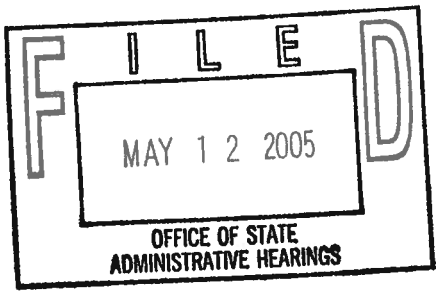
05-0517819

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted],	*	
	*	
	*	Docket Number:
Petitioner,	*	*OSAH-DOE-SE-0517819-25-CTC
	*	
v.	*	
	*	
SAVANNAH/CHATHAM COUNTY SCHOOL DISTRICT,	*	
	*	
	*	
Respondent.	*	



FINAL DECISION

I. INTRODUCTION

This matter comes before this administrative court ("the Court") pursuant to a due process hearing request filed February 16, 2005. Petitioner [redacted]. alleges that Respondent Savannah/Chatham County School District ("SCCSD") failed to provide Petitioner with an appropriate education, in violation of federal and state law. Respondent filed a counter claim seeking the Court to order an evaluation of [redacted]. without the consent of his parent.

The administrative hearing was held in Savannah in Chatham County on March 24 and 25, 2005. The record closed on April 26, 2005, with the filing of Petitioner's written closing argument and Respondent's written closing argument and proposed findings of fact and conclusions of law.

For the reasons indicated below, it is the decision of the Court that [redacted]. has received a Free and Appropriate Public Education (FAPE) and that Respondent is entitled to evaluate [redacted]. to determine eligibility and appropriate services.

II. FINDINGS OF FACT

[redacted]. is a [redacted]-year-old student attending sixth grade at [redacted] Middle School in Savannah. [redacted]. has been identified as a student with emotional-behavioral disorder and receives special education services.

An Individualized Education Plan ("IEP") for [redacted] for the 2004-2005 school year ("04-05 IEP) was developed at a meeting on March 25, 2004 and amended on September 24, 2004. (Respondent's Exhibit [R.Ex.] 69 through 89; 90) Petitioner's parent ("Ms. J."), attended the meeting and agreed to the IEP adopted that day. (R.Ex. 69 through 89;

Transcript ["T."] pages 37, 96, 98)[1] Ms. J. was provided timely notice of the meeting. (R.Ex. 90)

An IEP for [redacted] for the 2005-2006 school year (05-06 IEP) was developed at a meeting on February 11, 2005. IEP minutes disclose that Ms. [redacted] attended the meeting but did not agree that this was a proper annual IEP meeting, contending that she did not get the four to six-weeks notice that she needed. (R.Ex. 91-107, T pages 105-106) Ms. [redacted] was provided notice of the meeting on January 28, 2005, two weeks prior to the meeting. (R.Ex. 108; T.page 115) The 05-06 IEP is a complete IEP including a behavior intervention plan to address specific behavior issues. (T. III page 64, R.Ex. 94)

Petitioner complains of failure[2] to implement the 04-05 IEP, unfair disciplinary tactics, unfair grading, failure to provide a one-on-one aide and repeated bully/harassment/physical altercation issues. Petitioner seeks a new IEP team, increased safety measures and elimination of teachers not qualified as special education teachers for D.S. as well as a change of schools. (P.Ex. 1)

Trenn Russell, a teacher certified in special education, has worked with [redacted]. since August 2004 and became his case manager in January, 2005. Based upon her experience working with [redacted]. and his teachers, Ms. Russell believes that [redacted]. does not exhibit behaviors that interfere with his learning or prevent him from progressing academically. (T. page 111) [redacted]. exhibits behaviors wherein he does not respond to written and verbal directions or comply when asked to do so but those behaviors do not appear to have a detrimental effect on his progress in class. (T. page 112) D.S. performs on grade level based on QCC criteria. (R.Ex.71-72, 94)

Donald Gervais was [redacted].'s case manager prior to Ms. Russell. In response to two incidents of aggressive behavior by [redacted] in the fall of 2004, Mr. Gervais reviewed [redacted].'s file, consulted his teachers and observed [redacted]. in three of his classes. Mr. Gervais met with Ms. [redacted] many times and attempted to interview her as a component of an annual review he was conducting for [redacted]. Ms. [redacted] refused to participate in the interview. In December 2004 and January 2005, Mr. Gervais prepared a functional behavior analysis ("FBA") from which a behavior intervention plan ("BIP") was prepared and included in the 05-06 IEP. (T. pages 108, 292-305, 315, 342; P.Ex. 6) Mr. Gervais found that [redacted] had difficulty attending to his teachers, difficulty transitioning, and difficulty responding appropriately to teacher interventions, and designed a BIP to address those behaviors. (T. pages 300, 307-309)

[1] References to "T." are to the transcript of the first day of the hearing, March 24, 2005. References to "T.II" are to the transcript by Stephen Ray Green and Associates of the first part of the second day of the hearing, March 25, 2005. References to "T.III" are to the transcript by McKee Court Reporting of the last part of the second day of the hearing

[2] Ms. [redacted] contends, "From 2003 up until January 10th, at least, the IEP was not being implemented at all." (Testimony of Ms. J. at T. page 137)

[redacted]. has received support in Ms. Lemley's language arts class from Ms. Waters, a special education teacher, since the beginning of the school year. (T. pages 108-109, 117, 145) [redacted]. received support in Ms. Brooks' math class from Ms. Namdi from the beginning of the 04-05 school year. (T. page 215) He has received support in Ms. Miller-Singleton's math class since January 2005. (T. pages 108-109, 118) He does not receive support in social studies and science because he is successful in those classes, having a current grade average in the 80's. (T. pages 108-109, 145-146, 152,)

[redacted]. is currently passing all of his subjects and is making educational progress. (T. pages 108-109, 145-146, 152, 215)

[redacted]. received a first semester grade of 65 in Ms. Brooks' math class based upon his grades on tests and homework and class participation. (T. pages 218-222) His second semester grade was 70. (T. page 226)

[redacted]. received first semester grades of 65 and 82, respectively, in Ms. Butler-Garcia's social studies and science classes. In the second semester, [redacted]. received a 60 in social studies and a 66 in science because he did not pass any tests, even though the tests were open-book. (T. pages 247-248)

Ms. Lemley does not see that [redacted]. has a disability as he follows directions, does what she asks him to in class and does well in school, appearing "in the upper percent of his class in the work he produces." (T. pages 163-164)

Although the 03-04 IEP stated that [redacted] would be pulled out of general education classrooms to special education classrooms for EBD, he was not. Mr. Jones recalled that the committee did not want [redacted]. pulled out into a self-contained classroom and believes the pull out was an error by the reporter for the IEP. (T. pages 184-186; R.Ex. 69) However, [redacted]. was pulled out for math in a self-contained classroom in August 2004, after the first week of school and returned to the general education classroom in late September or early October pursuant to an amendment to the IEP dated September 24, 2004. (T. page 213, 218, 242; R.Ex. 90; R.Ex. 202)

[redacted]. behaves well in his classes as a general rule, follows instructions and does his work as directed. (T. pages 150, 164) Occasionally he gets distracted or upset and requires a calm-down period (T. pages 153-154) [redacted]. is accompanied by a teacher as he changes classes and goes to lunch to prevent confrontations with other students. (T. pages 154, 169)

[redacted] received disciplinary action for a March 9th incident in which he failed to follow Ms. Lemley's directions to take a calm down period before entering the classroom. (T. page 155-159)

[redacted] received disciplinary action for a December 6th incident in which [redacted]. and another student had an altercation in class during which [redacted] hit his head on the desk. [redacted]. was accompanied to the school office by Ms. Lemley but ran away from her and had to be

physically restrained by Ms. Butler-Garza in the hall, causing both to fall to the floor. (T. pages 262-273, 280) Both students were subsequently punished. (T. page 275)

[redacted] Middle School Principal Michael A. Jones investigates allegations of student violations of the Student Code of Conduct and imposes discipline on students based upon the school system's book of student conduct. Mr. Jones takes statements from teachers and students when there is an allegation of misconduct by [redacted], something that he feels compelled to do as a result of Ms. [redacted]'s intense interest in the school's actions. During the 04-05 school year, Mr. Jones investigated four incidents involving [redacted]. and determined that [redacted]. would not be disciplined for his conduct in one of the four incidents. In the other three incidents, both [redacted] and the other student involved received punishment. (T. pages 165-173; R.Ex. 131)

In determining the punishment to be given to [redacted], Mr. Jones took the disability of [redacted]. into account. (T. page 200) The evidence of record shows that [redacted]. was disciplined in accordance with standards set by Respondent.

When Ms. [redacted] raised concerns about bullying and harassment of [redacted]. by other students, Mr. Jones determined that [redacted]. would engage in verbal or physical "horseplay" with other students who would sometimes continue playing after [redacted]. wanted to stop. Mr. Jones notified teachers to monitor interactions between [redacted]. and other students, to walk next to [redacted]. from class to class, to allow [redacted]. to dress in the bathroom for gym while other students dressed in the locker room, and to allow him to go to the bathroom when no other student is in the bathroom. Mr. Jones also spoke to students who were alleged to have harassed [redacted], and their parents, to stop any harassment. (T. pages 170-172; R.Ex. 131) The evidence of record establishes that incidents of harassment or bullying which were reported to Mr. Jones were appropriately dealt with by Mr. Jones.

Respondent's Counterclaim for Evaluation of [redacted]:

~~The last full psychological evaluation[3] of [redacted]. took place in 2001. (R.Ex. 1-3; T. page~~ 111) At that time [redacted]. was experiencing depression, anxiety, serious thought disorder with visual and auditory and tactile hallucinations, hearing voices, feeling skin peeling. (R.Ex. 1-3; T. page 113) Reevaluation is required every three years to determine if the student has become able to manage the disability and no longer needs special education services, or to determine the programs that are appropriate for the student that is still eligible. (T.III pages 70-71)

Ms. [redacted] would not consent to Respondent's request for an evaluation of [redacted] in 2004 and 2005. (T. 110; T.III pages 72, 100) Therefore, Respondent determined eligibility in 2004 by a process, called " special consideration", that is usually reserved for severely disabled children whose disabilities are quite obvious and do not change substantially from one year to the next. (T.III pages 65, 70-72) Petitioner's behaviors do not fall in the severe range. (T.III pages 31-32)

[3] A full psychological evaluation includes IQ testing, academic testing, and behavioral testing by a psychologist. (T.III pages 73-74)

Mikki Garcia, Director of Special Education for the SCCSD, finds that failure to re-evaluate a student every three years, as required by law, "is detrimental to the child because we are not getting the information we need about the child in order to provide or to create an IEP that truly fits the child's needs…". (T.III page 75) "(P)utting a label on a child, Special Ed., is real serious business. It's something we take very, very seriously and it is important for us to determine if we (*sic*) the child truly needs the label. We don't want to keep labels on kids that don't need them." (T.III page 80) Ms. J. finds that "nothing can take the place of the health and safety of my child. And I allow him [redacted] to get a label and allow the school system to place a label on him because his health and safety superceded his education." (T.III page 95)

In Dr. Garcia's opinion, a one-on-one aide (a para-professional who is with the child all the time) is probably the most restrictive environment for a student because it does not allow the child to develop skills on their own and because it could make the child a target for ridicule and negative attention. (T.III page 85)

Students in SCCSD who have severe emotional behaviors generally attend the Coastal Georgia Academy. Those with mild or moderate behaviors attend schools in the student's area or zone. Petitioner's behaviors do not fall in the severe range. (T.III pages 31-32)

III. CONCLUSIONS OF LAW

In the present case, [redacted].'s challenge is to the implementation of the agreed upon 04-05 IEP and the appropriateness of the 05-06 IEP.[4] The dispute in this case is [redacted].'s mother's dissatisfaction with grades given to [redacted] between August 2004 and January 10, 2005 and with discipline meted out to [redacted]. during the 2004-2005 school year, which she alleges amounts to a failure to implement [redacted]'s IEP. D.S.'s mother believes that he has not received FAPE under the IDEA.

The IDEA provides federal funds to the states for the education of children with disabilities, guaranteeing disabled children between the ages of three and twenty-one access to receive a free, appropriate public education. 20 U.S.C. § 1401(3). A FAPE is defined as special education and related services provided at public expense under public supervision and direction without charge that meets the standards of the State educational agency which includes an appropriate school education in the State involved and which is provided in conformity with the Individualized Education Program (IEP) as required under section 1414(d) of Title 20. 20 U.S.C.A. § 1401(8).

[4] [redacted]. at no time challenged the sufficiency of the 04-05 IEP. In fact, Ms. [redacted] agreed and signed her consent to the IEP. (R.Ex. 81) Ms. [redacted] did not sign her consent to the 05-06 IEP because she felt the two-weeks notice of the IEP meeting was insufficient. Therefore the Court will consider the appropriateness of the 05-06 IEP. (R.Ex. 91-108)

A student's unique needs in obtaining a FAPE are laid out in an IEP which is a written statement that summarizes the student's abilities, outlines goals for the student's education, specifies the services the student will receive to achieve those goals, and establishes criteria to evaluate the student's progress. The IDEA specifically enumerates the components to be included in a student's IEP[5] and lists the individuals expected to compose the IEP team.[6] 20 U.S.C. 1414(d)(1)(A); 20 U.S.C. 1414(d)(1)(B).

[redacted]. has requested a new IEP team. As the makeup of the IEP team is set out in the IDEA, Respondent is not required to appoint a new IEP team.

IDEA's requirement of FAPE is satisfied when the State provides personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate grade levels used in the State's regular education, and must comport with the child's IEP, as formulated in accordance with the Act's requirements. If the child is being educated in regular classrooms, the IEP should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. Although the child is entitled to some educational benefit; the benefit need not be maximized to be adequate. Board of Educ. of the Henrik Hudson Central Sch. Dist. vs. Rowley, 458 U.S. 176, 187-204, 102 S.Ct. 3034 (1982).

The IDEA is designed to open the door of public education to children with disabilities but it does not guarantee any particular level of education once inside those

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[5] An IEP is defined as a written statement containing the following: (1) a statement of the child's present levels of educational performance; (2) a statement of measurable annual goals including short-term objectives; (3) a statement of the special education and related services and supplementary aids and services to be provided or available to the child and a statement of the program modifications or supports for school personnel that will be provided to the child; (4) an explanation of the extent, if any, to which the child will not participate with non-disabled children in the regular class; (5) a statement of modifications to State or district-wide assessments of achievement that are needed in order for the child to participate or if the child will not participate, a statement as to why that assessment is not appropriate and how the child will be assessed; (6) the projected date for the beginning of the services and the anticipated frequency, location, and duration of the services; (7) beginning at certain ages, transition services needed for the child; and (8) a statement of how the child's progress toward the annual goals will be measured and how and when the child's parents will be informed of progress. 20 U.S.C. 1401(11), 1414(d)(1)(A).

[6] The IEP team is composed of: (1) the child's parent(s); (2) at least one regular education teacher if the child is or may be participating in the regular education environment; (3) at least one special education teacher; (4) a representative of the local educational agency who is qualified to provide or to supervise specially designed instruction to meet the child's unique needs, is knowledgeable about the general curriculum, and about the availability of resources; (5) a person who can interpret the instructional implications of evaluation results; (6) others who may have knowledge or expertise regarding the child; and (7) the child, when appropriate. 20 U.S.C. 1414(d)(1)(B).

doors. Id.; J.S.K. v. Hendry Co. Sch. Bd., 941 F.2d 1563 (11th Cir. 1991). The Eleventh Circuit has determined that "when 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." J.S.K. at 1572-3. "The IEP and the IEP's educational outcome need not maximize the child's education." Id. at 1573, citing Todd D. v. Andrews, 933 F.2d 1576 (11th Cir. 1991); Doe v. Alabama Dept. of Educ., 915 F.2d 651 (11th Cir 1990).

While parents and school personnel are expected to be equal participants in formulating a child's educational plan, the law confers a great deal of flexibility on the educational agencies responsible for implementing the plan. Rowley, supra. Deference must be given to the educational professionals who developed the IEP and who are responsible for providing FAPE. J.S.K., supra., at 1573.

In Rowley, the United States Supreme Court developed a two-part test to determine the sufficiency of the obligations imposed by Congress under IDEA. "First, has the State complied with the procedures set forth in the Act? Second, is the IEP reasonably calculated to enable the child to receive educational benefits?" Id. at 176-178. Although a failure to meet one of these considerations may result in court ordered relief, it does not preclude a finding that a school district provided a FAPE under the IDEA. Erickson v. Albuquerque Public Schools, 199 F.3d 1116, 1120 (10th Cir. 1999).

The first prong of the two-part test examines whether any harm has resulted from a technical violation of the procedural requirements set forth in the IDEA.[7] While the IDEA sets forth complex procedural safeguards, the Eleventh Circuit has rejected the notion that violation of a procedural requirement is a per se violation of the IDEA. Rather, the Eleventh Circuit has held that actual harm must be shown as a result of the procedural violation in order to be entitled to relief. See Wiess v. School Bd. of Hillsborough County, 141 F.3d. 990 (11th Cir. 1998); Doe v. Alabama Dept. of Educ., 915 F.2d 651 (11th Cir 1990).

[redacted] has failed to show harm from any alleged violations of the procedural requirements of IDEA and is therefore not entitled to relief.

The second prong of the FAPE analysis under Rowley assesses whether the student has been provided with an educational program reasonably calculated to enable him to receive educational benefit in the least restrictive environment. Rowley, supra.; J.S.K. v. Hendry County School Board, 941 F.2d 1563 (11th Cir. 1991). Thus, there are two separate parts to this prong of the FAPE analysis: (1) whether the IEP allows for any educational benefit and (2) whether the IEP provides placement in the least restrictive environment appropriate for the student.

The Eleventh Circuit has explained that the decision as to educational benefit is "based on whether [the student is] receiving *any* educational benefit." The court in J.S.K.

[7] The Act's procedural safeguards are specifically enumerated in 20 U.S.C. 1415.

reiterated that the standard for determining educational benefit is the provision of a "basic floor of opportunity" and held that the educational benefit must only be "adequate." Id. at 1572-3.

When analyzing whether there has been any educational benefit, a court must determine whether there has been any measurable gain within the classroom. In order to show a school district's program is not reasonably calculated to enable the student to receive educational benefit, it must be shown that no measurable and adequate gains were made in the classroom. Rebecca S. v. Clarke County School District, 22 IDELR 884 (M.D. Ga. 1995).

The evidence is undisputed that [redacted]. is making measurable and adequate gains in the classroom. He is passing all of his courses at [redacted] Middle School and performs on grade level based on QCC criteria. I therefore find that both the 04-05 IEP and the 05-06 IEP are reasonably calculated to allow [redacted]. to receive educational benefit.

After considering whether the IEP is designed to confer any educational benefit, the issue of "least restrictive environment" must be considered. The least restrictive environment provision of the IDEA states that schools must establish procedures to assure that, to the maximum extent *appropriate*, children with disabilities. . . are educated with children who are not disabled, and that 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 is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. . . . 20 U.S.C. § 1412(a)(5) (emphasis added).

The Eleventh Circuit adopted the Fifth Circuit's test for determining whether a child has been provided with the least restrictive environment appropriate to that child's individual needs. Greer v. Rome City School Dist., 950 F.2d 688 (11th Cir.1991), vacated, 956 F.2d 1025, reinstated in part, 967 F.2d 470 (11th Cir. 1992). This test requires a two-part analysis: (1) Can education in the regular classroom, with the use of supplemental aids and services, be achieved satisfactorily? (2) Has the child been mainstreamed to the maximum extent appropriate? The analysis is an individualized and fact-specific inquiry. Id. The focus is properly upon the appropriateness of the mainstreaming. "[M]ainstreaming would be pointless if we forced instructors to modify the regular education curriculum to the extent that the handicapped child is not required to learn any of the skills normally taught in regular education." Daniel R. R. v. State Bd. of Educ., 874 F.2d 1036, 1049 (5th Cir. 1989).

[redacted] is being educated at [redacted] Middle school in a general classroom setting with support in math and language arts from qualified special education instructors. I find that the 04-05 IEP and the 05-06 IEP were designed to mainstream [redacted]. to the maximum extent possible.

[redacted]. seeks to have Respondent provide him with a one-on-one aide. However, the evidence does not support the allegation that a one-on-one aide is appropriate for [redacted].

Further, the evidence shows that a one-on-one aide would create a more restrictive environment for [redacted]. in middle school. Therefore, Respondent is not required to provide [redacted]. with a one-on-one aide to afford FAPE to D.S.

Often an issue arises as to which party bears the burden of proving that an educational placement is not appropriate. The Eleventh Circuit has adopted the Fifth Circuit's analysis as to the burden of proof in such cases holding that "the party attacking the IEP bears the burden of showing that the IEP is inappropriate." Devine v. Indian River Co. Sch. Bd., 249 F.3d 1289, 1292 (11th Cir. 2001). The [IDEA] "creates a presumption in favor of the education placement established by [a child's] IEP, and the party attacking its term should bear the burden of showing why the educational setting established by the IEP is not appropriate." Christopher M. v. Corpus Christi Indep. Sch. Dist., 933 F.2d 1285, 1290-91 (5th Cir. 1991) (internal citation omitted)." Id. at 1291-92. The Court determined that when a placement has been "jointly developed by the school district and the parents, the party attacking the program should show why it is inappropriate." Id. at 1292. When a party, be it the parents or the school, attacks a program it once deemed appropriate, the burden is on that party to show that the program is inappropriate. Id.

[redacted] seeks to be placed at a school outside of his school zone to improve his safety. However, [redacted] has not shown that another placement would improve his safety. Further, this Court has found that Respondent appropriately dealt with safety issues raised by [redacted].. Therefore, Respondent is not required to transfer [redacted]. to another school zone in order to provide him FAPE.

While it is the appropriateness of an IEP that the majority of IDEA cases address, some courts have considered challenges to the implementation of an IEP, similar to the challenges raised in the present case. See, for example, Manalansan v. Board of Educ. of Baltimore City, 35 IDELR 122, (D.C. Md. 2001); Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 (5th Cir. 2000); In Re: Sarah M., 28 IDELR 571 (SEA N.H. 1998). Those which have considered such challenges have held that in order to prevail, it must be shown that the educational agency failed to implement a significant portion of the IEP.

However, the standard that must be met in order to prevail under an implementation challenge is quite high. Given the Rowley preference for school flexibility in scheduling services, the standard for prevailing under a challenge to the implementation of an IEP requires a showing of a substantial failure to implement significant portions of the IEP.

To prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimus* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. Bobby R. at 349.

As previously indicated, [redacted]. challenges the implementation of the agreed upon 04-05 IEP, including the provision of supportive services as well as his mother's

dissatisfaction with grading and discipline. However, the evidence discloses that [redacted]. received supportive services as required by the 04-05 IEP except that he was not pulled out for EBD language arts ten hours a week from 8/16/04 to 3/25/04 as stated in the 04-05 IEP. Instead, [redacted]. was pulled out for EBD math from 8/14/04 until the IEP was amended 9/24/04 to return [redacted]. to the general education classroom. At the hearing Mr. Jones disputed that pull out for language arts was actually agreed upon by the IEP team. Despite multiple meetings, including an IEP amendment meeting September 24, 2004, the pullout issue was never raised by [redacted]. until the hearing. Since [redacted].'s IEP was substantially implemented, he cannot prevail on a challenge to the implementation of his 04-05 IEP. Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 (5th Cir. 2000.)

No provision of state or federal special education law gives parents the authority to dictate which personnel will work with their child. In Re: Sarah M., 28 IDELR 571, p. 11 (SEA N.H. 1998); see also, Freeport Sch. Dist., 34 IDELR 104 (SEA Ill. 2000); Spring Branch Indep. Sch. Dist., 2 ECLPR 223 (SEA Tx. 1996). Thus, deference is due SCCSD in their choice of personnel to provide services.

Likewise, the decision as to the location of the services falls within the purview of the school. "Once Rowley compliance is established, the school system has considerable latitude in choosing a location for the provision of services . . . ." 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).

In conclusion, SCCSD has met the two-part test established in Rowley and therefore, has provided a FAPE to [redacted]. [redacted] has not established any procedural violations and further, assuming there were technical violations of the procedural requirements set forth in the IDEA, [redacted]. has not shown any harm. This Court finds that SCCSD has complied with the procedures set forth in the IDEA and developed and implemented two IEP's reasonably calculated to enable [redacted]. to receive adequate educational benefits in the least restrictive environment through personalized instruction and related services. [redacted]. was being educated in self-contained classes and in regular education classes and was achieving passing marks and was progressing. [redacted] therefore was receiving adequate educational benefits as contemplated in J.S.K., supra.

Since [redacted]. did receive a FAPE, his request to change to another school, to change teachers and request for increased safety measures and a new IEP team are not warranted.

Respondent's Counterclaim for Evaluation of D.S.

It is well established that absent a showing of some threat of harm to the student, Respondent is entitled to conduct an evaluation of a child it serves. Andress v. Cleaveland Independent School District, 832 F. Supp. 1086 (E.D. Tex. 1993); P.S. v. Brookfield Bd. Of Educ., 353 F.Supp.2d 306 (D. Conn. 2005). [redacted]. was last evaluated more than four years ago. There is no threat of harm revealed in the record. Ms. [redacted] appears to believe that keeping [redacted]. in Special Ed. will keep him safe. However, there is

a likelihood of harm to [redacted]. from subjecting him to a Special Ed. label if one is not called for, or from providing services based on an out-of-date evaluation. Respondent is entitled to conduct a full psychological evaluation of [redacted].

IV. DECISION

IT IS HEREBY ORDERED THAT [redacted]. has received a FAPE and is therefore not entitled to a change in schools, a new IEP team, increased safety measures, a change of teachers, or any other remedy under IDEA.

IT IS FURTHER ORDERED that [redacted]. shall be made available to Respondent for a full psychological evaluation to be conducted at the expense of Respondent.

SO ORDERED, this 12th day of May, 2005.

CCrawford

Catherine T. Crawford
Administrative Law Judge