STATE BOARD OF EDUCATION

STATE OF GEORGIA

In re: R. C. : CASE NO. 1978-25

Appellant. :

O R D E R

THE STATE BOARD OF EDUCATION, after due consideration of the record submitted herein and the report of the Hearing Officer, a copy of which is attached hereto, and after vote in open meeting,

DETERMINES AND ORDERS, that the Findings of Fact and Conclusions of Law of the Hearing Officer are made the Findings of Fact and Conclusions of Law of the State Board of Education and by reference are incorporated herein, and

DETERMINES AND ORDERS, that the decision herein appealed from, be, and it is hereby, affirmed.

Mrs. Oberdorfer was not present.

This 12th day of October, 1978.

Thomas K. Vann Jr.

THOMAS K. VANN, JR.
Vice Chairman for Appeals

STATE BOARD OF EDUCATION

STATE OF GEORGIA

IN RE: R.C.	:	CASE NO. 1978-25
	:	
	:	REPORT OF
	:	HEARING OFFICER

PART I

SUMMARY OF APPEAL

This is a special education appeal by the parents from the placement of their son in a 180-day program following a finding by a Local Hearing Review Board that the 180-day placement was appropriate for their child. The appeal complains that the 180-day program is inappropriate and that the child's needs demand a continuous program of education. The Hearing Officer recommends that the decision of the Local Hearing Review Board be sustained.

PART II

FINDINGS OF FACT

The child (hereinafter referred to as "Student"), had been going to a training center and receiving continuous care. He was identified by the Local School System as a handicapped child within the jurisdiction of the Local School

System. The parents were notified that a placement meeting would be held for the evaluation of the Student. At the meeting, it was recommended that the Student be placed in the "Exceptional Child Center", a program of education operated by the Local School System for 180 days during the year. The parents accepted the placement, but objected to having placement only for the length of the school term. The parents wanted 12-month placement and requested a hearing before a local hearing review board.

The Local Hearing Review Board convened on April 18, 1978. The parents were represented by counsel and had been given a list of the witnesses to be presented by the Local School System. The Local Hearing Review Board issued its decision on May 19, 1978. The parents thereafter appealed to the State Board of Education, although there is no indication in the record when the appeal was filed with the local superintendent.

The Local Hearing Review Board issued a decision that the placement of the Student in the Exceptional Child Center for the 1978-79 school year was appropriate. The Local Hearing Review Board observed that there "is a need for a continuous program to optimally meet . . . [the Student's] needs, however, State law does not provide a funding pattern that will allow local education agencies to operate beyond the 180 day school year." The Local Hearing Review Board

decided that "the nine month program, as reflected in the IEP for . . . [the Student], meets the 180 day school year requirements according to State policy." With respect to the need of a twelve-month program, the Review Board stated "that if 'a continual care program', . . . is a necessity for . . . [the Student] that [sic] the least restrictive environment may not be public school placement." The Review Board stated that "It is not the responsibility of this Hearing Review Board to decide what might be ultimately appropriate and desirable for a student but rather, if what is being offered is appropriate and adequate under the requirements of the law."

The parents also appealed the lack of specific short-term goals in the individualized educational plan, but by agreement of the parties, this issue has been dropped because the Local School System agreed to provide such short term goals before the beginning of the school year. The parties, through counsel, also orally waived the requirement that the State Board of Education issue an opinion within 30 days after receipt of the transcript and appeal.

PART III

CONCLUSIONS OF LAW

The parent's appeal basically contends that: (1) a free and appropriate public education must meet the student's

special education needs; (2) their child needs a continuous program of education, and (3) it is, therefore, necessary for the Local School System to provide 12 months of schooling. The parents contend that Public Law 94-142 requires a continuous program for the Student, State law authorizes programs of continuous care which exceed 9-month programs, funding patterns of the State cannot be used as a criteria for determining the program needs of the Student, and that if the Student's ability to equally benefit from his education is predicated on a continual program of services, then Public Law 94-142 requires the provision of the services regardless of the funding pattern of the State and the local educational agency.

The Local School System responds by arguing that the Student does not need a 12-month program, and that neither federal nor state law requires a 12-month program. The Local School System supports its argument that the Student does not need a 12-month program by pointing out that the complaint is premature, that the parents have put forth insufficient reasons for asking for a 12-month program, that if the parents exercised their responsibilities there might not be a need for a 12-month program, and that a 12-month program would mean institutional care for the Student. The Local School System also argues that there is no requirement in law for a

12-month program, that to provide a 12-month program for a select group of handicapped students would be unconstitutional, and that state and federal law specifically permit a 180-day school year.

It is the opinion of the Hearing Officer that in the circumstances of this case, there is no requirement imposed by law on the Local School System to provide a 12-month program for the Student. The parent's initial premise is that the Student requires a program of continuous education. The Local Hearing Review Board did find that a continuous program was necessary in order to optimally meet the Student's needs. It also, however, found that the 180-day program was appropriate and adequate. Public Law 94-142 and the regulations thereunder call for a program which meets the unique needs of the handicapped child, but there is no requirement placed on a local school system to provide optimal programs. If the local school system is providing a 9-month or 180-day program which is appropriate and adequate, then it is fulfilling the requirements imposed on it by law.

In the instant case, the parents have not challenged the program content of the 180-day program offered at the Exceptional Child Center. They are only asking that the Exceptional Child Center Program be extended from 180 days to 12 months. Their only argument, therefore, is with quantity rather than quality. Since the program content is not being

challenged, the program itself must be deemed to be appropriate.

The parent's basic objection to the 180-day program is their fear that the Student will regress during the period that he is not attending school. This fear is founded on the report of the parent's independent expert who recommended that the Student be placed under a continual care program in order to avoid regression and on the fact that during a Christmas vacation period the Student regressed in his ability to walk. The parents argue that because the Student will regress, he will not receive the same benefits as other children receive during their period of education. They then take the position that since the Student will not receive the same benefits or results as other children because of his regression, he will not be receiving an "appropriate" education as required by law.

The Hearing Officer is of the opinion that the intent of the law is to provide equal opportunities for an education rather than to guarantee equal results from an education. Cf. 1975 United States Code Congressional and Administrative News 1427 ("In order to assure that full educational opportunities are available . . . ."). The Hearing Officer is of the opinion that a local school system cannot stand as a guarantor of what a student will do with the

education that is received. All of the students are given the same opportunity to learn, but the results obtained from the education will vary with the individual. The fact that a particular student will regress during the summer months, therefore, does not impose a requirement on the local school system to provide a program of continuous education in order to raise the advancement level to the same level as other students. While it may be desireable to provide a continuous program of education for all students, there is no requirement that the school system undertake such a program. The local school system is, therefore, providing an equal opportunity to all of its students if it is providing a 180-day program for the handicapped students whose needs indicate that such a program is adequate.

The parents disagree with the Local Hearing Review Board's discussion that continuous care means a more restrictive environment. Nevertheless, the parents are asking for a more restrictive environment than what has been recommended by the Local School System. The Exceptional Child Center was created in order to meet the needs of handicapped children who can learn under a 180-day plan or program. The Local School System has other programs available to meet the needs of the handicapped students who need continuous care. Thus, to the extent that the Exceptional

Child Center is geared to providing for the needs of children who do not require continual care, placing the Student into a program requiring continual care would amount to placing him in a more restrictive environment, i.e., he cannot function in the same environment as normal children who are schooled for only 180 days and is therefore in a more restrictive environment. The term "least restrictive environment" simply means placing, to the maximum extent possible, a handicapped student with children who are not handicapped. The Local Hearing Review Board, therefore, correctly observed that the parents were advocating a more restrictive environment than offered at the Exceptional Child Center. It was, however, the finding of the Local Hearing Review Board that the program at the Exceptional Child Center was adequate and appropriate for the Student. Continuous care does mean a more restrictive environment but the need for a more restrictive environment was not deemed appropriate at the time of the hearing.

In making its determination that a 180-day program was adequate, the Local Hearing Review Board noted that the "funding pattern" of the State did not permit more than 180 days of schooling. The parents have pointed out that the "funding pattern" of the State and the local school system cannot be used as a criteria for determining the placement of a handicapped child. The Senate Report on Public Law

94-142 makes it clear that providing services for handicapped children cannot be dependent on the availability of funds. 1975 United States Code Congressional and Administrative News 1447. The Senate Report cites the language in Mills v. Board of Education, 348 F. Supp. 866, 876 (1972), which states:

> "If sufficient funds are not available to finance all of the services and programs that are needed and desireable in the system, then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly-supported education consistent with his needs and ability to benefit therefrom."

The regulations provide that the local school system is required to indicate in the individualized education program what services are to be made available to a handicapped student and the extent to which the child will be able to participate in regular educational programs. 45 C.F.R. §121a.346 (c); 42 Fed. Reg. 42491 (1977). The plan must also contain:

> "A statement of specific special educational and related services needed by the child, determined without regard to the availability of those services which are needed to meet the unique needs of the child, including the type of physical education program in which the child will participate." Georgia Special Education Annual Program Plan, Section VI, E, 4 (1978).

A student's placement must be based on the individualized education program developed for the student, and

> "To the extent necessary to implement the individualized education program for each handicapped child in an applicable agency,

> that agency shall provide, or arrange for the provision of, all of the various alternative settings included in . . . [the] Annual Program Plan. However, such alternative settings may be arranged cooperatively with other agencies." Georgia Special Education Annual Program Plan, Section VIII, C, 2 (1978).

It thus appears that the individualized education program must include a statement of the services that are needed, whether or not they are currently available, and the local school system must then provide the services either within its regular programs or by contracting with other agencies to provide the programs needed. The only financial considerations that can be given is that if there is a shortage of funds, then the available funds must be expended equitably so that no child is entirely excluded from the educational programs they need. The "funding pattern" of the State and the local school system cannot be used as a criteria for the placement of a handicapped child.

In the instant case, however, it does not appear that the Local Hearing Review Board used the "funding pattern" as the criteria for the Student's placement. The Local Hearing Review Board stated:

> "Evidence presented indicated that there is a need for a continuous program to optimally meet . . . [the Student's] needs, however, State law does not provide a funding pattern that will allow local education agencies to operate beyond the 180 day school year."

This observation must be read in light of the Local Hearing Review Board's determination that the placement in the Exceptional Child Center was appropriate. It is also a correct statement with respect to the operation of the Exceptional Child Center. The Local School System is not required to operate the Exceptional Child Center for more than 180 days during the year. If the Student requires more than 180 days of care during the year, then the Local School System is required to provide a program for the Student, but it does not have to be the program that is available at the Exceptional Child Center. As previously indicated, the individualized education program for the Student did not establish a need for continuous care and the evidence of possible regression is not sufficient to require a change in the individualized education program at this time. The "funding pattern" of the State may determine the length of time that the Exceptional Child Center is operated, but such a determination does not establish the criteria for placement of the Student in the program. If it develops that the Student requires an educational program for more than 180 days, then the Local System can provide such a program through other means or alternative sources.

Because of the possibility that there could be a change in the Student's individualized education program and

because the evidence of any regression after attending the recommended program is speculative at this time, the Local School System argues that the parent's appeal is premature and that the State Board of Education should not enter an order at this time. While the Hearing Officer is of the opinion that education is not a static process which permits an educator to determine in advance that a particular educational program for a particular student will be successful for all time, but it does appear that there is a requirement placed on the Local School System to establish a program based on the information available and designed to meet the Student's needs. Although the Local School System may change the individualized educational program for the Student after it has had an opportunity to work with the Student, it nevertheless is obligated to initially propose an individualized education plan for the Student which is the best it can propose with the available facts. The parent then has the right to challenge the particular individualized educational program that has been proposed and request the Local School System to take into consideration the opinions and evaluations of the professionals and the parents in devising a program for the Student. The State Hearing Review Board can then review the available evidence and determine if a program of continual care is required under all of the facts of the

situation. It cannot, therefore, be said that the appeal of the parents is premature simply because the summer period has not arrived. The State Board of Education could determine that a program of continuous care was necessary in a particular case, even though such a determination is not made in the instant case.

PART IV

RECOMMENDATION

Based upon the foregoing findings and conclusions, the record submitted, and the briefs of counsel, the Hearing Officer is of the opinion that the individualized education program prepared for the Student was properly prepared and it does provide for a free and appropriate public education, and that there is no requirement for the Local School System to provide a program of continuous care when the evidence supports the conclusion that a 180-day program will be adequate and appropriate. The Hearing Officer, therefore, recommends that the decision of the Local Hearing Review Board be sustained.

L. O. Buckland

L. O. BUCKLAND
Hearing Officer