

*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

Student's Name: K.R.

Date of Birth: [redacted]

ODR No. 2058-10-11-AS

### CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

Evan W. Davis, Esquire  
Dechert LLP  
Cira Centre  
2929 Arch Street  
Philadelphia, PA 19104-2808

Benjamin D. Geffen, Esquire  
Public Interest Law Center of Philadelphia  
1709 Benjamin Franklin Parkway, 2d Floor  
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Discovery Charter School  
Business and Technology Center  
5070 Parkside Avenue  
Philadelphia, PA 19131

Scott H. Wolpert, Esquire  
Timoney Knox  
400 Maryland Drive  
Fort Washington, PA 19034

Date of Hearing:

July 6, 2011

Record Closed:

July 9, 2011

Date of Decision:

July 11, 2011

Hearing Officer:

William F. Culleton, Jr., Esquire

## INTRODUCTION AND PROCEDURAL HISTORY

Student is an eligible resident of the School District of Philadelphia (District), and attended the Discovery Charter School (School) for kindergarten during the 2010-2011 school year. (INT 10-14.)<sup>1</sup> Student is identified with Emotional Disturbance, pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). Ibid. On June 29, 2011, the Parents requested an expedited due process hearing regarding ESY issues only, seeking an order declaring the appropriate placement for ESY services. The School asserts that the appropriate ESY placement is an emotional support program in a private school.

The hearing was conducted in one session and the record closed upon receipt of transcript. I conclude that the appropriate placement is emotional support.

## ISSUES

1. Is the appropriate ESY placement an emotional support placement in a private school?
2. Should the hearing officer order that the ESY placement be a private academic tutoring organization?

## FINDINGS OF FACT

1. Student is diagnosed medically with Attention Deficit Hyperactivity Disorder (ADHD) and Oppositional Defiant Disorder (ODD). (S-16.)<sup>2</sup>
2. During the 2010-2011 school year, Student was placed in full time kindergarten in general education. Student displayed dangerous behaviors that impeded both Student's education and that of peers, including choking another student, threatening to harm self, pushing, shoving and other aggressive contact with peers, extended tantrums, throwing objects, deliberately breaking objects, eloping from the classroom, running in hallways,

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<sup>1</sup> This matter was heard on July 6, 2011, on an expedited basis. In order to make as complete a record as possible, I directed that the record would include the transcript of a hearing in a related due process matter involving the same parties and counsel, ODR No. 1697-10-11-AS. The transcript of the latter hearing is designated "1NT" and the transcript of the July 6 hearing in the present matter is designated "2NT."

<sup>2</sup> All documents referred to in the hearings on June 2011 and July 6, 2011, and not specifically excluded from evidence, are hereby admitted in evidence.

climbing fences, jumping from playground equipment, defiant behavior and trying to elope from school property. (NT 409-410, 446-447; S-16, 21.)

3. As a result of these behaviors, Student was reduced to one half day kindergarten and was excluded from many hours of class time. (NT 409-410; S-16, 25.)
4. Student's academic achievement is behind same age peers significantly. (NT 409-410; S-16.)
5. The School initiated an educational evaluation, performed a functional behavior assessment in February and March 2011, created a behavior intervention plan, assigned a mentor teacher and assigned a one to one aide to Student. (S-21, 25, 33.)
6. The ER identified Student with Emotional Disturbance. (S-16.)
7. At a meeting on March 25, 2011, the IEP team agreed to an IEP that placed Student in Supplemental Emotional Support, and offered to place the Student in a private school at the School's expense in order to provide that placement. (S-19, 25.)
8. Student's Mother participated in reviewing available private emotional support programs and visited two schools with School personnel. (NT 431-437; S-25.)
9. The School offered to transport the Student to that private school and to transport the Parent to that school for any appropriate meetings or observations. (NT 381, 384, 390-391.)
10. The private placement would offer a full time kindergarten program within a school wide emotional support program. The educational program would be at the Student's developmental level, kindergarten, and would include academic curriculum. (NT 385-389, 393, 405-407, 431-437.)
11. The School offered to provide the above placement to Student during the summer of 2011 as an ESY placement. (NT 388-389, 418-420; S-22, 23.)
12. The IEP dated March 25, 2011 stated that the Student needs ESY to ensure the provision of intensive behavioral support during the summer. The IEP did not set forth goals or specific program and placement for the ESY to be provided. After the IEP meeting, on March 30, 2011, Parent received a description of the ESY program to be provided at the same private school to which the Student would be assigned in the Fall. (S-19 p. 28, S-35.)
13. The ESY program would be full time for 29 days in the summer. It would include academic and behavioral interventions, including small class size, a school-wide behavioral program and a one - to - one aide for Student, as well as related services as needed. (S-35.)

14. Student's Mother approved the offer of private educational placement for the regular school year by signing the NOREP dated March 25, 2011. The NOREP did not indicate that it was also an offer of ESY placement. (S-20.)
15. By letter dated April 11, 2011, Parent notified the School of a parental disagreement with the identification category, emotional disturbance, assigned to the Student in the Evaluation Report. Parent requested an independent educational evaluation and an IEP meeting. (S-24.)

## DISCUSSION AND 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>3</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>4</sup> that the other party failed to fulfill its legal obligations as alleged in the due process 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.

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<sup>3</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>4</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. Dispute Resolution Manual §810.

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

#### APPROPRIATENESS OF ESY PROGRAMS OFFERED BY SCHOOL AND REQUESTED BY PARENTS

I conclude that the ESY program and placement offered by the School is appropriate. It addresses all of the educational needs identified in the evaluation report and is at no cost to Parents. Its purpose is to help Student to learn the behavioral and social skills needed to be able to remain accessible to learning, skills which the Student lacked during the 2010-2011 school year. The program also aims to remediate the Student’s academic deficits, which are necessarily caused – at least in part – by Student’s loss of many hours of schooling due to Student’s disruptive and dangerous behaviors.

Parents raise numerous arguments in opposition to this conclusion. I was struck during the emergent hearing by the Father’s testimony, in which Father appeared to minimize the severity of Student’s behavioral problems. I have no doubt of the Father’s sincerity or the Parents’ full devotion to their child’s wellbeing and educational success, but the Father’s testimony suggests that his experience with the Student’s behaviors in school is limited and that as a result he does not fully accept the severity of Student’s behaviors in school. I conclude that these behaviors need to be addressed as soon and as effectively as possible so that Student can benefit from education in the least restrictive setting as soon as possible; thus, an ESY setting that addressed such behaviors is appropriate.

Parents argue that the Student's identification is incorrect and that Student's behaviors are caused by learning problems that are as yet undetected. I reserve judgment on this issue; the ESY issue is considered entirely separate from this issue and on an expedited basis that does not allow me to make findings or reach conclusions regarding the evaluation or school year placement on a full record. However, even if Parents will eventually show that they are correct about the nature of Student's disability and the inappropriateness of the placement for the school year<sup>5</sup>, the record of Student's behavioral difficulties is more than preponderant. I must reach a conclusion based upon what is known at this time, because ESY options are available now and the recommended program must be utilized now or it will be gone. Based upon what is known, then, it is manifestly appropriate for the School to address Student's behavioral needs as an urgent need for ESY purposes; moreover, the recommended placement would also seek to remediate Student's academic delays.

Parents argue that the Student should not be placed with other students who exhibit inappropriate behaviors, because Student will learn worse behaviors from Student's peers in such a placement. I find no evidence in the record to support this fear. The program is recommended by experienced educational professionals; I found that the principal who testified on July 6 was highly knowledgeable about the program being recommended and had investigated it thoroughly, even taking into consideration the Student's Mother's concerns about location, transportation and accessibility by offering to transport Parent at School expense to the private program when needed. Parents introduced the testimony of the Student's behavior specialist, who expressed the opinion that the private school would be harmful to Student, but I find that this witness had inadequate knowledge of the private school and was basing this opinion upon hearsay reports of other, unidentified social service professionals. I cannot give such testimony weight: the exact

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<sup>5</sup> I recognize that the burden will be on the School ultimately regarding these issues.

nature of the hearsay is unknown, the identities of the informants are unknown, there is no suggestion that the witness and the informants have any educational expertise, and the hearsay is uncorroborated.

Parents argue that the placement is unnecessary because Student's primary need is to "catch up" in academics. I do not accept this point of view. Student has demonstrable behavioral needs, regardless of their etiology. Kindergarten is in part academic, but it is also intended to teach children behavioral and social skills that are needed in order to be able to access the education that will be provided to them in grade school. Thus, an approach that addresses only academic needs, as recommended by Parents, ignores a very real, age appropriate and pressing need of the Student.

Parents argue that the Student will remain in the private setting throughout Student's educational career. While I agree that this is a valid concern and would not be at all desirable as an outcome for this or any student, there is no evidence that this will occur, and there is no evidence that this is at all intended. Indeed, the credible testimony of the School's principal contradicts this argument.

Parents argue that they are deprived of due process due to my rulings on how this hearing would proceed on a very expedited basis. I conclude that the extent of process accorded to Parents with regard to the ESY placement issue is appropriate in light of the exigencies of an expedited ESY hearing. These hearings are expedited by law. This is because they must be decided immediately if the available programming is to be taken advantage of at all. Delay moots the issue because the summer programs are short and available only during specific times. Thus, it is customary to hold abbreviated hearings in these matters so that they can be decided

quickly; scheduling is customarily peremptory, and negotiation of the dates for hearing is rarely permitted.

In the case at hand, the recommended program has started already, and the Student is missing more benefit every day that I take to decide this. It should be kept in mind that the Parents asked for an appropriateness determination, and they did so almost at the end of June, only days before the recommended placement was to begin. I conclude that it was and is necessary to decide this on the best record that can be made under the circumstances.

I was told that Student's Mother was on vacation on the scheduled date; thus, my acceleration of the date for hearing to permit a decision at the beginning of the recommended program period was severely inconvenient. However, there was no explanation of why she could not have been present at least by telephone for a few minutes on the evening of July 6. I have assumed that her knowledge of the Student is extensive, including knowledge of Student's behaviors at school, and I have taken into consideration that she still opposes the recommended placement. She was represented by able counsel who presumably presented all of her reasons for such opposition during extensive oral argument that I heard. Given the exigencies of the matter, I conclude that sufficient process was afforded.

#### CONCLUSION

I conclude that the ESY program offered by the School is appropriate and that the alternative requested by the Parents is inappropriate. Any claims regarding issues that are not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The recommended ESY placement, an emotional support placement in a private school, is appropriate.
2. The hearing officer will not order ESY placement with a private academic tutoring organization.

*William F. Culleton, Jr. Esq.*

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

July 11, 2011