

STATE BOARD OF EDUCATION

STATE OF GEORGIA

IN RE: RONALD M.,)	
)	
Appellant,)	
)	CASE NO. 1985-26
v.)	
)	
DOUGHERTY COUNTY)	
SCHOOL SYSTEM,)	
)	DECISION OF STATE
Appellee.)	HEARING OFFICER

PART I

SUMMARY OF APPEAL

This is an appeal by the parents of Ronald M. (hereinafter "Student") from a decision of a regional hearing officer that the Student's placement within the Dougherty County School System (hereinafter "Local System") affords the Student a free and appropriate education as required under The Education for All Handicapped Children Act (hereinafter "Act"). The Student was served by the Local System for the 1984-85 school year in the Oak Tree Children's Center in a self-contained class for the severely emotionally disturbed, and the same placement was recommended for the 1985-86 school year. The parents requested a hearing because they contended the placement proposed by the Local System was inappropriate. They believed the Student should be placed in a residential treatment program pursuant to recommendations made in an evaluation by the Psychiatric Institute of Washington, D.C. (hereinafter "Institute") which

had been done in the summer of 1984. The parents appeal on the grounds the Regional Hearing Officer was not impartial and there are numerous substantive errors in the findings of fact and conclusions upon which the decision is based.

PART II

FACTUAL BACKGROUND

The Student is an eight year old boy who was adopted at the age of three and one-half years. He was involved in pre-school at the age of four and can currently speak well enough to convey his needs. He has severe developmental delays in all areas of functioning and symptoms that include self-destructive head banging, severe mood liability with aggressive outbursts, impulsivity, hyperactivity, and poor social skills. He has been treated with numerous drugs in the past and, during the last school year, was being treated with various amounts of Thorazine.

The Student received special education services from the Local System for the 1984-85 school year. These services were provided in the Oak Tree Children's Center which provides services to children with severe behavioral or emotional disturbances. The curriculum involves four areas of development: behavior, communication, socialization and academics. The classroom situations generally are set up with two teachers, a certified Special Education Teacher and a support teacher for five to eight Students.

The IEP recommended for the Student for the 1985-86 school year is the same as the 1984-85 IEP. The Student met only four of the 1984-85 IEP objectives: to trust his own body and skills; to use words spontaneously; to exchange minimal information with another child, and to seek contact with adults spontaneously. He failed to meet the following objectives: to use play materials appropriately; to follow directions such as "come here" without physical intervention; to use words to affect others in constructive ways; to accept praise or success without inappropriate behavior or loss of control; to trust an adult sufficiently to respond to him; to produce meaningful, recognizable sequence of words or signs in several activities; to exhibit a beginning emergence of self with the use of "I", "me" or "my"; to respond to the environment with the process of classification, discrimination, basic receptive language and body coordination; to be able to write name, to be able to identify the alphabet A through Z, and to be able to identify numbers one to ten. Much of the testimony provided in the hearing before the Regional Hearing Officer concerned the Student's lack of progress during the 1984-85 school year under the same IEP as was suggested for the 1985-86 school year.

One of the Student's teachers testified that the Student's behavior had deteriorated by the end of the first semester and that the Student made minimal, if any, progress in the area of behavior skills. She further testified that the Student had made minimal, if any, progress in the area of social skills

(limited to a "hello" in a low, muffled voice), that there was minimal, if any, progress in the area of communication, and that he had drastically regressed in the area of academic skills. She stated that during the last week of school the Student began to improve. The program, however, was not typical of a regular school week under the IEP because it was an activities week without the normal structure. In her opinion the program offered was an appropriate program. Another of the Student's teachers and a teacher therapist testified similarly. Further, all of these witnesses indicated that they felt the Student was over-medicated.

The parents presented an evaluation which they had done by the Institute during the summer of 1984. In the evaluation, a recommendation was made for a placement in a high quality, 24-hour treatment program offering modalities suitable for the Student's needs, such as behavior modification programs, structure and supervision, special education approaches, speech therapy, physical therapy, and occupational therapy.

The parents also objected to the Hearing Officer. They took the position that the Regional Hearing Officer was not impartial because her sister worked for the Local System as a Special Education teacher. The Regional Hearing Officer concluded that fact would not prevent her from rendering an impartial decision and refused to recuse herself.

The Regional Hearing Officer found that the Student had regressed during the second semester of the school year and that the parents did not present any evidence to show the goals and objectives in the Student's IEP could or would not benefit the Student or that they were not reasonably calculated to do so. The Regional Hearing Officer concluded that the IEP is not a binding contract and unachieved goals and objectives do not mean that a child's special education program or placement is inappropriate. A lack of achievement, however, does suggest the possible need for an adjustment in the child's program.

The Regional Hearing Officer determined that the testimony established that the proposed 1985-86 IEP was tentative, and if a subsequent review shows that the physical, speech or occupational therapy services suggested in the Institute's evaluation are needed, then the school district must provide them as a part of the Student's IEP. The Regional Hearing Officer then held that the Student's placement at the Oak Tree Children's Center's self-contained class for emotionally disturbed afforded the Student with an appropriate placement.

The Regional Hearing Officer rendered her decision July 12, 1985 and the parents appealed July 16, 1985.

PART III

DISCUSSION

The parents contend, on appeal, that the fact that the Regional Hearing Officer has a sister who is employed as a

Special Education Teacher in the Local System is prima facie evidence that the Regional Hearing Officer has a personal interest that would conflict with her objectivity in the hearing. They argue that a favorable decision would earn the gratitude of the Regional Hearing Officer's sister's supervisors and assist the sister in her professional career. The parents did not present evidence to support their conclusion. Because of the decision reached herein on other grounds, the State Hearing Officer does not make any decision on the issue of the Regional Hearing Officer's partiality.

The Local System is required to provide the Student with a free, appropriate public education. A free, appropriate public education has been defined by the U. S. Supreme Court in Board of Education of the Hendrick Hudson Central School District v. Rowley, 73 L.Ed.2d 690 (1982). There, the Court construed the Act so that "if personalized instruction is being provided with sufficient support services to permit the child to benefit from the instruction" at public expense which meets the state's educational standards, approximates the grade levels used in the state's regular education, and comports with the student's IEP, then the child is receiving a free, appropriate public education. Additionally, in Rowley, the Court noted "that in many instances the process of providing special education and related services to handicapped children is not guaranteed to

produce any particular outcome" and "implicit in the congressional purpose of providing access to a free appropriate public education is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." The Court concluded "that the 'basic floor of opportunity' provided by the act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."

In the instant case, the facts do not provide substantial evidence to support the proposition that implementation of the IEP proposed for the Student will provide an appropriate education. The testimony of all the witnesses was that the Student regressed under the proposed IEP during the 1984-85 school year. The testimony that progress was made during the last week related to a period when the school system offered a less structured, more recreational setting. Progress made during one week, in which the program was changed, does not support a finding that the IEP is designed to provide an educational benefit to the Student.

However, failure to show that the Student is receiving an educational benefit does not mean that the program is not designed to provide an educational benefit. As the Supreme Court stated in Rowley, there is no guarantee of any particular outcome. Thus, while the Local System has failed to demonstrate

that the Student is receiving an educational benefit, this does not automatically mean they are providing an inappropriate program.

Likewise, just because the facts do not show that the Student is receiving an educational benefit does not mean that the Student must be provided with residential treatment as requested by the parents. The only evidence presented that residential placement is necessary was the evaluation performed by the Institute. That recommendation was not supported by reasons why the residential placement was necessary and it did not explain why the program offered by the Local System or any other program that could be offered would be inappropriate.

As the Regional Hearing Officer stated in her decision, underachieved goals and objectives do suggest that there possibly should be an adjustment to try to provide a program which will result in an educational benefit to the Student. Merely repeating the same IEP that was used last year during a time in which the Student regressed, however, would not provide the Student with an IEP designed to provide the Student with an educational benefit.

The Local System took the position during the hearing that the Student was overmedicated and that was the main reason he was not progressing in school. The Local System had requested that the Student be evaluated at the Georgia Southwestern State Hospital and the parents refused to allow that evaluation to

be carried out. The purpose of that evaluation would have been to "get a better look at the appropriateness of medications, dosages and types." The evaluation would constitute a related service; i.e., a support service which would be required to assist the Student to benefit from special education. Related services include medical services for diagnostic or evaluation purposes.

The parents took the position that they had recently had an evaluation done at the Institute and, thus, did not need to have another one, at least until the previous evaluation was properly considered. The evaluation the Local System requested, however, was to determine whether medication problems existed.

If the Local System feels that overmedication is interfering with the Student's progress, then an evaluation of the Student's medication would be appropriate. That evaluation must be performed at the expense of the Local System. If the parents choose not to allow such an evaluation, the Local System has the option of requesting a hearing to determine whether an evaluation is needed. If a hearing officer were to decide the evaluation is necessary and the parents still refused to allow it, then the Local System would have fulfilled its responsibilities. If the parents allow the evaluation, then the Local System should consider the results in determining a new IEP for the Student.

Some of the Local System witnesses testified that the IEP proposed for 1985-86 was tentative and would be modified during

the year. While program content is subject to change, the changes must be made pursuant to the requirements of the IEP. The IEP should be developed with the idea that implementation is designed to provide an educational benefit to the Student. If changes are expected, then those changes should be considered and discussed at the IEP meeting and either adopted or rejected. In order to change the IEP itself, all of the due process requirements must be followed. The State Hearing Officer, therefore, finds unpersuasive the argument that an IEP is tentative and therefore appropriate.

At the hearing, the Local System proposed various other alternatives which were not considered at the IEP meeting. It appears that the Local System has a wide range of services available, excluding residential placement. The severity of the Student's handicap and the fact that the Student regressed over the past year warrants consideration of some of the other services the Local System has available.

PART IV

DECISION

Based upon the foregoing discussion, the State Hearing Officer is of the opinion that the Regional Hearing Officer's decision that the program offered by the Local Board is appropriate is unsupported by substantial evidence. The Local System cannot simply propose the same IEP for the Student when it is clear the Student has failed to make any progress under

the existing IEP. Thus, a new IEP must be developed which incorporates programs designed to provide the Student with an education from which he may derive some educational benefit. In order to establish such an IEP, the Local System may need to obtain an evaluation of the effects of medication upon the Student.

This decision, however, does not mandate residential placement since the record does not demonstrate that residential placement is required. A local system is required to make every effort to provide a program in the least restrictive environment. Residential placement may be the least restrictive environment for the Student, but an attempt should first be made to provide an appropriate program in a less restrictive environment. The evidence in the record is insufficient to establish an immediate need for residential placement, and it is the last alternative the Local System should consider.



L. O. BUCKLAND
State Hearing Officer