

**STATE BOARD OF EDUCATION**

**STATE OF GEORGIA**

**DEKALB COUNTY  
BOARD OF EDUCATION,**

**Appellant,**

v.

**J. O.,**

**Appellee.**

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**CASE NO. 1988-22**

**DECISION**

**PART I**

**SUMMARY**

This is an appeal by both the DeKalb County Board of Education and the parent of J. O. (“Student”) from a decision by a regional hearing officer. A due process hearing was requested by the DeKalb County School System (“Local Education Agency” or “LEA”) under the provisions of the Education for All Handicapped Children Act, 20 U.S.C. § 1401 et. seq. (the “Act”) to determine the primary area of exceptionality of the Student. The Regional Hearing Officer held that the LEA had improperly halted a meeting called for the purpose of developing the Student’s individualized education program (“IEP), that the Student was properly classified by the LEA, but that the program proposed for the Student was improper. The LEA appealed, and the Student’s parent appealed those portions of the decision that held the LEA had not committed any procedural violations. The decision of the Regional Hearing Officer is reversed in part and sustained in part.

**PART II**

**BACKGROUND**

The Student is twelve years old and has been diagnosed as having Down’s Syndrome.

She has been enrolled in the LEA's special education program since she was three-months old.<sup>1</sup> From 1982 until 1986, the Student was deemed eligible for services through the LEA's mildly mentally handicapped ("MIMH") program. During this period, the Student made some progress, but the progress was slight compared to other students in her class. An evaluation in 1985 determined that the Student was no longer eligible for services through the MIMH program, but she was eligible for services through the moderately mentally handicapped ("MOMH") program. In August, 1986, the Student began receiving services through the MOMH program. After another evaluation in May, 1987, a meeting was convened on July 30, 1987, to develop the Student's IEP for the 1987-1988 school year. The Student's parent disagreed with the LEA's eligibility evaluation that the Student's primary exceptionality was MOMH and the IEP meeting was adjourned. The Student's parent maintained that the Student was behavior disordered and wanted the Student's placement changed to another program outside the MOMH program. Attempts to reconcile the differences between the Student's parent and the LEA were unsuccessful, and, on November 2, 1987, the LEA requested a hearing before a regional hearing officer in order to determine the Student's primary area of exceptionality.

The hearing was held over a span of five days during December, 1987, and January, 1988. Shortly after the hearings commenced, the Student's parent petitioned for a hearing. The two hearings were consolidated and the issues raised by both parties were considered. The Regional Hearing Officer issued a decision after the parties were provided an opportunity to submit post-hearing briefs.

The LEA's request for a hearing was for the purpose of determining the Student's primary area of exceptionality; the Student's parent request for a hearing was based upon charges the LEA had violated the due process rights of both the Student and the parent and had committed numerous procedural violations. Additionally, the Student's parent moved to dismiss

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<sup>1</sup> The early admission was under a trial program developed by the LEA to attempt early intervention with children identified as having special education needs.

the LEA's hearing request on the grounds the LEA did not have any authority to request a due process hearing.

The record and the Regional Hearing Officer's findings show that the Student made slight progress in the MIMH program. She also experienced behavior problems. In 1985, the Student's teacher requested a re-evaluation of the Student to determine if she was moderately mentally handicapped. The evaluation concluded that the Student was moderately mentally handicapped, but she was continued in the MIMH program for the remainder of the school year. Another evaluation was performed during the spring of 1986, and it was determined that the Student was no longer eligible for the MIMH program. In September, 1986, the Student was placed in the MOMH program after the Student's parent initially resisted the change. During the 1986-1987 school year, the Student was able to make progress on the goals and objectives established in her IEP.

During the spring of 1987, the LEA notified the Student's parent that the Student would be re-evaluated. The Student's parent submitted a list of evaluation criteria that the LEA incorporated in its evaluation process. A multi-disciplinary team conducted the evaluation and prepared a report, but the team did not conduct any meetings. The evaluation was based upon intelligence tests, behavior tests, classroom observations, teacher observations, and other available data. The team concluded that the Student's primary exceptionality continued to be MOMH. The test scores and observations complied with the ranges established by the State for MOMH eligibility.

The Student's parent was notified that an IEP and placement meeting would occur on July 30, 1987. The Student's parent attended the meeting, but agreement was not reached on the Student's primary handicapping condition and the meeting was adjourned before the Student's IEP was prepared. The Student's mother wanted the Student's primary exceptionality to be classified as behavior disorder or MIMH, but the LEA refused to make a change from MOMH.

Subsequent meetings and mediation attempts did not result in any agreement. The LEA then notified the Student's parent that it was requesting a due process hearing to determine the Student's primary exceptionality.

The hearing before the Regional Hearing Officer began on December 8, 1987. The hearing was not completed and was continued to January 5, 1988. On January 4, 1988, the IEP and placement meeting was reconvened with the Student's parent present. The evaluation procedures, tests used, and method of reporting were discussed, but the meeting was adjourned without the IEP being completed. In the interim, the Student has remained in the current placement within the MOMH program.

The Regional Hearing Officer decided that the LEA had not violated the Student's or the Student's parent's due process rights except by requiring the parent to sign the IEP form and thus not completing the IEP. Additionally, the Regional Hearing Officer decided that the Student was properly evaluated as being moderately mentally handicapped, but that she should be placed in a mildly mentally handicapped program because it represents the least restrictive environment. Both parties filed timely appeals with the State Department of Education.

### **PART III**

#### **DISCUSSION**

##### **A. The Student's Appeal**

The Student's parent listed fifteen issues for appeal but they have been grouped to facilitate discussion. Most of the issues relate to the parent's contention that the Regional Hearing Officer erred in holding that the LEA had not violated any procedural rights other than requiring signatures and stopping the IEP hearing process. In addition, the Student's parent has made other claims concerning the conduct of the hearing and the hearing process. The Regional Hearing Officer's decision is upheld on those issues raised by the Student's parent.

The Student's parent maintains that the LEA does not have the authority to request a hearing before a regional hearing officer. Additionally, the Student's parent argues that the LEA violated the Student's and the parent's due process rights by (1) preparing an eligibility report prior to preparing the IEP without holding an multi-disciplinary meeting and inviting the parent's attendance; (2) using inappropriate testing instruments in preparing the eligibility report, and (3) omitting scores from the eligibility reports.

In the instant case, the LEA conducted an annual evaluation of the Student. The evaluation report was prepared by one of the members of the evaluation team. The evaluation team determined that the Student's specific learning disability had not changed from the previous year. The Student's parent claims that there was a violation of due process rights because an evaluation report was prepared before the IEP meeting, the evaluation team did not meet, and the Student's parent was not present when the evaluation was conducted. The regulations, however, require an evaluation before an IEP is prepared, and there is no requirement for the evaluation team to meet, or, if there is a meeting, that the parent be present at the meeting.

Before an IEP is prepared, a student has to be evaluated to determine the student's educational needs. 34 C.F.R. § § 300.530 - 300.543. When the evaluation is completed, an evaluation report has to be prepared. The report has to include information on the basis for determining that the student has a specific learning disability, the behavior noted during observations of the student, and the relationship of the behavior to the student's academic functioning. 34 C.F.R. § 300.543. There is no requirement that the members of the evaluation team hold a meeting, nor is there any requirement for the presence of the student's parent if any meetings are held. The only meeting requirement placed upon the evaluation team is that, after the evaluation is completed, a member of the evaluation team has to be present at the IEP meeting. 34 C.F.R. § 300.344(b)(1). Only in those situations where the evaluation meeting has been used as an IEP meeting has it been held that a parent has the right to be present. See, Cobb

Cnty. Bd. of Educ. v. Sean C., Case No. 1985-6 (Ga. DOE, 1985). In the instant case, there was no evidence that the IEP was prepared by the evaluation team or that the evaluation team made any placement decisions. The evaluation team merely provided an eligibility report to be used by the placement committee in preparing the Student's IEP.

As illustrated in Sean C., *supra*, it is possible for placement decisions to be made during the evaluation process. An evaluation involves procedures "to determine whether a child is handicapped and the nature and extent of the special education and related services that the child needs." 34 C.F.R. § 300.500. In determining whether a student is handicapped and eligible for special education services, a student may be classified as mentally handicapped at the levels of (1) mildly mentally handicapped, (2) moderately mentally handicapped, (3) severely mentally handicapped, or (4) profoundly mentally handicapped. Ga. Dept. of Ed. Regulations and Procedures, IDDFd3 VI-A-2. The Federal Office of Special Education Programs has taken the position that any labeling to identify universal characteristics has the unavoidable consequence of planning a child's needs based upon what the child has in common with other similarly identified children and, therefore, is presumed to violate the protections accorded under Federal and State laws. See Richards, EHLR DEC. 211:440 (1987). In the instant case, there is no evidence that the LEA uses the evaluation process to determine the contents of the Student's IEP. The evaluation process is used to determine whether the Student is eligible for a particular program. The LEA's MOMH program emphasizes a functional approach, whereas its MIMH program is more academically oriented. The Student's eligibility, however, does not affect the IEP contents, i.e., the Student is not automatically given MOMH services or instruction because of her eligibility; academically oriented instruction and other special education needs are available for the Student if they are educationally beneficial. Within each program, a continuum of placements are available, from self-contained classrooms to regular classes with resource services. Thus, even though the Student is eligible for special education services under the MOMH program, she could be placed in classes containing students who are eligible for special education services under the MIMH program, or she could be placed in a regular classroom with

resource services if that placement were deemed to be educationally beneficial.

The State Hearing Officer concludes that the Regional Hearing Officer correctly held that the LEA did not violate any due process rights of the Student or the Student's parent by conducting an evaluation before preparing an IEP, and in failing to hold a multi-disciplinary evaluation meeting. Additionally, the State Hearing Officer concludes that the LEA has not used evaluation and eligibility labels to determine the contents of the Student's IEP.

The Student's parent also claims that the evaluation process was flawed because a test administered to the Student was not listed on the evaluation report, and inappropriate tests were given to the Student. The regulations, however, do not require the listing on the evaluation report of all tests that have been administered to the Student, nor do the regulations require that any particular tests be given to a student. There is evidence in the record that the particular test given to the Student was considered by the evaluation team, but it was not considered to be an appropriate test for determining the Student's primary area of exceptionality. Evaluation tests have to be tailored to assess specific areas of educational needs, but specific tests are not required. 34 C.F.R. § 300.532(b). There is evidence in the record that the tests used by the LEA were appropriate to determine the educational needs of the Student. The State Hearing Officer, therefore, concludes that the Regional Hearing Officer correctly concluded that there was no due process violation that resulted from the failure to list the test on the evaluation report, or from using the tests that were administered.

The Student's parent claims that the LEA did not have the authority to request a due process hearing, and, as a result, damages and attorney fees should be awarded. 34 C.F.R. § 300.506, however, clearly states:

A parent or a public educational agency may initiate a hearing on any of the matters described in Reg. 300.504(a) (1) and (2). [emphasis added]

34 C.F.R. § 300.504(a) (2) refers to the refusal of a public educational agency to change the identification, evaluation, or educational placement of a student. In the instant case, the Student's parent wanted the Student's eligibility evaluation changed from MOMH to MIMH, but the LEA refused to make the change. The LEA then requested a hearing before a regional hearing officer in order to obtain a decision from a disinterested party. In Gregory P. v. DeKalb Cnty. Bd. of Educ., Case No. 1988-16 (Ga. DOE 1988), it was held that the LEA improperly requested a due process hearing. In Gregory P, however, the record did not disclose that the LEA had refused to make a change in the student's evaluation. The student had been classified as being severely emotionally disturbed and the parents requested a change, but then dropped their request. The LEA, nevertheless, proceeded with a hearing even though there was no change or refusal to change the evaluation. In the instant case, however, the LEA has refused to make the change requested by the Student's parent. The State Hearing Officer, therefore, concludes that the LEA clearly has the right to request a hearing under the regulations when it refuses to make a requested change in classification of a student. The Regional Hearing Officer, therefore, correctly refused to dismiss the proceedings requested by the LEA, and correctly refused to award damages or attorney fees to the Student's parent.

The Student's parent also claims that the Regional Hearing Officer erred in not requiring the LEA to pay for the independent evaluation obtained by the parent. 34 C.F.R. § 300.503(b) provides:

A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. However, the public agency may initiate a hearing ... to show that its evaluation is appropriate. If the final decision is that the evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

The Regional Hearing Officer decided that the evaluation performed by the LEA, and its determination that moderately mentally handicapped was the primary handicapping condition, was appropriate. The record shows that the evaluation was made on the basis of tests, observations, and interviews that were designed to identify the Student's specific educational



needs. The record does not show that the Student's parent requested an independent educational evaluation at public expense, even though there was clear disagreement with the results of the LEA's evaluation and mediation was attempted to resolve the issue. When the hearing began, the issue was raised whether an independent evaluation was necessary and the Regional Hearing Officer decided against the need. After the hearing began, the Student's parent nevertheless obtained an independent evaluation of the Student. Since the evaluation by the LEA was found to be appropriate, the State Hearing Officer concludes that the Regional Hearing Officer was correct in not granting reimbursement to the Student's parent for the independent evaluation.

The Student's parent maintains that the Regional Hearing Officer erred in holding that the failure to provide information regarding the availability of free or low cost legal counsel was a harmless error on the part of the LEA. Other than to point out that the regulations require a list of attorneys to be provided, the Student's parent has not shown where any harm resulted from not receiving the list. The State Hearing Officer, therefore, concludes that the Regional Hearing Officer did not err in concluding that the failure of the LEA to provide a list was a harmless error and there is no requirement for the LEA to pay for the representation obtained by the parent.

The Student's parent maintains that the Student's rights of confidentiality were breached by the LEA because it permitted its counsel and an independent psychologist to observe the Student and review the Student's records while preparing for the hearing before the Regional Hearing Officer. 34 C.F.R. § 300.571(a) (2) provides that parental consent has to be obtained before personally identifiable information is disclosed, unless the information is to be used to meet the requirements of a due process hearing. 34 C.F.R. § 300.563 provides that a public educational agency has to maintain access records except for access by parents and authorized employees of the agency. In the instant case, the access to records and the viewing of the Student were done in preparation for a due process hearing. Additionally, the attorney and the psychologist were employed by the LEA for the purposes of presenting information at the hearing. Both sections 300.571 and 300.563 recognize exceptions to the requirements of

confidentiality that appear to be applicable in the instant case. The State Hearing Officer, therefore, concludes that the Regional Hearing Officer did not err in holding that the LEA had not violated the Student's confidentiality rights by permitting its attorney and psychologist to observe the Student and review the Student's records as part of their preparation for the due process hearing.

The Student's parent also claims that the Regional Hearing Officer was not impartial. This claim appears to arise from the Regional Hearing Officer's decision rather than from any evidence of partiality on the part of the Regional Hearing Officer. Repeatedly during the hearing, the Regional Hearing Officer questioned the parties about his impartiality, and both parties agreed that the Regional Hearing Officer was impartial. The Student's parent alleges that actions of the Regional Hearing Officer occurred outside the hearing, but were not raised during the hearing, that establish the Regional Hearing Officer's bias. For example, the Student's parent alleges that the Regional Hearing Officer was observed arriving at the hearing location but entered the hearing thirty-five minutes later and informed the participants that he had just arrived.

Additionally, the Student's parent alleges that the Regional Hearing Officer made frequent eye contact with the LEA's attorney. Even if the alleged actions occurred, they do not show any bias on the part of the Regional Hearing Officer. Except in one instance, the Student's parent had an opportunity to raise the issue during the hearing and failed to pursue any objections. The State Hearing Officer, therefore, concludes that the Regional Hearing Officer was impartial and his actions do not provide any basis for reversing his decision.

The Student's parent claims that the Regional Hearing Officer abused his discretion by taking too long to render a decision. The record, however, shows that the Regional Hearing Officer rendered a decision within the time of the extensions granted by the parties so that the parties could submit post-hearing briefs. The State Hearing Officer, therefore, concludes that the

Regional Hearing Officer did not abuse his discretion and take too long to render a decision.

The Student's parent also claims that the State Hearing Officer has a conflict of interest because a former partner of the State Hearing Officer was once employed by the Georgia Department of Education. The Student's parent does not point out how this may establish a conflict of interest, and does not advance any arguments in support of the assertion. The State Hearing Officer is unaware of any conflict of interest, appearance of a conflict, or any violation of any canons. The State Hearing Officer, therefore, declines to recuse himself.

All other claims asserted by the Student's parent were either improperly presented, or not raised during the hearing, or are unsupported by the evidence, and are, therefore, deemed without merit.

B. The LEA's Appeal

The LEA maintains on appeal that the Regional Hearing Officer erred in making a determination concerning the appropriateness of the Student's placement, and erred in holding that the Student was denied educational benefits when the IEP meeting was recessed to determine the Student's primary exceptionality. The State Hearing Officer agrees with the LEA.

Although the Regional Hearing Officer decided that the LEA had the right to request a hearing, he also held that the LEA denied the Student substantial educational benefits by halting the IEP meeting and requesting a hearing to determine the Student's primary exceptionality. The Regional Hearing Officer reasoned that, even though the LEA had the right to request a hearing to determine the Student's primary exceptionality, it did not have the right to stop the IEP process when the Student's parent wanted to change the Student's handicap classification and the LEA refused. It is unclear whether the Regional Hearing Officer was simply holding that a parent is not required to sign an IEP, or that the LEA had to proceed with the IEP meeting regardless of any disagreements between the LEA and the parent. There is no requirement for a

parent to sign the IEP, but the Regional Hearing Officer stated that the LEA had a responsibility to develop an IEP and provide a placement, without regard to the primary exceptionality, because the Student is entitled to an individualized plan that is not based on labels or group classifications. As a result, the Regional Hearing Officer determined that the Student was deprived of an IEP review and parental input in the placement decision because the IEP review meeting was halted to conduct a hearing to determine the Student's primary exceptionality. It thus appears that the Regional Hearing Officer has held that the LEA should develop an IEP and provide a placement without determining the Student's handicap, and regardless of whether the parent agrees with anything.

34 C.F.R. § 300.504(B) (2) provides:

Except for pre-placement evaluation and initial placement, consent may not be required as a condition of any benefit to the parent or child.

The Georgia Department of Education Regulations and Procedures provide that signed parental consent is required before an evaluation is made and before a placement is made, but there is no requirement for the LEA to obtain a signed agreement that the results of the evaluation are correct. Ga. Regs. IDDFd3-IB. If written parental consent is not given, then either the LEA or the parent can request a hearing. Ga. Regs. IDDFd3-IB-li; IDDFd3-IB-2h. Thus, even though parental consent is required in order to perform an evaluation or make a placement, benefits cannot be denied to the parent or child if parental consent is not given. This, however, does not mean that, if a parent opposes a program or situation and withholds consent, the school system can force a parent or child into the opposed program or situation based on the argument that the student cannot be denied the benefit of special education services. The comment to 34 C.F.R. § 300.504 states:

If ... there is no legal requirement for consent outside of these regulations, the public agency may use the due process procedures under this subpart to obtain a decision to allow the evaluation or services without parental consent. The agency must notify the parent of its actions, and the parent has appeal rights as well as rights at the hearing itself.

The “hearing itself” refers to the hearing requested by the school system. The comment indicates that, if a parent does not consent to an evaluation or placement, then the school system needs to request a hearing to determine if an evaluation or a placement should be made; it is the benefit of a hearing that cannot be denied to the student or parent.<sup>2</sup>

A school system does not deny a student any benefits under the Act when it takes an action that is permitted under the Act. In the instant case, the necessity of a hearing is a benefit for the Student since the LEA cannot arbitrarily refuse to change the Student’s classification; the action or inaction has to be approved by the parent or a hearing officer. Additionally, the Student’s placement has not been changed, and the Student will continue to receive the benefits of the Act.

Both the Regional Hearing Officer and the Student have taken the position that the LEA’s approach results in the classification determining the contents of the IEP. This position, however, overlooks the necessity of conducting an evaluation in order to determine if a student even requires special education services. One of the purposes of the Act is to move handicapped students out of special classes and into the regular classroom. Evaluation is necessary in order to establish that a school system can even place a student into a special education program. The necessity of an evaluation is another of the benefits provided students and parents to avoid arbitrary placement of students into special classes.

Whatever the basis for the decision, whether because the LEA requested a hearing to determine the Student’s primary exceptionality, or because the Regional Hearing Officer felt the eligibility report resulted in a placement determination, the State Hearing Officer concludes that

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<sup>2</sup> The U.S. Dept. of Education may take a contrary position. See., Winston, 2 EHLR DEC. 213:103 (1987) (school districts cannot condition changes in an educational program or placement upon parental consent). In the instant case, however, the LEA is not proposing any change in the Student’s placement and the educational program has remained the same.

the Regional Hearing Officer erred in holding that the LEA withheld educational benefits from the Student and the Student's parent.

The LEA also claims on appeal that the Regional Hearing Officer erred in deciding that the Student should be placed into an MIMH class. The State Hearing Officer agrees that with the LEA.

34 C.F.R. § 300.343 requires that meetings be held for the purpose of “developing, reviewing, and revising” a student's IEP. 34 C.F.R. § § 300.344 and 300.345 require

participation in the IEP meetings by the student's parent(s). A student's placement cannot occur before an IEP is prepared. 34 C.F.R. § 300.342. See, Johanna J. v. Atlanta City Bd. of Educ., Case No. 1987-7 (Ga. DOE, 1987); In Re: Jim B., Case No. 1981-4 (Ga. DOE, 1981). A regional hearing officer cannot determine the proper placement of a student in the absence of an IEP prepared by the a school system and the student's parents. - Johanna J., supra; 34 C.F.R. § 300.552(a)(2). In the instant case, an IEP was not prepared because the LEA requested a hearing before the IEP was completed. The Student's placement cannot be determined until the IEP is completed. It will be necessary for the LEA and the Student's parent to complete the IEP. The State Hearing Officer, therefore, concludes that the Regional Hearing Officer erred by determining that the Student should be placed into an MIMH program in the absence of an IEP.

#### **PART IV**

#### **DECISION**

Based upon the foregoing, the record presented, and the briefs of the parties, the State Hearing Officer is of the opinion that the LEA did not violate any of the Student's or the Student's parent's due process rights, the Regional Hearing Officer was not biased and did not commit any errors in the conduct of the hearing, but was in error in deciding that the LEA denied

the Student educational benefits by requesting a hearing before completing the IEP and in making a placement decision in the absence of an IEP. The decision of the Regional Hearing Officer regarding the Student's claims, therefore, is affirmed, but that part of the decision that finds that the LEA deprived the Student of educational benefits and requires the LEA to place the Student in an MIMH program is reversed.

This 15<sup>th</sup> day of July, 1988.

L.O. Buckland  
State Hearing Officer

