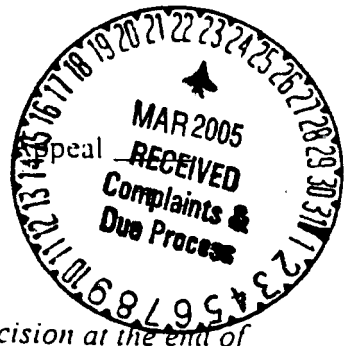


Local Hearing _____

XX

05-064

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 end of the special education hearing and submitted to the Department of Education before billing.)

School Division

Name of Parents

March 21, 2005

Name of Child

J. Thomas Tokarz

Date of Decision

Hilary Malawer
Jonathan G. Martinis

Counsel Representing LEA

Parent

Counsel Representing Parent/Child

Parent

Party Initiating Hearing

Prevailing Party

Hearing Officer's Determination of Issue(s)

ESY services are required for Spring, Summer and Winter breaks, in order to avoid regression

Hearing Officer's Orders and Outcome of Hearing:

Schools should provide substantial ESY for the several breaks

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.

Urdhie B. Ellis
Va. State Bar No. 5422

Printed Name of Hearing Officer

Signature

DEPARTMENT OF EDUCATION
DUE PROCESS HEARING



(Schools, LEA)

(Parent)

(Child)

MARCH 21, 2005
(date of decision)

J. THOMAS TOKARZ, ESQ.
(counsel for Schools)

HILARY MALAWER, ESQ.
JONATHAN G. MARTINIS, ESQ.
(counsel for Parent, Child)

DECISION OF HEARING OFFICER

This proceeding was initiated by Parent, by Request for Due Process Hearing filed February 2, 2005. The undersigned was appointed as Hearing Officer, and there was prompt handling, and the case was set for hearing on March 4 and 7, and then changed to March 7 and 9, and then, due to illness of one counsel, was changed to March 17 and 18, and took place. A court reporter was present. Many exhibits and long witness lists were filed by both parties. Subpoenas were requested. Mediation was not successful.

The Hearing Officer had no conflicts, and the Parties had no objection to this Hearing Officer. Prehearing telephone conferences took place on February 15, and 22, and March 8.

Schools submitted 97 exhibits, and Parent submitted 67, all of which were received. There was much duplication.

The Parent testified and presented 3 other witnesses. Schools presented 3 witnesses. Both sides made opening and closing arguments.

THE FACTS:

This Child has had very serious problems since birth and has been receiving extensive services from Schools. 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 has been much handling, and many IEPs.

Child is a , now years old, who has been in various programs at Schools since was 3. is nearly blind, is quite deaf, and has had other serious medical problems, and is said to be mentally retarded. was originally classed as Developmentally Delayed and Other Health Impaired. Later was changed to Deaf-Blind.

IEPs have had very simple goals dealing with Communication, Self-Care, Daily Living, and Social Skills. has had a full time, one on one, Intervener or assistant, who uses sign language and speech with , for some time. has also had services from Occupational Therapy, Speech, Vision and other staff persons. is in a small special education class with several other children.

(2)

numerous IEPs showed some small progress over the years in various very limited goals dealing with Daily Living Skills, Classroom Skills, Literacy-Communications, Vision, Math, Science, Social, Fine Motor, and Leisure Skills. There is no dispute about condition or need for Special Education.

THE ISSUE AND THE APPLICABLE LAW:

The issue here is whether it is necessary to provide ESY, Extended School Year, services for Child over the several breaks---Spring, Summer, and Winter. Several case decisions are the controlling law---M.M. v. SCH.DIST. OF GREENVILLE COUNTY, 303 F.3d 523 (4th Cir. 2002); JH v. HENRICO COUNTY SCHOOL BOARD, ___ F.3d ___ (4th Cir, 2005); and JH v HENRICO COUNTY SCHOOL BOARD, Case 3:01 CV 519 (E.D. Va. 3/16/04).

Parent has the burden of proof here and must establish that ESY is needed for the shorter Spring and Winter Breaks, and for the Summer Break. According to the M.M. decision, Parent must prove by a preponderance of the evidence that:

“...ESY would prevent significant regression of skills or knowledge retained by child so as to seriously affect his progress toward self-sufficiency, or that benefits accrued to the child during the regular school year would be significantly jeopardized if he were not provided an educational program during the summer” .

M.M. also said: “...the determination whether services beyond the regular school day are essential for the child to receive any educational benefit is necessarily fact and case specific.” ; and

“Because a showing of actual regression is not required , a disabled child’s need for ESY Services may be established by expert testimony , based on a professional individual evaluation.” ; and that

“However the mere fact of likely regression is not a sufficient basis,....”

and the decision also made clear that the Parent does not have to show actual regression as that would create a ‘Hobson’s choice’ for the Parent.

The decision in J.H. v. HENRICO COUNTY by Judge Williams of the E.D. of Va. (3/16/04) stated:

“ Moreover, the Court agrees with the school board that that MM standard requires the hearing officer and courts to consider the degree of possible regression, the ability to recoup any loss, and the time necessary for recoupment.”

This case is somewhat simplified because due to the delay in hearing date, the Parties have agreed for some ESY services for the upcoming Spring Break. This leaves the issued of Summer 2005 and Winter Break 2005-6 in issue. Schools argued that a decision was not needed or proper for those periods because the IEP procedure has not

(3)

yet taken place, and there has been no decision or denial of ESP. Parent argued that timing for the due process procedure effectively denied them relief if they had to wait for the IEP procedure. The Hearing Officer agrees with Parent and feels it is proper and desirable that ESY be considered for those periods.

THE EVIDENCE REGARDING ESY

The Mother (Parent) testified at length regarding the Child's problems, and about the various services has been receiving. Schools has provided extensive services, and has provided ESY services many times until this past Winter Break 2004-5. No ESY services were provided during the 11 days of no schooling after Hurricane Isabel in Sept. 2003. The Mother also specified in detail that she had provided extensive educational services for child by hiring qualified persons and teachers, at her expense, at various times, and had personally provided such services extensively to fill in the needs. Child was also receiving day care services. The Mother had spent much time and effort in learning about the disabilities involved, was much involved in various special groups and educational activity, and had achieved a high level of competence in dealing with the various problems and in helping the Child. There was no dispute about these general conclusions.

A more detailed review of the Mother's testimony follows. She described in detail much of Child's serious and complicated physical and health problems, and in particular the self stimulating and harmful behavior of head banging, picking fingers until bleeding, pulling out the tube used at one time for feeding and still for medication, etc. She pointed out that this behavior escalates when there are changes in conditions for Child. The principal school and IEP goals are in Communication, Self-care, Social skills, and Daily living. Child was provided with ESY Services in Spring, Summer, and Winter breaks in 1998-99; and in 1999-2000 for Winter and Spring, and full summer 2000, specifically for fear of regression, and to maintain skill levels, as indicated in the IEP Addendum (Parent Ex.66). Child did fine when returned to school in the fall 2000.

Some problems with Services over the Winter break 2000-01 and a lack of services for the Spring break 2001 caused the Mother to express concern to Schools (Parent Ex.65). ESY Services were provided during the Summer 2001, and the IEP noted that Child had always had ESY (Parent Ex. 54). Child had no regression when returned to school in Fall due to having services. ESY Services were provided over the Winter 2001-2 Break, and results were satisfactory. Likewise during Spring break 2002, and Summer break 2002. Many details are spelled out in the IEPs, and various special services were provided such as PT, OT, Vision, Speech, Hearing. (e.g. Parent Ex. 58)

ESY was approved for the Winter break 2002-3 (Parent ex. 40), but not all was provided, and the Mother noticed behavior problems to escalate, and so she hired , and personally provided, additional hours of qualified services to reduce regression (Parent Ex. 36-39).

(4)

Some ESY services were provided during the Spring break 2003 (Parent Ex. 35, and School Ex. 36) and Child returned to school okay.

A Triennial report was done by Schools in 10/02, which showed the many complicated details pertaining to child and needs (Parent Ex. 43, 47-54).

An independent evaluation was done by a Licensed School Psychologist for Schools in May 2003, who said he interviewed all IEP members and conducted in depth evaluation. He recommended ESY for Winter, Spring and Summer breaks. (Parent Ex. 5, 27, 28, and Schools Ex. 39 and 43). It was noted that he had not seen since.

ESY Services were provided for Summer 2003, but only for period June 23--July 31 (Parent Ex. 24 and 26). The Mother expressed concern about the adequacy of these proposed services (Parent Ex. 25). Serious problems developed with head-banging and other details, and the Mother arranged for additional services at her expense, and thru her own efforts. (Parent Ex. 20, 21).

In Sept. 2003 we had Hurricane Isabel, and Schools were closed for more than a week, and during those 11 days the Mother noted a serious deterioration in Child. Mother arranged for a motel suite, with electricity, and provided some school type services to reduce regression. Child thus was okay when returned to school. Day care services were not enough.

For the Winter break 2003-4 some ESY services were considered by the IEP Team (Parent Ex. 18) and some services were offered, but were rejected by Parent as being day care which she already had, and so Mother arranged for some professional services and provided many hours herself (Parent Ex. 15, 16, 17; School Ex. 69). Child did okay on return to school.

In Spring 2004 Schools did not offer ESY (Parent Ex. 14), and Mother arranged for services, and Child did okay on return to school.

ESY Services were scheduled for Summer 2004 (Parent Ex. 12) but were not fully provided for first 2-3 weeks for various reasons, and Mother was not able to hire other assistance or do it herself, and a significant deterioration was noted in Child, who did not recover for some weeks after ESY started

For the Winter break, 2004-5, the IEP Team concluded (Parent Ex. 8) that ESY was not justified due to "lack of supporting data that indicates regression would likely occur". Reasons for refusal were that data for weekends and Thanksgiving did not show a pattern of regression, and data for April 2004 and January 2004 after school vacations did not indicate significant regression, and that data did not indicate that benefits that Child had gained would be significantly jeopardized without ESY. Mother had arranged for extensive services by a "signer" and Child was okay when school resumed in Jan. 2005.

The Team had been told about the services hired by Mother to prevent or reduce regression. (Parent Ex. 7)

During the snow days in early 2005, the Mother arranged for services and Child was okay on return.

The Mother is seeking services for the longer breaks in order to avoid regression. She has not sought services for weekends. The Mother has provided services when

(5)

Schools has not done so, and thus Schools observations that Child does not show regression when returns to school is correct.

Child is the only Deaf-Blind student at Schools.

Parent and Schools had the benefit of several evaluations. One by the Licensed School Psychologist mentioned above. Another, in some detail by a PH.D licensed Psychologist from N.Y., who had much experience with deaf-blind children, and who had come to Richmond and done a substantial investigation on April 1, 2004. He strongly recommended extensive ESY. (Parent Ex. 1 and 13 and School Ex. 95).

The 2d witness was a Richmond area MD who had been treating Child regularly and often for years, and devoted much of his practice to children with disabilities. He described many details and emphasized the need for consistent services, and a need for ESY. He felt the Mother had done a remarkable job and had extensive knowledge. He felt that child had regression, even over weekends. (Parent Ex. 2 and Schools Ex. 50).

Another report was from a Speech Pathologist at a Richmond medical facility, who had been providing services to Child for 2 1/2 years on a regular basis and felt Child needed ESY to prevent regression (Parent Ex. 4, and attachment to Ex. 26).

The last opinion was by an Occupational Therapist at the same Richmond medical facility, who had worked with Child for 5 years, and also felt she needed ESY services, and explained why. (Parent Ex. 3 and attachment to Ex. 26). This person was also the Parent's 4th witness. Sensory Integration has been one of her interests, and those like Child need a structured routine. She had observed regression when Child did not have the regular services, such as in the Summer 2004. She said ESY was needed.

The 3d witness was Child's Special Education teacher for the past year, and a member of the IEP Team. Her conclusion was there was no need for ESY because Child had come back to school after each break and been okay. She knew that the Mother had provided some services. She did support ESY for the Summer.

Schools had 4 witnesses present, but only presented 3 witnesses (2 at the request of Hearing Officer). The 1st was the Principal of the School attended by Child. He had much special education experience and had known her well and seen her regularly in the course of his duties. He had reviewed all the papers, files, exhibits, and talked to teachers, and been on most of the IEP Teams. He knew Child well. He had observed that Child had little regression problem when she came back to school after breaks, and felt that none of IEP Team had seen regression. He felt the ESY was needed for the Summer, but not needed in the Spring or Winter breaks. He was aware that Mother had provided services during the breaks, and he had not seen Child except by coincidence during the breaks. It was stipulated that Schools had no knowledge about Child during breaks, and that those who saw her during the breaks were the best observers. He said the Schools do tremendous work with Child and do not want to see regression.

At the request of Hearing Officer, two other School staff were called as witnesses.

(6)

The first was Child's prior Special Education teacher and had 5-6 hours a day all year. Child had a full time Intervener. She saw no regression after Hurricane Isabel, and after other breaks. She agreed with the IEP decision that ESY was not needed. She knew that Child had received services, and she had not seen Child during breaks.

The 3d witness was the Intervener who did sign language. Child can hear but not speak. Has worked with Child since 9/03. Saw no regression after breaks or Hurricane Isabel. Child is usually happy at School and compliant. She knew that Mother provided services. She never spoke to people who worked with Child over breaks.

THE APPLICABLE LAW:

Parent filed for due process, and thus has the burden of proof.

The law on ESY is set out above.

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. The issue is need for Extended School Year services, ESY.

(2) Parent has provided a strong preponderance of the evidence and has shown that Child will suffer significant regression if it does not have substantial ESY during the Spring, Summer and Winter breaks.

(3) The conclusions of Schools that ESY is not needed, because there had been no data showing regression after recent breaks, is not reliable, because it failed to take into consideration the services provided by outside professionals hired by the Mother and the skilled services provided by the Mother.

(4) Schools failed to give proper weight to the opinions and views of the several experts and outside professionals who had reviewed Child's situation and needs.

(5) Schools did not contact the persons who had been giving services to Child during the breaks when ESY was not being provided.

(6) The evidence showed that Child did have regression on several occasions, when ESY services had not been provided. and it took some effort and time to overcome that regression.

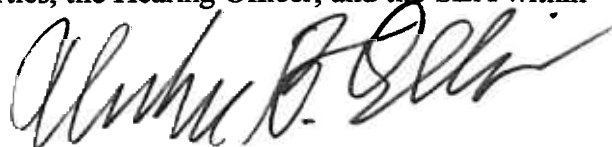
(7)

(7) Child's various problems are acute and serious and require a high degree of attention, and a continuous structured program to obtain any progress and to maintain such progress as has been obtained.

(8) There are no procedural problems.

ORDER: Schools is to provide Child with substantial Extended School Year services, ESY, for Spring, Summer, and Winter breaks.

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.



Urchie B. Ellis, Hearing Officer
Va. State Bar No. 5422

dated: March 21, 2005

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