

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

T. D. -F.,)
)
 Petitioner,)
)
 vs.) Case No. 04-0257E
)
 MANATEE COUNTY SCHOOL BOARD,)
)
 Respondent.)
 _____)

FINAL ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the due process hearing in this proceeding on behalf of the Division of Administrative Hearings (DOAH), in Bradenton, Florida, on March 17 through 19, and 24, 2004.

APPEARANCES

For Petitioner: Timothy W. Weber, Esquire
Battaglia, Ross, Dicus & Wein, P.A.
980 Tyrone Boulevard
Post Office Box 41100
St. Petersburg, Florida 33743

For Respondent: Robert J. Shapiro, Esquire
Manatee County School Board
Post Office Box 9069
Bradenton, Florida 34206

STATEMENT OF THE ISSUE

The issue for determination is whether Petitioner is eligible for an Individual Education Plan (IEP) pursuant to

20 U.S.C. Section 1400, et seq., the Individuals With Disabilities Education Act (IDEA).

PRELIMINARY STATEMENT

On January 14, 2004, Respondent determined that Petitioner is not eligible for an IEP. Petitioner requested a due process hearing by letter dated January 14, 2004. Respondent referred the matter to DOAH to conduct the due process hearing. The parties waived the requirement that a final order be entered within 45 days of the request for due process hearing.

At the hearing, each party presented the testimony of eight witnesses, and the parties stipulated to the admission of three exhibits. The identity of the witnesses and exhibits and any attendant rulings are reported in the two-part Transcript of the hearing filed on April 7 and 12, 2004. The parties timely filed their respective Proposed Final Orders on May 3, 2004.

FINDINGS OF FACT

1. Petitioner is a nine-year-old male student in the Manatee County School District in Bradenton, Florida (the District). Petitioner attended the third and fourth grades at Stewart Elementary School (Stewart) during the 2002 through 2003 and 2003 through 2004 school years. Petitioner attended the first and second grades in Milton, Massachusetts. Petitioner's date of birth is May 7, 1994.

2. Petitioner has a full-scale IQ on the Wechsler Intelligence Scale of 123. Petitioner's verbal IQ is 124, and his performance IQ is 117.

3. Petitioner has excelled academically at Stewart. Petitioner generally earns grades of A and B in his academic courses and has progressed through grade levels within the District. Petitioner achieves high scores on state standardized achievement tests.

4. Petitioner has a long-standing history of Attention Deficit Hyperactivity Disorder (ADHD), depression, and hearing loss. ADHD is a neurologically-based disorder commonly associated with hyperactivity and impairments in attention; impulse control; adaptive skills, including organizational and social skills; and handwriting.

5. Petitioner's ADHD is an "other health impairment" (OHI) within the meaning of 20 U.S.C. Section 1401(3)(A) and 34 C.F.R. Section 300.7(c)(9). Petitioner's ADHD limits Petitioner's alertness by increasing his alertness to environmental stimuli and decreasing his alertness to his educational environment (limited alertness) and adversely affects Petitioner's educational performance. Petitioner's unique needs include inattention, impulsivity, restlessness, fidgeting, squirming, forgetfulness, anxiety, social and adaptive skill deficits, and inability to understand directions.

6. At the beginning of the third grade, the school personnel at Stewart determined that Petitioner is a handicapped person within the meaning of Section 504 of the Rehabilitation Act of 1973 (Section 504). In relevant part, the staff at Stewart determined that Petitioner is handicapped by reason of his ADHD and that the ADHD substantially limits the major life activity of learning.

7. Petitioner's OHI causes limited alertness. Petitioner's third-grade teacher placed Petitioner in the 98th percentile in hyperactivity and in the 93rd percentile in attention problems. Petitioner's teacher in the beginning of the fourth grade (the initial fourth-grade teacher) placed Petitioner in the 88th percentile in hyperactivity and in the 89th percentile in attention problems.

8. Petitioner's third-grade teacher and his initial fourth-grade teacher found that Petitioner was never well organized and almost always was easily distracted from class work, bothered other children when working, and tapped his foot or pencil. The third-grade teacher reported that Petitioner almost always rushed through his assigned work, had a short attention span, acted without thinking, and had trouble concentrating. The initial fourth-grade teacher found that Petitioner almost always was overly active.

9. Petitioner exhibited other behaviors in the third and fourth grades that evidenced a limited alertness. Petitioner often did not pay attention to lectures, had poor handwriting or printing, had trouble in transition from one task to another, made loud noises when playing, sang or hummed to himself, babbled to himself, and rocked for long periods of time.

10. Petitioner's teachers in the third grade and in the beginning of the fourth grade had significant concerns regarding Petitioner's adaptive behaviors, including his study skills, leadership skills, and adaptability. No teacher rated any of the foregoing skills above the 14th percentile, and several teachers rated Petitioner's skills as low as the 1st percentile.

11. In addition to a limited alertness, Petitioner's OHI adversely affected Petitioner's educational performance in citizenship and conduct. Citizenship and conduct are integral measures of educational performance in the District. The Manatee County School Board's mission statement emphasizes citizenship as a primary goal of the District. The District requires school personnel to provide students with separate evaluations and assessments (ratings) for the citizenship and conduct in regular progress reports.

12. Petitioner's third-grade teachers at Stewart rated Petitioner's citizenship and conduct as satisfactory in Petitioner's regular progress reports. However, the

satisfactory ratings did not accurately reflect Petitioner's actual educational performance in citizenship and conduct. Petitioner's actual educational performance was negative on approximately 100 days during the third grade. Petitioner's classroom teachers, teacher aides, and fellow students, identified as peer monitors, routinely disciplined Petitioner for behaviors related to ADHD by means other than disciplinary referrals to the assistant principal.

13. One form of discipline involved time out from recess to stand on the sidewalk next to a wall outside of the school. The parties identified this method of discipline as the wall or time on the wall.

14. Petitioner received time on the wall for a variety of behaviors related to his ADHD. The behaviors included talking in the bathroom, talking in the hallway, talking in class, talking in the library, talking in the lunchroom, fidgeting, tapping, wiggling in his seat, moving during learning, forgetting homework, running up to the drinking fountain, pushing, touching, annoying another student, breaking school rules, and running in the hallway.

15. Teachers at Stewart imposed another form of discipline on Petitioner for behavior that manifested deficits in organizational skills. Teachers held Petitioner out of recess and required him to sit in a workroom for such organizational

skill deficits as forgetting his homework, forgetting to turn in assignments, forgetting to take his daily agenda home, forgetting to bring his agenda to school, and forgetting to have one of his parents sign the agenda.

16. Petitioner suffered elevated levels of anxiety, depression, and loss of self-esteem from routine discipline during the third grade and in the beginning of the fourth grade. In some instances, Petitioner vomited at home as a result of his discipline problems at school.

17. In the middle of the fourth grade, the administration at Stewart transferred Petitioner to a different class taught by a different teacher (the permanent fourth-grade teacher). The permanent fourth-grade teacher provided specially designed instruction to Petitioner on a de facto basis without an IEP.

18. The specially designed instruction by the permanent fourth-grade teacher was special education within the meaning of 20 U.S.C. Section 1401(3)(A) and 34 C.F.R. Section 300.26. The special education included an individualized positive behavior support program, modified presentation of directions, handwriting accommodations, accommodations for deficits in organizational skills, preferential seating, and other modifications to the educational environment. The special education met the unique needs of Petitioner.

19. Petitioner's educational performance in citizenship and conduct and Petitioner's self-esteem and emotional well-being improved significantly as a result of the special education that the permanent fourth-grade teacher provided to Petitioner. Petitioner's educational performance, his self-esteem, and his emotional well-being would not have improved at Stewart but for the special education provided by Petitioner's permanent fourth-grade teacher.

20. A comparison of Petitioner's educational performance at Stewart before and after he received special education from his permanent fourth-grade teacher shows that Petitioner has an OHI that adversely affects his educational performance and, by reason of his OHI, needs special education and related services for his unique needs. Petitioner is a child with a disability within the meaning of 20 U.S.C. Section 1401(3)(A) and is eligible for an IEP.

21. Respondent violated several material procedural safeguards that Respondent is required by the IDEA to provide to Petitioner. The violations prevented a timely and accurate evaluation of Petitioner in accordance with the IDEA and denied Petitioner an IEP that would have met Petitioner's unique needs. The violations perpetuated the adverse affect of Petitioner's OHI on his educational performance through routine discipline for behaviors related to Petitioner's ADHD and postponed the

special education and related services that Petitioner needs for his unique needs. The consequences of the procedural violations included elevated levels of anxiety and depression and decreased self-esteem.

22. Respondent violated several procedural safeguards. Respondent violated 34 C.F.R. Section 300.532(f) by using academic progress and standardized test scores as the sole criteria for determining Petitioner's eligibility for an IEP.

23. Respondent has consistently determined Petitioner's eligibility for an IEP by reference to Petitioner's academic performance and standardized test scores. In the absence of a decline in academic performance, Respondent consistently maintained that Respondent can adequately accommodate Petitioner's OHI through the 504 plan in effect at Stewart. Respondent views the 504 plan and an IEP as mutually exclusive for students, such as Petitioner, who perform adequately in academic courses and on standardized tests.

24. For reasons stated in the Conclusions of Law, Respondent's responsibilities under Section 504 and the IDEA are not mutually exclusive. Respondent must satisfy its responsibilities under each federal statute.

25. Even if the two federal statutes authorized Respondent to exhaust accommodations in a 504 plan before providing an IEP when a disability does not adversely affect academic performance

or standardized test scores, that statutory authority would not have altered the outcome of this proceeding. Respondent was unable to accommodate Petitioner's OHI in the 504 plan in a manner that enabled Petitioner to make educational progress in citizenship and conduct.

26. In the beginning of the third grade, school personnel agreed, in accordance with the 504 plan, to perform a functional behavioral assessment (FBA) whenever Petitioner exhibited maladaptive behaviors in school and to document the results. School personnel also agreed that Petitioner needed physical activity during the day, movement during learning, preferential seating in class, frequent breaks, testing accommodations, and various other modifications to the educational environment to accommodate his handicap.

27. School personnel were unable to effectuate the 504 plan. In September of the third grade, school personnel regularly punished Petitioner for behaviors related to his ADHD. The punishment included time on the wall, time out from recess and physical activity, and confinement.

28. In early October of the third grade, school personnel promised Petitioner's mother they would discontinue time on the wall for Petitioner. School personnel also agreed to complete behavior forms in accordance with the 504 plan to document the type of behaviors that Petitioner was exhibiting, the frequency

of the behaviors, and the antecedent events. However, school personnel continued to give Petitioner time on the wall and did not complete behavior forms required in the 504 plan.

29. In December, Petitioner's mother provided school personnel with revised behavior forms in another effort to track Petitioner's behaviors. A few teachers completed these forms for one or two weeks, but participation in this effort by school personnel ceased by mid-January of the third grade. School personnel continued to keep Petitioner out of recess through time on the wall and in the workroom. Petitioner's teachers denied Petitioner the physical activity, opportunities for social interaction, participation in structured sports activities, and other benefits of recess enjoyed by non-disabled students.

30. School personnel kept no record of the frequency with which they held Petitioner out of recess in third grade. However, Petitioner missed some or all of his recess due to discipline for ADHD behavior on approximately 100 school days during the third grade. When Petitioner missed only a portion of his recess, other children were already engaged in team activities and did not allow Petitioner to join one of the teams.

31. Petitioner spent his recess during the first five days of fourth grade either on the wall or in the workroom.

Petitioner spent time on the wall or in the workroom for behavior related to his ADHD.

32. Petitioner's mother first requested in August 2003, that school personnel consider Petitioner for an IEP. The school guidance counselor at Stewart, subsequently, reported back to Petitioner's mother that the guidance counselor presented information to the Child Study Team at a meeting on August 22, 2003, and that the team determined that Petitioner was not eligible for an IEP because scores on the Florida Comprehensive Assessment Test (FCAT) were high.

33. On September 5, 2003, the Child Study Team met again and determined they would not evaluate Petitioner to determine if Petitioner were eligible for an IEP. Rather, the Child Study Team offered to revise Petitioner's 504 plan.

34. In addition to Respondent's exclusive reliance on Petitioner's performance in academics and standardized testing, Respondent violated several other procedural safeguards in the IDEA. Respondent violated 34 C.F.R. Sections 300.535(a)(1), 300.535(a)(2), 300.532(c)(1)(i), 300.532(g), and 300.532(j), respectively, by failing to draw upon information from a variety of sources; failing to document and carefully consider information from a variety of sources; relying on standardized tests not validated for the specific purpose for which they were used; failing to assess Petitioner in all areas of academic

need; and failing to use assessment tools and strategies that provided relevant information that would have directly assisted persons in determining the educational needs of Petitioner.

35. Tashawna Duncan, Ph.D., evaluated Petitioner at the request of Petitioner's mother. Dr. Duncan is a licensed psychologist, a school psychologist, and a pediatric neuro-physiologist.

36. Dr. Duncan gathered information from a variety of sources in completing the evaluation. Dr. Duncan reviewed Petitioner's grades, test scores, parent input, rating scales, laboratory measures, adaptive behavior, and teacher questionnaires. Dr. Duncan also interviewed Petitioner's pediatrician and soccer coach, and reviewed information provided by Petitioner's teachers in standardized rating scales and open-ended questionnaires.

37. On October 17, 2003, the Child Study Team met again, in relevant part, to consider the results of Dr. Duncan's evaluation. The school personnel in attendance had neither read the evaluation nor considered the evaluation. The school psychologist for Stewart did not attend the meeting. School personnel advised Petitioner's mother that they would not make a determination without input from the school psychologist.

On October 18, 2003, the school psychologist for Stewart reviewed Dr. Duncan's report and concluded that Petitioner was not eligible for an IEP.

38. On October 29, 2003, the school psychologist observed Petitioner to collect classroom behavioral data for an eligibility determination. The school psychologist employed an interval system in which he observed Petitioner for 60 intervals of two seconds each. Although the school psychologist testified that he also observed three comparison students, he presented no data concerning his observations of the other students.

39. Two other members of the school staff observed Petitioner for behavioral assessments. However, Respondent did not offer the testimony of the other staff members concerning the results of their observations.

40. It is undisputed that Respondent made no attempt to establish an inter-observer agreement between the three observers. An inter-observer agreement is a necessary protocol to ensure the reliability of data collected and to eliminate observer bias. The behavioral data collected by all three observers was collected at the same time of day in a structured, quiet classroom with few visual distractions.

41. The methods used by school personnel to collect behavior data for Petitioner is not reliable. School personnel

failed to use reliable protocols and failed to collect data in multiple settings.

42. The Child Study Team convened again on November 20, 2003. The participants included Dr. Duncan, lawyers for the parties, and the 504 administrator for the District. The participants discussed Dr. Duncan's report and behavioral data. They also discussed policy memos issued by the District suggesting that school personnel were to determine the eligibility of an OHI student for an IEP solely on the basis of the student's grades and FCAT scores when the student had no adverse performance in academics or standardized testing. At the conclusion of the meeting, Respondent stated that it would make a final eligibility determination by December 1, 2003.

43. On January 14, 2004, Respondent determined that Petitioner was not eligible for an IEP. Petitioner's mother requested a due process hearing on the same day, and this proceeding ensued.

CONCLUSIONS OF LAW

44. DOAH has jurisdiction over the subject matter of this proceeding and the parties. § 1003.57(5), Fla. Stat. (2003). DOAH provided the parties with adequate notice of the hearing.

45. Respondent stipulated at the hearing that Respondent has the burden of proving by a preponderance of evidence that Petitioner is not eligible for an IEP. The preponderance of

evidence shows that Petitioner is a child with a disability and eligible for an IEP. Petitioner has an OHI that adversely affects Petitioner's educational performance and, by reason thereof, needs special education and related services that meet Petitioner's unique needs. 20 U.S.C. § 1401(3)(A).

46. The requirements of Section 504 and the IDEA are not mutually exclusive. Respondent cannot evade the IDEA by accommodating Petitioner in a 504 plan. Respondent must satisfy the separate requirements of Section 504 and the IDEA. Yankton School District v. Schramm, 93 F.3d 1369, 1376 (8th Cir. 1996).

47. Petitioner's ADHD is an OHI defined in 34 C.F.R. Section 300.7(c)(9). Petitioner's OHI adversely affected Petitioner's educational performance during the third grade and in the beginning of the fourth grade. Petitioner's OHI would have adversely affected his educational performance thereafter but for the de facto special education he received.

48. Petitioner is a "child with a disability" within the meaning of 20 U.S.C. Section 1401(3)(A). A comparison of Petitioner's educational performance before and after he received special education in the fourth-grade teacher demonstrates Petitioner has an OHI and, by reasons thereof, needs special education and related services that meet his unique needs.

49. Respondent's exclusive reliance on academic performance to determine eligibility under the IDEA is misplaced. Educational performance is not limited to academic progress, and it is inappropriate to use passing grades or achievement test scores as a litmus test for determining eligibility for an IEP. Yankton, 93 F.3d at 1376 (8th Cir. 1996); Elida Local School District Board Of Education v. Erickson, 252 F. Supp. 2d 476 (N.D. Ohio 2003); Westchester Area School District v. Chad C., 194 F. Supp. 2d 417 (E.D. Pa. 2002); Corchado v. Board Of Education, Rochester City School District, 86 F. Supp. 2d 168 (W.D.N.Y. 2000); and Mary P. v. Illinois State Board Of Education, 919 F. Supp. 1173 (N.D. Ill. 1996).

50. The implementing regulations for the IDEA specifically require consideration of a variety of sources of information, including aptitude and achievement tests, parent input, teacher recommendations, physical condition, social or cultural background, and adaptive behavior. The regulations expressly reject reliance on any one factor. 34 C.F.R. § 300.535(a). The "child find" requirement in the federal regulations require Respondent to find all children with a disability "even though they are advancing from grade to grade." See 34 C.F.R. § 300.125(2)(ii).

51. Even though Petitioner advanced from the third to the fourth grade, Petitioner's OHI adversely affected his

educational performance during the third grade and in the beginning of the fourth grade. Petitioner's OHI would have adversely affected Petitioner's educational performance in the remainder of the fourth grade but for the special education Petitioner received from his permanent fourth-grade teacher. See Yankton, 93 F.3d at 1375.

ORDER

Based upon the foregoing Findings of Facts and Conclusions of Law, it is

ORDERED that:

Petitioner is a child with a disability and is entitled to special education and related services pursuant to an IEP that Respondent must develop in accordance with the IDEA.

DONE AND ORDERED this 2nd day of June, 2004, in Tallahassee, Leon County, Florida.



DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of June, 2004.

COPIES FURNISHED:

Carol Lee
Manatee County School Board
Post Office Box 9069
Bradenton, Florida 34206-9069

Robert J. Shapiro, Esquire
Manatee County School Board
Post Office Box 9069
Bradenton, Florida 34206

Timothy W. Weber, Esquire
Battaglia, Ross, Dicus & Wein, P.A.
980 Tyrone Boulevard
Post Office Box 41100
St. Petersburg, Florida 33743

Eileen L. Amy, Administrator
Exceptional Student Education Program
Administration and Quality Assurance
Department of Education
325 West Gaines Street, Suite 614
Tallahassee, Florida 32399-0400

Dr. Roger Dearing, Superintendent
Manatee County School Board
Post Office Box 9069
Bradenton, Florida 34206-9069

NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless an adversely affected party:

- a) brings a civil action within 30 days in the appropriate federal district court pursuant to Section 1415(i)(2)(A) of the Individuals with Disabilities Education Act (IDEA); [Federal court relief is not available under IDEA for students whose only exceptionality is "gifted"] or
- b) brings a civil action within 30 days in the appropriate state circuit court pursuant to Section 1415(i)(2)(A) of the IDEA and Section 1003.57(5), Florida Statutes; or
- c) files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 1003.57(5) and 120.68, Florida Statutes.