

**COMMONWEALTH OF MASSACHUSETTS  
SPECIAL EDUCATION APPEALS**

**In Re: Mashpee Public Schools**

**BSEA #09-6375**

**DECISION**

This decision is issued pursuant to the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C., § 1400 *et seq.*; Section 504 of the Rehabilitation Act of 1973 (29 U.S.C., §794); the Massachusetts special education statute or “Chapter 766,” (M.G.L. c. 71B) and the Massachusetts Administrative Procedures Act (M.G.L. c. 30A), as well as the regulations promulgated under these statutes.

At issue here is whether, for the summer of 2009, the Mashpee Public Schools was required to supplement Student’s six-week extended school year (ESY) program by funding approximately four weeks at the private summer program selected by Parent.

Parent filed a request for hearing on May 15, 2009. An evidentiary hearing took place on June 19, 2009 at the office of the Bureau of Special Education Appeals (BSEA) in Malden, MA. Parent was represented by an advocate, and the School was represented by counsel. Both parties had the opportunity to examine and cross-examine witnesses, introduce documentary evidence, and present oral and written arguments.

Those present for all or part of the proceeding were:

Student’s Mother	
Mother’s Cousin	
Susan Conlan	Parent’s Private Behavioral Consultant
Joan Collins	Asst. Administrator of Special Education, Mashpee Public Schools
Carla R. Thomas	Administrator of Special Education, Mashpee Public Schools
Anita Woods	Program Director, Cape Cod Collaborative
Sheila Deppner	Advocate for Parent
Mary Joann Reedy	Attorney for Mashpee Public Schools

The official record of the hearing consists of Parent’s exhibits P-1 through P- 10, School’s exhibits S-1 through S-11 and tape-recorded oral testimony and argument. The parties presented written closing arguments on June 24, 2009 and the record closed on that date. On August 11, 2009, a Conclusion and Order were issued, which is hereby incorporated by reference.

## **ISSUE PRESENTED<sup>1</sup>**

The sole issues for decision here are: (1) whether the six-week extended school year (ESY) program offered by the Mashpee Public Schools (Mashpee or School) through the Cape Cod Collaborative<sup>2</sup> for the summer of 2009 was reasonably calculated to prevent substantial regression in Student's skills during the summer vacation; (2) if not, whether Handi Kids, which was the program proposed by Parent for the remaining summer weeks, was appropriate such that Mashpee was required to fund it for Student.

## **POSITION OF PARENT**

Student's disabilities are severe and pervasive. Student requires a 50-week program in order to make meaningful educational progress and avoid regression, particularly in the areas of behavior. The six-week ESY program offered by the Mashpee Public Schools fails to meet Student's needs because it leaves her with a total of approximately five weeks without services over the summer months, during which she is at risk for substantial regression.

## **POSITION OF MASHPEE PUBLIC SCHOOLS**

Mashpee offered Student a six-week ESY program that was reasonably calculated to prevent substantial regression in Student's learning skills over the summer of 2009, as required by the IDEA and Chapter 766. Parent failed to meet her burden of proving that Student required additional ESY services to prevent substantial regression. In fact, the record tends to show that Student has not experienced regression during breaks in her services. Moreover, Handi Kids, the program sought by Parent, is not a special education program but a recreational camp that is not approved by the Department of Elementary and Secondary Education (DESE) to provide special educational services. As a matter of law, Mashpee is not required to provide prospective funding for this non-approved recreational camp program.

## **FINDINGS OF FACT**

1. Student is an eight-year-old child who is a resident of Mashpee. From February 2008 through the 2008-2009 school year, Student attended a program for children on the autism spectrum operated by the Cape Cod Collaborative (CCC). Student enjoys

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<sup>1</sup> In her hearing request, Parent also sought an order for extended-day, home-based services. During the course of hearing, one of Mashpee's witnesses testified that Mashpee would be willing to provide such services. This offer on the record represented a reversal of its position prior to hearing. The parties reached an agreement on this issue, the details of which were not disclosed to the Hearing Officer, and Parent withdrew the claim for home-based services. This decision, therefore, concerns only the ESY services referred to above.

<sup>2</sup>For convenience and brevity, this program may be referred to either as "Mashpee's ESY program" or the CCC ESY program.

spending time with her family, and many activities, including doing puzzles, using the computer, listening to music, and swimming. (Mother, S-3)

2. There is no dispute that Student has significant disabilities, including autism and mental retardation, which have a substantial effect on her functioning in most domains, including communication, fine and gross motor skills, self-care, social-emotional functioning, behavior, and learning. (Mother, Conlan, S-3) Student's eligibility for special education services is not in dispute.
3. Student communicates primarily with the Picture Exchange Communication System, (PECS) and also uses some short verbal utterances. She is able to make her immediate wants and needs known, as well as to comment. (S-3)
4. Student is learning to carry out activities of daily living, but still requires step-by-step prompting and assistance for such tasks as washing, dressing, and toothbrushing. As of the hearing date, toilet training was in progress. (S-3, S-4) Academically, as of the spring of 2009, Student was able to identify upper and lower case letters and colors, as well as some numbers. She was learning to match some words to the corresponding pictures, was using her PECS book to make requests, and to sort items by color. (S-3) Student was also learning how to complete puzzles and had learned how to use a touch screen computer to activate speech and language software, and to participate in structured games with other students. (S-3)
5. As a result of her disabilities, Student has a number of behaviors that interfere with her educational progress and which Parent and her service providers have attempted to address during her school career. (Conlan, Mother, Woods) The targeted behaviors relevant to this proceeding include spitting (defined as saliva outside of her mouth not directed at a person), aggression (hitting, spitting at a person, kicking, etc.), destruction (e.g., throwing materials, overturning chairs), and toileting accidents. (Mother, S-4) Outside of school, the behaviors can be frequent and severe, affecting Student's functioning at home and substantially limiting Parent's ability to take her into the community. (P-2, Mother)
6. Prior to February 2008 Student attended elementary school in Mashpee in a substantially separate program for students on the autism spectrum. (Thomas)
7. Beginning in February 2008, as the result of a settlement agreement with the Mashpee Public Schools dated February 15, 2008, Student began attending the autism program operated by the CCC at an elementary school in East Sandwich. The CCC program provides Student with individualized instruction based on ABA principles, and includes discrete trial training, as well as related services including occupational therapy (OT), physical therapy (PT), and speech/language therapy. (Woods)
8. In March 2009, CCC provided Student with a functional behavioral assessment (FBA) and individualized behavioral support plan that was designed to help reduce the targeted behaviors referred to in Paragraph 5, above. (S-4) Consistent with its

use of ABA principles, CCC has maintained data on the occurrence of the targeted behaviors (as well as data related to instruction) in order to assess the effectiveness of the behavioral support plan and assess Student's progress. (Woods, S-5, S-10)

9. At all relevant times, Student's IEPs have included extended school year (ESY) services. Mashpee has implemented these services in a variety of ways. During the summer of 2006, Mashpee provided Student with a five-week summer program<sup>3</sup> which included 10 hours per week of home-based ABA services. Additionally, Parent funded Camp Lyndon for the initial week of summer vacation, before Mashpee's services started, and two weeks at the end of the summer after Mashpee's services had ended, with Mashpee funding transportation to and from camp, as well as a 1:1 aide. (Mother, P-10)
10. During the spring of 2007, the Mashpee TEAM discussed Mashpee's move towards operating or arranging for ESY programs designed to explicitly implement IEPs and prevent substantial regression, rather than funding or supporting recreational camps for students in need of ESY services. (Thomas, Mother) During the summer of 2007, Mashpee funded, and Student attended, the CCC program from July 9 through August 16. Mashpee paid for Student to attend the camp program at issue in this hearing, Handi Kids, for the two weeks before the CCC program started and two weeks after the CCC program ended.
11. The 2007 arrangement was the result of a mediated agreement, under which Mashpee, Parent and the Department of Mental Retardation (DMR)<sup>4</sup> shared the costs of the program with Mashpee's share consisting of transportation and a 1:1 aide. (Mother, S-11) Mother chose Handi Kids over Camp Lyndon because she felt that Handi Kids provided more learning opportunities. Mashpee agreed to assist with supporting the camp placement despite its changed policies on ESY services because it did not want to "pull the rug out" from parents who had relied on camp programs in the past. (Thomas)
12. By the summer of 2008, Mashpee had essentially solidified its position that it would not fund recreational camp programs over the summer months, but rather would provide its own six-week ESY programs (in Student's case, through an arrangement with CCC) during the eleven-week summer vacation break. (Thomas) When asked what Mashpee would provide in the event that a child needed services for all eleven vacation weeks, Ms. Thomas testified that such students might receive additional home-based services. (Thomas)

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<sup>3</sup> Carla Thomas, from the Mashpee Public Schools, testified that 2006 was the first summer that Mashpee operated or arranged for an ESY program fully capable of implementing Student's IEP. Previously, ESY programs had been scattered around the Cape, leading Mashpee to sometimes provide or supplement ESY services with camp programs. In approximately 2006, Mashpee began moving away from this model and focused instead on developing and providing ESY services designed to work on IEP goals and prevent substantial regression. (Thomas)

<sup>4</sup> DMR is now named the Department of Developmental Services, or DDS.

13. In Student's case, however, despite Mashpee's change in practice, Paragraph 2 of the settlement agreement referred to in Paragraph 7, above, provided summer camp for Student during the summer of 2008:

For the summer of 2008 only, Mashpee agrees to fund and provide transportation for [Student] to attend Session 1 (June 23 – July 3, 2008) and Session 5 (August 18 – 22, 2008) at the Handi Kids summer camp. [Student] will not have any "stay put" entitlement to the continuation of this camp experience for successive years, unless such services are incorporated into her IEP by Mashpee. (S-1)

14. Student's IEP covering March 31, 2008 through March 31, 2009 provided for ESY services consisting of the six-week summer program operated by CCC. That program operated for five hours per day, four days per week between July 7 and August 14, 2008. (S-9) Pursuant to the settlement agreement cited in the previous paragraph, Mashpee funded Student's attendance at Handi Kids during the approximately three weeks that the CCC program was not in session. (S-9)
15. In March 2009, the TEAM developed an IEP for Student covering March 20, 2009 through March 20, 2010. The relevant disputed portion of that IEP provided essentially the same ESY services as the IEP for 2008 – 2009, i.e., a six-week (July 6 to August 13, 2009), five hours per day, four days per week program operated by CCC. (S-3) On April 7, 2009, Mother partially rejected this IEP based on "lack of extended summer services 50 weeks/year."

#### **Evidence Relative to Regression**

16. Parent presented the testimony and report of Ms. Susan J. Conlan in support of her position that Student needed a full summer program, entailing four weeks of ESY services in addition to those offered by Mashpee, to prevent substantial regression in Student's skills over the summer, particularly in the area of behavior. Ms. Conlan has a Master's degree in severe special needs, and has worked since 1985 both as a direct service provider and as a consultant regarding services to students on the autism spectrum. Ms. Conlan currently has a private practice consulting with parents and school districts in the areas of ABA, as well as home and school-based systems for supporting students with autism. (Conlan, P-1)
17. On March 11, 2009, Ms. Conlan observed Student at home at the request of Mother, who was seeking suggestions for strategies for managing Student's behavior at home, especially spitting, non-compliance, and throwing items. (Conlan, Mother). Ms. Conlan conducted an informal assessment, which did not include gathering data. (Conlan, P-2)
18. In a report dated March 20, 2009, Ms. Conlan made several recommendations, including creation of a simplified PECS book for home, establishing an Independent Activity Schedule to structure after-school time, and using specific tactics to address

Student's spitting and throwing of items. Ms. Conlan further recommended that Parent obtain 5 hours per week of 1:1 home consultation to address dysfunctional behaviors and teach leisure and self-care skills. (P-2)

19. On the issue of summer services, Ms. Conlan recommended "an educational program throughout the summer for six hours a day," along with swimming lessons at a place such as the YMCA during non-school hours. Ms. Conlan based this recommendation on the "severity of [Student's] needs, consistent with Autism Spectrum Disorder." (P-2)
20. Ms. Conlan testified that during her observation, Student engaged in spitting or throwing behaviors approximately once per minute (although Ms. Conlan did not collect formal data), along with screaming, moaning, and tantrumming. Mother reported to Ms. Conlan that Student's behavior in the community could be even more severe than that demonstrated at home. (Conlan)
21. Ms. Conlan further testified that based on her observation of Student at home, an ESY program of only six weeks duration during the summer would place Student at risk of an increase in the frequency and severity of her behaviors, along with the possible loss of skills, during the remaining weeks of the summer break. (Conlan)
22. On cross-examination by the School, Ms. Conlan was showed graphs of behavioral data gathered on Student in school during the course of the 2008 – 2009 school year. (S- 10 ) Ms. Conlan testified that she saw great fluctuation in the frequency of targeted behaviors, in that periods of few or no behaviors would be followed by isolated or clustered spikes. (Conlan) Ms. Conlan stated that without knowing anything about the circumstances at any given time that data was taken, she could not comment on the causes for the fluctuation. Ms. Conlan acknowledged, however, that she saw no clear relationship between increases in maladaptive behaviors and school vacations; i.e., spikes did not consistently occur upon return from school breaks. (Conlan)
23. Testimony also was provided by Ms. Anita Woods, the Program Director at CCC who supervised the staff in Student's program and knew Student. (Woods). Like Ms. Conlan, Ms. Woods testified that the available data did not support a finding of significant regression after school vacations. (Woods)

#### **Program Requested by Parent**

24. According to its program brochure, Handi Kids is a "non-profit recreational facility for children and young adults with physical and cognitive disabilities. Handi Kids provides therapeutic recreation...through our Summer Day Camp, Saturday Camp, School Vacation Camp, After School, [and] Therapeutic Horseback Riding." (S-2)
25. The purpose of the summer day camp is to "provide therapeutic recreation" to children and adults with disabilities, i.e., to enable participants to "have fun as they

develop self-confidence, meet new friends, exercise, socialize and develop important life skills through play.” (S-2)

26. Handi Kids provides traditional summer camp activities such as swimming, arts and crafts, sports, movies, boating and fishing, as well as cooking, music and dance, and introduction to horses. (S-2)
27. Handi Kids is not a DESE-approved ESY program. (P-8) The record does not indicate that it is staffed by certified teachers or providers. Application and enrollment forms do ask parents to provide IEPs and related documents. According to an email sent by Handi Kids’ program director to Parent’s advocate on June 12, 2009, Handi Kids “utilize[s] the IEPs to get information on the best way to work successfully with our attending campers,” and “also tr[ies] to work on some supplemental goals (informally) throughout the summer...” (P-8) The record does not indicate that the program systematically addresses IEP goals and objectives.
28. There is no dispute that Student enjoyed her time at Handi Kids during 2007 and 2008, and benefited from participating in the program.

#### **Program Proposed by School**

29. As stated above, Mashpee proposed the same six-week, four-day, five-hour ESY program operated by the CCC in which Student had participated during summer 2008. According to the relevant IEP, Student was also offered 1x30 minutes per week, each, of OT, PT and speech therapy. It was unclear from the record whether these therapies were in addition to the 20 hours per week of educational services. Other than testimony from Ms. Woods indicating that the program was very structured and focused on implementing IEP goals, there is little information on the record about the content of this ESY program; however, the only dispute is over the duration of the program, not its appropriateness per se.

#### **CONCLUSION AND ORDER**

For the reasons stated above, Parents have not met their burden<sup>5</sup> of showing that the CCC summer program offered by Mashpee for summer 2009 was inappropriate, and that Student needed a 50-week ESY program to meet the relevant standards and provide Student with FAPE. My reasoning follows.

Massachusetts regulations at 603 CMR 28.05(4)(d)(1) provide that extended school year programs “may be identified if the student has demonstrated or is likely to

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<sup>5</sup> In order to prevail here, the Parent must prove, by a preponderance of evidence, that the program or services offered or provided by the school district are not reasonably calculated to provide Student with a FAPE. Schaffer v. Weast, 546 U.S. 49, 62 (2002).

demonstrate substantial regression in his or her learning skills and/or substantial difficulty in relearning such skills if an extended program is not provided.”<sup>6</sup>

Here, while the parties agree that the Student needs summer programming, the Parent has not demonstrated that Student needs more than the six weeks offered by Mashpee in order to avoid substantial regression and/or substantial difficulty in relearning skills. On the contrary, the record indicates no demonstrable nexus between Student’s behavior and school vacations. Both the School’s witness (Ms. Woods) and the Parent’s witness (Ms. Conlan) testified that Student’s behavioral data seemed relatively unaffected by school vacations that ranged in duration from a few days to approximately two weeks. The evidence is insufficient to support a conclusion that Student would respond any differently to the non-service weeks during summer 2009 than she had during the school year, especially given that these weeks would not occur all at once, but in two separate two-week segments before and after the six-week summer program. These breaks are similar in duration to the December-January vacation break during the school year, which had no demonstrable effect on Student’s school performance.

Mother additionally argues that the Student needs a 50-week program because of the severity of her disability and need for consistency and structure. Ms. Conlan also testified to this effect. It may very well be that Student would benefit from additional weeks of educational programming. There is insufficient factual support in the record, however, that Student would be denied a FAPE in the absence of additional weeks of service during the summer months, or, as Parent also argues in her closing brief, that home-based ABA or other services during the uncovered weeks, if offered, would be insufficient to meet Student’s needs. Parent relies on the testimony of Ms. Conlan; however, while Ms. Conlan indicated that she would “expect” 25 days without services to lead to regression for Student, she also testified, very candidly and credibly, that she had not spoken to Student’s teachers, had not gathered data during her informal observation of Student, and did not see a correlation in the data that she reviewed between school vacation periods and regression.<sup>7</sup>

Finally, even if Parent had demonstrated that the School was required to provide additional ESY services to ensure that Student received FAPE, the School would not be required to fund Handi Kids. According to 603 CMR 28.05(4)(d)(4), “[c]amping or recreation programs provided solely for recreational purposes and with no corresponding

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<sup>6</sup> The corresponding federal regulation 34 CFR Sec. 300.106, does not explicitly mention the so-called “regression-recoupment” standard for ESY services. Rather, the federal regulation requires school districts to provide ESY services “as necessary to provide FAPE...” Id. However, the August 2006 comments accompanying the regulations note that the “concepts of recoupment and likelihood of regression or retention’ have formed the basis for many standards that States use in making ESY eligibility determinations and are derived from well-established judicial precedents...[citations omitted.]” 71 FR 156, page 46582. August 14, 2006.

<sup>7</sup> As stated above, during the hearing, Mashpee indicated that it would provide home-based extended day services and the parties reached agreement on this issue, although the parties have not disclosed the details of their agreement relative to this issue. It would be reasonable to infer that many of Ms. Conlan’s concerns about Student’s need for structure in light of her behavior would be addressed by the addition of extended day, home-based services during the school year.

IEP goals or specially designed instruction shall not be considered extended year programs.” Handi Kids is a self-described “recreational facility.” Handi Kids clearly is designed to make a full range of recreational and leisure opportunities accessible to persons with major disabilities. Handi Kids staff members use IEPs as tools to better understand and serve participants. Further, children and teens who attend Handi Kids—like non-disabled children who go to summer camp or get involved in recreational programs—undoubtedly learn new skills, make friends, etc.

Valuable as the experience at Handi Kids may be to Student, however, the record does not indicate that it can be considered an ESY program within the meaning of the regulations. It is not approved by DESE to provide ESY services. Although staff may work informally with campers on some IEP goals, the program does not purport to formally implement IEPs, does not provide specialized instruction, and does not formally track and document students’ progress towards achievement of IEP objectives. Rather, Hand Kids clearly is a “camping or recreation program” which “shall not be considered [an] extended year program.” 603 CMR 28.05(4)(d)(4).

For the foregoing reasons, the Mashpee Public Schools was and is not required to fund the Handi Kids program for the Student during any portion of the summer of 2009 as requested by the Parent.

By the Hearing Officer:

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Sara Berman

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Dated: September 24, 2009