

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████,)
)
Petitioner,)
)
vs.) Case No. 13-1514E
)
FLAGLER COUNTY SCHOOL BOARD,)
)
Respondent.)
)
_____)

FINAL ORDER

A formal hearing was conducted in this case on May 14, 2013, in Bunnell, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: ██████████ (Petitioner's father), pro se
(Address of record)

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

STATEMENT OF THE ISSUE

The issue is whether the Flagler County School Board ("School Board") must provide extended school year ("ESY") services to Petitioner in order to afford Petitioner a free

appropriate public education ("FAPE") pursuant to the Individuals with Disabilities Education Act ("IDEA").

PRELIMINARY STATEMENT

On March 27, 2013, Petitioner's mother, [REDACTED], filed a Request for Exceptional Student Education Due Process (the "Petition") with the School Board. The Petition stated the issue as follows:

I feel [REDACTED] is being excluded from extended school year services because [REDACTED] is severely autistic. [REDACTED] has attended ESY services since [REDACTED] was in pre-K. Last year they just took [REDACTED]'s summer program away stating that [REDACTED] did not qualify for it anymore. The school tells me and [REDACTED] in [REDACTED]'s IEP meeting that [REDACTED] will not regress or has no emerging skills and therefore [REDACTED] does not need ESY. My complaint against Flagler County Schools is that I feel they are excluding [REDACTED] because of [the child's] disability. How do you know [REDACTED] will not regress if left home for 10 weeks with no summer school? [REDACTED] did regress over [the] winter break. [REDACTED] pulled [the] hair out of [REDACTED]'s head and now has a bald patch on the side of [REDACTED]'s head because [REDACTED] was left with no school for 2 weeks. I had an IEP meeting today. Today's date is March 18. They told me today and put it in [the] IEP that [REDACTED] is not going to qualify for ESY services this summer again because [REDACTED] will not regress or has no emerging skills. School ends on June 8. That is about 10 weeks away. How do you say that [REDACTED] does not qualify for a summer program because [REDACTED] has no emerging skills 10 weeks prior to school ending? They already gave up on [REDACTED] having an emerging skill. [REDACTED] can have an emerging skill next week. They should not have made

this decision until [REDACTED]'s] last IEP meeting at the end of April. I feel [REDACTED] is being discriminated against because of [REDACTED]'s] disability.

The School Board met with [REDACTED]'s parents to attempt an informal resolution of the case on April 24, 2013. On April 26, 2013, the School Board referred the matter to the Division of Administrative Hearings ("DOAH") for the assignment of an administrative law judge and conduct of a formal hearing. On April 30, 2013, a Notice of Hearing was issued that scheduled the final hearing for May 14, 2013, in Bunnell. On May 8, 2013, a joint pre-hearing stipulation was filed. The hearing was held as scheduled on May 14, 2013.

At the hearing, Petitioner was present but did not testify. Petitioner's parents, [REDACTED] and [REDACTED], testified on Petitioner's behalf. Petitioner did not offer any exhibits into evidence. The School Board presented the testimony of [REDACTED], an exceptional student education ("ESE") staffing specialist; [REDACTED], the ESE teacher who taught [REDACTED] during the 2012-2013 school year; [REDACTED], a speech/language pathologist who provided services to [REDACTED] during the 2012-2013 school year; and Dr. [REDACTED], the School Board's ESE director. The School Board's Exhibits 1 through 13 were admitted into evidence.

No transcript of the proceeding was filed at DOAH. At the close of the hearing, the parties agreed that proposed final orders, if any, would be filed on May 21, 2013. Both parties filed Proposed Final Orders on May 23, 2013, without objection. Despite the late filing, the parties' post-hearing submissions have been fully considered in the preparation of this Final Order.

FINDINGS OF FACT

1. The School Board is the agency responsible for the Flagler County School System. The School Board receives state and federal funds to provide ESE services to students with disabilities.

2. [REDACTED] was born on [REDACTED], [REDACTED]. [REDACTED] has been enrolled as a student in the Flagler County School System since [REDACTED]. [REDACTED] currently attends a Flagler County elementary school, and was enrolled in the [REDACTED] grade during the 2012-2013 school year.

3. [REDACTED]'s primary exceptionality is [REDACTED] [REDACTED] ("[REDACTED]"). [REDACTED] has been determined eligible for ESE programs in the following areas: [REDACTED], [REDACTED], [REDACTED], and [REDACTED].

4. [REDACTED] functions at level 1 in the Unique Learning Systems ("ULS") program, a standards-based curriculum specially designed for ESE students. "Level 1" indicates that the student

requires maximum supports for educational activities, similar to the "participatory" level of the Florida Alternate Assessment.

██████ is able to respond to text and answer questions using picture symbols; however, ██████'s disability affects ██████'s ability to acquire skills at the same rate as general education peers.

5. The School Board employs "exceptionality aggregate" or "cluster" sites where students with a particular disability are aggregated to receive educational services and supports specifically designed to address their disability. ██████ attends a Flagler County elementary school that is a cluster site for students with ██████.

6. ██████'s teacher, ████████████████████, is a certified ESE teacher with seven years' experience in the field. ██████ is in the process of obtaining ██████ specialty certification in teaching students with ██████.

7. In March 2013, Petitioner's father, ██████, requested a meeting to discuss ██████'s eligibility for ESY services. ██████ had received ESY services in summer 2011 but was determined not to require ESY services in summer 2012.^{1/} ██████ testified that he requested the meeting because ████████████████████ had told him ██████ did not anticipate that ██████ would require ESY services in summer 2013.

8. The meeting was held on March 18, 2013. Both parents were present at the meeting. Also present was the individual

education plan ("IEP") team consisting of [REDACTED], staffing specialist [REDACTED], speech/language pathologist [REDACTED], and general education teacher [REDACTED].

9. The IEP team used the School Board's form FCS012M, titled "Determination of Need for ESY Services." The form requires the team to review seven different items to determine the need for ESY. Each item sets forth a factual statement that must be answered "yes," "no," or "not applicable" by the IEP team. The team must also provide a rationale for its answer. The items are as follows:

1. Data indicates the likelihood that significant regression will occur in critical life skills related to academics, or for Pre-K students, developmentally appropriate pre-academic skills and these skills cannot be recouped within a reasonable amount of time without ESY services.
2. Data indicates the likelihood that significant regression will occur in critical life skills related to communication and those skills cannot be recouped within a reasonable amount of time without ESY services.
3. Data indicates the likelihood that significant regression will occur in critical life skills related to independent functioning and self-sufficiency and these skills cannot be recouped within a reasonable amount of time without ESY services.
4. Data indicates the likelihood that significant regression will occur in critical life skills related to

social/emotional or behavior development and these skills cannot be recouped within a reasonable amount of time without ESY services.

5. Data indicates the likelihood that the student is at a critical stage in the development of a critical life skill and a lapse in services would substantially jeopardize the student's chances of learning this skill. This may include emerging skills and critical points of instruction on existing skills.

6. The nature or severity of the student's disability [is] such that the student would be unlikely to benefit from his or her education without the provision of ESY services. This may include the student's rate of progress.

7. There are extenuating circumstances pertinent to the student's current situation that indicate the likelihood FAPE would not be provided without ESY services. Examples include, but are not limited to:
a student who has recently obtained paid employment and requires the services of a job coach in order to be successful;
a student who requires ESY services in order to remain in his or her existing least restrictive environment and prevents a movement into a more restrictive setting;
a student whose frequent health-related absences have significantly impeded progress on goals related to critical life skills.
(Emphasis in original.)

10. As to each of these items, the IEP team found that the answer was either "no" or "not applicable" and that [REDACTED] therefore did not need ESY services in order to receive FAPE.^{2/} The team wrote that no emerging skills had been noted for [REDACTED], and that [REDACTED] was "making slow, but steady progress."

11. [REDACTED] filed the Petition with the School Board on March 27, 2013.

12. On or about April 8, 2013, the annual meeting was held to review and update the [REDACTED]'s IEP. In attendance at this meeting were [REDACTED]'s parents, [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], Dr. [REDACTED], principal of the school attended by [REDACTED], and Dr. [REDACTED], ESE director for the School Board. During this meeting the need for ESY Services was again addressed, this time in the context of an attempt to resolve the due process complaint.

13. The IEP team's report of the meeting included the following as regards the ESY issue:

The team discussed resolution, because of the due process, because of [REDACTED] not going to Extended School Year. [REDACTED] asked the teachers if anything had changed since the meeting in March. The team noted that nothing had changed. Dad noted that during Winter Break [REDACTED] pulled [REDACTED]'s hair out. This stopped when [REDACTED] came back to school. The team discussed the criteria for Extended School. The parents feel that, because of the severity of [REDACTED]'s disability, [REDACTED] should be going to ESY. Recent ULS testing was reviewed noting that [REDACTED] only regressed on point, and [REDACTED] recouped this quickly. The parent would like to see [REDACTED] take one of these tests. The parents feel that [REDACTED] should go to ESY, and are in disagreement with the rest of the team who say that [REDACTED] does not meet criteria. The team agreed to send home a BIGmack/LITTLEmack^{3/} for the parents can use [sic] at home over the summer. However, the parents still want to go to mediation.

14. ██████████, ██████████'s ESE teacher, testified that the IEP team reviewed the data as well as ██████████ daily observations of ██████████ in the classroom to determine whether ESY services would be necessary to prevent ██████████ from unduly regressing in the skills learned during the school year.

15. ██████████ collected data on ██████████'s classroom performance throughout the year. ██████████ measured ██████████'s performance on a daily basis, and kept progress charts indicating ██████████'s performance levels in math and reading before and after working with the ULS curriculum.^{4/}

16. ██████████ testified that ██████████ is nonverbal. ██████████ communicates in class via pictures. ██████████ requires hand-over-hand prompting for all academic activities, though ██████████ is able to eat without assistance. ██████████ is tested using the Florida Alternate Assessment. The School Board provided ██████████'s Florida Alternate Assessment performance level scores for 2010, 2011, and 2012. ██████████'s math scores were performance level 1 in 2010 and level 2 in 2011 and 2012. ██████████'s reading scores were level 2 in 2010, level 1 in 2011, and level 2 in 2012.

17. ██████████ noted the parents' contention that ██████████ regressed during the Christmas break, but ██████████ did not believe ██████████ regressed more than any other student in ██████████ class.^{5/} ██████████ noted that before the Christmas break, ██████████ learned to dress after toileting and retained that skill during the break.

████ agreed with the IEP team's conclusion that █████ is making slow, steady progress.

18. █████ testified that █████ data was accurate, reliable and a valid measurement of █████'s current academic level and █████'s ability to recoup skills learned in a reasonable time following a break. █████ stated that, as █████'s ESE teacher, █████ could override the IEP team's recommendation if █████ felt strongly that █████ required ESY services. However, █████ agreed with the other members of the team (excepting █████'s parents) that █████ did not require ESY services.

19. █████ testified that █████ was evaluated at the beginning of the year for communication ability. █████ classroom observation and data indicated that █████ had not regressed any more than any other student. █████ found that █████ was able to recoup those skills in a reasonable time period.

20. █████ testified that █████ had no emerging communication skills and the data reflected █████ was not currently at a functional level where communication skills would be lost over the summer break.

21. █████ testified that in █████ role as a staffing specialist for the School Board, █████ works with more than 300 students who receive ESE services (not counting 80 students in the gifted program), and that █████ participates in the ESY decisions for all of those students.

22. ██████ led the IEP team. ██████ discussed with the team all of the classroom testing and observation data when considering the seven areas on form FCS012M to determine ██████'s eligibility for ESY services. ██████ stated that the team considered ██████'s independent functioning and self-sufficiency, and found that no new skills were emerging for ██████. ██████ further noted that ██████'s parents pointed out no new skill or data that the IEP team had overlooked.

23. ██████ noted that ██████ received ESY services during the summer of 2011, but did not receive ESY services during the summer of 2012. The lack of ESY services during the summer of 2012 did not appear to make a difference in ██████'s rate of recoupment. In the areas of social/emotional and behavioral development, ██████'s behaviors did not regress after the summer of 2012, when ESY was not provided. Neither did those behaviors regress during holiday breaks. ██████ testified that the data showed ██████'s behaviors were very consistent over time.

24. ██████ ██████, the speech therapist, worked with ██████ twice a week during the 2012-2013 school year and was in ██████'s classroom every day. ██████ testified that ██████ collected data which was used when considering ██████'s likelihood of regression related to communication. ██████ also focused on whether ██████ was at a crucial stage in development of a critical

life skill related to communication. ██████████ testified that the data did not document a potential for undue regression. ██████ found that ██████'s performance was fairly consistent over the course of the school year and that any regressions could not be linked to school breaks. The data also did not support a finding that ██████ was at such a crucial stage in development that a lapse in services over the summer would substantially jeopardize the chances of learning a communication skill.

25. Dr. ██████████ testified that ██████ is on the lower functional end of students with ██████. ██████ acknowledged that ██████'s parents believe that the severity of ██████'s condition alone should qualify the child to receive ESY services. However, Dr. ██████████ stated that severity alone does not suffice for the IEP team's determination. Rather, the severity of the student's condition is a factor considered by the team in determining the benefit the student would receive from ESY services.

26. Dr. ██████████ testified that the District has 117 students with the diagnosis of ██████. This diagnosis does not mean that all 117 students will require ESY services. Dr. ██████████ stated that over the summer, every student is expected to regress, regardless of whether the student is in ESE or regular education. The issue to be considered by the IEP team is the rate the student will recoup the academic skills that

regressed over the summer. Dr. [REDACTED] concluded that there was no data available to the IEP team that suggested [REDACTED] meets the criteria for ESY services.

27. Based on all of the data reviewed, the IEP team could not show that [REDACTED] would unduly regress. The IEP team found no documentation suggesting an emerging skill or that [REDACTED] was having a breakthrough in an area of critical life skills sufficient to support the need for ESY services.

28. The nature and severity of [REDACTED]'s disability was considered by the IEP team, which found that the data shows [REDACTED] was able to begin school after breaks and get back into the routine of school without difficulty.

29. Finally, the IEP team looked at whether there were any extenuating circumstances pertinent to [REDACTED]'s current situation that would indicate the likelihood that FAPE was not being provided. The IEP team found no extenuating circumstances. The team further noted that [REDACTED]'s parents did not indicate there were any emerging skills or data being overlooked.

30. Based on a review of the seven factors set forth in form FCS012M, the IEP team found [REDACTED] did not meet the criteria for placement in the ESY program for the summer of 2013.

31. [REDACTED], [REDACTED]'s mother, testified that she believes [REDACTED]'s civil rights have been violated, in that the School Board was discriminating against [REDACTED] due to the child's disability.

She questioned the accuracy of the School Board's data because she does not believe there is any way to accurately test a child whose disability is as severe as ██████'s. ██████ also believed that ██████'s disability rendered futile any effort to predict whether or how much ██████ will regress without ESY services. ██████ asserted that under the criteria set forth in the IDEA and its implementing regulations, the nature and severity of ██████'s disability alone should qualify the child for ESY services without regard to the other criteria listed in form FCS012M.

32. ██████ accused the School Board of denying ESY services to ██████ for budgetary reasons. She believed that the federal and state dollars the School Board is receiving for ██████ are not being used for ██████. Aside from her assertions, ██████ provided no evidence that the School Board based its decision as to ██████'s ESY services on budgetary considerations. ██████ strenuously and credibly denied that the School Board ever considers anything other than the child's educational needs in determining eligibility for ESE services of any kind.

33. ██████, ██████'s father, also attacked the objective criteria by which the School Board measures ██████'s progress. ██████ argued that the severity of ██████'s disability makes it impossible for anyone to know what ██████ is thinking, and therefore it is impossible for the School Board to state that

█████ is not learning something in school now that will be lost without the provision of ESY services.

34. █████ testified that █████ has recently shown signs of an emerging life skill. █████ stated that █████ was beginning to attempt to wipe after a bowel movement. █████ testified that █████ had not observed that emerging skill because █████ has seldom if ever had a bowel movement during school hours. Thus, even if it is accepted that █████ is attempting to wipe at home, this is not an emerging skill that would benefit from the provision of ESY services.

35. The parents were concerned that █████'s behavior at home deteriorates during school breaks. █████ likes the routine of coming to school, meeting █████, and working with █████. When deprived of that routine, █████ is at loose ends and begins acting out at home. Dr. █████ pointed out that, even if the child's behavior at home were a proper factor for the School Board to consider in assessing the need for ESY services, █████'s routine would be disrupted even if ESY services were provided. ESY services are provided at a different school than the one █████ attends during the regular school year. █████ would not be █████'s teacher and █████ would not be █████'s speech therapist.

36. █████'s parents plainly love their child and care deeply for █████'s welfare. They understand the difficulties

█ faces in life and seek to provide █ with every possible advantage. They made a powerful and moving presentation on █'s behalf at the hearing. However, the evidence presented at the hearing fully supported the IEP team's determination that ESY services will not be necessary during the summer of 2013.

CONCLUSIONS OF LAW

37. 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)(b), Florida Statutes (2012), and Florida Administrative Code Rule 6A-6.03311(9).

38. The IDEA, 20 U.S.C. §§ 1400 et seq., provides that the local education agency must provide children with disabilities with a free, appropriate public education, which must be tailored to the unique needs of the child by means of an IEP program. Bd. of Educ. Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982).

39. The determination of whether a school district has provided FAPE to an exceptional student involves a twofold inquiry as directed by the United States Supreme Court in Rowley:

First, has the State [or school district] complied with the procedures set forth in the Act [IDEA]? And second, is the individualized educational program developed through the Act's procedures reasonably

calculated to enable the child to receive educational benefits? If these requirements are met, the State [or school district] has complied with the obligations imposed by Congress and the courts can require no more.

Id. at 206-207. See also Sch. Bd. of Collier Cnty., Fla. v. K.C., 285 F.3d 977 (11th Cir. 2002) (restating and applying the Rowley test).

40. The nature and extent of "educational benefits" required by Rowley to be provided by Florida school districts was discussed in School Board of Martin County v. A.S., 727 So. 2d 1071, 1074 (Fla. 4th DCA 1999):

Federal cases have clarified what "reasonably calculated to enable the child to receive educational benefits" means. Educational benefits provided under IDEA must be more than trivial or de minimis. J.S.K. v. Hendry Cnty. Sch. Dist., 941 F.2d 1563 (11th Cir. 1991); Doe v. Alabama State Dep't of Educ., 915 F.2d 651 (11th Cir. 1990). Although they must be "meaningful," there is no requirement to maximize each child's potential. Rowley, 458 U.S. at 192, 198. The issue is whether the "placement [is] appropriate, not whether another placement would also be appropriate, or even better for that matter. The school district is required by the statute and regulations to provide an appropriate education, not the best possible education, or the placement the parents prefer." Heather S. by Kathy S. v. State of Wisconsin, 125 F.3d 1045, 1045 (7th Cir. 1997)(citing Bd. of Educ. of Cmty. Consol. Sch. Dist. 21 v. Illinois State Bd. of Educ., 938 F.2d 712 at 715, and Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 (7th Cir. 1988)). Thus, if a student progresses in a school district's program, the courts should not examine

whether another method might produce additional or maximum benefits. See Rowley, 458 U.S. at 207-208; O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233, 144 F.3d 692, 709 (10th Cir. 1998); Evans v. District No. 17, 841 F.2d 824, 831 (8th Cir. 1988).

41. Petitioner has the burden of proof to establish by a preponderance of the evidence that [REDACTED] will be denied FAPE by the IEP team's decision that [REDACTED] does not require ESY services during the summer of 2013. See Schaffer v. Weast, 546 U.S. 49 (2005).

42. It is undisputed that [REDACTED] is an exceptional student with [REDACTED] for whom services under the IDEA must be provided.

43. The IDEA provides no express statutory right for an ESE student to receive ESY services. However, 34 C.F.R. section 300.106 provides as follows:

§ 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

(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.

44. Several federal appellate courts have dealt with how to determine when ESY services are necessary to provide FAPE. In M.M. v. School District Of Greenville County, 303 F.3d 523, 537-538 (4th Cir. 2002), the Fourth Circuit set forth the following guidelines:

ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months. We have observed that "the determination whether services beyond the regular school day are essential for the child to receive any educational benefit is necessarily fact and case specific." Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 980 (4th Cir. 1990). Because a showing of

disabled child's need for ESY Services may be established by expert testimony, based on

a professional individual evaluation. However, the mere fact of likely regression is not a sufficient basis, because all students, disabled or not, may regress to some extent during lengthy breaks from school. ESY Services are required under the IDEA only when such regression will substantially thwart the goal of "meaningful progress." Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 184 (3d Cir. 1988).

45. In Alamo Heights Independent School District v. State Board of Education, 790 F.2d 1153, 1158 (5th Cir. 1986), the Fifth Circuit stated:

The some-educational-benefit standard does not mean that the requirements of the Act are satisfied so long as a handicapped child's progress, absent summer services, is not brought "to a virtual standstill." Rather, if a child will experience severe or substantial regression during the summer months in the absence of a summer program, the handicapped child may be entitled to year-round services. The issue is whether the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided an educational program during the summer months. This is, of course, a general standard, but it must be applied to the individual by the [IEP team] in the same way that juries apply other general legal standards such as negligence and reasonableness. (Citations omitted.)

46. The School Board points to Johnson v. Independent School District No. 4 of Bixby, 921 F.2d 1022, 1027-1028 (10th Cir. 1990), wherein the Tenth Circuit stated:

The amount of regression suffered by a child

together with the amount of time required to recoup those lost skills when school resumes in the fall, is an important consideration in assessing an individual child's need for continuation of his or her structured educational program in the summer months...

However, the regression-recoupment analysis is not the only measure used to determine the necessity of structured summer program. In addition to degree of regression and the time necessary for recoupment, courts have considered many factors important in their discussions of what constitutes an "appropriate" educational program under the Act. These include the degree of impairment and the ability of the child's parents to provide the educational structure at home; the child's rate of progress, his or her behavioral and physical problems, the availability of alternative resources, the ability of the child to interact with non-handicapped children, the areas of the child's curriculum which need continuous attention, and the child's vocational needs; and whether the requested service is "extraordinary" to the child's condition, as opposed to an integral part of a program for those with the child's condition...

The analysis of whether the child's level of achievement would be jeopardized by a summer break in his or her structured educational programming should proceed by applying not only retrospective data, such as past regression and rate of recoupment, but also should include predictive data, based on the opinion of professionals in consultation with the child's parents as well as circumstantial considerations of the child's individual situation at home and in his or her neighborhood and community. (Citations

47. In the instant case, [REDACTED] did not demonstrate that unusual regression or inordinately slow recoupment has occurred

in the past or will occur after a regular school break. The data presented at the hearing did not establish historic regression, and ██████'s teachers were confident undue regression would not occur during the summer of 2013. The lack of ESY services during the summer of 2012 did not make a difference in ██████'s rate of recoupment when the 2012-2013 school year started. It was noted that ██████'s best reading performance of the school year occurred during the month after the winter holiday break. ██████'s parents did not offer even anecdotal evidence that could be construed as data establishing a danger of inordinate regression.

48. The evidence did not demonstrate that ██████ has an emerging life skill that would benefit from or be enhanced by the provision of ESY services.

49. The IEP team made an individualized determination of the need for ESY services. The School Board's form FCS012M allowed the IEP team to give due consideration to criteria that are fully consistent with the case law discussed above.

51. There was no evidence, aside from the unsupported assertions of ██████'s parents, that discrimination or budgetary constraints played any part in the IEP team's deliberations as to ██████'s eligibility for ESY services.

52. The evidence presented at the hearing fully supported the IEP team's determination that ESY services will not be necessary during the summer of 2013.

ORDER

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

ORDERED that Request for Exceptional Student Education Due Process filed on behalf of [REDACTED] on March 27, 2013, is DISMISSED.

DONE AND ORDERED this 30th day of May, 2013, in Tallahassee, Leon County, Florida.

S

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of May, 2013.

ENDNOTES

^{1/} The School Board's 2012 decision that [REDACTED] did not require ESY services was the subject of a due process hearing. See A.C. v. Flagler Cnty. Sch. Bd., Case No. 12-2157E (Fla. DOAH Aug. 17, 2012). The final order upheld the School Board's decision that [REDACTED] did not require ESY services.

2/ ██████████ testified that if the answer to any one of the seven items is "yes," then the child is deemed eligible for ESY services.

3/ BIGmack and LITTLEmack are digital single-message communicating devices used with some success in ██████████'s classroom. The devices allow ██████████ to connect pictures to words. For example, if ██████████ selected a picture of a dog, the device would sound the word "dog."

4/ No clear patterns regarding ██████████'s performance before and after school breaks emerged from the graphs submitted by the School Board reflecting ██████████'s data. ██████████'s performance in math appeared to peak in the month of February, whereas ██████████'s peak performance in reading came in January, just after the winter holidays.

5/ ██████████'s class consisted of six students, including ██████████ ██████████ had two paraprofessionals to assist ██████████. The paraprofessionals were not called as witnesses in the hearing.

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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 90 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 90 days in the appropriate state circuit court pursuant to Section 1415(i)(2)(A) of the IDEA and Section 1003.57(1)(b), Florida Statutes; or
- c) only if the student is identified as "gifted", files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 1003.57(1)(b) and 120.68, Florida Statutes.