

handicapped. The Student's parent objected to the moderately mentally handicapped classification. Based upon the Student's parent's objection to the classification, and the Representative's opinion that the Student should be classified as moderately mentally handicapped, the Local Board requested a hearing to determine the classification of the Student.

The hearing was held on October 16 and 17, 1986. Numerous delays were incurred for various reasons, both at the Regional and State level and all delays granted were within the discretion of the Regional Hearing Officer and State Hearing Officer. During the pendency of the hearing and this appeal, the Student attended school in a placement agreed upon by the parties.

At the opening of the hearing, the Local Board, through its counsel, stated that it intended to show the primary exceptionality of the Student was moderately mentally handicapped. This was the issue for which the Local Board had called the hearing. In the opening remarks, the Student's attorney stated she could not say whether the Student was moderate or mild, but that the Student's primary handicap was speech/language disorder. When confronted with a request to define the Student's position, counsel for the Student finally stated:

We are not challenging Georgia's regulations on their face at this time. We are just challenging how they have been put into effect in the placement of this particular child in the Atlanta School System.

At the hearing, the Local Board presented ample evidence that the Student should be classified as moderately mentally handicapped. A qualified school psychologist testified the Student's I.Q. scores were in the moderate mentally handicapped range, and the Student's teacher testified the Student did not function as high as the other students in her mildly mentally handicapped class.

The testimony presented by the Student did not contradict the position of the Local Board that the Student fell within the classification of moderately mentally handicapped. The Student presented testimony to establish that the Student had a language problem, which was never

contested by the Local Board. In fact, language had been listed as a handicap by the Local Board in the proposed IEP.

The Regional Hearing Officer issued a decision on February 2, 1987. The Regional Hearing Officer found that the classification of the Student as moderate was appropriate, no showing had been made that the Local Board could not provide an appropriate program, there was uncontroverted testimony that the Local Board could construct such a program, and the Local Board was not required to reimburse the Student's parent for the costs of an independent evaluation the Student's parent obtained. The Regional Hearing Officer, however, went further and concluded that, since the IEP was incomplete, it would not serve the basic needs of the Student and is likely to lead to more regression. Thus, the Regional Hearing Officer ordered a new IEP to be drawn and the Student's language/speech program to be increased to five hours per week.

PART III

DISCUSSION

The Student contends on appeal that the Local Board's evaluation was not appropriate and the Local Board should, therefore, be required to pay for the cost of the evaluation; that the Regional Hearing Officer misallocated the burden of proof; that the Regional Hearing Officer actually found for the Student, and that the Regional Hearing Officer's placement was inappropriate.

The Student's first argument is that the Local Board's evaluation was not appropriate. The Education for All Handicapped Children Act (20 U.S.C. 1400) requires a complete evaluation not less than every three years. The Student contends the Local Board did not properly reevaluate the Student because the Local Board did not test the Student's speech and language impairment in 1986. Also, the Local Board only did general testing of the type administered to all children in a mentally retarded class, and a 1985 speech evaluation performed

by the Local Board was insufficient to comply with the regulations.

The Local Board contends its evaluations were appropriate and, therefore, it is not required to pay for the independent evaluation obtained by the Student's parent. It contends the disagreement was not with the Local Board's evaluation, but rather with the placement recommended pursuant to the Local Board's evaluation.

The Regional Hearing Officer found that the independent evaluation did not provide anything which was not already known about the Student and that no witnesses testified that the Local Board's evaluation was improper. The State Hearing Officer is bound by the rule that if there is substantial evidence to support the decision of the Regional Hearing Officer, the Regional Hearing Officer's decision must be sustained. State Board Policy JQAA, June, 1984; Georgia Special Education State Program Plan FY 84-86, pg. 51.

There was substantial evidence to support the decision of the Regional Hearing Officer that the evaluations performed by the Local Board were appropriate. The findings of Student's witnesses were consistent with the evaluation performed by the Local Board. The Student argues that the speech and language testing done in 1985 was not sufficient because it failed to determine the nature and extent of the special education and related services the Student needed. While an evaluation may contain recommendations of services to be provided, an evaluation is not defective because they are missing. Only the IEP committee can determine the nature and extent of the special education and related services. The evaluation itself does not determine the nature and extent of the special education and related services the child needs, as is suggested by the Student. The Regulations provide that the evaluation is to be used to determine the nature and extent of the special education and related services the student needs. Additionally, the Student's argument that the testing done was only the basic testing administered to all children in a school, grade or class, is incorrect. The testing performed with the Student was individual testing consistent with the Regulations.

The Student's second contention is that the Regional Hearing Officer misallocated the burden of proof. The Student's related third contention is that the Regional Hearing Officer actually found for the Student. The second contention is based upon the argument that, because the Regional Hearing Officer concluded the Student had not disproved the Local Board's claim that it could appropriately place the Student, the Regional Hearing Officer was improperly placing the burden of proof on the Student to prove a negative since the Local Board could not provide an appropriate program. The Student contends that the Regional Hearing Officer actually found for her because the IEP was found to be insufficient.

The Student's second and third contentions result from the confusion that exists with this case, and which existed during the hearing below, regarding the issues to be decided. This case arose as a result of a request by the Local Board to classify the Student. Under State Board of Education Policy and Federal Regulations, the Local Board may request a hearing before it proposes to change the identification or evaluation of the Student. The proposal of the Local Board to change the classification of the Student from mildly mentally handicapped to moderately mentally handicapped constituted a change in the evaluation of the Student. Thus, it was an appropriate question for a hearing. During the hearing, discussions arose regarding the content of the Student's IEP. The Local Board, however, had not completed the Student's IEP. It would be inconsistent with the State Regulations to complete the IEP without making a determination, through evaluation, as to the degree of the Student's mental handicap. The fact that the State Regulations provide for a determination of the degree of the Student's mental handicap is not inconsistent with the Federal Regulations. Federal Regulations require the Student to be evaluated as being mentally handicapped, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, deaf-blind, multi-handicapped, or as having specific learning disabilities. 34 C.F.R. §300.300.5. Thus, Federal Regulations require classification and the State Regulations simply go further and provide for subclassifications in the area of mental handicaps.

Because no IEP had been completed, the issue of whether the Local Board offered the Student an appropriate placement could not be determined. Whether the Local Board offers a student an appropriate education must be determined by looking at the student's IEP. In some instances, the failure to complete the IEP might be a violation of a student's rights. In this instance, however, the IEP was not completed because of the disagreement which arose regarding the classification of the Student. The Local Board was within its rights to request a hearing regarding the Student's classification prior to completing the Student's IEP. Thus, in the present case, the Regional Hearing Officer could not have found that the Local Board could not offer the Student an appropriate education. Such a finding, if one had been made by the Regional Hearing Officer, would have been premature.

Since, under the facts presented, it would have been improper for the Regional Hearing Officer to find that the Local Board could not provide an appropriate program, and the IEP was not completed, the Student's second and third arguments provide no grounds for reversal. The fact that the Regional Hearing Officer stated the Student did not prove the Local Board could not provide an appropriate program is simply a statement of fact. Indeed, the Student could not have proven that the Local Board could not provide an appropriate program under the circumstances of the case. If that issue were to be considered, the Regional Hearing Officer would have first ordered the Local Board to complete the Student's IEP. The finding that the IEP did not provide the Student with an appropriate education was correct, but without giving the Local Board the opportunity to complete the IEP, such a finding is premature.

The Student's final argument, that the Regional Hearing Officer's placement was inappropriate, fails to recognize that the Regional Hearing Officer did not order placement. The Regional Hearing Officer concluded that the Local Board could provide an appropriate educational placement, but that the IEP must contain five hours per week of individual language/speech program and some similar instruction on a daily basis. The placement decision was still to be determined by the IEP committee.

The finding that the Student should be classified as moderately mentally retarded does not determine the Student's placement. The fact that the Student is classified as moderately mentally retarded would mean that the Student is eligible for such a program. The individual needs of the Student, however, as determined by the IEP, will determine the placement of the Student.

PART IV

DECISION

Based upon the foregoing discussion, the record presented, and the briefs of counsel, the State Hearing Officer is of the opinion that there was substantial evidence to determine that the Student should be classified as moderately mentally handicapped as opposed to mildly mentally handicapped. However, the finding that the IEP was not appropriate was premature because the IEP was incomplete.

This 12th day of May, 1987.

L. O. BUCKLAND
STATE HEARING OFFICER