

STATE OF RHODE ISLAND and PROVIDENCE PLANTATIONS

DEPARTMENT OF EDUCATION

SPECIAL EDUCATION DUE PROCESS HEARING  
(CASE # 12-18)

STUDENT: JOHN DOE

SCHOOL DISTRICT: EAST PROVIDENCE

HEARING OFFICER: ARTHUR G. CAPALDI, ESQ.  
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PARENT PRO SE:

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PARENT'S REPRESENTATIVE:

LEXICON

For the purposes of the decision in the within hearing and to ensure confidentiality of the Student, the following Lexicon shall be used in this decision:

STUDENT:

MOTHER:

SCHOOL DISTRICT: EAST PROVIDENCE SCHOOL DEPARTMENT

HEARING OFFICER: ARTHUR G. CAPALDI, ESQ.

ATTORNEY FOR SCHOOL DEPT.: ANDREW A. THOMAS, ESQ.

STUDENT'S REPRESENTATIVE: MOTHER

**STATE OF RHODE ISLAND**

**ADMINISTRATIVE**

**DEPARTMENT OF EDUCATION  
ADMINISTRATIVE**

**IMPARTIAL DUE  
PROCESS HEARING**

**POSITION OF PARTIES**

**PARENT:** The School District denied the Student a free appropriate public education (F APE) by not providing the Student with extended school year services.

**SCHOOL DISTRICT:** The Student is performing well academically and behaviorally and does not require extended school year services ..

**ISSUE:** Did the School District deny a free appropriate public education to the Student by denying extended school year services?

**DECISION:** The School District's decision not to provide ESY services is hereby upheld. The School District has provided a free appropriate public education for the Student.

### **TRAVEL OF THE CASE**

Pursuant to IX, 7.1.1 of the Regulations of the Board of Regents Governing Children with Disabilities, on May 22, 2012, this Hearing Officer received notice of appointment to conduct an impartial due process hearing in the above matter

On May 22, 2012, a notice of appointment was sent to all parties setting forth proposed hearing dates. The following hearing dates were proposed:

June 6, 2012  
June 7, 2012  
June 12,2012  
June 14,2012  
June 19,2012

The notice was sent to: Cheryl Ursillo, Director of Special Education, Parent, Patricia Byrnes, Esq., Child Advocate, and Andrew A Thomas, Esq .. , Attorney for the School District.

On June 5, 2012, the parties agreed to June 19<sup>th</sup> and June 20<sup>th</sup> 2012, for hearing

The Parent represented herself.

The hearing began and concluded on June 19,2012.

The Hearing Officer received the hearing transcript on July 2, 2012 after requesting the same.

### **FACTS**

The Student is eight years old The Student is in the "CRAFT PROGRAM" (Children's Residential and Family Treatment Program). The Student was admitted to the "CRAFT PROGRAM" on or about August 17,2011 and will be discharged soon. The Student resides at

Bradley Hospital and attends the Agnes B. Hennessey Elementary School in East Providence. The Student's disabilities were described as follows: PDD (Pervasive development delay) ADD (Attention Deficit Disorder) anxiety and difficulty with behavior.

An IEP is in effect from November 16,2011 to November 15, 2012 .. The Mother attended the IEP meeting.

Page 9 of the IEP addresses the need for an extended school year service and the Team decided that the Student did not need ESY service (Joint Exhibit 1)

The trimester 3 report shows the Student was meeting grade level (Grade 2) in Reading, Writing, Mathematics, Science and Music. The Student was neatly achieving the Standard in Physical Education, Art, Library and Health, (Joint Exhibit 7)

On January 9, 2012, David A. Britto, Principal, notified the Mother that the Student was suspended for one day for striking two Students .. (Joint Exhibit 3)

There was a team meeting on January 26, 2012, which was attended by the Mother, regular education teacher, special educator, psychologist, social worker, occupational therapist, speech teacher, director of special education, and the principal. The Mother requested a clarification concerning eligibility for ESY. The report stated:

"Discussion related to Academic instruction impact. No regression expressed or emerging skills at this time"

The Mother was advised to refer to the Department of Education, State of Rhode Island criteria for eligibility for ESY. The Team report concluded that there would be another ESY meeting later in the year should the need arise. (Joint Exhibit 4)

On March 8, 2012, there was a follow up team review of ESY criteria. The team concluded that the Student was performing well academically and behaviorally at school. ESY

was not recommended. The Parent disagreed with the Team. The Parent presented behavioral data to the Team. (Joint Exhibit 5)

On May 17, 2012, there was a team meeting at which the Student's behavior at CRAFT PROGRAM was reviewed and the teaching staff gave CRAFT PROGRAM strategies that worked at school. The CRAFT PROGRAM Staff reported the Student's willingness to interact with other children and the regular education teacher reported that the Student interacts appropriately with peers. (Joint Exhibit 6)

Ms. Midgley, a special educator with the East Providence School Department, testified .. She helped formulate the IEP. She testified that "the Student was doing well academically, behaviorally in all of the (Student's) goals and objectives in the IEP" (Trans .. 6-19-12 p. 15, L 8 & 9) She did not know of any factors that would indicate that the benefits derived during the regular school year would be jeopardized without ESY services. (Trans .. 6-19-12 p .. 15, L 15-18) She stated that the Student's rate of learning was above average. (Trans. 6-19-12 p. 15, L 5) The failure to provide the Student with ESY would not limit the Student's ability to acquire essential skills. (Trans .. 6-19-12 p. 16, L 8 -14) Ultimately, she did not recommend ESY services.

She concluded:

" (The Student) has done phenomenally well (The Student) came in with some behavioral difficulties but has done really well. He has mainstreamed with the peers on his own without support, is doing well in that setting as well as in the classroom setting. Behavioral difficulties have been decreased" (Trans. 6-19-12 p .. 16 L 12 -16 and p 17 L, 17)

I find the facts enumerated by this Witness were uncontradicted.

Jennifer Lima Marcello, the occupational therapist, worked among the different elementary schools in East Providence. She testified. She too worked on the Student IEP. She also testified that the Student was making steady progress and that the Student's skills were in place and not emerging and would not regress for the lack of ESY services ..

(Trans 6-19-12 p. 22, L 18 - 23)

As to what they looked at to determine the need for ESY, she said:

" We look after December vacation, we look after February vacation, long weekends such as Martin Luther King holiday and April vacation I do not have any evidence in my progress notes that shows a significant regression after those breaks"

(Trans .. 6-19-12, p 22, L 2 - 8)

She concluded that the Student did not require ESY services and not having such service would not affect his ability to acquire essential skills. Further, she said:

" I'm looking to see if their skills are either emerging or if the skills regress when there is a short period vacation when they me not attending school, and I don't have any evidence to support that (The Student) has been making steady progress with his Of goals."

(Trans .. 6-19-12 P 23, L 10-15)

On cross examination, the Mother presented a situation to the witness where the Student became disregulated at home and then did not want to go to school or was late on a regular basis, The Mother's example was presented to the witness as evidence that the Student was sufficiently disregulated to the point that the disruption was harmful to the Student and further, the increasing disregulation at home in the absence of Of services was a reflection of a potential for regression. The witness stated that the Student was able to go to school and get himself regulated within a

few minutes. This Witness did not find that the Student's one-day suspension was evidence of regression

Barbara Ann Bell is the speech and language pathologist She was part of the IEP team. She testified that (the Student) did not demonstrate behaviors that would interfere with the Student's ability to learn during the regular school year .. (Trans .. 6-19-12 p. 29, L 1- 6) In here opinion, the Student was not at a critical stage of learning. When asked to describe the Student's interaction with the Student's developing peers, she said:

"I bring another school Student into OUI- group and (the Student) does very well and looks forward to working with her. (The Student) intergrated into a regular second grade classroom for science and social studies+- ... "

The Witness did not recommend ESY services This Witness testimony was not contradicted ..

Peter Gillen the director of the *CRAFT PROGRAM* testified. He stated that the Student was

sensitive to transition and change. (Trans .. 6-19-,12, p. 34, L 10 -12)

As to the need for ESY services because of a lack of structure he said:

"When he gets structure he does very well.

When he doesn't get it I think there is a  
legitimate

worry on Mom's concern as to: will he regress

quickly after he doesn't get it. Maybe he is not

regressing now and we wouldn't suspect that he

would but there is a risk that he could regress' ...»

When asked by the Heming Office as to his opinion concerning the need for ESY services for behavioral issues he responded:



"I don't feel like I'm the best to judge,  
because I think kids are different in  
different settings."

(Trans. 6-19-12 p. 36 L 9 -14)

This Witness could not give a definite opinion concerning the need for ESY services

The Mother was asked by the Hearing Officer to give a statement which will be  
considered testimony.

" ..... historically, I'm the only one who has  
known (the Student) for eight years. So everybody  
seen (the Student) over the journey the Student had  
over the year and (the Student)  
is doing well. The Student doing poorly in  
the beginning of the year and doing well  
at the end of the year is a pretty standard,  
pretty common phenomenon"

The Mother testified that (the Student) attempted suicide, attempted to hurt her, attempted  
to kill his sister and (the Student) became unmanageable.

Joint Exhibit 2 was the Shift notes from the CRAFT PROGRAM .. From December 2,  
2011 to December 29,2011 there were twenty-one days in which there was a behavioral  
incidents by the Student From January 3, 2012 to January 25, 2012 there were fourteen days in  
which there was a behavioral incident by the Student. From February 1, 2012 to March, 2012  
there were sixteen days in which there was a behavioral incident. I find that none of these  
incidents in and of themselves are evidence of the need for ESY services. There was no  
correlation between these incidents and establishing the criteria needed to support ESY services.

The burden of persuasion in an administrative hearing challenging an IEP is properly  
placed upon the party seeking relief; Schaffer v. Weast, 546 U.S. 49 (U.S. 2005)' 126 S. Ct. 528  
It was incumbent upon the Parent to establish the criteria necessary to require ESY services.

I find that the Student may very well be subject to some regression when away from the structure provided by the School or by the CRAFT PROGRAM. Regression is only one part of the criteria when considering the need for ESY service. Other elements that have to be reviewed in making such a determination involves the following: whether or not the Student's level of achievement would be jeopardized by summer break; retrospective data such as past regression has to be viewed as well as rate of recoupment; finally, predictive data based upon the opinion of professionals in consultation with the Student's Parents as well as circumstantial consideration of the Student's situation at home and in his or her neighborhood and community. Johnson v. Independent School District No. 4 of Bixby, 921 F.2d 1022 (10th Cir. 1990)

From the facts as above related, I find that the School District did in fact review the stated elements needed to make a decision as to the need for ESY services.

The School District held three of ESY services Each meeting had the entire IEP team which included those professionals providing services to the Student and they also included information from the Mother and those from the CRAFT PROGRAM.

The Mother and CRAFT PROGRAM provided information regarding retrospective data of past regression. During the hearing, Dr Gillen provided information of predictive regression. As to recoupment, testimony established that the Student although disregulated upon arrival at school was regulated within a few minutes

I find that the regression seen by the Mother in no way jeopardized the progress made by the Student at school Ms. Midgley, the special educator, Jennifer Lima Marcello, the occupational therapist, Barbara Ann Bell, the speech and language pathologist, all testified that the Student was achieving and progressing according to the goals of the IEP I find that the Student's skills were not emerging but set

Based upon the testimony and exhibits, I find that the benefits accrued during the regular school year will not be significantly jeopardized by not providing ESY services.

I find that ESY services are not required ..

The Student is provided with a basic floor of opportunity and therefore the IEP does provide a free appropriate public education for this Student Board of Education of Hendrick Hudson Central School District, Westchester County, et al v. Rowley, 458 U.S. 176.

The Mother's concern is real and as Dr .. Gillan testified there is a "risk" for regression when there is a lack of structure. The Team and the School District can not act on what may happen but what is happening. The criteria for ESY establishes that An IEP is always work in progress and the School District in conjunction with the Mother will be reviewing this issue regularly ..

DATE: 7/13/12

7/13/12



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