

02-0230202

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA



~~020~~,)
Petitioner,)
v.)
BURKE COUNTY SCHOOL SYSTEM,)
Respondent.)

DOCKET NO.:
OSAH-DOE-SE-02-30202-17-JRA

FINAL DECISION

I. Introduction

The above matter came before the Office of State Administrative Hearings (OSAH) on May 15, 2002 in Waynesboro, Georgia, as a result Petitioner's request for a due process hearing under the Individuals with Disabilities Education Act, ("IDEA"), 20 U.S.C. §§ 1400 *et seq.*¹ The primary issue presented at the hearing was whether Petitioner should be identified as a "disabled child" eligible to receive services under IDEA, as that term is defined under the act at 20 U.S.C. § 1401(3)(A)(i) and in Georgia Department of Education regulations, 160-4-7-.02. Petitioner's mother was seeking eligibility under the category of "emotional and behavioral disorder" or "EBD" and seeking to have her son placed in a school for emotionally disturbed children. Based on the evidence presented at the hearing, the following findings of fact and conclusions of law are made. In summary, Respondent's, the Burke County School System (hereinafter the "Local School System" or "LSS"), decision of denying eligibility under the category of EBD is affirmed. However, the evidence is suggestive that ~~020~~ has failed to make educational progress which might be a result of his diagnosis of Attention Deficit Hyperactivity Disorder (ADHD). Because there was insufficient evidence to determine eligibility under the category of Other Health Impaired ("OHI") and the LSS has an obligation under IDEA for child find, Respondent's decision is reversed in part. Respondent is ordered to arrange (within 60 days from the date of this order) an independent evaluation of a physician and a clinician familiar with treating children with ADHD and with expertise in evaluating the impact on educational progress (if there remains a diagnosis of ADHD). The results of this evaluation shall be considered in a subsequently convened eligibility meeting which will focus on eligibility under the OHI category.

¹ At the hearing Petitioner was represented by his mother without the assistance of counsel and Respondent was represented by counsel, James D. Hyder. Respondent's representative/designee was Sandra Griffin.

II. Procedural History

A due process request was made by the Petitioner's representative on April 22, 2002 and received at OSAH on the same day via fax. A hearing was scheduled for and conducted on May 15, 2002 in the Burke County Courthouse, Waynesboro, Georgia. The evidentiary record was held open for two weeks for receipt of written closing argument.

III. Findings of Fact

1.

☐☐☐ is a child, currently ☐ years old, who entered kindergarten in the ☐☐☐☐☐☐ Elementary School, Burke County School System in the school year, 1994-1995. He had been determined eligible for and received special education services at the pre-kindergarten level under the category of "significantly developmentally delayed" but ineligible for services during his kindergarten year. ☐☐☐ had mastered all his goals under his 1993 Individualized Education Plan (IEP) and had pre-readiness skills for kindergarten. (Testimony of Griffin, Transcript ("T") at p. 13; Respondent's Exhibit 1, pp. 3-6; 27-30; 57-64;73-74)

2.

☐☐☐ passed all his grades kindergarten through 5th grade. However, he is currently repeating the 6th grade and may not be promoted to the 7th. During the pendency of his latest evaluation for IDEA eligibility under the EBD category, he was removed from the ☐☐☐☐☐☐☐☐ Middle School and placed in an alternative school because of his disruptive behavior. Beginning with the school year of 1997-1998, he received intervention services through the student support team, SST. At the request of ☐☐☐'s mother, but not the recommendation of the SST, he was referred in the February, 2000 for a psychological evaluation. (Testimony of Griffin, T. at pp. 13-17; Respondent's Exhibit 1, pp. 83-92)

3.

Generally, when a referral for special education services is received in the Burke County School System, the student services director evaluates whether the teacher attempted prior interventions and whether standard screening tests for hearing and vision have been done. Then the director assigns the child to one of the two LSS psychologists for evaluation. When the evaluation is complete, a meeting is held, after notice to the parents, to initially assess eligibility. If the child is determined eligible, an IEP meeting will proceed. (Testimony of Griffin, T. at pp. 11-12)

Psychological Evaluation: 2000

4.

As a result of an evaluation conducted on March 20, 2000, the school psychologist determined that ☐☐☐ was functioning in the slow learner to low average intellectual range with a Binet Composite IQ of 81. Achievement tests did not deviate significantly from ability and the assessment of emotional factors failed to indicate significant emotional problems. The psychologist was aware of a diagnosis of ADHD and that ☐☐☐ was on medication at the time. Eligibility for special education services was denied at this time. (Testimony of Griffin, T. at p.14 ; Respondent's Exhibit 1, pp. 15-21)

Psychological Evaluation: 2002

5.

Again in January, 2002, the Burke County Middle School SST referred [REDACTED] for evaluation for special education services. [REDACTED] was repeating the 6th grade and having problems with reading, comprehension and writing. Behaviorally, problems were identified in that he was distractible, impulsive, had a high energy level, was disorganized, inattentive, breaking rules and verbally aggressive. Subsequent to obtaining background information and conducting numerous standardized tests designed to identify intellectual functioning, as well as to identify emotional and behavioral problems, the psychologist concluded on February 13, 2002 that [REDACTED]'s intellectual/cognitive ability fell within the low average classification of abilities. Composite Binet test results placed the IQ at 81. No significant, consistent emotional factors could be determined as the cause of his inappropriate behaviors in the classroom. Additionally, his achievement testing was in line with his ability level. The psychologist concluded that [REDACTED]'s "behavior appears to be due to his ADHD symptoms and conduct-type behaviors rather than significant emotional dysfunction". (Testimony of Kicklighter, T. at pp.34-50 Respondent's Exhibit 1, pp.7-14)

6.

Subsequent to the evaluation by the school psychologist, and after notice to [REDACTED]'s parent, a meeting was held to assess [REDACTED]'s eligibility for special education services under the category of EBD. Present at the hearing were the student services director, a regular education teacher, the school psychologist who conducted the evaluation and the instructional coordinator of [REDACTED] Middle School. This meeting was held on March 15, 2002. After the referral, but prior to this meeting, [REDACTED] had been transferred to an alternative school due to numerous infractions of school rules, including disruption of class by talking, failure to follow instructions and complete work, and hitting and pulling other students. [REDACTED] was considered not eligible for special education services under the EBD category. That denial is resulted in this due process request. (Testimony of Griffin, T. at pp. 17-23)

7.

[REDACTED]'s mother received a special education diploma. She and a daughter have been diagnosed with bipolar disorder and she believes that [REDACTED] will receive the same diagnosis in the future. She is seeking his placement in a school for emotionally disturbed children. (Testimony of Petitioner's mother, T. at pp.56-78) 2

IV. Conclusions of Law

1.

This matter is governed by the Individuals with Disabilities Act (IDEA) and the regulations implemented under IDEA which require that a free and appropriate education (FAPE) be provided

2 Petitioner tendered documents at the hearing but had not presented them in accordance with the five day rule. These are admitted and objections considered in reference to the weight given the documents.

to any student who is identified as having a disability as defined by the Act, 20 U.S.C. § 1401(3); in the least restrictive environment 20 U.S.C. § 1412 (1); 34 C.F.R. § 300.4. The FAPE requirement has been interpreted to mean that "the education to which access is provided is sufficient to confer some educational benefit upon the handicapped child". *Board of Education of the Hendrick Hudson Central School District v Rowley*, 458 U.S. 176(1982) at 200.

2.

The above matter is Petitioner's request for a determination of eligibility as a disabled child under IDEA. In light of the LSS's responsibility under federal and state law to locate children with disabilities (DOE regulation 160-4-7-.03) as well as state regulations which place the burden of proof on the LSS (DOE regulation 160-4-7-.18(1)(g)(8)), Respondent bears the burden of persuasion and going forward with the evidence. The standard of proof is preponderance of the evidence. OSAH Rule 616-1-2-.21(4).

3.

Based on the above findings of fact, the preponderance of the evidence supports the determination that [redacted] is not a "disabled child" as defined under federal law under the category of serious emotional disturbance, further defined under state regulations as EBD. However, his inattentive and disruptive behaviors, in light of his past diagnosis of ADHD, may support eligibility under the OHI category. Federal law defines disability as follows:

(3) Child with a disability.

(A) In general. The term "child with a disability means a child--

(I) with mental retardation, hearing impairments (including deafness), visual impairments (including blindness), serious emotional disturbance (hereinafter referred to as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities.
20 U.S.C. § 1401(3)(A)(I).

State regulations further define the categories of serious emotional disturbance and other health impaired as follows:

(1) Definitions. A student or youth from three through 21 years of age is considered to have a disability under the Individuals with Disabilities Education Act (IDEA) if the student or youth meets the eligibility criteria in any of the following areas.

.....

(d) Emotional and behavioral disorder. (Appendix D)

(g) Other health impairment. (Appendix G)

These categories are further defined:

Appendix D--- Emotional and Behavior Disorder (EBD)
Definition.

An emotional and behavioral disorder is an emotional disability characterized by the following:

- (i) An inability to build or maintain satisfactory interpersonal relationship with peers and/or teachers.
- (ii) An inability to learn which cannot be adequately explained by intellectual, sensory or health factors.
- (iii) Consistent or chronic inappropriate type behavior or feelings under normal conditions.
- (iv) Displayed pervasive mood of unhappiness or depression.
- (v) Displayed tendency to develop physical symptoms, pains or unreasonable fears associated with personal or school problems.

Appendix G--- Other Health Impairment (OHI)

Definition.

Other health impairment means having limited strength, vitality or alertness including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—

- (1) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, or heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia; and
- (2) Adversely affects a student's educational performance.

In some cases, heightened awareness to environmental stimulus results in difficulties with starting, staying on and completing tasks; making transitions between tasks; interacting with others; following directions; producing work consistently; and organizing multi-step tasks.

Based on the evidence presented at the hearing, the LSS properly determined that [REDACTED] fails to meet the definition of a disabled child under the category of EBD. The school psychologist administered a variety of tests which should have shown some indication of emotional problems. [REDACTED] presents himself as a happy child and his performance on the tests did not reveal any information to support disability under the EBD category.

[REDACTED] is functioning at the low average range of intelligence which should allow him to pass his grade levels. Although LSS personnel point to achievement tests to demonstrate that [REDACTED]'s achievement is commensurate with his intellectual ability, he has failed the 6th grade once and may again. His behavior in the classroom is suggestive of the impulsive behavior seen in children with ADHD. Further evaluation by an expert is needed and may result in his disability under the category of other health impaired if ADHD is established. Additionally, [REDACTED] has been placed in an alternative school because of behavior which could be the result of his ADHD. Although LSS personnel find the behavior volitional rather than impulsive, this is a difficult assessment to make in the absence of input from a physician/clinician specializing in ADHD.

4.

The ALJ has authority under 34 C.F.R. 300.502(d) to order an independent evaluation. ~~XXXX~~ needs assessment by a physician and clinician with expertise in diagnosing ADHD and assessing its impact on educational progress.

V. Decision

- (1) The LSS acted in compliance with IDEA in determining that ~~XXX~~ did not meet the definition of a disabled child under the category of EBD;
- (2) the LSS did not properly consider ~~XXX~~'s eligibility under the category of OHI ;
- (3) within 60 days, Respondent shall arrange for a medical and clinical evaluation with a physician/clinician specializing in ADHD and its impact on educational progress;
- (4) subsequent to receipt of the independent evaluation, another meeting shall be scheduled, as soon as practical, to determine if eligibility under the OHI category exists.

SO ORDERED this 11th day of June, 2002.


JESSIE R. ALTMAN
ADMINISTRATIVE LAW JUDGE