District of Columbia
Office of the State Superintendent of Education

Student Hearing Office
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Confidential

STUDENT, through the legal guardian[1]	)	Complaint Filed: January 7, 2010
	)	
Petitioner,	)	Prehearing Order: March 1, 2010
	)	
v.	)	Hearing Date: March 12, 2010
	)	
	)	Docket Nos.
	)	
Respondent.	)	
	)	
Student Attending:	)	
	)	

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HEARING OFFICER'S DECISION

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[1] Personal identification information is provided in Appendix A.

Jurisdiction

This proceeding was invoked in accordance with the rights established under the Individuals With Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title V of the District of Columbia ("District" or "D.C.") Municipal Regulations ("DCMR"); and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

Background

Petitioner is a year-old student attending On January 7, 2010, Petitioner filed a Due Process Complaint Notice ("*Complaint*") alleging that the had failed to identify Petitioner as a child with a disability. In a Prehearing Order on March 1, 2010, the Hearing Officer determined the issue to be adjudicated as follows:

- DCPS' alleged failure to identify Petitioner as a child with a disability

  Petitioner alleges that declined to identify Petitioner as a child with a disability at a Multidisciplinary Team ("MDT") meeting on July 8, 2009. Petitioner further alleges that Petitioner failed four of six courses during the 2008-2009 school year, that Petitioner's counsel requested that reconsider Petitioner's eligibility in a letter dated August 7, 2009, but again declined to determine that Petitioner was eligible.

  asserts that Petitioner does not meet the qualifications under IDEIA for a child with a disability; although he is underperforming, that underperformance is not due to a disability.

The due process hearing was convened on March 12, 2010 and completed on March 19, 2010 with the parties' filing of findings of fact and conclusions of law. The parties' Five-Day Disclosures were admitted into evidence at the inception of the hearing.

Witnesses for Petitioner

Janelle Knott, Educational Advocate, James E. Brown & Associates
Petitioner's Mother
Dr. Terra Schmookler, Clinical Psychologist

Witnesses for IDEAPCS

Dr. Mary Ryan, Psychologist, Mental Health Resources Plus
Special Education Individual Resource Specialist,

General Education Mental Health Counselor,
English Teacher,
Special Education Coordinator,

Findings of Fact

1. Petitioner is a year-old student who has attended since the beginning of the 2008-2009 school year.[2]

2. On April 7, 2008, when Petitioner was in the grade, Dr. Schmookler completed a Psychoeducational Evaluation of Petitioner. Dr. Schmookler diagnosed Petitioner with Attention Deficit Hyperactivity Disorder ("ADHD") and Developmental Coordination Disorder.[3] Petitioner's Full Scale IQ was 84.[4] His grade equivalent scores included 8:3 in Basic Reading Skills, 5:8 in Broad Written Language, 5:7 in Written Expression, 6:7 in Broad Math Skills, and 6:9 in Math Calculation Skills.[5] Dr. Schmookler's findings and recommendations, *inter alia*, included the following:

> [Petitioner] has a history of academic difficulty in all subject areas beginning in the fifth grade after transferring to a new school. He reportedly had no identified academic difficulties before that time. In addition, [Petitioner's] motivation towards his academics has been described as variable, as [Petitioner] often neglects to complete his assignments...
>
> [Petitioner's] performance on the VMI indicated severe deficits in visual-motor integration (Very Low range), visual perception (Low range) and motor coordination (Very Low range). This is consistent with [Petitioner's] poor performance on all tasks that included a graphomotor component. It was also observed during this evaluation that he disliked writing and avoided it when possible. Given the available data, a DSM-IV-TR diagnosis of Developmental Coordination Disorder is warranted. An occupational therapy evaluation should be conducted to further evaluate this area of functioning.
>
> [Petitioner's] functioning on the IVA+Plus was strongly indicative of a diagnosis of ADHD. His scores revealed significant difficulty focusing and

[2] Testimony of Petitioner's mother.
[3] Petitioner's Exhibit ("P.Exh.") No. 4 at 14.
[4] *Id.* at 18.
[5] *Id.* at 20.

sustaining attention, as well as response inhibition. Likewise, on the CPRS, [Petitioner's mother] reported Markedly Atypical difficulties with inattention and her responses yielded a Markedly Atypical score on the Conners ADHD Index. She did not report significant problems with hyperactivity. Further, [Petitioner's mother's] responses on the BRIEF yielded Clinically Significant scores on several indexes of executive functioning, indicating that [Petitioner] has considerable difficulty shifting attention, initiating tasks, planning and organizing tasks, monitoring behavior, and working memory. A previous evaluation conducted in 2005 noted that [Petitioner] demonstrated symptoms of ADHD at that time, but the diagnosis was not assigned due to the evaluator's belief that the symptoms were not interfering with is academic functioning. In the current evaluation, [Petitioner's mother] reported significant deficits in [Petitioner's] ability to organize, plan, and initiate school-related tasks. In addition, [Petitioner] reported that he often "zones off" when trying to focus on his school work. A DSM-IV-TR diagnosis of Attention-Deficit/Hyperactivity Disorder (ADHD), Predominantly Inattentive Type is warranted.

[Petitioner's] performance on tests of academic achievement was variable, demonstrating uneven development of his academic skills... Taken together, [Petitioner] is functioning below grade level in all academic areas, including reading, math, and writing. This is consistent with reports that he is greatly struggling in his grade classes. However, his academic achievement is generally consistent with his Low Average verbal abilities and Borderline perceptual reasoning abilities as measured by the WISC-IV. Therefore, a diagnosis of a learning disability is not warranted. As an exception, [Petitioner's] grammar and punctuation skills are more deficient than would be expected based on his age and cognitive functioning. While these deficits alone do not warrant a diagnosis of Disorder of Written Expression, they point to the need for remediation and targeted intervention...

RECOMMENDATIONS

[Petitioner's] academic functioning is currently significantly below grade level. He meets criteria for special education services under the classification of Other Health Impaired (OHI) due to his diagnosis of ADHD. He should receive specialized instruction in all academic subjects including mathematics, reading, and written expression. Particular attention should be given to his deficits in punctuation and grammar. In addition to specialized instruction in a small-group classroom setting, he should receive remedial individualized (1:1) tutoring in all academic subjects.

[Petitioner] would benefit from enrollment in Extended School Year (ESY) so he does not lose skills over the summer. Without continued instruction

over the summer, it is likely that [Petitioner] would fall further behind. It is recommended that tutoring services be provided intensively during this time as well to better prepare [Petitioner] for the upcoming school year…

[Petitioner] currently suffers from motivational difficulties in relation to his school work. A specific, concrete behavioral plan should be put in place to offer incentives and rewards to keep [Petitioner] engaged in his academics. This plan should be made collaboratively by the school team and [Petitioner's] mother; their collaborative efforts in implementing the plan will be essential to its success…[6]

3. convened a Multidisciplinary Team ("MDT") meeting on April 7, 2009 to review evaluations and to determine Petitioner's eligibility for special education services. A Speech and Language Evaluation conducted by the Zimitti firm concluded that speech services were not warranted.[7] The team then discussed Petitioner's academic progress. There was a consensus that Petitioner did not present a behavioral problem. Following an extended discussion of Petitioner's performance and a review of Dr. Schmookler's evaluation, stated that Petitioner "does not qualify for Special Education services purely based on A.D.D." Petitioner's educational advocate objected to statement based on Dr. Schmookler's evaluation and teacher reports. Dr. Ryan suggested that Petitioner's needs could be met through a Section 504 plan rather than special education services.[8] agreed to conduct occupational therapy ("OT") and clinical psychological evaluations.[9]

4. The MDT developed a Section 504 plan that included the following accommodations:

Concrete behavioral plan (BIP) with rewards that are manageable.
Parents and teachers create reward system to be tracked on a weekly basis.
Frequent prompts, time added for assignments.
Extended time for class assignments/test.
Attend after school tutoring at a minimum of three days per school week.
Simple and brief instructions; should be read aloud.
Assistance when needed on more complex assignments.
Visit general education counselor.[10]

5. On April 8, 2009, Ms. Patrice A. Brown of Conaboy & Associates completed a Comprehensive Occupational Therapy Evaluation of Petitioner. Ms. Brown concluded that Petitioner "is not a candidate for occupational therapy at this time."[11]

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[6] *Id.* at 11-14.
[7] P.Exh. No. 5; Exh. No. 7.
[8] P.Exh.. No. 9 at 9. During the hearing, Dr. Ryan testified that Dr. Schmookler's diagnosis of ADHD was suspect, because there was no evidence that Petitioner exhibited ADHD symptoms in more than one setting. However, Ms. Euille testified that Petitioner had ADHD, but his needs could be adequately addressed through a Section 504 plan.
[9] *Id.* at 8.
[10] *Id.* at 13.

6. May 20, 2009, Mr. Mitchell Reid of Charlot-Swilley & Associates, P.C., completed a Clinical Evaluation of Petitioner. Mr. Mitchell diagnosed Petitioner with ADHD, Predominantly Inattentive Type.[12] Mr. Mitchell's findings and recommendations, *inter alia*, included the following:

> Three key elements to consider in the conceptualization of [Petitioner's] current social emotional functioning include ADHD, depressive-like symptomatology and normal adolescent processes. His ever-present feelings of low self-esteem and depression about school and the future, although an age-appropriate adolescent angst, can become crippling if he does not receive an avenue for appropriate expression. The potential for significant depressive symptomatology exists given his poor sense of self and is negative cognitions. The result of current assessment supports the diagnosis by history of Attention Deficit Hyperactivity Disorder, Predominantly Inattentive Type.
>
> With regard to his ADHD behaviors, [Petitioner] is forgetful, easily distracted by others, does not follow through on chores and tasks unless he is constantly reminded, and he makes careless mistakes on his homework. The behaviors affect him most in an academic setting where it can be difficult for him to focus for an entire class… Since he has been at IDEA, [Petitioner] has received structured tutoring and other services which have helped increase his grades…
>
> RECOMMENDATIONS
>
> A multidisciplinary conference is recommended to discuss and make the necessary modifications to the current 504 Plan.
>
>> To help increase [Petitioner's] motivation towards academics, [Petitioner's mother] and the teachers may find it beneficial to work conjointly to find rewards and privileges that help promote academic progress.
>>
>> Test alterations (i.e., more time for taking a test or in another room) may be beneficial for [Petitioner] to give him the opportunity for success…
>
> It is strongly recommended that [Petitioner] attend structured tutoring sessions that focus on his academic compromises. Given his psychological difficulties, a tutor will help [Petitioner] organize and complete assignments in a timely and efficient manner.[13]

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[11] P.Exh. No. 6 at 7.
[12] P.Exh. No. 7 at 6.
[13] *Id.* at 5-7.

7. For the 2008-2009 school year, Petitioner failed JROTC, Introduction to Technology, English I, and Algebra I, and received Cs in Biology and World History. Petitioner was absent from JROTC 27 times and from Introduction to Technology 23 times. Two teachers listed "Excessive Tardiness" as a reason for the failures, and the JROTC teacher also listed "Excessive Absences." Three teachers noted that Petitioner "Does Not Complete Class Assignments."[14]

8. reconvened an MDT meeting on July 8, 2009 to review new evaluations, review the Section 504 plan, and to review Petitioner's progress. Consistent with the OT evaluation, the MDT proposed no OT services. Mr. Reid, who conducted, the clinical evaluation, stated that the current Section 504 plan was appropriate, but suggested adding a "quiet room space for testing."[15] The team also agreed to Mr. Reid's recommendation to add 45 minutes per week of psychological counseling to the Section 504 plan.[16]

9. Upon receipt of Petitioner's final Report Card for the 2008-2009 school year, Petitioner's educational advocate wrote to and stated that "Based on this information, [Petitioner] will be retained for the grade. In light of this information, the 504 plan does not sufficiently address his disability and needs. I am requesting a meeting before the start of SY 2009-2010 to further discuss [Petitioner's] eligibility for special education services."[17] did not respond to the request.

10. As of January 5, 2010 of the 2009-2010 school year, Petitioner was absent from 93 classes and tardy for 42 classes. He failed seven courses specifically due to absences: Introduction to Technology, World History – Industrial, English II, Spanish I, Build Think Skills, Principles of Geometry, and Environmental Science. In JROTC, in which he was absent but once, Petitioner received a B-. In Language Network, in which he missed two classes, he received a C+. In Art Appreciation, in which he missed four classes, Petitioner received a C.[18] Through the Third Advisory, Petitioner had missed 136 classes and was tardy 60 times. In the Third Advisory, he received Absence Failures in World History, English II, Build Think Skills, and Principles of Geometry. He failed Introduction to Technology and Spanish I. In History of Music, in which he missed one class and was never tardy, Petitioner received an A-. In Language Network, in which he missed one class and was never tardy, he received a C-. And in JROTC, Petitioner received a B- despite three absences.[19]

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[14] P.Exh. No. 14 at 1.

[15] *Id.* at 5. Ms. Lee participated in this meeting and testified that Petitioner's academic problems were due primarily to his absences and that is poor final grades for the 2008-2009 school year did not warrant a reconsideration of the decision not to find him eligible for special education services.

[16] *Id.* at 6.

[17] P.Exh. No. 33

[18] Exh. No. 14 at 1.

[19] *Id.* at 2.

Conclusions of Law

Failure to Identify Petitioner as a Child with a Disability

The LEA must evaluate a child suspected of a disability in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.[20] No single procedure should be used as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child.[21] The results of the evaluations must be given considerable weight in determining the child's eligibility for services and in the development of the child's IEP.[22]

The first issue is whether Petitioner established that he suffers from ADHD. Both Dr. Schmookler and Mr. Reid examined Petitioner and diagnosed him with ADHD. Dr. Ryan testified that Dr. Schmookler's diagnosis was suspect, because there was no evidence that Petitioner exhibited ADHD symptoms in more than one setting. However, Dr. Ryan never evaluated Petitioner, never interviewed Petitioner, never observed him in class, and never interviewed Petitioner's mother. Ms. Euille, Special Education Individual Resource Specialist, participated in both MDT meetings and testified that Petitioner suffered from ADHD, but that his needs could be met through a Section 504 plan. The Hearing Officer concludes that, by a preponderance of the evidence, Petitioner established that he suffers from ADHD.

The second issue is whether Petitioner's ADHD qualifies him for special education services. At the April 7, 2009 MDT meeting, stated that Petitioner "does not qualify for Special Education services purely based on A.D.D." If meant that ADHD could not qualify a student for coverage under IDEIA, he was mistaken. ADHD is a qualifying disability if the student has "limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment that" is due to ADHD, and the ADHD "adversely affects a child's educational performance."[23] Therefore, Petitioner would be eligible for special education services if his ADHD adversely affects his educational performance.

There is no question that Petitioner's academic performance has been poor for several years. Petitioner's mother testified that Petitioner was a straight-A student through the fifth grade. Thereafter, he was enrolled in a more demanding program, did not perform as well, and lost his motivation to do well. That lack of motivation has persisted until his enrollment at in 2008. As set forth in the Findings of Fact, Petitioner failed most of his courses at during the 2008-2009 school year, was retained in the tenth grade, and is failing most of his courses this year.

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[20] 34 C.F.R. §300.304(c)(4).
[21] 34 C.F.R. §300.304(b)(2).
[22] 34 C.F.R. §300.305(a).
[23] 34 C.F.R. §300.8(c)(9).

The question is whether his poor performance is due to his ADHD or other factors. In this case, the evidence is incontrovertible that Petitioner's poor performance, at least at is due to his failure to attend school. Petitioner's mother testified that she purchased a car to ensure that Petitioner and his brother would have reliable transportation to school. Nevertheless, Petitioner failed seven courses in the first semester specifically due to absences, and four courses in the Third Advisory due to absences. The two other courses he failed during the Third Advisory were courses for which he received Absence Failures in the first semester. In all of his other courses, Petitioner had minimal absences and received As, Bs, and Cs.

Petitioner did not testify at the hearing. Therefore, there is no explanation for Petitioner's failure to attend some classes but apparent willingness to attend others. But his record demonstrates an ability to get decent grades when he attends his classes. The only teacher to testify at the hearing confirmed this. Ms. Barr has taught Petitioner English the last two years. Ms. Barr testified that Petitioner has had absence and tardiness problems in her class for the last two years. He is "not there consistently enough – he's absent more than he's late. When he comes, he's tardy more often than he's on time." When he comes, he does not participate in class discussions and does not answer questions. He is disinterested, and talks about things unrelated to the class. She has offered Petitioner after-school tutoring, but he has never attended. Ms. Barr testified that Petitioner has the intellectual capability to do the work. He is simply disinterested in doing the work, and has said that if he fails, he can "just take it over in summer school."

Mr. Reid, who evaluated Petitioner in April 2009, participated in the July 2009 MDT meeting and agreed to the appropriateness of the Section 504 plan. The MDT adopted his recommendation to add a weekly psychological counseling session.

A child may not be determined to be eligible if the child's poor performance is due primarily to a lack of instruction in reading or math or limited English proficiency.[24] The evidence in this case established that Petitioner is failing most of his courses due primarily to his non-attendance in those classes. In the classes that Petitioner attends regularly, he receives passing grades. There was no explanation offered for Petitioner's willingness to attend some classes but not others. Since Petitioner attends some classes regularly, the Hearing Officer is unable to conclude that Petitioner's ADHD is the reason for his absences or lack of motivation. Therefore, the Hearing Officer concludes that Petitioner has failed to meet his burden of proving that (1) Petitioner's ADHD is the cause of his poor academic performance, and (2) violated IDEIA by failing to identify him as a child with a disability.

[24] 34 C.F.R. §300.306(b).

ORDER

Upon consideration of Petitioner's request for a due process hearing, the parties' Five-Day Disclosure Notices, the testimony presented during the hearing, and the representations of the parties' counsel at the hearing, this 29th day of March 2010, it is hereby

ORDERED, that the Complaint is **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED, that this Order is effective immediately.

Notice of Right to Appeal Hearing Officer's Decision and Order

This is the final administrative decision in this matter. Any party aggrieved by the findings and/or decision 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 of the entry of the Hearing Officer's Decision, in accordance with 20 U.S.C. Section 1415(i)(2)(B).

/s/
Terry Michael Banks
Hearing Officer

Date: March 29, 2010