

STUDENT	§	BEFORE A SPECIAL EDUCATION
	§	
	§	
V.	§	HEARING OFFICER FOR THE
	§	
CORPUS CHRISTI INDEPENDENT	§	
SCHOOL DISTRICT	§	STATE OF TEXAS

DECISION OF THE HEARING OFFICER

I. Statement of the Case

Petitioner brings this appeal, pursuant to the Individuals with Disabilities Education Improvement Act 20 U.S.C. § 1400 et seq., (hereinafter referred to as "IDEIA"), against Respondent (hereinafter referred to as "Respondent" or "School District"). Petitioner (hereinafter referred to as "Petitioner" or "Student") filed a written request for a due process hearing which was received by the Texas Education Agency on November 2, 2009. Petitioner was represented by Attorney Christopher Jonas of Corpus Christi, Texas. Respondent was represented by Attorney John J. Janssen, J.D., Ph.D. of Corpus Christi, Texas. A telephone prehearing conference was held on Wednesday, November 19, 2009, at which time both parties waived their right to a final decision within forty-five (45) days of the date the written request for due process hearing was filed. [34 C.F.R. §300.511(c)] A due process hearing was held on Thursday, January 21, 2010, in Corpus Christi, Texas. The parties agreed to file post-hearing briefs on or before February 16, 2010.

The parties agreed that the Petitioner in a ***-year old attended *** School in School District.

Petitioner's Request for Special Education Due Process Hearing and Required Notice ("Complaint"), filed with the Texas Education Agency on ("TEA") on October 30, 2009, raises the following issues regarding the special education identification, evaluation, placement, programs and services of Student:

1. Petitioner alleges that Respondent has failed to appropriately identify all of the Student's educational needs for special education services. Student has been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD") and Respondent did not provide the Student with a continuum of services to satisfy the Student's educational needs.

2. Petitioner states that Student is receiving private Speech Therapy and Occupational Therapy services.

3. Petitioner claims that Respondent has failed to provide Student with an appropriately trained, designated one-on-one aide.

4. Petitioner claims that Respondent has failed to evaluate Student for special education services even though Student lacks social skills, listening skills and concentration.

5. Because of such failures by the Respondent, the Student has been denied a Free Appropriate Public Education (“FAPE”).

As relief in this due process hearing, Petitioner requests that Respondent be ordered to do the following:

1. Provide Student with a FAPE to meet Student’s unique and individual needs.
2. Educate Student in his Least Restrictive Environment (“LRE”).
3. Provide appropriate evaluations to Student.
4. Provide appropriately implemented services which are effective, goal oriented and educationally beneficial.
5. Provide one year of compensatory educational services, or an amount of compensatory services deemed appropriate by the Hearing Officer.

Based upon the evidence and the argument of counsel, the Hearing Officer makes the following findings of fact and conclusions of law.

II. Findings of Fact

1. On September 13, 2009 a Report of Psychological Evaluation was completed on Student’s behalf by Student’s doctor. Evaluations were conducted on May 14, 2009; June 2, 2009, and July 8, 2009. It was determined that Student met the diagnostic criteria for Attention-Deficit Hyperactivity Disorder, Combined

Type; and Adjustment Disorder with Mixed Disturbance of Conduct and Emotion. Student's Doctor ruled out autism. Face-to-face psychological tests were administered by a Licensed Psychological Associate.

2. In the September 13, 2009 Psychological Evaluation, Doctor noted that even though Student is *** years and *** months old, Student's level of functioning was more the *** to early ***-year-old level due to Student's inconsistent attention and task completion. Doctor noted that Student was overactive and talkative, and that Student's performance and resultant scores accurately reflected Student's functioning, which is often influenced by impulsivity and inattention.

3. According to Parent, there were no concerns regarding learning or behavior at School at the time of the September 13, 2009 Psychological Evaluation.

4. Student's Parent had no knowledge if Student's Doctor had attended and observed Student in the classroom and in Student's educational environment to perform the September 13, 2009 Psychological examination.

5. At the beginning of the 2009-2010 school year, Student's Parent met with Student's Teacher and stated that Student's Parent suspected Student of having autism and that Student had been diagnosed with ADHD. Based on this conference, Student's Teacher arranged for a special education teacher to attend Student's class and observe Student's behavior and classroom functioning for signs of educational difficulties. Neither Student's Teacher nor the additional special education teacher noted any difficulties.

6. Student had been attending the *** program the previous year at the ***. Officials at *** had no concerns regarding Student's learning or behavior. *** had minor concerns with Student's attention, but despite Parent's concerns, *** believed Student's learning and behavior to be within normal limits.

7. Student's Doctor administered two diagnostic tests on Student's behalf, the Woodcock-Johnson III report and the WRAT-4 test. Student's Doctor did not report on nor assess Student's academic performance in the classroom or in Student's primary school environment.

8. Teacher completed a Caregiver-Teacher Report Form as part of an Other Health Impairment ("OHI") form, on October 27, 2009. The document assessed various behavioral issues a student may exhibit, totaling 56

various behavioral issues. Student's Teacher marked Zero (0) for "Not True" on all listed possible behavioral issues. The Teacher noted that Student is a very polite student, and interacts appropriately with others, follows directions, and works cooperatively.

9. Student's Teacher observed no egregious behavioral problems, hyperactivity, or inattentiveness in Student in Student's classroom, despite warnings from Parent.

10. Student's Teacher testified that Student was working at grade level and working satisfactorily. Teacher further testified that Student has mastered all work in the areas of ***. Student only had a problem with ***.

11. Student's Teacher maintained classroom notes regarding Student from August to October, 2009. Teacher asserts in notes that Student exhibited no behavioral issues, that Student sat quietly in chair, listened, and followed directions, participated in class discussions, and was able to do everything that other students were able to do. Teacher filled out forms given to Teacher by Parent stating that Student has no special needs and does not require special education services.

12. A Standards and Competencies Report was completed by Student's Teacher for the School Year of 2008 to 2009 on Student's Behalf. Teacher marked Student as having Satisfactory competency in all Introduced subject matters, reflecting Student's academic progress.

13. A Standards and Competencies Report was completed by Student's Teacher for the School Year of 2009 to 2010 on Student's Behalf. Teacher marked Student as having Satisfactory competency in all introduced subject matters, reflecting Student's academic progress. Student's next friend does not challenge the legitimacy of Student's grade reports for 2009-2010.

14. Student's Doctor wrote a Confidential Psychological Report on December 30, 2009 based on evaluations administered on December 22 and 29, 2009. In that report, Student's Doctor concluded that Student's poor attention capacity visibly influenced Student's performance in face-to-face psychological tests administered by a Licensed Psychological Associate. Associate stated that Student was overactive, impulsive, and displayed many signs of inattention. After being retested with less comprehensive tests, both academically and cognitively, to determine student's function while on Student's currently prescribed ADHD medication, Student was more able to attend to and comprehend instructions.

15. The December 30, 2009 Confidential Psychological Report noted that Student's teacher indicated no concerns about Student. Student's teacher stated that Student interacts appropriately with peers, follows directions and works cooperatively. Teacher's only concern was that Student's mother showed an "inability to see [Student] has no need of special services." The report asserted that Student may not show some of the symptoms when on medication or Student may not be far enough behind classmates to be recognized as having a problem with learning.

16. Student's Doctor has no direct knowledge of Student's actual classroom performance. Moreover, Student's Doctor did not attempt to evaluate in either the September 13, 2009 report of Psychological Evaluation, or the December 30, 2009 Confidential Psychological Report how the Student was actually performing in the classroom.

17. Student's Doctor believes it is possible for Student to perform at grade level even with the ADHD that he diagnosed.

18. Student received Satisfactory marks on all Introduced subjects in the School District's Standards and Competencies report for 2009-2010 school year.

19. Student's Parent has not requested the District to evaluate the Student to rule out an educational disability.

20. A School Activity Report dated December 9, 2009 determined that Student participates in normal everyday activities and that there were no functional (physical or psychological) limitations in classroom or in P.E. The report further stated that Student follows directions, interacts appropriately, makes friends, and cooperates. In the report, Teacher stated that Parent has requested special education services but Teacher saw no problem that would require such services.

21. Student's Parent and Student's Teacher have had an adversarial relationship during the 2009-2010 school year. Student's Parent believes that Student's Teacher did not fill out an OHI form in good faith and with sufficient consideration. Student's Teacher mistrusts the validity of or motives behind Student's Parent's wishes

that Student qualify of special education services. The relationship has, at times, impaired the ability of the two stakeholders to communicate with each other productively, about the Student's educational performance.

III. Discussion

This case represents a dispute between the District and the Student's Parent over the Student's eligibility for special education services and protections. The Parent alleges that the District has failed to identify the Student as OHI based on the Student's clinically diagnosed ADHD and provide the Student with special educational services. The District denies that the Student requires special education services, regardless of the ADHD diagnosis, based on the Student's actual classroom behavior and performance. The apparent impasse between the parties is actually resolved by a cursory review of controlling regulations that implement IDEIA and well- settled case law.

The regulations that define a Student's eligibility for special education also describe the procedure used to determine a student's eligibility. Rule 34 CFR §300.1(a) states the very purpose of IDEIA's implementing regulations:

“To ensure that all *children with disabilities* have available to them a free appropriate public education that emphasizes special education and related services designated to meet their unique needs and prepare them for further education, employment, and independent living.” 34 CFR §300.1(a).
(emphasis supplied)

“Children with a Disability” is defined thusly:

(a) General. (a) Child with a disability means a child *evaluated in accordance with §300.304 through §300.311* as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotions disturbance (referred to in this part as “emotional disturbance”), an orthopedic impairment, autism, traumatic brain injury, *an other health impairment*, a specific learning disability, deaf-blindness, or multiple disabilities, *and who, by reason thereof needs special education and related services.* 34 CFR §300.8(a) (emphasis supplied)

Therefore, the two cited regulations state the following: Special education is only meant for a child who has been *evaluated* using specific procedures (§300.304-300.311) to be found to have an impairment such as OHI and who *also needs special education and related services*. It is not enough that the child has an impairment, but the child must also need services *because* of the child's impairment.

The procedures for determining a child's impairment are already prescribed. Rule 34 CFR §300.301 states the need for the initial evaluation and the party that can request it. The first two subsections of §300.301 provide:

(a) General. Each public agency must conduct a full and individual initial evaluation, in accordance with §300.305 and §300.306, before the initial provision of special education and related services to a child with a disability under this part.

(b) Request for initial evaluation process. Consistent with the consent requirements in §300.300, *either a parent of a child or a public agency may initial a request for an initial evaluation* to determine if the child is a child with a disability. 34.CFR §300.301(a) and (b) (emphasis supplied)

The language of 34 CFR §300.301 uses the phrase “child with a disability” as a combination of the definition of a “child with a disability” in §300.8(a) (cited herein); the proper procedures and standards for evaluation tools set out in §300.304 [Evaluation Procedures]; and the actual determination of the student's eligibility procedure found in §300.306 [Determination of Eligibility]. The student's parent, teachers, school officials and perhaps, diagnosticians, review the results of evaluations performed to identify impairments and decide whether an identified impairment requires the student to receive a special education intervention. It is not enough that the student has an impairment such as ADHD. The impairment must interfere with learning.

After all, the limits of special education and a FAPE have been defined by the courts. United States Supreme Court and Fifth Circuit Court of Appeals decisions *Board of Education of the Hendrick Hudson Central School District, v. Rowley*, 458 U.S. 176 (1982) and *Cypress Fairbanks v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997), read together, define a FAPE as an individualized educational intervention that provides an impaired student with a basic educational floor on which the student can make meaningful progress. If a student is already making meaningful progress in a *general education* setting and with general education curriculum, then that student has no need for a special education intervention.

In this record, the Student is making more than simply meaningful educational progress in the general setting. The Student is functioning appropriately in class, from a behavioral standpoint, and is performing academically as well as the other students in the classroom. The Student may have a subject weakness or two and may have a bad day or two. This is the essence of normal, general education. Even if the Student has ADHD, the condition has not interfered with learning to an extent recognized by

IDEIA. Maybe this is because of the medication prescribed for the Student, or maybe it is because the Student's impairment is not that severe. This record does not contain information on why the Student is able to cope with ADHD. But the fact that the Student can function in school is no more than the Student's Doctor testified was possible. The Student's ability to perform in school is why IDEIA's eligibility determination process requires an entire *group* of stakeholders and not simply a doctor's diagnosis, to make a determination of special education eligibility. The Student's Teacher is allowed by IDEIA to be result oriented and look at the Student's classroom performance. From her perspective, there is no reason to even refer the Student for a §300.304 special education evaluation. If the parent requests the District for such an evaluation or set of evaluations, then the District can decide if it will agree to the evaluations or require that a due process hearing request be filed on its refusal to evaluate the Student. This is not the question of this case. Here, the Parent merely assumed that the Student's Doctor's analysis provided the unassailable proof that the Student should be admitted to special education. This assumption skips several steps, especially where there is disagreement on what comprised unassailable proof.

IV. Summary

In short, Petitioner's allegations are without merit in form and substance. There is a procedure to be followed to determine the Student's eligibility for special education that procedure was simply not followed. Moreover, the facts of the Student's actual classroom performance point away from a conclusion that the Student has an educational disability. The parties could stand to be more forthright with one another and refrain from judgmental assumptions that obscure the actual questions and the path to a resolution of the questions. If the true issue is the Student's need for special education, then the applicable regulations provide ample means to resolve that issue. However, on these facts, I conclude that there is no failure shown of the District to provide the Student with a FAPE.

V. Conclusions of Law

1. Petitioner is a student who resides within the boundaries of the School District.
2. Student has made educational progress in the current general education placement and curriculum. *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982) and *Cypress Fairbanks v. Michael F.*, 118 F. 3d 245 (5th Cir. 1997).
3. Petitioner has failed to show that the Student is a child with a disability as defined by IDEIA and applicable regulations. 20 U.S.C. §1400 *et seq*; 34 CFR §300.1(a).

V. Order

After due consideration of the record, the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer ORDERS that the relief sought by Petitioner is DENIED.

SIGNED in Austin, Texas this 22nd day of February, 2010.

Stephen P. Webb
Special Education Hearing Officer

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SYNOPSIS

Issue: Did the District fail to timely provide special education services to a Student who had been clinically diagnosed with ADHD even after the Doctor’s report was presented to it and the parties disputed the need for special education?

Federal Citation: 20 U.S.C. §1400 *et. Seq.*; 34 CFR §§ 300.1(a); 300.8(a); 300.304-300.311

Held: For the District. While there was a difference of opinion between the Parent and the District about whether the Student has an eligible educational disability that requires special education, there was no referral to a special education evaluation of the eligibility determination process or refusal to evaluate the Student for an eligible disability. Evidence of an impairment in the presence of appropriate performance in a general education setting, does not equate to special education eligibility.