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: E.H.
Date of Birth: [redacted]
Date of Hearing: 07/07/2017
ODR File No. 19375-1617KE
CLOSED HEARING

Parties to the Hearing:	Representative:
Father - Petitioner Parent	Father's Attorney Grace M. Deon, Esq. Eastburn and Gray, P.C. 60 East Court Street PO Box 1389 Doylestown, PA 18901
LEA - Respondent Methacton School District 1001 Kriebel Mill Road Norristown, PA 19403	LEA Attorney Sharon Montanye, Esq. Sweet Stevens Katz & Williams LLP PO Box 5069, 331 Butler Avenue New Britain , PA 18901
Mother - Intervening Party Parent	Mother's Attorney Liliana Yazno-Bartle, Esq. The Law Offices of Caryl Andrea Oberman LLC 705 North Easton Road Willow Grove, PA 19090
Date of Decision:	07/14/2017
Hearing Officer:	Brian Jason Ford, JD, CHO

Introduction

This special education due process hearing concerns the summer Extended School Year (ESY) placement for the Student.[1] The Student's mother (Mother) and father (Father) are divorced. The Father and the School District (District) agree that the Student should attend the District's ESY program. The Mother believes that the District's ESY program is inappropriate for the Student. Currently, the Student is placed in an ESY program run by an Approved Private School (APS) by agreement between the Mother and the District. The Father believes that the ESY program at the APS is inappropriate for the Student. Generally, the District agrees with the Father, despite its agreement with the Mother. The parties' positions are set forth in greater detail below.

This special education due process hearing arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*.

For reasons discussed below, I agree with the District and Father that the APS's ESY program is inappropriate for the Student. I also agree with the District and the Father that the District's ESY program is appropriate for the Student. Consequently, I will order the District to place the Student in its own ESY program.

Stipulations, Background, and Procedural History

The procedural history of this matter is somewhat complex. Stipulations reached by the parties are helpful to understanding the history, and vice versa. For these reasons, factual stipulations and the procedural history of this matter are interspersed in this section. Stipulations are recorded on the record at NT 55-64 and 73. Other facts in this section are facts that the parties very clearly do not dispute, even though there was no explicit stipulation on those pages of the transcript. I also take notice of a prior due process hearing involving this Student, *E.H.,* ODR No. 15720-1415AS.

In general, there are very few disputed facts in this case.

1. At all times, the District was (and is) the Student's Local Educational Agency (LEA).

2. At all times pertinent to this matter, the Student was (and is) a Child with a Disability, as that term is defined by the IDEA, under the disability category of Emotional Disturbance.

3. The 2014-15 school year was the Student's 1st grade year. Towards the end of that school year, the Mother requested a special education due process hearing. The Mother alleged that the Student was denied a free appropriate public education (FAPE) during the 2013-14 (kindergarten) and 2014-15 school year. The Mother demanded, *inter alia*, placement in a more restrictive setting.

4. On July 27, 2015, Hearing Officer Culleton found, *inter alia*, that the District denied a FAPE to the Student from January 15, 2014 through the last day of the 2014-15 school year. Hearing Officer Culleton ordered a more restrictive placement.

[1] Except for the cover page of this decision, identifying information is omitted to the extent possible.

5. At the time of Hearing Officer Culleton's order, the Student was exhibiting severe behavioral problems in school resulting in numerous physical restraints.

6. During the 2015-16 (2nd grade) and 2016-17 (3rd grade) years, the Student attended the APS, which provides a specialized setting for students with social, emotional, and behavioral needs.

7. The District, Father, and Mother all agree that the APS was an appropriate placement for the Student during 2015-16 and 2016-17. All three agree that the Student made outstanding behavioral progress during those school years.[2]

8. For part of the 2016-17 school year, the Student started to slowly re-integrate into the District's schools. For portions of the school day, the Student would attend one of the District's elementary schools — but not the same school that the Student attended during the 2013-14 and 2014-15 school years.

9. The Student did well attending school for limited periods of time in the District's elementary school, and so time in the elementary school was gradually increased. The majority of the Student's education, however, took place at the APS throughout the 2016-17 school year.

10. On April 26, 2017, the District convened an IEP team meeting. All parties were pleased with the Student's progress, but they were not certain that the Student would return to the District for the 2017-18 school year.

11. During the April 26, 2017 IEP team meeting, or very shortly thereafter, the District drafted and issued two Notices of Recommended Educational Placement (NOREPs). The NOREP is a form used by LEAs to provide parents with prior written notice of their actions. Parents complete a portion of the NOREP to provide or withhold consent to those actions. Copies of both NOREPs were given to both parents.

12. One of the April 26, 2017 NOREPs offered placement in the District's ESY program. The purpose of that placement was to foster the Student's transition to the District for the 2017-18 school year.

13. The other April 26, 2017 NOREP offered placement in the APS ESY program.[3]

14. On May 23, 2017, the Student's IEP team reconvened. At this time, the Student's return to the District for the 2017-18 school year was all but certain. At the meeting, all three parties agreed that the District's ESY program was appropriate. The Father approved the NOREP for the District's ESY program at this time.

15. The District's ESY program is staffed by three Emotional Support teachers. One of those teachers conducted many of the physical restraints that occurred during the 2014-15 school year.

16. Sometime between May 23, 2017 and June 9, 2017, the Mother came to understand how the District's ESY program is staffed. The Mother objected to any contact between the

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[2] The Student's remarkable progress is also captured by the testimony of the APS's Supervisor of Special Education at NT 95-97. *See also* NT 120.

[3] There is no agreement between the parties as to the intended purpose of the APS ESY offer.

Student and the teacher. The District refused to change its staffing, and would not guarantee that there would be no contact between the Student and the teacher.

17. On June 9, 2017, the Mother rejected the NOREP for the District's ESY program and requested a due process hearing. That matter, ODR No. 19352-1617KE, was assigned to me. The only relief that the Mother demanded was replacement of the teacher who previously restrained the Student.

18. Currently, the Mother concedes that the District's ESY placement would be appropriate for the Student were it not for the involvement of the teacher who restrained the Student in the past.

19. After some communication between the Mother and District via counsel, on June 12, 2017, the Mother approved the NOREP for ESY at the APS, and the District agreed to fund and transport the Student to and from that placement.

20. On June 14, 2017, the Mother withdrew her complaint.

21. On June 16, 2017, the Father filed a complaint initiating this due process hearing. Shortly thereafter, the Mother filed a motion to intervene. That motion was granted. Therefore, regardless of the positions that the parties took during this hearing, the Father is the petitioner, the District is the respondent, and the Mother is an intervening party.

Parties' Positions

For context, it is helpful to understand the positions that the parties took during the hearing.

The Father's position is that the District's ESY placement is appropriate because it will foster the Student's transition to the District's elementary school for the 2017-18 school year. The Father's position is also that the ESY program at the APS is inappropriate both because it would not help the Student's transition, and because it would harm the Student's self esteem.

The District's position is that its own ESY program is appropriate for the Student.[4] At the same time, the District concedes that it offered ESY placement at the APS. Technically, the District does not concede that the APS placement is inappropriate. Rather, the District takes the position that the Student is not entitled to ESY as a matter of law, but that it offered placement in its own program to help with transition. After June 9, 2017, the District agreed to placement at the APS in an effort to avoid litigation. *See* NT 78.

The Mother's position, as noted above, is that the District's ESY program *is appropriate* for the Student but for the presence of the teacher who restrained the Student during the 2014-15 school year, and the Student's potential interactions with that teacher. It is unclear why the Mother believes that placement in the APS's ESY program would be beneficial to the Student.

[4] More specifically, the District believes that its own ESY program is appropriate if the Student comes to the District's elementary school for the 2017-18 school year. District personnel believe that the Student will come to the elementary school.

Witness Credibility and Weight of the Evidence

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses and weighing evidence. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); *see also generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014).

I found no credibility issues with any of the witnesses. However, not all testimony is given the same weight. A significant amount of testimony, particularly from the Mother, was hearsay. Hearsay is admissible in special education due process hearings, but cannot be used to form the bases of my decision. Consequently, I give the hearsay testimony presented during the hearing no weight.[5] On the other hand, the APS's Supervisor of Special Education (Supervisor) had, by far, the most direct contact with the Student in a school setting over the past two years. *See, e.g.* NT 88, 92. The Supervisor was knowledgeable about the Student's needs, was focused on those needs, and had a clear foundation for her opinions. Consequently, the Supervisor's testimony is given enhanced weight.

Findings of Fact

I carefully considered all evidence and testimony that was made part of the record in this case. I make findings of fact, however, only as necessary to resolve the issues presented. Consequently, not every document moved into the record, and not every aspect of each witnesses' testimony, is referenced below. Similarly, to the extent that the testimony and documentary evidence only re-affirmed the stipulations and non-disputed facts above, I decline to review them a second time. I find as follows:

1. During the 2016-17 school year, while attending the APS, the Student met or exceeded all academic and behavioral IEP goals. NT 89; F-7.

2. The Student's transition to the District's elementary school started with the Student attending a 45 minute social skills group in the elementary school one time per week. NT 94.

[5] Nearly all of the testimony concerning the Student's anxiety about potential contact with the prior teacher is given no weight for this reason. The Mother attempted to call the Student's school counselor from the APS to testify about this issue. I excluded the Student's counselor because the Father would not provide consent for the counselor to breach confidentiality. I have no doubt that the counselor may be the person with the best evidence about the Student's anxiety, but relevancy is not a factor in the analysis. My analysis is set forth in a pre-hearing order, made part of the record in this matter as H-1.

3. During the IEP team meetings in April and May of 2017, the IEP team members (including both parents) discussed the Student's qualification for ESY services in the summer of 2017.[6] NT *passim, see, e.g.* NT 90.

4. It is anticipated that the Student will regress behaviorally if the Student is compelled to attend the APS for the 2017-18 school year. *See, e.g.* NT 104-105. There are two reasons for this. First, the Student will continue to be exposed to other students with significant behavioral issues without "typical" peers to model. Second, and more importantly, having prepared for a transition back to the District, the Student would view another year at the APS as a demoralizing defeat. NT 121-122, 137-140.[7]

5. Attending the APS for ESY could yield the same, negative results. *See,* NT 140.

6. The ESY program at the APS consists of academic and social skills instruction in the morning, followed by an afternoon of camp-like activities. NT 125.

7. The District's ESY program is focused primarily on social skills instruction, taught by three different teachers. NT 154. Each teacher is assigned to one of three groups of students. The students are grouped by age. One time per week, all three groups come together for a large group lesson. There is also some academic instruction. NT 154-155.

Discussion

I. The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Father is the party seeking relief and must bear the burden of persuasion.

II. The Student Is Entitled to ESY Services

Pennsylvania regulations establish seven factors that IEP teams must consider when making an ESY eligibility determination. 22 Pa Code § 14.132(a)(2)(i)-(vii). This is an enhancement of federal ESY regulations at 34 CFR § 300.106. The fourth of those seven factors is the "extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted." 22 Pa Code § 14.132(a)(2)(iv).

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[6] The IEP team specifically considered whether the Student met criteria under the factors specified in Pennsylvania regulations at 22 Pa. Code § 14.132.

[7] The APS's Supervisor of Special Education described this both in terms of setting a moving target for the Student, and also in terms of dangling a carrot, only to yank it away. The record as a whole, and the Supervisor's testimony in particular, leaves no doubt that the Student wants to return to the District, and believes that [the Student] has earned that right.

The Student is at a critical juncture. The Student's presentation as described by Hearing Officer Culleton in ODR No. 15720-1415AS is, very fortunately, unlike the Student's presentation today. Despite the Student's remarkable progress, all three parties believe that a gradual transition out of the APS and into the District's elementary school is needed. The 2016-17 school year ended near the zenith of that effort. Just as Pennsylvania regulations contemplate, the Student is mastering a skill (the ability to control behaviors while attending programming outside of the APS) just as programming was interrupted by the summer.

I respectfully disagree with the District that the Student's transition needs are something separate and apart from the Student's ESY eligibility. Under the circumstances of this case, the Student's transition needs, and the Student's progress toward transition, are the elements that make the Student eligible for ESY services.

III. The ESY Program at the APS is Inappropriate

No credible evidence was presented to support the Student's ESY eligibility other than the Student's need to master and consolidate transition skills. No credible evidence links the Student's transition needs to the APS's ESY program. To the contrary, all three parties agreed that it was appropriate for the Student to receive instruction outside of the APS during the 2016-17 school year in order to foster the Student's transition back to the District. Moving the Student's instruction completely outside of the APS this summer is the logical progression of that work. Keeping the Student's instruction inside of the APS this summer is a step backwards. This, and potential for actual harm to the Student's that remaining in the APS could cause (*see* FF 4, 5), renders the APS's ESY program inappropriate for the Student.

IV. The ESY Program at the District is Appropriate

The Mother is the only party who objects to the District's ESY program. The Mother stipulates that the District's ESY program is appropriate but for the involvement of the teacher who restrained the Student in the past. The Mother argues that just being with that teacher will traumatize (or re-traumatize) the Student. Consequently, I will only consider whether the teacher's involvement renders the District's ESY program inappropriate.

The Student will see the teacher who restrained the Student in the past because of the way that the District's ESY program is structured. The Student may also interact with that teacher. Despite the Student's progress, it is conceivable that the Student will have a behavioral incident at the District's ESY program warranting restraint. Should that occur, it is also possible that the teacher who restrained the Student in the past will restrain the Student again.

Evidence concerning how the Student will react to seeing the teacher in question, interacting with that teacher, or (in the worst case) being restrained by that teacher, is contradictory. Generally, the Mother testified that the Student is afraid of the teacher. Generally, the Father testified that the Student is not afraid of the teacher. Generally, District personnel testified that the Student had a positive relationship with the teacher despite the restraints. Nearly all evidence on this point was hearsay. The remaining scintilla of evidence concerning this issue

was not credible.[8] In sum, the record is simply devoid of reliable, non-hearsay evidence concerning how the presence of the teacher in question will impact upon the Student.

I must base this decision "solely upon the substantial evidence presented at the hearing." 22 Pa. Code § 14.162(f). The record in this case does not establish that the teacher's involvement in the District's ESY program renders that program inappropriate.[9]

Conclusions

The Student requires an ESY program this summer as part of the Student's transition out of the APS. The ESY program offered at and by the APS does nothing to help the Student transition, and may harm the Student's behavioral progress and self esteem. All three parties stipulate that the ESY program offered by and through the District is appropriate, except for the Mother, who argues that the presence of a teacher from the Student's past will traumatize the Student. The record does not support the Mother's argument.

I will order the District to move the Student out of the APS's inappropriate ESY program and into the District's appropriate ESY program.

An order consistent with the foregoing follows.

ORDER

Now, July 14, 2017, it is hereby **ORDERED** that the District shall place the Student into its own ESY program for the summer of 2017.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED.**

/s/ Brian Jason Ford
HEARING OFFICER

[8] As noted above, the person who is most likely to have reliable evidence on this point is the Student's counselor. That person did not testify because the Father did not waive confidentiality.
[9] As the petitioner, it is the Father's burden to prove that the ESY program at the APS is inappropriate. The Father satisfied that burden. It is also the Father's burden to prove that the District's ESY program is appropriate. That burden is satisfied by the Father's and District's stipulations. However, the Mother intervened for the purpose of presenting evidence on her own behalf, with the intention of supporting the APS's ESY placement. *See Mother's Motion to Intervene*. The Mother was the only party who took the position that the District's ESY program was inappropriate, and the only factor making that program inappropriate is the involvement of the former teacher. No evidence supports that position.