**Collier County School District**
**No. 06-2210E**
**Initiated by: Parent**
**Hearing Officer: Daniel Manry**
**Date of Final Order: December 26, 2006**

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| [redacted] | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | Case No. 06-2210E |
| | ) | |
| COLLIER COUNTY SCHOOL BOARD, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

FINAL ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the due process hearing in this case on July 21, 2006, in Naples, Florida, for the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Stephanie Leigh Langer, Esquire
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For Respondent: Richard W. Withers, General Counsel
Collier County School District
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STATEMENT OF THE ISSUES

The issues are whether extended school year (ESY) services were necessary in 2006 to provide Petitioner with a free appropriate public education (FAPE), within the meaning of the

Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1401(9) (2004) and 34 C.F.R. Section 300.106(a)(2) (2006);[1] and, if so, whether Respondent should reimburse the parents of Petitioner for expenses they incurred to compensate Petitioner for ESY services denied by Respondent (compensatory education).

## PRELIMINARY STATEMENT

This proceeding is related to a companion case involving the same parties. The two cases have an extensive procedural history, portions of which are discussed in the findings of fact.

By written memorandum dated June 19, 2006, Petitioner filed a due process complaint in accordance with the requirements of 20 U.S.C. Section 1415(c)(2). Respondent referred the complaint to DOAH to conduct a due process hearing.

At the hearing, the ALJ sustained Petitioner's objection to an ore tenus motion to consolidate this case with the companion case. The parties agreed to incorporate in the record of this case the evidentiary record in the companion case.

Petitioner presented the live testimony of one witness and submitted no additional exhibits for admission into evidence. Respondent presented the testimony of two live witnesses and submitted 15 additional exhibits for admission into evidence. The identity of the witnesses and exhibits and the rulings regarding each are reported in the one-volume Transcript of the hearing filed with DOAH on August 11, 2006.

At the conclusion of the hearing, 44 days remained in the 45-day timeline prescribed in 34 C.F.R. Section 300.515(a) for the issuance of a final order. The parties agreed during the due process hearing that the 45-day timeline would not begin to run until the filing deadline for proposed final orders (PFOs).

The 45-day timeline did not begin to run until November 18, 2006. The ALJ granted two consecutive requests for extensions of time that together extended the filing deadline for PFOS until September 13, 2006. The filing deadline was extended again on September 11, 2006, when Respondent filed Respondent's Motion to Re-Open Testimony Due to Petitioner's Enrollment and Registration in a Foreign School District. Respondent sought to prove that Petitioner was no longer entitled to FAPE from Respondent and that this case is moot. An Order Denying Motion dated October 23, 2006, determined this case is not moot because the claim for a compensatory remedy is insulated from the doctrine of mootness. The Order required the parties to file their PFOs no later than November 2, 2006.

Respondent timely filed its PFO on November 2, 2006, and filed supplemental legal authority on November 6, 2006. Counsel for Petitioner filed a late PFO on November 16, 2006, because [redacted] gave birth to twins on a date, which [redacted] did not disclose in [redacted] motion to accept [redacted] late-filed PFO. On November 17, 2006, Respondent filed a written objection to the late-filed PFO (the objection).

The objection is overruled. Pursuant to the agreement of the parties on the record, the 44 days remaining in the 45-day timeline began to run on November 18, 2006.

FINDINGS OF FACT

1. Respondent is the agency responsible for the School District of Collier County, Florida (the District). Respondent receives state and federal funds to provide special education and related services to disabled students in the District's public schools.

2. Petitioner is a disabled [redacted] student, born on [redacted], who attended the District's public schools until January 17, 2006. Petitioner's primary exceptionality is autism. Petitioner is also language impaired and uses sign language as [redacted] primary mode of expressive and receptive communication.

3. Petitioner understands verbal communication, but [redacted] receptive communication is enhanced when verbal communication is accompanied by sign language. Petitioner manifests no maladaptive behavior, except that which is needed for self-stimulation.

4. Petitioner attended the District's public schools from the beginning of the 2001-2002 school year until January 17, 2006. On August 24, 2006, Petitioner enrolled in a public school in the [redacted] School District ([redacted]) and began attending school in [redacted] on September 5, 2006. Petitioner

did not attend any public or private school between January 17 and September 5, 2006.

5. Prior to January 17, 2006, Respondent provided special education and related services to Petitioner pursuant to an individualized education plan (IEP) developed during each school year that Petitioner attended a District public school. Respondent provided ESY services to Petitioner each summer, except the summer of 2006.

6. Petitioner transitioned from [redacted] to [redacted] school at the start of the 2005-2006 school year when Petitioner enrolled in [redacted]. ([redacted]). Between the start of the school year at [redacted] and November 9, 2005, Respondent provided special education and related services to Petitioner pursuant to an IEP developed in the previous [redacted] school (the transitional IEP). The services included monthly parent conferences and monthly progress reports.

7. On November 9, 2005, the [redacted] IEP team developed an IEP that they used to provide special education and related services through January 17, 2006. Petitioner did not attend a District public school after January 17, 2006.

8. Petitioner requested ESY services on May 30, 2006, and agreed to "any testing or evaluation needed to determine eligibility for ESY services." Respondent refused the request on June 7, 2006, in relevant part, because 20 U.S.C. Section 1415(j) required Petitioner to remain in the "then-current educational

placement" unless Petitioner and Respondent "otherwise agreed" to an alternative placement (the stay-put requirement).[2]

9. The stay-put requirement applied automatically on January 17, 2006, when Petitioner served Respondent with a letter that was the functional equivalent of a due process complaint described in 20 U.S.C. Section 1415(c)(2). That due process complaint precipitated a companion case involving the same parties in [redacted] v. Collier County School Board, Case No. 06-0274E (DOAH October 18, 2006) (the companion case).

10. The stay-put requirement in the companion case remained in effect until at least October 18, 2006, when the ALJ dismissed the companion case in a Final Order of Dismissal.[3] The Order determined that the companion case was moot because Petitioner had enrolled in [redacted]. The due process complaint in the companion case did not include claims that have been judicially determined to be insulated from the doctrine of mootness, including claims for reimbursement of expenses, compensatory education, or attorney's fees (insulated claims).[4]

11. A second stay-put requirement applied automatically on June 19, 2006, when Petitioner served Respondent with a due process complaint in this case. The second stay-put requirement applies through any appeal of this Final Order.

12. For the purposes of the stay-put requirements in both the companion case and this case, the IEP developed on November 9, 2005, was the "then-current educational placement"

within the meaning of the stay-put requirement (the stay-put IEP). The stay-put IEP did not authorize ESY services for Petitioner.

13. The ESY box on the IEP form used to develop the IEP was left unchecked on November 9, 2005. The IEP team did not address ESY services.

14. The provision of the ESY services to Petitioner during the summer of 2006 would have been an alternative placement not prescribed in the stay-put IEP.[5] Such an alternative placement would have required agreement between the parties.[6]

15. Respondent did not agree to ESY services or any of several other alternative placements that Petitioner proposed in this case and the companion case. The parties engaged in an undisclosed number of attempts to negotiate both cases after the respective resolution session in each case. The scope of the negotiations included alternative placements.[7]

16. Petitioner first requested DOAH to order an alternative placement on March 31, 2006, when Petitioner filed a motion in the companion case entitled Petitioner's Motion for Temporary Injunction. The motion requested an order temporarily placing Petitioner in a District public school with a qualified sign language interpreter.[8]

17. The ALJ summarily denied the Motion on the ground that DOAH lacked authority under the state constitution to grant equitable remedies such as injunctive relief. However, the issue

persisted during the hearing in the companion case, and an Order issued on May 17, 2006, cited judicial decisions, also discussed in the conclusions of law, holding that the authority to order an alternative placement in derivation of the stay-put requirement lies within the exclusive jurisdiction of the courts rather than DOAH. The authority of DOAH is limited to a determination of the "then current educational placement" and an order requiring the student to remain in that placement.

18. Petitioner has continued in this case to challenge Respondent's invocation of the stay-put requirement to deny ESY services. Petitioner alleges that Respondent's refusal to agree to ESY services is improper for three reasons.

19. Petitioner first argues that the refusal to provide ESY services was a substantive denial of FAPE within the meaning of 20 U.S.C. Section 1415(f)(3)(E)(i). Second, Petitioner argues that the refusal to conduct an IEP team meeting to review the request for ESY services was a procedural violation that impeded Petitioner's right to FAPE, impeded the parents' opportunity to participate in the decision making process, and caused a deprivation of educational benefits to Petitioner within the meaning of 20 U.S.C. Section 1415(f)(3)(E)(ii). Finally, Petitioner alleges that Respondent invoked the stay-put requirement to retaliate against Petitioner.

20. The issues presented by Petitioner include mixed issues of law and fact. The factual record in this case, by agreement

of the parties, includes the record in the companion case. The record in the companion case includes 3,454 pages of testimony and over 2,000 pages of exhibits developed in 13 days of hearing.

21. The parties agree that the only practical remedy in this case is the reimbursement of expenses incurred to provide compensatory education to Petitioner during the summer of 2006. However, the total amount sought is not evident in the record.

22. The [redacted] provided sign language instruction to Petitioner during the summer, but the amount claimed, if any, is not disclosed. The parents paid a behavior specialist $900 a week for an undisclosed number of weeks. The parents also paid $150 for claimed occupational therapy at the [redacted] Equestrian Challenge, a horseback riding camp. Finally, the parents paid for claimed occupational therapy at a sailing and swimming camp at a cost of $20 a week, for an undisclosed number of weeks, and at Gymnastics World at a cost of $10 per event, for an undisclosed number of events.

23. In the typical compensatory remedy case, parents unilaterally withdraw their child from public school. This case is atypical because Petitioner argues that [redacted] failure to attend [redacted] after January 17, 2006, was not the result of a unilateral withdrawal by [redacted] parents.[9] Rather, the parents testified that Respondent constructively expelled or evicted Petitioner from [redacted].

24. Between December 7 and 30, 2005, Petitioner developed epilepsy.[10] The parents testified that Petitioner did not attend [redacted] after January 17, 2006, because Respondent refused to provide a full-time school nurse[11] to administer Diastat medically prescribed for certain seizures.[12]

25. The allegation of constructive expulsion or eviction is limited to the due process complaint in this case. A similar allegation does not appear in the due process complaint in the companion case. The scope of the due process complaint in the companion case is limited to allegations that Respondent refused to amend the stay-put IEP to include seizure disorder as a disability and refused to allow a trained service dog to accompany Petitioner at [redacted].

26. At the IEP meeting convened on January 17, 2006, the IEP team considered relevant information provided by the parents including medical records and input from the trainer of a two-year-old Labrador retriever. The dog was trained as a service dog to assist Petitioner during seizures and with certain symptoms of autism (the service dog).

27. The IEP team disagreed with the medical diagnosis of seizure disorder,[13] determined that the service dog was not necessary to provide FAPE to Petitioner, and refused to amend the IEP.[14] However, the IEP team scheduled another IEP meeting for January 23, 2006, to consider a written report of a medical

evaluation Petitioner was scheduled to receive, and in fact received, on January 19, 2006.

28. At the conclusion of the IEP meeting on January 17, 2006, the parents of Petitioner served Respondent with a letter dated January 12, 2006. Respondent deemed the letter to be a due process complaint described in 20 U.S.C. Section 1415(c)(2) and thus began the companion case.

29. The gravamen of the due process complaint in the companion case alleged that the refusal to allow the service dog to accompany Petitioner at [redacted] violated Petitioner's federal civil rights, Petitioner's rights under the Americans with Disabilities Act (ADA), 42 U.S.C. Sections 12101-12213, and impeded Petitioner's ability to fully benefit from [redacted] education under the IDEA. The portions of the due process complaint relevant to the IDEA state:

> Please understand that our [redacted] rights under the ADA and state law are rights that are additional to [redacted] rights under the IDEA, and that it is not necessary to wait for [redacted] IEP to be modified under the IDEA. As time is of the essence, however, we do request that our scheduled Jan 17th monthly meeting of all IEP Team Members be formalized as an emergency IEP Team Meeting, under the circumstances.
>
> We continue to desire an amicable and speedy resolution of this matter, and would hope that you will grant this request by the end of next week, as the school semester has already begun and every day that [Petitioner] is denied the right to be accompanied by [redacted] service dog . . . impedes [redacted] ability to fully benefit from attending school. The presence of a service dog provides our [redacted] with greater independence, an enhanced

> quality of life, greater socialization, and improved behavior management. . . .[15]

30. On the morning of January 23, 2006, the IEP team cancelled the IEP meeting scheduled for that day. Respondent cancelled the meeting on the ground that the stay-put requirement automatically precluded changes to the stay-put IEP.

31. The parties chose to pursue resolution prior to the due process hearing in the companion case pursuant to 20 U.S.C. Section 1415(f)(1)(B). A final order was due 45 days after the expiration of the 30-day resolution period on February 16, 2006, pursuant to 34 C.F.R. Section 300.515(a).

32. During the pre-hearing conference conducted on January 30, 2006, the parties agreed to begin the due process hearing on February 20, 2006, four days after the expiration of the 30-day resolution period. On February 15, 2006, the day before the resolution period expired, Respondent filed a Motion to Continue the due process hearing because the parents of Petitioner had filed a criminal complaint on February 14, 2006, against a key witness in the companion case, and the witness asserted the constitutional protection against self-incrimination.[16]

33. The criminal complaint, according to the parties, alleged the witness had violated a state statute that makes it a misdemeanor to interfere with a person's use of his or her service dog when the witness refused to allow the service dog to

accompany Petitioner at [redacted]. The parties agreed that the witness was a material witness in the companion case.

34. The ALJ granted the Motion to Continue, rescheduled the due process hearing, and required the parties to submit legal memoranda regarding the constitutional protection against self-incrimination. The parties ultimately resolved the self-incrimination issue, agreed to begin the due process hearing in the companion case on May 1, 2006, and the witness testified.

35. The evidence that emerged in the companion case after May 1, 2006, was replete with factual disputes over whether the stay-put IEP had been designed and implemented to provide FAPE in the absence of requirements for: the service dog, a full-time nurse to administer medication to Petitioner for [redacted] seizure disorder, a trained sign language interpreter, an appropriate classroom, and appropriate and measurable goals and objectives. However, the factual disputes did not include the ESY services.

36. The due process complaint in the companion case did not challenge the failure of the stay-put IEP to authorize the ESY services. Based on judicial decisions discussed in the conclusions of law, the failure to raise the issue of the ESY services in the companion case does not preclude Petitioner from raising the issue in this case.

37. A determination of whether the ESY services during the summer of 2006 was required to provide Petitioner with FAPE is a factual inquiry that must examine the unique needs of Petitioner,

rather than the characteristics that autism manifests generally. The evidence must show that educational gains during the regular school year would be significantly jeopardized in the absence of the ESY services in the summer of 2006.

38. The due process complaint in this case does not include a factual allegation that ESY services were required to prevent regression from educational gains during the regular school year. The due process complaint mentions neither educational gains during the regular school year, the rate of regression without ESY services, nor the rate of recoupment.

39. The due process complaint limits the factual allegations to educational levels on November 9, 2005, Petitioner's disability, the constructive expulsion claim. In relevant part, the due process complaint alleges that Petitioner is "clearly" entitled to ESY services, based on the following:

> [Petitioner] is . . . a nonverbal ESE student. . . .
>
> [Petitioner's] current IEP dated 11/09/05 identifies [redacted] Primary Exceptionality as Autistic. Secondary Exceptionalities identify [redacted] need for Occupational Therapy, that [redacted] is Speech Impaired, and Language Impaired. [redacted] Primary Mode of Communication is acknowledged as Sign Language.
>
> [Petitioner's] IEP Placement is Separate Class (less than 40% with non-ESE). [redacted] IEP maintains, that due to the disability of Autism, [redacted]"is unable to succeed in general education curriculum even with one to one assistance and needs to be in a small self contained classroom with intensive instruction with specialized strategies.["]

> [Petitioner's] receptive signed vocabulary is acknowledged in [redacted] IEP as approximately 400 functional and academic words, far below typically developing peers in [redacted] age group.
>
> [Petitioner's] IEP acknowledges that "The student's demonstrated cognitive ability prevents the student from completing required coursework and achieving the Sunshine State Standards and requires extensive direct instruction to accomplish the application and transfer of skills and competencies needed for domestic, community living, leisure, and vocational abilities."
>
> [Petitioner] is on a K-1st Grade level academically and is in [redacted] School [redacted] Grade based solely on [redacted] age. [redacted] is [redacted] grade levels behind [redacted] typically-developing peers.
>
> [Petitioner] has been a classified ESE Student in Collier County since 2001, during which time [redacted] has always been determined eligible, and has always received, ESY services.
>
> [Petitioner] has never withdrawn from the public school system; only removed from a Placement for safety and health concerns, and the ineffective implementation of [redacted] IEP. The district's failure to protect the child's right to due process, and provide FAPE during the proceedings, to include addressing [redacted] diagnosed medical condition, has prevented [redacted] from returning to school. The District has a continuing obligation to provide FAPE during these proceedings but has failed to do so.

40. If the due process complaint were to allege facts sufficient to state a claim for ESY services, a preponderance of evidence does not show in a particularized manner, based on Petitioner's individualized needs, that ESY services were necessary during the summer of 2006 to provide FAPE to Petitioner.[17] Nor does a preponderance of the evidence support a

finding that denial of ESY services denied FAPE to Petitioner within the meaning of 20 U.S.C. Section 1415(f)(3)(E).

41. There is a dearth of record evidence that the unique needs of Petitioner on June 7, 2006, required a continuous structured program during the summer of 2006 in order to prevent significant regression. Between January 17 and June 7, 2006, Respondent had no educational experience with Petitioner, and Petitioner submitted no evidence from another public or private school in the state concerning Petitioner's educational performance during that period.[18] A preponderance of the evidence does not show the educational gains made by Petitioner between January 17 and June 7, 2006; the rate of [redacted] educational progress; the likelihood of losing the acquired skills if not provided the ESY services; and the time required for recoupment.

42. The evidence is insufficient for the trier of fact to examine the need for the ESY services based on a regression-recoupment analysis. The evidence does not permit the amount of probable regression during the summer months to be compared to the amount of time required to recoup lost skills, and the result weighed for significance.[19]

43. The degree of regression and the rate of recoupment Petitioner would experience in the summer of 2006 are not demonstrated by retrospective data, including past regression and recoupment rates. Evidence of periodic regression from goals and objectives prescribed in IEPs in [redacted] school does not establish

that the degree of regression from goals and objectives prescribed in the stay-put IEP for [redacted] school, if any, would be significant without the ESY services in the summer of 2006.

44. When Petitioner started [redacted] school, Petitioner exhibited some regression after receiving the ESY services during the preceding summer. However, there is insufficient evidence to measure the actual regression Petitioner experienced after the holiday break in December of 2005 because Petitioner did not attend a District public school after January 17, 2006.

45. Petitioner need not show actual regression during the summer of 2006. However, a preponderance of the retrospective data does not show the likelihood of more than adequately recoupable regression in the absence of the ESY services during the summer of 2006.[20]

46. Evidence based on predictive data from expert opinion does not show the likelihood of more than adequately recoupable regression in the absence of the ESY services during the summer of 2006. Expert testimony in the companion case opined that Petitioner had made virtually no meaningful progress toward any educational goals and objectives while attending the District public schools. While this testimony arguably provides some evidence that previous IEPs were inappropriate, the testimony tends to refute the efficacy of past ESY services in providing Petitioner with FAPE and does not provide predictive data to support the need for the ESY services in the summer of 2006.

47. Predictive data based on expert opinion in the companion case was, at best, conflicting. The expert opined that Petitioner would benefit from proposed interventions, including the service dog and ESY services, by enabling Petitioner to apply learned skills across settings outside of the classroom. However, evidence that Petitioner will benefit from the ESY services is not determinative of the need for such services.[21] Nor is evidence that proposed interventions will benefit Petitioner across settings outside of the classroom determinative of whether Petitioner needed the ESY services in the summer of 2006.[22]

48. The failure to show that the ESY services were necessary to provide Petitioner with FAPE renders moot the alleged procedural violations. If the ESY services were not necessary to provide FAPE, Respondent's refusal to conduct an IEP meeting to address the request for the ESY services did not impede Petitioner's right to FAPE, did not impede the parents' opportunity to participate in the decision making process concerning FAPE, and did not deprive Petitioner of educational benefits within the meaning of 20 U.S.C. Section 1415(f)(3)(E)(ii).[23]

49. Even if the remaining allegations were not moot, Respondent satisfied the statutory requirement for periodic review of the request for the ESY services. Respondent conducted two IEP meetings during the regular school year, engaged in at

least one resolution conference, and participated in several attempts to agree on alternative placements, including the ESY services.

50. A preponderance of evidence does not support a finding that Respondent relied on the stay-put requirement to retaliate against Petitioner. Petitioner cited no legal authority that requires Respondent to agree to an alternative placement while the stay-put requirement is in effect.

51. The absence of a demonstrated need for ESY services deprives the record of the evidential prerequisite for a compensatory remedy in this case. The evidence does not show that the parents are entitled to reimbursement of expenses they incurred to provide compensatory education to Petitioner during the summer of 2006.

## CONCLUSIONS OF LAW

52. DOAH has jurisdiction over the subject matter and parties in this proceeding. 20 U.S.C. § 1400, § 1003.57(5), Fla. Stat. (2005); Fla. Admin. Code R. 6A-6.03311. DOAH provided the parties with adequate notice of the due process hearing.

53. The companion case could have included a claim that the omission of ESY services from the stay-put IEP denied FAPE. However, the companion case did not include such a claim.

54. The doctrine of res judicata precludes Petitioner from litigating in this case claims that were, or could have been, litigated in the companion case. See ICC Chemical Corporation v.

Freeman, 640 So. 2d 92, 93 (Fla. 3d DCA 1994) (court must look not only at cause of action actually litigated, but also to related causes of action that could have been litigated). The doctrine prohibits the splitting of causes of action. See Tyson v. Viacom, 890 So. 2d 1205, 1214 (Fla. 4th DCA 2005) (en banc); Signo v. Florida Farm Bureau Casualty Insurance Company, 454 So. 2d 3, 5 (Fla. 4th DCA 1984) (a claim extinguished all rights of the plaintiff with respect to the transaction and any part of the transaction). The doctrine is intended to avoid multiple lawsuits and piecemeal litigation. Gaynon v. Statum, 10 So. 2d 432, 433 (Fla. 1942); Lobato-Bleidt v. Lobato, 688 So. 2d 431 (Fla. 5th DCA 1997). Compare M.C.G. v. Hillsborough County School Board, 927 So. 2d 224 (Fla. 2d DCA 2006) (distinguishing res judicata from collateral estoppel).

55. The doctrine of res judicata does not apply in the absence of a judgment on the merits. An adjudication of the companion case on grounds that are purely technical, where the merits do not come into question, does not preclude Petitioner from claiming the ESY services in this case. Kent v. Sutker, 40 So. 2d 145, 147 (Fla. 1949). Purely technical grounds include dismissal for lack of jurisdiction. Albright v. Hanft, 333 So. 2d 112 (Fla. 2d DCA 1976).

56. The Final Order of Dismissal dismissed the companion case for lack of jurisdiction. The Order determined that the companion case was moot because Petitioner no longer attended

public school in the District. See Board of Education of Downers Grove Grade School District no. 58 v. Steven L., 89 F.3d 464, 469 (7th Cir. 1996) (dismissal for mootness is not a determination on the merits that entitles parents to attorney's fees). The judicial doctrine of res judicata does not bar the compensatory claim at issue in this case.

57. The IDEA provides no express statutory right to receive the ESY services. However, federal regulations in 34 C.F.R. 300.106, provide in relevant part:

> (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.
>
> * * *
>
> (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--
>
> * * *
>
> (ii) In accordance with the child's IEP . . . .

58. As a preliminary issue, Petitioner may not have been legally entitled to ESY services in the summer of 2006 when [redacted]

did not attend a District school after January 17, 2006. See Kenton County School District v. Jeffrey Hunt and Linda Hunt, 384 F.3d 269, 282 (6th Cir. 2004) (student that does not attend school for entire year may not be entitled to ESY services). A child who does not attend a school is not entitled to FAPE. Hooks v. Clark County School District, 228 F.3d 1036, 1039 (9th Cir. 2000); M.C.G. v. Hillsborough County School Board, Case No. 02-1265E (DOAH July 29, 2003), aff'd per curiam, 902 So. 2d 150 (unpublished opinion).

59. Petitioner has the evidentiary burden of proving entitlement to ESY services authorized in 34 C.F.R. Section 300.106. Petitioner is the party seeking relief from the stay-put IEP because the stay-put IEP did not provide ESY services during the summer of 2006. The burden of proof is properly placed upon the party seeking relief from the IEP. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005); West Platte R-II School District v. Wilson, 439 F.3d 782, 784-785 (8th Cir. 2006); JH v. Henrico County School Board, 395 F.3d 185, 197 (4th Cir. 2005).

60. A preponderance of the evidence must show that the educational benefits Petitioner gained during the regular school year would have been significantly jeopardized without an educational program during the summer months. M.M. v. School District of Greenville County, 303 F.3d 523, 537-538 (4th Cir. 2002). A determination of whether educational gains during the regular school year would be significantly jeopardized without

ESY services is generally based on a regression-recoupment analysis. Johnson v. Independent School District No. 4, 921 F.2d 1022, 1028 (10th Cir. 1990); Cordrey v. Euchert, 917 F.2d 1460, 1474 (6th Cir. 1990); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 184 (3d Cir. 1988); Alamo Heights Independent School District v. State Board of Education, 790 F.2d 1153, 1158 (5th Cir. 1986).

61. The regression-recoupment analysis measures significance of the alleged regression by comparing evidence of the amount of regression suffered during the summer months with evidence of the time required to recoup the lost skills. Johnson, 921 F.2d at 1027. The evidence does not need to show Petitioner actually regressed during the summer of 2006, but the mere fact of likely regression is not sufficient to support a finding that ESY services were necessary to provide FAPE. M.M., 303 F.3d at 538.

62. Nor is general evidence of regression associated with autism sufficient to satisfy the applicable burden of proof. Cordrey, 917 F.2d at 1472. All students, disabled or not, may regress to varying degrees during lengthy breaks in school. M.M., 303 F.3d at 538. However, regression and recoupment patterns vary greatly among similarly handicapped students. Cordrey, 917 F.2d 1470-1471.

63. The evidence must show in a particularized manner relating to Petitioner individually that the ESY services were

necessary in the summer of 2006 to avoid something more than adequately recoupable regression. Cordrey, 917 F.2d at 1472; accord, Kenton County, 384 F.3d at 278. Evidence of the degree of regression and recoupment time that Petitioner would allegedly experience in the summer of 2006 may be shown by empirical evidence such as retrospective data, including past regression and rate of recoupment; and predictive data, including the opinions of professionals. Johnson, 921 F.2d at 1028. Finally, the trier of fact may consider evidence of other factors, including the degree of impairment; the ability of the parents to provide educational structure at home; Petitioner's rate of progress; [redacted] behavioral and physical problems, if any; the availability of alternative resources; the ability of Petitioner to interact with non-handicapped students; curricula that need continuous attention; vocational needs; and whether the requested services are extraordinary or an integral part of a program for children with autism. Johnson, 921 F.2d at 1027; Cordrey, 917 F.2d at 1472.

64. Retrospective data concerning past regression and recoupment rates was limited in this case to past ESY services needed to recoup educational goals and objectives prescribed in [redacted] school. Evidence of past ESY services needed in [redacted] school is not necessarily determinative of the need for current ESY services in middle school. Cf. M.M., 303 F.3d at 538 (actual regression after past ESY services not required); Cordrey, 917

F.2d at 1471 (unfair to penalize student without past regression because previously enrolled in ESY programs).

65. Petitioner did not have sufficient time in [redacted] school for an experience sample adequate to provide retrospective data relevant to the educational goals and objectives prescribed for [redacted] school. Evidence of regression at the start of [redacted] school followed past ESY services in [redacted] school. There was insufficient evidence to measure regression and recoupment rates after the Thanksgiving and holiday breaks in [redacted] school because Petitioner did not attend ..... or any other school in the state after January 17, 2006.

66. Predictive data concerning the need for ESY services in the summer of 2006 is limited to the testimony of the parents and their expert. However, the testimony conflicted with other evidence and did not satisfy the preponderance standard. Compare M.M., 303 F.3d at 538 (conflicting evidence failed to demonstrate educational progress would be significantly jeopardized in the absence of ESY services) with J.H. 395 F.3d at 197 (remanding case for resolution of conflicting evidence pursuant to correct allocation of burden of proof).

67. Petitioner alleges that Respondent committed several procedural violations, but the evidence does not show that the alleged procedural violations denied FAPE to Petitioner. When procedural violations are not shown to actually interfere with FAPE, the procedural violations cannot support a conclusion that

Respondent failed to provide FAPE within the meaning of 20 U.S.C. Section 1415(f)(3)(E)(ii). Compare Dibuo v. Board of Education of Worcester County, 309 F.3d 184, 190 (4th Cir. 2002) (procedural violation that does not actually interfere with FAPE does not deny FAPE) with Maine School Administrative District No. 35 v. Mr. and Mrs. R., 321 F.3d 9, 25-26 (1st Cir. 2003) (compensatory education is not appropriate remedy for purely procedural violation).

68. The record does not support a conclusion that Respondent committed the alleged procedural violations. Respondent's refusal to convene an IEP meeting in June of 2006 to evaluate the requested ESY services was not a procedural violation of the IDEA requirement for periodic review of the stay-put IEP. 20 U.S.C. § 1414(d)(2)(A).

69. Respondent conducted IEP meetings on November 9, 2005, and January 17, 2006. Thereafter, Respondent engaged in negotiations intended, in relevant part, to reach agreement on an alternative placement, including ESY services. Respondent's actions satisfied the statutory requirement for periodic review. See C.P. v. Leon County School Board, 466 F.3d 1318 (11th Cir. 2006) (educational agency that conducts IEP meeting and thereafter engages in attempts to reach agreement concerning alternative placement satisfies statutory requirement for periodic review of IEP).

70. The refusal of Respondent to agree to alternative placements proposed by the parents, irrespective of Respondent's motives, is not a procedural violation. An educational agency is not obligated to implement an alternative placement proposed by the parents. C.P., 466 F.3d at 1324-1325.

71. The reliance by Respondent on the stay-put requirement during the pendency of this case and the companion case was not a procedural violation within the meaning of 20 U.S.C. Section 1415(f)(3)(E)(ii). Petitioner was statutorily required to remain in the then-current educational placement prescribed in the stay-put IEP until the conclusion of all pending proceedings, unless the parties agreed otherwise. 20 U.S.C. § 1415(j) (2004). The parties could have agreed to an alternative placement, but there is no express statutory requirement for either party to do so. Moreover, counsel for Petitioner has not cited a judicial decision requiring Respondent to agree to an alternative placement. In the absence of an agreement between the parties, the stay-put requirement is unequivocal. Honig v. Doe, 484 U.S. 305, 323, 108 S. Ct. 592, 604, 98 L. Ed. 2d 686 (1988).

72. The stay-put requirement is a statutory injunction that is automatic. Wagner v. Board of Education of Montgomery County, 335 F.3d 297, 301 (4th Cir. 2003). A party need not satisfy the requirements for preliminary injunctive relief in order to enjoy the benefit of the statutory stay-put injunction. Id.

73. When presented with an application for stay-put relief, the trial tribunal is limited to a determination of the then-current educational placement and an order maintaining the child in that placement. Id. It is an error for the tribunal to order Respondent to seek out an alternative placement. Id.

74. In this case, the stay-put IEP is the then-current educational placement, and that placement did not authorize the ESY services for Petitioner in the summer of 2006. It would be error for DOAH to order Respondent to seek out, or agree to, alternative placements in the absence of an order issued by a court of competent jurisdiction.

75. In the typical stay-put case, a school district is attempting to remove a child from his or her current educational placement, and the parents assert the stay-put requirement to stop the removal of the child. This case is atypical in that Respondent does not seek to change Petitioner's educational placement but asserts the stay-put requirement to maintain the educational placement prescribed in the stay-put IEP.

76. The fact that Petitioner may not benefit from the stay-put requirement does not mean Petitioner is without remedy. A court of competent jurisdiction has equitable power to order a change in the stay-put IEP upon a sufficient showing that maintenance of that placement would cause irreparable harm. Compare Wagner, 335 F.3d at 302 (for the proposition cited) with Komninos v. Upper Saddle River Board of Education, 13 F.3d 775,

780 (3d Cir. 1994) (questioning in dicta whether regression per se constitutes such irreparable harm as to justify an exception to the exhaustion requirement).

77. Respondent was not required to update the stay-put IEP to provide ESY services during the summer of 2006 while the stay-put requirement was in effect. See C.P., 466 F.3d at 1324-1325 (educational agency not required to update stay-put IEP in the absence of agreement with the parents). In C.P., the court notes that the parents invoked the stay-put requirement. However, the decision in Wagner makes clear that the stay-put requirement operates as an automatic statutory injunction in atypical cases that do not involve parental invocation of the stay-put requirement.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED AND ADJUDGED that Petitioner's parents are not entitled to reimbursement of the expenses claimed in this proceeding.

DONE AND ORDERED this 26th day of December, 2006, in Tallahassee, Leon County, Florida.

S

DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of December, 2006.

## ENDNOTES

1/ Unless otherwise stated, references to provisions of the IDEA are to those in the IDEA adopted in 2004, and references to provisions of the federal regulations are to the regulations that became final on August 3, 2006.

2/ Respondent also presented testimony that Petitioner's absence from [redacted] after January 17, 2006, prevented an evaluation in April or May, when the District usually evaluates students for ESY services, in time to formulate special education and related services for the summer session. That testimony, however, is not persuasive to the trier of fact because it conflicts with other evidence that counsel for Petitioner made informal requests for ESY services prior to May 30, 2006, during negotiations in the companion case, and Petitioner was available for evaluation during the negotiations in time for Respondent to formulate ESY services. In relevant part, Respondent either refused or failed to disclose the identity of the school where ESY services would be provided to Petitioner and whether a full-time nurse was available at the school to administer seizure medication to Petitioner until the ALJ required counsel for Respondent to disclose the information on the record during the due process hearing.

3/ The stay-put requirement may continue to apply during any appeal of the companion case.

4/ Compare Brown v. Bartholomew Consolidated School Corporation, 442 F.3d 588, 597 (7th Cir. 2006) (claim for reimbursement can defeat mootness challenge in an IEP placement suit); with Charlie F. v. Board of Education of Skokie School District 68, 98 F.3d 989, 993 (7th Cir. 1996); N.B. v. Alachua County School Board, 84 F.3d 1376, 1379 (11th Cir. 1996) (holding that court has jurisdiction over claim for compensatory money damages by student who moves to a different school); and M.P. v. Independent School District No. 721, 326 F.3d 975, 980 (8th Cir. 2003); Smith v. Special School District, No. 1, 184 F.3d 764, 768 (8th Cir. 1998); Board of Education of Downers Grove Grade School District No. 58, 89 F.3d 464, 467 (7th Cir. 1996) (claim challenging IEP

in school district student no longer attends is moot). See also Frazier v. Fairhaven School Committee, 276 F.3d 52 (1st Cir. 2002) (student who seeks only money damages must exhaust administrative remedies under IDEA). But see Covington v. Knox County School System, 205 F.3d 912, 917 (6th Cir. 2000); Witte v. Clark County School District, 197 F.3d 1271, 1275 (9th Cir. 1999); W.B. v. Matula, 67 F.3d 484, 495-496 (3d Cir. 1995).

5/ The term "current educational placement" means the special education and related services provided in the most recent IEP. Mackey v. Board of Education for the Arlington Central School District 386 F.3d 158, 163 (2d Cir. 2004). A change in placement occurs when the change affects the general education program, and a transfer to a different school is not a change in placement when there is no change in the general education program. P.C. v. McLaughlin, 913 F.2d 1033, 1041 (2d Cir. 1990); Concerned Parents and Citizens for Continuing Education at Malcolm X v. New York City Board of Education, 629 F.2d 751 (2d Cir. 1980), cert. denied, 449 U.S. 1078, 101 S. Ct. 858, 66 L.Ed. 2d 801 (1981). ESY services are special education and related services provided beyond the regular school year in accordance with the student's IEP. M.M. v. School District of Greenville County, 303 F.3d 523, 528 n. 9 (4th Cir. 2002). Because the stay-put IEP did not prescribe ESY services, the provision of ESY services in the summer of 2006 would have required a change in the general education program prescribed in the stay-put IEP.

6/ An agreement between an educational agency and parents occurs by operation of law upon the entry of an administrative or judicial decision in favor of the agency or the parents. Mackey, 386 F.3d at 163.

7/ The undersigned sustained the objection of Respondent to testimony that would have disclosed the terms of settlement negotiations. Notwithstanding the ruling, counsel for Petitioner has consistently asserted that one of the terms of settlement

discussions was an alleged requirement by Respondent to preclude the parents of Petitioner from the classroom.

8/ Compare Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982), 102 S. Ct. 3034, 73 L.Ed. 2d 690 (deaf child making educational progress is not entitled to a sign language interpreter).

9/ This case is also atypical because the parents did not place Petitioner in a public or private school between January 17 and August 24, 2006.

10/ Petitioner suffered a seizure on December 7, 2005, at [redacted] and was taken to a hospital emergency room. [redacted] suffered a second seizure on December 30, 2005, at home. After the first seizure, Petitioner was medically diagnosed with seizure disorder. After the second seizure, Petitioner was medically diagnosed with epilepsy. The mother is a registered nurse and was the sole witness to [redacted] [redacted]'s second seizure. The medical diagnosis of epilepsy was based, in substantial part, on symptoms of the second seizure described to the physician by the mother. The trier of fact finds the testimony of the mother and physician to be credible and persuasive and is not persuaded by contrary evidence submitted by Respondent. See Warner v. Independent School District No. 625, 134 F.3d 1333 (8th Cir. 1998) (student that suffers from epileptic seizure disorder is handicapped and entitled to special education and related services).

11/ Respondent provided a school nurse three days a week, and the parents requested a school nurse to be present every school day to administer Diastat to their [redacted] if necessary. Nursing services are related services, within the meaning of 20 U.S.C. Section 1401(a)(17), that an educational agency must provide if the nursing services are required for a student to access his or her special education. See Cedar Rapids Community School District v. Garret F., 526 U.S. 66 (1996), 119 S. Ct. 992, 143 L.Ed. 2d 154 (one-to-one nursing services required for ventilator-dependent student to remain in school); Irving Independent School District v. Tatro, 468 U.S. 883 (1984), 104 S. Ct. 3371, 82 L.Ed. 2d 664 (nursing services required for clean intermittent catherization every three to four hours for kidney patient). School health services, however, may be provided by either a school nurse or other qualified person, including trained school staff. See Department of Education, State of Hawaii v. Katherine D., 727 F.2d 809, 813-815 (9th Cir. 1983) (maintenance of student's tracheostomy tube may be performed by trained school staff and does not require services of a nurse in order to provide FAPE).

12/ Competing expert testimony disagreed on the issues of whether the medication was needed for seizures more than three or seven minutes in duration and whether the medication must be administered by a trained nurse or could be administered by trained school staff, although Petitioner contended alternatively that the training Respondent provided to school staff was inadequate. Respondent never informed the parents between January 17, 2006, and the due process hearing in the companion case that school staff had been trained to administer the medication, but the failure to disclose did not impede Petitioner's right to FAPE or significantly impede the parents' opportunity to participate in the decision-making process, within the meaning of 20 U.S.C. Section 1415(f)(3)(E)(ii)(I) and (II), because the parents allege that the training Respondent provided to school staff was inadequate to ensure the safety of their [redacted] and facilitate [redacted] return to [redacted].

13/ The IEP team incorrectly determined that a diagnosis of seizure disorder requires two seizures. A preponderance of the evidence shows that a single seizure supports a medical diagnosis of seizure disorder. A medical diagnosis of epilepsy requires at least two seizures.

14/ The stay-put IEP provided a full-time one-to-one aide for Petitioner at [redacted], and the IEP team determined the addition of a service dog was unnecessary. The IDEA does not authorize parents to choose the methodology used to provide educational and related services to a student. See Rowley, 458 U.S. at 208 (parents of deaf student receiving FAPE cannot compel use of sign language interpreter). See also M.M. v. School Board of Miami-Dade County, Florida, 437 F.3d 1085, 1102 (11th Cir. 2006) (parents of hearing impaired child receiving FAPE cannot compel choice of communication mode); White v. Ascension Parish School Board, 343 F.3d 373, 380 (5th Cir. 2003) (parents cannot prescribe location for delivery of services); Renner v. Board of Education of the Public Schools of the City of Ann Arbor, 185 F.3d 635, 645-646 (6th Cir. 1999) (parent has no right to compel Lovaas and other methods of treating autism); E.S. v. Independent School District, No. 196, 135 F.3d 566, (8th Cir. 1998) (parents cannot compel method for treating dyslexia); Lachman v. Illinois State Board of Education, 852 F.2d 290 (7th Cir. 1988) (parents cannot prescribe that deaf student be educated using a cued speech instructor).

15/ Allegations that refusal to allow the service dog to accompany Petitioner at [redacted] impedes Petitioner's ability to "fully benefit" from [redacted] education and that the presence of the dog "maximizes" Petitioner's educational benefit may not state a claim under the IDEA. See Rowley, 458 U.S. at 198 (IDEA does not require services to maximize each child's potential). See also

M.M., 437 F.3d at 1103 (complaint seeking to maximize educational benefit and choose best and most desirable methods of education does not state a cause of action under IDEA).

16/ The parties stipulated on the record in this case that Petitioner filed the criminal complaint on February 24, 2006. However, Respondent filed its motion to continue on February 15, 2006. The trier of fact infers from the date of the motion that the criminal complaint was actually filed on February 14, 2006.

17/ A determination of the educational and related services needed to provide FAPE must be based on each child's unique needs, not the child's disability. See M.M., 437 F.3d at 1095 (citing similar language in former 34 C.F.R. § 300.300(a)(3)(ii)).

18/ A student that does not attend a school defined by state law is not entitled to FAPE. Hooks v. Clark County School District, 228 F.3d 1036, 1039 (9th Cir. 2000); M.C.G. v. Hillsborough County School Board, Case No. 02-1265E (DOAH July 29, 2003), aff'd per curiam, 902 So. 2d 150 (unpublished opinion).

19/ The factual analysis is derived from judicial decisions involving ESY services. See, e.g., Cordrey v. Euckert, 917 F.2d 1460, 1475 (6th Cir. 1990).

20/ See Johnson v. Independent School District No. 4 of Bixby, Tulsa County, Oklahoma, 921 F.2d 1022, 1027-1028 (10th Cir. 1990).

21/ ESY services are not necessary to provide FAPE if they merely benefit a student, but are not required to preserve educational gains during the regular school year. Cordrey, 917 F.2d at 1475.

22/ J.S.K. v. Hendry County School Board, 941 F.2d 1563, 1573 (11th Cir. 1991) (meaningful gains across settings is limited to measurable gains in the classroom and does not require gains across settings outside the classroom).

23/ See Dibuo v. Board of Education of Worcester County, 309 F.3d 184, 190 (4th Cir. 2002) (procedural violation that does not actually interfere with FAPE does not deny FAPE).

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## NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless an adversely affected party:

a) brings a civil action within 30 days in the appropriate federal district court pursuant to Section 1415(i)(2)(A) of the Individuals with Disabilities Education Act (IDEA); [Federal court relief is not available under IDEA for students whose only exceptionality is "gifted"] or
b) brings a civil action within 30 days in the appropriate state circuit court pursuant to Section 1415(i)(2)(A) of the IDEA and Section 1003.57(5), Florida Statutes; or
c) files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 1003.57(5) and 120.68, Florida Statutes.