

01-0124187

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

~~_____~~,)

Petitioner,)

DOCKET NO.:

OSAH-DOE-SE-01-24187-51-JRA

v.)

EFFINGHAM COUNTY SCHOOL)
SYSTEM,)

Respondent.)



FINAL DECISION

I. Introduction

The above matter came before the Office of State Administrative Hearings (OSAH) on July 11, 2001 as a result Petitioner's request for a due process hearing under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*¹ The sole issue presented at the hearing was whether Petitioner is entitled to receive extended school year (ESY) services; specifically, additional speech therapy in the amount of thirty minutes, two times per week. Based on the evidence presented at the hearing, the following findings of fact and conclusions of law are made. It is determined that the services Respondent has provided Petitioner during the school year of 2000-2001 constitute an adequate free and appropriate education (FAPE). In applying the criteria found in state regulations as well as federal law, it is determined that the evidence does not support a conclusion that Petitioner's Individualized Educational Program (IEP) requires that EYS services be included. Consequently, Respondent's action is **affirmed**.

II. Procedural History

A due process request was made by Petitioner's mother on behalf of Petitioner on June 21, 2000. Although there was originally a claim by Petitioner's mother that the request was made on May 29, 2001 via letter, that letter requested merely mediation. A prehearing conference was conducted and as a result of that conference, venue was established in Savannah, Georgia and a hearing date set for July 11, 2001. At the conclusion of the hearing, the record was held open for thirteen days for filing of briefs.²

¹ At the hearing Petitioner's mother appeared represented by Eric R. Gotwalt; Respondent was represented by Richard J. Harris. Respondent representative/designee was Dr. Colleen Webb.

² Counsel for both parties submitted excellent briefs, very useful to this tribunal.

III. Admissibility of Petitioner's Exhibits P-4 and P-5

Left reserved for the decision was the issue of admissibility of Petitioner's Exhibits P-4 and P-5. P-4 is incomplete and not admitted. P-5 is unfortunately a combination of several documents. Admitted is Petitioner's May 29, 2010 letter to the school; not admitted are the other documents showing a request for due process (Petitioner's mother laid no foundation in her evidence to show these documents were sent and they contain two different dates); not admitted are the statements by Gabriel Chittick; Tony Kicklighter; and Abby Gayle Johnson (who were not present to testify); admitted are the speech therapist, Ms. Boyette's, notes; admitted is the Babies Can't Wait material; admitted is the copy of the October 2, 2001 IEP; admitted are the notes from the May 24, 2001 meeting; admitted are the occupational therapy evaluations of Weger; admitted is the May 8, 2001 IEP notes; admitted is Ms. Boyette's letter dated May 11, 2001; admitted are the speech-language short term instruction goals; not admitted is the remainder of the material, no foundation in record as to who created the notes.

III. Findings of Fact

1.

██████ is a █████ year old boy who attends █████ Elementary School ("Local School District" or "LSS") and is in their preschool intervention (PSI) program. He has been diagnosed with Pervasive Developmental Disorder (PDD) with autistic characteristics. He entered the LSS in August, 2000. (Testimony of Sikes, transcript (T.) at p. 28 ; Respondent's Exhibit R-3)

2000-2001 School Year

2.

When he initially entered the LSS, an IEP was developed on August 29, 2000 placing him in the PSI. Although the option of continuing his services at █████, a school he had been attending was considered, this option was rejected. His short-term objectives under the August 29, 2000 IEP focused on completing educational and developmental evaluations, especially speech and language and occupational therapy (OT) evaluations. Once his educational needs were assessed a new IEP was developed on October 2, 2001. (Respondent's Exhibit R-2)

3.

██████ had been presenting tantrums at the beginning of the school year, but this began to decrease by the October 2, 2000 IEP meeting after █████ became used to the classroom structure and routine. He initially would communicate with a whine and had difficulty sitting for any length of time. (Testimony of Sikes; T. at pp. 29-32)

4.

His speech was evaluated by the school speech therapist, Ms. Boyette, in September, 2000. █████ showed a moderate language delay in areas of receptive and expressive semantics (vocabulary, descriptive and quantity concepts) and in syntax (pronouns and verb usage). In

addition he had a moderate articulation delay, and limited spontaneous speech. (Testimony of Boyette, T. at pp. 70-71; Respondent's Exhibit R-3)

5.

An Autism Eligibility report was prepared by the associate school psychologist with input from the PSI teacher, speech therapist and occupational therapist. Based on the Gilliam Autism Rating Scale, [REDACTED] showed a quotient of 90, the average range of severity of autism symptoms. His motor skills were evaluated as adequate but communication and social skills below average. (Respondent's Exhibit R-3)

6.

The IEP developed on October 2, 2000 for the school year 200-2001 specified the provisions of the following services: autism services through the PSI classroom with speech-language therapy two times per week for language and articulation delay; and OT for one time per month. Annual and short -time goals were established in several skill areas, including speech. (Respondent's Exhibit R-3)

7.

During the course of the school year 2000-2001, [REDACTED] made steady progress in meeting his identifiable goals. By the end of the school year he had mastered all but two of his objectives in the area of speech. His PSI teacher and school speech therapist observed a steady progression in skills; in speech [REDACTED] would talk in three to four word sentences. Neither the PSI teacher or speech therapist noticed any loss of skills due to school holidays or breaks. (Testimony of Sikes, T. At pp.34-35; testimony of Boyette, T. at pp. 73; 77-78)

2001-2002 School Year

8.

An IEP for the upcoming school year was developed on May 8, 2001. The option of ESY services was considered in speech therapy but rejected. [REDACTED] was not exhibiting any emerging skills in language, i.e., no sudden jump or blossoming in skills. He had shown steady progress throughout the year and did not lose skills once obtained. Services for the upcoming year including continuing placement in PSI and continuing speech and occupational therapy with new annual and short-term goals. Additionally, in response to [REDACTED]'s mother's concern over missed speech therapy sessions (due to holidays and training days), these sessions were to be made-up before the end of the school year. (Testimony of Sikes T. at p. 60; testimony of Boyette T. at pp. 79-89; Respondent's Exhibit R-4 and R-5)

9.

[REDACTED] began receiving private speech therapy on April 15, 2001, one time per week for one hour. His private speech therapist observed some spontaneous speech developing in June, 2001 and observed [REDACTED] using three to four word sentences. (Testimony of Goodnature, T. At p. 127; 131)

IV. Conclusions of Law

1.

This matter is governed by the Individuals with Disabilities Act (IDEA) and the regulations implemented under IDEA which require that a free and appropriate education (FAPE) be provided to any student who is identified as having a disability as defined by the Act, 20 U.S.C. § 1412 (1); 34 C.F.R. § 300.4, in the least restrictive environment. The FAPE requirement has been interpreted to mean that "the education to which access is provided is sufficient to confer some educational benefit upon the handicapped child". *Board of Education of the Hendrick Hudson Central School District v Rowley*, 458 U.S. 176(1982) at 200. The court established a two prong test to determine the appropriateness of an Individualized Education Plan (IEP): first, has the State complied with the procedures set forth in the Act and secondly, is the individualized educational program reasonably calculated to enable the child to receive educational benefits?

2.

The above matter is Petitioner's request for a due process hearing under IDEA. Petitioner is satisfied with services provided during the school year but is seeking EYS services. Consequently, the burden of proof rests with the Petitioner. *Devine v. Indian River County School Board*, 249 F.2d 1289 (11th Cir. 2001)

3.

The LSS shall ensure that ESY services are available as necessary to provide FAPE. 34 CFR § 300.309. In assessing when ESY services should be provided as part of a disabled individual's FAPE, there appears to be no bright line rule. Each individual's needs should be considered on a case by case basis. Some criteria, however, are found in federal case law. One criterion is whether the absence of services would result in a regression of the individual's skills and lead to a long time of recoupment of these skills. *Alamo Heights Ind. School District v. State Board of Education*, 790 F.2d 1153 (5th Cir. 1986) Although regression/recoupment is an important criterion, the determination should not be limited to regression/recoupment but other criteria used as well. *Johnson v. Ind. School District No. 4*, 921 F.2d 1022 (10th Cir. 1990)

The State of Georgia's Department of Education has promulgated regulations which set out criteria to be considered by the LSS when making this decision:

The IEP shall determine if ESY services are needed as part of the student's FAPE. In doing so, it shall consider the individual needs of the student, and a multiplicity of variables, including such factors as:

- (i) The age of the student;
- (ii) The severity of the student's disability;
- (iii) Progress on skills as identified in the IEP goals and objectives which address, as appropriate, the student's needs in the area of academics, communication, social, behavior, motor, vocational, and mobility.
- (iv) The contents of any applicable transition plan;
- (v) The rate of progress for the student or the rate of regression which may limit the student's ability to achieve IEP goals and objectives;

- (vi) The relative importance of the IEP goals at issue;
- (vii) Whether related services are needed to enable the student to progress toward IEP goals;
- (viii) Whether there were any delays or interruptions in services during the school year; and
- (ix) Other pertinent information such as emerging skills. Ga. DOE Reg. 160-4-7-.09(3)(i)(i-ix).

4.

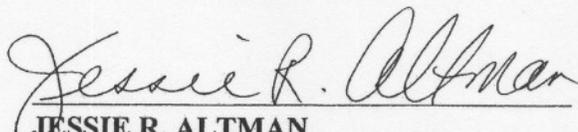
Here there is no evidence of past regression during breaks or holidays. In fact this is the first summer subsequent to [REDACTED]'s entry into the LSS. Although retrospective experience is not the only factor to be considered, the opinion of the school personnel (who have worked most closely with [REDACTED]) is that significant regression is not expected. [REDACTED] is continuing to receive private speech therapy. There is an opinion in the letter submitted by Petitioner's neurologist that [REDACTED] may be "at risk" for regression but what this opinion is based on is difficult to determine. And additionally, Petitioner has argued that regression is not the concern. Petitioner through his mother and counsel is emphasizing new emerging language skills and the young age of the Petitioner.

Although there is some testimony by the private speech therapist that spontaneous speech had developed in June, the environmental prompts and the nature of the speech (three to four word sentences) does not suggest more than what the school officials have already observed as the part of the child's natural progression. Only the mother of Petitioner has observed more speech development. Clearly, speech therapy has been a significant component of [REDACTED]'s IEP and he is at a critical age for language development. However, the preponderance of the evidence supports the conclusion that [REDACTED] has made steady progress in meeting his educational goals and received benefit from the instruction provided under his IEPs. There is insufficient evidence of emerging skills to require ESY services as part of his FAPE.

Decision

Based on the foregoing findings of fact and conclusions of law, the LSS has been determined to have complied with IDEA.

SO ORDERED this ____ day of August, 2001.


JESSIE R. ALTMAN
ADMINISTRATIVE LAW JUDGE