

STATE BOARD OF EDUCATION

STATE OF GEORGIA

DEKALB COUNTY)	
BOARD OF EDUCATION,)	CASE NO. SBE 1986-33
)	
Appellant,)	
)	
v.)	
)	DECISION OF
ANDREW H.,)	STATE HEARING OFFICER
)	
Appellee.)	

PART I

SUMMARY OF APPEAL

This is an appeal by the DeKalb County Board of Education (hereinafter “Local Board”) from a decision of a Regional Hearing Officer that the Local Board did not offer Andrew H. (hereinafter “Student”) an appropriate education because it failed to offer a residential component which was needed by the Student. The Regional Hearing Officer further found the Local Board was required to reimburse the Student’s Mother for the expenses she had incurred in placing the Student in a private residential placement and that the Department of Human Resources (hereinafter “DUR”) violated the due process rights of the Student. The Local Board contends that the Regional Hearing Officer erred by basing his findings on an assumption that the Student failed previously in a program similar to the one offered by the Local Board when, in fact, that program was not similar to the one offered by the Local Board. Additionally, the Local Board contends the program it offers is appropriate, residential placement is not necessary, and, in fact, the current private placement is inappropriate. The Local Board contends it should not be required to reimburse the Student’s Mother for the private residential placement because it is not appropriate, it has offered an appropriate program and the Student’s Mother failed to cooperate with the Local Board to assist in providing services. The Student’s Mother contends the decision of the Regional Hearing Officer should be sustained.

PART II

FACTUAL BACKGROUND

In late September or early October of 1985, the Student's Mother began on an odyssey of frustration which results in this appeal. The Student's Mother is a sergeant in the Army who, prior to December of 1985, resided in Maryland. She began the odyssey when she received notice that she might be promoted and transferred to Georgia. The Student's Mother had some concern regarding her transfer because the Student was, at that time, placed in a residential facility in Maryland and the Student's Mother was unclear as to what would be the Student's prospective placement in Georgia. Based on this concern, the Student's Mother began to investigate prospective placements in Georgia.

In contacting personnel at the Local Board, the Student's Mother was informed that there was a process involving interstate transfers which should be instituted. This process is called the Interstate Compact Agreement. In November, 1985 she was told to begin processing the Interstate Compact Agreement, which she did. She was also told she must change her residency to Dekalb County if the Student were to receive services from the Local Board. Based upon that requirement, the Student's Mother declared her legal residency to be in DeKalb County. However, she lived in temporary quarters outside Dekalb County until she obtained a residence in Dekalb County in the middle of March, 1986.

The Student's Mother arrived in Georgia for her new assignment in the middle of December, 1985. when she arrived, she found the Interstate Compact Agreement had not been completed. Based on her conversations with the Dekalb County employee, she believed the Student was going to be placed in the Georgia Mental Health Institute (hereinafter "GMHI") . Thus, she contacted GMHI, explained that the Interstate Compact Agreement was in process and was told she could bring the Student to GMHI. The Student was then admitted to GMHI on December 27, 1985 by the staff of GMHI under a voluntary entrance. The Student showed

progress while at GMHI and, in the opinion of the GMHI staff, needed to be moved out of their facility and into a less restrictive environment. Thus, they notified the Student's Mother of their decision to discharge the Student. During this same time, based upon the Student's Mother's proposed purchase of a residence in Dekalb County, the Local Board notified the Student's Mother it would hold an IEP meeting to decide placement for the Student. The Student's Mother was unsure of what to do since the Student would no longer be enrolled in a program and effective March 14, 1986 she removed the Student from GMHI1 and enrolled the Student in a private residential program at her own expense.

Eased upon the Student's Mother's purchase of the residence in Dekalb County, the Local Board held an IEP meeting March 20, 1986 to offer the Student what the Local Board considers is an appropriate placement. The Local Board developed an IEP under which it would provide services through a program designed to deliver therapy through a psychologist, recreational therapist, music therapist and psychiatrist, either in individual or group modes. The IEP did not provide for residential placement, however, and for that reason the Student's Mother rejected it. She then demanded a hearing and requested residential placement at the private school the Student was currently in, as well as reimbursement for her past expenses of placing the Student in private school.

At the hearing, the evidence showed the Student has had a long history of emotional and behavior related problems. He was served in a self-contained special education placement in Maryland (hereinafter "Carl Sandburg School") from late 1980 until June of 1985, with the exception of a period when he was evaluated at Children's Hospital National Medical Center. Until the Student's behavior regressed in late 1984, the Student made academic progress. At that time, however, the Student ceased to respond to methods which had previously been successfully used by staff at the Carl Sandburg School to control his behavior. Because the Student no longer was responding to the methods used to control his behavior, he ceased making academic progress and a new placement was proposed. The new proposed placement consisted of a day therapeutic

treatment program at the Regional Institute for Children and Adolescents (hereinafter 'RICA') . The Carl Sandburg School was a program which the record shows was not a therapeutic program.

However, in spite of the fact the Student's proposed placement was to be in a day therapeutic program, the Student ended up in the residential phase of the RICA program. The record reflects the residential placement was obtained for several reasons: the Student's Mother requested the residential placement as opposed to the day placement, a change in the Student's grade status made him eligible for residential placement in RICA, the staff at RICA thought it would be best for the Student, RICA was able to work out the placement so that the residential component was attributable to Maryland's Department of Health and Mental Hygiene, and a place in the residential component of the school opened up.

The Student was in the RICA program for about seven months prior to the Student's Mother's transfer. While in that program, the evidence shows he made progress.

The Student was placed in the GMHI program shortly after he arrived in Georgia. The evidence shows that he also made progress while in that residential placement.

At the hearing, the Student's Mother presented numerous witnesses who supported her contention that the Student needed residential placement. Seth Goldberg, the school psychologist for the Carl Sandburg School, recommended that the Student needed a therapeutic environment that had a residential component. However, this recommendation conflicted with his earlier recommendation when he was called upon to recommend actual placement for the Student. At that time, he recommended a day therapeutic program. Rebecca Newman, principal at RICA, stated the Student was appropriately placed in the residential program because a great deal of intervention had already been tried at the Carl Sandburg School and because, based on her knowledge of the Student, he would not have made progress either therapeutically or academically without a twenty four hour program. She based her opinion on her observations of

the Student during the six months the Student was in the program at RICA. Cheryl Snyder, psychology intern at RICA, stated the Student needed to be in a residential treatment facility because his behavior at home was so disruptive, and because he responded well to a rigorous schedule. Thomas Applin, child psychiatrist and half time RICA staff member, stated the Student was not ready to leave residential care when he left RICA because he had just begun to make progress and because he needed a residential program similar to RICA's with a special school placement with individual, group and family therapy. Rick Weber, the alternative structure teacher at RICA, testified that the residential treatment was suggested for other than educational reasons. He also testified the Student was making progress while at RICA. However, based upon the level system for determining progress, the Student did not appear to be making great strides. The Student moved from level one to level two over a three month period and then dropped back to level one the next day after he reached level two. Approximately half a month later, he again reached level two, only to fall back one month later. When he left, he was still on level one although he was approaching level two.

Susan Rhoades, assistant to the director of the private school the Student was placed in by his mother (hereinafter "Private school"), testified that the Private School was a school for children with speech and language difficulties. She felt the Student would not benefit from day placement and recommended residential placement until the Student could handle change and make peer relationships. She did not, however, evaluate the Student and classified him as learning disabled. Kathy Jenkins, speech language pathologist at the Private School, testified the Student needed a highly structured program and would benefit from a residential program. Debbie Sinclair, the Student's classroom teacher at the Private School, testified the Student needed residential treatment because he has trouble getting along with his peers and has behavioral problems exceeding those of her day students.

The Local Board presented witnesses who testified about the program offered by the Local Board and the Student's needs for a residential program. Janet Montgomery, Center

Coordinator for the Local Board's program, testified the Student met the criteria for a behavior disorder and emotionally disturbed child and that the program the Local Board was offering was a small structured classroom that offers programming and planning both for emotional behavioral needs as well as academic needs. The program has a full-time clinical staff, a social worker, a psychometrist, a psychologist recreation therapist, and a full time music therapist and includes family therapy during and after school hours. If the Student needs psychiatric therapy, he would be provided that by the school. She made no recommendation as to a residential component because there was no family workup due to the inability of the Local Board to convince the Student's Mother to meet regarding family services. Robin Morris, a Department of Psychology professor at Georgia State University, evaluated the Student at the request of the Local Board and stated the Student was behaviorally disordered and emotionally disturbed and did not have a specific learning disability. It was his opinion that, while the Student needs a very structured environment, he does not need residential treatment. Thomas Kinder, the Student's teacher at GMHT, testified it was his judgment that, at the time of the Student's discharge from GMHI, it was time to see if the Student could function in a less restrictive environment. Richard Ward, child psychiatrist, evaluated the Student for the Local Board and stated that his first recommendation would be for the Student to attend the program offered by the Local Board and live at home and that next he would recommend the Student attend the program offered by the Local Board and live at one of the group homes in the area. He stated the Student needed a structured educational program with additional support and structure outside of the program.

The Regional Hearing Officer found that the Student was severely emotionally disturbed and requires an intense and highly structured environment in order to benefit from any educational process. He found the TEP developed by the Local Board contains appropriate goals and objectives for the education of the Student and that the Student needed individual as well as family therapy. He found the Student made the most progress when he was in a residential placement, but when he was enrolled in a therapeutic day program at the Carl Sandburg School, he regressed academically, which required his placement in RICA. He found the day program at

RICA and the day program offered by the Local Board are essentially similar. Finally, he found the Student was placed at GMHT without an IEP and was discharged without any type of transitional placement meeting having occurred.

As a result of the above findings of fact, the Regional Hearing Officer concluded the Student requires a residential component in order to benefit from the special education program offered by the Local Board during the day. In support of this position, the Regional Hearing Officer stated that the evidence indicated the home environment will not provide the type of support and structure envisioned by Richard Ward, that the Carl Sandburg School program had not worked, and that the Carl Sandburg School staff had recommended a more restrictive environment. The Regional Hearing Officer further concluded that the Student's Mother should be reimbursed for the cost of the Private School placement she incurred because the Local Board refused to serve the Student until the Student's Mother actually moved into the county, even though she had declared her intention to reside in the county. The Regional Hearing Officer found the Local Board's argument concerning residence to be spurious, since she was a member of the military and had formally declared her intention to reside in Dekalb County. Finally, the Regional Hearing Officer found that IJHR had violated the Student's due process rights by failing to prepare an IEP or IPP for the Student, and for failing to contact the Local Board to coordinate and insure the continuation of services for the Student upon his discharge from CMHT.

The Regional Hearing Officer's decision was issued on June 27, 1986 and the appeal was received by the State Department of Education on July 24, 1986. The brief of the Local Board was received on August 11, 1986 and the brief of the Student's Mother was received on August 19, 1986.

PART III

DISCUSSION

The Local Board contends that the Regional Hearing Officer erred by basing his findings on an assumption that the Student failed previously in a program similar to the Local Board's program when in fact the other program was not similar to the one offered by the Local Board. Additionally, the Local Board contends the program it offers is appropriate, residential placement is not necessary, and the current private placement is inappropriate. The Local Board contends it should not be required to reimburse the Student's Mother for the private residential placement because it is not appropriate, they have offered an appropriate program and because the Student's Mother failed to cooperate with the Local Board to assist in providing services.

The State Hearing Officer is bound to sustain the decision of the Regional Hearing Officer if it is consistent with the law and there is substantial evidence to support that decision.

State Board Policy JQAA, June, 1984; Georgia Special Education State Program Plan FY 84-86, pg. 51.

In the present case there is not substantial evidence to support the Regional Hearing Officer's decision that the Student needed residential placement. The Regional Hearing Officer based this conclusion on his finding that the Student regressed academically when he was in a therapeutic day program. The day program the Regional Hearing Officer referred to, the one at Carl Sandburg School, was clearly not a therapeutic program. In fact, the staff at that program recommended that the Student move from the Carl Sandburg School program to a therapeutic day program, namely the RICA day program. The Regional Hearing Officer found that the day program at RICA and the Day program offered by the Local Board are essentially similar. The testimony regarding the program offered by the Local Board clearly demonstrates it is a day therapeutic program similar to the day program at RTCA. Thus the Regional Hearing Officer based his conclusion on an erroneous finding of fact.

The Regional Hearing Officer also made a finding of fact that because of the severity of the Student's emotional disorder, the Student requires an intense and highly structured

environment an order to benefit from any educational process. While the finding is supported by substantial evidence, it does not, by itself, require the Local Board to provide residential placement. The program offered by the Local Board is designed to provide an intense and highly structured environment. The Local Board has a family therapy option available which it has been unable to implement due to the conflict between the Local Board and the Student's Mother. Provision of the program offered by the Local Board, together with the family therapy, would lead to a program which would be in line with the program recommended by the staff when the Student left the Carl Sandburg School and would be the type program recommended by the experts who testified in the case, even though it would not include the residential component recommended by some of the experts.

The witnesses who testified for the Student's Mother did not present substantial evidence that the Student needed residential placement in order to receive educational benefit, or that the program offered by the Local Board was not calculated to provide the Student with an educational benefit. Seth Goldberg's testimony, that the Student needed residential placement, was in conflict with his actual recommendation on placement at the time the Student left Carl Sandburg School. At that time, he recommended a day therapeutic placement. While he stated he thought a residential placement might be necessary at a later date, the program he initially recommended was never carried out and thus a program such as the one offered by the Local Board has never been carried out. Rebecca Newman, the principal at RICA, stated the Student would not have made progress either therapeutically or academically without a twenty-four hour program, but she based her opinion on her belief that a great deal of intervention had already been tried at the Carl Sandburg School. The Carl Sandburg School program, however, was not a therapeutic program so the basis for her opinion did not support the idea that the Local Board's program is not appropriate. Cheryl Snyder, the psychology intern at RTCA, based her recommendation for a residential program on the fact that the Student was so disruptive at home and because he responded well to a structured environment. The fact that a student is disruptive at home does not require a residential placement if the Local Board can provide a program which

enables the Student to receive an educational benefit. Under the case of Hendrick Hudson District Board of Education v. Rowley, 73 L.Ed.2d 690, (1982), the Supreme 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.” Id. at 708. The Local Board is not required to provide a program which insures that the Student does not have problems with his family after school, just as it is not required to provide a program which insures the Student’s health or safety after school, if it can design a program which meets the specific educational needs of the Student. Thus, testimony, such as Cheryl Snyder’s, that the Student needs residential placement because of problems at home, does not establish a requirement for residential placement for educational purposes. Indeed, it is probably for this very reason that the placement in RTCA was made a day placement for educational purposes and a residential placement for clinical purposes under Maryland’s Department of Health and Mental Hygiene.

The testimony regarding residential placement by the members of the staff of the Private School was based upon their opinion the Student was learning disabled, which was contrary to the Regional Hearing Officer’s finding and contrary to the evaluations performed on the Student. Additionally, the staff at the Private School had not performed evaluations related to the Student’s behavior disorders or emotional disturbance, nor did they have expertise in those areas. Because the staff at the Private School based their opinions on information inconsistent with the findings of the Regional Hearing Officer and the remainder of the record, their testimony does not provide substantial evidence to conclude that residential placement was necessary for the Student.

The Regional Rearing Officer relied on the fact that the Carl Sandburg School was a therapeutic school to conclude that the Student needs residential placement. Because this fact was in error, and because his other findings of fact do not support a requirement of residential placement, his conclusion that residential placement is necessary was in error.

The Regional Hearing Officer also found that the Local Board should be required to reimburse the Student's Mother for the cost of the Private School placement she incurred because the Local Board refused to serve the Student based on her residency. Additionally the Regional Hearing Officer found that DHR had violated the Student's due process rights by failing to abide by the requirements of the Act and the cooperative agreement between the State Department of Education (hereinafter "DOE") and DHR.

The Local Board contends that the Regional Hearing Officer's decision requiring it to reimburse the Student's Mother is in error because the Private School was not an appropriate placement and because the Local Board had no obligation to the Student's Mother until the Student or his Mother resided in Dekalb County.

At the time the Local Board made its decision, that it was not required to provide services to the Student unless the Student resided in Dekalb County, it was acting consistent with the laws of the state. O.C.G.A. § 20-2-671 (repealed effective July 1, 19S6) provided that "admission to all public schools shall be gratuitous to all eligible children residing in the districts in which the schools are located." Additionally, O.C.G.A. § 20-2-152 required (and the new O.C.G.A. § 20-2-152 still requires) that local systems provide special education to students who are residents of their districts. While the Local Board is required to provide an appropriate education to students residing in their district, there has been no showing by the Student's Mother that the Local Board is required to provide an appropriate education to her because she makes a declaration of residency. Even if residency is equated with domicile, domicile requires more than a declaration of an intention to change one's domicile. It requires an act done in execution of the intention. O.C.G.A. § 19-2-1.

The Regional Hearing Officer also found that DHR had violated the Student's due process rights by failing to prepare an IEP or TPP for the Student, and for failing to contact the Local Board and coordinate with it to insure the continuation of services for the Student upon his discharge from GMHI. The Regional Hearing Officer, however, dismissed DHR from the action

because the Student was no longer at GMHI and because the onus of providing a free appropriate public education lies with the local educational agency. The State Hearing Officer is of the opinion the Regional Hearing Officer erred by dismissing DHR from the case. Based upon the evidence presented, it would appear the finding that DHR violated the Student's due process rights is correct. DHR has agreed to comply with the due process requirements of the Act in regards to children it serves in educational programs. (see Interagency Agreement between DOE and DHR.) In the present case, DHR would have properly been a party for the purpose of determining whether DHR violated the rights of the Student. While the Regional Hearing Officer issued a finding that IEP violated the Student's due process rights, he also dismissed DHR from the case. Since DHR has a contractual agreement with DOE to comply with the procedures required under the Act and since the issue of whether DHR complied with such procedures is a proper issue for a hearing, DHR should not have been dismissed.

PART IV

DECISION

Based upon the foregoing discussion, the record presented, and the briefs of counsel submitted, the State Hearing Officer is of the opinion the Local Board offered the Student an appropriate program and did not violate the Student's due process rights. The Local Board, therefore, is not required to pay for the expenses of the private residential placement. The State Hearing Officer is also of the opinion that DHR should not have been dismissed as a party. The decision of the Regional Hearing Officer is, therefore, reversed.

This 25th day of August, 1986.

L. O. BUCKLAND
State Hearing Officer