

New Hampshire Department of Education

Student/_____ School District

SB FY 17-06-039

Due Process Decision

Introduction

This case involves two issues. One is whether the student remains eligible for special education services under the Other Health Impaired (OHI) category. The second is whether the student is eligible for special education under the serious emotional disturbance (SED) category.

The student received special education services during the 2016/2017 school year under the OHI category, but on April 13, 2017, the school found that student was no longer eligible because of student's progress. On May 18, 2017, the school determined that the student was not eligible for special education under serious emotional disturbance.

Because the student was receiving special education services under the OHI category, and the school is proposing to change that by eliminating those services, the school has burden to prove that the student is no longer eligible under the OHI category. Since the student has not been found eligible for SED in the past, the parent has the burden to prove that the student is eligible under that category.

Based on the evidence before me, I find that neither party met their burden. As a result, the student remains eligible under OHI, but is not eligible under SED.

OHI Eligibility

To be eligible under OHI, a student must have an impairment that meets the requirements in 34 CFR § 300.8(a)(9), the impairment must adversely affect the student's educational performance, and the student must require special education services as a result. The school contends that the student no longer meets the "adversely affects educational performance," and the "requires special education services" prongs of the definition.

The student has ADHD, diabetes, and some other diagnosed conditions. Student received special education services under the OHI category because of the impact these conditions had on student involvement and progress in the general curriculum. The student's IEP explains it as follows:

The student's disability affects [] ability to access the curriculum because [] attention and organizational skills along with [] medical issues impact [] performance in the classroom without special education support. Special educators need to cue [] to remain on task. [] needs assistance filling out [] agenda and following directions within the classroom setting." See SD 43.

The student also has issues with social skills and pragmatics.

Special education requirement

With respect to the special education requirement, in 2016-2017 under the IEP, the student received special education services in the classroom, and some in a pull-out setting, which the school called directed study. All of these services are listed as special education services in the student's IEP.

At the hearing, the school witnesses testified that the student was doing well in the classroom setting, and did not require much intervention in the classroom setting. Most of the instruction was being provided to student in the directed study. The school witnesses contend that student no longer needs the classroom services. They agree that student still needs the directed study services, but they contend that these services can be provided as accommodations under Section 504.

The school's reasoning is based on the belief that special education, or specialized instruction, is only academic based instruction, such as providing different instruction to help a student do a math problem, which would allow them to progress in the curriculum. Whereas assistance with organizational skills and executive functioning issues, like the student requires in this case, are accommodations because it is helping the student access the curriculum. The school believes these services are accommodations that it can provide through a 504 plan. As a result, the school makes a distinction between instruction to provide access to the material, and instruction to help the student learn or understand the material, with access being an accommodation, and instruction being specialized instruction.

However, the definition of special education and specialized instruction in the IDEA does not make that same distinction. It says:

34 CFR § 300.39 Special education.

(a)General.

(1)Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including -

- (i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
- (ii) Instruction in physical education.

...

(b)(3) *Specially designed instruction* means 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.

The law includes access to the curriculum in the definition, and it is not limited to academic instruction. It is broad enough to include teaching organizational skills, and other related skills, that will allow the student to access the curriculum.

Additionally, the school placed the services it was providing to the student in the special education services section of the IEP, as opposed to the accommodation section, so the school at some point agreed that these services were specialized instruction.

While numerous school witnesses testified that the student no longer needs specialized instruction, that testimony was all based on the assumption that what the student was receiving in directed study was not specialized instruction.

For these reasons, I find that the school has not demonstrated that [] student no longer requires special education, or specialized instruction.

Adversely affects education

The school members of the IEP team also found that the student's disability no longer adversely affected [] educational performance. As evidence, the school relies on the student's progress on evaluations, state achievement tests, classroom performance, and [] grades. However, whatever progress the student made was made while the student was receiving specialized instruction.

To no longer be eligible for special education, the school must demonstrate that the student can succeed without the supports the student has been receiving. The school's evidence of this was [] performance in the classroom setting where, according to the school, services became unnecessary, even though they were supposed to be provide under the IEP.

However, this classroom performance was also due in part to the services [] received outside of the classroom, and the school did not demonstrate that the student will make the same progress without these services. The school does not dispute that the student still needs the directed study services, they just believe that these services are not specialized instruction because they are not academic in nature. As a result, the school has not met its burden here.

Additionally, the school did not establish that the progress the student made with specialized instruction is sufficient to show student is ready to leave special education. The student did not master all of [] IEP goals. The student has above average ability, yet [] test scores and grades are generally in the average range, and there are a fair amount of failing grades on different assessments. The student's progress in terms of grades has been inconsistent. The student also did poorly on some subtests in the evaluations, and on part of the most recent statewide assessment test.

While the student has made some progress, it is not enough to demonstrate that [] impairments do not adversely affect [] educational performance to find that the student is no longer eligible for special education. Particularly in light of First Circuit standards for cases like *Mr. I. ex rel. L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1 (2007).

As a result, I find that the school did not meet its burden of proving that the student's disability does not adversely affect [] educational progress.

Serious Emotional Disturbance

I also find that the parent did not meet the burden of proving that the student qualifies under SED. The standard for SED is different than OHI. It requires a showing that

(i)*Emotional disturbance* means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

34 CFR § 300.9(c)(4). The school agreed that some of these criteria were met, but found that they either were not to a marked degree, or that they did not have an adverse effect on educational performance.

The parent did not present evidence on these issues to demonstrate that these criteria were met with respect to the mood disorder condition, which was the condition at issue for this category. While, as noted above, there is an adverse effect on educational performance, the evidence presented indicates that was from other conditions (ADHD, diabetes).

As a result, the parent did not meet the burden of proving the student is eligible under the SED category.

Requests for Findings of Fact by the School District

Granted: Numbers 1-6, 8, 10, 12,13, 15, 18, 19

Denied: Numbers 7, 9, 11, 14, 16, 17, 20

Requests for rulings of law by the School District

Granted: Numbers 21-29, 32

Denied: Numbers 30,31,33,34,35

Order

1. The student remains eligible for special education services under the OHI category.
2. The student is not eligible under the SED category.
3. The school district shall convene a meeting to develop and IEP for the student for the 2017/2018 school year.

I do want to note that this decision is not meant to express an opinion regarding the school's proposed services for the student that were discussed at the hearing. The school testified about some of the plans that it had for the student for the 2017/2018 school year under a 504 Plan, and this decision does not mean that those services cannot be carried out. As noted, some of those services appear to qualify as specialized instruction and could be delivered with goals under an IEP.

The decision just means that the parties must get together to develop an IEP and develop goals for whatever services the team determines to be necessary to provide the student with FAPE. If there is a disagreement, then the dispute resolution process may be used to resolve it.

So ordered.

Date

Scott F. Johnson
Hearing Officer

Appeal Rights

If either party is aggrieved by the decision of the Hearing Officer, either party may appeal this decision to a court of appropriate jurisdiction. The parents have the right to a transcription of the proceedings at no cost from the Department of Education. The District shall notify the Commissioner of Education of either party appeal's this decision.