

STATE BOARD OF EDUCATION

STATE OF GEORGIA

GREGORY P.

Appellant,

v.

**DEKALB COUNTY
BOARD OF EDUCATION,**

Appellee.

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CASE NO. 1988-16

**DECISION OF STATE
HEARING OFFICER**

PART I

SUMMARY

This is an appeal by the parents of Gregory P. ("Student") from a decision of a Regional Hearing Officer that the DeKalb County Board of Education ("Local Board") should provide the Student an updated evaluation, a staffing should be convened to complete an Individualized Education Plan ("IEP") for the Student, and that no remedy was necessary for any procedural violations because no procedural violations were proved. The decision of the Regional Hearing Officer is sustained.

PART II

FACTUAL BACKGROUND

The Student is a seventeen year old male who is currently attending a private school. In the summer of 1986, an eligibility report prepared by the Local Board found the Student to be severely emotionally disturbed ("SED") and the Local Board developed an IEP that proposed the Student be placed in its psycho-educational center. The parents, however, chose to place the Student in the private school at their own expense. In March, 1987, the parents requested a

hearing on the issue of tuition reimbursement for the private school placement. The request for a hearing was later dropped. The Local Board continued its attention to the Student, however, and convened an IEP meeting on June 1, 1987. At the IEP meeting, the Local Board asked the Student's parents to sign the eligibility report, which classified the Student as eligible for services for the severely emotionally disturbed. The parents refused to sign the report and refused to agree with the classification proposed by the Local Board. The Student's parents requested that the Local Board continue to develop the IEP, but the Local Board refused to continue unless an agreement was reached on the Student's handicapping condition. The Local Board then requested a hearing regarding the identification of the Student's primary area of exceptionality.

The hearing was held on February 4, 5, and 12, 1988, and the Regional Hearing Officer rendered a decision on March 19, 1988. The Student's parents contended that the Local Board had no authority to request the hearing. The Student's parents also contested the right of the Local Board attorney to represent the Local Board, the impartiality of the Regional Hearing Officer, and alleged numerous procedural violations. The Student's parents argued that their procedural rights were violated because (1) they were not notified of the eligibility meeting or given the opportunity to participate in the eligibility meeting, (2) the Local Board refused to complete the IEP upon the disagreement of the classification of the Student, and (3) there were no written procedures for the conduct of the hearing.

The Regional Hearing Officer held that the hearing should be held and determined that the Local Board should provide the Student with an updated evaluation, that a staffing should be convened promptly to complete the IEP for the Student, that there were no procedural violations and, thus, no remedy was necessary for any procedural violations. The Regional Hearing Officer amended her decision on March 21, 1988, to reflect her findings that the Student was a seriously emotionally disturbed, or severely behavior disordered, child who did not have a specific learning disability. The Student's parents appealed the decision of the Regional Hearing Officer

by letter received by the State Department of Education on April 8, 1988.

PART III

DISCUSSION

The Student's parents cite numerous contentions on appeal. While it is somewhat difficult to isolate the various contentions on appeal, or determine the remedy that is being sought for such contentions, because they overlap or are intermingled in the three briefs they filed, their basic arguments will be addressed. First, they contend the Local Board did not have the authority to request a hearing. Second, the Student's parents contend they were entitled to notice and attendance at the Student's eligibility team meeting. Third, they contend the Student should not have been labeled SED. Fourth, they object to the process because they contend there have been no written procedures provided by the State Department of Education. Fifth, they contend that the Regional Hearing Officer was not impartial and that the State Hearing Officer has a conflict of interest because his associate formerly worked for the State Department of Education. Sixth and last, they have moved for attorneys' fees and damages for abusive bad faith litigation.

The Student's parents' first position, that the Local Board had no authority to request the hearing, is based on their argument that they are not required to sign the IEP and that there is no requirement that a handicapping condition be determined to develop an IEP. The Local Board contends that it had the right to request a hearing under 34 C.F.R. § 300.506, which states that a parent or public educational agency may initiate a hearing on any of the matters described in 34 C.F.R. § 300.504(a) (1) and (2). These regulations provide for a hearing any time a public agency proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child, or if they refused to take the above steps. The Local Board contends that its position is supported by the case of Johanna J. v. Atlanta City Bd. of Ed., Case No. 1987-7.

After a careful review of the record, the State Hearing Officer concludes that the Local Board should not have requested a hearing. The Student's parents' argument, that they cannot be required to sign an IEP, is irrelevant to the issue of whether a local board can request a hearing. In this instance, the reason the Local Board was not entitled to request a hearing is that it was not initiating or changing the identification, evaluation or educational placement of the child. The Local Board contended its reason for requesting the hearing was that it was identifying the Student as SED. The Student, however, had been previously placed in special education and was already identified as eligible for SED placement in an eligibility report dated June 2, 1986. The Local Board was not changing the identification, evaluation or educational placement of the Student. Thus, the issue for which the Local Board requested the hearing, to determine the classification of the Student, was neither an attempt to initiate a new classification or to change the previous classification of the Student. At the time the Local Board requested the hearing, the Student's parents were requesting the Local Board to continue with the IEP process and provide an appropriate placement. The parents, however, stated they disagreed with the Student's classification as SED, but asked that an IEP be developed notwithstanding their objection. The Local Board argues that an agreement must be reached on a student's classification in order to have a meaningful continuation of the IEP meeting. The Local Board is correct, but, in this instance, neither the parents nor the Local Board were requesting a change in classification, and it is only when there is a proposed change in classification that a hearing can be requested. The regulation does not address the question of a meaningful continuation of the meeting because of a disagreement. The Local Board should proceed to develop the IEP. If the parents refuse to cooperate, or do not request a change of classification, the lack of cooperation or failure to request a change in classification should be noted. Thus, if the parent later claims that the proposed program was inappropriate because of some other classification, or because of the lack of services appropriate to some other classification, then the Local Board would have valid defenses for a program based upon an existing agreed-upon classification. The State Hearing Officer concludes that the request for a hearing was premature, but this conclusion does not affect the Regional Hearing Officer's decision that an IEP should be developed.

This case is thus distinguishable from the case of Johanna J., *supra*, because in Johanna J. the local board proposed changing the classification of the student from mildly mentally handicapped to moderately mentally handicapped. Where a local board proposes a change in the classification of a student, the local board clearly has the right to request a hearing in the event of a disagreement.

The Student's parents' second contention raised on appeal, that they were entitled to notice and attendance at the Student's eligibility team meeting, is not supported by the law or facts of the case. The Student's parents cite Cobb Cnty. Bd. of Ed v. Sean C., Case No. 1985-6, as supporting their position that they are entitled to notice and opportunity to participate in the eligibility meeting. In Sean C., however, the facts showed that the eligibility meeting actually amounted to a placement meeting. In the present case, the witnesses testified that the eligibility report did not determine placement. In fact, several eligibility reports were prepared. Since the eligibility report did not amount to an IEP meeting, and no placement decision had actually been made by the Local Board, no finding could be made that the eligibility meeting determined the Student's placement. Thus, Sean C. does not support the Student's parents' position, and they have presented no other support for their position.

The Student's parents' third contention is that the Regional Hearing Officer should not have labeled the Student as SED. It was unnecessary for the Regional Hearing Officer to make this determination, but there was no error committed, since the Student was already classified as SED. The Student's handicapping condition does not determine placement, but it is one of the factors to be considered in determining placement. The placement must be individually designed to meet the unique needs of the student. The evidence presented below was more than sufficient to support a determination by the Regional Hearing Officer that the Student was eligible to be classified as SED. Numerous experts, and factual showings, were presented to show that the Student met the criteria to be considered a severely emotionally disturbed student. The State Hearing Officer thus concludes that the Regional Hearing Officer did not commit any error in

issuing an order classifying the Student as SED.

The Student's parents' fourth argument is based on their contention that the State Department of Education has not provided any written procedures for the hearings and their due process rights were thereby violated. The Department of Education regulations provide that any party to a hearing has the right to be accompanied and advised by counsel and individuals with special knowledge and training with respect to the problems of handicapped children, present evidence and confront, cross—examine and compel the attendance of witnesses, and prohibit the introduction of any evidence that has not been disclosed to that party at least five days before the hearing. Beyond a bare allegation, the Student's parents have not shown how the process has, in any manner, violated their due process rights. The State Hearing Officer concludes that the Student's parents' contention that the lack of a civil practice act for special education hearings denies them due process is without merit.

The Student's parents' fifth contention revolves around the impartiality of the Regional and State Hearing Officers. The Student's parents contend that the Regional Hearing Officer was not impartial because she had previously served as a mediator in a case involving DeKalb County, she serves as an independent contractor for the neighborhood justice center which derives funding from DeKalb County, and because the Regional Hearing Officer serves as a hearing officer for several other state agencies other than the State Department of Education. The Student's parents argue that the State Hearing Officer has a conflict of interest because his associate formerly worked for the State Department of Education. None of these allegations, even if true, provide any substantive evidence of a lack of impartiality on behalf of the Regional or the State Hearing Officer. The State Hearing Officer thus concludes the claims of a lack of impartiality are without merit.

Finally, the parents have moved for attorney's fees and damages for abusive, bad-faith litigation. This argument is made based on various allegations of impropriety and improper

motives of the Local Board. In fact, it appears that there was a clear disagreement between the Local Board and the parents regarding the classification of the Student. The Local Board chose to attempt to resolve that disagreement before a third party before proceeding further with the IEP. While it has been ruled above that the Local Board did not have the authority to request a hearing, that does not mean the Local Board's request was an abuse of process. It appears from the record presented that the Local Board's actions were an attempt to clarify one of the issues that it felt would be an important factor in determining placement and were not based on any improper motivation. The State Hearing Officer concludes that the parents' claims of abuse of process are wholly without merit.

PART IV

DECISION

The decision of the Regional Hearing Officer, that the Local Board should provide the Student an updated evaluation, a staffing should be convened to complete an IEP for the Student, and that no remedy was necessary for any procedural violations consistent with the facts of the case and the law as applied to the facts of the case, is

SUSTAINED.

This 11th day of May, 1988.

L. O. Buckland
State Hearing Officer