

*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**

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**Child's Name:**

E. E.

CLOSED HEARING  
ODR Case #20617-1718KE

**Date of Hearing:**

May 18, 2018

**Parents:**

[redacted]

Michael Raffaele, Esquire – 1230 County Line Road  
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*Counsel for Parents*

**School District:**

Upper Merion School District – 435 Crossfield Road  
King of Prussia, PA – 19406

Karl Romberger, Esquire – 331 Butler Avenue – P.O. Box 5069  
New Britain, PA – 18901  
*Counsel for the School District*

**Date of Decision:**

May 30, 2018

**Hearing Officer:**

Michael J. McElligott, Esquire

## **INTRODUCTION**

Student)<sup>1</sup> is pre-teen age student who has been identified as a student with autism and a serious emotional disturbance. The student resides in the Upper Merion 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 summer programming for the summer of 2018. The positions of the parties are straightforward. The parents maintain that the student qualifies for extended school year (“ESY”) services in the summer of 2018. The District contends that the student does not qualify for an ESY program, or more precisely perhaps, that information and data have not been produced which would support a finding that the student qualifies for ESY programming.

For the reasons set forth below, I find in favor of the parents.

## **ISSUES**

Does the student qualify for ESY?

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<sup>1</sup> To protect the confidentiality of the student, the generic use of “student”, rather than a name or gender-specific pronouns, will be employed and will be substituted in direct quotes throughout the decision.

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

## **FINDINGS OF FACT**<sup>3</sup>

1. In April 2016, the student's parents unilaterally placed the student in a private placement. By agreement of the parties, the student has remained at the private placement since that time, including qualifying for ESY programming at the private placement in the summers of 2016 and 2017. (Hearing Officer Exhibit ["HO"]-3).
2. In the spring of 2017, the District requested, and parents consented to, a psychiatric evaluation, which resulted in the issuance, in June 2017, of a report recommending that educating the student at the private placement was medically necessary. (HO-3).
3. The District also requested, and parents consented to, a psychological re-evaluation. (HO-3).
4. In November 2017, the student's individualized education program ("IEP") team met. The IEP team agreed that educating the student at the private placement is a medical necessity. The District issued a notice of recommended educational placement ("NOREP") recommending continued enrollment of the student at the private placement. Parents approved the NOREP. (School District ["S"]-8, S-9; HO-3)
5. Parents had provided written input for the IEP team's consideration, including the parents' view that they felt the student continued to qualify for ESY services. (S-5; HO-3).
6. The student's disability profile places the student in the group requiring an expeditious determination of ESY eligibility pursuant to 22 Pa. Code § 14.132(d). The student's IEP team discussed that an ESY determination would be made by February 28, 2018. (S-8 at page 26).

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<sup>3</sup> Stipulations of fact were drafted by counsel for the parties. This hearing officer, having reviewed the stipulations, accepts the stipulated findings of fact as drafted. For stylistic consistency with his decision-writing, however, certain stylistic or grammatical changes have been made. Certain stipulated facts, while not explicitly incorporate herein, are made part of the fact-finding in this matter with the adoption of the stipulated facts as drafted by the parties. The parties' stipulations, as submitted, are made part of the record as Hearing Officer exhibit 3. Also, the testimony of the student's mother, the director of special education, and the director the private placement where the student attends, is incorporated generally (Notes of Testimony ["NT"] at 25-273).

7. In mid-January 2018, parents sent an email to the District's director of special education, reiterating their views from November 2017 regarding ESY and including a letter from the student's treating psychiatrist who shared her opinion that it is medically necessary for the student to attend ESY programming at the private placement in the summer of 2018. (S-10, S-11; HO-3).
8. In November 2017 and January 2018, the District's director of special education asked the parents and educators from the private placement for progress monitoring data and other information relating to the student's eligibility for ESY. (S-10; HO-3).
9. Apart from these specific requests, the private placement and/or parents regularly sent to the District, without prompting, the student's academic reports/report cards. (HO-3).
10. In mid-February 2018, without having re-convened the IEP team, the District issued a NOREP stating its position that the student does not meet ESY eligibility criteria. (S-13; HO-3).
11. Shortly after issuance of the February 2018 NOREP, parents requested an IEP team meeting to discuss student's eligibility for ESY. (S-14; HO-3).
12. Nearly contemporaneously with the parents' request for an IEP team meeting, the private placement sent updated progress monitoring reports to the District. (S-15, S-16; HO-3).
13. Parents returned the February 2018 NOREP, checking a request for an informal meeting. (S-13; HO-3).
14. In late February 2018, the District requested that the private placement provide data collection used to prepare the progress-monitoring on goals, such as bi-weekly rubrics, observation data, clinical observations, daily behavior chart, and team notes, in addition to information related to the student's progress or safety. (S-15; HO-3).
15. In late February 2018, parents forwarded to the District various email correspondence between parents and the private placement sent from November 2017 through February 2018 regarding the student's struggles associated with school holidays and unpredictable routines. (S-17; HO-3).

16. In early March 2018, the private placement provided to the District the data and information it had requested in late February. (S-19, S-20; HO-3).
17. The parties scheduled an IEP meeting for mid-April 2018. (S-21; HO-3).
18. In mid-March 2018, parents provided a letter from the student's new treating psychiatrist, stating his medical recommendation that the student receive ESY programming for the summer of 2018 at the private placement. (S-21, S-22; HO-3).
19. In mid-April 2018, the IEP team met to discuss the student's eligibility for ESY. The IEP team included: the parents, the parents' advocate, an administrator from the private placement, the student's homeroom and math teachers at the private placement, the social worker from the private placement, and the District's director of special education. (S-24; HO-3).
20. Parents and the attendees from the private placement shared that they all felt the student requires ESY to maintain social and emotional skills, as well as coping skills, and to avoid significant regression. (HO-3).
21. At the April 2018 IEP team meeting, the District's director of special education requested additional data. The members of the IEP Team from the private placement indicated that the next progress reporting would be available in late April 2018. (HO-3).
22. The members of the IEP Team from the private placement indicated that the next progress reporting would be available in late April 2018, and parents agreed to provide that information when it became available. (HO-3).
23. Within 10 days of the IEP Team meeting, but prior to the date where the April progress-monitoring would become available, the District issued a NOREP finding that the student was not eligible for ESY. (S-25, S-27; HO-3).
24. On the same day in late April 2018, as the parents and private placement educators had indicated at the IEP meeting, the private placement provided information to the District, and parents provided the most recent academic report. (S-26, S-27, S-28; HO-3).

25. Shortly thereafter, the private placement provided additional narratives of the student's learning and needs. (S-29; HO-3).
26. Parents returned the April 2018 NOREP, indicating disagreement with the District's position and requesting a special education due process hearing. (S-30; HO-3).
27. The parents filed a special education due process complaint which led to these proceedings. (HO-1, HO-2).
28. In addition to factual stipulations, the parties stipulated that, should the student be found eligible for ESY programming, the full-time summer program at the private placement is appropriate and would be supported by the District, including transportation. (NT at 17-19).

### **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).

In this case, the record in its entirety supports a conclusion that the student is eligible for ESY programming. Specifically, the evidence is compelling that the student would suffer emotional and behavioral regression if the student does not participate in ESY programming. The legal foundation for the necessary provision of those services is found at 22 PA Code §14.132(a)(2)(iii), (vii): The student has significant behavioral

and emotional support needs related to autism and a serious emotional disturbance (vii), needs that present significant difficulties with regression that make it unlikely that the student will maintain the skills and behaviors relevant to the services and goals in the student's IEP (iii).

Accordingly, and pursuant to the parties' stipulation as to remedy, the District will be ordered to provide for the student's ESY programming for the summer of 2018 at the private placement.

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### **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the student qualifies for ESY programming in the summer of 2018. As agreed to by the parties given the foregoing finding, the School District shall make arrangements for the student's attendance at the full-time summer program offered through the private placement in the summer of 2018, including daily transportation to/from the program.

*Michael J. McElligott, Esquire*

Michael J. McElligott, Esquire  
Special Education Hearing Officer

May 30, 2018