

STATE BOARD OF EDUCATION

STATE OF GEORGIA

TODD D.,	:	
	:	
Appellant,	:	
	:	CASE NO. 1988-38
v.	:	
	:	DECISION
DEKALB COUNTY	:	
BOARD OF EDUCATION,	:	
	:	
Appellee.	:	

PART I

SUMMARY

This is an appeal by the parents of Todd D. (“Student”) from the decision of a regional hearing officer that the DeKalb County Board of Education did not have an appropriate educational facility for the Student and that the Georgia Department of Education was, therefore, required to provide services for the Student under the provisions of the Education for All Handicapped Children Act, 20 U.S.C. § 1401 et. seq. The decision of the Regional Hearing Officer is sustained in part and reversed in part.

PART II

FACTUAL BACKGROUND

The Student is a severely emotionally disturbed nineteen year old who has been diagnosed as a paranoid schizophrenic. He has been enrolled in special education programs since he was three years old. The DeKalb County Board of Education has served as the Student’s local education agency (“LEA”) since 1974 when the Student was in preschool. In 1986, the LEA and the parents attempted to place the Student in the Columbus Regional Hospital in Columbus, Georgia. The Department of Human Resources, however, would not accept the Student because

he was not in State custody and was not a priority candidate for admission. During the period November 25, 1986 through April, 1987, the Student was placed in a residential school in Hialeah, Florida. He was discharged from the residential school in April, 1987 and returned home. The Student then began attending the Community Friendship facility at the parent's insistence.

On June 13, 1988, a placement committee meeting was convened. Goals and objectives for the Student were established and agreed upon. The Student's individualized educational program ("IEP") provided for placement in the Columbus Regional Hospital. Again, however, the Department of Human Resources refused to accept the Student because he was not in State custody and was not a priority candidate for admission.

Because the Department of Human Resources would not accept the Student, the Student's parents requested a due process hearing before a regional hearing officer in order to have the IEP implemented. Prior to the due process hearing, the State Department of Education (the "Department") and the Department of Human Resources were invited to attend and participate. Neither agency, however, participated in the due process hearing.

The Regional Hearing Officer found that the IEP was appropriate because the LEA and the Student's parents agreed to all of its provisions; the Student needs the related services of a residential treatment center in order for him to have any chance of receiving an education; neither the LEA nor the Department operates a residential treatment center appropriate for the Student, and the Student cannot be placed in a Department of Human Resources facility because the agreement between the Department and the Department of Human Resources eliminated Department of Human Resources' hospitals as possible placements for related services for handicapped children. The Regional Hearing Officer then decided that the Department was responsible for providing for implementation of the Student's IEP in an education program to be provided as close to home as reasonably possible.

PART III
DISCUSSION

The Student's parents and the Department appealed the decision of the Regional Hearing Officer. The parents appealed on the ground the decision did not provide the Student with any relief. The LEA supports the parents' appeal and claims that it does not have a residential facility available for the Student; placement of the Student, therefore, is the responsibility of the Department. The LEA also maintains that the Department has violated the provisions of the Education for All Handicapped Children Act, 20 U.S.C. § 1401 et. seq., (the "Act") by not having an agreement with the Georgia Department of Human Resources to provide hospital facilities for handicapped children.

The Department maintains that it was not a party to the hearing before the Regional Hearing Officer and, therefore, cannot be held responsible by the Regional Hearing Officer. In addition, the Department maintains that the Regional Hearing Officer erred as a matter of law and fact in finding that it had eliminated the Department of Human Resources hospitals as possible placements for related services to be provided to handicapped children. The Department also maintains that the Regional Hearing Officer erred as a matter of law in holding that it was responsible for providing services if the LEA were unable to provide the services and in holding that residential services have to be provided within the state.

This appeal raises three issues. The first issue is whether a parent and an LEA can agree on a placement they both know the LEA cannot provide with the LEA then able to absolve itself of all responsibility and force the state educational agency to provide the agreed upon services. The second issue is whether a state educational agency is a party to the hearing before the regional hearing officer so that the regional hearing officer can issue a decision that requires the state educational agency to take direct action with respect to providing a handicapped student with a free appropriate public education, i.e., provide direct services to handicapped children.

The third issue is whether the “least restrictive environment” requirement of the Act means that a child has to be placed in a program that is located within the child’s home state when programs are available in other states.

The regulations implementing the Act provide that local education agencies must develop and implement an IEP for each of their handicapped children, and the state educational agency will act as an insurer that local education agencies comply. 34 C.F.R. Reg. 300.341. The LEA and the parent are responsible for preparing a child’s individualized education program. 34 C.F.R. Reg. 300.344. If the parent and the local education agency cannot reach an agreement on a student’s placement, then either the parent or the local education agency can request a “due process” hearing in order to permit an independent hearing officer to decide if the student’s IEP will provide the student with a free appropriate public education. 34 C.F.R. Reg. 300.506. The Act and the implementing regulations do not provide for the State educational agency, or any other entity, to participate in the hearing as a party. The local educational agency has the primary responsibility for providing a free appropriate public education to its handicapped students.

The state education agency has overall responsibility for implementation of the Act by insuring that the local education agencies comply. For example:

Req. 300.148 - Each annual program plan must set forth policies and procedures designed to insure that funds paid to the State under Part B of the Act are spent in accordance with the provisions of Part B

Req. 300.300 - Each State shall insure that free appropriate public education is available to all handicapped children ... within the State....

Req. 300.304 - Each State educational agency shall insure that each public agency establishes and implements a goal of providing full educational opportunity to all handicapped children....

Req. 300.341 - The State educational agency shall insure that each public agency develops and implements an individualized education program for each of its

handicapped children.

Req. 300.530(a) - Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of Reqs. 300.530—300.534.

If a local educational agency cannot provide a free appropriate public education then 34 C.F.R. Req. 300.360 provides:

(a) A State educational agency may not distribute funds to a local educational agency, and shall use those funds to insure the provision of a free appropriate public education to handicapped children residing in the area served by the local education agency, if the local educational agency, in any fiscal year:

(3) Is unable or unwilling to establish and maintain programs of free appropriate public education.

The regulations provide that initial responsibility for providing a free appropriate public education rests with the local educational agencies, and the first step in the process, once a student has been determined eligible for services, is the preparation of an IEP. The IEP is prepared by a committee composed of representatives of the local educational agency and the student's parents. 34 C.F.R. Req. 300.344. The state educational agency does not participate in the preparation of the IEP. Disputes between the local educational agency and the parents concerning the IEP or its implementation are taken before a regional hearing officer. It thus appears that the LEA and the Student's parents can agree upon an IEP they both know the LEA cannot implement. Ultimately, the only issue to be decided by a regional hearing officer is whether the IEP is appropriate and whether the local educational agency can provide a student with a free appropriate public education.

Neither decision by a regional hearing officer requires a State educational agency to be a party to the hearing before the regional hearing officer. If the regional hearing officer decides that the local educational agency cannot provide a free appropriate public education, then the

provisions of 34 C.F.R. Req. 300.360 become operative, regardless of whether the Department was a party to the hearing before the regional hearing officer. Under Regulation 300.360, a State educational agency is automatically prohibited from distributing funds to a local educational agency that “[i]s unable or unwilling to establish and maintain programs of free appropriate public education”, or that “[h]as one or more handicapped children who can best be served by a regional or State center designed to meet the needs of those children.” The State educational agency is then directed to “use those funds to insure the provision of a free appropriate public education to handicapped children residing in the area served by the local educational agency....” Since the provisions of Req. 300.360 are automatic if a regional hearing officer decides that the local educational agency cannot provide a free appropriate public education, it is unnecessary for a State educational agency to be a party to the hearing before the regional hearing officer.

The Regional Hearing Officer in this case decided that the Department was responsible for providing for implementation of the Student’s IEP in an education program to be provided as close to home as reasonably possible. The Department argues that its capacity is merely supervisory and it is not in the business of providing direct services, nor is it required to provide direct services. The language of 34 C.F.R. Regulation 300.360(b) supports the position of the Department that it is not required to provide direct services.¹ The Department, however, does have the responsibility of insuring that the Student is provided with a

free appropriate public education, whether such services are provided directly by the Department, by contract, or through other arrangements, whatever they might be. The Regional Hearing Officer, thus, cannot direct the Department to provide direct services; the decision has to be limited to deciding whether the LEA can provide the Student with a free appropriate public education.

¹ 34 C.F.R. 300.360, subpart (b), provides:

In meeting the requirements of paragraph (a) of this section, the State educational agency may provide special education and related services directly, by contract, or through other arrangements. [Emphasis added].

The Department argues, as part of its support for the argument that its position is supervisory, that it is limited to withholding all funds from the LEA if the LEA is not in compliance with the Act. The LEA argues that State educational agencies cannot withhold funds from local educational agencies in lieu of providing direct services because “Congress only authorized withdrawal of funds to the extent ... the state educational agency may use such funds to provide the direct services necessary, not to withhold all funds entirely as a mechanism to ‘threaten’ local educational agencies.” LEA Brief, p. 18. Neither the Department nor the LEA, however, have adequately briefed the issue of the extent a State educational agency can withhold funds from a local educational agency. A decision in this case on the issue of the extent to which funds can be withheld would be premature since there has not been any attempt to withhold any funds.

If the local educational agency cannot or will not provide a free appropriate public education, then

The State educational agency may provide special education and related services under Reg. 300.360(a) in the manner and at the location it considers appropriate. However, the manner in which the education and services are provided must be consistent with the requirements of this part (including the least restrictive environment provision of Regs. 300.550-300.556 of Subpart E). 34 C.F.R. Reg. 300.361

The State educational agency will thus step into the void created by the local educational agency’s failure to provide services and provide the services “directly, by contract, or through other arrangements”. The State educational agency will also determine the proper placement of the student. If the State educational agency proposes a placement different from the one proposed in the IEP prepared by the local educational agency and the parent, then either the parent or the State educational agency can demand a hearing before a disinterested hearing officer to determine appropriateness. The Regional Hearing Officer’s decision in the instant case, therefore, was in error to the extent it directed the Department on how and where it would provide services to the Student.

In summary, the parent and the LEA can agree to an IEP that requires the LEA to provide services they both know the LEA cannot provide. The Department could not be involved in either the preparation of the IEP or in the hearing before the Regional Hearing Officer. Since the L cannot or will not provide the services it agrees are necessary for the Student, the department is required to withhold special education funds from the LEA and undertake to provide “special education and related services ... in the manner and at the location it considers appropriate.” The services can be provided “directly, by contract, or through other arrangements.” If the Department disagrees with the placement contained in the Student’s IEP, or the placement cannot be provided, the Department can have another IEP developed.

The final issue, whether the least restrictive environment requirements dictate that the Student’s placement must be within the State of Georgia, does not need to be addressed at this time. As stated in the preceding paragraph, if the Department, or the agency it selects to provide services, disagrees with the placement provided in the original IEP, then it can develop another IEP to provide “special education and related services ... in the manner and at the location it considers appropriate.” Any decision regarding the Student’s placement, therefore, would be premature. If the placement proposed in the present IEP is approved, then there is no controversy; if it is not approved, then the new placement will be the subject of the controversy rather than the placement proposed in the present IEP.

PART IV

DECISION

Based upon the foregoing and the record and briefs submitted, the State Hearing Officer is of the opinion that there is substantial evidence that the LEA is either unwilling or unable to provide the Student with special education services. The Regional Hearing Officer’s decision that the LEA is unwilling or unable to provide the Student with a free appropriate public education, therefore, is sustained. The State Hearing Officer, however, is of the opinion that the regulations permit the Department to provide special education and

related services in the manner and at the location it considers appropriate. That part of the Regional Hearing Officer's decision that directs, or can be construed to direct, the Department to provide services in a particular manner and in a particular location is, therefore, reversed.²

This 6th day of March, 1989.

L. O. Buckland
State Hearing Officer

² Reversal of the Regional Hearing Officer on this point, however, does not require this case to be returned to the Regional Hearing Officer for any further action.