02-0205455

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted],

Petitioner,

vs.

LEE COUNTY SCHOOL SYSTEM,
Respondent.

Docket No.:
OSAH-DOE-SE
02-05455-88-MPW

FINAL DECISION FOLLOWING DUE PROCESS HEARING

I. INTRODUCTION

This matter was heard on November 19,2001, at the Lee County Courthouse and Commissioner's Boardroom in Leesburg, Georgia. The Lee County School System (hereafter "Respondent" or "School System") proposed an amendment to the Individual Education Plan (IEP) for the Petitioner, [redacted], on September 20, 2001. The Petitioner asserts that this amendment violated the provisions of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*

The following specific issues concerning the Petitioner's Special Education needs were raised on appeal: (1) The Individualized Education Program (IEP) amended on September 20, 2001 proposed an increase in Special Education Resource classroom time from 15 to 20 segments per week that will be ineffective, as the previous increase from 10 to 15 segments per week has not resulted in educational improvement; (2) the increase in resource class time does not provide a Free Appropriate Public Education (FAPE) in the least restrictive environment, which would be the regular education classroom; (3) the proposed Behavior Intervention Plan (BIP) does not allow corporal punishment as a behavior modification tool, and therefore is ineffective; (4) the proposed IEP does not include a person to "shadow" the Petitioner during the school day; (5) the school system violated proper procedure by not addressing the Petitioner's inclusion in a regular education classroom during the IEP meeting conducted on September 20, 2001; and (6) the Petitioner's educational and behavioral problems could be better addressed by the Dougherty County School System, and the Petitioner's family proposed that he be transferred to the Dougherty County schools.

The Petitioner's parents, [redacted] and [redacted] represented him at the hearing. Emily C. Bagwell, Attorney at Law, Whelchel & Dunlap, LLP, Gainesville, Georgia represented the Respondent.

The parties agreed that the decision should be issued only after the Administrative Law Judge had the opportunity to review the transcript. The transcript was received from the court reporter on January 9, 2002, and this Decision was issued as promptly thereafter as possible.

For the reasons set forth in this Decision, I conclude that the Respondent has not violated IDEA in regard to any of the six specific issues raised at the hearing. Further, I conclude that the proposed amendment to the IEP dated September 20, 2001 was proper and appropriate and should be immediately implemented.

II. FINDINGS OF FACT

The following Findings of Fact are based solely on a preponderance of the credible evidence produced at the hearing. Every fact produced at the hearing was considered by the Administrative Law Judge, but not every fact is discussed in this Decision.

The testimony of each witness mentioned in the Findings of Fact is referenced at page numbers as "Tr. 1, Tr. 210," etc. References to the written direct testimony of the Respondent's witnesses are indicated as "St. 1," "St. 2," etc. Documentary evidence tendered by the Petitioner is referenced as "Ex. P-1," etc., and the Respondent's exhibits are "Ex. R-1," etc.

Often, several witnesses testified about one particular fact, or the fact was addressed in more than one exhibit. The Administrative Law Judge does not refer to multiple references for each fact, unless the fact is in dispute or he deems it appropriate to cite multiple references.

1. [redacted] (hereafter "[redacted]") was born on [redacted]. [redacted]'s birth mother was manic-depressive and did not take good care of him. He was physically and emotionally neglected as a very young child. He also was sexually abused at an early age by a family member. DFCS took him from his birth mother in 1998, and placed with his maternal grandparents, [redacted] and [redacted] in Albany, Georgia (St. 1; Ex. R-8).

2. [redacted] attended pre-school in Dougherty County. He was diagnosed with ADHD, and placed in

Dougherty County's Special Education Program. [redacted] was also diagnosed with mild intellectual disability (MiLD). An Individualized Education Plan (IEP) was adopted and implemented by the Dougherty County School System (Ex. R-8; St. 1).

3. [redacted]'s aunt and uncle, [redacted] and [redacted] agreed to take [redacted] into their home in Lee County (the [redacted] have since adopted [redacted]). He transferred to the Lee County School System for Kindergarten for the beginning of the 1999-2000 school year. The IEP from Dougherty County was adopted by Lee County so that [redacted] could receive Special Education services from the beginning of the school year (St. 1).

4. Lee County conducted its first IEP meetings for [redacted] in September and October, 1999. The Dougherty County IEP was amended to address [redacted]'s behavior problems on the school bus, and modified to increase his Special Education services in the MiLD Program from ten segments to fifteen segments per week (a "segment" is a 31-60 minute period of educational instruction). [redacted] was placed in the Regular Education classroom for all hours he was not in the MiLD Special Education Resource class or, possibly, in therapy (hereafter "resource class"). This placement was continued through the end of the 1999-2000 school year (St. 1; Ex. R-1, R-2 and R-3).

5. [redacted] was retained in Kindergarten for the 2000-2001 school year. His resource class time was maintained at 15 segments per week, and a behavior modification plan (also called a "behavior intervention plan," or "BIP") was adopted. The IEP and BIP were modified in March, 2001, but not implemented as the end of the school year was so close (the BIP is contained within the IEP. However, since the parents have issues with the educational and behavioral issues of the IEP, the IEP and BIP are discussed separately within this Decision) (St. 1; Ex. R-2; Tr. 39-46).

6. [redacted] was promoted to the First Grade for the 2001-2002 school year. The IEP from March, 2001 was implemented, and resource segments were decreased from fifteen to ten per week. In August, 2001, the IEP was again amended, this time to increase the resource class segments from ten to fifteen per week. (St. 1; Ex. R-1).

7. Then, on September 20, 2001, the IEP Committee met to consider further modifications to the BIP and IEP. At the conclusion of the meeting, the IEP Committee determined that [redacted] had not made academic progress in his present placement, and that his behavior interfered with his and other

student's classwork. The Committee recommended an increase in resource segments to twenty per week; that his language arts segment be held in the resource classroom rather than the regular classroom; and that his BIP be modified to increase parental contact (St.1; Ex.R-1).

8. [redacted]'s parents objected to the implementation of the September 20 IEP and BIP amendments. On September 24, 2001, they filed a Due Process hearing request, and the amended IEP and BIP have not been put into effect while this Decision was pending (Ex. R-14).

9. At the hearing, the school system produced witnesses and documentary evidence to support its determination that [redacted] needed more resource classroom time, and, therefore, less inclusion in the regular classroom. Elaine Bennett and Paula Reed co-teach [redacted]'s regular education class, and both testified that he was far behind the other children academically, behaviorally and socially. Bennett is his language arts teacher. She testified that [redacted] does not provide accurate responses to questions and is two or three reading levels behind his peers. She has tried to work with [redacted] one-on-one in the regular education classroom, but this hasn't helped because it takes too much time to explain each task to him. By the time [redacted] understands the task, the rest of the class has progressed to a point where it is impossible for him to catch up. Bennett testified that the other kids in the regular education class are tolerant of [redacted]'s inappropriate behaviors, which include shouting, but that he still is disruptive in the classroom. She has tried to include [redacted] as much as possible in classroom activities, but he is often frustrated because he cannot keep up with the other children (St. 2; Tr. 65, 70, 71, 76-77).

10. Reed testified that [redacted] has not made improvement in the regular education classroom. He has not yet learned to ask questions at the appropriate times in class, but rather will make statements of fact ("Are those football pads easy to put on?" becomes "You wear those playing football"). Reed testified that if [redacted] continues in the regular education class at the same number of segments per week, he will continue to fall further and further behind his classmates. He knows the information, but is not able to process information at the same rate as other children. However, if he could be in the resource classroom more often, the individualized curriculum and very small class size would help him learn how to process the information he learned. Reed also testified that the new behavior interventions, such as in-room time out, will help Michael continue the improvement in his behavior shown so far during the 2001-2 school year (St. 3; Tr. 81, 82, 89-90, 93, 99-100).

11. Vicky Sperry, [redacted]'s Speech Language Pathologist, testified that [redacted] suffers from problems with use of syntax and other language skills. She noticed that he had recently improved in many areas of language usage and also in his behavior. She believed this improvement was due in part to his more stable home environment. She testified that [redacted] has trouble with the transition between his regular education and resource classes. Even if [redacted] had a one-on-one para-professional or other adult supervisor he still would not be able to function in the regular education class full-time (St. 4; Tr. 110, 112, 113, 115, 116).

12. Kristina Paul is [redacted]'s Special Education teacher. She testified that because there are fewer children in the resource class, [redacted] is less distracted by his environment and can learn better. She also believed that increased hours in the resource classroom would provide [redacted] with instruction at his own learning pace, and with the ability to repeat lessons as needed. Paul testified that [redacted] has some strengths, such as the ability to recognize sight words. He was also showing improvement in his willingness to try new work, and to have more appropriate reactions if he didn't want to do a particular task. However, to ensure that these strengths are maximized, Paul stated that [redacted] needs a situation where slow progress would not be a problem, such as the small-group resource room setting. In regard to [redacted]s behavior, Paul testified that she spends probably five to ten minutes an hour addressing his problems. This was more of a distraction in the large regular classroom than in the small resource class (St. 5; Tr. 144, 146, 154, 155, 156, 157, 158, 161, 162, 163-165, 166).

13. Ron McGhee, the Lee County School Psychologist, testified that time-out and out-of-classroom placement were effective behavior modification methods for [redacted]. He observed [redacted] in his classrooms and noticed some improvement in his behavior. [redacted] was less disruptive of other children, and able to sit for longer periods. He also testified that because [redacted] was abused and neglected in early childhood, it would be counterproductive to discipline him by corporal punishment, the method suggested by his parents. McGhee did agree that spanking might be appropriate in some circumstances to correct dangerous or potentially dangerous behavior (St. 6; Tr. 173, 184-5, 186-7, 192)

14. The school system has determined that the parent's request for corporal punishment cannot be granted. In reaching this conclusion, the school system had input from the [redacted]'s regular and special ed teachers, and Dr. McGhee (Rebuttal Testimony of Katherine Wooten, Tr. 234).

15. In their case-in-chief, [redacted]'s parents called Jennifer Sherlie, a Counselor at Merry Acres Middle School in Albany. Sherlie testified that, in her opinion, corporal punishment was a better discipline technique than time-outs or other forms of behavior management used by the Lee County School System. She also testified that if [redacted] had a "shadow" during the school day, he could be included more in the regular education classroom. A "shadow" is a full-time para-pro or other staff member employed by the school system to assist one child (Tr. 213-222).

16. [redacted], [redacted]'s grandmother, also testified on behalf of [redacted]'s parents. She testified that a number of different behavior modification techniques were tried by [redacted]'s family and the school system. Paddling was more successful than time-outs and "reinforcers" in modifying [redacted]'s extreme behavior, both in the short-term and over time. [redacted] and her husband, [redacted] had traveled to [redacted]'s school and taken him out of class on an extremely bad day. After [redacted] was paddled, he behaved much better. [redacted] also testified that [redacted]'s reading had improved using a phonics program at home (Tr. 222-233).

III. CONCLUSIONS OF LAW

1. The Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, provides that any identified disabled student is entitled to receive special education and related services. IDEA states that, to the maximum extent appropriate, children with disabilities should be educated with children who are non-disabled. 20 U.S.C. § 1412(5)(b) and 334 C.F.R. Section 300. Therefore, in this case [redacted] must be provided a "Free Appropriate Public Education" ("FAPE"), in the least restrictive environment.

2. "FAPE" is defined at 20 U.S.C. § 1401(8) as follows:

> The term "free appropriate public education" means special education and related services that—
> (A) have been provided at public expense, under public supervision and direction, and without charge;
> (B) meet the standards of the State educational agency:
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
> (D) are provided in conformity with the individualized education program.

3. Federal law requires that FAPE be provided in the least restrictive environment. 20 U.S.C. § 14129(a)(5) defines "least restrictive environment" in part as follows:

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or 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 a supplementary aids and services cannot be achieved satisfactorily.

4. The seminal case concerning FAPE is *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982) (hereafter *"Rowley"*). *Rowley* requires that FAPE be "tailored to the unique needs of the handicapped child by means of an "individual educational program (IEP)." According to *Rowley*, whether the school system has actually provided FAPE to a child is a two-part test.

> "First, has the State complied with the procedures set forth in the [Individuals with Disabilities Education] Act? And second, is the individual educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." *Rowley* at 478 U.S. 206-207.

5. The 11th Circuit Court of Appeals, which includes Georgia, has held that a school district does not need to provide the maximum educational benefit to a child in order to meet both the statutory requirements and *Rowley* test for FAPE.

> [W]hen measuring whether a handicapped child has received educational benefits from an IEP and related instructions and services, courts must only determine whether the child has received the basic floor of opportunity…The IEP and the IEPs educational outcome need not maximize the child's education. Id: *Doe v. Alabama State Dep't of Educ.*, 915 F. 2d at 665…While a trifle might not represent "adequate" benefits, see, e.g., *Doe v. Alabama* [cite omitted] maximum improvement is never required." *JSK v. Hendry County Sch. Bd.*, 9411 F. 2d 1563 (11th Cir. 1991)

6. The Georgia Department of Education has established its own guidelines to ensure that a child receives FAPE. The Department's rules are found at *Ga. Comp. R. & Regs.* 160-4-7-.04. Local school districts in Georgia must "establish and implement a goal of providing full educational opportunity to all students with disabilities…." DOE Rule 160-4-7-.04(1)(e)

7. The issue of "least restrictive environment" was addressed by the 11th Circuit in *Greer v. Rome City School District*, 950 F.2d 688 1991) (hereafter *"Greer"*). In *Greer*, the 11th Circuit did not require local school districts to take Herculean steps to ensure a student is placed in the least restrictive environment. Instead, the court set up a three-tiered test to determine if the district met the minimum statutory requirements for least restrictive environment:

> First, the school district may compare the educational benefit that the handicapped child will receive in a regular classroom, supplemented by appropriate aids and services, with the benefits he or she will receive in a self-contained special education classroom
> ....
> Second, the school district may consider the effect the presence of the handicapped child in a regular classroom would have on the education of other children in the classroom. The comments to the regulations promulgated pursuant to [IDEA] provide:
>
> > "[W]here a handicapped child is so disruptive in a regular classroom that the education of the other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs."
>
> ....
> Third, the school district may consider the cost of the supplemental aids and services that will be necessary to achieve a satisfactory education for the handicapped child in a regular classroom.... 950 F. 2d at 697.

8. DOE Rule 160-4-7-.08 further defines what constitutes "Least Restrictive Environment" for students in Georgia schools. Georgia presumes:

> ...that special education services will be provided in the general education classroom and school that the student would have otherwise attended had he not a disability. Before the IEP Committee may conclude that a student with a disability should be educated outside the regular classroom, it must consider whether (the whole range of) supplemental aids and services would permit satisfactory education in the regular classroom. DOE Rule 160-4-7-.08(1)(a).

The local school system may place the student outside the regular education classroom only if IEP goals and objectives cannot be achieved satisfactorily with one or more supplemental aids and services. The IEP Committee may consider "[a]cademic, social, language and other relevant factors, as appropriate...when reaching this decision. DOE Rule 160-4-7-.08(1)(iv).

9. Georgia also presumes that the student will be educated in the school he would have attended if he was not receiving Special Education. DOE Rule 160-4-7-.008(1)(i),(iii). If a school system is not able to provide the services needed by a student, then it may ask the State School Superintendent for assistance in exploring possible alternatives. DOE Rule 160-4-7-.26.

10. As indicated in Federal law and affirmed by *Rowley* and subsequent court decisions, the State must provide an IEP for each student with a disability. DOE Rules define an IEP as "a written statement for a student with a disability that is developed, implemented, reviewed, and revised in accordance with Rules [sic] 160-4-7 Special Education." DOE Rule160-4-7-.09(1)(a).

11. An IEP can be prepared only in an IEP Committee meeting, and the meeting must include at

least one parent or guardian and at least one regular education teacher and one special education teacher. Other participants may include experts called in by the parents and the local school system, and representatives of agencies that might be called upon to provide counseling or services to the child. DOE Rule 160-4-7-.09(4). Parents must be provided with an opportunity to participate meaningfully in the IEP meeting, and with appropriate advance notice of the meeting. DOE Rule 160-4-7-.09(5).

12. "In developing each IEP, the IEP Committee shall consider the strengths of the student, the concerns of the parent(s)... for enhancing the student's education, the results of the initial or most recent evaluation, and the results, as appropriate, of the student's statewide or districtwide assessments. DOE Rule 160-4-7-.09(6)(a). The IEP may take into consideration a student's behavior problems which impede his learning or that of other students. The IEP may thus include a plan for behavioral intervention. DOE Rule 1160-4-7-.09(6)()(2)(I).

13. If either the local school system or the child's parents have a concern "with regard to the identification, evaluation, placement or provisions of a free appropriate public education (FAPE) to a student with a disability," the concerned party may request an impartial due process hearing before a State administrative law judge. DOE Rule 160-4-7-.18(a). The school district usually "bears the burden of coming forward with the evidence and burden of proof in any administrative hearing to establish that the proposed IEP is appropriate and provides FAPE." DOE Rule 160-4-7-18(1)(g). Also see OSAH Rule 616-1-2-.07. The standard of proof is by a preponderance of the credible evidence. OSAH Rule 616-1-2-.21(4).

14. In the present case, the burdens of persuasion and going forward with the evidence were placed on the Respondent, the Lee County School System.

15. As stated in the Introduction to this Decision, [redacted]'s parents have asserted six specific issues with the IEP and BIP amendments of September 20, 2001. They assert in Issue 1 that the proposed increase in resource segments from 15 to 20 per week violates FAPE because it will not effectively provide any academic benefits. The school system presented highly credible evidence that [redacted] cannot learn as well in the regular class environment as he can in the resource class. His attention is easily diverted by the other students in the larger regular education class, and he cannot receive the individual, tailored instruction he needs. Although it is not required of the school system, it appears

in this case that Lee County is trying to provide much more than the "basic floor of opportunity" required by *JSK v. Hendry*. Therefore, the Administrative Law Judge concludes that the increase in resource segments proposed in the September 20, 2001 amendment does provide FAPE within the guidelines established by IDEA and the *Rowley* decision, as it is reasonably calculated to enable [redacted] to receive educational benefit.

16. In Issue 2, [redacted]'s parents argue that the increase in resource segments takes him out of the regular education classroom more hours per week, and thus is not the "least restrictive environment" as required by IDEA. Applying the evidence in this case to the three-pronged *Greer* test, the Administrative Law Judge concludes that: (1) [redacted] will receive more educational benefit in a resource class than he will in the regular education class, even if supported with aides and services such as a "shadow," especially since he is not able to keep up with the coursework assigned to the other children; (2) [redacted] is so disruptive in the regular education class that the other students' education is significantly impaired; and (3) there is no evidence on record concerning the relative costs of inclusion in the regular education class with aides and services versus the increased number of segments in the resource class. Based on the *Greer* test, the school system has met the statutory requirements for placing [redacted] in the least restrictive environment.

17. In Issue 3, [redacted]'s parents assert that the school system should allow corporal punishment as an effective method for behavior management. The school system based its decision not to paddle [redacted] on the recommendation of his teachers and the school psychologist. The Administrative Law Judge concludes that this decision was correct, and that the school system is not required to use spanking as a behavior modification device. [redacted]'s parents are not prohibited by law from using corporal punishment themselves in appropriate situations.

18. In Issue 4, [redacted]'s parents argue that he should have a full-time para-professional or other school employee to "shadow" him during the day. The evidence in this case strongly shows that one-on-one adult supervision has not worked in the past as an effective educational method. [redacted] tends to focus on the adult, and not on his schoolwork. Therefore, the Administrative Law Judge concludes that the school system is not required to provide a "shadow" for [redacted]

19. In Issue 5, [redacted]'s parents argue that procedural FAPE was violated in that inclusion in the regular education classroom was not addressed during the September 20, 2001 IEP Meeting. Based

on the oral and documentary evidence, it appears that the parents' desire for full inclusion in regular education was asserted at the meeting. It was rejected by the IEP Committee in favor of increased resource segments, as discussed above in Conclusion #13. Therefore, the Administrative Law Judge concludes that the Petitioner was provided with procedural FAPE regarding the inclusion issue, as required by IDEA and *Rowley*.

20. In Issue 6, [redacted]'s parents ask for a transfer to the Special Education Program in Dougherty County. There is some testimony and documentary evidence that [redacted] received resource placement in Dougherty County, and evidence that the behavior plan adopted by Dougherty County may have been successful in [redacted]'s preschool and Kindergarten years. However, DOE Rule 160-4-7-.26 requires that a student be educated in the same school he would attend if he were not receiving Special Education. There is no evidence that the Lee County School System cannot provide the services [redacted] needs, and the Administrative Law Judge must conclude that a transfer to Dougherty County is not required in this case

IV. DECISION

It is the Final Decision of the Administrative Law Judge that the Lee County School System may implement the amendments to the Petitioner's IEP adopted by the IEP Committee on September 20, 2001. Therefore, I AFFIRM the Respondent's actions in this case, and DISMISS the Petitioner's appeal.

This 1st day of ~~January~~ February, 2002.

M. Patrick Woodard, Jr.
Administrative Law Judge
Office of State Administrative Hearings
State of Georgia