

STATE BOARD OF EDUCATION

STATE OF GEORGIA

IN RE: STEVEN M.

)  
)  
)  
)  
)

CASE NOS. 1983-1, 1983-2

DECISION OF STATE

HEARING OFFICER

PART I

SUMMARY OF APPEAL

This is an appeal by the Atlanta Board of Education (here in-after "Local System"), combined with an appeal by the parent of Steven M. (hereinafter "Student"), from the special education placement decision of a regional hearing officer who decided that the Local System had an appropriate educational program for the Student, but that the Student should not be placed into the program because of the potential harm that could occur if the Student was moved. The Local System appealed from that part of the Regional Hearing Officer's decision which held that the Student should not be moved. The Student's parent appealed from that part of the decision which held that the recommended program was appropriate.

PART II

FINDINGS OF FACT

The Student is presently sixteen years old and enrolled in a private residential program where he was placed in 1980. The original placement was made by the Student's parent, and the Local System agreed with the placement for the 1981-82 school year because the Local System did not have an appropriate program available for the Student.

During the spring of 1982, the Local System made plans to establish a new program for learning disabled students. A placement committee met with the Student's parent during July, 1982, and August, 1982, and both the Local System and the Student's parent agreed on

the goals set forth in an individualized education program (“IEP”) prepared for the Student. The representatives from the Local System then recommended placement of the Student into the new program, which was to be established for both learning disabled students and behavioral disordered students. The Student’s mother objected to the change in the Student’s placement and mediation was attempted without success. The Student’s mother then requested a hearing before a regional hearing officer. The hearing was held on November 5 and November 18, 1982. The regional hearing officer issued her report on December 13, 1982. Both the Local System and the Student’s parent appealed the decision on January 12, 1983. Oral arguments and briefs were received by the State Hearing Officer and the timeline for a decision by the State Hearing Officer was extended to February 18, 1983, by consent of the parties.

The Student has always been enrolled in private schools because of his learning disabilities. He has been able to advance to fourth through sixth grades in his educational achievements. In order to learn, he has to be shown each step and given individualized instruction. He has extreme difficulty interacting with his peers. The goals set forth in the Student’s IEP were to: improve oral and silent reading skills; improve language arts skills; acquire science and social studies concepts; improve self concept; improve communication skills; improve gross and fine motor skills; become exposed to career awareness; improve word recognition skills, and improve mathematics skills. Some of the objectives established to improve the Student’s self concept were: (1) participate in club activities by joining at least two clubs; (2) participate in social events and off-campus activities; (3) participate in table conversation, and (4) develop age appropriate social and emotional skills by increasing interaction with peers in groups of five or more and decreasing withdrawal response to pressure.

The Regional Hearing Officer found that the program offered by the Local System was to be housed in a large high school room and six students were enrolled in the program. The other students had not exhibited any acting out behavior even though they had been

primarily identified as being behaviorally disordered. The Regional Hearing Officer also found that the Student could learn to traverse the halls of the school. In the beginning, he could be led from one area to another by the teachers or by other students at a time when the regular school population was not in the halls. The Student had been able to learn how to traverse an airport after being shown where he was supposed to go, and he was able to ride the buses without assistance. The Regional Hearing Officer found that since the Student was able to cope with the noise levels in his present setting and in an airport, he would be able to cope with the noise level in the site of the suggested program setting. The Regional Hearing Officer also found that adequate support facilities were available for the Student in the form of physical and occupational therapy, adaptive physical education, and speech and language instruction. The Regional Hearing Officer then found that none of the clubs that existed in the school were appropriate for the Student, but the Local System would have to make other clubs that existed in other schools available to the Student.

Based upon her findings, the Regional Hearing Officer found that the program offered by the Local System was an appropriate program for the Student, but recommended delay in placing the Student into the program because of the harm that would result from his move during the school year. The Regional Hearing Officer found that the Student requires a gradual reentry into the public school setting because he does not adjust quickly to change. The Regional Hearing Officer did not indicate when the change in placement should take place.

The Regional Hearing Officer also found that the Local System had not complied with the procedural requirements regarding notice to the parent in the event a change in placement was contemplated. Additionally, the Local System did not perform any evaluation to support the change in placement. The Regional Hearing Officer cautioned the Local System to follow the State directive regarding the giving of notice to parents, but she did not find that the error was sufficient to make any changes in the placement of the Student.

## CONCLUSIONS OF LAW

The major issues to be decided as a result of the appeals filed are:

1. Does the program offered by the Local System represent a change in placement such that the Local System is required by the regulations under Public Law 94-142 to conduct an evaluation of the Student before a change can be made?
2. When a local system and a parent agree on the goals set forth in an individualized educational program and the parent requests a hearing because the local system offers a self-contained learning disabilities program instead of the residential program in which the student is enrolled, is the regional hearing officer limited to deciding only whether the offered program is appropriate, or can the regional hearing officer make binding “recommendations” concerning the timing of the transfer from a residential program to the program offered by the local system?
3. Can a student who has not been identified as being behaviorally disordered be placed into a program which also has behaviorally disordered students enrolled in it when the student’s TEP states that the student will receive services in a self-contained learning disabilities class?

Other issues that were raised by the appeals are discussed after these major issues.

The Local System contends that the only issue before the Regional Hearing Officer was whether the program offered by the Local System was appropriate because the Local System and the Student’s parent had agreed on the goals in the Student’s TEP. Since this was the sole issue to be decided, the Local System maintains on appeal that the Regional Hearing Officer was without authority to go any further after determining that the program offered was appropriate for the Student. The Student’s parent responds by arguing that the Regional Hearing Officer did not find that the offered program was appropriate because the Regional Hearing Officer decided that the Student should not be immediately transferred out of the residential program in which he was enrolled into the program offered by the Local System.

The Student’s parent also argues on appeal that the Local System was required by the regulations of Public Laws 94-142 and the State Program Plan to notify her and make an evaluation of the Student before recommending a change because the program offered by the Local System represents a change in placement since it changes the services from a

residential program to a self-contained learning disabilities program which operates only during school hours. The Student's parent also argues that the lack of notice was such a procedural violation that a change in placement cannot be made. The Local System argues that an evaluation was not required because the Student has been evaluated within the past three years, they do not contend that any changes have taken place in the Student's ability or handicaps, and the self-contained program simply represents a new program which was not previously available in the Local System. Since there have not been any changes in the Student's condition, the Local System contends that a new evaluation was not necessary before recommending placement of the Student in the self-contained program that has become available, and no procedural violations have occurred.

The Student's parent also argues on appeal that the program offered by the Local System is inadequate because the Student's IEP states that services will be provided in a learning disabilities class, but the program offered by the Local System is in a combined learning disabilities class and behavioral disorders class. Because of the peculiar problems the Student has with peer modeling, the parent maintains that it is inappropriate to place the Student with behaviorally disordered students. The Local System argues that the program designation is immaterial and the teachers involved in the self-contained program are capable of presenting an appropriate program to both behaviorally disordered students and to the Student. The Local System also argues that the Student has exhibited behavior problems similar in nature to those commonly associated with behaviorally disordered students in that he has exhibited withdrawal and temper tantrums when confronted with different situations. Because of these similarities, the Local System maintains that it is not inappropriate to present the Student's program in a classroom which also contains behaviorally disordered students.

The first major issue to be decided is whether the Local System was required to give any notice to the Student's parent, and, if so, what notice was required to be given. The Regional Hearing Officer found that the Local System had not complied with the provisions

of Section VII, Paragraphs C and D of the State Program Plan, which require a parent to be notified in writing before there is a change in the educational placement of a child and a statement of the reasons for the proposed action, including specific tests or reports upon which the proposed action is based, together with a description of the options and any other factors the Local System considered and the reason why those options were rejected. The word "placement" in the State Program Plan and in the federal regulations (34 C.F.R. § 300 et seq.) denotes the type program being presented. The language of 34 C.F.R. § 300.301 states:

For example, when it is necessary to place a handicapped child in a residential facility, a State could use joint agreements between the agencies involved for sharing the cost of that placement. (Emphasis added).

This language has clear reference to the type program, i.e., residential, offered to the handicapped student. In the instant case, the Student is presently enrolled in a residential program and the Local System has proposed moving him into a self-contained day program. This change in the method of providing services to the Student is clearly a change in the Student's educational placement. The Local System, therefore, was required to give notice to the Student's parent that a change in educational placement was being considered.

The Regional Hearing Officer, however, erred in deciding that the Local System did not give the Student's parent written notice of the contemplated change in the Student's educational placement. The required annual review of the Student's IEP was accomplished in meetings held on June 10 and August 6, 1982. Both school system personnel and the Student's parent attended these meetings. The Student's TEP was prepared at the meetings and after it was prepared, the staffing committee addressed the question of where the Student would be placed. The committee recommended placement of the Student in the self-contained learning disabilities class which was to be formed by the Local System. Written notice of these proceedings was given to the Student's parent and is contained in the record as Respondent's Exhibit 6. The writing shows that the committee considered the information obtained from the private residential facility, the parent's observations, and the other records on file. The writing also shows the options that were considered and the reasons why they

were not selected. The Local System, therefore, provided the Student's parent with all of the information required by the regulations. The regulations do not require the Local System to provide the written notice at some time in advance of preparing the Student's IEP. The federal regulations, 34 C.F.R. § 300.552, specifically provide that a student's educational placement must be "based on his or her individualized education program..." The student's LEP, therefore, must be prepared before the student's educational placement can be considered. The purpose of the written notice provision is to give the parent an opportunity to agree or disagree with the proposed placement and request a hearing if there is disagreement. In the instant case, the Student's parent received the written notice (Respondent's Exhibit 6) and was given an opportunity to agree or disagree with the placement recommended (Respondent's Exhibit 3). The State Hearing Officer, therefore, concludes that the Local System provided the Student's parent with the appropriate notice and there was no denial of any procedural due process.

The second major issue to be decided involves the scope of the regional hearing officer's authority. Resolution of the issue is complicated in the instant case because the decision of the Regional Hearing Officer is unclear. Both the Local System and the Student's parent found it necessary to appeal because they were not sure what the Regional Hearing Officer had decided. The Regional Hearing Officer's decision states:

I find that the program . . . recommended by the Local System was an appropriate program for . . . [the Student]. However, I recommend that . . . [the Student] not be placed in this program immediately . A slow transition is recommended.

The Local System contends that the Regional Hearing Officer's finding that the recommended program was appropriate is conclusive and the subsequent recommendations do not affect the Local System's responsibilities. This contention is based upon the Local System's argument that the only issue before the Regional Hearing Officer was whether the recommended program was appropriate because both the Local System and the Student's parent had agreed on the Student's IEP.

Even though the Student's IEP had been agreed upon, the appropriateness of the proposed self-contained learning disabilities program was not the sole issue before the Regional Hearing Officer. A parent can request a hearing if there is a proposal to change (1) the identification, (2) evaluation, or (3) educational placement of the child, or (4) the provision of a free appropriate public education to the child. 34 C.F.R. §§ 300.504, 300.506. The Student's parent in the instant case disagreed with the Student's proposed placement in the self-contained learning disabilities program because (1) an evaluation of the Student had not been made, and (2) the parent was not satisfied that the Student's IEP could be implemented in the self-contained learning disabilities program (Respondent's Exhibit 3). The parent's request for a hearing, however, stated that the request was made because mediation efforts had failed. During the mediation proceedings and the hearing before the Regional Hearing Officer, the Student's parent was concerned about the ability to meet the Student's needs in the self-contained learning disabilities program. The Student's parent, however, was also concerned that an evaluation of the Student had not been made before a recommendation was made to change the Student's placement. The Local System maintains that an evaluation was not necessary because one had been performed within the previous three years. See, 34 C.F.R. § 300.534(b). Reg. 300.552, however, states:

Each public agency shall insure that:

(d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs.

This regulation does not require an evaluation of the Student, but it does require that the effects of any move must be taken into consideration. Since the recommended program represents a change from a residential program, the Regional Hearing Officer was not restricted to considering only whether the proposed program could adequately meet the Student's needs as set forth in the IEP. The Regional Hearing Officer also had to take into consideration the potential harmful effects such a move would have on the Student.

Since the Regional Hearing Officer expressed the consideration of the potential harmful effects in terms of recommendations, both the Local System and the Student's parent have taken exception. The Local System argues that the Regional Hearing Officer's failure to include any guidelines or timelines for when the transition is to be made leaves the responsibility for deciding when the move will be made with the Local System. The Student's parent, however, argues that the recommendation establishes that the Regional Hearing Officer concluded that the recommended program was not adequate because it does not contain a program designed to introduce the Student to a less restrictive environment.

The Regional Hearing Officer's decision, however, is not internally inconsistent. Based upon the evidence presented, the Regional Hearing Officer could find that the recommended program was adequate to meet the Student's needs as set forth in the IEP, but, when consideration was given to the Student's placement, the harmful effects of a move from the private residential program dictated that the move should not immediately be made. The Local System argues that the potential harmful effects identified by the Regional Hearing Officer result only because the change in placement could occur during mid-term, but the self-contained program was recommended before school started and only because the Student's parent rejected the recommendation could a mid-term change occur. The Local System, therefore, argues that it should not be responsible for making decisions involving factors over which it did not have any control. The State Hearing Officer, however, does not find this argument to be persuasive. The Local System could have given consideration to the potential harmful effects of the different times when a change in placement might occur when the new program was recommended. In other words, when the new program was recommended, the staffing committee was in a position to consider the effects of both a move at the beginning of the school year or a later move, either mid-term or at the end of a quarter.

The Regional Hearing Officer found that the change from the residential program would have potential harmful effects because the Student does not adjust quickly to change. As a result, the Student needs to make a gradual re-entry into a public school setting. The

State Hearing Officer, therefore, concludes that the Local System must take steps to provide for the gradual re-entry of the Student into a public school program based upon considering the potential harmful effects of the move on the Student. The measures to be taken, the time and the duration of the measures are best left for determination by the Local System. The Student's parent would again have the right to request a hearing on the issue of the harmful effects if there is disagreement with the Local System's proposals.

The last major issue to be decided is whether it is improper to place a student, who has been identified as having a learning disability, with other students who have been primarily identified as being behaviorally disordered when the student has exhibited problems with peer modeling. The Student's IEP also states that services will be provided in a learning disabilities class rather than in a combined learning disabilities and behavioral disorder class. The Regional Hearing Officer found no evidence of any history of acting out in the classroom by the behaviorally disordered students enrolled in the program recommended by the Local System. The Regional Hearing Officer, therefore, decided that placing the Student with behaviorally disordered students did not affect the adequacy of the recommended program. Although the record does show that one of the behaviorally disordered students has displayed aggressive actions towards other students, these incidents have not occurred within the classroom. During the staffing committee meeting, when the Student's placement was being considered and after the Student's TEP was prepared, the committee was informed of the fact that the program would contain students who were primarily identified as being behaviorally disordered. The State Hearing Officer, therefore, concludes that the record supports the Regional Hearing Officer's decision that placement of the Student with behaviorally disordered students did not affect the adequacy of the recommended program and the labels attached to the programs do not affect the adequacy.

The Student's parent also appealed from the decision of the Regional Hearing Officer on the grounds the evidence did not support a decision that the proposed program was adequate. The Student's parent points to several factors to show error in the decision. The

Student's TEP sets a goal that the Student will join and participate in at least two clubs and participate in off-campus activities in order to improve his self-image. The IEP also sets the objectives that the Student will increase interaction with peers, decrease overdependence on adults, and decrease inappropriate ways of dealing with pressure and frustration. The Regional Hearing Officer found that there were no clubs the Student could join at the particular school he would be attending, but other clubs available in the Local System could be used for the purpose and the Local System would have to provide the Student with such activities. There is no requirement for program activities to be physically present in the facility where the program is located. The State Hearing Officer, therefore, concludes that the lack of clubs for the Student to join does not make the proposed program inadequate.

The Student's parent also points out that the evidence showed that the class had only five other students enrolled and that these students would not be in the class for the full day. The parent, therefore, argues that the goal set forth in the Student's IEP that he interact with at least five students could not be fulfilled. The IEP, however, does not state that the five students must be present for the entire day and that interaction must be constant. The State Hearing Officer, therefore, concludes that the fact that all of the students will not be in the classroom during the entire day does not make the proposed program inappropriate.

The parent also argues that the evidence showed that the Student would not be able to navigate the halls of the large school building, and the Regional Hearing Officer's decision that the Student could learn to navigate was not supported by any evidence. The record, however, does show that the Student has been able to learn how to navigate the campus of the residential facility in which he is presently enrolled, he has learned to navigate a major airport, and he has learned to ride a bus by himself. There was, therefore, evidence in the record which supports the Regional Hearing Officer's determination that the Student could learn to navigate the halls of the school where the program is located.

The Student's parent also points out that there was evidence the Student has difficulty coping with noise and the noise level in the large school building where the recommended program is located would be disorienting for the Student. As the Regional Hearing Officer observed, the Student did not have any apparent difficulty coping with the noise and activity level in an airport, and the Student could move about the school during periods when the other students were not changing classes so the activity level and noise would not be present. The State Hearing Officer, therefore, concludes that the noise and activity level in the school will not present problems for the Student with the guidance the Local System will be providing.

The Student's parent also maintains on appeal that there were procedural errors made by the Local System which the Regional Hearing Officer did not address, but which render the proceedings void. Specifically, the Student's parent argues that the Local System decided on the Student's placement before the IEP was prepared, and the Student was not identified as being behaviorally disordered, but was placed in a class that contained behaviorally disordered students. Contrary to the parent's objections, the evidence does not show that a decision was made concerning the Student's placement before the IEP was prepared. Additionally, the regulations do not prohibit the personnel from a local system from discussing a student's placement based upon the evidence contained in the student's files and arriving at a consensus of opinion based upon such review and discussions. No formal action was taken before the IEP was prepared, and there is no indication that the personnel from the Local System were bound to recommend the self-contained learning disabilities program regardless of what the IEP contained. The regulations also do not prohibit placement of a student who has been primarily identified as having a learning disability with students who have been primarily identified as being behaviorally disordered. The State Hearing Officer, therefore, concludes that the Local System did not make any procedural errors which make the recommendation for a self-contained learning disabilities program void or in violation of State or federal regulations.

The Student's parent also challenged the impartiality of the Regional Hearing Officer because the Regional Hearing Officer was selected by the Local System. Since this issue was not raised at the initial hearing, it cannot be raised for the first time on appeal. The State Hearing Officer, therefore, concludes that the challenge was not timely and no decision regarding it is required.

#### PART IV

#### DECISION

Based upon the foregoing findings and conclusions, the record submitted, and the briefs and arguments of counsel, the State Hearing Officer is of the opinion the record supports the decision of the Regional Hearing Officer. The self-contained learning disabilities program recommended for the Student is an appropriate program to meet the needs of the Student as set forth in the individualized education program, but, because of the potential harm that can result from immediately placing the Student into a public school setting, steps must be taken by the Local System, while the Student is enrolled in the residential program, to introduce the Student to a less restrictive environment. The specific actions to be taken, the timing, and the duration of these actions are to be determined by the Local System. If there is disagreement between the Local System and the Student's parent regarding the actions to be taken and the parent requests, the Regional Hearing Officer will have to decide whether the actions are appropriate considering the evidence already submitted and any new evidence submitted which specifically addresses itself to the question of the potential harm which might result to the Student because of the move from the residential program.

L. O. Buckland  
State Hearing Officer