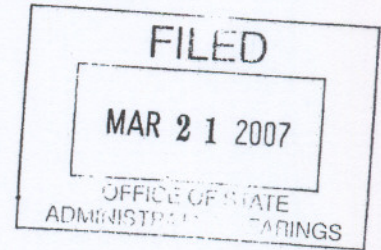


07-017607

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA



█
Petitioner,
v.
COBB COUNTY SCHOOL DISTRICT,
Respondent.

DOCKET NO.
OSAH-DOE-SE-0711126-33-Hackney

FINAL DECISION

ORDER GRANTING MOTION FOR INVOLUNTARY DISMISSAL

I. INTRODUCTION

This matter is before the Court pursuant to a request for due process hearing filed Petitioner █ against the District. As stipulated by the parties, the only issue for resolution in this matter is whether the use of a "portable FM sound field" system meets Petitioner's needs under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.* (IDEA). A hearing was held on this matter on February 7, 2007. Petitioner was represented by her parents, █ and █. Petitioner, as the party with the burden of proof, presented her case first. Immediately after the conclusion and resting of Petitioner's case, the District made an oral motion for involuntary dismissal, alleging that Petitioner had failed to meet her burden of proof. After hearing oral argument, the Court ordered the District to submit a proposed written order regarding its motion and allowed Petitioner an opportunity to submit a written response to the District's proposed written order. Petitioner included with her response a Cross-Motion for

Summary Judgment, filed on March 12, 2007. Respondent subsequently filed a Response to Petitioner's Cross-Motion for Summary Judgment. After reviewing the parties' submissions, and for the reasons listed below, this Petitioner's Cross-Motion for Summary Judgment is **DENIED** and the District's Motion for Involuntary Dismissal is **GRANTED**.

II. FINDINGS OF FACT

Petitioner ■■■ is a ■■■-year-old student currently enrolled in a regular education kindergarten class in the District. (T.¹, pp. 17, 66.) She is deaf and wears a cochlear implant to improve her hearing. (T., p. 17.) With use of her cochlear implant, Petitioner is able to process sound, which when coupled with speech and language therapy, allows her to hear, though less than non-hearing impaired students. (T. pp. 18, 74.) There is no dispute that Petitioner is eligible for special education services under IDEA due to her deafness.

In addition to her cochlear implants, Petitioner uses assistive technology provided by the District to improve her hearing. Specifically, she currently uses a "portable FM sound field system" to improve her hearing. She has used this system throughout the current school year. (T., pp. 21, 67.) The system consists of a small portable speaker through which sound entered into a microphone, such as a teacher's voice, is amplified. The speaker sits on Petitioner's desk, but is not fixed to any location. Petitioner can pick up this speaker and take it with her. (T., pp. 21-24, 65) Petitioner objects to the use of the portable FM sound field system and instead requests a "boot," an assistive technology device that attaches directly to her cochlear implants and amplifies sound entered into a microphone. (T., pp. 19, 25-26.)

¹ All citations are to evidence or testimony entered into the record of this matter and will be cited as follows. Respondent's exhibits are designated as "R-," in accordance with their exhibit number. Petitioner's documents are designated as "P-" in accordance with their exhibit number. Citations to the transcript are designated as "T." (Transcript), "p." (page number).

Petitioner's parent, however, admits that [REDACTED] is "doing well" and "doing fine" in school with the use of the personal FM sound field system provided by the District. (T., pp. 19, 38, 78; R-47, pp. 250, 258.) According to [REDACTED], Petitioner "loves school, she's doing well, she's got friends, her sister is there, all that good stuff, which is amazing, we're very happy about that." (T., p. 38.) Additionally, [REDACTED] acknowledges that Petitioner is "testing at age level." (T., p. 42.) [REDACTED] also acknowledged that Petitioner is progressing through a regular education kindergarten curriculum, and he fully expects her to advance to first grade for the next school year. (T., pp. 66, 68, 78.) Additionally, [REDACTED] acknowledged that Petitioner fully participates in all activities in which a regular education kindergarten student would participate, such as recess, lunch, and physical education. (T., pp. 67-67, 69.)

III. CONCLUSIONS OF LAW

The pertinent laws and regulations governing this matter include the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 *et seq.*), 34 C.F.R. § 300 *et seq.*, the Family Educational Rights Privacy Act (FERPA) (20 U.S.C. § 1232g), O.C.G.A. § 20-2-152, and Ga. Comp. & Regs. at Chapter 160-4-7 *et seq.* (DOE Rules) and Chapter 616-1-1 *et seq.* (OSAH Rules). Other statutes and rules that may apply include, but are not limited to, the Americans with Disabilities Act (42 U.S.C. § 12101 *et seq.*), the Rehabilitation Act (29 U.S.C. § 700 *et seq.*), the Georgia Quality Basic Education Act (O.C.G.A. § 20-2-130 *et seq.*), and the compulsory attendance provisions of O.C.G.A. § 20-2-690 *et seq.*

A. Petitioner's Cross Motion for Summary Determination

Petitioner has moved for "summary judgment" on the issue of whether the assistive technology provided to Petitioner meets the requirements of the IDEA and the Individualized

Education Program (“IEP”). This motion is analogous to a motion for “summary determination” which is recognized by this Court and will be considered as such.

OSAH Rule 15(1) provides that should a party seek summary determination, “Such a motion must be filed and served on all parties no later than 10 days after the filing of the prehearing order or 30 days before the date set for hearing, whichever is later; provided that upon good cause shown the motion may be filed at any time before the close of the hearing.” Petitioner’s motion has not been filed within the timelines provided by OSAH Rule 15. Petitioner has waited almost one month after the date set for hearing to file her motion. Petitioner has failed to show good cause for the delay. Furthermore, Petitioner’s response fails to identify or set forth those material facts that are undisputed as required by OSAH Rule 15. For the foregoing reasons Petitioner’s Cross Motion for Summary Judgment is DENIED.

B. Respondent’s Motion for Involuntary Dismissal

Appeals before the Office of State Administrative Hearings (“OSAH”) are de novo proceedings, and the standard of proof is the preponderance of the evidence. *See* OSAH Rule 21. As the party bringing this hearing request and seeking relief, Petitioner bears the burden of proof as to all issues for resolution. The only issue here is whether the use of a “portable FM sound field” system meets Petitioner’s needs under IDEA. Petitioner alleges, and must prove that the portable FM sound system as recommended by the District, and as Petitioner has been using, is not appropriate for Petitioner and that a boot would be more appropriate. Essentially, Petitioner must prove that, without a boot, she cannot receive a free appropriate public education, or FAPE. 20 U.S.C. § 1412(a)(10)(C); *Schaffer v. Weast*, 126 S. Ct. 528 (2005); GDOE Rule 160-4-7-.18(1)(g)(8).

Pursuant to OSAH Rule 35, “[a]fter a party with the burden of proof has completed the presentation of its evidence, any other party, without waiving its right to offer evidence in the event the motion is not granted, may move for dismissal on the ground that the party which has presented its evidence has failed to carry its burden so as to demonstrate its right to some or all of the determinations sought by that party.”

The Individuals with Disabilities in Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, requires that the District provide a free appropriate public education to children with disabilities. 20 U.S.C. § 1412(a)(1). The United States Supreme Court in *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982), considered the meaning of IDEA’s requirement of a free appropriate public education and held that an appropriate education is one which is provided pursuant to an IEP that has been developed in compliance with the procedural requirements of IDEA, is designed to meet the student’s specific needs, and is calculated to enable the student to receive educational benefit.

In determining whether an IEP provides an opportunity for a student to receive educational benefit, the Supreme Court in *Rowley* rejected arguments that appropriate meant the maximization of potential or commensurate opportunity and specifically held that the Act does not require that the education services provided to the disabled student “be sufficient to maximize each child’s potential.” *Id.* at 198. The Court further stated that “to require . . . the furnishing of every special service necessary to maximize each handicapped child’s potential is, we think, further than Congress intended to go.” *Id.* at 199. The Court held that IDEA requires a school district to provide a “basic floor of opportunity” for the disabled child. *Id.* at 201. In determining whether a student has received adequate educational benefit, and therefore received a FAPE under the standard outlined by both the United States Supreme Court and the Eleventh

Circuit, a student's academic progress and his ability to advance from grade to grade are important factors for consideration. *See, e.g., Rowley*, 458 U.S. at 203-204.

The Eleventh Circuit Court of Appeals in *J.S.K v. Hendry County Sch. Bd.*, 941 F.2d 1563 (11th Cir. 1991), addressed the issue of the level of educational benefit required under EAHCA (now IDEA). Following *Rowley*, the Eleventh Circuit held:

[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. *Todd D. v. Andrews*, 933 F.2d 1576, 1580 (11th Cir. 1991). This opportunity provides significant value to the handicapped child who, before EAHCA might otherwise have been excluded from any educational opportunity. The IEP and the IEP's educational outcome need not maximize the child's education. *Id.*; *Doe v. Alabama State Dep't of Educ.*, 915 F.2d at 665. If the educational benefits are adequate based on surrounding and supporting facts, EAHCA requirements have been satisfied. While a trifle might not represent "adequate" benefits, *see, e.g., Doe. v. Alabama State Dep't of Educ.*, 915 F.2d at 655, maximum improvement is never required. Adequacy must be determined on a case-by-case basis in the light of the child's individual needs.

Id. at 1572-73 (emphasis added). The Eleventh Circuit also noted that in determining whether an IEP provided adequate educational benefit, courts must pay great deference to the educators who develop the IEP. *Id.* at 1573. The *J.S.K.* decision continues to be the standard in the Eleventh Circuit for determining the educational benefit required under IDEA. *See, e.g., Devine v. Indian River County Sch. Bd.*, 249 F.3d 1289 (11th Cir. 2001).

Here, there is no dispute that Petitioner is making adequate educational progress. By her parent's own admission, she is "doing well," is progressing through a regular education curriculum, and is expected to advance to first grade with her peers. Petitioner has accomplished this progress with the use of a portable FM sound field system provided by the District, rather than the "boot" requested by her parents. Given this, it is clear that the District has complied with the requirements of IDEA.


Petitioner contends that, because she cannot use her personal FM sound field system at all times in every environment, that she is being denied "equal access to the curriculum." However, [REDACTED] acknowledges that Petitioner attends all regular education classes, participates in a regular education curriculum, and participates in all activities in which any other kindergarten child would participate. She is included with nondisabled peers for her entire school day and accesses the same curriculum and activities as those peers. She has been able to progress through that curriculum with the use of the assistive technology provided by the District.

Indeed, the facts of *Rowley*, the seminal decision interpreting and explaining the IDEA, support the District's compliance with IDEA. In *Rowley*, parents of a deaf child contended that their child required an assigned sign language interpreter during the school day. The Supreme Court disagreed, noting that because the student had been able to make adequate educational progress without the use of a sign language interpreter and by instead relying on lip reading. Surely, the student may have been able to better access her educational environment with the use of a sign language interpreter, as lip reading would not be helpful in many instances, such as when a speaker's back was turned to the student or when the student had difficulty reading the lips of a particular speaker or speakers (this is similar to the argument Petitioner makes here). The Supreme Court rejected this argument, however, and held that this is not the standard by which to judge compliance with IDEA. Rather, compliance simply requires that a school district provide a disabled student with the supports and services that enable a child to make adequate educational progress. In the instant case, the District has complied with this standard, as evidenced by Petitioner's undisputed progress and receipt of adequate educational benefit.

IV. DECISION

Accordingly, **IT IS HEREBY ORDERED THAT** Petitioner has failed to meet her burden of proof in this matter, that Petitioner's Motion for Summary Judgment is **DENIED**, that the Respondent's Motion for Involuntary Dismissal is **GRANTED**, and that this matter is **DISMISSED WITH PREJUDICE**.

SO ORDERED THIS 21st day of March, 2007.


Elbert Hackney
Administrative Law Judge