

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, N.E.
Washington, DC 20002

OSSE
Student Hearing Office
April 08, 2014

PARENT, on behalf of
STUDENT,

Petitioner,

Hearing Officer: Michael Lazan

V

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION

This is a case involving a student who is not eligible for services.

A Due Process Complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on January 13, 2014 in regard to the Student. This Hearing Officer was appointed to preside over this case on January 14, 2014.

A response was filed by the District denying this contention on January 22, 2014. This response was timely filed. A resolution meeting was not held in this case. The resolution period ended on February 12, 2014.

On February 20, 2014, this Hearing Officer held a prehearing conference. Jocelyn Franklin, Esq., counsel for Petitioner, appeared. Justin Douds, Esq., counsel for Respondent,

appeared. A prehearing conference order issued on February 23, 2014 outlining the summarizing the rules to be applied in this hearing and identifying the issues in the case.

A hearing date was scheduled for March 19, 2014. Testimony and evidence was not completed on this date. Respondent then moved for a 10 days continuance, which was granted without opposition. The HOD date was moved from March 29, 2014 to April 8, 2014 to accommodate the additional witnesses that needed to be called. The matter was continued on April 3, 2014. The HOD was due on April 8, 2014.

This was a closed proceeding.

Petitioner entered into evidence exhibits 1-10, 13-28; Respondent entered into evidence exhibits 1-10. Petitioner presented as witnesses: Petitioner; Witness A, an advocate; Witness B, a psychologist; and Witness C, an advocate. Respondent presented: Witness D, a school psychologist; and Witness E, a general education teacher.

JURISDICTION

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act (“IDEIA”), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

ISSUE

As identified in the Prehearing Conference Summary and Order, the issues to be determined are as follows:

1. Should DCPS have classified the Student as eligible for special education services as a Student with multiple disabilities as a result of the meeting on November 26, 2013? If so did DCPS deny the Student a FAPE?

2. After the November 26, 2013 eligibility meeting, did DCPS fail to provide the Petitioner with adequate notice of the results of the meeting? If so, did DCPS deny the Student a FAPE?

FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. The Student is currently ineligible for services.
(Testimony of Petitioner)
2. The Student has a full scale IQ of 96, which is in the average range. (P-3-6)
3. The Student's achievement testing scores are all in the average or low average range. (P-3-7-8)
4. The Student is stronger in math than she is at reading. (Testimony of Petitioner)
5. Student diagnosed with Mood Disorder NOS, Post Traumatic Stress Disorder ("PTSD"), and Reading Disorder. (Testimony of Witness B)
6. The Student has difficulty with retention, organization, motivation, and legibility of writing. (Testimony of Petitioner)
7. The Student can be nonchalant and disengaged. (Testimony of Petitioner)
8. The Student has not gotten in trouble for misbehavior. (Testimony of Petitioner)
9. The Student has issues with attendance. (Testimony of Petitioner)

10. The Student is a pleasant, average student who does better if enjoys the assignment. (Testimony of Witness E)
11. The Student feels she is doing well academically. (P-3-3)
12. The Student gets along with teachers and students. (Testimony of Witness C)
13. The Student benefits from modified directions because of comprehension issues, focusing issues, and attention issues. (Testimony of Witness E)
14. She benefits from proximity to the teacher, check-ins, and individual attention from a co-teacher. (Testimony of Witness E)
15. The Student benefits from redirection. (Testimony of Witness E)
16. The Student was diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”) at age 4. (P-3-2)
17. The Student has PTSD in connection to events that occurred when she was a young child. (Testimony of Petitioner)
18. During the Student’s elementary school years, the Student attended School A, where a 504 plan was developed for her. This plan continued throughout the Student’s middle school years at School B. (P-3-3)
19. A psychological assessment was conducted of the Student in or about April, 2011. The evaluator reported that the Student was in the average range cognitively and that teachers did not indicate any significant concerns other than the fact that she was late for class and had poor attendance. (P-4)
20. The evaluator conducted a CAB test, which assessed the Student’s hyperactivity in school. Scores were in the normal range. (P-4-1-9)

21. When the Student began high school, she started at School C. The Student did not do well at School C. (Testimony of Petitioner)

22. The Student then began to attend School D, where she attends today. (Testimony of Petitioner)

23. For the Student's first year at School D, the 2012-2013 school year, she was enrolled in the "Twilight" program, which met at late hours. This program was not a success for the Student. (Testimony of Petitioner)

24. A Section 504 meeting was held for the Student in May, 2013. At this meeting, attendance deemed a concern for the Student. Petitioner indicated that the Student had executive functioning issues. The Student indicated that the "Twilight" program's structure was not a good fit for her. A teacher indicated she was disorganized with poor attendance and did not turn in assignments. (Testimony of Witness C)

25. The Student's Section 504 plan dated May 17, 2013 provides the following accommodations: preferential seating towards the teacher and away from the remote areas of the classroom to encourage appropriate behavior; regular and periodic breaks inside the classroom; responsibilities in the classroom to keep her occupied; frequent reinforcement for acting appropriately; breaks between subtests and during tests; repetition of directions; checking for understanding after directions have been given to insure that the Student has accurately understood what she is supposed to do; tests administered at the best time; ensure student is wearing eyeglasses; and extended time on assignments. (P-18-3-4)

26. The Section 504 plan indicates that the Student is eligible because of ADHD. (P-18-3)

27. An HOD was issued by IHO Bruce Ryan on June 22, 2013 in connection to this Student. This HOD addressed claims that Respondent failed to assess the Student in all areas of suspected disability, failed to evaluate the Student appropriately, and failed in its child find obligations. This HOD dismissed all claims against Respondent. (R-1)

28. For the current year, the Student goes to School D in the “more traditional” program. (Testimony of Petitioner)

29. The Student is placed in a English classroom with a general education teacher and a special education teacher. There are about 30 students in this classroom. Seven of the students have IEPs. (Testimony of Witness E)

30. The Student will sometimes displays a lack of focus by talking and fooling around with cellphones when she is not too interested in the lesson. (Testimony of Witness E)

31. Psychological testing of the Student was conducted in Fall, 2013 by Witness B. (Testimony of Witness B)

32. This testing indicated that the Student is functioning with a Full Scale IQ of 96 on the Wechsler Abbreviated Intelligence Scale. On the Woodcock-Johnson III Tests of Achievement- 3, the Student’s broad reading was a 95 standard score, with an 87 standard score in fluency (low average). Broad math was a standard score of 101. Written language was a standard score of 109. (P-3-7-8)

33. Observations conducted by Witness E indicated unremarkable behavior. Witness E remarked that the Student will sometimes get off task, talk too loud, or use profanity, but generally responds to redirection. (P-3-3-4)

34. Bender-Gestalt-II and House-Tree-Person testing of the Student by Witness E indicate difficulties with anxiety, frustration, inadequacy and susceptibility to stress. (P3-8-9)

35. Reynolds Adolescent Depression Scale-2 testing of the Student by Witness E indicated no clinically significant symptoms. (P-3-9)
36. The Retter Incomplete Sentences Blank testing of the Student by Witness E, High School Form, indicated concerns with rejection, gaining acceptance, and living up to expectations. (P-3-10)
37. BASC-2 testing of the Student by Witness E (student interview) indicated clinically significant scores in School Problems, Attitude to School, Sense of Inadequacy, Attention Problems, and Hyperactivity (P-3-10)
38. BASC-2 testing of the Student by Witness E (parent interview) indicated clinically significant scores in Hyperactivity, Attention Problems, Adaptive Skills, Social Skills, and Functional Communication. (P-3-10)
39. The Student's first term report card for the 2013-2014 school year revealed three D grades, a B grade, an A grade, and an F in Biology. (P-9-1)
40. An eligibility meeting was held in regard to the Student on November 26, 2013. Central to the meeting was a review of the assessment of Witness B. Representatives from Respondent and the Petitioner disagreed on the Student's emotional state. The parties agreed to conduct an FBA of the Student. Petitioner sought an auditory processing assessment. The current Section 504 plan was not reviewed at the meeting. The possibility of eligibility as a Student with Emotional Disturbance was not discussed. The possibility of eligibility as a Student with Other Health Impairment was not discussed. The possibility of eligibility as a Student with a Specific Learning Disability was discussed. (Testimony of Petitioner, Witness A, Witness D)

41. Respondent indicated that they would “ramp up” the Section 504 plan.

Respondent also promised Petitioner an audiological assessment. Respondent felt that reading fluency scores from the assessment do not necessarily indicate a reading disorder where a student has attentional issues. Respondent felt that the BASC-2 testing was not persuasive without a teacher’s report. Respondent noted that there were no elevated scores in the Reynolds testing. Respondent felt that absences affected the student and were her problem. The advocate at the meeting indicated the issue on the table was whether the Student was eligible as a Student with a specific learning disability. (Testimony of Petitioner, Witness A, Witness D)

42. After the meeting, Petitioner requested to observe the Student, an FBA, documents relating to meeting, and an auditory processing assessment. (Testimony of Witness A)

43. The Student has improved during the 2013-2014 school year. She is keeping up with the work in regard to reading. She is redirected if she loses focus. She has poor attendance which hurts her grades and makes her fall behind. Often her assignments are incomplete or late. She has had some difficulty in the larger classroom. She is receiving additional time to do the work, small group instruction with the co-teacher, close proximity to the teacher, and redirection. (Testimony of Witness E)

44. The Student has 12 credits, and takes some classes with 11th and 12th graders. (Testimony of Petitioner)

45. Notices were created reflecting the determination that the Student was ineligible on November 26, 2013 and December 11, 2013. (P-10-1-3)

46. After the eligibility meeting, a letter was send by Witness A to Respondent further to conducting an educational assessment, to request an auditory processing assessment, and eligibility determination documentation. ((P-21-1)

47. For the second terms of the 2013-2014 school year, the Student's grades consisted of F in both Biology and Entrepreneurship, C- in English, C in US History/Geo: Industrial to the Present, B in Probability and Statistics, D in Computer Applications, and A in general music. (R-5-2)

48. I found all the witnesses credible in this proceeding.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

The burden of proof in a special education due process hearing lies with the party seeking relief. 5 DCMR Sect. 3030.3; Schaffer v. Weast, 546 U.S. 49 (2005).

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conformance with a written IEP (i.e., free and appropriate public education, or "FAPE"). 20 U.S.C. Sects. 1400(d)(1)(A), 1401(9)(D), 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Shaffer v. Weast, 546 U.S. 49, 51 (2005). Pursuant to the Supreme Court's decision in Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, "provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005).

The IDEA defines "child with a disability" as: "a child evaluated in accordance with Sects. 300.304 through 300.311 as having...a serious emotional disturbance, ... an other health impairment, a specific learning disability, ... or multiple disabilities, and who, by reason thereof, needs special education and related services." 20 U.S.C. Sect. 1401 (3) (A); 34 C.F.R. Sect. 300.8 (a).

As the above statutory criteria make clear, IDEA does not require a school district to provide special education and related services to every student who may struggle academically. Only certain children with defined disabilities are eligible for IDEA's benefits. See, e.g., Alvin Indep. School Dist. v. A.D., 503 F.3d 378 (5th Cir. 2007)(student achieved passing grades despite procedural issues). Moreover, it is not sufficient for a child merely to be diagnosed with a specified medical or psychological condition. There must also be a demonstrated adverse effect on the child's educational performance, such that the child needs special education and related services to receive an educational benefit. 34 C.F.R. Sects. 300.8(c)(4)(i), (c)(9)(ii); see N.C. v. Bedford Central School District, 51 IDELR 149 (2d Cir. 2008)(behavioral problems stemmed from drug use); N.G. v District of Columbia, 556 F. Supp. 2d 11 (D.D.C. 2008)(child's depression affected his schoolwork).

The regulations also provide that the "term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance" as defined under subparagraph (c) (4) (i). 34 CFR Sect. 300.8 (c) (4) (ii); 5-E DCMR Sect. 3001.1.

1. Emotional Disturbance.

"Emotional Disturbance" is defined as "a condition [1] exhibiting one or more of the following characteristics [2] over a long period of time and [3] to a marked degree that [4] adversely affects a child's educational performance: (A) an inability to learn that cannot be

explained by intellectual, sensory, or health factors; B), an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (C) inappropriate types of behavior or feelings under normal circumstances; (D) a general pervasive mood of unhappiness or depression; (E) a tendency to develop physical symptoms or fears associated with personal or school problems." 34 CFR Sect. 300.8 (c) (4) (i); 5-E DCMR Sect. 3001.1.

The record does not establish that the Student has an inability to learn or an inability to maintain satisfactory relationships. The Student has passed most of her classes and gets along with adults and peers at her school. The Student appears to be a person who is content with her education. There is nothing in the record suggesting "inappropriate" behavior from the Student. The Student does not have a tendency to develop physical symptoms or fears associated with personal or school problems. While the Student has been diagnosed with Mood Disorder NOS and Post Traumatic Stress Disorder, these diagnoses are not connected to any school-related issues or problems according to this record. The Student has not exhibited the necessary characteristics to a marked degree for an extended period of time. I find that there is no basis for a determination that the Student is eligible for special education services as a student with an emotional disturbance under these facts.

2. Specific Learning Disability.

As defined in the DCMR, a Specific Learning Disability (SLD) is:

a disorder in one or more of the basic psychological processes involved in understanding or using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations, including such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. SLD does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, mental retardation, emotional disturbance, or environmental, cultural or economic

disadvantage should have been deemed eligible for services as a Student with a specific learning disability.

5-E DCMR Sect. 3001.1; see also 20 USC Sect. 1401(30).

Under regulations pursuant to IDEA, a specific learning disability may be found if a child "does not achieve adequately for the child's age" in basic language or mathematics skills or if the child fails "to meet age or State-approved grade-level standards" in such skills. 34 CFR Sect. 300.309(a). In forming a determination, a school district should "[d]raw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior." 34 CFR Sect. 300.306(c)(i).

The Student has been diagnosed with Reading Disorder by Witness B, who did extensive psychological testing of the Student. However, all the indicators in Witness B's report show that the Student is functioning within the average range in reading. On the Woodcock-Johnson-III Tests of Achievement, the Student's broad reading is a 95 standard score. The Student's scores were above average in letter-word identification, and in the average range in passage comprehension. The one score that was lower was the score for reading fluency, which is in the low average range with a standard score of 87. However, there are no reports of the Student having particular difficulty with reading fluency in school. There is no evidence here that the Student has fallen below state standards. Moreover, courts in the District of Columbia have held that small differences between achievement and intelligence scores are not a sufficient basis for a determination that a Student has a learning disability, especially where attendance has been a factor. Nguyen v. District of Columbia, 54 IDELR 18 (D.D.C. 2010)(student had poor attendance and minor scatter in scores); Kruvant v. District of Columbia, 99 Fed. App'x 232

(D.D.C. 2004). Under the circumstances, I decline to find the Student to be eligible for services as a Student with a specific learning disability.

3. Other Health Impairment.

“Other health impairment” is an appropriate classification if a Student has limited strength, vitality or alertness with respect to the educational environment which adversely affects a child's educational performance. This classification requires identification of chronic or acute health problems such as: Asthma;, Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder; Diabetes; Epilepsy; a heart condition; Hemophilia; Lead poisoning; Leukemia; Nephritis; Rheumatic fever; or Sickle cell anemia. 34 C.F.R. Sect. 300.8(c)(9); 5-E DCMR Sect. 3001.1

The Student was identified as having ADHD when she was four years old according to Witness B. However, there is no current documentation or testimony indicating that the Student has ADHD. On the contrary, a psychological assessment was conducted of the Student in or about April, 2011. The evaluator conducted a CAB test, which assessed the Student’s hyperactivity in school. Scores were in the normal range. Moreover, Witness B did not conduct ADHD testing of the Student. Accordingly, Petitioner did not show that the Student has ADHD at this time.

There is testimony in the record that the Student benefits from modifications because of comprehension issues, focusing issues, and attention issues. However, the credible testimony of Witness E does not suggest that the Student is hyperactive or lacking in alertness. Rather, Witness E’s testimony is that the Student’s issues in class have to do with her not being interested in certain subject matter. At these times, the Student will talk in class and perhaps “fool around” with her cellphone. To this IHO, Petitioner has not shown that the Student lacks

the kind of “strength, vitality or alertness” that is required in the regulations and is underscored by decisional law in the District of Columbia. Parker v. Friendship Edison Pub. Charter Sch., 577 F. Supp.2d 68 (D.D.C. 2008)(Student not diagnosed with ADHD and actions had minimal connection to alertness); Lyons by Alexander v. Smith, 829 F. Supp.2d 414 (D.D.C. 1993)(Student with ADHD did not have issues with alertness).

Accordingly, I decline to find this Student eligible because she is Other Health Impaired.

4. Notice of the Meeting Results.

Petitioner also contends that DCPS failed to provide the Petitioner with adequate notice of the results of the meeting in November, 2013. However, Petitioner’s evidence contains a notice indicating the results of the meeting. (P-10) Even if Petitioner did not receive appropriate notice of the meeting results, there is nothing in the record to show that the lack of any formal written notice had any substantive impact on the Petitioner or the Student. Accordingly, I find this claim to be without merit.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, this matter is hereby dismissed with prejudice.

Dated: April 8, 2014

Michael Lazan
Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: April 8, 2014

Michael Lazan
Impartial Hearing Officer