

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA



JUN 29 2018

████ by and through █████)
and █████)
Petitioners,)
v.)
CATOOSA COUNTY)
SCHOOL DISTRICT,)
Respondent.)

Docket Number:1835374
1835374-OSAH-DOE-SE-23-Kennedy

Kevin Westray
Kevin Westray, Legal Assistant

And

████ by and through █████)
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Petitioners,)
v.)
CATOOSA COUNTY)
SCHOOL DISTRICT,)
Respondent.)

Docket Number:1836007
1836007-OSAH-DOE-SE-23-Kennedy

FINAL DECISION

████ and █████ by and through their father █████ █████ filed a request for due process hearing. A hearing was held on May 25, 2018. The parties submitted written closing arguments on June 4, 2018. Upon careful consideration of the evidence presented, judgment is entered for Petitioner in the matter of █████ and judgement is entered for Respondent in the matter of █████

I. FINDINGS OF FACT

1.

████ █████ is the father of █████ children, █████ of whom are disabled. *Testimony of* █████ █████ *Testimony of* █████ █████

2.

On April 2, 2018 Mr. ██████ filed Due Process Hearing Requests for two of his children, ██████ (age █) and ██████ (age █). On both Due Process Hearing Requests, Petitioners indicated the reasons for requesting a hearing were related to “Evaluation” and “Educational Placement.” Petitioners then detailed their concerns regarding Extended School Year (ESY) services. In their requests, Petitioners asserted that Respondent failed to explain ESY to Petitioners, that ESY was not discussed at any time prior to February 23, 2018 to determine if Petitioners qualified to receive such services, and that Petitioners would have benefited from receiving ESY services in prior years. Petitioners requested as relief, “monies or an educational scholarship to be set aside for [their] education upon graduating high school.” *Testimony of ██████ ██████ ALJ Exhibits 1 and 2, Due Process Hearing Requests.*

3.

During the 2017-2018 schoolyear, ██████ attended ██████ Primary School and completed the 1st grade, while ██████ attended ██████ Elementary School and completed the 3rd grade. *Stipulation of Parties.*

4.

Both ██████ and ██████ suffer from various disabilities that adversely impact their education. More specifically, ██████ suffers from Mild Intellectual Disability (MID), Speech Delay, Anxiety, Autism and Epilepsy. ██████ suffers from MID, Attention Deficit Hyperactivity Disorder (ADHD), Speech Delay, Language Disorder, Auditory Processing Disorder, and Short Term Memory Loss. *Stipulation of Parties; Testimony of ██████ ██████*

5.

Both children have been determined eligible to receive Special Education Services under the Individuals with Disabilities Education Act (IDEA). More specifically, ██████ has been determined eligible under the IDEA categories of Significant Developmental Delay and Speech or Language Impairment, while ██████ has been determined eligible under the IDEA categories of Specific Learning Disability and Speech or Language Impairment. *Stipulation of Parties; Testimony of ██████ ██████ Testimony of B█████ C█████; Special Education Director for Catoosa County School District; Petitioner’s Exhibit P-1 for ██████ and Petitioner’s Exhibit P-1 for ██████*

6.

The parties met on March 28, 2017 and February 5, 2018 to conduct annual reviews of ■■■■■s Individualized Education Plan (IEP).¹ In addition to the annual reviews, a follow-up meeting was held in April 2018 to specifically discuss ■■■■■'s eligibility for Extended School Year (ESY) services. *Stipulation of Parties; Petitioner's Exhibits P-1, P-2, P-3, P-4 for ■■■■■*

7.

The parties met on April 19 and May 3, 2017, as well as February 23, 2018 to conduct an annual review ■■■■■s IEPs. In addition to the annual reviews, a follow-up meeting was held in April 2018 to specifically discuss ■■■■■s eligibility for Extended School Year (ESY) services. *Stipulation of Parties; Petitioner's Exhibits P-1, P-2, P-3 for ■■■■■*

8.

Prior to each IEP meeting Respondent typically prepares a draft IEP that is pre-filled in with information added by relevant members of the IEP team such as teachers and therapists. The draft is also pre-marked with expected outcomes, such as no transportation needs or no ESY if that is what is anticipated. However, during the meeting each page of the IEP is discussed and can be altered as appropriate depending on the team's decisions. *Testimony of ■■■■■ ■■■■■ Testimony of E ■■■■■ C ■■■■■, Special Education Teacher and Resource Teacher for 1st and 2nd grade at ■■■■■ Primary School; Respondent's Exhibit 4.*

9.

On the IEP documents from ■■■■■ and ■■■■■s IEP meetings there is a page titled, "Extended School Year." This page reads as follows:

The IEP committee has considered the following factors in order to determine whether or not ESY services are needed.

- The chance of significant regression of critical skills caused by a normal school break with a failure to recover those lost skills in a reasonable time.

¹ IEP meetings for ■■■■■ were also held on May 23, 2017, September 14, 2017, and September 22, 2017 to address either parental concerns or clerical errors. *Petitioner's Exhibit P-6 for ■■■■■*

- The actual and expected progress related to critical skills.
- Any emerging skills or breakthrough opportunities which might require ongoing instruction during a school break.
- Any significant interfering behaviors targeted as IEP goals that prevented the student from receiving some benefit from his educational program during the regular school year.
- The nature and severity of the disability.
- Other special circumstances.

The IEP Committee has made the following comments:

Committee members discussed these factors and have determined that none apply; therefore the student is not in need of ESY services.²

After considering the above questions, will the benefits that the student receives from his/her educational program during the regular school year be significantly jeopardized if the student is not provided ESY? No.

Petitioner's Exhibits P-1, P-2, P-3 for [REDACTED]; Petitioner's Exhibits P-1, P-2, P-3 and P-4 for [REDACTED].

10.

At the February 5, 2018 IEP meeting for [REDACTED] the IEP team briefly reviewed the ESY page and the school members agreed that [REDACTED] did not qualify for ESY. This discussion occurred during a short period of time that Mr. [REDACTED] had left the room to pick up [REDACTED] and [REDACTED] for early dismissal. Mrs. [REDACTED] does not recall the discussion taking place. However, Principal G [REDACTED], Ms. C [REDACTED], Ms. E [REDACTED] and Ms. B [REDACTED] recall the brief discussion. *Testimony of J [REDACTED] He [REDACTED] Testimony of N [REDACTED] G [REDACTED]; Principal at [REDACTED] Primary School; Testimony of M [REDACTED] E [REDACTED]; Special Education facilitator for Catoosa County School District; Testimony of T [REDACTED] B [REDACTED]; Speech Language Pathologist; Testimony of C [REDACTED] who served as lead IEP team member at the February 5, 2018 meeting.*

² This specific sentence is included in [REDACTED]'s finalized March 28, 2017 and February 5, 2018 IEP documents, but not in [REDACTED]'s February 5, 2018 draft IEP document. *Petitioner's Exhibits P-1, P-2, P-3 for [REDACTED]*. This specific sentence does not appear on [REDACTED]'s April 19, 2017 and February 23, 2018 draft IEPs, but it is included on the April 19, 2017 and April 19, 2018 finalized IEP documents. The finalized February 23, 2018 IEP for [REDACTED] does not include this section at all. Instead it states, "Extended School Year Decision is deferred. The committee must reconvene to finalize the decision." *Petitioner's Exhibits P-1, P-2, P-3, P-4 for [REDACTED]*.

11.

During the February 23, 2018 IEP meeting for [REDACTED] [REDACTED] [REDACTED] became fully aware of ESY services. Mr. and Mrs. [REDACTED] do not recall Respondent informing them about ESY or conducting a full discussion of whether [REDACTED] or [REDACTED] were eligible for ESY services prior to that meeting. Following the meeting Mr. [REDACTED] contacted the Georgia Department of Education to seek additional information about ESY and to file a grievance against Respondent for not having fully addressed whether [REDACTED] or [REDACTED] were eligible for ESY prior to Spring 2018. Mr. H [REDACTED] also filed the Due Process Hearing Requests referenced in Finding of Fact 2, above. *Testimony of [REDACTED] [REDACTED] Testimony of [REDACTED] [REDACTED] Petitioner's Exhibit P-6 for [REDACTED]*

12.

The parties met in April 2018 to specifically discuss [REDACTED] and [REDACTED]'s eligibility for ESY. At the conclusion of the meetings, Respondent maintained that the children did not qualify for the services, in part, because they were making progress on their IEP goals and because any regression the children exhibited following a break in the school year was regained within an appropriate time. Additionally, neither [REDACTED] nor [REDACTED] had a new or emerging skill that would require ESY to complete or to maintain progress. Finally, Respondent determined that the children's level of performance correlates to their poor attendance during the regular school year, which would not be remedied by ESY services. Mr. [REDACTED] acknowledges that [REDACTED] has been checked out of school early several times to attend medical appointments. However, she is typically checked out after her academic classes take place. *Testimony of [REDACTED] [REDACTED] Testimony of C [REDACTED]; Petitioner's Exhibits P-4, P-5 for [REDACTED]; Petitioner's Exhibits P-5, P-6 for [REDACTED]; Respondent's Exhibits 1, 2, 3; Respondent's Answer ¶ 1.*

13.

In Spring 2017, at the end of [REDACTED]'s 2nd grade year, the IEP team noted that "reading goals have been mastered. Writing is progressing as is math." It was further noted that [REDACTED] had made significant progress in her handwriting increasing from below average to average from 2014 to 2017. Nevertheless, [REDACTED] has now completed the 3rd grade, but she is reading at a Kindergarten/1st grade level without any accommodations, and is completing math at a 1st grade level without any accommodations. *Testimony of [REDACTED]*

██████ Testimony of C██████; Testimony of K██████ B██████, ██████'s Special Education Math Teacher; Petitioner's Exhibits P-2, P-3, P-8, P-9 for BH.

14.

██████'s school records indicate that she routinely exhibits regression following most school breaks, including Thanksgiving Break, Winter Break, and Spring Break. Respondent has found that it takes ██████ between 4 and 10 educational days for ██████ to improve or regain any educational benefit she may have lost over the break.³ However, ██████'s records indicate that it can take up to 21 days for ██████ to recover in certain areas. Testimony of ██████ ██████ Testimony of ██████ ██████ Testimony of C██████; Testimony of B██████; Testimony of R██████ C██████, ██████'s Special Education Reading Teacher; Petitioner's Exhibit P-5 for ██████; Respondent's Exhibit 1 – ██████ Reading; Respondent's Exhibit 2 – ██████ Math.

15.

R██████ C██████, ██████'s reading teacher, has noted that ██████ “quickly recovers from dips.” Ms. C██████ has administered several tests to ██████ to track her progress toward her IEP goals and has found that ██████ has shown steady progress throughout the 2017-2018 school year, including being able to handle more challenging reading passages as she masters fluency. For example, the data from Max-Scholar shows ██████'s ‘fluency with word passages’ was at a level of 16 words per minute (wpm) in May 2017. The following fall, on September 21, 2017, her level had increased to 21 wpm at 91% accuracy. By December 21, 2017, ██████ was at 45 wpm at 92% accuracy. ██████ then began working with blends. ██████ started on February 5, 2018 at 39 wpm at 90% accuracy and by the end of school was at 45 wpm with 83% accuracy. Additionally, data related to locating a main idea, theme and supporting detail indicates that ██████ initially scored at 46% in February 2018 when the goal was initiated, and by April 18, 2018, ██████ was scoring at 85%. By the end of the school year ██████ was averaging 63% with more challenging passages. Testimony of C██████; Petitioner's Exhibit P-5 for ██████; Respondent's Exhibit 1 – ██████ Reading.

³ For example, ██████ had regressed in reading to 39 words per minute following a school break but within four educational days had increased to 63 words per minute. In math, ██████ increased from 0% following the Winter Break to 83% by January 26, 2018. Testimony of ██████

16.

K[REDACTED] B[REDACTED], [REDACTED]'s special education math teacher, has also recognized [REDACTED]'s "dips," but she considers that to be expected based on [REDACTED]'s learning disability. Ms. B[REDACTED] has found that if [REDACTED] receives "refreshers" she is typically able to pick up the information again. Ms. B[REDACTED] also noted that [REDACTED] ended her 2nd grade year at a 1st grade math level and that she started her 3rd grade year following the summer break at a 1st grade 2nd month grade level. Thus, it appears that [REDACTED] did not have significant regression in her math skills over the summer of 2017. During the 2017-2018 school year, [REDACTED] made progress. For example, data for addition and subtraction showed 0% on September 1, 2017. By April 18, 2018 [REDACTED] scored 100% for addition and subtraction with the use of her number line. Also, in comparing numbers, [REDACTED] scored 50% in August 2017, but by March 23, 2018 [REDACTED] scored 100%. In regard to word problems, [REDACTED] scored 67% in August 2017 and by April 18, 2018 she was scoring 100% with an increase in difficulty. However, the word problems are read to her. *Testimony of B[REDACTED]; Petitioner's Exhibit P-5, P-9 for [REDACTED]; Respondent's Exhibit 2 – [REDACTED] Math.*

17.

R[REDACTED] J[REDACTED], a Speech Language Therapist working with [REDACTED] during the 2017-2018 schoolyear, noted that [REDACTED] did not exhibit regression over the Summer break in 2017. According to Ms. J[REDACTED]'s records, [REDACTED] was at 80% for "wh" questions in Spring 2017, but had increased to 90% in Fall 2017. Additionally, [REDACTED] was at 40% for the R sounds in Spring 2017, but had increased to 82% in August 2017. However, despite these gains [REDACTED] struggles with conversational speech. She typically speaks too quickly and slurs her words. *Testimony of R[REDACTED] J[REDACTED], Speech Language Therapist; Petitioner's Exhibit 7 for [REDACTED] Respondent's Exhibit 3 – [REDACTED] Speech.*

18.

Although [REDACTED] is typically able to regain any lost educational progress following short breaks within no more than 21 days of instruction, Mr. [REDACTED] is concerned that if [REDACTED] exhibits regression after a short-period break, she is likely to exhibit significant regression following an extended summer break that will significantly disrupt her educational progress. Mrs. [REDACTED] has observed that [REDACTED] forgets how to write numbers. She believes that ESY services will allow [REDACTED] to not experience significant regression so

that she can more quickly progress in the Fall rather than expend a significant amount of time regaining her prior level of functioning before being able to begin progressing in the new school year. *Testimony of ██████████ ██████████; Testimony of ██████████ ██████████; Testimony of C█████████*:

19.

The School District has concerns that ██████████ has missed a significant amount of educational time. The School District believes that ██████████'s recovery from breaks is impacted negatively by missing class. For example, during the 2017-2018 school year, ██████████ was absent 12 days, and she was picked up early on 46 days. However, on the days when ██████████ was picked up early she had already completed a majority of her core subject classes, including speech, reading and math. ██████████ attends speech from 8:00 to 8:30 a.m. on Tuesdays and Thursdays; Math from 9:15 to 10:15 a.m. Monday through Friday; and Reading from 12:00 to 1:30 p.m. Monday through Friday. When ██████████ has been picked up for early dismissal it is typically in the afternoon after 1:00pm. *Testimony of ██████████ ██████████; Petitioner's Exhibit P-6 for ██████████; Respondent's Exhibits 1, 2, 3.*

20.

██████████ did not exhibit regression after school breaks during the 2017-2018 school year. Instead, ██████████ showed steady progress on her IEP goals throughout the school year. Additionally, ██████████ did not show regression between Spring 2017 and Fall 2017 in her numbers, handwriting skills or speech. For example, when working with L's and R's ██████████ was at 26% in Spring 2017, 25% in Fall 2017 and ended the 2017-2018 school year at 79% when L is the initial letter. Additionally, regarding concepts such as colors and shapes ██████████ was at 56% in May 2017, 80% in September 2017 and ended the 2017-2018 school year at 95%. Also, with "wh" questions, ██████████ was at 16% in Spring 2017, 20% at the beginning of August 2017, 50% by the end of August 2017 and ended the 2017-2018 school year at 79%. *Testimony of C██████████; Testimony of G██████████; Testimony of C██████████; Testimony of S██████████ F██████████, Occupational Therapist; Testimony of T██████████ B██████████; Speech Language Pathologist; Petitioner's Exhibits P-3, P-4 for ██████████; Respondent's Exhibits 5, 6.*

21.

The “extended school year program” is a part of a student’s Individual Education Program designed to help the student meet the critical objectives set out in the IEP.
GDOE Rule 4-7-.01-3(e)/Definitions

22.

A Fact Sheet Petitioners obtained regarding ESY states that if the IEP team agrees a student needs ESY, the team must also decide:

- What services will be provided
- When and where services will be provided
- How often (frequency) services will be provided
- How long (duration) services will be provided

In addition, when deciding whether a student requires ESY, the IEP team can consider the following:

- Will the student lose skills over a break?
- Will the loss of skills be excessive?
- Will the loss of skills be more that you would expect of other students?
- Will the student be able to recover those lost skills and how long will that take?
- Did the student make progress on IEP goals? How much progress?
- Did the student make as much progress as the IEP team expected?
- Does the student make progress slowly or quickly?

The Fact Sheet further points out that ESY is not:

- Tutoring, summer school, child care or enrichment programs.
- Decided by one person. It’s an IEP team decision!
- Determined by only one measure.

Petitioner’s Exhibit P-9 for [REDACTED] and P-12 for [REDACTED]

23.

[REDACTED] and [REDACTED]’s parents were advised of every IEP meeting scheduled for [REDACTED] and [REDACTED] they attended each of the meetings, and they signed off to indicate their agreement with and acceptance of every IEP that was written on behalf of [REDACTED] and [REDACTED] *Testimony of*

██████████ Testimony of ██████████ ██████████ Petitioner's Exhibits 1, 3 for ██████████; Petitioner's Exhibits 2, 4 for ██████████

24.

At the end of the school year, ██████████ and ██████████s teachers provided their parents a Summer Review Book with various activities and information for ██████████ and ██████████s parents to review with them over the summer. Respondent's Exhibits 7 sample review book for ██████████; Respondent's Exhibit 8, ██████████'s Summer Review Book.

25.

It is unclear from the record what specific ESY services Petitioners are seeking, such as a specific number of hours or days per week. It is also unclear from the record what specific goals and/or areas Petitioners are seeking for ESY services.

II. CONCLUSIONS OF LAW

1.

This case arises under the Individuals with Disabilities Education Act ("IDEA") and corresponding federal and state rules and regulations, 20 USC § 1400 *et seq.*, 34 CFR Part 300, Ga. Comp. R. & Regs 160-4-7. The primary purpose of the IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education ["FAPE"] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living", 20 U.S.C. § 1400(d).

2.

There is no dispute that ██████████ and ██████████ are both eligible students under the IDEA to receive services. Both ██████████ and ██████████ have Individual Education Programs (IEP) that have been developed by their respective IEP teams over the years, but the IEPs have not provided for Extended School Year (ESY) services. Petitioners allege that Respondent violated Petitioners' procedural rights by failing to fairly and appropriately consider whether ██████████ and/or ██████████ qualified to receive ESY services when preparing their IEPs. Petitioners further allege that this procedural violation resulted in substantive harm to both ██████████ and ██████████ because (1) ██████████ and ██████████ have not progressed as much as they could

have if they had been provided ESY services for the past two years, (2) [REDACTED] and [REDACTED] are not on grade level for their academic classes, and (3) [REDACTED] is not on-level for speech.

3.

Petitioners bear the burden of proof in this case and to meet that burden they must establish that ESY services are needed to provide [REDACTED] and [REDACTED] a FAPE. See Schaffer v. Weast, 546 U.S. 49 (2005) (the burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief); See also M.M. ex rel. C.M. v. School Bd. of Miami-Dade County, Florida, 437 F.3d 1085 (11th Cir. 2006). Ga. Comp. R. & Regs 160-4-7-.18(1)(g)(8) (the party seeking relief shall bear the burden of coming forward with the evidence and the burden of proof at the administrative hearing)

4.

The initial question is whether Respondent committed a procedural violation by not fully including the parent's in a detailed discussion of ESY services in Spring 2017.⁴ If so, the court must then determine whether that procedural violation resulted in substantive harm. More specifically, the court may conclude that [REDACTED] and/or [REDACTED] did not receive a FAPE "only if the procedural inadequacies . . . *significantly impeded* the parents' opportunity to participate in the decision-making process regarding the provision of a [FAPE]." See Johnson v. Dist. Of Columbia, 873 F. Supp. 2d 382 (2012), *quoting* 20 U.S. § 1415(f)(3)(E)(ii) (emphasis added).

5.

Although there is no requirement that ESY services be made a part of every disabled student's IEP, the IEP team is legally obligated "to consider and fairly evaluate the appropriateness of ESY in developing every IEP for every disabled child." Reusch v. Fountain, 872 F. Supp. 1421 (1994). The detailed and extensive separate ESY meetings that took place in April 2018 for both [REDACTED] and [REDACTED] are not required to ensure that the IEP team is able to make an adequate decision regarding a student's eligibility for ESY. Instead, during an IEP annual meeting when goals and progress are discussed, as well as the least restrictive environment and services that may be needed, the IEP team is

⁴ In April 2018, the parties participated in a detailed and full discussion of whether [REDACTED] and/or [REDACTED] were eligible for ESY services. Although it may have been Petitioners who raised the issue, Respondent then scheduled meetings to ensure a full and thorough review of Petitioners' potential eligibility for ESY. Thus, the court concludes there was no procedural violation for the 2017-2018 school year. *Petitioner's Exhibit P-5 for [REDACTED] Petitioner's Exhibit P-4 for [REDACTED]*

essentially gathering and reviewing information that can be utilized to make a determination of eligibility for ESY. Parents are an integral part of the IEP team and must be informed to have a meaningful opportunity to participate in the meeting and decision-making. However, in Spring 2017, the IEP team did not take the time to ensure that [REDACTED] and [REDACTED]'s parents had an opportunity to fully participate in the ESY determination because, as the parents testified, they did not have an understanding of what ESY is or what is involved to make a determination whether a child is eligible for ESY despite the fact that they signed the IEP indicating an agreement with it and the IEP included one-page that mentioned ESY. *Compare Johnson v. District of Columbia*, 873 F. Supp. 2d 382 (2012) (a parent's opportunity to participate is not necessarily impeded based on the mere fact that the parent did not attend the IEP meeting where there was no allegation that parent did not receive notice of the IEP meeting). During the Spring 2017 IEP meetings, Respondent did not take the time to explain ESY to the parents. It is not necessary that schools take the time year after year to fully apprise parents of every portion of the IEP, but when children are young and initially begin participating in the IEP process it is crucial that parents be informed of each part of the IEP to have a meaningful opportunity to participate. Thereafter, parents will have the knowledge from year to year because of the time taken in the initial IEP meeting to ensure the parents understood each part. Additionally, during the Spring 2017 IEP meetings Respondent did not specifically ask for the parents input regarding ESY services. Based on the record as a whole, the court concludes that the parents' participation in the ESY determination during Spring 2017 was significantly impeded by a lack of knowledge, explanation and opportunity for input. Thus, the next question is whether [REDACTED] or [REDACTED] suffered substantive harm as a result of this procedural violation. The court concludes that this procedural violation affected the quality of [REDACTED]'s education to the extent it denied her a FAPE because by failing to ensure that the IEP team, as a whole, fairly and appropriately evaluated [REDACTED]'s eligibility for ESY services in Spring 2017, it resulted in denying her a service to which she was entitled taking into consideration her disabilities, regression, and time to recoup lost educational benefits, among other factors. *Rosaria M. v. Madison City Bd. Of Educ.*, 2018 U.S. Dist. LEXIS 54315 (U.S. Dist. Ct. for Northern District of Alabama, 2018).

6.

Under IDEA and the regulations implementing it, schools are required to provide ESY services as necessary in order to provide a child with a FAPE. 34 C.F.R. 300.106(a)(1); Ga. Comp. R. & Regs. 160-4-7-.09(3)(i)(2). *See also Gwinnett County Sch. Dist. v. J.B.*, 398 F. Supp. 2d 1245 (2005). A school must provide these services only if the child's IEP team determines that such services are necessary for the provision of a FAPE. 34 C.F.R. 300.106(a)(2). IDEA and its regulations do not set forth the specific factors an IEP team must consider in making this decision. *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202, 1211 (9th Cir. 2008). Rather, states establish and develop criteria for determining whether a disabled student is in need of ESY services. Because providing ESY is the exception not the rule, a parent challenging a school's decision about ESY must show that the benefits a disabled child gains during a regular school year will be significantly jeopardized if he/she is not provided with an educational program during the summer months or other extended school-breaks. *Id.*

7.

IDEA does not define how to determine which children will need ESY services in order to receive a FAPE. However, IDEA does state that it is up to each IEP team to determine eligibility and services on an individualized basis. The Georgia Department of Education has set forth guidance for IEP teams in determining ESY eligibility and services:

- a) The IEP team should not use one single criteria as a sole qualifying factor;
- b) The IEP team must review how much regression the child will have during the time away from school. Regression being defined as a decline in knowledge and skills that can result in a disruption in education;
- c) The IEP team must review how long the recoupment period would be after the time away from school. Recoupment being defined as the amount of time it will take to regain the prior levels of functioning;
- d) The IEP team must review whether the child has any new or emerging skills that might be lost during a prolonged time away from school;
- e) The IEP team must review whether benefits gained during the regular school year will be significantly jeopardized during prolonged time away from school. These

benefits include academics, behavior, life skills and other special circumstances or factors;

- f) The IEP Team should consider any transitional needs of the child;
- g) The IEP Team must consider the degree of the child's disability; and
- h) The IEP Team should consider the ability of the parent's to provide structure at home.

8.

If the IEP Team decides that the child is eligible and should receive ESY services, the IEP Team must then identify which goals in the current IEP are being extended or modified.

9.

Petitioner asserts that [REDACTED] and [REDACTED] are not performing academically at their respective grade level, nor in accord with their chronological age, and that this somehow establishes that Respondent should provide ESY services to both [REDACTED] and [REDACTED]. IDEA, however, does not require that the school maximize a student's potential, only that it provide an opportunity for "more than minimal progress" and is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Endrew F. ex. rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988 (2017). "The FAPE described in an IEP need not be the best possible one, . . . rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him [or her] to benefit from the instruction." Loren F. v. Atlanta Indep. Sch. Sys. 349 F.3d at 1312 n. 1.

10.

[REDACTED]'s eligibility for services falls under the primary category of Specific Learning Disability. The Georgia regulation defining this eligibility category states that "[t]he child with specific learning disability has one or more serious academic deficiencies and does not achieve adequately according to age to meet State-approved grade-level standards." Ga. Comp. R. & Regs. 160-4-7-.05, Appendix (i), par. 2. Thus, it is not unusual or unexpected for [REDACTED] to be below-grade level in reading and math. Respondent further argued that [REDACTED]'s excessive absences and early dismissals impacted her performance and progress. Johnson v. District of Columbia, 873 F. Supp. 2d 382 (2012)

(record indicates that the student's lack of progress is largely attributable to her truancy). However, ■■■'s early dismissals for medical appointments primarily took place in the afternoon after her academic classes were completed. Thus, these early dismissals should not have adversely impacted ■■■'s ability to progress and recuperate after school breaks. In the area of reading (Decoding Oral Fluency), it took ■■■ 13 days of instruction to recuperate after the Thanksgiving Break. *Respondent's Exhibit 1*. It took ■■■ 21 days of instruction to recuperate after the Winter Break. *Id.* Although ■■■ progressed from 21 words per minute (wpm) in September 2017 to 45 wpm in April 2018, there is a likelihood that the benefits she gained during the regular school year could be significantly jeopardized during the prolonged summer.⁵ *Respondent's Exhibit 1; Johnson v. District of Columbia*, 873 F. Supp. 2d 382 (2012) (ESY services are required under the IDEA when regression will substantially thwart the goal of "meaningful progress"). In math (adding/subtracting, comparing numbers), ■■■ often has dips in progress, but she recovers quickly. *Respondent's Exhibit 2*. For example, in meeting the goals set for her in the area of adding/subtracting ■■■ did not show any regression following the Thanksgiving Break. *Id.* After the Winter Break, ■■■ showed regression, but within 9 days of instruction she had recovered to 100%. *Id.* Thus, it appears that certain areas of math may be strengths for ■■■ that would not necessarily require ESY services. However, this would be an issue that the IEP team would need to determine when reviewing all of the factors for consideration of ESY services since Petitioners did not present sufficient evidence for the court to craft the ESY services to be provided. Similarly in speech, ■■■ experiences dips, but appears to recover well. *Respondent's Exhibit 3*. Although there is at least one speech pattern that ■■■ should have mastered by this age but has not yet done so, this single factor alone would not necessarily indicate a need for ESY services in the area of speech.⁶ Instead, an overall picture of ■■■'s

⁵ The court reaches this conclusion despite Respondent's indication that ■■■ did not show regression during the Summer of 2017. Respondent correctly points out that ■■■'s May 2017 progress report indicates that ■■■ was working at 16 wpm and that this increased to 21 wpm by September 21, 2017. However, by September 21, 2017 ■■■ had already received 26 days of instruction in the new school year that could account for her recovery from any regression and then slight progress. *Petitioner's Exhibit P-7 for ■■■; Respondent's Exhibit 1*.

⁶ No single measure of educational benefit should be examined in isolation, or should be conclusive alone. See *K.C. v. Fulton County School District*, 2006 WL 1868348 (Slip Opinion, N.D. Ga., June 30, 2006). Although scores obtained on standardized tests, grade-level equivalents and report cards are all indicators

progress, disability, and other factors set forth above must be taken into consideration. Based on the record as a whole, it does not appear that [REDACTED] would require ESY services related to speech to receive a FAPE. However, as with math, this would be a determination [REDACTED]'s IEP team would need to ultimately make, in part, because Petitioners did not present sufficient evidence for the court to craft or propose specific ESY services.

11.

Regarding [REDACTED] Petitioner failed to meet its burden to prove that [REDACTED] requires ESY services to receive a FAPE. There "is no requirement that ESY be made a part of every disabled child's IEP even if there would be some educational benefit." Reusch v. Fountain, 872 F. Supp. 1421 (1994). In this matter, the evidence does not show a concern regarding regression following school-breaks for [REDACTED]. Thus, recoupment periods are not a concern for [REDACTED]. Additionally, there was no evidence that [REDACTED] has a new or emerging skill that could be lost during the summer. Finally, taking into consideration [REDACTED]'s disabilities, goals, progress and overall educational plan, the evidence does not show that the benefits she gained during the regular school year will be significantly jeopardized during the summer break, or any other break at this time.

III. DECISION


Based on the foregoing Findings of Fact and Conclusions of Law, the court concludes that [REDACTED] is eligible for ESY services, at a minimum, in the area of reading. Accordingly, Petitioners' request for relief as it relates to [REDACTED] is **GRANTED**. Since Petitioners did not present sufficient evidence for the court to craft the ESY services, Respondent is **DIRECTED** to schedule an IEP meeting for [REDACTED] as soon as is reasonably practicable for the IEP Team to identify which goals in her current IEP are being extended or modified.

of benefit, even a lack of educational progress by a student would not, in and of itself, show a violation of the IDEA. See Fuhrmann, *supra* at 1039-40 (IEP must be judged by what it proposes, not by child's after-occurring performance).

Additionally, based on the foregoing Findings of Fact and Conclusions of Law, the court further concludes that Petitioner did not meet its burden to prove that [REDACTED] is eligible for ESY services. Accordingly, Petitioners' request for relief as it relates to [REDACTED] is **DENIED**.

Petitioners' specific request for "monies or an educational scholarship to be set aside for . . . education upon high school graduation" is **DENIED**.

This 29th day of June, 2018.



Ana Kennedy
Administrative Law Judge