately 6 months. (F.F. 20, 21) Although Student was naturally and understandably apprehensive about this drastic change in recent circumstances, (N.T. pp.157, 158), and was hospitalized for a short period after the first few days at School, (F.F. 8), Student has had no significant problems adjusting since that initial period, including after spring break. The two disciplinary incidents referenced during the due process hearing actually had an effect that was no doubt completely opposite to Parent's intention, demonstrating that despite Student's troubled and difficult history, significant oppositional and aggressive behaviors in Student's last placement within the District schools and the significant change from a long period of home schooling to a school setting, Student adjusted and responded

remarkably well to the School program. (F.F. 20, 21) There is no reason to believe that Student will not have a similarly uneventful re-transition to school at School after the much shorter summer break.

Finally, anticipating a potentially difficult transition from home schooling to School, Student's current IEP provides adjustment counseling, which Student did not use. (F.F. 23) Nevertheless, such services are still in Student's IEP, and should be included for the next school year until Student's re-adjustment to School is assessed in the fall. In light of the lack of evidence that Student needs a summer program to consolidate, maintain and/or to avoid regression in behavior skills, or that Student may have difficulty recouping such skills after the summer break, as well as the availability of counseling services as a "safety net" resource for Student should such issues arise in the beginning of the 2009/2010 school year, Student will not be provided with ESY services in the areas of behavior or emotional support.

CONCLUSION

For the reasons detailed above, the District will be ordered to provide Student with ESY services for reading during the summer of 2009, focused particularly on decoding skills, as well as fluency, reading rate and any other significant reading needs identified by Student's IEP team, and which the IEP team concludes require significant remediation in order for Student to receive FAPE going forward. In all other respects, Parent's claim for ESY services will be denied based on lack of evidence that Student needs such services during the summer in order to assure meaningful educational progress in any other academic area or in the area of behavior skills.

ORDER

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

1. Convene Student 's IEP team to develop an appropriate IEP for ESY services, limited to reading instruction and focusing primarily upon decoding skills, as well as underlying and concomitant reading skills such as reading rate, fluency and phonics.
2. The ESY program/services recommended by Student's IEP team must be delivered in accordance with the following criteria:
 - a. ESY services shall be delivered within the boundaries of the Philadelphia School District unless Parent agrees to an out of District program.
 - b. If a District summer school class is recommended for delivery of ESY reading instruction, the class shall include no more students than in Student's classes at School and all emotional support and behavior services provided at School must be available in the ESY setting.
3. In the event Parent and the District cannot agree upon an existing reading program or another means and method of delivering ESY reading instruction and/or cannot agree upon the frequency and duration of the services, ESY services shall be provided to Student as follows:
 - a. The District shall deliver ESY reading instruction to Student by means of 1:1 instruction for approximately the same number of hours a student would typically attend the District's summer school reading program, provided that such instruction shall total at least twenty scheduled hours and need not exceed 40 scheduled hours.
 - b. Student's ESY services in reading shall be provided between the end of the 2008/2009 school year and the beginning of the 2009/2010 school year.
 - c. Before the ESY reading instruction begins, Parent, Student and the instructor shall establish an agreed schedule for delivery of the ESY reading services that is consistent from day to day and week to week, and provides for instruction between the hours of 9:00 a.m. and 3:00 p.m., unless the instructor agrees to or requests other time parameters.
 - d. Once a schedule is established, changes may be made only by agreement of the person delivering the instruction.
 - e. In the event Student misses an ESY instruction session, or is not available for instruction when a session is scheduled, the time can only be re-scheduled if the person delivering the instruction agrees, and any such misses will not result in scheduling additional hours to make up for missed sessions during the ESY period or after the weeks of ESY end, unless the instructor agrees.

It is **FURTHER ORDERED** that in all other respects, Parent's claim for ESY services is **DENIED**.

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

April 30, 2009