

04-0404069

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

~~0000~~,
Petitioner,

) Docket No.
) OSAH-DOE-SE-0404069-79-MSF

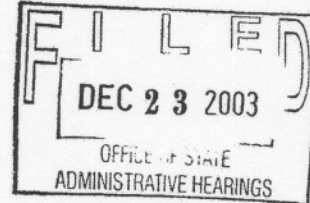
v.

Jasper County School District,
Respondent.

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Initial Decision

I. Introduction



This matter is the Administrative review of an action brought by the parents of Petitioner under the Individuals With Disabilities Act (IDEA) challenging the child's individualized educational program as provided by Respondent. ¹ Petitioner has alleged that Respondent violated the Americans With Disabilities Act (ADA). The school district seeks a determination that its proposed placement of Petitioner in a self-contained EBD classroom setting is an appropriate method of providing Petitioner with FAPE in the least restrictive environment. For the reasons stated below the relief sought by Petitioner is denied and the relief sought by Respondent is granted.

II. Background

A telephone pre-hearing conference was held with the parties on August 30, 2003. Consistent with the Pre-Hearing Order issued on October 17, 2003, the parties were ordered to exchange exhibits, witness lists and statement of the legal issues by September 1, 2003. Petitioner's parents indicated to the court that they had not received Respondent's documents but had sent their documents to the State Board of Education and to the school Petitioner had attended. The parents agreed to proceed with the hearing as scheduled.

At the end of the hearing, the parties agreed to an extension of the time for issuance of

¹ A hearing of this matter was conducted on October 6, 2003. Petitioner, a minor child, was present. His parents, referred to as (P) and (M), elected to proceed *pro se*, without counsel. Witnesses for Petitioner included himself and Thaxton Pennamon. Respondent was represented by Sam Harben, Jr., Esquire. Witnesses for Respondent included Thomasa Bowden, Laela Bunn, Kelvin T. Butts, Patricia Curry, Janice Moore, Sandra Shepherd, Michael Strickland and Mary Pope Tumlin. Admitted into evidence were Joint Exhibits 29-31, 34-35 & 57; Respondent Exhibits 1-58, including R -55 A & B. Petitioner's Exhibits 1 (2 cassette tapes) & 2 (3 cassette tapes), were not admitted into evidence but are part of the record.

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III. Findings of Fact

1.

Petitioner, a ~~09/16/97~~-year-old student in the Jasper County School System, is eligible to receive special education services under the Individuals with Disabilities Education Act (IDEA). He is currently being kept at home pending the outcome of this hearing.

2.

Petitioner's developmental milestones were reportedly normal; he suffered from chronic, severe asthma until four years of age, and has a family history of mental illness and seizures. (Joint Exhibit 35, Respondent Exhibit 42)

3.

In March, 1995, at the age of four, Petitioner was referred for evaluation from the Head Start Program for behavioral issues that included impulsive and aggressive behaviors. He was described as being stubborn, violent, disrespectful and aggressive. Further he had difficulty following rules, and had begun to strike out, by hitting and throwing objects at children and teachers. (Testimony of Sandra Shepherd, T. 39-40, Respondent Exhibits 1, 2, 3 & 42, Joint Exhibit 35)

4.

An initial evaluation in April 1995 determined Petitioner had an emotional and behavioral disorder (EBD). He was therefore eligible for and received special education services for a behavioral disability beginning May 3, 1995. Initial areas of concern included interpersonal relationships and inappropriate behavior. (Testimony of Shepherd, T. 40, Respondent Exhibits 3, 4, 5, 6, 7 & 42)

5.

In a re-evaluation conducted on March 3, 1998, it was noted that Petitioner's second grade year, 1997-1998, was characterized by a marked deterioration in his behavior and unpredictable conduct in the classroom, a low tolerance for stress, a reaction to frustration by either becoming tearful and making self-deprecating remarks, or becoming belligerent, aggressive and non-compliant. (Testimony of Shepherd, T. 40, Respondent Exhibit 10 & 11)

² The mother for Petitioner telephoned the court and left two messages around October 16, 2003, but the court did not return the calls as ex parte communications are prohibited. OSAH Rule 616-1-2-.10

6.

Academically, the 1998 re-evaluation results indicated that Petitioner had a high average range of intelligence, verbal reasoning skills in the very superior range and well-developed reasoning abilities across all skill areas. Such results suggested that Petitioner should be able to acquire and assimilate information in the regular classroom with appropriate effort and motivation. (Testimony of Shepherd, T. 40, Respondent Exhibit 11)

7.

On September 25, 1998, Petitioner became eligible for severe emotional and behavioral disorder services (SEBD). He was served at [REDACTED] Elementary School by [REDACTED] Center, a part of The [REDACTED] Program under individual educational plans (IEPs) written by the [REDACTED] Center from May 1998 through the end of the 1998-1999 school term. (Testimony of Shepherd, T. 41-43, Respondent Exhibits 12 & 42)

8.

While in [REDACTED] Center program, Petitioner showed clinically significant internalizing and externalizing behaviors, such as rapid mood swings, unpredictable behavior, and disassociated episodes such as voice changes and feelings that others were out to get him. Petitioner did not turn in assignments and reacted to stress and frustration by becoming tearful or belligerent and aggressive. (Testimony of Shepherd, T. 41, Respondent Exhibits 13, 14, 15 & 42)

9.

Petitioner's physical aggression purportedly escalated in September 1998 including throwing objects at his teacher and attempting to choke a kindergartener. During that time weekly telephone calls were placed to his parents. (Respondent Exhibit 12)

10.

From October 1998, through January 1999, Petitioner received counseling through the SEBD program, both in a group setting and individually. This counseling focused on, among other things, Petitioner's anger management, self-control and personal issues. (Respondent Exhibits 16 & 17)

11.

The April 1999, IEP meeting notes indicate that although Petitioner had a history of destroying school property and aggression toward peers when he lost control, he had not exhibited those behaviors since his placement in the SEBD setting. However, even in the SEBD setting, Petitioner was quick to react to stress or frustration by becoming tearful,

belligerent, aggressive (both verbally and physically) and non-compliant. In this setting, when angry, he was escorted or physically redirected. During this year his physical aggression included kicking and throwing punches at staff. (Testimony of Shepherd, T. 41, Respondent Exhibits 16 & 17)

12.

The April 1999 IEP documents, written by school staff, indicate that Petitioner's parents preferred that he be placed in regular education classes rather than receive special education services. In response to the parents' request, despite his teachers' concerns, Petitioner's classroom time in special education was reduced to two segments with five segments daily in regular education class. (Testimony of Shepherd, T. 42, Respondent Exhibits 16, 17, 18, 19 & 42)

13.

During the annual IEP meeting to develop Petitioner's fourth grade IEP, Petitioner's mother opined the SEBD service was "bogus". She was concerned that in special education class Petitioner would be expected to misbehave and would do so, rather than learn skills appropriate to control his behavior. She preferred for him to face the consequences for misbehavior and to be disciplined in the regular classroom setting. Furthermore she did not want his emotional/behavior issues addressed through a special education resource class. (Respondent Exhibit 19)

14.

Petitioner began his fourth grade year at ██████████ Elementary School attending only one hour daily in the special education EBD resource setting. Petitioner's IEP, in effect from August 6, 1999, to May 19, 2000, indicates his behavior improved. (Respondent Exhibit 19)

15.

On August 10, 2000, an annual IEP meeting was held to review Petitioner's progress and develop his IEP for fifth grade, in effect from August 11, 2000 to May 25, 2001. Although he had made progress both academically and behaviorally, it was still apparent that Petitioner needed the EBD consultative model weekly for thirty minutes. Petitioner had utilized this option about once per week in fourth grade as the EBD classroom had been an effective tool to allow him to "cool down" when upset, demonstrating continued need for self-control assistance. (Testimony of Shepherd, T. 43, Respondent Exhibits 22, 23, 24, 25 & 42)

16.

On February 21, 2001, while Petitioner was in the fifth grade, a re-evaluation determined that Petitioner no longer qualified for special education services. His teachers described

Petitioner as cooperative with both teachers and peers, having good study habits, good self-care, age appropriate motor skills and good communication skills. The psychological evaluation, included in this re-evaluation, indicates Petitioner's mother reported his negative feelings about special education class. (Testimony of Shepherd, T. 43, Joint Exhibit 29)

17.

On May 7, 2001, the annual IEP meeting was held to review Petitioner's progress and develop his sixth grade IEP. Teachers reported Petitioner at or above grade level in all academic areas and progress in regular classroom behavior. Specifically, his regular education teacher reported he made progress interacting with peers, had begun to establish friendships and had improved his self-control. According to his teachers at this time, Petitioner showed improvement in behavioral control and normal adjustment within the school setting. Based upon the February re-evaluation and his progress, the committee determined that Petitioner was ineligible for EBD services. (Testimony of Shepherd, T. 43-44, Respondent Exhibits 25, 26, 27, 28, 29 & 42)

18.

Due to the fact that Petitioner was now entering middle school and based upon parental concerns about discontinuation of special education services, a plan was developed to transition Petitioner from the self-contained special education placement to a resource placement and then to consultative services within the regular classroom setting. The IEP committee decided that a six-week consultative placement using EBD services would be used as a means of easing Petitioner's transition. Following the six-week transition, Petitioner would be monitored for behavior issues by the Student Support Team (SST). (Testimony of Shepherd, T. 43-44, Patricia Curry, T. 112, 116, 118, 123-126, Respondent Exhibits 25, 26, 27, 28, 29 & 42)

19.

Thomasa Bowden taught Petitioner during his sixth and seventh grade years. In 2001, at the start of Petitioner's sixth grade year, she found him to be rambunctious, overactive, and desirous of being the center of attention but easily redirected. Despite performing well academically, as the school year progressed, Petitioner exhibited disruptive outbursts necessitating his removal from the classroom. (Testimony of Thomasa Bowden, T. 70-73, 85-86, 98)

20.

Patricia Curry is a special education teacher who only saw Petitioner angry in school one time in sixth grade; however, his behavior was quite different in seventh grade where he was usually angry, had problems in the lunchroom or classroom, was quite disruptive of the other students her class and had to be escorted in the halls. (Testimony of Curry, T. 107- 112, 121, Respondent Exhibit 51)

21.

Toward the end of Petitioner's sixth grade year, a Section 504 Accommodation Plan, dated March 19, 2002, was drafted with his parents' input, Bowden recalled attending a school meeting in which Petitioner's 504 Plan and its implementation were discussed. Later, in a meeting held on September 25, 2002, Petitioner's parents were given two options: Petitioner could continue with the 504 Plan or could be referred to special education services. The parents chose to update the existing 504 Plan. (Testimony of Bowden, T. 83-84, 93-96, Respondent Exhibit 29)

22.

During Petitioner's seventh grade year in 2002-2003, minor behavioral problems turned more serious. As confirmed by an administrator charged with independent observation, Petitioner exhibited frequent outbursts to distract Ms. Bowden from teaching. Petitioner also used profanity, balled up his fists, left the room without permission and attempted to run the class. Bowden opined that 95% of the time Petitioner was in the classroom he would have angry outbursts 85% of the time. These outbursts would take as much as twenty minutes out of the fifty-five minute classroom period. (Testimony of Bowden, T. 74-77, 90, 92, 101)

23.

Bowden reported that Petitioner's peers requested to be removed from his proximity in class, that she had received a note from one student, who felt threatened, describing an altercation with Petitioner and that she observed Petitioner attempt to choke a student in her classroom. (Testimony of Bowden, T. 78, 90)

24.

Bowden reported to the school administration two occasions in which Petitioner placed his hands on her. In one of those incidents, she had to ask Petitioner to remove his hands from her shoulder three times. As the year progressed, she requested the administration have someone present in the hallway whenever she talked with Petitioner. During these discussions, Petitioner would pull up his shoulders, ball his fists, mumble under his breath and pace. Bowden stated that Petitioner is physically stronger than she is and that she felt afraid of and uneasy with him. (Testimony of Bowden, T. 74-76, 89-90, Butts, T. 206, Respondent Exhibit 50)

25.

Kim Brown completed the Functional Behavior Assessment For Teachers of Petitioner on November 26, 2002. The assessment states that Petitioner, in his seventh grade regular education classroom, refuses to accept correction and doesn't want to follow any rules. He typically exhibits one of two behaviors in the classroom: attempting to leave or

dominating classroom activities and rallying others to join. (Respondent Exhibits 41 & 42)

26.

On November 22, 2002, due to Petitioner's worsening behavior, a meeting was held in which his 504 Plan was again updated and continued until an evaluation could be completed and special education eligibility could be reviewed. (Respondent Exhibits 30, 31, 32, 33, 36 & 37)

27.

On January 16, 2003, at an IEP committee meeting, with Petitioner's parents in attendance, Petitioner was found eligible for special education services for EBD. The Emotional and Behavioral Disorder Eligibility Report states that Petitioner's behavior was disruptive to the learning process for both himself and his classmates, that he manipulated and challenged authority and rules, asked to leave the classroom for trivial matters, attempted to dominate classroom activities, attempted to get classmates to join, muttered disrespectful and suggestive comments under his breath and displayed angry outbursts in the classroom.

28.

All four of Petitioner's teachers reported significant and/or at risk hyperactivity, aggression and conduct problems. Petitioner's attitude to teachers on the BASIC Self-Report of Personality fell within the clinically significant range, suggesting a high level of maladjustment. His parents reported significant depression and anxiety, with suicidal ideation. Purportedly, Petitioner would see things that were not there, seemed out of touch with reality and sometimes would say, "I'm afraid I'll hurt someone." (Respondent Exhibits 38, 39 & 42)

29.

Petitioner's parents signed that eligibility report for special education EBD services and agreed to EBD services for him on March 7, 2003.

30.

A meeting was held on March 10, 2003, attended by Ms. Bowden among others, in which Petitioner's eligibility for special education services as an EBD student as well as a January 10, 2003, psychological evaluation were discussed. At that time, an IEP was developed that included Petitioner's placement in all regular education classes using the EBD resource teacher as needed. Later in March 2003, an IEP was developed for Petitioner. The IEP included a consent agreement that was to be in effect until May 23, 2003, and included .05 EBD segments for Petitioner. (Testimony of Bowden, T. 79-80, Respondent Exhibit No. 48)

31.

Ms. Bowden agreed that Petitioner was in need of EBD services due to his inability to remain in her regular education class and to receive assistance for emotional issues such as controlling his anger. Petitioner was spending more time out of Ms. Bowden's class than in due to in school suspensions (ISS) or out of school suspensions (OSS). Placement in the special education resource setting would allow for Petitioner to receive one-on-one instruction allowing him to remedy his having fallen behind academically. (Testimony of Bowden; T. 80-82)

32.

Petitioner was unable to finish the last few days his seventh grade school year, 2002-2003, once incarcerated and enrolled in the education program at the ██████████ RYDC (Regional Youth Detention Center) and the Department of Juvenile Justice. The school district received a request for his education records, including his current IEP and psychological, and notification on May 19, 2003, that he had been enrolled in the education plan at the ██████████ RYDC. Petitioner's mother informed the school that Petitioner had been placed for thirty days in a boys' group home in Commerce, Georgia, for stealing from his father and neighbors. She also told SEB teacher Strickland that the YDC referral was because Petitioner had a physical altercation with a family member. Thereafter, his parents sought a grant for long-term therapy treatment. (Testimony of Strickland, T. 197-199, Respondent Exhibits 53 & 54)

33.

Petitioner reentered the Jasper County School System for his eighth grade year, 2003-2004. At an IEP meeting held August 5, 2003, it was determined that Petitioner would receive regular education classes in science, connections, math and reading; in the math and reading classes he would receive the assistance of a special education teacher as the "inclusion" model for special education services. He would also have EBD resource class for English, anger management and Georgia studies. He was to participate in an anger management counseling session with the school's EBD resource teacher daily. (Respondent Exhibits 55, 55B & 55C)

34.

On August 18, 2003, an additional meeting was held to discuss Petitioner's behavior problems and explore whether his placement should be adjusted to include an amendment to and modification of his IEP. On August 22, 2003, another meeting was held in which such amendment was drafted changing Petitioner's inclusion classes to EBD self-contained classes in a resource setting based upon his reported inability to control his behavior in class. Petitioner's parents strongly disagree with this change in Petitioner's IEP. (Testimony of Mary Pope Tumlin, T. 142-144, Respondent Exhibits 56, 57 & 58)

35.

In the present school year, during only the first few weeks of class before his parents removed him from school in August 2003, the evidence consistently demonstrates that in a regular classroom setting, Petitioner was defiant of teacher authority, disruptive of the entire classroom and virtually unmanageable at school. (Testimony of Tumlin, T. 131-132, 134, 136-138, Bunn, T. 149-153, Butts, T. 205-207)

36.

Laela Bunn teaches advanced and regular reading classes. She taught Petitioner for only two weeks of the current school year prior to his removal from school. Petitioner was initially placed in Bunn's regular reading class and despite disruptive behavior, was moved to the advanced reading class based upon academic ability. Petitioner proved unable to accept the advanced placement due to his continuing disruptive behaviors. (Testimony of Bunn, T. 147-150, 152)

37.

Following Petitioner's repeated incidents of intolerable regular classroom behaviors, his teachers agreed that he would be placed in EBD class. Michael Strickland, SEBD teacher, assumed the role of primary teacher for Petitioner. Strickland found Petitioner academically proficient when he so chose but that he concentrated instead on not wanting to be a special ed student, making excuses to leave class and picking on other students or playing with classmates during class. (Testimony of Strickland, T. 160-164)

38.

Strickland described an incident where Petitioner had been menacing to him in class. Petitioner wanted to leave the classroom and Strickland told him that he would be reported; whereupon, Petitioner got in his face, puffed up, then stormed out and slammed the door. After Strickland called the administration, Petitioner came back into the classroom, brushed right against Strickland, went to get something and came back and told Strickland he was lucky he was a teacher. Strickland pushed the teacher panic button several times after Petitioner left the class, and held the door to keep Petitioner outside when he tried to re-enter the class. (Testimony of Strickland, T. 167-168)

39.

Petitioner's parents attempted to show that Mr. Strickland was biased in favor of the school system because he lacks a teaching contract. Mr. Strickland believes the best placement for Petitioner would include special education services in Mr. Strickland's class for the period of time necessary for Petitioner to accept his emotional behavioral issues, by following the rules, until he regained the ability to reenter regular education classes. Therefore Strickland's opinion was consistent with the testimony of Petitioner's

teachers who contended that he should benefit from class instruction in a small group setting with one-on-one instruction. (Testimony of Strickland, T. 176, Curry, T. 122)

40.

Assistant School Principal Kelvin Butts, a former police officer, has the task of student discipline as one of his main duties. He described Petitioner's seventh grade year as one in which Petitioner progressed from classroom disruptions, that consisted mostly of his taking or loud disruptive behavior, to being tardy to class and causing general disruption. He described Petitioner as being impossible to teach, using profanity, whistling, laughing and using disruptive questioning in class. (Testimony of Butts, T. 22, 203-205)

41.

By eighth grade, after placement in Strickland's class, Butts observed Petitioner did not want to be in special education class, was not apt to accept any authority and exhibited direct and open defiance of authority. He described Petitioner's disruptive behavior on a scale of one to five, with one being the least disruptive, to be a five-plus. (Testimony of Butts, T. 205-207)

42.

In August 2003, after approximately two weeks of class, Petitioner's parents withdrew him from school. He has remained at home working independently on classroom materials provided for him. Petitioner does not want to attend class in a special education classroom and his parents agree with his wishes. (Testimony of Strickland, T. 175, 178)

43.

Strickland acknowledged the school has approved the use of a behavior specialist, Robert Spalding, to evaluate Petitioner to suggest additional behavioral management techniques Strickland could incorporate for Petitioner in class. (Testimony Strickland, T. 195-196)

44.

Accommodations made for Petitioner in the eighth grade have included teachers and staff attempts to be non-confrontational with Petitioner, allowing the child to make telephone calls to the parents as needed, escorting him to class, having a "cooling - off" time, in-school and out-of school suspension and writing in a journal. (Testimony of Butts, T. 207-208)

45.

Intellectually Petitioner tests in the average range with verbal reasoning skills in the very superior range. His intellectual ability is such that he has functioned above grade level

and is capable of a high level of work, but his emotional problems have had a negative impact on his class work performance. (Testimony of Tumlin, T. 130, Bunn, T. 153-154, Strickland, T. 161, Respondent Exhibits 11, 12)

IV. Conclusions of Law

1.

This matter is governed by the Individual's with Disabilities Act (IDEA) and its regulations that require a free and appropriate education (FAPE) must be provided to any student who is identified as having a disability as defined by the Act, 20 U.S.C. § 1412 (1); 34 C.F.R. § 300.4, in the least restrictive environment. 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. The Court established a two prong test to determine the appropriateness of an Individualized Education Plan (IEP): first, has the State complied with the procedures set forth in the Act and secondly, is the individualized educational program reasonably calculated to enable the child to receive educational benefits.

2.

Respondent shall bear the burdens of persuasion and going forward with the evidence. OSAH Rule 616-1-2-.07 The standard of proof on all issues in a hearing is a preponderance of the evidence. OSAH Rule 616-1-2-21 (4)

3.

The IDEA defines "free appropriate public education" as special education and services that have been provided at public expense, under public supervision and direction and without charge, meet the standards of the state education agency, include an appropriate preschool, elementary or secondary school education in the state involved, and are provided in conformity with the individualized education program required under Section 1415 (a) (5) of the Act.

4.

The "free appropriate public education" required by the Act is tailored to the unique needs of the disabled child by means of an "individualized education program," an IEP. *Rowley*, 458 U.S. 176 (1982)

5.

Under the substantive prong of the free appropriate education analysis, the court must

determine whether a student received adequate educational benefits during the years at issue at the public school. Adequate educational benefits refer to a "basic floor of opportunity." *Weiss v. School Board of Hillsborough County*, 141 F. 3d 990, 1998 U.S. App. LEXIS 9572

6.

An emotional and behavioral disorder is one that is characterized by (1) an inability to build or maintain satisfactory interpersonal relationships with peers/teachers, (2) an inability to learn which cannot be adequately explained by intellectual, sensory or health factors, (3) consistent or chronic inappropriate type of behavior or feelings under normal conditions, (4) displayed pervasive mood of unhappiness or depression, (5) displayed tendency to develop symptoms, pains or unreasonable fears associated with personal or school problems. Georgia Department of Education Rules, 160-4-7-.02, Appendix D-Emotional and Behavioral Disorder (EBD)

7.

A student with EBD is a student who exhibits one or more of the above emotionally based characteristics of sufficient duration, frequency and intensity that it/they interfere(s) significantly with educational performance to the degree that provision of special educational services is necessary. *Id*

Discussion

In the instant case, Petitioner's parents seek a determination that the school district improperly denied Petitioner special education services in 2001 when he entered middle school, that the school system and faculty allegedly harassed and retaliated against Petitioner and his family, and that Petitioner's current school placement should be a regular education classroom setting.

1. Special education services for school year 2001-2002

Petitioner has been eligible for special education services for EBD from 1995 through 2003 with the exception of his sixth grade school year. For that year, 2001-2002, Petitioner's parents contend he was improperly denied special education services. The evidence showed that Petitioner had been in a special environment at The Learning Center, which drafted his IEPs, and that he made great improvement. Then he made the move into the regular school for sixth grade, at the beginning of middle school. Evaluations done in February 2001, while he was in fifth grade, found Petitioner no longer eligible for special education services. Additionally, his fifth grade teachers found his classroom behavior acceptable. Based upon the evaluations and the positive reports of his classroom behavior, a transition plan was developed to assist him for six weeks in adjustment into middle school, to be monitored thereafter by a student support team. Petitioner was consistently monitored by his teachers, school officials and his parents

during his sixth grade year. There is no evidence that the evaluations determining Petitioner ineligible for special education services were invalid, flawed or incorrect. Nor was the testimony of his teachers discredited. The fact that Petitioner subsequently began to exhibit disruptive emotional behaviors as his sixth grade year progressed, alone, is insufficient to discredit the reevaluation of ineligibility for special education services. (See Findings of Fact, Numbers 16-20)

2. School district provision of special education services in 2002-2003

Petitioner's seventh grade year and a few weeks of his eighth grade year, in the fall of 2003, have been characterized by overwhelmingly consistent evidence of need for special education services in an EBD resource room. Petitioner consistently demonstrates classroom behaviors that include attention seeking, disruption, isolated incidents of violence and issues with anger management. Taken as a whole, Petitioner's classroom behavior both in the regular classroom setting and the special education setting demonstrates an emotional behavioral disorder that prevents him from achieving academic accomplishment commensurate with his demonstrated intellectual potential. The evidence shows Petitioner has been unable to function successfully in a regular classroom setting in both seventh and eighth grade and even limited success in an EBD classroom. The evidence does not support the parents' demand that Petitioner be taught in a regular rather than an EBD classroom.

Petitioner's parents chose in September 2002 to continue with the 504 Plan in effect during his seventh grade year, rather than to accept offered special education services. An issue for determination here is whether the school district was required to go beyond the parents' wishes and develop an IEP for Petitioner that addressed his EBD needs and provide him with FAPE.

A review of the evidence indicates that a meeting was convened on November 22, 2002, to update the 504 Plan, until evaluations could be done and eligibility reviewed and an IEP could be put into place in January 2003. Thereafter, a functional behavior assessment of Petitioner was done on November 26, 2002. A psychological evaluation was done and at the IEP meeting on January 16, 2003, Petitioner was determined eligible for EBD services. By March 2002 the parents agreed in a consent agreement to classroom EBD segments for Petitioner. See Findings of Fact, Numbers 21-27

3. Petitioner's parents removed Petitioner from school after only a few weeks of his eighth grade school year, 2003-2004. The school district cannot be held responsible to provide FAPE to Petitioner when he has not been present at school. The school district has demonstrated that Petitioner's classroom behaviors warrant inclusion EBD services. The child's desire not to be served in special education class does not change the fact that he has demonstrated a need for special education services. A child eligible for special education services, by the nature of his disability, should not be served, as his parents contend, through disciplinary measures.

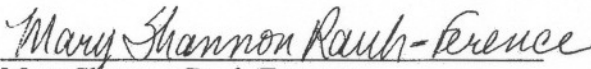
4. Petitioner's parents allege harassment and retaliation by school officials and teachers. These allegations were unproven.

5. The school district's issue is whether its proposed placement of Petitioner in a self-contained EBD classroom setting is an appropriate manner in which to provide Petitioner with FAPE in the least restrictive environment. Respondent has shown by a preponderance of the evidence that a self-contained classroom would be the least restrictive and appropriate environment for Petitioner. The uncontroverted testimony of his teachers is that Petitioner is not learning in the regular classroom and is disruptive to other students, that accommodations have been unsuccessful and that EBD behaviors have not improved. The school district has therefore carried its burden to show that the August 22, 2003, IEP developed for Petitioner for placement in a self-contained classroom satisfies the requirements of IDEA and is reasonably calculated to provide Petitioner with FAPE in the least restrictive environment.

IV. Decision

For the reasons stated above, the relief sought by Petitioner is hereby denied. The relief sought by Respondent is granted.

SO ORDERED, this 23rd day of December, 2003.


Mary Shannon Rauh-Ference
Administrative Law Judge