

*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.A.

Date of Birth: [redacted]

ODR No. 17896-15-16-KE

### CLOSED HEARING

#### Parties to the Hearing:

#### Representative:

Parent[s]

Pro Se

Upper Darby School District  
601 North Lansdowne Avenue  
Drexel Hill, PA 19026

Scott C. Gottel, Esquire  
Holsten & Associates  
One Olive Street  
Media, PA 19063

Date of Hearing:

June 23, 2016

Record Closed:

June 23, 2016

Date of Decision:

July 8, 2016

Hearing Officer:

William F. Culleton, Esquire, CHO

## **INTRODUCTION AND PROCEDURAL HISTORY**

The child named in this matter (Student)<sup>1</sup> is an eligible enrollee of the school district named in this matter (District). The Student is classified under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA) as a child with the disabilities of Serious Emotional Disturbance and Other Health Impairment.

Student's mother (Parent) requests due process, asserting a number of claims based upon the IDEA. In particular, Parent requests extended school year services (ESY) under the IDEA; this under Pennsylvania law requires an expedited hearing, with a decision due date within 30 calendar days of the filing to the complaint. 22 Pa. Code §14.132(e). I bifurcated the matter, and I decide only the issue regarding ESY in this final decision. The remainder of Parent's claims will be calendared and decided on the ordinary IDEA timelines, with a new ODR case number. The District asserts that Student is ineligible for ESY services for the current summer recess.

The hearing was completed in one session. At the outset of the hearing, Parent appeared and waived her right to participate, then left the hearing room and did not return. I have determined the credibility of all witnesses and I have considered and weighed all of the evidence of record. I conclude that the Student is not eligible for ESY services for the current summer recess.

### **ISSUES**

1. Is Student eligible for ESY services for the current summer recess?

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<sup>1</sup> Student, Parent and the respondent District are named in the title page of this decision and/or the order accompanying this decision; personal references to the parties are omitted here in order to guard Student's confidentiality.

## FINDINGS OF FACT

1. Student has a history of significant difficulties with inattention, hyperactivity, impulsivity, and significant behaviors of concern. Student is diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and Oppositional Defiant Disorder. (S 1.)
2. Student is of average intelligence and Student's academic achievement and functional abilities are average. (S 1.)
3. Student has a history of receiving services through a local behavioral health provider, including management of medication for ADHD. (S 1.)
4. Before coming to the District, Student was enrolled in a charter school for the early elementary school years and a parochial school for fifth grade. (S 1.)
5. Student has a history of receiving early intervention services, but no history of being identified as a child with a disability under the IDEA until Student was referred by the parochial school teacher to the local Intermediate Unit (IU), which provided an evaluation report to Parent on April 25, 2016. (S 1.)
6. The IU classified Student with Serious Emotional Disturbance and Other Health Impairment. (S 1.)
7. Student enrolled in the District on or about May 2, 2016, and started elementary school on May 9, 2016. Student arrived without an IEP. (NT 21; S 2.)
8. From the first day of school in the District's elementary school, Student exhibited behaviors of concern, including losing focus, calling out inappropriately, throwing things and exhibiting immature and socially distancing behaviors with peers. (S 8.)
9. The District requested consent to perform a re-evaluation consisting of a Functional Behavioral Assessment on May 12, 2016. Parent consented on May 17, 2016. (S 4.)
10. The District began taking data on Student's behavior on May 19, 2016. (S 16.)
11. On May 26, the District convened a meeting to formulate an Individualized Education Program (IEP). It offered an IEP with a reading goal and placement in itinerant learning and emotional support in the neighborhood school, along with modifications and accommodations addressing attention issues. (S 5, 8.)
12. At the meeting, Parent provided a written request for ESY services. Parent wanted these services so that Student could work on social skills, self-regulation and executive functioning. (S 6.)
13. Parent declined to sign the offered Notice of Recommended Educational Placement (NOREP), because it did not offer goals for all of Student's identified needs. (S 9)
14. The IEP team reconvened on June 9, 2016. The District offered additional modifications and accommodations to Student. It planned to convene a meeting in August 2016 to provide

transitional services to Student, as Student will be transitioning to middle school for the upcoming school year. (NT 83-84; S 12.)

15. At the June 2016 meeting, the IEP team found Student to be ineligible for ESY services due to the lack of data indicating any loss of educational benefit due to regression and recoupment difficulties. Data from the ongoing FBA did not support any need for ESY services; in fact, the data indicated improvement in Student's behaviors of concern. (NT 45-46; S 12.)
16. Parent accepted the proposed program and placement by signing the NOREP on June 9, 2016. (S 13.)
17. The IEP team, through the agency of the District's school psychologist, considered the criteria set forth in the Pennsylvania Code for determining eligibility for ESY services. (NT 46-49, 75-82.)
18. There was no data indicating that Student was likely to have difficulty transitioning to middle school to the extent that it would interfere with Student's learning. (NT 84-87.)

## **CONCLUSIONS OF LAW**

### **BURDEN OF PROOF**

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.<sup>2</sup> In Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence<sup>3</sup> that the

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<sup>2</sup> The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

<sup>3</sup> A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006).

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called “equipoise”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parent, who initiated the due process proceeding. If the Parent should fail to produce a preponderance of the evidence in support of Parent’s claim, or if the evidence is in “equipoise”, the Parent cannot prevail under the IDEA.

#### CREDIBILITY

It is the responsibility of the hearing officer to determine the credibility of witnesses. 22 PA. Code §14.162 (requiring findings of fact); A.S. v. Office for Dispute Resolution, 88 A.3d 256, 266 (Pa. Commw. 2014)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact). I carefully listened to all of the testimony, keeping this responsibility in mind, and I found the District’s witnesses to be credible and reliable.

#### ESY SERVICES

The federal regulations implementing the IDEA require that a District provide ESY services “as necessary to provide FAPE ... .” 34 C.F.R. §300.106(a)(1). Necessity for such services must

be determined by the IEP team in accordance with the procedures for IEP teams. 34 C.F.R. §300.106(a)(2). The agency may not limit its ESY services by category of disability or limit the type, amount or duration of services. 34 C.F.R. §300.106(a)(3).

The state regulations implementing the IDEA requirement for ESY services add certain procedural requirements and criteria for determining eligibility, 22 Pa. Code §14.132(a). Neither the federal nor the state regulations explicitly provide criteria for determining the extent or nature of the ESY services that are necessary in order to provide a FAPE.

Nevertheless, the state regulation's criteria for determining eligibility can provide a guide for the determination in this matter. See generally, William D. V. Manheim Twp. Sch. Dist., 2007 WL 2825723 (E.D. Pa. 2007). These criteria are:

- (i) Whether the student reverts to a lower level of functioning as evidenced by a measurable decrease in skills or behaviors which occurs as a result of an interruption in educational programming (Regression).
- (ii) Whether the student has the capacity to recover the skills or behavior patterns in which regression occurred to a level demonstrated prior to the interruption of educational programming (Recoupment).
- (iii) Whether the student's difficulties with regression and recoupment make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives.
- (iv) The extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted.
- (v) The extent to which a skill or behavior is particularly crucial for the student to meet the IEP goals of self-sufficiency and independence from caretakers.
- (vi) The extent to which successive interruptions in educational programming result in a student's withdrawal from the learning process.

(vii) Whether the student's disability is severe, such as autism/pervasive developmental disorder, serious emotional disturbance, severe mental retardation, degenerative impairments with mental involvement and severe multiple disabilities.

22 Pa. Code §14.132(a)(2).

In this matter, Parent declined to participate in the hearing, so the only evidence was testimony from District personnel, including Student's teacher for fifth grade and the school psychologist who reviewed the matter with regard to Student's eligibility for ESY services. I am satisfied by a preponderance of the evidence that the District and IEP team considered the factors listed in Chapter 14 and concluded that Student does not need ESY services in order to ensure that, in the brief period during which Student was enrolled with an IEP in the District, the IEP would deliver a FAPE.

Indeed, Parent's request was not predicated upon a need for ESY in order to assure preservation of any gains made after Student enrolled and began attending school in the District. Rather, Parent sought ESY services for purposes of assuring a smooth transition for Student from elementary school to middle school. That is not the purpose of ESY under the IDEA, no matter how laudable that purpose may be.

### **CONCLUSION**

I conclude that the District evaluated Student's eligibility for ESY services appropriately, and reached the appropriate conclusion that Student is not eligible for such services for the current summer recess. Therefore, I will not order the District to provide such service.

**ORDER**

In accordance with the foregoing findings of fact and conclusions of law, the requests for relief are hereby DENIED and DISMISSED. It is FURTHER ORDERED that any claims that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

*William F. Culleton, Jr. Esq.*

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WILLIAM F. CULLETON, JR., ESQ., CHO  
HEARING OFFICER

DATED: July 8, 2016