

STATE BOARD OF EDUCATION

STATE OF GEORGIA

JACK A.,	:	
	:	
Appellant,	:	CASE NO. 1987-31
	:	
V.	:	
	:	
GREENE COUNTY BOARD	:	DECISION OF STATE
OF EDUCATION,	:	HEARING OFFICER
	:	
Appellee.	:	

PART I

SUMMARY

This is an appeal by the parents of Jack A. (“Student”) from a Regional Hearing Officer’s decision that the Greene County Board of Education (“Local Board”) could provide the Student with a Free Appropriate Public Education (“FAPE”) and was not required to provide a residential placement for the Student. The parents contend on appeal that there were procedural violations in developing the Student’s educational program and that the program offered is not appropriate.

PART II

FACTUAL BACKGROUND

This case came before a Regional Hearing Officer as a result of a disagreement by the Student’s parents and the Local Board regarding placement. From 1983 until a meeting in the spring of 1987 to plan the Student’s individualized educational program (“IEP”), the Local Board placed the Student in a private residential program emphasizing speech and language (“Private School”).

At the IEP meeting in the spring of 1987, the Local Board proposed placing the Student in its program for the moderately mentally handicapped with various related services. The IEP meeting was attended by the parents, the parents’ attorney, the assistant director of the Private

School, the director of special education for the North East Georgia Regional Education Service Area, the Local Board's special education director, the Local Board's attorney, a private speech language pathologist consultant employed by the Local Board, the Local Board's psychologist, a teacher of the moderately mentally handicapped for the Local Board, the Local Board's speech language pathologist, the Local Board's physical therapist, and the Local Board's occupational therapist. The Student's parents contested the proposed placement and did not consent to the IEP. Thereafter, the Local Board requested a hearing. The record of the IEP meeting does not reflect that the members discussed any potential harmful effects of the proposed transfer.

The hearing was held on June 30, and July 1, 1987. Both sides presented numerous witnesses with expert qualifications. The Local Board's school psychologist testified at the hearing that he had tested the Student, the Student met the criteria to be considered moderately mentally handicapped, that he provided input into the development of the IEP, and that the proposed IEP would be his recommendation. Additionally, he testified that it was his belief that any potential harmful effects of the transfer should be discussed closer to the time of the actual transfer, rather than at the IEP meeting which occurred in the spring of 1987. The speech language pathologist, who the Local Board asked to evaluate the Student, testified that the Student's program should emphasize cognitive, social, and adaptive behavior skills as well as language skills. She further testified that the IEP developed will meet his speech needs. Various other witnesses for the Local Board also testified they believed the program offered for the Student by the Local Board was appropriate.

From the testimony presented, the Regional Hearing Officer found that the Student is a multi-handicapped ten-year old male, who tests within the moderately mentally handicapped range, has speech and language difficulties, and physical handicaps which affect his ability to learn. The Regional Hearing Officer also found that the Student was in need of speech and language therapy, occupational therapy, physical therapy and a special education program. The Regional Hearing Officer concluded that the IEP committee formed by the Local Board met statutory standards, that the Local Board was not precluded from recommending a change in

placement because they had acquiesced to the prior residential placement, and that the IEP offered by the Local Board will provide the Student with an appropriate education.

The Student's parents timely appealed the decision. At the request of the parties, the decision of the State Hearing Officer was delayed.

PART III

DISCUSSION

The parents contend on appeal that the Regional Hearing Officer's decision was in error as a matter of law and fact on the following grounds:

1. The IEP committee ("Committee") procedure was violated.
2. The Student requires residential services and the Committee violated the permanent injunction in *Georgia Association of Retarded Citizens v. McDaniel*, 511 F. Supp. 1263, 1279 (N.C. Ga. 1981), *aff'd*, 716 F. 2d 1565 (11th Cir. 1983).
3. The hearing officer improperly shifted the burden of proof.
4. The determination of "primary disability" was in error.
5. The IEP offered was not appropriate.

The parents first contest the procedures followed by the Committee. Their procedural contentions are that personnel from the Private School had to be present for the Committee to be validly constituted, the IEP is defective because there was no discussion of the potential harmful effects of the proposed change in placement, and the determination that the Student was eligible for a moderately mentally handicapped program occurred without the participation of the Student's parents. It is the parents' position that the regulations require the individuals who worked with the Student at the Private School to be present at the IEP meeting. The parents contend that, because the Student's teachers from the Private School were not present, the IEP

was defective. The parents cite 34 C.F.R. 1300.344(a)(2), requires the Student's teacher to be involved in the IEP meeting, to support their position.

The Regional Hearing Officer found, and the Local Board argues, that the IEP was properly constituted because, since the Student was not being taught in the Local System, the Committee included a person who was qualified in the area of the child's disability instead of the Student's Private School teacher, and the Local Board had asked the Student's Private School to send representatives to the meeting. The decision as to who attended from the Private School was made by the director of the Private School, who sent the assistant director because she was the one most knowledgeable about the Student and his needs. The purpose of 34 C.F.R. 1300.344(a)(2) is to assure input in the committee meeting about a student's needs by the person who has worked with the student or who will work with the student. Presumably, this is the person who will have to relate goals with specific programs and actions. The comments in the regulations make it clear that the word "teacher" does not specify a particular individual, but it does contemplate a knowledgeable individual. In the instant case, the representative from the Private School was selected as the person most knowledgeable about the Student's needs. She should, therefore, have been the one who could best fulfill the purpose of 34 C.F.R. 1300.344(a)(2). The State Hearing Officer concludes that the composition of the Committee was not defective.

The Student contends that the TEP was further defective because it did not include a discussion of the potential harmful effects of the transfer from the Private School, as is required by 34 C.F.R. §300.552(d) and State Department of Education Regulation IDDFd. 3 7, sec. II, 04. The Local Board contends that this requirement only applies when there is a recommendation that a student be placed in a more restrictive environment. In this case, the Local Board contends the proposed placement is in a less restrictive environment than the parents have requested. The Local Board, therefore, contends that it complied with the spirit and letter of the requirement.

The IEP minutes do not show that there was a specific discussion of the potential harmful effects of the proposed transfer. 34 C.F.R. §300.552(d) provides that consideration has to be given to any potential harmful effect on the child when the public agency is selecting the least restrictive environment. As pointed out by the Local Board, the primary concern that resulted in this requirement was the effect on a handicapped child if the child was moved from a regular classroom to a more restrictive environment. The regulation, however, does not dismiss the requirement when the proposed placement is from one environment to another when both environments are outside the regular classroom. The harmful effect to be considered is the result of not placing the child in the regular classroom, and not the effect resulting from moving the child from one placement outside the regular classroom to another placement outside the regular classroom.

The Student's parents' complaint is that the Committee failed to consider the harmful effects of moving the Student from the residential program to the proposed placement. The Local Board's psychologist testified that an evaluation of the effects of moving the Student to the proposed placement from the residential program should not be made until after the Student had been served in the proposed placement. Such an evaluation, however, addresses effectiveness of the proposed placement rather than the harmful effects of the Student's attending classes outside the regular classroom setting. The State Hearing Officer, therefore, concludes that the Student's parents' complaint does not establish a basis for reversing the decision of the Regional Hearing Officer. Additionally, the lack of any evidence in the record whether consideration was given to the potential harmful effects of the Student's being placed in a program outside the regular classroom does not indicate reversible error since it is evident that all parties agree the Student requires placement in a special education program.

The parents next contend the IEP process was also defective because the determination the Student was eligible for the moderately mentally handicapped program was made without the parents' input, the student support team did not meet, and no eligibility report was attached to the IEP. The Local Board contends that, because the Student was already in a special education

program, there is no requirement for a student support team. Additionally, the Local Board contends that there is no requirement that the parents participate in the eligibility report, since it is a part of the evaluation process, and the parents failed to object to comments during the Committee meeting that the Student was eligible for a moderately mentally handicapped program.

The Georgia Department of Education Regulation IDDFd3 VI, 12, at 3-18, provides, in part, that:

(p)rior to consideration for referral and placement in a mentally handicapped program, alternative instructional intervention strategies must be considered, described, discussed, and documented through the Student Support Team.

The procedures outlined in this regulation are applicable only during the initial evaluation when a student is being considered for special education placement. In this case, the Student is already in a special education program and the need for a pre-placement evaluation as outlined in Regulation IDDFd3 VI, 12 is not applicable. The State Hearing Officer, therefore, concludes that the Student's parents' contention is without merit.

The Parents argue four contentions directly attacking the Regional Hearing Officer's substantive determinations. First, they argue that the Committee failed to consider the Student's need for summer services. They contend that, since the Student had previously received summer services, the Local Board's postponement of consideration of summer services until a future date is a violation of McDaniel, supra, as well as a violation of insufficient evidence to establish that a summer program was necessary, this burden was not met. The State Hearing Officer, therefore, concludes that there was substantial evidence to support the Regional Hearing Officer's decision that a summer program did not have to be offered at the present time.

The parents' second contention is that the Regional Hearing Officer improperly shifted the burden of proof to them concerning the necessity of a summer program. For the reasons

discussed above, the State Hearing Officer concludes that the Regional Hearing Officer did not improperly place the burden to proof on the parents.

The parent's final two arguments are that the Local Board's determination of primary disability was in error and that the program offered was not appropriate. The parents contend that the Student is multi-handicapped, and the determination to allow placement in a program with the primary emphasis on mental retardation violates provisions prohibiting placement in a special education program for only one impairment. They contend that the program offered is not appropriate because of the misdesignation of the Student's primary disability and because the Local Board asserted it was willing to change the Student's program if it was necessary. They contend that the assertion that the Local Board may change the program constitutes an acknowledgement that the program offered is inappropriate.

The Local Board contends that the Student's other handicapping conditions are addressed by the IEP because the Student is to receive sixteen hours of instruction in the moderately mentally handicapped program, two and one-half hours each week for his speech and language therapy, one-half hour each week for occupational therapy, one-half hour each week for physical therapy including adaptive physical education as well as mainstreaming. There is substantial evidence to support the Regional Hearing Officer's position that the program offered is appropriate. There was expert testimony that the proposed program is substantially the same as the program at the Private School, except for the length of the program. Essentially, the goals and objectives are similar and the Local Board has individuals qualified to provide the services offered. The fact that the Local Board stated it was willing to modify the program if needed does not show that the proposed program is inappropriate. Each student has to be periodically evaluated and necessary program changes made, as required by the regulations. Evidence that the Local Board is willing to abide by the regulations does not establish that the proposed program is inappropriate.

While there was testimony contradicting the Local Board's witnesses, the contradictory testimony did not demand a finding that the program offered by the Local Board was inappropriate. Additionally, the program offered by the Local Board was in a less restrictive environment than the Private School program, which is preferred under the Education for All Handicapped Children Act of 1975.

The State Hearing Officer concludes that the decision of the Regional Hearing Officer is supported by substantial evidence, and the Student's parents have not presented any basis for altering the decision. The decision of the Regional Hearing Officer, therefore, is

SUSTAINED.

This 2nd day of March, 1988.

L. O. Buckland
State Hearing Officer