

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████,)
)
Petitioner,)
)
vs.) Case No. 12-2157E
)
FLAGLER COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

FINAL ORDER

On July 25, 2012, a duly-noticed hearing was conducted in Bunnell, Florida, before Administrative Law Judge W. David Watkins of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: ██████████ (Petitioner's Parent), pro se
(Address of Record)

For Respondent: Kristy Janda Gavin, General Counsel
Flagler County School District
Building 2
1769 East Moody Boulevard
Bunnell, Florida 32110

STATEMENT OF THE ISSUE

Whether the Flagler County School Board (FCSB) has provided to ██████████ a free appropriate public education as required by the Individuals with Disabilities Education Act (IDEA).

PRELIMINARY STATEMENT

This case arose on June 5, 2012, when Petitioner filed a request for due process hearing with FCSB. On June 18, 2012, the matter was referred to the Division of Administrative Hearings for assignment of an administrative law judge.

On June 21, 2012, an Order Requiring Status Report was issued, requiring the parties to advise the undersigned regarding the results of any mediation or resolution session and the dates for a pre-hearing conference. A prehearing conference was held on July 5, 2012. On July 9, 2012, the undersigned issued a Notice of Hearing, setting the case for final hearing on July 25, 2012.

On July 23, 2012, the parties filed a Joint Pre-Hearing Stipulation containing numerous stipulations of fact and law. To the extent relevant, those stipulations have been incorporated in this Final Order.

The final hearing was held in Bunnell, Florida, as scheduled. Petitioner was not present at hearing but was represented by [REDACTED] father, [REDACTED], who also testified on [REDACTED] behalf. Petitioner did not offer any exhibits in evidence. Respondent called one witness, Dr. Tracy Umphenour, Director of Exceptional Student Education for FCSB, and offered nine exhibits in evidence.

The proceedings were not transcribed. At the conclusion of the hearing the parties agreed that proposed final orders would be filed by August 6, 2012. Respondent served its Proposed Final Order on Petitioner via U.S. Mail on July 18, 2012. However, for reasons unknown, Respondent's Proposed Final Order was not filed at the Division of Administrative Hearings until August 8, 2012. Notwithstanding technical non-compliance with the filing deadline at the Division, Respondent's Proposed Final Order has been considered in the preparation of this Final Order.^{1/} As of the date of this Final Order Petitioner had not filed a proposed final order.

FINDINGS OF FACT

Background

1. [REDACTED] was born on [REDACTED] [REDACTED]. [REDACTED] was first enrolled as a student with the Flagler County School System in August 2004. [REDACTED] currently attends a [REDACTED] [REDACTED] [REDACTED] school. During the 2011-2012 academic year, [REDACTED] was enrolled in the [REDACTED] [REDACTED].

2. [REDACTED] primary exceptionality is autism spectrum disorder. Specifically, Petitioner is severely incapacitated in the ability to interact with other people and access the school curriculum. [REDACTED] mother has indicated that Petitioner's disability makes it a struggle for [REDACTED] to get [REDACTED] out of bed and to school on time. [REDACTED] also has a tendency to be sick.

█████ father testified that █████ has the mental capability of a two-year-old, and that █████ does not speak.

3. FCSB determined that █████ was eligible for Exceptional Student Education (ESE) programs in the following areas: Autism Spectrum Disorder, language impaired, speech impaired and visually impaired.

4. █████ functions at level 1 in the Unique Learning Systems Program. █████ is able to respond to text and answer questions using picture symbols; however, Petitioner's disability affects █████ ability to acquire skills at the same rate as general education peers.

5. █████ is in the "cluster program" at the Flagler County elementary school, a program specifically designed to address students with autism. Petitioner's teacher, Jennifer Middlewart, holds a specialty certification in teaching autistic students.

6. On April 20, 2012, FCSB conducted an IEP meeting. █████ mother participated in the meeting by telephone. The team addressed █████ goals, services and supports needed for the 2012-2013 school year. In doing so, the IEP team reviewed the results of informal testing, therapist observations, data collection and teacher and staff reportage.

Need for Extended School Year (ESY) Services

7. Petitioner's father testified that since [REDACTED] enrollment in the Flagler County school system, [REDACTED] has been attending summer school. The parties stipulated that [REDACTED] attended ESY in the summer of 2011 "as the team was in agreement that ([REDACTED]) had emerging skills in independent functioning, and they did not want to see [REDACTED] regress."

8. During the 2011-2012 academic year the supplementary curriculum of the "Unique Learning System" was implemented by FCSB to help assess skill levels in reading, writing, math, and access and participation.

9. On May 11, 2012, a meeting was scheduled at [REDACTED] parent's request to address the criteria/qualifications to determine whether [REDACTED] needed ESY for the summer of 2012. The meeting was held on May 23, 2012. [REDACTED] father was present, as were: Jennifer Middlewart, ESE teacher for [REDACTED]; Jennifer Menendez, General Education representative; Stephen Hinson, principal; Aimee Mahoney, speech/language therapist; and Jacquelyn Barker, the LEA representative.

10. During the May 23, 2012, meeting, the IEP team used the "Determination of Need for ESY Services" form to assess whether A.C. needed ESY services over the summer. The form requires the team to consider seven different factors to determine the need for ESY. [REDACTED] father testified that this

form had not been utilized in the past by FCSB in evaluating [REDACTED] need for ESY services.

11. Dr. Tracy Umpenhour, Director of Exceptional Student Education for FCSB, testified that the IEP team applied the seven criteria set forth on the form to determine [REDACTED] need for ESY services. Dr. Umpenhour confirmed that the team considered available data relevant to the seven criteria when making its decision on the need for ESY. She also observed that the data reviewed was "fresh data" since it was compiled in preparation for the April 20, 2012, IEP meeting and was close in time to the May 23, 2012, ESY determination.

12. The first area considered by the team was whether there would be significant regression in critical life skills related to academics. The team reviewed [REDACTED] academic data for the year which revealed Petitioner was able to recoup the skills within a reasonable amount of time following breaks.

13. [REDACTED] communication skills were not emerging and the data reflected [REDACTED] was not at a functional level with communications at the present time where the skills would be lost over the summer break.

14. The team considered [REDACTED] independent functioning and self-sufficiency and found that unlike prior years where skills were emerging, [REDACTED] was observed not to regress in areas of independent functioning (such as toileting), following breaks.

15. The team reviewed data for the area of social/emotional or behavioral development and found that [REDACTED] behaviors had not regressed after holiday breaks. Rather, [REDACTED] behaviors were noted to remain very consistent.

16. The data the team reviewed did not indicate the student would regress during the summer break. In addition, there was no documentation to suggest that [REDACTED] was emerging, or having a breakthrough in the area of critical life skills indicating a need for ESY services.

17. The nature and severity of [REDACTED] disability was considered by the team. The data indicated [REDACTED] was able to begin school after breaks and get back into the routine of school without difficulty.

18. Finally the team looked at whether there were any extenuating circumstances pertinent to [REDACTED] current situation which would indicate that FAPE was not being provided. There were no extenuating circumstances noted, and the parent did not indicate there were any emerging skills or data being overlooked.

19. Based on their review of the seven factors discussed above, the IEP team concluded that [REDACTED] did not meet the criteria for placement in the extended school year program for the summer of 2012.

20. At hearing [REDACTED] father testified that "the doctors don't know how [REDACTED] brain works." He noted that "sometimes [REDACTED] gets things on the 999th try." [REDACTED] father asserted that if ESY services are not provided, [REDACTED] would regress more than would a normal child. However, [REDACTED] did not provide specific examples or observations to substantiate this belief.

21. The evidence at final hearing did not establish that ESY was required for [REDACTED] at this time. To the contrary, the evidence supported the determination of the IEP team that ESY was not necessary during summer, 2012.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.569, 120.57(1), and 1003.57(1)(e), Florida Statutes (2011), and Florida Administrative Code Rule 6A-6.03311(11).

23. Respondent is the governing body of the Flagler County School District and is responsible for the control, organization, and administration of the public schools in its district. Art. IX, Fla. Const.; §§ 1001.30, 1001.33, 1001.41, and 1001.42, Fla. Stat.

24. The request for due process hearing asserts that [REDACTED] qualifies for ESY services. Petitioner has the burden of

proving its claim in this case. Schaffer v. Weast, 546 U.S. 49 (2005).

25. The Individuals With Disabilities Education Act (IDEA) provides that, in order to receive federal funding, a state must insure the right of all students with disabilities to receive a free appropriate public education (FAPE). 20 U.S.C. section 1401(9) defines FAPE as follows:

The term "free appropriate public education" means special education and related services that -

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under section 614(d) [20 U.S.C. § 1414(d)].

26. Consistent with federal requirements, Florida has implemented the IDEA by requiring districts to provide for an appropriate program of special instruction, facilities, and services for students eligible for those services. It is undisputed that [REDACTED] is an exceptional student with autism spectrum disorder for whom services under the IDEA must be provided. 20 U.S.C. 1415; § 1003.57, Fla. Stat.

27. School districts must provide ESY programming to IDEA-eligible students when necessary to provide FAPE. 34 CFR section 300.106 sets forth the specific federal requirements relating to the provision of ESY services:

§ 300.106 Extended school year services.

(a) *General.* (1) Each public agency must ensure that extended school year services are available as necessary to provide FAPE, consistent with paragraph (a)(2) of this section.

(2) Extended school year services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with §§ 300.320 through 300.324, that the services are necessary for the provision of FAPE to the child.

(3) In implementing the requirements of this section, a public agency may not—

(i) Limit extended school year services to particular categories of disability; or

(ii) Unilaterally limit the type, amount, or duration of those services.

(b) *Definition.* As used in this section, the term extended school year services means special education and related services that—

(1) Are provided to a child with a disability—

(i) Beyond the normal school year of the public agency;

(ii) In accordance with the child's IEP; and

(iii) At no cost to the parents of the child; and

(2) Meet the standards of the SEA.

28. Thus, ESY services are special education and related services that are provided to a child with a disability beyond the normal school year, in accordance with the child's IEP, and at no cost to the parents of the child. 34 CFR § 300.106(b)(1). ESY services must be provided only if necessary to provide FAPE.

29. In Reusch v. Fountain, 872 F. Supp. 1421 (D. Md. 1994), a federal court addressed the school district's "hostility to providing ESY." Specifically, the court listed six factors that an IEP team should consider in deciding whether a child is eligible for ESY services:

1. Regression and recoupment - is the child likely to lose critical skills or fail to recover these skills within in a reasonable time;
2. Degree of progress toward IEP goals and objectives;
3. Emerging skills/breakthrough opportunities - Will a lengthy summer break cause significant problems for a child who is learning a key skill, like reading;
4. Interfering Behavior - does the child's behavior interfere with his or her ability to benefit from special education;
5. Nature and/or severity of disability;

6. Special circumstances that interfere with child's ability to benefit from special education.

30. The court in Reusch also observed:

There is no requirement that ESY be made a part of every disabled child's IEP even if there would be some educational benefit. Indeed, it appears that ESY would appropriately be part of an FAPE for a relatively small number of disabled children. Nevertheless, while there is no requirement that all disabled children have ESY in their IEP, there is a legal obligation to consider and fairly evaluate the appropriateness of ESY in developing every IEP for every disabled child.

Id. at 1424.

31. Final orders issued by Florida administrative law judges in other ESY cases are also instructive. In Z.H. v. Charlotte Cnty. Sch. Bd., Case No. 00-2715E (Fla. DOAH Aug. 9, 2000), ALJ Johnston recognized the factors to be used for ESY determinations. ALJ Johnston found those factors to be: 1) the likelihood of regression; 2) slow recoupment; and 3) predictive data based on the opinions of professionals. The ALJ added that "students are not eligible for ESY services if they do not regress during breaks from school." In Z.H.'s case, ALJ Johnston concluded that the evidence was insufficient to establish a need for ESY services. Specifically, he noted there was no evidence of out-of-the-ordinary regression or slow recoupment after school breaks.

32. In the case sub judice, █████ failed to provide persuasive evidence that out-of-the-ordinary regression or slow recoupment has, or will, occur after regular school breaks. In fact, the data presented by Dr. Umpenhour revealed that █████ recoupment was reasonable following breaks.

33. █████ IEP team made an individualized determination of the need for ESY services with consideration given to the appropriate criteria.

34. At hearing, █████ father expressed his belief that the denial of ESY services to █████ was due to budgetary constraints being experienced by FCSB. While this suspicion is certainly understandable given the current fiscal climate, FCSB established that ESY services were being provided to other students over the summer.

35. Moreover, the unrebutted evidence established that the decision to decline █████ participation in ESY for the summer of 2012 was based on empirical data and objective assessments as applied to the appropriate evaluation criteria. Specifically, the data and assessments established that █████ did not inordinately regress during breaks from school. The IEP team further concluded that the benefits acquired by █████ during the regular school year would not be significantly jeopardized if Petitioner was not provided an educational program during the summer months, nor would █████ level of achievement be

jeopardized by a summer break. Based upon the data and information presented and considered by the I.E.P. team at the May 23, 2012, meeting it was found ESY services were not required for the student. This conclusion was supported and corroborated by competent substantial evidence presented by Respondent at the final hearing.

CONCLUSION

Based on the evidence presented, the demeanor and credibility of the witnesses, the Findings of Fact and Conclusions of Law stated above, Petitioner's due process complaint is dismissed.

DONE AND ORDERED this 17th day of August, 2012, in Tallahassee, Leon County, Florida.

S

W. DAVID WATKINS
Administrative Law Judge
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Filed with the Clerk of the
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this 17th day of August, 2012.

ENDNOTE

^{1/} There has been no showing of prejudice to Petitioner resulting from the late filing.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless, within 90 days after the date of this decision, an adversely affected party:

- a) brings a civil action in the appropriate state circuit court pursuant to section 1003.57(1)(b), Florida Administrative Code Rule 6A-03311(9)(w); or

- b) brings a civil action in the appropriate district court of the United States pursuant to 20 U.S.C. § 1415(i)(2), 34 C.F.R. § 300.516, and Florida Administrative Code Rule 6A-6.03311(9)(w)