

Local Hearing yy

State Level Appeal



CASE CLOSURE SUMMARY REPORT

(This summary sheet must be used as a cover sheet for the hearing officer's decision at the special education hearing and submitted to the Department of Education before billing.)

Schools
School Division

Ms.
Name of Parents

Dec. 8, 2004

Name of Child

Date of Decision

Kathleen S. Mehfoud, Esq.

Leila H. Kilgore, Esq

Counsel Representing LEA

Counsel Representing Parent/Child

Schools
Party Initiating Hearing

Schools
Prevailing Party

Hearing Officer's Determination of Issue(s):

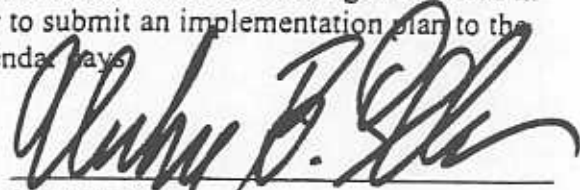
The IEP dated June 17, 2004, proposed by Schools, but not signed by Parent, is approved---subject to the requirement that Schools advise Parent of details of related services to be supplied, etc.
That IEP provides FAPE and is the LRE.

Hearing Officer's Orders and Outcome of Hearing:

same

This certifies that I have completed this hearing in accordance with regulations and have advised the parties of their appeal rights in writing. The written decision from this hearing is attached in which I have also advised the LEA of its responsibility to submit an implementation plan to the parties, the hearing officer, and the SEA within 45 calendar days.

Urchie B. Ellis
Printed Name of Hearing Officer


Signature

DEPARTMENT OF EDUCATION
DUE PROCESS HEARING



(Schools, LEA)

SCHOOLS

Ms.
(Parent)

(Child)

December 8, 2004
(date of decision)

KATHLEEN S. MEHFOUD, ESQ.
(counsel for Schools)

LEILA H. KILGORE, ESQ.
(counsel for Parent, Child)

DECISION OF HEARING OFFICER

This proceeding has been protracted, and decision delayed, and it is the strong feeling of the Hearing Officer that it is critical to get the Child in a suitable and better educational program as soon as possible. There has been much evidence, many exhibits, and strong arguments, and some unique complications. The Hearing Officer concludes that the program proposed by Schools in the proposed IEP dated June 17, 2004, (Schools Ex. 96) should be implemented at the earliest possible date, supplemented with a written notice to Parent explaining the proposed related services to be provided, and how and when they will be provided, and how they will be paid for, and any contingencies for further review, addition or change, as may be involved.

This proceeding was initiated by Schools, by Request for Due Process Hearing filed August 11, 2004. A Hearing Officer was appointed and there was active handling, and the case was set for hearing, which took place on Sept. 9 and 10. Many exhibits and witness lists were filed by both parties. Mediation was offered but not attempted. At the instance of Parent, the original hearing officer was removed, and the undersigned was appointed Sept. 27, confirmed by letter of Sept. 28.

This Hearing Officer had no conflicts, and the Parties had no objection to this Hearing Officer. Prehearing telephone conferences took place on Sept. 27, Sept. 28, Oct. 1, Oct. 4, Nov. 11, Nov. 30, and Dec. 1. Additional lists of witnesses and exhibits were received. The original Hearing Officer conducted hearings on Sept. 9 and 10, and scheduled a further hearing for Sept. 30. However that was cancelled, and further hearings tentatively set for Oct. 7 and 8, after Counsel for Parent became of record about Sept. 27. Those hearing dates were cancelled at the request of Counsel for Parent, who sought a 60 day extension. The Hearing Officer reluctantly agreed, concluding that it was in the best interest of the Child, and set hearing dates for Dec. 6, 7, and 8, as needed. The record of the Sept. 9 and 10 hearing was to be used. Final hearing took place on Dec. 6, 2004.

(2)

Schools submitted 113 exhibits, all of which were received, and Parent presented exhibits 1--33, and lettered A--W, and lettered A, C, and G on Dec. 6, and all were received. There were objections to several exhibits of both parties, all over-ruled. Schools presented several witnesses. The Parent testified and presented several witnesses, including a Ph.D. as an expert. Both sides made closing arguments.

THE FACTS:

This Child had been the subject of much attention, and special treatment, by Schools, and the Parent has been heavily involved and has made a strong effort to advocate the best interest of Child, and to get the best program. There have been many evaluations, IEPs, addenda to IEPs, much homebound study, many disorder and discipline actions, and various related services, over the past several years.

Child is a boy, now years old, who has been in various programs at Schools since 1999. Testimony and exhibits of both parties detail extensively the many discipline and serious disorder problems starting with a suspension in 1999 and continuing to date. An evaluation was done 5/24/00 to determine if he was eligible for special education. A committee found him eligible as Developmentally Delayed (DD) and an IEP was signed on 11/6/2000. The Initial Triennial Reevaluation was on 12/6/00 and an IEP Addendum was signed. Another Addendum was 1/2/01, and another was 1/18/01, when his disability was then shown as ED, and another was 4/5/01, and things continued down to date with many meetings, evaluations, discipline problems, and other handling. Homebound instruction was provided in Addendum of 6/14/01, and has been used extensively since then, with some return to the Schools classrooms. Various related services have been supplied. More recently, his disability has been listed as OHI and LD. It is not necessary to review all of the details. It should be noted that Child's disability is behavioral. He has average intelligence.

The problems created by the conduct of Child were frequent and very difficult, and sometimes dangerous, and required repeated and extensive teacher, staff, committee, and other handling. Things evolved, and Schools was continuing to try to resolve them. This due process proceeding is the result of serious disorder in early 2004, leading to much handling. Schools prepared to seek a Court order to remove Child from school, and negotiation with Parent, and her then attorney, lead to IEP Addendum of 3/18/04 which provided for an "emergency change of placement" to homebound services so that the Parent, Mother, could tour and come to a decision on placement at a local private day school. The Addendum also specified that "It is expected that a decision will be made no later than 4/19/04." Parent has never agreed, and has not offered suggestions or changes.

A further IEP was prepared at meeting 6/17/04 which provided for Private Day Placement and Compensation Homebound Instruction, and other details. Parent,

(3)

Mother, participated but did not sign as consenting. Schools filed on 8/11/04 a due process request to implement this IEP, which has lead to this decision.

Since the Addendum of 3/18/04, Schools has attempted to provide homebound instruction to Child, along with some compensatory homebound services, but has been hampered in doing so by various incidents of refusal or lack of cooperation by Parent, who has not given any satisfactory explanation for not cooperating. Child is currently receiving homebound instruction. Schools witnesses included staff and teachers who had good qualifications and extensive experience with Child.

There was testimony to describe the services of the local private day school, which has had substantial experience in dealing with students with various problems. Schools has over recent years referred many students to this school, with good results, and has regular contact and good working arrangements. The Director of the private day school testified at length about the qualifications and various services offered and available, and particularly as to behavior programs, including a quiet room, which can be locked if needed, but is very carefully monitored. The Director is highly experienced and well qualified. Most of the Staff are trained in CPI, Crisis Prevention Intervention. The private day school is affiliated with, and located adjacent to, a local psychiatric hospital. They apply and follow an IEP, and provide various related services, as needed, and as changes take place. They have talked with Schools about Child, have seen his IEP and other materials, and feel they can provide an appropriate program. They have had other children with similar problems, and have procedures and special training to deal with them.

Parent has not consented to the IEP of 6/17/04, in issue here, but has not clearly indicated what is thought to be a proper solution, even though asked by the Hearing Officer to do so. She has expressed concerns, and raised questions, particularly about related services during the Homebound instruction period, about the proper evaluation of Child with some contention of brain injury and related questions as to program adequacy at the local private day school, and about the possible locked use of the quiet room. Parent did testify, with obvious very serious and careful thought, and expressed opposition to possible residential school placement, and a desire to see Child able to return to some public school program, and a concern about related services not being provided, and indicated a feeling that the homebound services with the activities arranged by Parent and some local service organizations were currently of benefit to Child.

Parent also presented 3 other witnesses. One was an Occupational Therapist who had seen Child in June 2003, and made recommendations to the IEP committee, and OT was included in the Addendum of 6/16/03, and later. She had not seen him since. A second, saw Child at Sunday School and had some experience with behavior problems, and felt he could be helped with special attention.

(4)

The 3d witness was a Ph.D. who qualified as an expert, and had done a several hour visit on Dec. 2 with Child, Parent, and the local private day school, and one of Schools staff, and submitted a written statement (Parent's Exhibit 32). He testified in detail about Child's behavior problems, and possible underlying causes, and some possible solutions. He advocated residential placement and suggested several possible out of town locations, and indicated those facilities would each have to evaluate Child to determine if they could assist him. He did not see homebound schooling as a viable option. He talked about Traumatic Brain Injury (TBI) and other possible diagnoses, but did not offer a precise conclusion. He felt there was a need for extensive "wrap around" services, but he did not know the extent of services available locally.

Parent provided four other Ph.D. evaluations and two medical reports with a related Ph.D. evaluation. The Ph.D. evaluations were all from MCV and dated 6/3/98, 2/7/2000, 5/21/03, and 3/9/04. They found he had average intelligence, and many behavior problems. They did not have precise analysis, but concluded that head trauma was not a factor. They suggested structured programs and consistent behavioral management. The medical reports dated 9/27/04 addressed to Juvenile Court in a related matter, and dated Sept. 30 addressed to Counsel for Parent, were both from an M.D. in the area, who felt there was probably brain injury in an automobile accident in March 1997, and that might be the cause of the behavior problems, along with some other causal factors. In the first report, he recommended further comprehensive evaluations and intensive treatment and highly structured program either as an outpatient, if available, or in an inpatient program. The 2d report was similar, but recommended only a residential program related to traumatic brain injury. The related Ph.D. evaluation from the Univ. of Va. was dated 11/16/04 and concluded "Rule out chronic effects of traumatic brain injury", and recommended comprehensive intervention which could best be addressed during residential care and evaluation.

Parent was concerned about provision of related services, which were not listed in the 3/18/04 Addendum providing for homebound services on an emergency basis, with the expectation that a decision on the private day school would be by 4/19/04. The Parent consented to this Addendum. The Director of Special Services for Schools, who has been heavily involved in problems with Child for some time, testified that an Addendum is intended to cover everything that is to be done from that point on, and no related services were intended to be provided for this interim period. The IEP 6/17/04 in issue here, which provided for the private day school placement, did refer to related services. The private day school can provide related services, as needed. Related services are also provided by some other local organizations, and Child has received some in that manner in the past, and apparently currently. Schools has provided various compensatory related services such as weekend camp experiences. If other related services are needed, a revised IEP or Addendum is a possible procedure.

(5)

Parent had filed 4 complaints about Schools with the Virginia Department of Education, Office of Dispute Resolution and Administrative Services, 9/27/02, 11/15/02, 1/6/03, and 5/3/04. The first 3 have been resolved, and did not deal directly with any of the issues here, however it is notable that the 1/6/03 complaint dealt in part with a proposal to use the same local private day school for ESY service during the summer. The complaint of 5/3/04 involves issues in this due process proceeding, and has been held in abeyance by the Dept. of Education pending this decision. The Hearing Officer has reviewed the 4 documents of record (exhibits) as to that complaint, and concludes, on the basis of this more extensive record, that Schools has not acted improperly in the several details cited as Noncompliance in the Letter of Findings dated 7/23/04. It is noted that the Department did not do any investigation with Schools beyond the written presentations. The current placement in homebound service was described as an emergency, was intended to be very short term, and was the result of a very serious and complicated situation with Child. Schools therefore did not go to Court to get an order removing Child from school. The explanations offered by Schools to the Department are accepted by the Hearing Officer. It should be noted that the private day school would have provided any appropriate related services.

Parent expressed strong concern about the possible locking of the quiet room, but that was satisfactorily explained by the Director of the private day school as being very limited in use, and carefully monitored. Parent did not indicate any other objection to use of the private day school. She simply refused to consent.

Parent seemed to finally indicate her preference for homebound instruction with related services provided. However all of the other witnesses, and exhibits, that addressed the point, felt that homebound was not a good solution for Child.

Parent was opposed to residential placement.

Parent seemed to want a clear statement of the related services to be provided.

THE APPLICABLE LAW:

Schools filed for due process, and thus has the burden of proof. It must show that the IEP is reasonably calculated to enable the child to receive educational benefits. Board of Education, etc v. Rowley, 458 U.S. 176 (1982). Least Restrictive Environment is also a factor to be considered.

Cases have held that IDEA does not require that a child be able to maximize potential, but that a plan must offer some educational benefits, and need not offer every special service necessary to maximize potential.

(6)

CONCLUSIONS:

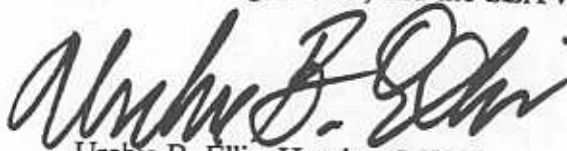
- (1) The Child has defined problems and needs, and there is little, if any, dispute between the parties on these details. Child needs special education and some related services.
- (2) Schools acted reasonably, and with good intentions, in creating the emergency homebound placement in the Addendum of 3/18/04, which was intended to be for a short term, and which did not provide for related services in that interim period. It was expected that interim services would be renewed in connection with the private day school program.
- (3) The Letter of Findings dated 7/23/04 is wrong in finding Schools to be in noncompliance.
- (4) The lack of related services has been greatly compounded by the Parent's refusal to agree to the private day school program. Changes and additions to related services can be arranged as needs develop.
- (5) The local private day school can provide the structured program and behavioral management services recommended by several of the Ph.D. witnesses. Other adequate programs may exist, but this IEP offers Child an available and better chance to progress with education.
- (6) Schools has met its burden of proof by an overwhelming preponderance of the evidence. Deference should be given to the views of the qualified and experienced education professionals of Schools. There is no evidence of anything but good intentions on the part of Schools.
- (7) The program offered at the private day school, and the proposed IEP here in issue, would provide this Child with a better opportunity to receive educational benefit, and thus provides FAPE. It is the least restrictive environment.
- (8) There are no procedural problems. Parent received proper notice of this proceeding.
- (9) Schools needs to provide Parent with a clear written explanation of what related services will be provided at the private day school, and any other relevant information.

(7)

ORDER: The IEP of 6/17/04 is approved, subject to the comment in (9) above.

Either party has the right to appeal this decision by filing the appropriate action in a Virginia Circuit Court or U. S. District Court with jurisdiction. Any party wishing to appeal is advised to consult with legal counsel about procedures and deadlines. See Virginia Regulation 8 VAC 20-80-76 O Right of Appeal. Schools has a responsibility to submit an implementation plan to the parties, the Hearing Officer, and the SEA within 45 days.

dated: December 8, 2004



Urchie B. Ellis, Hearing Officer
Va. State Bar No.

cc: To the Parties ; to Counsel; and the Virginia Dept. of Education..