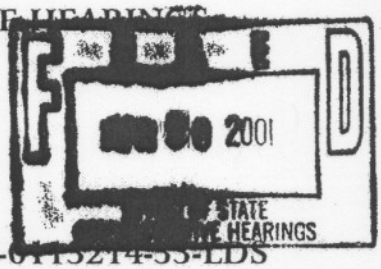
01-0113214

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS

STATE OF GEORGIA



[redacted], *
Petitioner, * Docket No:
* OSAH-DOE-SE-0113214-33-LDS
v. *
*
MARIETTA CITY SCHOOL SYSTEM, *
Respondent. *

FINAL DECISION

[redacted], (hereinafter "Petitioner"), requested a due process hearing pursuant to the *Individuals with Disabilities Act*, 20 U.SC. § 1400, et. seq., (hereinafter "IDEA"), in order to dispute the recommended change in school placement made by Respondent, Marietta City School System, (hereinafter "MCS") in her most recent Individual Education Plan (hereinafter "IEP"). Having heard the evidence and reviewed the record in this case, this hearing officer finds that the recommended placement change is appropriate and rules in favor of Respondent.

INTRODUCTION

A. Issue Presented

Is the current IEP placement proposed by MCS for Petitioner, appropriate for the implementation of the goals and objectives of her IEP, and in compliance with the terms and provisions of the Individual with Disabilities Education Act (hereinafter " IDEA")?

B. Procedural History

On January 23, 2001, Petitioner requested a due process hearing to contest MCS's recommended change in her IEP. The request was received by the Division for Exceptional Students of the Georgia Department of Education on the same day.

On January 25, 2001, the undersigned Administrative Law Judge (ALJ) was appointed to hear the matter.

During this process, Petitioner was represented by her mother, Ms. [redacted], (hereinafter "Ms. [redacted]"). Attorney Kevin W. Pendley, from The Weatherly Law Firm, (hereinafter "Mr. Pendley), represented Respondent. A pre-hearing telephonic conference was held on February 2, 2001 and Ms. [redacted] and Mr. Pendley both participated. During that conference the parties expressed an interest in mediation and it was agreed that mediation would be scheduled as soon as possible. Several available dates were discussed. A hearing was set for February 22, 2001, with the understanding that it would take place if mediation failed. Documents were to be exchanged by the parties pursuant to the five (5) day rule and would take place by the close of business on Friday, February 16, 2001. A Pre-Hearing Order was issued on February 2, 2001.

Mediation was scheduled for February 13, 2001, at the Justice Center of Atlanta, and Petitioner's representative, Ms. [redacted], failed to appear. Ms. [redacted] reported that she had not been able to locate the Justice Center, and expressed a desire to reschedule the mediation. The parties agreed to a continuance so that mediation could again be attempted, and the hearing originally scheduled for February 22, 2001, was continued until March 15, 2001.

Ultimately the second attempt at scheduling a time for mediation failed, and Ms. [redacted] subsequently left town for a brief interval. A second continuance was granted to accommodate Ms. [redacted]'s schedule and a Notice of Hearing was issued on March 8th, resetting the hearing for March 20, 2001.

On March 7, 2001, Respondent filed a Motion For Summary Determination Or In The Alternative Motion To Dismiss and Memorandum Of Law In Support. The Motion was considered and denied on March 15, 2001.

C. The Hearing

1.

The Due Process Hearing was convened in Marietta, Georgia at the County Courthouse on March 20, 2001 at 9:30 o'clock a.m.. Ms. [redacted] appeared on behalf of Petitioner. Mr. Pendley appeared on behalf of Respondent and was assisted during the hearing by Dr. Leland Howard, Director of Special Services for MCS. Petitioner, [redacted]. was not personally present.

2.

Respondent presented evidence first and testifying on its behalf were: Dr. Leland G. Howard; Ms. Betty Blessing, (Inter-related Resource teacher at [redacted] Elementary School); Ms. Jill Menger, (Fourth grade Regular Education teacher at [redacted] Elementary School); Ms. Kathleen Huntley, (Self-contained Learning Disability teacher at [redacted] Elementary School)and Dr. Bill Knauf (School Psychologist for MCS) testified on behalf of Respondent. Ms. [redacted] testified on behalf of Petitioner. No other witnesses were called for Petitioner.

3.

The transcript of this hearing consists of one volume, is comprised of 83 pages, and is incorporated , along with the Exhibits attached, by reference herein. Exhibits "R-1" through "R-39" were admitted without objection and in accordance with the five-day rule. Petitioner offered no Exhibits for admission.

FINDINGS OF FACT

1.

Petitioner, [redacted]., was born on [redacted]. This [redacted] year old student resides with her family in the MCS district and currently attends [redacted] Elementary School.

2.

On May 1, 1997, [redacted]'s kindergarten teacher referred her for a Student Support Team (SST) review. (Resp. Exhibit 4). [redacted] was having difficulty recognizing letters, numbers and shapes and appeared to be unusually tired much of the school day. She had missed six days of school that year and had been tardy twenty six times. On May 12, 1997, [redacted]'s mother, Ms. [redacted], gave permission for the SST to work with her daughter "to plan and recommend alternative strategies and administer assessments if necessary." (Resp. Exhibit 5).

3.

[redacted] received SST services while in first grade during the 1997-98 school year. Her teacher worked with her in a small group setting on a daily basis. [redacted] worked on the computer three times a week and Sunshine books were sent home with her to read three times a week. She continued to be unusually sleepy during her school day. On December 8, 1997, some academic improvement was noted. (Resp. Exhibit 6).

4.

[redacted] transferred to [redacted] Elementary School in January of 1998, and on March 2, 1998, the SST chairman at that school notified Ms. [redacted] that her daughter's problems in math and reading were continuing and therefore provision of SST services remained appropriate. [redacted] was noted to be well behind what was expected of a student her age and she required constant individual attention as she was unable to work independently. Current strategies, which included daily individual tutoring, assistance from a Title I teacher, and modification of assignments, were getting only fair to poor results. She was also noted to sleep frequently during class and she often refused to complete her work. She was referred for a full psycho-educational evaluation by the SST committee. (Resp. Exhibits 7 and 8).

5.

An individual psycho-educational evaluation was conducted on September 8, 1998, by William Knauf, Ph.D. Dr. Knauf concluded that "{B}ased upon her Full Scale I.Q., available achievement data supported severe discrepancies between predicted learning and achievement in the areas of basic reading skills and reading comprehension." (Resp. Exhibit 12; Transcript of Hearing, page 76).

6.

On September 21, 1998, notice of an IEP/Placement committee meeting was sent to Ms. [redacted], (Resp. Exhibit 13), and on September 28, 1998 that meeting occurred. Ms. [redacted] was not present. The IEP committee found [redacted] to be eligible for special services under the IDEA based upon the psycho-educational evaluation, observations, class work and achievement testing. (Resp. Exhibit 14). Her primary area of eligibility was identified as "Specific Learning Disabilities" (SLD). (Id.). [redacted] was to receive 12 hours of resource instruction each week and a social worker was to follow up on her excessive lethargy during school hours. A copy of the IEP was sent to Ms. [redacted] and she consented to placement. (Resp. Exhibit 15).

7.

MCS offers a continuum of services including regular education without support, regular education with support, resource services, self-contained classroom settings, alternative schools and residential placements. (Transcript of Hearing, pages11-13; 20). It was initially decided that MCS would attempt "resource" delivery to [redacted]. The "resource" method is one in which the child is placed in a regular education class but "...comes out for services to meet their goals and objectives in whatever areas are identified..." in their IEP. "It could be reading, written expression, math, academic support...depending on their performance and their individual needs." (Transcript of Hearing, page 21).

8.

On May 24, 1999, a notice was sent to Ms. [redacted] setting June 3, 1999, for [redacted]'s annual IEP review. The meeting was held and Ms. [redacted] did not attend. New goals and recommendations were established for [redacted]. She was noted to have mastered only 25 % of her previous goals and objectives and made growth towards mastery in 75 %. It was noted that she remained tired in class. The IEP team determined that [redacted] was not getting the support she needed in her current placement and recommended a self-contained classroom for the following year if her reading skills did not improve. (Resp. Exhibit 19).

9.

On November 8, 1999, a Notice of a Meeting on November 30, 1999, for the purpose of amending [redacted]'s IEP was sent to Ms. [redacted]. Ms. [redacted] responded that she would not attend. (Resp. Exhibit 20). The meeting was held and committee recommendations were sent to Ms. [redacted] [redacted]'s goals were modified to reflect the difficulty she was experiencing in meeting the math requirements in her third grade regular education class. Her time spent in special education classes was increased to three segments a day. (Resp. Exhibits 21 and 22).

10.

On May 1, 2000, notice was sent to Ms. [redacted] that an IEP review would occur on May 23, 2000, and she indicated that she would be there. (Resp. Exhibit 24). The meeting was held but Ms. [redacted] did not attend. (Resp. Exhibit 25). The review committee identified specific areas in which [redacted] continued to require special assistance, including reading comprehension, math calculations, grammar skills and spelling. (Transcript of Hearing, page 23). After discussion, the committee recommended that [redacted] be placed in a self-contained SLD classroom, located at [redacted] Elementary School, as neither regular education alone nor with resource

support was enough for [redacted] to make appropriate educational progress. (Resp. Exhibit 25).

11.

On September 9, 2000, notice was sent to Ms. [redacted] that an IEP review would be held on September 11, 2000. Ms. [redacted] attended the meeting. The IEP team again reported that [redacted], despite modifications, was not making appropriate progress. (Transcript of Hearing, page 33). The team again recommended a self contained program. Ms. [redacted] disagreed with the placement decision, preferring that her daughter remain at [redacted] Elementary School in her current program. Other options were discussed and the team agreed to try increasing [redacted]'s resource time from 15 segments a week to 17 segments per week and add support in science and social studies. (Transcript of Hearing, pages 24-25). The team agreed to review progress at the end of the semester and Ms. [redacted] agreed to return at that time for an IEP review of her daughter's progress. (Resp. Exhibit 29; Transcript of Hearing, page 25).

12.

In accordance with the agreement between MCS and Ms. [redacted], an IEP meeting was scheduled for December 18, 2000, to discuss [redacted]'s progress under the program set in September. MCS used several methods to provide notice of the meeting to Ms. [redacted], including a notice sent home with [redacted] and telephone calls. (Resp. Exhibit 31). Ms. [redacted] indicated that she was unable to attend the meeting on the date it was originally scheduled due to a death in her family, so the meeting was reset for January 10, 2001 for her convenience. (Resp. Exhibits 32 and 33). Again, several methods of communication were used by MCS to reschedule the IEP with Ms. [redacted] (Resp. Exhibit 33).

13.

Ms. [redacted] did not attend the IEP conference on January 10, 2001, although she had notified MCS that she planned to attend. (Resp. Exhibit 32-33; Transcript of

Hearing, page 35). It was determined at the meeting that despite extensive classroom and material modifications, (Transcript of Hearing, page 46), [redacted] continues to fail to benefit from the regular curriculum and from her overall educational experience. Although [redacted] is motivated, is in a relatively small classroom setting[1], and receives more individualized attention than she would in an average 4th grade classroom, she continues to function "well below grade level in all areas." (Resp. Exhibit 33, page 6). She "...continues to struggle and is unable to do grade level work. In special education she has mastered 2 of 24 objectives." (Id.; Transcript of Hearing, pages 38, 48). Her reading and written expression skills, currently at the 1st and 2nd grade level, (Id.), continue to concern her teachers, (Transcript of Hearing, page 26), as she continues to read on a "lower second grade level." (Transcript of Hearing, pages 27-28). [redacted] was also noted to be frustrated and she "gives up at times." (Transcript of Hearing, pages 28, 53). She regularly fails to complete homework assignments. (Transcript of Hearing, page 30). She does best with "one on one" assistance. (Transcript of Hearing, page 53). [redacted]'s testing indicates severe discrepancies in her learning ability (Transcript of Hearing, page 76), and it is feared that [redacted] will only "get farther and farther behind." (Transcript of Hearing, page 48).

14.

At this January 10, 2001, IEP meeting, the team discussed the continuum of services available to [redacted] and concluded that general education placement could not serve her needs, and neither could the resource program. [redacted] had demonstrated that she needed more support than the resource program could provide.

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[1] [redacted] is currently placed in a fourth grade classroom that contains only sixteen students. This is not typical, as State standards for fourth grade allow up to thirty-three students in a fourth grade classroom, and MCS standards allow a maximum of twenty-eight in each class. (Transcript of Hearing, page 44).

The team again recommended a self-contained SLD classroom setting and noted that the appropriate program for [redacted] is located at [redacted] Elementary School. (Id.) In the self-contained SLD classroom at [redacted] Elementary School [redacted] would be in a classroom with approximately eight (8) children served by one teacher and one para-professional. She would benefit from the low student-teacher ratio and intensive reading program and increased classroom structure. (Transcript of Hearing, pages 18, 39-40; 61-67; 71-73). [redacted] is approximately four (4) miles from [redacted] Elementary School. (Transcript of Hearing, page 39).

15.

A Notice of Change of Placement was sent to Ms. [redacted] on January 10, 2001, indicating that placement would change on January 22, 2001. (Resp. Exhibit 34). On January 19, 2001, Ms. [redacted] telephoned Dr. Leland G. Howard and requested a Due Process Hearing to contest the placement change. (Resp. Exhibit 35). Ms. [redacted] indicated that she did not want her daughter to change schools, and requested that services continue to be delivered to her daughter at [redacted] Elementary School. [2] (Transcript of Hearing, pages 6-7). Mediation was attempted, but Ms. C. did not appear on the date originally scheduled, (Transcript of Hearing, page 14). Attempts to set another date for mediation were unsuccessful.

CONCLUSIONS OF LAW

The Individuals with Disabilities Act (hereinafter "the Act"), and its Regulations provide that a free and appropriate education (FAPE) must be provided to any student who is identified as having a disability as defined by the Act, 20

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[2] MCS does not have a self-contained specific learning disabilities class at each elementary school as there are not enough students in its district who are eligible to receive special services to make that feasible. MCS has five self-contained specific learning disability classes "grouped roughly by age and grade level." (Transcript of Hearing, page 11).

U.S.C. §1412 (1); 34 C.F.R. Reg. 300.4. In accordance with the provisions of 20 U.S.C. §1412(a)(5), the FAPE must be provided "to the maximum extent appropriate with children who are not disabled" in the least restrictive environment so that "...special classes, separate schooling, other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." If a more restrictive environment is recommended for a student, then there must be ample evidence that without the additional restricting factors, the student would be denied a minimum of educational benefit.

In *Hendrick Hudson School District v. Rowley,* 458 U.S. 176 (1982), the United States Supreme Court established a two-part test to determined whether a school system meets the standards established in the IDEA. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedure reasonably calculated to enable the child to receive educational benefit? If these requirements are met, the State has complied with the obligation imposed by; Congress and the courts can require no more. Id. at 206-207.

Under *Rowley* it is clear that a school system satisfies the requirements of FAPE when it provides "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." (Id. At 203). The education must be provided in accordance with an Individualized Education Plan. An "appropriate" education for a child with a disability is understood to mean an educational program which is individually designed to meet the child's unique needs. Letter to Anonymous, 20 IDELR 1155 (OSEP 1993).

Petitioner expresses her unwillingness to accept the most recent change in placement recommended by MCS, however, she has offered nothing to show that the

proposed placement was not developed in accordance with a proper IEP, nor has she offered any evidence to demonstrate that the placement is not the option most likely able to meet her unique needs. She has failed to demonstrate the inappropriateness of the proposed placement as required under current legal standards, both federal, (See: *Renner v. Board of Education of Public Schools of Ann Arbor,* 185 F.3d 635, 642 (6th Cir. 1999); *Doe v. Board of Education of Tullahoma City Schools,* 9 f.3d 455 (6th Cir. 1993), and State (See: *Georgia State Board of Education Rule 160-4-7-.18(1)(g)(8).*

Additionally, MCS met the requirements established under the IDEA to provide Ms. [redacted] every opportunity to participate in the formation and institution of her daughter's educational program. However, Ms. [redacted] failed to make use of many of those opportunities. She did not attend most of the IEP conferences, despite adequate notice, nor did she attend regular parent-teacher conferences. [redacted] apparently was not receiving assistance at home in the completion of her homework as she often failed to return homework assignments. Throughout the record there are notes indicating that [redacted] is tired during the school day and is not getting enough sleep at home. There are also indications that this problem was made known to Ms. [redacted] on more than one occasion, and her assistance sought in resolving this condition. [redacted]'s school lethargy continues, however. Petitioner offers nothing to contradict the conclusions reached over time, through the designated IDEA process.

Conversely, the weight of the evidence in this matter supports a finding that MCS has met the *Rowley* two-part test. MCS has provided [redacted] with educational opportunities that follow the continuum of services beginning with one of the least restrictive settings possible. [redacted] failed to make appropriate progress in a resource setting despite extensive modifications in materials and in the classroom setting. [redacted]'s IEP committee met regularly, in accordance with the requirements of the IDEA, monitored her progress carefully, and altered the delivery

of services in her IEP to reflect her emerging needs. There is ample evidence that the IEP committee considered information gathered from many sources, including testing results and classroom observations, and also that sincere and reasonable efforts were made to include [redacted]'s mother in all steps of this process. MCS has complied with the procedures set forth in the IDEA and has developed a program for [redacted] which is individualized for her specific needs and is reasonably calculated to provide her with educational benefit.

Once *Rowley* compliance is established, the school system has considerable latitude in choosing a location for the provision of services. Federal Courts have historically found that services called for in a student's IEP can be implemented with respect to cost, duplication of services, centralized locations, staffing concerns and limited resources. *Flour Bluff Independent School District v. Katherine M.*, 91 F.3d 689 (5th Cir. 1996); *Kevin G. v. Cranston School Comm.*, 130 F.3d 481 (1st Cir 1997). Placement should be based upon the educational needs of the student as indicated in his or her IEP, and should be located as close as possible to the student's home. "At most a preference" exists for education in the neighborhood school. *Murray v. Montrose County School District*, 22 IDELR ¶ 558 (10th Cir. 1995); *Decatur County Schools*, 26 IDELR ¶ 58 (SEA Ga. 1997). A student with a disability is only required to be educated in a program that is located as close as possible to his or her home. 34 *C.F.R.* §300.552(a). See: *Muscogee County School District*, 29 IDELR ¶ 1005 (SEA Ga. 1998); *Decatur County Schools*, Id. at 58.

Ms. [redacted] argues that she does not want her daughter to be transferred to a different school, a school outside of her zoned district. However, the classroom setting that the IEP team chose as most appropriate for [redacted] exists at [redacted] Elementary School, which is only four miles away from [redacted] Elementary. While it would be ideal if each school could serve the needs of each student in that

student's home district, such accommodation is often not possible, and the law certainly does not require a school system to do so.

DECISION

The evidence supports a finding that the placement proposed for Petitioner by MCS provides FAPE in the least restrictive manner possible to meet her needs and to enable her to receive educational benefit. There is ample reason to believe that the recommended placement is reasonably calculated to ensure that [redacted]a makes sufficient progress toward the goals and objectives in her IEP, and it is hereby ordered that the recommendations of the IEP committee on January 10, 2001, which include placement of Petitioner [redacted], in the self-contained SLD classroom at [redacted] Elementary School be implemented without delay.

SO ORDERED this 30th day of April, 2001.

Lois D. Shingler

LOIS D. SHINGLER
Special Assistant Administrative Law Judge