

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.)



Public Schools

School Division

Name of Parents

November 12, 2003

Name of Child

Date of Decision or Dismissal

, Esq.

Counsel Representing LEA

Counsel Representing Parent/Child

Public Schools

Public Schools

Party Initiating Hearing

Prevailing Party

Hearing Officer's Determination of Issue(s):

Proposed individualized education program provides student with free appropriate public education.

Hearing Officer's Orders and Outcome of Hearing:

Proposed IEP is approved and declared in effect, and implementation plan is ordered.

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.

Printed Name of Hearing Officer

Signature

PUBLIC SCHOOLS v



HEARING OFFICER'S OPINION

This due process proceeding was initiated by the Public Schools on September 17, , pursuant to Virginia Administrative Code section 20-80-76 B 2, for the purpose of declaring valid an Individualized Education Program for adopted August 20, , and to permit implementation of that plan.

's request (Exhibit IV-82)/¹ asks this hearing officer to "make a determination regarding the proposed IEP and issue an opinion regarding all issues between PS and 's parents, including educational programming, related services, and transportation".

The latest proposed IEP for was adopted following IEP Team meetings July 2 and 24 and August 12 and 20.

's parents, , received timely notice of each meeting, and they, or one of them, attended each meeting. Neither would sign the IEP on August 20, when all other team members approved the plan. affixed signature on the notice page with the notation "on hold until I see the final schedule" (Exhibit IV-55, p. 38). On September 5, signed the IEP form giving consent but with notes requesting additional services not included in the proposed IEP, stating: "Have requested Resource 10 through alternative method...."

1. exhibits are designated by volume number and item number, e.g., "II-16". The parents' exhibits are designated as, e.g., "Exhibit 14".

This referred to _____ desire that Resource 10 should not be taught at school, as the IEP proposed (Ex. IV-55, page 35) rather than at home, by a tutor, _____, paid by the _____, a practice still in place at this writing. _____ also conditioned _____ consent with a request contrary to what the IEP team had decided, i.e., a school day ending at 11:45 a.m. instead of 1:55 p.m.

A pre-hearing conference was held on September 25. This hearing officer's pre-hearing order letter of September 26 included the agreement that the only issues in this case were:

1. Whether the individualized education program approved for the 20____-20____ school year provides _____ with a free appropriate public education, in the least restrictive environment.

2. Whether to provide a FAPE the school division must allow _____ access, in school, to the Kurzweil reading, writing and studying program. The _____ agreed to pay the cost of this, about \$250.

_____ is an 18-year-old now in the 10th grade at _____ High School. _____ has been diagnosed as autistic and learning disabled. _____, generally described as pleasant and cooperative, with a good sense of humor, is pursuing a modified standard diploma program scheduled to result in graduation in 20____. Part of the time _____ attends school, part of the time studies at home with two teachers hired by _____, and as part of _____ program _____ has had satisfactory experiences as a volunteer worker with the American Cancer Society and "FLAG", or "For the Love of Animals in _____". _____ has also taken a correspondence course in Civics.

_____ has a Kurzweil 3000 reading and writing program

on home computer. authorities have long considered, but have not yet agreed to, the parents' proposal that be allowed to use such a device at school.

The other question is whether, to have a FAPE. should undertake the "Resource 10" program at school, as set out in the proposed IEP, or at home, as at present, under the tutelage of . is paid by the parents for Resource 10, and by the county for teaching Algebraic Concepts at home. other county-provided home teacher, , teaches Health and Physical Education.

Both and have attended some IEP team meetings.

In accordance with the pre-hearing order, filed 386 exhibits and the 46.

The parents listed 12 potential witnesses and listed six. At the hearing October 15, at the School Board office in , and October 16, at the county attorney's office at Courthouse, only four testified.

called , schools' occupational therapist, and , its lead teacher specialist in special education.

The parents called , 's autism resource teacher, and .

was familiar with the Kurzweil device, and with , whom had worked with in assistive technology (from low-tech devices like pencils to high-tech devices like computers) for eight years. Last year, testified, needed maximum

support in using the Kurzweil device, and was not sure it was a good compensatory aid. At the time of the hearing,

said a Kurzweil evaluation was about half finished, and the target date for completing it was October 30.

Because of this, and the difficulty of ruling on the Kurzweil issue between October 30 and the mandated November 3 opinion completion date, this hearing officer, without objection, by letter of October 29, stated that it would be in 's best interest to extend the completion date to November 17.

Thereafter, after distribution of the October 30 Kurzweil report (filed as Hearing Officer Ex. 1), 's requested a further extension in order to have another Kurzweil evaluation. Not finding this in 's best interest, request was denied.

The Kurzweil question will be considered first.

, 's occupational therapist, said was recommending aggressive training in the device for , but felt it would be "a setup for failure to integrate it in the classroom now".

, lead teacher specialist in special education, who had known for 11 years, said had received special education services since was a pre-schooler. said the Kurzweil device should be added to 's program if 's evaluation recommended it.

The 7-page October 30 "School Based Assistive Technology Assessment" (Hearing Officer Ex. 1) was made by a team of seven,

three of whom had been on the IEP team. It recited various assistive technology (AT) aids [redacted] had had over the years; a 20 [redacted] computer accommodation assessment conducted by Woodrow Wilson Rehabilitation Center (which noted that "integration of the Kurzweil software into the school curriculum" was beyond the scope of its assessment); the supervised use by [redacted] of the Kurzweil software at school in the 20 [redacted]-20 [redacted] school year, and

[redacted]'s remarks at the August 20 IEP meeting that [redacted]'s use of Kurzweil independently had improved over the summer of 20 [redacted]. It was at this time, the report said, that [redacted] and the IEP team suggested an assessment of the current level of functioning with Kurzweil "would be appropriate at this time to assist with program planning".

The assessment team recited 12 observations of using Kurzweil at school and one at home, concluding that [redacted] had "weaknesses in keyboarding and in general computer use... continues to require consistent supervision, visual cuing and verbal assistance when using the computer to complete an instructional task."

The team said its assessment indicated "[redacted]'s current accommodations are more effective than the software", describing it as "an exciting software program with good reliability and flexibility". Despite [redacted]'s progress in using it, "[redacted] is not yet ready to use it in the integrated school setting secondary to limitations in computer use, attention and other weaknesses noted in the assessment above".

The assessment team's recommendations were:

1. " does not require Kurzweil to make sufficient progress with IEP goals...the extra time and assistance required to use it will likely detract from IEP goal instruction."

2. The occupational therapist should work with on Kurzweil 30 minutes a week "during resource class at High School", and then work with and the school staff "to integrate 's use of the Kurzweil into the academic setting, as appropriate."

3. The IEP team should "continue to support" 's Kurzweil efforts.

's wrote November 4 to say disagreed "with the results of the evaluation report" and asked for another evaluation, at county expense, which was denied.

At the hearing October 15, cross-examined on the subject of Kurzweil, and referred to matter had filed, e.g., Exhibit 30, a publication on assistive technology, and Exhibit 28, 's own 20 and 20 memoranda, which included references to Kurzweil, and approved of its home use. Other relevant evidence was Exhibit 27, the Woodrow Wilson assessment by and , which recommended 's continued use of Kurzweil but refrained from opining on whether it should be integrated into the classroom.

At 's request, was subpoenaed to testify by deposition October 15, but then decided not to use testimony.

Since the hearing, I have again read the opinion of the Supreme Court of the United States in Board of Education v Rowley, 458 U.S. 176, decided in 1982. Because it is binding on all courts and hearing officers, the Rowley case is referred to in almost every special education decision of a lower court since then, including the three distributed by _____ counsel at the hearing in this case:

School Board of Henrico County v Palkovics, ___ F. Supp. 2d. ___, 2003 W.L. 2287923, decided by the United States District Court for the Eastern District of Virginia in September, 2003, and holding a hearing officer erred in saying an autistic child's IEP was deficient despite parents' expert testimony that it was. The Rowley case, the judge wrote, established that the Individuals with Disabilities Education Act, like its predecessor, only required that an IEP must provide "personalized instruction with sufficient support services to benefit educationally with that instruction."

Arlington County School Board v Smith, 230 F. Supp.2d 704, where another judge of the same court ruled in 2002 that the hearing officer erred in ordering that a severely depressed child should be placed in a private therapeutic center.

The judge recited that under the Rowley case and other decisions, "the IDEA does not require a school district to provide a child with the best possible education...Instead, a school district can satisfy its obligation to provide a disabled child with a FAPE by providing 'personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction'."

The hearing officer, the judge wrote, "failed to defer to the considered judgment of the educational experts" who testified. The parents "called no expert witnesses to testify that Jane needed to be in a private, day facility".

Hartman v Loudoun County Board of Education, 118 F. 3d 996, decided by the Court of Appeals for the Fourth Circuit in 1997, reversing the trial court's decision that an autistic child was denied a FAPE when the school district's proposed IEP found he was making no academic progress in the regular classroom and proposed placing him in a class specifically structured for autistic children. The parents refused to approve the IEP, claiming it failed to comply with the mainstreaming provision of the IDEA, 20 U.S.C. section 1412 (5), which says a school district should provide that:

"To the maximum extent appropriate, children with disabilities...are educated with children who are not disabled...."

The hearing officer, and the state reviewing officer, upheld the proposed IEP. The Court of Appeals said the District Court erred in reversing those decisions.

The facts of the ruling Rowley case are somewhat analogous to those in the present case. There a student with "minimal residual hearing", but skilled in lipreading, was provided various accommodations, including a device that amplified teachers' and students' speech; a teletype to transmit information to the child's deaf parents, and an hour's daily instruction by a tutor for the deaf. The parents wanted, in addition, a qualified sign language instructor for the child throughout the school day. This was tried for two weeks, after which the interpreter said the child didn't need his services.

The Supreme Court said in deciding whether an IEP complied with the IDEA a court has to make a twofold inquiry:

1. Whether the procedural requirements of the IDEA had been complied with (not an issue in the case now before me), and
2. Whether the proposed IEP was "reasonably calculated to enable the child to receive educational benefits".

"Once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States."

The do not contend that is not receiving educational benefits now, or that the proposed IEP of August 20 would not provide with educational benefits.

The evidence recited above, including the October 30 assessment report, shows that is openminded about the specific methodology in question, i.e., whether the Kurzweil device some day should be employed more than it is now, in particular, in the classroom.

Whether its use should now be integrated into the classroom is a question of methodology which the Rowley case and its many progeny say is not within the power of a hearing officer, or a court, to decide.

Therefore I rule that the proposed IEP, in its treatment of assistive technology, does not in that respect deny a FAPE.

Much of what is said above is applicable to the only other specific complaint before me: that implementing the proposed IEP, in requiring 's Resource 10 learning to be performed at , rather than at home, would deny a FAPE.

This question includes the disagreement over when 's school day should end: at 11:45 a.m., as the parents contend, or at 1:55 p.m., as the proposed IEP requires.

now provides with free one-way transportation, from home to school. It would do the same for the school-to-home trip, if that trip commenced in accordance with the IEP plan. Now this return trip is paid for by the parents.

is not hostile to home schooling for . It now provides, and is willing to continue to provide, the services of as at-home teacher in Algebraic Concepts, and of as at-home teacher in Health and Physical Education. The question is whether halting 's other at-home service, the teaching of Resource 10, paid for by the , would deny a FAPE.

testified eloquently in favor of the present setup.

Part of the problem, said, was that altering the present schedule would interfere with some of 's helpful volunteer programs, especially the American Cancer Society work. is "just blossoming with" the present schedule, and is involved in the community in a holistic way. Also, it is important for to get home in time for lunch because, with some dietary problems, does not properly digest food if stressed. The current schedule allows to relax and get in the proper mood to continue with afternoon schedule.

said does not contend the teacher proposed for an in-school Resource 10 class is not as good as . only objection is to the late release (1:55 p.m.) set out in the proposed IEP.

also referred to Exhibit 16, a possible schedule worked out by and , guidance counselor, which would have provided Resource 10 at school but with a 12:30 p.m. release allowing lunch at home. (It is discussed in Exhibit 6.)

The only other witness for the parents was , autism resource teacher, who had worked with for 4 years. Alone with , said, gave appropriate responses, and they had a very positive interaction.

The disability of autism would be with for the rest of life, said, but can grow and learn to help self. It was more difficult to learn, though, in an environment where did not feel comfortable.

had not attended IEP meetings about , and: "I don't feel qualified to speak to the IEP."

About all said concerning the issues in this case was that needs to be in a school environment. A major portion of needs involves social engagement, and: "I don't think the home provides social engagement."

The "mainstreaming", least restrictive environment, requirement referred to at page 8 above, is not an element in this case. 's proposed IEP would provide a less restrictive

environment for 's Resource 10 work than the present one-on-one program in the home environment, which provides no other-student contact.

Whether that program provides a better education than the proposed class at school is not a question for me to decide. The Rowley case and the cases that followed it, such as those mentioned at pages 7 to 9 above, make it clear that a proposed IEP need not provide the best educational benefit for a child, or even one as good as a parent's proposed alternative. In the language of the Rowley case, a school district need not furnish "every special service necessary to maximize each handicapped child's potential". It need only to provide a program "reasonably calculated to enable the child to receive educational benefits".

No evidence is before me indicating that the proposed IEP of August 20, including its at-school Resource 10 provision, offers no educational benefits. Indeed, I do not understand that to be contended at all.

Thus I rule that in its Resource 10 provision the proposed IEP would not deny a FAPE.

FINDINGS OF FACT

1. had proper notice of each of the four IEP team meetings resulting in the proposed IEP of August 20, 20 , and at least one of them was present at each of those meetings.
2. is not yet ready to use Kurzweil effectively in the classroom.
3. will receive substantial educational benefits under the proposed IEP, without use of the Kurzweil in class and without continuing Resource 10 program at home.

4. receives the educational programming is now entitled to, and will receive it under the proposed IEP.

5. receives the free related services is now entitled to, and will receive them under the proposed IEP.

6. receives the free transportation is now entitled to, and will receive it under the proposed IEP.

7. The parties indicated, and the record shows, that mediation would be futile in this case.

CONCLUSIONS OF LAW

1. All procedural provisions required by law have been complied with.

2. now receives a free appropriate public education.

3. Under the proposed individualized education program of August 20, 20 (Exhibit IV-55), will receive a free appropriate public education.

4. That proposed individualized education program is hereby approved, and is declared now in effect as the IEP for the 20 -20 school year.

5. All parties are directed now to implement that IEP.

6. must file an implementation plan within 45 days from this date.

This decision is final. An appeal from this decision may be filed no later than one year from this date in a Virginia circuit court, or may be filed in a federal district court.

(Respectfully) submitted,

Hearing officer