

New Hampshire Department of Education

Student/_____ School District

IDPH FY 15-02-021

Due Process Decision

Introduction

The issue in this case is whether the student remains eligible for special education services. The student has been receiving special education services under the Other Health Impairment (OHI) category. On [date], the team met and the school members of the team determined that the student is no longer eligible for special education services because the student does not require specialized instruction. The parent disagreed. The school district requested due process.

Findings of Fact

1. The student began attending the _____ School District at the beginning of the [] school year. Before that, the student attended school in a different school district.
2. The student was enrolled in the [] grade for the [] school year.
3. Unbeknownst to the school district, the student was repeating the [] grade. The parent enrolled the student in the [] grade again at _____ even though the student had completed the [] grade in the school district where the student previously lived.
4. The school district later found out about this and spoke to the parent who said that the student was enrolled in [] grade again because the student was frequently absent from school in the [] grade at the prior school district.
5. The school district allowed the student to remain in the [] grade for the [] school year. As a result, the student is still to this day in classes that are a grade below where the student should be academically and chronologically.
6. The student came to the school district with an IEP. The student was eligible for special education services under the Other Health Impairment (OHI) category. The student's underlying disabilities are ADHD, ODD, and mood disorder.
7. The IEP had one goal in writing.

8. The student's IEP expired in February 2014 and the school proposed a new IEP with one goal in the area of "self-help." The proposed IEP removed the writing goal.
9. The proposed IEP also has accommodations.
10. The parent agreed to the IEP.
11. The IEP notes that the student has issues with attention, organization, staying on task, remaining focused in class, and completing work. SD Exh. 110.
12. Other documents in the record and testimony at the hearing are consistent with the IEP findings and demonstrate that the student frequently does not complete school work or homework, has problems paying attention in class, has a short attention span, is easily distracted, has behavioral issues at school, has trouble keeping up in class, has problems with mathematics, is often not prepared for class, frequently leaves items needed for school such as the daily agenda at home, and is often absent from school. SD Exh. 141-142.
13. The student can also be argumentative and will refuse to do work or comply with teacher directives.
14. The self-help goal in the proposed IEP stated that the student will "improve self-help skills as evidenced by earning grades of proficient or better" in each of the student's classes. SD Exh. 113. The goal had nine objectives all aimed at the student "bringing the agenda to school, using locker checklists, and turning in assignments."
15. The IEP lists one of the student's functional needs as lacking the ability in math to repeat basic foundational skills, but the IEP does not include a goal to address this issue. SD Exh. 110.
16. The student's performance under the IEP does not show much progress.
17. None of the goals and objectives of the student's IEP were met. The report cards in the record show that the self-help goal of earning grades of proficient or better was not met. SD Exh. 183, 198, 204.
18. The progress reports for the benchmarks and short term objectives in the IEP do not show any progress. Rather, all of the benchmarks are either "Attempted only" or "not yet introduced." SD Exh 206-209.

19. A chart prepared by the school's psychologist comparing the student's results over _____ school years shows that the student began having difficulties at school with grades attendance in the [] grade school year and continued to have difficulties at _____ in the [] school year. SD Exh. 139.
20. The student's NECAP scores also dropped during this time from proficient to partially proficient in the [] school year and then during the [] school year at _____, they dropped further to partially proficient in Reading and Below Proficient in Math. SD Exh. 139.
21. The student's testing and report cards in the [] and [] school years are consistent with the pattern in the chart. The student's results are sporadic and are primarily a mix of "insufficient work submitted," "partially proficient," and "substantially below proficient" grades. SD Exh. 162, 183, 198, 204.
22. A recent progress report states that the student is not "completing work and focusing during class would help academic progress." SD Exh. 201.
23. There is some school based testing in the record that shows slight improvement in some academic areas, but regression, or lack of improvement, in others. See SD Exh. 210, 211, 215.
24. The student's testing and report card results must be viewed in light of the fact that the student repeated [] grade.
25. The student's behavioral issues at school have led to frequent disciplinary issues during the [] and [] school years.
26. Between [] and [] (roughly 12 school months), the student was disciplined 20 times. SD Exh. 219 – 220.
27. The discipline incidents have common themes of being disruptive, being argumentative, not being able use self-control, not focusing on work, not being prepared for class, and not having homework or classwork completed. SD Exh. 219 – 220.
28. The discipline the student received included going to guidelines (the equivalent of a time out), detentions, in school suspensions, and an out of school suspension. SD Exh. 219 – 220.
29. When the student was suspended for [] days due to behavior, the student was required to complete a risk assessment before being allowed to return to school.

30. The school has not conducted a functional behavioral assessment of the student, nor has a behavior plan been developed to try to address the student's issues.
31. The regular education teachers go out of their way to help the student and offer additional help and leniency with deadlines, but these regular education methods have not been enough to result in improvement in the student's performance.
32. In [], the school began a reevaluation process of the student and after the evaluations were completed, the team met to determine if the student was still eligible for special education services.
33. One of the evaluations was a psychological report dated []. The report included five recommendations to help address the student's behavior and issues at school, including a functional behavioral assessment. SD Exh. 143. The recommendations were not implemented.
34. In [], the team met to determine the student's continued eligibility for special education.
35. The team found that the student still met the criteria for Other Health Impairment (OHI) and specifically found that the student's disability still adversely affected the student's educational performance. SD Exh. 193-94.
36. However, the school members of team determined that the student was no longer eligible for special education because the student did not require specially designed instruction (also referred to as specialized instruction). SD Exh. 193-94.
37. The decision that specialized instruction is not required for this student comes from the school team member's belief that specialized instruction does not address behavioral issues.
38. The parent disagreed with the team's decision.
39. The school district requested this due process hearing.

Rulings of Law

1. To be eligible for special education services under the IDEA and state laws, a student must fit into one of the definitions of disability and require specially designed instruction (or specialized instruction).

2. The Other Health Impairment (OHI) category includes a requirement that the student's disability adversely affect their educational performance. 34 CFR § 300.8(c)(9).
3. The student continues to meet the requirements of Other Health Impairment (OHI).
4. The student's disabilities continue to adversely affect the student's educational performance.
5. The IDEA and state laws do not preclude specially designed instruction from addressing behavioral issues.
6. Various provisions of the IDEA and state law require schools to address student behavior for students with disabilities. *See e.g.* 20 USC § 1400(c)(5)(f); 34 CFR § 300.324.
7. Specially designed instruction is adapting instruction that a particular child may need because of their disability and that includes instruction that is designed to meet the student's behavioral needs.
8. In the context of a student who has previously been found to be eligible for special education, the school district has the burden of demonstrating that the student no longer requires the services and is no longer eligible for special education. *Elida Local Sch. Dist. Bd. of Educ. v. Erickson*, 252 F. Supp. 2d 476, 482 (N.D. Ohio 2003).
9. The school district requested due process in this case and has the burden of demonstrating that the student does not require specialized instruction and is no longer eligible for special education services. *Schafer v. West*, 546 U.S. 49 (2005); Ed 1123.17.
10. The school did not meet its burden of demonstrating that the student does not require specialized instruction and is no longer eligible for special education services.

Discussion

The evidence at the hearing established that the student is struggling academically and behaviorally at school. The student has not made much improvement over the past year and a half of school with the programs and services provided by the school. The team found that the student's disability adversely affected the student's educational performance, but the student was no longer eligible for special education because the student did not require specialized instruction to address the adverse affects that the student's disability had on the student's educational performance.

The team's finding about specialized instruction is based on the belief by school team members that specialized instruction is geared towards academic or learning deficits and not behavior. Legally, that is not correct. There is nothing in the IDEA or state laws that would preclude specialized instruction from addressing behavior issues that adversely affect learning as is the case here.

Indeed, the IDEA and state laws require schools to consider and address student behavior. For example, the Congressional Findings to the IDEA in 2004 emphasized the importance of using behavioral interventions and supports in order to address the "behavioral needs" of children and made clear that the IDEA includes both learning and behavioral needs. 20 USC § 1400(c)(5)(f). As one example of how behavioral needs are addressed in the IDEA, the law requires IEP teams to consider the functional needs of a student, which includes behavior, when developing an IEP. 34 CFR § 300.324(a)(1). When a student's behavior impedes the student's learning, the team must consider the use of Positive Behavioral Interventions and Supports (PBIS) and other strategies to address behavior. 34 CFR § 300.324(a)(2). That was apparently not done by the school in this case even though the record shows that the student's behavior often impeded the student's learning and resulted in disciplinary action against the student.

The IDEA and state laws have provisions for including both academic and functional goals in IEPs and state laws and United States Department of Education comments on the IDEA regulations make clear that functional includes non-academic issues and behavior. *See e.g.* Ed 1102.02(t) (functional behavioral assessment is a "means of assessment of a student's behavior."); Ed 1102.02(u) (functional goal is a measurable outcome developed by an IEP team to "address a need detailed in the analysis of a student's functional performance."); Ed 1102.02(v) (functional performance is "how the child demonstrates skills and behaviors....").

Moreover, when determining eligibility for special education, the IDEA requires a statement of "the relevant behavior noted during the observation of the child and the relationship of that behavior to the child's academic functioning." 34 CFR § 300.311(a)(3).

Given this emphasis on behavior in the IDEA, it seems clear that Congress did not intend to limit specialized instruction to academic instruction. Rather, in looking at the definition¹ and the other provisions in the law about behavior and other functional issues, Congressional intent is

¹ The definition of specially designed instruction is "adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction-- (i) To address the unique needs of the child that result from the child's disability; and (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children." 34 CFR § 300.39(b)(3).

clear that specialized instruction includes instruction that is designed to address the student's behavioral needs.²

In this case, the student has numerous behavioral issues related to attention, organization, staying on task, lack of self-control, completing work, being easily distracted, and having trouble keeping up in class. The student is argumentative with school personnel, not prepared for class, and refuses to do work at school. Sch Dist Exh 141-142. In the context of this student, specialized instruction would mean adapting or designing the student's instruction to address these issues since they have impacted the student's ability to complete work and participate and progress in the general curriculum.

While the evidence at the hearing was that team members don't believe the student requires specialized instruction and what the team has proposed or provided to the student in the past is not considered specialized instruction by team members, that is based on the perception that specialized instruction addresses only academic issues. Additionally, what the team has proposed and provided in the past to the student hasn't met the student's needs, so it may be that entirely different forms of specialized instruction that have not yet been identified are required for this student.

Moreover, the numerous discipline actions against the student and the lack of a functional behavior evaluation to address the behavior are troubling. The discipline form in the record lists [] discipline incidents with the student between [] and [] (roughly 12 school months). The incidents have common themes of being disruptive, not being able use self-control, not focusing on work, not being prepared for class, and not having homework or classwork completed. The discipline the student received included time outs, detentions, in school suspensions, and an out of school suspension.

Despite the ongoing behavioral and discipline issues, the school district has never conducted a functional behavioral assessment of the student, nor has the team developed a behavior plan to try and address the behavioral issues. Both were recommended by the school's psychologist in [], but the school district apparently never followed through to implement them. SD Exh. 143.

² While courts apparently have not had to directly address if specially designed instruction includes behavior, courts routinely discuss specialized instruction as doing so. See e.g. *Reg'l Sch. Unit 51 v. Doe*, 920 F. Supp. 2d 168, 215 (D. Me. 2013)(student received specially designed instruction in behavior once a week for 55 minutes).

That is not to say that the school teachers and administrators have not made efforts to try and help the student. They have made some efforts particularly with respect to the student's organizational and preparedness issues, but the problems remain.

There is also evidence in the record that some of the student's issues are a result of the student's own doing. For example, the student seems to do better in subjects that are of interest to the student and when the student likes the teacher. The student made statements to the school psychologist that the student does not do work in a class if the student doesn't like the teacher. Sch. Dist Exh. 142. Some documents in the record state that the student doesn't care about school or is not interested in school. The student's absences and lack of a plan to have the student make up missed work from these numerous absences have also likely contributed to the lack of progress. All of these self-inflicted deficits are just part of the student's unique needs that need to be addressed in the student's IEP.

Overall, the record shows that the IEP with one goal in self-help and some accommodations hasn't been successful enough to allow the student to progress in the general curriculum and the school hasn't made any ongoing efforts to modify the plan. While the student has made some marginal progress in some areas on his/her report cards and on some testing conducted by the school, the student's scores must be viewed in light of the fact that the student repeated [] grade.

Further evidence of the lack of progress is found in the fact that the student's goals and objectives in the IEP have not been met. Rather than change or modify the goals, the team proposed to remove the student from being eligible for special education and provide accommodations in a 504 Plan. The accommodations would be the same as the accommodations that are in the student's current IEP and the record demonstrates that those accommodations and the one goal that was in the IEP have not been sufficient to meet the student's unique needs to allow for progress in the general curriculum.

For these reasons, the school has not met its burden of establishing that the student no longer requires specialized instruction and is no longer eligible for special education. The school district argues that the parent should have the burden and cites some First Circuit cases addressing parental challenges to IEPs. However, in this case since the student is already eligible for special education, the school district is in effect challenging the IEP by saying it is no longer necessary, so it should have the burden of proof. *See e.g. Elida Local Sch. Dist. Bd. of Educ. v. Erickson*, 252 F. Supp. 2d 476, 482 (N.D. Ohio 2003). Moreover, the school district requested due process which generally means it has the burden of proof unless altered by the hearing officer for good cause. *Schafer v. West*, 546 U.S. 49 (2005); Ed 1123.17.

School District's Proposed Findings of Fact and Rulings of Law

The school district submitted proposed findings of fact and rulings of law. They are granted or denied as follows:

School District's Proposed Findings of Fact

Granted

1-9, 11-23, 25-31, 36-43, 45-70, 72-78, 81, 84-94, 97-101, 104, 107-111

Denied

10, 24, 32-35, 44, 71, 79, 80, 82, 83, 95, 96, 102, 103, 105, 106,

School District's Proposed Rulings of Law

Granted

1-8

Denied

9, 10, 11

Order

1. The school district has not met its burden of demonstrating that the student is no longer eligible for special education.
2. The student remains eligible for special education under the OHI category.
3. The team shall meet to discuss any further evaluations necessary to identify the student's needs and the services and instruction that the student requires. A good place to start would be the recommendations of the school psychologist from [] to perform a functional behavioral assessment and develop a behavioral intervention plan.

4. Based on the information obtained by the team, the team shall develop an IEP that addresses the student's unique needs. The IEP may need to include the development of functional goals to address the student's behavior.
5. The school team shall also consider the use of PBIS and other strategies to address the student's behavior when developing the student's IEP.
6. The student's absences and the school work and instruction missed due to absences also need to be addressed by the parent, the school, and the IEP team.
7. Given the communication break down between the parties, the team may want to utilize the New Hampshire Department of Education's facilitated IEP meeting program where a trained, neutral volunteer will attend and facilitate the meetings. The parties may contact Amy Jenks at 271-3842, or Amy.Jenks@doe.nh.gov for more information.

So Ordered.

Date

Scott F. Johnson
Hearing Officer