STATE BOARD OF EDUCATION

STATE OF GEORGIA

IN RE: JOSEPH G.	:	
	:	CASE NO. 1983-36
AND	:	
	:	DECISION OF
ATLANTA CITY BOARD OF EDUCATION	:	STATE HEARING OFFICER

This is an appeal by the parent of Joseph G. (hereinafter "Student") from a decision by a regional hearing officer that the Atlanta City Public School System (hereinafter "Local System") could provide the Student with a free, appropriate public education. The basis of the appeal is that the Regional Hearing Officer erred in not permitting the introduction of documentary evidence, and that the evidence was insufficient to support the decision.

The Regional Hearing Officer found that the Student exhibited the symptoms of either infantile autism or childhood onset of pervasive developmental disorder, and mild retardation. The Student is sixteen years old, but functions at the level of a five-year old child. He has a sister living at home who also requires special education services. The Student is enrolled in a private residential program in another state where he has been since 1981. The parties agreed to the short-term and long-term goals and objectives of the Student's individualized educational program ("IEP").

The conflict arose over whether the Student required continued year-around residential placement, or if the Student could be served in the psychoeducational center in a program proposed by the Local System.

I. Admission of Documents

Prior to the hearing, counsel for the Student's parent informed counsel for the Local System that the documents the Student's parent intended to introduce at the hearing were available for inspection. Counsel for the Local System requested copies of the documents, but counsel for the Student's parent took the position that copies did not have to be exchanged, and the Student's parent should not have to bear the cost of copying the documents. At the hearing before the Regional Hearing Officer, counsel for the Local System objected to the introduction of the documents because copies had not been delivered and they therefore had not been disclosed five days prior to the hearing. The Regional Hearing Officer ruled the documents inadmissible. The excluded documents were included in the record on appeal. Several of the documents were copies of documents prepared by the Local System.

The Student's parent argued that the regulations do not require a parent to make copies of the documents to be introduced at the hearing; they only require the opposing party to be made aware of the documents to be introduced.

The Student's parent also argued that court rules do not require copying of documents by the party seeking to introduce them, and if they are to be copied, the copying is done at the expense of the party desiring to make the copies. The Local System argued that documents are not available if copies have to be made, and that the word "disclosed" means that copies have been given to the opposing party. In addition, the Local System argues that the custom or procedure that has been followed within the state is for copies of the documents to be given to the opposing party. Neither party cited any cases for their respective positions, and the State Hearing Officer is unaware of any decided cases which have addressed the issue.

The federal regulations merely state that a party to a hearing can prohibit "the introduction of any evidence . . . that has not been disclosed to that party at least five days before the hearing." 34 C.F.R. §300.508. In the comments provided when the regulations were initially made, there is the statement that: "Opening up the hearing and the evidence that may be presented should serve to insure that the result of a hearing will be in the best interests of the child." 42 Fed. Reg. 42512 (1977). The commentators to the previously proposed regulations had requested that hearings should be free or at reasonable cost to the parents, but a decision was made to exclude any provisions regarding costs. Id.

It therefore appears that the intent of the regulations was to (1) take into consideration the best interests of the child, but (2) the parent could expect to incur some costs.

In order for the regional hearing officer to make an informed decision, which would be in the best interests of the child, all relevant documents should be before the regional hearing officer regardless of whether they have been disclosed to the other side five days before the hearing. However, the regional hearing officer's discretion for determining admissibility based upon relevancy has been removed if the document is not disclosed five days before the hearing. This provision eliminates the element of surprise. The regulations, therefore, by limiting evidence to that which was disclosed five days before the hearing, substantially foreclose consideration of what is in the best interests of the child in determining the intent of the regulations concerning disclosure of documents.

The word "disclosed" is not a term of art. The ordinary meaning of the word is to make known that which was unknown. There is nothing in the definition of the word, or in the context of the regulations, which indicates that a party must make copies of the documents available to the other party in order for the documents to be admitted into evidence at the hearing. The State Hearing Officer, therefore, is of the opinion that it is unnecessary for copies of the

documents to be given to the opposing party in order to permit the documents to be entered into evidence. This ruling may result in higher costs to parents because an attorney may feel compelled to travel in order to examine the documents which a school system will be offering into evidence. In drafting the regulations, however, the cost of conducting hearings was not added as a consideration. It will also be necessary for the parties to prepare lists of the documents to be introduced in order to avoid any problem of proving whether the documents were disclosed before the hearing.

In the instant case, some of the documents deemed inadmissible were submitted by the Local System. These documents related to the assessments and meetings concerning placement for the 1983-1984 school year. The remainder of the documents, except one, related to prior placements, previous hearings, initial admission reports at the residential facility, and quarterly progress reports. These documents do not relate to the current placement except to establish the Student's level of performance at particular times in the past. This information was also established through the direct testimony of witnesses. The only current document which was not admitted was a letter written by the Student's treating medical doctor which recommended that the Student remain in the residential program because of the lack of sufficient progress and an inability to function

outside the residential environment. The State Hearing Officer, therefore, concludes that the information contained in the rejected documents was before the Regional Hearing Officer, and the decision to exclude the documents was not harmful to the Student's parent.

II. Sufficiency of Evidence

The Regional Hearing Officer found that the supervision required by the Student outside the classroom setting was custodial and did not differ from the supervision that any five-year old child would require. The Student does not present any danger to himself or others. The Local System can provide the Student with the personalized educational instruction and support services needed. In addition, the Local System can provide extra support services for the Student's parent, and a summer program is available if the Student's parent applies for the program.

The Regional Hearing Officer also found that the Student's regression and recoupment were similar to other exceptional children. The Regional Hearing Officer, therefore, found that the 180-day program proposed by the Local System was sufficient to meet the needs identified in the Students IEP.

The Student's parent contended during the hearing that the presence of another exceptional child in the home

would have an adverse impact upon the Student. The Regional Hearing Officer, however, found that the Student's sister would be a positive factor rather than a negative factor.

The Regional Hearing Officer decided that the Local System's recommended placement in a psychoeducational center would provide the Student with a free, appropriate public education in the least restrictive environment and would provide educational benefits to the Student.

The Student's parent argues on appeal that the record clearly shows that he requires a residential, 365-day program. The argument is buttressed by reference to testimony of the psychologist, the psychiatrist, and a staff member from the residential school, who testified on behalf of the Student, that he requires a residential program and he presents a danger to himself and others. Reference was also made to the testimony of both the Local System's consulting psychologist and the program director, who testified they observed improvements in the Student's behavior and that he required constant supervision.

A review of the record supports the decision of the Regional Hearing Officer. All of the witnesses agreed that the Student requires observation, but the degree of supervision was the same as that required by any five-year old child. The witnesses also testified that the danger the Student presented arose from his level of development. The Student is not

aggressive and is controllable. The supervision he requires does not arise from any educational requirements. The State Hearing Officer, therefore, concludes that the evidence supports the Regional Hearing Officer's findings.

The Student was placed in the residential program in 1981. He has made progress while in the residential program, but it is located in another state. The program recommended by the Local System represents the least restrictive environment for the Student. There was evidence that the Student has started to exhibit institutional behavior, and there is a need for him to be reintegrated in the home environment. The educational programs provided in the residential program and the psychoeducational center are substantially the same. The Local System has been able to provide services to other children who have manifested greater needs than the Student, and they have been able to make educational progress. The State Hearing Officer, therefore, concludes that the program proposed by the Local System will be in the least restrictive environment.

The Student's parent argues that she cannot provide the Student with the required supervision because she does not have the proper training, and because the Student is larger than his five-year old level of functioning. As found by the Regional Hearing Officer, the Student's needs do not arise from

his special education requirements. The Local System, therefore, is not required to provide a residential program when it can meet the Student's educational needs in a day program. In addition, the Local System can provide the Student's parent with training and assistance.

Based upon the foregoing, it is the State Hearing Officer's opinion that the Regional Hearing Officer erred in excluding the documents proffered by the Student's parent, but the error was harmless because the documents either were included in the documents submitted by the Local System, or were not relevant to the issues before the Regional Hearing Officer, or, upon review by the State Hearing Officer, were adequately covered by the direct testimony of the witnesses. It is, therefore, the further opinion of the State Hearing Officer that the Regional Hearing Officer properly found that the Local System can provide the Student with a free, appropriate public education in the least restrictive environment. The decision of the Regional Hearing Officer is, therefore,

SUSTAINED.

This 20th day of January, 1984.

L. O. Buckland

L. O. BUCKLAND
State Hearing Officer