

**IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**

D.D. : **Docket No.:**
Petitioner, : **OSAH-DOE-SE-1454724-63-Woodard**
 :
v. :
 :
GLYNN COUNTY SCHOOL DISTRICT, :
Respondent. :



FILED

OCT 15 2014

FINAL DECISION

I. INTRODUCTION

Kevin Westray
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Respondent Glynn County School District proposed that Petitioner “D.D.” receive Extended School Year (“ESY”) programming at the rate of 4.5 hours per day, three days per week, for the period June 10, 2014 through July 24, 2014, and assigned a different lead teacher than was assigned during the regular school year. Petitioner’s mother, “C.M.,” filed a Due Process Hearing Request on May 28, 2014 with the Georgia Department of Education. She sought an increase in ESY programming to four days per week, and reassignment to a class led by the regular school year teacher.

Pursuant to an Order entered by the undersigned Administrative Law Judge, the parties held a resolution conference on June 12, 2014, but were not able to settle the issues in dispute. An evidentiary hearing was conducted on July 9, 2014 at Brunswick City Hall, Glynn County, Georgia. C.M. appeared and represented Petitioner *pro se*. Respondent was represented by Andrew H. Lakin, Attorney at Law, Brunswick. Copies of the exhibits admitted during the hearing were filed on July 14, 2014. The record was held open for any additional exhibits from Petitioner, and closed on July 28, 2014.

II. FINDINGS OF FACT

1.

D.D. is an 18 year old male who is a student who has been served by the Special Education program in Glynn County from the earliest available age after he moved with his family from Brooklyn, NY, to Brunswick.. D.D. is diagnosed with autism (described by Carol Geiken, Special Education Coordinator for Glynn County School District as “more severe”) and

attention deficit hyperactivity disorder. Because of these disabilities, D.D. is non-verbal. He is, however, independent with most activities of daily living such as toileting, feeding, and basic hygiene. He communicates through sign language, pointing to pictures, and facial expressions to convey his wants and emotions. The small class size also helped D.D. adjust to a potentially overwhelming change in environment brought about by the opening of a new and much larger Brunswick High School campus. *Testimony of Carol Geiken; testimony of Linda Savage, Occupational Therapist; testimony of C.M.; Individualized Education Plan (IEP), May 2014.*

2.

Petitioner was placed in a Resource Learning classroom during the 2013-2014 school year. A total of six students are served in the Resource class by one Special Education teacher and five Paraprofessionals. The school staff observed that D.D. exhibited good gross motor skills, but that he had great difficulty with some tasks that required fine motor skills, such as writing. Linda Savage, an Occupational Therapist, noted that intensive instruction has been provided to D.D. over a period of years to help him perform basic writing tasks. The first goal is to teach D.D. how to write his own name. As of the end of the Spring semester 2014, D.D. has mastered writing the letter "L," and is working on mastering the letter "E," which are both contained in his name. *Testimony of Carol Geiken; testimony of Linda Savage.*

3.

On May 16, 2014, a meeting was convened of the IEP Committee to consider whether D.D. would benefit from Extended School Year (ESY) services provided during the regularly-scheduled Summer break. In attendance were Laura Wallen, the Autism Specialist for the school district; Dr. Carol Geiken; Michelle Ussery, D.D.'s regular school year Special Education teacher; and C.M. The IEP Committee reviewed behavior data compiled by Ms. Ussery over multiple weeks during August, September, October, November and December 2013, and January and March 2014. Based on this empirical data, the Committee determined that D.D. "qualifies for ESY based on his behavioral needs" According to the recommendation of a majority of the IEP Committee, D.D.'s ESY goals were limited to "transitioning without behaviors or disruptions, not stealing food during times of meal/snacks, and accepting the word "no" without significant behaviors or disruptions." The Committee concluded that D.D.'s behavioral goals could be met by providing 3 days ESY per week, 4 ½ hours per day, between June 10, 2014 and July 24, 2014, with the week of June 30 off for the holiday break. *Testimony of Carol Geiken;*

IEP Committee Report, May 16, 2014.

4.

Although the majority of the IEP Committee did not find that the empirical data supported ESY to meet an educational goal, D.D.'s mother argued during the meeting that ESY should also include educational instruction. She also asserted that he required more hours than the IEP Committee recommended, and requested that his ESY be increased from 3 to 4 days per week from the first day onward. The majority of the Committee found that 4 days per week was an inappropriate use of school district resources, as his behavioral goals could be met in 3 days. The Committee did recommend, however, that ESY hours could be reevaluated after 2 weeks, and additional ESY hours provided if an increase was supported by the available data. *Testimony of C.M.; IEP Committee Report, May 16, 2014.*

5.

The Committee voted over C.M.'s objections to approve D.D. for ESY at the recommended level of class hours for 3 days per week. Her concerns and objections were formally noted in the formal IEP Committee report. C.M. filed a request for Fair Hearing to contest the ESY recommended by the majority of the IEP Committee. She also decided to hold D.D. out of ESY. Her decision was based on the same arguments raised during the IEP Meeting in May 2014, and also on the subsequent decision by the school district to hire John Roy as the 2014 ESY teacher for D.D.'s class. C.M. argued that Ms. Ussery should be hired to teach ESY, as she was his regular school year teacher and knew him better than any other educator. *Testimony of Carol Geiken.*

6.

At the hearing, C.M. explained why she wanted more ESY days per week, what changes she wanted in the ESY goals, and why the ESY teacher should be changed. C.M. noted that an extra day of ESY could help reinforce D.D.'s penmanship, which had improved during the last two months of the 2013-2014 regular school year. C.M. helped D.D. with his writing skills at home, but she was not able to help him master all the letters needed to write his entire name. C.M. wanted D.D. to learn how to write his name before leaving the public school special

education program after he reached age 22. C.M. also wanted the Glynn County School District to consider a special writing program sold by a private company in Texas, and implement the program into the ESY. (The school district representatives at the hearing did not commit to adopting this "Texas Writing Program," nor was it rejected). In regard to the behavior goals established in the IEP Committee's ESY recommendation, C.M. testified that she wished to add several goals to D.D.'s ESY; including: training on sitting in his seat and concentrating in class; no jumping and spinning around; no hitting on walls when in pain; and teaching D.D. to use sign language to meet his needs. Finally, C.M. argued that Ms. Ussery should be the ESY teacher because she was D.D.'s regular special education teacher and knew his needs and strengths. C.M. believed that Ms. Ussery was "much more experienced" than Mr. Roy, although she was not aware of Roy's educational and employment background as a professional educator. C.M. strongly disagreed with the hire of John Roy as the ESY teacher. Mr. Roy taught D.D. during a previous ESY, and C.M. recalled that D.D. came home several times with torn clothes. The school district emphasized at the hearing that D.D. was welcome to attend ESY for the remainder of the Summer Break.

7.

The hearing record shows that John Roy holds a Master's Degree in Education, and has many years of experience in Indiana and Georgia in educating low-functioning children in self-contained classrooms. He has set up programs for children with extreme autism in several county school districts in Indiana, and has taken his experiences and training to the ESY class at Brunswick High School. Roy taught D.D. during the 2013 ESY session, but that was at the old Brunswick High School, which he described as "older, and much poorer" than the current facility. The 2013 ESY class contained 12 students, while the 2014 ESY was set up for only 6 students (Because D.D. was withheld from ESY prior to the hearing, only 5 students were actually served in the class). The 2014 ESY class also contained a relatively large number of paraprofessionals, which meant the normal ratio of student-to-staff was no more than 2-to-1. Roy recalled that D.D. did tear his pants during the 2013 ESY, and that he and other staff members had searched the gym, classroom, and bus to locate the cause. Roy was saddened that D.D. was not present in his ESY class. He believed that D.D. would benefit from interaction with the teachers, paraprofessionals, and other students. The three-day-per-week ESY sessions

were designed to provide students with more instruction and guidance than they received in four days in past years. Roy emphasized that the new high school building was more conducive to a positive learning experience and better student attitudes. *Testimony of John Roy.*

III. CONCLUSIONS OF LAW

A. General Law Regarding IDEA.

1.

The laws governing this case include IDEA, 20 U.S.C. § 1400 *et seq.*; federal regulations promulgated pursuant to IDEA, 34 C.F.R. § 300 *et seq.*; and Georgia Department of Education Rules, Ga. Comp. R. & Regs. (“Ga. DOE Rules”), Ch. 16-4-7.

2.

Petitioner bears the burden of proof in this matter. Schaffer v. Weast, 546 U.S. 49 (2005); Ga. DOE Rule 160-4-7-.12(3)(1); OSAH Rule 616-1-2-.07. The standard of proof on all issues is a preponderance of the evidence. OSAH Rule 616-1-2-.21(4).

3.

Under IDEA, students with disabilities have the right to a free appropriate public education (“FAPE”). 20 U.S.C. § 1412(a)(1); 34 C.F.R. §§ 300.1, 300.100; Ga. DOE Rule 160-4-7-.01(1)(a). “The purpose of the IDEA generally is ‘to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living’” C.P. v. Leon County Sch. Bd., 483 F.3d 1151 (11th Cir. 2007), *quoting* 20 U.S.C. § 1400(d)(1)(A).

4.

5

The United States Supreme Court has developed a two-part inquiry to determine whether a school district has provided FAPE: “First, has the State complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?” Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 (1982). “This standard, ... has become known as the Rowley ‘basic floor of opportunity’ standard.” C.P., 483 F.3d at 1152, citing JSK v. Sch. Bd., 941 F.2d 1563, 1572-73 (11th Cir. 1991). See also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1280 (2008). Under the Rowley standard, a disabled student “is only entitled to some educational benefit; the benefit need not be maximized to be adequate.” Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1292 (11th Cir. 2001).

B. Criteria for Extended School Year Programming

5.

As an additional educational element to ensure that a student is provided with FAPE, the school district is required by Federal and State law to provide Extended School Year (ESY) in appropriate situations. “[ESY] Programming is educational programming which extends instruction beyond the conventional school year to prevent serious regression over the summer months.” Hoelt v Tucson Unified School Dist., 967 F. 2d 1298, 1301 (9th Cir. 1992)(citing Johnson v Indep. Sch. Dist. No. 4, 921 F.2d 1022, 2017-28 (10th Cir. 1990). A school district is not required to provide ESY to all disabled students, but only when ESY is ‘necessary to provide FAPE....’ 34 CFR § 300.106(a)(1). “[ESY] 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.” 34 CFR § 300.106(a)(2), See also

Ga. DOE Rule 160-4-7-.02(7).

6.

In order to determine if a child must be provided ESY, a school district is to “proceed by applying not only retrospective data, such as past regression and rate of recoument, 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.” Johnson, 921 F.2d at 1028. However, a school district is not required to provide FAPE, including ESY programming “that is guaranteed to maximize the disabled student’s potential. Congress was mindful of the financial burdens that such expanded services imposed, and Congress was not utopian in its goals. Sumner School Dist. v. L.D., 166 P. 3d 837, 844 (Wash. App. 2007) (internal citations omitted).

B. Due Process Complaints and Hearings

7.

If a parent disagrees with all or a portion of a child’s IEP (including any provision for or denial of ESY), or believes the school district has violated IDEA in terms of the identification, evaluation, educational placement or the provision of FAPE, the parent is entitled to file a due process complaint. 34 C.F.R. § 507(a). In addition, because the definition of FAPE requires special education and related services that are provided “in conformity with the IEP,” a parent can also seek relief under IDEA if the school fails to implement a “substantial,” “material,” or “essential” provision of the IEP. B.F. v. Fulton County Sch. Dist., 2008 U.S. Dist. LEXIS 76714, *72 (N.D. Ga. 2008), citing Van Duyn v. Baker Sch. Dist., 502 F.3d 811, 822 (9th Cir. 2007); Houston Indep. Sch. Dist. V. Bobby R., 200 F.3d 341 (5th Cir. 2000); Neosho R-V Sch.

Dist. V. Clark, 315 F.3d 1022 (8th Cir. 2003).¹

7.

Parents can also bring a claim under IDEA if the school district has failed to comply with the “comprehensive system of procedural safeguards designed to ensure parental participation in decisions concerning the education of their disabled children.” Honig v. Doe, 484 U.S. 305, 308 (1988). However, “[v]iolation of any of the procedures of the IDEA is not a per se violation of the Act.” K.A. v. Fulton County Sch. Dist., 741 F.3d 1195, 1205 (11th Cir. 2013), quoting Weiss v. Sch. Bd., 141 F.3d 990, 996 (11th Cir. 1998). Under IDEA, in order to prove a denial of FAPE based on a procedural violation, Petitioners must show that the procedural inadequacies “(i) impeded the child’s right to a FAPE; (ii) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) caused a deprivation of educational benefit.” See 34 C.F.R. § 300.513(2); 20 U.S.C. § 1415(f)(3)(E). In Weiss, the Eleventh Circuit held that where a family has “full and effective participation in the IEP process . . . the purpose of the procedural requirements are not thwarted.” 141 F.3d at 996. See also K.A. v. Fulton County Sch. Dist., 741 F.3d at 1205 (no relief warrant where no evidence of prejudice to student or parents from defects in notice or delay in furnishing records). There is no requirement, however, that a parent must be afforded the right to choose the specific educator who teaches their child. The parent certainly can make a suggestion to the IEP Committee, but the school district’s refusal to follow the parent’s suggestion is not, per se, a violation of the parent’s right to “full and effective participation in the IEP process.”

1 The failure to implement must be more than *de minimus* failures. Id.

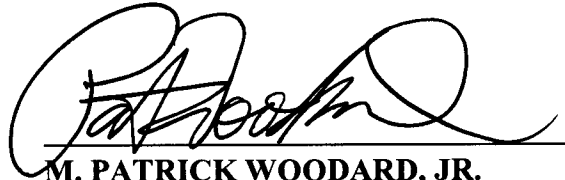
9.

The IDEA regulations provide that “[c]hanges to the IEP may be made either by the entire IEP Team at an IEP Team meeting, or as provided in paragraph (a)(4) to this section, by amending the IEP rather than by redrafting the entire IEP.” 34 C.F.R. 300.324(a)(6). Subparagraph (a)(4) of that section permits the School District to make changes to an IEP after an annual IEP meeting if the parent and the School District “agree not to convene an IEP Team meeting for the purpose of making those changes, and instead ... develop a written document to amend or modify the child’s current IEP.” 34 C.F.R. 300.324(a)(4).

10.

The Court concludes, based on the Findings of Facts above, that Glynn County School District did not violate any procedural or substantive safeguards when it decided to provide the following services: (1) ESY to D.D. for the Summer session of 2014; (2) ESY class sessions at the rate of 4 ½ hours per day, 3 days per week, during the Summer, with a week-long break coinciding with the July 4 holiday; (3) Applying the empirical data recorded by Ms. Ussery during the regular 2013-2014 school year that showed D.D. would benefit from working toward behavioral goals, and not educational goals; and (4) Selection of John Roy as ESY teacher. There is no evidence that C.M. was limited in any way from expressing her views during or after the IEP meeting in May 2014, or that the other members of the IEP Committee dismissed her requests for changes in ESY services without first giving her concerns due consideration. For these reasons, the Court declines to make any changes to the IEP in regards to ESY for Summer 2014.

SO ORDERED, this 10th day of October, 2014.

A handwritten signature in black ink, appearing to read "M. Patrick Woodard, Jr.", written over a horizontal line.

M. PATRICK WOODARD, JR.
Administrative Law Judge