

STATE BOARD OF EDUCATION

STATE OF GEORGIA

EVANS J.,

Appellant,

v.

**AMERICUS CITY BOARD
OF EDUCATION,**

Appellee.

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CASE NO. 1987-17

**DECISION OF STATE
HEARING OFFICER**

PART I

SUMMARY

This is an appeal by the parents (hereinafter "Appellant") of Evans J. (hereinafter "Student") from a Regional Hearing Officer's decision that the Americus City Board of Education (hereinafter "Local Board" or "Local System") offered the Student a free appropriate public education and was not required to provide a residential placement for the Student or reimburse the Student's parents for the amounts they spent for residential placement. The parents contend on appeal that the Regional Hearing Officer erred in not striking certain testimony from the record, that the Regional Hearing Officer ignored certain issues which require a finding for the Student, and that the decision is not supported by substantial evidence.

PART II

FACTUAL BACKGROUND

The eleven-year old Student is multiply handicapped and has received special education services since 1981. In June, 1985, a placement committee prepared an individualized education program ("IEP") for the Student. The committee, which included the Student's father, concluded that the Student's needs could be met in the Moderately Mentally Handicapped program within the local system. The program also provided for speech therapy, hearing impaired services, and regular classroom participation. Although they agreed with the IEP, the parents placed the

Student in a private residential school in September, 1985.

On March 12, 1986, the parents requested a hearing. They contended that the Local Board failed to provide the Student with an appropriate education, that the placement of the Student at the private school was necessary and appropriate, and that the Local board was responsible for paying for the educational costs of the Student's placement. The hearing was postponed by consent. On March 6, 1987, the Local Board's placement committee met and recommended that the Student be placed in the school system's Severely Mentally Handicapped ("SMH") program in a self-contained classroom with related services of speech and language therapy, recreational therapy, hearing impaired therapy, transportation, and mainstreaming into a regular classroom for lunch each day. The IEP also provided for physical and occupational therapy as well as referral for evaluation in both areas. Finally, the IEP provided for parent observation and training, and parent home training.

The parents disagreed with the proposed IEP and a hearing was held on April 9 and 10, 1987. The parties agreed to give the Regional Hearing Officer until May 11, 1987, to issue his decision.

The Regional Hearing Officer's decision was issued on May 11, 1987. The Regional Hearing Officer held that the June 6, 1985, IEP provided the Student with an appropriate education except that the placement committee failed to consider the need for extended year services, the Local Board was not required to reimburse the parents for the costs of residential placement, and the March, 1987, IEP was appropriate except for the question of whether extended year services are necessary. The parents filed this appeal by letter received by the State Department of Education on June 1, 1987. The parents' attorney requested that the decision of the State Hearing Officer be delayed, and the request was granted.

PART III

DISCUSSION

The Student's parents have raised several issues on appeal. The issues were not set forth

clearly, but the two basic issues are 1) whether the evidence supports the Regional Hearing Officer's decision that the Local System can provide a free appropriate public education, and 2) whether the evidence supports the Regional Hearing Officer's decision that the Local System's program was appropriate when the parents unilaterally placed the Student in a private residential program. The State Hearing Officer concludes that there is substantial evidence to support the decision of the Regional Hearing Officer on both issues.

Appellant maintains on appeal that there was no evidentiary support for the Regional Hearing Officer's decision because:

(1) the record shows that the Local System did not have an appropriate program in 1985 since the facilities were substandard, the Local System did not have a speech and language disorders program in operation, the Local System did not offer the same level of physical and occupational therapy services as were offered the previous year, (2) there was no evidence to show that the private residential program was inappropriate, and (3) there was no evidence that the proposed program was appropriate. A review of the record, however, fails to support Appellant's contentions.

In Burlington School Committee v. Dept. of Educ., 471 U.s. 359 (1985), the Court decided that a local system could be ordered to reimburse parents for their private school expenditures if the the courts decided that the private placement was proper and "that an IEP calling for placement in a public school was inappropriate...." In Hendrick Hudson Dist. Bd. of Ed. v. Rowley, 458 U.S. 176 (1982), the Court held that if a student was being provided services that would permit the student to benefit from the instruction, then the local system would be providing a free appropriate public education.

The Regional Hearing Officer found that the Student made progress during the 1983-1984 and 1984-1985 school years prior to being moved to the private residential facility. There was testimony from the Student's teachers that the Student progressed in his abilities during these two years. The Student's parents agreed with the IEP, and the goals established for the

Student during the 1985 IEP meeting. The evidence concerning the Local System's facilities does not show that their condition prevented the Local System from providing a program for the Student, and Appellant has not shown that the condition of the facilities had or would have had any impact on the Student's progress. There was, therefore, substantial evidence to support the Regional Hearing Officer's decision that the Local System had an appropriate program in 1985. The lack of a pre-existing program at the time the speech and language disorders program was recommended does not establish that the Local System could not provide an appropriate program. A local system is not required to maintain programs when a need does not exist, and there is no evidence that the Local System would have been unable to provide the required program once the need arose. Appellant's comparison of services between one year and the next also does not establish that the Local System was unable to provide an appropriate program for the Student. As pointed out, there was never any contention that the services recommended for the 1985-1986 school year were inappropriate; the Student's parents indicated agreement with the proposed IEP. Additionally, as time passes, the Education for All Handicapped Children Act of 1975 (20 U.S.C. §1401, et. seq.) contemplates that the type and level of services provided should change. Otherwise, there would be no need for an annual evaluation and a new IEP. Although there was conflicting evidence, there was evidence that the Student was making progress, and, therefore, benefiting, from the program offered by the Local System. The State Hearing Officer, therefore, concludes that there was substantial evidence to support the decision of the Regional Hearing Officer that the Local System had an appropriate program available when the Student's parents unilaterally transferred the Student into a private residential program.

There is also substantial evidence to support the Regional Hearing Officer's decision that the program proposed for the Student is appropriate. Appellant argues, first, that the proposed program is inappropriate because students with different levels of ability are grouped into one class. Then Appellant argues that the private residential program is appropriate, even though the same grouping occurs in the private program because mental capacities are not taken into consideration in the private program. The Regional Hearing Officer simply found that the

program offered by the Local System addressed the Student's primary handicapping condition, but the private residential program did not. Instead, the private program addressed only one aspect of the Student's needs. As pointed out by the Local System, there are no requirements contained in the law or regulations that students be segregated based on their handicapping conditions. Appellant's argument, that the proposed program is inappropriate because the students are grouped, therefore, does not establish that the evidence fails to support the Regional Hearing Officer's decision.

Appellant then argues that the Regional Hearing Officer's decision was erroneous because of the finding that "the record is murky on the question of whether or not the IEP committee properly considered the implementation of summer services for the student." Appellant argues that the record is clear that no consideration was given to providing summer services. Assuming, arguendo, the IEP committee failed to give summer services any consideration does not make the Regional Hearing Officer's decision erroneous. The Regional Hearing Officer held that the IEP committee had to reconvene and give full consideration to the provision of summer services. This would have been the same result if the circumstances were as argued by Appellant. The Regional Hearing Officer's decision, therefore, was not erroneous as argued by Appellant.

Appellant also contends that the Regional Hearing Officer's decision should be reversed because procedural error was committed when the Regional Hearing Officer permitted a witness to testify over objection. An attempt was made to exclude the testimony of the witness because the witness was told an item of information given in the testimony of a previous witness, but the Regional Hearing Officer allowed the witness to testify. Appellant has not shown or suggested any harm that resulted from the witness' testimony and knowledge of the information provided by a previous witness. Additionally, the Regional Hearing Officer has discretionary authority to allow or disallow the testimony of an expert witness who has not been sequestered. The Regional Hearing Officer's decision, therefore, was not erroneous because of any procedural error.

The adequacy of the private residential program is not relevant since the Regional Hearing Officer found that the Local System's proposed program was appropriate for the Student's needs. Appellant's allegations of errors in the Regional Hearing Officer's consideration of the private residential program do not establish any basis for reversal.

PART IV

DECISION

Based upon the foregoing discussion, the record presented, and the briefs of counsel, the State Hearing Officer is of the opinion that there is substantial evidence to support the decision of the Regional Hearing Officer. The decision of the Regional Hearing Officer is, therefore, SUSTAINED.

This 17th day of December, 1987.

L. O. Buckland
State Hearing Officer