IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted] by and through [redacted] and [redacted]	:	
Petitioners,	:	
	:	**Docket No.: 1736103**
v.	:	**1736103-OSAH-DOE-SE-38-Schroer**
COWETA CHARTER ACADEMY AT SENOIA,	:	
Respondent.	:	

FINAL DECISION

I. INTRODUCTION

On May 10, 2017, [redacted][1] through her step-father, [redacted] filed a due process complaint pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"). The due process hearing was held before the Office of State Administrative Hearings ("OSAH") on July 12, 2017. [redacted] who is an attorney, appeared with [redacted]s mother, [redacted] and represented Petitioners.[2] Respondent Coweta Charter Academy was represented by Joseph Chauncey, Esq. and Meredith Guerrero, Esq. The record remained open following the evidentiary hearing in order for the parties to file post-hearing briefs. The deadline for the issuance of this decision was extended pursuant to 34 C.F.R. § 300.515(c).

II. FINDINGS OF FACT

1.

[redacted] is [redacted] years old and lives with her mother, [redacted] her step-father, [redacted] and her siblings in Senoia, Georgia. In August 2016, [redacted] began kindergarten at Coweta Charter Academy, a

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1 Petitioner and her family members will be referred to by initials only.

2 [redacted] is not a member of the State Bar of Georgia.

local educational agency ("LEA") under Georgia law.[3] [redacted]'s mother described [redacted] as an active child, who wants to please and is eager to learn. (Testimony of [redacted] Ex. R-5; Response to Request for Hearing, at ¶ 6.)

2.

[redacted]s teacher at Coweta Charter Academy was Emily Carnes. Although Ms. Carnes was out on maternity leave from Labor Day until the end of October, she spent almost four weeks in August getting to know [redacted] and working with her in both a large and small group setting. According to Ms. Carnes, [redacted] was "on her radar" from the beginning because [redacted] appeared to struggle academically compared to some of the other children in her class. Nevertheless, because children demonstrate a wide range of skills and knowledge at the beginning of kindergarten, Ms. Carnes was not overly concerned about [redacted]s academic performance at that time. (Testimony of Carnes, [redacted]

3.

In October 2016, [redacted]s mother, [redacted] noticed that [redacted] was not progressing academically, especially in the area of language arts. Although [redacted] spent considerable time with [redacted] on homework, [redacted] continued to struggle and was growing frustrated. From October through December 2016, [redacted] contacted both Ms. Carnes and the substitute teacher repeatedly to express her concerns and to ask for guidance. Ms. Carnes encouraged [redacted] not to worry and suggested that [redacted] would eventually master the skills. (Testimony of [redacted] Carnes; Ex. P-1.)

4.

In January 2017, [redacted] requested a meeting with Coweta Charter Academy's principal,

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3 A public nonprofit charter school is considered an LEA. Ga. Comp. R. & Reg. r. 160-4-7-.21(28); 34 C.F.R. § 300.28(b)(2).

Gene Dunn. On January 23, 2017, [redacted] met with Mr. Dunn and Ms. Carnes and gave them a letter requesting that the LEA conduct an initial evaluation of [redacted] to determine whether she was a child with a disability under IDEA. Although Mr. Dunn and Ms. Carnes proposed trying certain interventions before conducting the evaluation,[4] [redacted] did not want to delay the evaluation and requested that an evaluation be scheduled within sixty days. (Testimony of [redacted] Ex. P-7.)

5.

Emilie Parham, a school psychologist under contract with Coweta Charter Academy, began a psychological evaluation of [redacted] on March 27, 2017.[5] Ms. Parham found [redacted] to be a charming and friendly child, but observed that [redacted] had considerable difficulty maintaining focus during the testing. Consequently, Ms. Parham conducted the testing over four separate days, concluding her evaluation at the end of April 2017. In preparing her report, Ms. Parham considered the results of a battery of tests she administered, plus information provided by Ms. Carnes and [redacted] as well as the results of speech language pathology and occupational therapy assessments. Based on the testing, [redacted] appeared to be functioning in the Low Average to Average range of intelligence, and she exhibited both deficits and strengths in various skills. Overall, Ms. Parham concluded that [redacted] was "experiencing delays in her development, particularly in her cognition, communication, and motor skills," although she did opine that [redacted]'s inattention may have contributed to some of her low scores. (Testimony of Parham; Ex. R-5.)

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4 [redacted] Mr. Dunn, and Ms. Carnes discussed a practice known as "Response to Intervention" or "RTI," whereby researched-based interventions are implemented and the student's response to those interventions are monitored before a child is referred for a special education evaluation. See Ga. Comp. R. & Regs. r. 160-4-7-.03(2) (interventions prior to referral are generally required). [redacted] testified that she wished to "bypass" RTI and have [redacted] tested right away.

5 Although Petitioners argued in their post-hearing brief that Coweta Charter Academy and Ms. Parham did not timely commence or complete the initial evaluation, this claim was not raised in Petitioners' due process complaint and is not properly before the Court at this time.

6.

The Coweta Charter Academy invited [redacted] and [redacted] to a meeting of [redacted]s Individualized Education Program ("IEP") team on May 2, 2017 to determine her eligibility for special education services and to develop an IEP, if appropriate. At the May 2 meeting, the IEP team discussed the data collected by Ms. Parham and others. The LEA members of the team suggested that [redacted] be considered eligible for special education services under the categories of significant developmental delay[6] or "SDD," and speech-language impairment ("SL"). [redacted] and [redacted] requested time to research these categories of eligibility, and the IEP team scheduled a second meeting a week later. (Testimony of [redacted] Carnes, Parham; Exs. R-6, R-7.)

7.

[redacted] and [redacted] decided to accept the SDD and SL categories of eligibility and met with the IEP Team again on May 9, 2017. In addition to confirming [redacted]'s eligibility for special education services, the IEP Team prepared a draft IEP for [redacted] using the Georgia Online IEP software referred to as "GO IEP." Among other things, the IEP Team discussed whether [redacted] was eligible for Extended School Year ("ESY") services in the summer. [redacted] and [redacted] strongly believed that [redacted] would benefit from special education services through the summer and requested that ESY services be included in her IEP. The LEA members of the IEP Team, guided by the GO IEP prompts, as well as an ESY Fact Sheet from the Georgia Department of Education ("Ga. DOE"), considered some of the following factors in deciding whether ESY services were necessary for [redacted]

- Severity of the disability

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6 The term "significant developmental delay" is used with children under age nine and "refers to a delay in a child's development in adaptive behavior, cognition, communication, motor development or emotional development to the extent that, if not provided with special intervention, the delay may adversely affect a child's educational performance in age-appropriate activities." Ga. Comp. R. & Regs. r. 160-4-7-.05(h). See also 34 C.F.R. 300.8(b).

- Student's age
- Regression and Recoupment (Will student lose skills over break? Will loss of skills be excessive and more than expected from other students? Will student be able to recover lost skills and how long will that take?)
- Degree of progress toward IEP goals
- Presence of emerging or breakthrough skills
- Transitional or vocational needs
- Behaviors interfering with progress
- Other special circumstances

(Testimony of [redacted] Carnes, Parham; Exs. R-6, R-9, R-10, R-26.)

8.

Petitioners asserted that [redacted] was showing signs of regression. For example, [redacted] testified that [redacted] appeared to have mastered certain letters and sounds at home, but was not consistently demonstrating such mastery in school, even as late as May 2017. Moreover, [redacted] and [redacted] argued that the Fact Sheet and the GO IEP prompts were inconsistent with IDEA's guarantee of a free and appropriate public education ("FAPE") to [redacted] and should not be used to deny her ESY services. Specifically, [redacted] and [redacted] objected to some members of the IEP Team suggesting that an IEP must be in place for an entire school year before ESY services would be considered. (Testimony of [redacted] Exs. R-9, R-26.)

9.

Ms. Parham did not recall anyone stating that a student must receive IEP services for one year before ESY services could be provided, but she did recall saying that [redacted] could be eligible

for ESY services in the future even if she was not found eligible this summer.[7] Moreover, both Ms. Carnes and Ms. Parham testified that based on the factors above, [redacted] was not eligible for ESY services. First, [redacted] exhibited difficulties with retention, not regression. According to Ms. Carnes and Ms. Parham, regression occurs when a student masters a particular skill and then loses it. Ms. Carnes did not believe [redacted] had lost skills she had mastered previously. Rather, [redacted] was slow and inconsistent in learning new skills and had trouble retaining them across various settings. Both Ms. Carnes and Ms. Parham testified that all students would benefit academically from ESY services and extra help through the summer, not just [redacted] (Testimony of Carnes, Parham.)

10.

After discussing the factors listed on GO IEP relating to ESY services, the LEA members of the IEP Team determined that [redacted] did not need ESY services in order to receive a FAPE because (1) her disabilities were not severe, (2) she was not exhibiting true regression, (3) she was not having a critical "breakthrough," and (4) she was not having an adverse reaction to a change in her schedule or environment. Neither Ms. Parham nor Ms. Carnes recalled [redacted] or [redacted] identifying any special circumstances that would require the provision of ESY services to [redacted] (Testimony of Carnes, Parham; Exs. R-9, R-26.)

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7 Apparently, an audio recording was made of the May 9, 2017 IEP meeting. Although Petitioners mentioned this recording, it was not entered into evidence during the hearing on July 12, 2017. When Petitioners filed their post-hearing brief on July 31, 2017, they attached a CD as Petitioners' Exhibit A, a purported copy of the May 9 audio recording, and cited Exhibit A for the proposition that school members of the IEP Team stated at the meeting that an IEP must be in place for one year before ESY services can be considered. Respondent objected to the admission of Exhibit A on the grounds that it was not tendered at the hearing and had not been authenticated. The Court declines to admit Exhibit A and has not considered it in reaching this Final Decision. Following the July 12 hearing, the record remained open solely to allow the parties to file post-hearing briefs. Under OSAH's rules, a party may move for an order allowing the introduction of additional evidence only on the basis that such evidence is "newly discovered and was not discoverable in the exercise of reasonable diligence at the time of the hearing." Ga. Comp. R. & Regs. r. 616-1-2-.25. Petitioners made no such motion and presented no evidence that the recording was newly discovered. Rather, the evidence is that the recording was available at the hearing, but was never tendered into evidence by either party.

11.

Petitioners filed a due process complaint on May 10, 2017, contesting the denial of ESY services and the application of the Ga. DOE guidelines in the Fact Sheet. Petitioners requested that [redacted]s IEP be amended to include ESY services and that Coweta Charter Academy pay for private speech and language and academic remediation services. The due process hearing was held on July 12, 2017, and the parties filed post-hearing briefs and related motions and responses through August 22, 2017. Respondent objected to Petitioners' Closing Argument Brief as untimely and asked the Court to strike the brief in its entirety. The Court hereby denies Respondent's request to strike the brief, and has considered Petitioners' arguments, with the exception of Exhibit A to the brief, which the Court has excluded, as set forth above.

III. CONCLUSIONS OF LAW

A. General Law

1.

The pertinent laws and regulations governing this matter 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. 160-4-7.

2.

Petitioners bear the burden of proof in this matter. *Schaffer v. Weast*, 546 U.S. 49 (2005); Ga. DOE Rule 160-4-7-.12(3)(n); 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 or 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 Cty Sch. Bd.*, 483 F.3d 1151, 1152 (11th Cir. 2007) (quoting 20 U.S.C. § 1400(d)(1)(A)). The United States Supreme Court recently held that IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1001 (2017). Determining what is "reasonably calculated" is a "fact-intensive exercise," informed by both the expertise of school officials and the input of parents. *Id.* at 999. For most children, the Supreme Court held, "a FAPE will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade." *Id.* at 1000.

B. Extended School Year Services

4.

As part of developing an IEP for a child with a disability, IEP Teams must evaluate whether the child needs extended school year services in order to receive a FAPE. *See* 34 C.F.R. § 300.106; *A.L. v. Jackson Cty. Sch. Bd.*, 635 F. App'x. 774, 783 (11th Cir. 2015) ("A public school must provide ESY if a child's IEP team determines that such services are necessary for the student to receive a FAPE.").[8] Extended school year services are defined as special education and related services that are provided beyond the normal school year at no cost to the

8 In 1983, the Eleventh Circuit Court of Appeals rejected as impermissible Georgia's then across-the-board policy of limiting special education to 180 days. *Ga. Ass'n of Retarded Citizens v. McDaniel*, 716 F.2d 1565, 1575 (11th Cir. 1983), *vacated on other grounds*, 468 U.S. 1213 (1984), *adopted and modified on other grounds*, 740 F.2d 902 (1984), *cert. denied*, 469 U.S. 1228 (1985). The decision about the duration of special education services must be made on an individual basis based on the reasonable educational needs of each child. *Id.*

parents and in accordance with the child's IEP. 34 C.F.R. § 300.106(b)(1). IDEA also provides that ESY services must "[m]eet the standards of the SEA." 34 C.F.R. § 300.106(b)(2).[9] *See also* Rosemary Queenan, *School's Out for Summer – But Should It Be?*, 44 J.L. & Educ. 165, 166 (Spring 2015) ("While it is clear . . . that states are required to consider the need for ESY services, the federal regulations do not identify specific factors for determining a child's need for ESY, instead authorizing the states to determine the eligibility standard."); *Dep't of Educ. v. Leo W.*, 226 F. Supp. 3d 1081, 1112 (D. Haw. 2016) (district court unaware of any legal authority indicating that SEA's standards for evaluating eligibility for ESY services violated IDEA, "particularly in light of the authority given to local educational agencies to establish standards for the provision of ESY services").

5.

Like most other states, the Georgia Department of Education, as the SEA in this state, has developed multiple criteria for IEP Teams to consider in determining whether ESY services are necessary for the provision of a FAPE. *Id.* at 183.[10] Although the courts in the Eleventh Circuit have not specifically addressed Georgia's standards for ESY, other Circuits have held that 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 ESY services are not provided in the summer. *See MM ex rel. DM v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 537–38 (4th Cir. 2002) (citing

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9 An SEA is a state educational agency. 34 C.F.R. § 300.41.

10 Professor Queenan conducted a 51-state survey of state law on assessing eligibility for ESY services. Although nearly every state considers regression and recoupment as a relevant factor in this inquiry, only eleven states use regression as the primary or sole factor. 44 J.L. & Educ. at 179. Thirty-five states, including Georgia, consider regression along with multiple other factors to determine the need for ESY services, such as the nature and severity of the child's disability, whether the student is at a critical stage in learning, whether a student's ability to master a skill is emerging, and the student's overall achievement of intended goals and rate of progress during the school year. *Id.* at 183, n.136 (citing Ga. Comp. R. & Regs. r. 160-4-7-.02(7)(a)(1) ("Extended school year services must be provided only if a child's IEP Team determines, on an individual basis, that the services are necessary for the provision of FAPE to the child."); and the ESY Fact Sheet (Ex. R-11)).

Cordrey v. Euckert, 917 F.2d. 1460, 1473 (6th Cir. 1990); *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1158 (5th Cir. 1986);[11] *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d 1022, 1028 (10th Cir. 1990). "'[A] claimant seeking an ESY must satisfy an even stricter test, because 'providing an ESY is the exception and not the rule under the regulatory scheme.'" *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202, 1211 (9th Cir. 2008) (quoting *Bd. of Educ. of Fayette Cty v. L.M.*, 478 F.3d 307, 315 (6th Cir. 2007)) (other citations omitted).

6.

In this case, Petitioners failed to present sufficient probative evidence to show that ESY services were necessary for [redacted] to make appropriate progress in light of her particular circumstances. They presented no expert testimony indicating that ESY services were necessary,[12] nor did they present any other evidence to prove that [redacted] had a unique need for special education services through the summer. First, the Court concludes, based on a preponderance of the evidence, that Petitioners failed to prove that [redacted] would likely regress academically over the summer in the absence of ESY services. Moreover, even assuming *arguendo* that Petitioners had presented sufficient evidence to prove that [redacted] had problems with regression, as opposed to retention, the possibility of regression over the summer is not enough, alone, to prove eligibility for ESY services. "[T]he 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

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11 The Fifth Circuit held that "if a child will experience severe or substantial regression during the summer months in the absence of a summer program, the . . . 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." *Id.* at 1158.

12 Although evidence of actual regression is not required, courts have held that claimants must show through "expert opinion testimony" that ESY is necessary to permit the child to benefit from instruction. *See N.B. v. Hellgate Elem. Sch. Dist.*, 541 F.3d at 1212; *MM ex. rel. DM*, 303 F.3d at 538.

substantially thwart the goal of 'meaningful progress.'" *MM ex rel. DM*, 303 F.3d at 538 (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 184 (3d Cir. 1988).

7.

In addition to an absence of probative evidence showing that [redacted] would experience significant regression that would jeopardize her academic progress, Petitioners failed to present any other evidence that would support a finding that ESY services were necessary for [redacted] to receive a FAPE. There was insufficient evidence in the record to show that [redacted]s disabilities were severe, that she was on the cusp of breaking through on an important IEP goal, or that any other factor or special circumstances made ESY services necessary over the summer break. Rather, the Court concludes, based on a preponderance of the evidence in the record, that the IEP Team appropriately considered the multiple factors identified by the Ga. DOE in the ESY Fact Sheet, took into account the wishes of [redacted]s parents to continue services through the summer,[13] and properly decided that [redacted] was not eligible for ESY services under IDEA.

IV. DECISION

Petitioners failed to prove that Coweta Charter Academy failed to provide [redacted] a free appropriate public education by denying her ESY services through the summer. Accordingly, Petitioners' request for relief is **DENIED**.

SO ORDERED, this 8th day of September, 2017.

KIMBERLY W. SCHROER
Administrative Law Judge

13 "As all parents do, Mother wants the best for Student. While Mother's passionate advocacy for her child is commendable, the Hearings Officer and this Court are required to follow the applicable law." *Dep't of Educ. v. Leo W.*, 226 F. Supp. 3d at 1114 (federal district court affirmed hearing officer's ruling that the exclusion of ESY services for summer did not constitute a denial of FAPE, holding that IDEA does not require a school to provide ESY services to every student with disabilities to prevent that student from experiencing any regression).

NOTICE OF FINAL DECISION

Attached is the Final Decision of the administrative law judge. The Final Decision is not subject to review by the referring agency. O.C.G.A. § 50-13-41(e)(3). A party who disagrees with the Final Decision may file a motion with the administrative law judge and/or a petition for judicial review in the appropriate court.

Filing a Motion with the Administrative Law Judge

A party who wishes to file a motion to vacate a default, a motion for reconsideration, or a motion for rehearing must do so within 10 days of the entry of the Final Decision. Ga. Comp. R. & Regs. 616-1-2-.28, -.30(3). All motions must be made in writing and filed with the judge's assistant, with copies served simultaneously upon all parties of record. Ga. Comp. R. & Regs. 616-1-2-.04, -.11, -.16. The judge's assistant is Kevin Westray - 404-656-3508; Email: kwestray@osah.ga.gov; Fax: 404-818-3724; 225 Peachtree Street NE, Suite 400, South Tower, Atlanta, Georgia 30303.

Filing a Petition for Judicial Review

A party who seeks judicial review must file a petition in the appropriate court within 30 days after service of the Final Decision. O.C.G.A. §§ 50-13-19(b), -20.1. Copies of the petition for judicial review must be served simultaneously upon the referring agency and all parties of record. O.C.G.A. § 50-13-19(b). A copy of the petition must also be filed with the OSAH Clerk at 225 Peachtree Street NE, Suite 400, South Tower, Atlanta, Georgia 30303. Ga. Comp. R. & Regs. 616-1-2-.39.