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: D.F.

Date of Birth: [redacted]

Dates of Hearing: July 6, 2010

OPEN HEARING

ODR No. 1265-09-10 AS

Parties to the Hearing:	**Representative:**
Parents	**Parent Attorney**
Parents	**Mr. Daniel Fennick, Esquire** **1423 East Market Street** **York, PA 1740** **Ms. Judith Gran, Esquire** **Reisman Carolla Gran, LLP** **19 Chestnut Street** **Haddonfield, NJ 08033**
School District	**School District Attorney**
Frank Herron, Superintendent **Red Lion Area School District** **696 Delta Road** **Red Lion, PA 17356**	**Mr. Stephen Russell, Esquire** **Stock and Leader** **221 West Philadelphia Street, Suite E-600** **York, PA 17404**
Date Record Closed:	**July 14, 2010**
Date of Decision:	**July 21, 2010**
Hearing Officer:	**Rosemary E. Mullaly, Esquire**

INTRODUCTION AND PROCEDURAL HISTORY

[Student] ("Student") is a [teenaged] student residing in the Red Lion Area School District ("District") who has been identified as a child with a disability under the Individuals with Disabilities Education Act ("IDEA") and its implementing regulations at Title 34 Part 300 of the United States Code, and Chapter 14 of the Pennsylvania education regulations at Title 22 of the Pennsylvania Code. Specifically, The Student has been identified as a child with deaf-blindness pursuant to 300.8(b)(2) resulting from bacterial meningitis contracted when [Student] was 6 months old. (S-5 at 3).

The hearing in the matter was originally scheduled for July 12, 2010 but due to the unavailability of District witnesses, it was rescheduled for July 6, 2010.

The parties were notified of the expedited nature of the proceedings and that certain time limits would apply to the compilation of the record to assure that a timely decision was rendered. No party voiced an objection. At the hearing, the parties were presented with a document entitled, "Procedures to Appeal the Decision of the Hearing Officer." It was marked as H.O. Exhibit 1 and entered into the record.

The only issues presented to the hearing officer in this one-session hearing were (1) whether the District's offer of a free appropriate public education ("FAPE") - specifically related to the schedule for services provision and non-academic components of its offer of extended school year ("ESY") for the Summer of 2010 - complied with the Individuals with Disabilities Education Act ("IDEA") and (2) what constituted the Student's current educational placement "during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing." (N.T. 13-14, 32, 39, 198). No other issue was addressed by the hearing officer in that no additional issue that was asserted by the parties was an appropriate subject for the expedited hearing timelines. (N.T. 39). The parties were notified that if there were additional outstanding issues that required administrative review, they would need to be asserted in a different matter.

Neither party asserted an objection as to the timeliness of the disclosure of evidence and records. (N.T. 10). The parents, who were accompanied by counsel and notified of the options for an open or a closed hearing, opted for the hearing to be opened. Since no resolution meeting took place prior to the hearing, the parties indicated on the record the resolution meeting was waived and they would memorialized this in writing. (N.T, 9-10).

The District preserved an objection as to the admission of documents into the record upon identification. (N.T. 24).

ISSUES

1. Whether the District's offer of FAPE - specifically related to the schedule for the provision of services and non-academic components of its offer of ESY for the Summer of 2010 - complied with the IDEA; and

2. What constitutes the Student's current educational placement "during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing."

STIPULATIONS BY THE PARTIES

1. The Student is [teenaged] (DOB [redacted]). (N.T. 11).

2. The Student is a resident of [the] School District. (N.T. 11).

3. The Student is eligible for Extended School Year Services for the Summer of 2010. (N.T. 11).

FINDINGS OF FACT

1. The Student has been identified as a child with deaf-blindness. For the 2010-2011 school year, [Student] will be in seventh grade. (N.T. 14, 18). The Student's IEP for the 2009-2010 school year including the ESY program for the Summer of 2010 is identified on the record at S-26. It has been amended throughout the school year at IEP meetings which the parents attended. (S-26; N.T. 115, 118).

2. On March 8, 2010, the student's IEP team met to determine if the Student was eligible for extended school year services for the Summer of 2010. The IEP team, which included educational professionals and the student's parents, agreed that [Student] was eligible and discussed the program that would be offered. (P-12 at 1-2; P-13 at 1; S-26; N.T. 115, 118).

3. At the March 8, 2010 IEP meeting to discuss ESY for the Student, the team, using as its guide the *Extended School Year (ESY) Decision-Making Guide,* verified evidence to support eligibility for ESY according to analysis of the following under the topics "Mastery," "Self-Sufficiency and Independence," Successive Interruptions," and "Severity of Disability." On this form under the heading "Evidence to justify the decision may include any of the following:" there were check marks next to "Progress on goals in

consecutive IEPs" and "Observation and opinions by educators, parents, and others supervising extracurricular activities." (S-26, at 67; N.T. 43, 93,115, 164).

4. The conference report from the March 8, 2010 meeting was attached to the Student's IEP and - regarding the ESY program - indicated "socialization appropriate camp. [Student] needs interaction. Get a volunteer from current class to accompany [Student]." It further provided, "Offer 6 weeks of 4 days per week, with 3 of these days during the first 3 weeks being .5 days, including activities in both the school setting and a community setting that allowed for [sentence ends]… begin 7:45 AM start for last 3 weeks of school." (S-29 at 69; N.T. 119-120)

5. At some point during the March 8, 2010 meeting, the issue of where the Student would attend camp was addressed. When the team discussed three different camps – Windsor Wonderland, YMCA and Easter Seals - and raised the possibility of putting the Student in one of the Easter Seal Camps that is designed for children with disabilities, the parents neither agreed nor objected. (N.T. 115-117, 169-70, S-14).

6. In the months after the March 8, 2010 IEP meeting, based upon investigation of all three camps, the District proceeded to arrange for the Student to attend camp only at Easter Seals – a camp specially designed for students with disabilities because it believed that it would provide [Student] with appropriate programming, [Student] could interact with same age and older peers and the staff were well-versed in the needs of special education students. (N.T. 128; S-19).

7. During the March 8, 2010 meeting, the mother did indicate that when the student attended camp she would like a non-disabled peer to attend with [Student]. (N.T. 169-170).

8. The District agreed to arrange for peers in the Student's Circle of Friends who attend school with the Student who have received training related to the Students need including in the area of communication to accompany [Student] to camp. (N.T. 81,101, 147-149).

9. A Notice of Recommended Educational Placement/Prior Written Notice, dated March 17, 2010 for ESY services for the Summer of 2001 was issued to the parents. On April 4, 2010, the parents signed and returned a Notice of Recommended Educational Placement/Prior Written Notice ("NOREP/PRN") dated March 31, 2010 with an "X" in the box next to the section "I approve this action/recommendation.**"** By means of the notation - "See* on page 3" - the parent directed the District to the next page of the document to which was added to the typewritten statement, "We continue to believe the 8/31/09 IEP is the operative IEP and that includes during ESY. We agree [the

Student] is eligible for ESY and the number of hours and days proposed. We do not agree that ESY is to review the curriculum presented in 6th grade. We believe ESY should focus on the preparing [Student] for the 7th grade curriculum so [Student] can meet the standards of the state applicable to all children." (P-5, S-14,at 4).

10. During the month of June the District was involved with the arranging the details of the student's ESY schedule. (S-22, S-23).

11. Based upon June 2010 email communications between the parents and the district, the parents concluded that the District was not going to be implementing the ESY program that they thought was to be implemented. (S-23, at 4)

12. By means of correspondence dated June 11, 2010 the parents indicated their understanding of what [the Student]'s ESY should be:

    3 weeks: 3 days (half day) of academics, I full day at camp
    2 weeks: 4 full days – 3 (3 half days of academics, ½ day at camp, 1 full day at camp
    1 week: 4 full days – 3 half days of academics, ½ day at new school/community to do O&M (this was decided because there was no camp this week for the summer of 2009 and because [the Student] was transferred to a larger, 2-story school building). Last 3 weeks of ESY should start at 7:45 am and there was supposed to be a volunteer from [the Student]'s current class to accompany [the Student] to Camp…. (P-15, at 2).

13. The Windsor Wonderland Camp ("Windsor") the parents are requesting for the Student did not provide for peers who are the same age or in the same grade as the Student. (N.T. 58).

14. With limited exception, the Windsor camp staff are not equipped to provided services necessary to include the Student and promote social interaction with peers. During the afternoon, the camp regularly shows videos to the campers – something the Student is not interested in and is an activity that does not promote social interaction with peers. (N.T. 91, 113, 125-26, S-32).
15. The District also considered the YMCA camp but learned that other students from the District would not be attending the camp there that summer. (N.T. 93,53, 154, 168).
16. The District's proposed O&M instruction for both ESY and the school year revolves around [Student's] community and school. (N.T. 174, S-26 at 42 et seq.).
17. The O&M services must be provided by a certified instructor. (N.T. 124).
18. During the summer of 2010, the District does not run summer academic programs for students without disabilities. (N.T. 156)
19. On June 21, 2010, the parents initiated this matter by filing a Due Process Complaint Notice. The essence of the complaint was that the District did not end up offering what they agreed to at the IEP. On the Due Process Complaint Notice that initiated this matter, the following was provided as the nature of the problem, "The IEP team met on

March 8, 2010 and determined ESY should be the same as agreed to for the ESY 2009. On June 11, 2010, we were informed by [Ms. F] of the specifics of [the Student]'s ESY program. We responded to her correspondence that the program in her email did not match what was agreed to for the 2010 ESY program. In a follow up email from [Ms. F] on June 18th the ESY program was not changed to what was agreed to during the March 8, 2010 IEP meeting."

20. The proposed resolution indicated on the Due Process Complaint Notice was stated, as follows-

"Revise the Student's ESY to:
3 weeks (half day) of academics, 1 full day at camp
2 weeks: 4 full days – 3 half days of academics, ½ day at camp, 1 full day at camp
1 week: 4 full days – 3 half days of academics, ½ day at new school/community to do O&M
Agreement for 2009 ESY was reached between counsel for both parties. On June 3, 2009 the district (through correspondence from their counsel) proposed the above. In a June 5, 2009 letter to [District counsel] we accepted their proposal."

21. By means of electronic mail correspondence from the District to parent's counsel on July 1, 2010, the District offered to send the Student for one day a week to the Windsor Camp. The District would pay for camp, provide transportation, and offered an additional day of camp to make up for the day missed. (N.T. 66-67, 96, 125,33, S-31, S-32).
22. The NOREP associated with the Summer of 2009 ESY program was dated April 16, 2009. The parents signed and returned a Notice of Recommended Educational Placement/Prior Written Notice ("NOREP/PRN") dated March 31, 2009 checking the section "I approve this action/recommendation" indicating by an "X" make in agreement with the District's proposal of ESY. By means of the notation - "See*" - the parent directed the reader to the next page of the document and included the typewritten statement, "We consent to [the Student]'s ESY program as being a continuation of [the Student]'s placement and program as stipulated in [Student's] current IEP (P-5). We have not received any written information from the district regarding the specifics of [the Student]'s ESY program (goals to be worked on, the start and end dates of the program, type, location or duration of services, SDI etc.). Therefore we acknowledge the District's proposed ESY program will be a continuation of the placement and program in [the Student]'s current IEP (P-5) as written in the NOREP/PWN." (S-5 at 4).

23. By means of an email dated 6/3/2009, the [Parents'] counsel contacted them describing a letter she received from District's counsel that stated "Just got a letter from [counsel]- they are offering the following: 3 weeks of 3 half days of academics and one full day at

Windsor; 2 weeks of 4 full days; 3 half days of academics/half day at Windsor; 1 full day at Windsor; 1 week of 4 full days; 3 half days of academics/half day at new school/community to do O&M 1(Windsor program is over by the last week). (P-9, at 1).

DISCUSSION AND CONCLUSIONS OF LAW

At administrative hearings challenging an IEP, the burden of proof lies upon the party seeking relief. *Schaffer ex rel. v. Weast,* 546 U.S. 49, __, 126 S.Ct. 528, 537 (2005). In that the parents are challenging the March 25, 2010 offer of extended school year services, the burden lies with them. The IDEA requires that a court reviewing a hearing decision must base its decision on the preponderance of the evidence. *See* 34 C.F.R. 300.516(c)(3); *L.E. v. Board of Education,* 435 F. 3d 384, 389 (2006).

ISSUES:

1. **Did the District offer the Student an appropriate ESY program in the least restrictive environment?**

Appropriate ESY Program

The IDEA implementing regulations provide

> Each public agency must ensure that extended school years services are available as necessary to provide FAPE. Extended school year services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with 34 C.F.R.Secs. 300.320 – 300.324 [regulations related to Individual Education Programs] that the services are necessary for the provision of FAPE to the child.

See 34 C.F.R. Sec. 300.15 . In this case, both parties agreed that the Student was eligible for ESY and that the academic component was appropriate to address the presenting academic ESY needs identified by the IEP Team. Therefore the only remaining issues to consider include the location for O&M training, the services schedule, and the extent that the student was placed in the LRE.

Orientation and Mobility

The parents are seeking an adjustment to the location for the provision of the Student's ESY O&M services. Specifically, they would like them integrated at camp instead of being provided at school. Nothing about the O&M goals of the IEP require that they take place in the camp setting. To the contrary, they relate to in- school O&M. (See e.g., S-26 at 42 & 44). No

evidence was presented to support the need or appropriateness of the change of location of the O&M services as necessary for the provision of a FAPE. The parents indicated that they would prefer it. In that the parents bear the burden in the matter, they have failed to demonstrate the need for this change in order for the District to provide an appropriate ESY program.

Schedule of Services

The parents are seeking an adjustment in the ESY schedule, specifically providing for half days of academics and half days of camp/socialization instead of the District proposed schedule. No evidence was presented to support the need for this schedule change as necessary for the provision of a FAPE. In that the parents bear the burden in the matter, they have failed to demonstrate the need for this change in the ESY program.

Least Restrictive Environment

In support of their position that the District should have and did not offer an appropriate ESY program in the LRE, the parents state in their written closing that

> It is beyond dispute that IDEA requires school districts to provide Extended School year Services in the least restrictive environment. Even if a school district does not operate a summer school of its own into which it can integrate students with disabilities, it must meet LRE requirement by alternative means, such as private placements, when it is determined that a student with disabilities requires interaction with nondisabled peers. *Letter to Myers* (August 30, 1989), 213 EHLR 255. *Cf. T.R. v. Kingwood Township Bd. of Educ.,* 205 F.3d 572 (3d Cir. 2000).

Review of the documents cited by the parents does not establish that "it is beyond dispute" that there is an IDEA requirement to provide ESY in LRE. This ambiguity is significant because the enactment of the Individuals with Disabilities Education Act, 20 U.S.C. Sec. 1400 et seq. (IDEA) was an exercise of Congress' authority under the Spending Clause, U.S. Const., Art. I, § 8, cl. 1. Any conditions attached to a State's acceptance of funds must be stated unambiguously. *See Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 17, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981).

Starting with the analysis regarding the authority cited by the parents, *Letter to Myers* is a twenty-one-year-old statement by an employee of the Office for Special Education Programs that does not comply with Office of Management and Budget Final Bulletin related to Agency Good Guidance Practices. It deserves little if any weight based upon the current statutory and regulatory requirements for agency guidance promulgated by the United States Department of Education ("USDOE.") *See* http://www.whitehouse.gov/omb/fedreg/2007/012507_good_guidance.pdf.

Specifically, on January 25, 2007, the Office of Management and Budget (OMB) –which is responsible both for promoting good management practices and for overseeing and coordinating the Administration's regulatory policy - announced that it was "publishing a final Bulletin entitled, *Agency Good Guidance Practices*, which establishes policies and procedures for the development, issuance, and use of significant guidance documents by Executive Branch departments and agencies. *See* 72 Fed Reg. 3432 et seq. (No. 16 January 25, 2007). This Bulletin was intended "to increase the quality and transparency of agency guidance practices and the significant guidance documents produced through them." *Id.* The OMB explained the purpose for the bulletin; specifically, "As the scope and complexity of regulatory programs have grown, agencies increasingly have relied on guidance documents to inform the public and to provide direction to their staffs. As the impact of guidance documents on the public has grown, so too, has the need for good guidance practices—clear and consistent agency practices for developing, issuing, and using guidance documents." *Id.*

This bulletin is also clearly consistent with 20 U.S.C. Section 1406 (d)-(e) which was modified in 2004 to provide

(d) Policy letters and statements

> The Secretary may not issue policy letters or other statements (including letters or statements regarding issues of national significance) that –
>
> (1) violate or contradict any provision of this chapter; or
>
> (2) establish a rule that is required for compliance with, and eligibility under, this chapter without following the requirements of Section 553 of title 5.

(e) Explanations and assurances

> "Any written response by the Secretary under subsection (d) regarding policy, question, or interpretation under subchapter II shall include an explanation in the written response that
>
> (1) Such response is provided as informal guidance and is not legally binding;
>
> (2) When required, such response is issue in compliance with the requirements of 553 of title 5; and
>
> (3) Such response represents that interpretation by the Department of Education of the applicable statutory or regulatory requirements in the contexts of the specific facts presented.

Review of the Agency Good Guidance Practices provides a sound rationale for this change in the IDEA that occurred after the OMB's *Stimulating Smarter Regulation: 2002 Report to Congress*

on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local and Tribal Entities, 72–74 (2002) . *See* http://www.whitehouse.gov/omb/fedreg/2007/012507_good_guidance.pdf.

Specifically,

> OMB has been particularly concerned that agency guidance practices should be more transparent, consistent and accountable. Such concerns also have been raised by other authorities, including Congress and the courts. (*Footnote omitted*.)
>
> In its 2002 Report to Congress, OMB recognized the enormous value of agency guidance documents in general. Well-designed guidance documents serve many important or even critical functions in regulatory programs. (*See* U.S. Office of Management and Budget, *Stimulating Smarter Regulation: 2002 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local and Tribal Entities,* 72–74 (2002) (hereinafter ''2002 Report to Congress'').
>
> Agencies may provide helpful guidance to interpret existing law through an interpretive rule or to clarify how they tentatively will treat or enforce a governing legal norm through a policy statement. Guidance documents, used properly, can channel the discretion of agency employees, increase efficiency, and enhance fairness by providing the public clear notice of the line between permissible and impermissible conduct while ensuring equal treatment of similarly situated parties.
>
> Experience has shown, however, that guidance documents also may be poorly designed or improperly implemented. At the same time, guidance documents may not receive the benefit of careful consideration accorded under the procedures for regulatory development and review. Id. at 72. These procedures include:
>
> (1) Internal agency review by a senior agency official;
>
> (2) public participation, including notice and comment under the Administrative Procedure Act (APA);
>
> (3) justification for the rule, including a statement of basis and purpose under the APA and various analyses under Executive Order 12866 (as further amended), the Regulatory Flexibility Act, and the Unfunded Mandates Reform Act;
>
> (4) interagency review through OMB;
>
> (5) Congressional oversight; and
>
> (6) judicial review.
>
> Because it is procedurally easier to issue guidance documents, there also may be an incentive for regulators to issue guidance documents in lieu of regulations. As the D.C. Circuit observed in *Appalachian Power:*

> The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency *follows* with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations. *Appalachian Power Co.* v. *EPA,* 208 F.3d 1015, 1019 (D.C. Cir. 2000).

See 72 Fed. Reg. 3432.

In *Letter to Myers*,213 IDELR 255 (OSEP 1989), at 1, an individual identified as Judy A. Schrag, Ed.D, Director, a representative of the USDOE Office of Special Education Program, opined without citation to regulation or statute that "the LRE requirements at 34 CFR §§300.530-300.556 do apply when an IEP is developed for extended school year services"; notwithstanding the fact that she notes, "the EHA-B does not address the obligations of school districts to make a full continuum of alternative placements available to children with handicaps when the school district provide extended school year services." Id at 2.

Based upon the current version of the IDEA - enacted fifteen years after the *Letter to Myers* – and the Office of Management and Budget Final Bulletin for Agency Good Guidance Practices issued 18 years after the Letter to Myers – whatever authority this might have had in 1989, it currently retains little to none because it does not comply with the agency good guidance practices. Moreover, it has not been included in the Significance Guidance Documents for the USDOE; and is no longer available on the USDOE website, *see* http://www2.ed.gov/policy/gen/guid/significant-guidance.html and http://www2.ed.gov/policy/speced/guid/idea/letters/revpolicy/tplre.html. More significantly for purposes of analyzing the current matter, it does not comply with the IDEA at 20 USC Section 1406.

The other authority cited by the parents to support their conclusion that that IDEA requires school districts to provide Extended School year Services in the least restrictive environment is *T.R. v. Kingwood Township Bd. of Educ.,* 205 F.3d 572 (3d Cir. 2000). Review of the *T.R.* clearly is limited to the principle that a disabled child is "require[d] to be placed in the least restrictive environment ('LRE') that will provide him with a meaningful educational benefit. " *T.R.* at 578. Neither the term "extended school year" nor the acronym "ESY" is contained in the T.R. decision.

Whether an LEA has an obligation to provide extended school year services in the least restrictive environment concepts was, however, recently addressed by the federal court for the Eastern District of Pennsylvania in *Travis v. New Hope Solebury School District*, 544 F.Supp. 2d 435 (E.D. PA 2008). Therein, the court stated, "that LRE must be considered in ESY is less than clear in the Third Circuit." *See id.* at FN5. The court in *Travis G*. noted that the hearing officer's finding therein that LRE must be considered in ESY was based the authority of *Reusch v. Fountain,* 872 F.Supp. 1421, 1428 (D.Md.1994). The *Travis G*. court further observed that Maryland regulation that the court interpreted in *Reusch* expressly required that ESY "be provided pursuant to a properly developed IEP as soon as possible and in accordance with LRE requirements ..."). *Id* at FN 5. No such requirement exists in Pennsylvania ESY regulation, *See* 22 Pa. Code 14. 132

In that the issue of whether the IDEA requires school districts to provide ESY services in the least restrictive environment is not beyond dispute, we must turn to the general concept of what constitutes an appropriate IEP. Specifically, the Act provides:

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are [to be] educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A).

The issue of whether an IEP is appropriate is a question of fact. *S.H. v. State-Operated School District of Newark,* 336 F.3d 260, 271 (3d Cir.2003), *citing Carlisle Area School District v. Scott P.,* 62 F.3d 520, 526 (3d Cir.1995). As noted by the *Travis G*. court, "it is axiomatic that under the mainstreaming component of the IDEA, a disabled child is "require[d] to be placed in the least restrictive environment ('LRE') that will provide him with a meaningful educational benefit. *L.E. v. Ramsey,* 435 F.3d at 390, quoting *T.R. v. Kingwood Township Board of Education,* 205 F.3d 572, 578 (3d Cir.2000)." The *Travis G.* court further confirmed that the Third Circuit has adopted a two-part test for determining whether a School District complies with the education of students in the LRE to the maximum extent appropriate.

> The first step is for the court to determine whether the school can educate the child in a regular classroom with the use of supplementary aids and services. If not, the next step is to decide whether the school is mainstreaming the child to the maximum extent possible. *S.H.,* 336 F.3d at 272 citing *Oberti v. Board of Education of the Borough of Clementon School District,* 995 F.2d 1204, 1215 (3d Cir.1993). To answer the first question, the courts must consider "(1) the steps the school district has taken to

accommodate the child in a regular classroom; (2) the child's ability to receive an educational benefit from regular education; and (3) the effect the disabled child's presence has on the regular classroom. *L.E.,* 435 F.3d at 390, quoting *T.R. v. Kingwood,* 205 F.3d at 579."

Travis G. at 443. The hearing testimony is uncontraverted – the District does not provide any academic summer programming to students without disabilities so there is a no regular classroom to educate the Student with the use of supplementary aids and services nor is there a option for maintstreaming to the maximum possible.

The record supports a finding that the District did consider placement of the child in three different camps – two designed for traditionally developing children and one a specialized camp for students with disabilities. The one the District chose was the specialized camp accompanied by one of [Student's] peer buddies. Testimony at hearing indicated reasons why the District did not believe that it would be appropriate to place the student at the YMCA and Windsor Wonderland Camp. While the other two camps would have more traditionally developing children, the District determined that they were not appropriate in that they did not offer same aged peers, did not offer students who were familiar with the Student, and did not provide staff trained to address the Student's significant impairments in a semi-structured setting.

Therefore, the next step is to decide whether the District can provide an ESY program outside of the mainstream that would help the Student maintain [Student's] current skills levels in accordance with [Student's] IEP goals. *See Travis G*. at 442. The *Travis G*. case affirmed the District's offer of ESY that did not include any non-exceptional peers. *Id*. at 443. In the instant matter, the District did provide the Student with access to non-exceptional peers to accompany [Student] to camp – specifically classmates who attend school with the Student who have received training through the Circle of Friends Program to communicate and interact with the student. Based upon the reasoning of the Travis G. case, a similar outcome in the instant matter is supported the U.S. District Court for the Eastern District of Pennsylvania interpreting Pennsylvania law.

The parents have failed to meet their burden that the District's offer of ESY for the Summer of 2010 was inappropriate due to the location chosen for development of socialization skills contained in the Student's IEP.

2. What is the pendent ESY placement?

The parents have also requested the hearing officer identify the stay-put or pendent ESY placement during the pendency of this proceeding. Both the IDEA at 20 USC Sec.1415(j) and its implementing regulations at 34 C.F.R. Sec. 300.518 state in pertinent part that "Except as provided in § 300.533, during the pendency of any administrative or judicial proceeding

regarding a due process complaint notice requesting a due process hearing under § 300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement." (Emphasis added)

The focus of this analysis must be centered on what the current educational placement is. Whether the parents agreed to the NOREP which contained the District's offer of ESY by means of the mother's April 16, 2010 signature is key to this issue. If so, it is the current educational placement. If not, then the ESY component of the IEP in place during the Summer of 2009 would be the current educational placement.

Requirements for Notice of Recommended Educational Placement/Prior Written Notice

Sec. 300.503 Prior notice by the public agency; content of notice.

(a) Notice. Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency--

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

(b) Content of notice. The notice required under paragraph (a) of this section must include--

(1) A description of the action proposed or refused by the agency;

(2) An explanation of why the agency proposes or refuses to take the action;

(3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

(4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(5) Sources for parents to contact to obtain assistance in understanding the provisions of this part;

(6) A description of other options that the IEP Team considered and the reasons why those options were rejected; and

(7) A description of other factors that are relevant to the agency's proposal or refusal.

(c) Notice in understandable language.

(1) The notice required under paragraph (a) of this section must be--

(i) Written in language understandable to the general public; and

(ii) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(2) If the native language or other mode of communication of the parent is not a written language, the public agency must take steps to ensure--

(i) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;

(ii) That the parent understands the content of the notice; and

(iii) That there is written evidence that the requirements in paragraphs (c)(2)(i) and (ii) of this section have been met.

C.F.R. Sec. 300.503, 20 U.S.C. 1415(b)(3) and (4), 1415(c)(1), 1414(b)(1).

Based upon the evidence of record, the parents indicated that they approved of the District's offer of ESY for the Summer of 2010. By means of text added to the document, they explained what they believed that the school district was offering. Unfortunately, it was not consistent with the District's actual offer. If the parents did not agree with the District's offer of ESY, it was incumbent upon them to so by indication on the NOREP/PWN document. If they wished to maintain the student's then current placement, they would have had to do so within ten days of the District's offer, or else it would become by default the student's pendent ESY placement. Notwithstanding the fact that the parents indicated approval of the District's offer of ESY for the Summer of 2010 in April 2010, they did not actually approve what the district was offering. (See S-26).

On the other hand, the District's IEP and NOREP are not the picture of clarity regarding the District's offer of ESY. It is significant that the IEP indicated at S-26, 6 of 9, "[The Student] is identified as Armstrong Kline category student and therefore is eligible for ESY services. The specifics of the services will be determined prior to February 28, 2010." By the date that the NOREP for ESY for the Summer of 2010 was issued, the ESY program was still not in final form. In fact, the only documents contained in the record related to ESY for the Summer of 2010 were a one page document entitled "Extended School Year (ESY) Decision-Making Guide," and a two page document entitled "Conference Report" both dated March 8, 2010. The document

contains hand written notes but no real specifics of the services. At one point there is an incomplete sentence. Moreover, the document indicated in three different places that "Further Action needed." While the District did present a NOREP/PWN document to the parents, it simply was not sufficient to describe the district's proposal for ESY for the Summer of 2010

Unfortunately, this document did not provide a description of the action proposed or refused by the agency. It describes a future action that the District was investigating. Once the parents did realize what the district's proposal was after communication with the District in June, they soon thereafter requested a hearing, thereby invoking the stay put provision of the IDEA regarding the proposed change in the student's current ESY program - specifically the one in place for the Summer of 2009.

Unfortunately, based upon the evidence presented at the hearing, it is unclear there what the ESY program was for the student during the Summer of 2009. The IEP with a 9/1/2009 "IEP Implementation Date" and a 8/31/2010 "Anticipated Duration of Services and Programs" is contained in the record (S-26, at 63). It contains the statement, "ESY for the summer of 2009 included 6 weeks of 4 days per week, with 3 of those days during the first 3 weeks being .5 days, including activities in both the school setting and a community setting that allowed for additional social interaction with peers."

On the other hand, the parents at various time assert different understandings of what the 2009 Summer ESY program was - none of which are contained in any IEP or NOREP contained in the record. Specifically

1. They assert that it was the program contained in an email sent by District's attorney to their attorney on June 3, 2009**,** "Just got a letter from [counsel[- they are offering the following: 3 weeks of 3 half days of academics and one full day at Windsor; 2 weeks of 4 full days; 3 half days of academics/half day at Windsor; 1 full day at Windsor; 1 week of 4 full days; 3 half days of academics/half day at new school/community to do O&M 1(Windsor program is over by the last week)**.**
2. They assert in the April 16, 2009 NOREP**,** "We consent to [the Student]'s ESY program as being a continuation of [the Student]'s placement and program as stipulated in [Student's] current IEP (P-5). We have not received any written information from the district regarding the specifics of [the Student]'s ESY program (goals to be worked on, the start and end dates of the program, type, location or duration of services, SDI etc.). Therefore we acknowledge the District's proposed ESY program will be a continuation of the placement and program in [the Student]'s current IEP (P-5) as written in the NOREP/PWN." The P-5 document is contained in the record at Exhibit P-1, and it is silent as to the ESY program. The NOREP/PWN in which the parents assert the ESY program was written is not contained in the record.
3. They assert by statement on the NOREP signed on April 16, 2010, "We continue to believe the 8/31/09 IEP is the operative IEP and that includes during ESY. We agree [the Student] is eligible for ESY and the number of hours and days proposed.

The pendency provisions of state and federal law apply to the IEP which contains the ESY eligibility determination. Therefore, if an IEP team proposes by NOREP to change a student's ESY eligibility status or previous ESY program, and the parent requests due process, there must be no change in ESY eligibility or program from the previous year, unless agreed to by the parties, pending completion of due process procedures - unless the local agency and the parents of the child agree otherwise. While it appears that on July 1, 2010 the District has offered an ESY plan that the parents may agree with, unless such an agreement is reached the ESY program shall be that described in S-26 at 63 - the only place in the record where the IEP document describes the District's ESY offer for the summer of 2009.

CONCLUSION

The parents have failed to meet their burden to prove that the ESY program offered by the District for the Summer of 2010 is not appropriate. The student's current ESY program is during the pendency of proceedings related to this dispute will be the program described in the 2009-2010 school year IEP.

ORDER

AND NOW, this 21st day of July, 2010, it is hereby ordered that the School District has offered the student an appropriate extended school year program for the Summer of 2010. For the reasons cited above, the last agreed upon ESY program and placement for the student that must be maintained during the pendency of the administrative and judicial proceedings is that provided in the IEP for the school year 2009-2010 (S-26 at 63).

Rosemary E. Mullaly, Esquire
HEARING OFFICER

Date of decision: July 21, 2010