04-071

CASE CLOSURE SUMMARY REPORT

Public Schools
School Division (LEA)

(Parent)
Name of Parent(s)

Name of Child

March 31, 2004
Date of Decision

Kamala Lannetti, Assistant City Attorney
Counsel Representing LEA

(Parent)
Counsel Representing Parent/Parent

(Parent)
Party Initiating Hearing

LEA
Prevailing Party

Hearing Officer's Determination of Issue(s):

The Hearing Officer determined the child was not eligible for special education and related services and found the LEA is the prevailing party.

Hearing Officer's Orders and Outcome of Case:

By order entered March 31, 2004, the hearing officer upheld the LEA's decision which found the child not eligible for special education and related services.

This certifies that to the best of my knowledge I have completed this matter in accordance with applicable law.

Ternon Galloway Lee

Ternon Galloway Lee, Hearing Officer

Date: April 5, 2004

cc:

Kamala Lannetti, Counsel for LEA
, Parent

v. City of **Public School Division**

Parent/Child: /

Counsel for the City of
Public School Division (LEA): Kamala Lannetti, Esq.

Hearing Officer: Ternon Galloway Lee, Esq.

I. PROCEDURAL HISTORY

On February 5, 2004, parent, requested a due process hearing challenging the City of Public School Division (hereinafter"LEA") decision that is ineligible for Special Education and related services. Hearing Officer's Exh. (hereinafter "H.O. Exh.") 3. The hearing officer held an initial pre-hearing conference on February 16, 2004, wherein the issue was determined to be whether is eligible for special education and related services. The hearing officer also scheduled the due process hearing and based on discussions during the pre-hearing conference issued a scheduling order on February 17, 2004. A second pre-hearing conference was held on February 26, 2004, to determine if there were any objections to exhibits and the testifying of any witnesses. The due process hearing was held on February 27, 2004.

II. ISSUE

Whether is Eligible for Special Education and Related Services

III. STATEMENT OF FACTS

(hereinafter " ") is a ten (10) year old student in the

fourth grade at School in the City of

Public School Division in the Commonwealth of Virginia (hereinafter "

Public Schools" or "LEA"). Her math, science and social studies teacher is

and her language arts teacher is . Tr. 81, 109; LEA Exh. 4/14,17;

Joint Exh. (hereinafter "Jt. Exh.") 1 #1.

Reports show has been diagnosed with Attention Deficit Hyperactive Disorder (hereinafter "ADHD") and Oppositional Defiant Disorder (hereinafter "ODD") and is currently being treated with herbal medications. LEA Exh. 4/14.

Prior to her enrollment in the Public Schools, from the first to the third grade, was enrolled in the of Schools in the Commonwealth of Virginia (hereinafter " Public Schools") and received Special Education and related services under the category of developmental delayed. LEA Exh. 1/1.

was reevaluated at a Triennial Meeting conducted by the Public Schools on January 29, 2003 and found ineligible for special education and related services. (hereinafter "parent") appealed that decision and the initial decision of ineligibility was confirmed on March 14, 2003. LEA Exh. 1; Jt. Exh. 1 # 5,6.

Developmental Delayed is a category of disability that is only available to a child ages two through eight who (1) is experiencing developmental delays, as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: physical developmental, cognitive development, communication development, social or emotional development, or adaptive development; and (2) by reason thereof, needs special education and related services. 34 CFR § 300.7(b); 8 VAC 20-80-10.

Academically, overall is not performing well in school. She is not reading on

grade level, often does not understand or complete class-work and homework assignments. She works on homework five hours at a time without completing it. Tr. 27, 28, 115, 123, 133 - 135; Parent's Exh. (hereinafter "P. Exh.) 1/14 - 16. She received the following report card grades during the present school year, 2003 - 2004.

	First Marking Period	Second Marking Period
Reading	D-	C-
Writing	E (denotes failing)	D
Math	D-	E
Social Studies	E	E
Science	D	D

Tr. 27-28; LEA Exh. 5.

's behavior is not disruptive. Tr. 19 -20, 40, 87

Because of 's academic difficulties, on October 15, 2003, she was referred for a decision regarding special education and related services. Tr. 123; LEA Exhs. 4 and 6/8.

A Special Education Committee (hereinafter "SEC") screening meeting took place October 16, 2003. LEA Exh. 6/8.

Prior to determining eligibility, a Behavior Assessment was completed by the school psychologist, . During the assessment Ms. did not interact one on one with but observed her off task behavior and other behaviors (fidgeting, vocalizing, playing with objects, and being out of seat) in Ms. 's and Ms. 's classes and compared 's off task behavior and other behaviors to that of other randomly selected same-sex students in each class. Tr. 38-40' LEA Exh. 4; Jt. Exh. 1 #12.

In Ms. 's class, of the time Ms. observed 's behaviors and the behavior of other students, exhibited off task behavior 57% of the time as compared to 14% of the time other same sex students were off task. Other behaviors of were about comparable to those of observed same sex peers 19% and 14% respectively Tr. 39-40, LEA Exh. 4/15.

In Mrs. 's class, of the times the school psychologist observed 's and other same sex peers's off task behaviors, exhibited off task behaviors 50% of the time as compared to 35% of the time of her peers. Tr. 40. Lea Exh. 4/15.

's eligibility was deliberated during a subsequent eligibility committee meeting on December 18, 2003, and the committee reached a consensus that was not a child with a disability. Tr.70 ;LEA Exh. 6/1-5.

To prepare the Psychoeducational Evaluation Report, : Public School psychologist, (i) administered the Wechsler Intelligence Scale for Children - Third Edition (hereinafter "WISC - III") to gather an estimate of 's cognitive abilities (ii) administered the Wechsler Individual Achievement Test - Second Edition (WIAT - II) to estimate 's current level of academic achievement in the areas of Reading, Writing, Mathematics, and Oral language and (iii) obtained completed behavior rating scales to gather more information from 's teachers and parent about 's behavior in the classroom and at home as it applies to her ADHD diagnosis. LEA 1/49-53.

received a Full Scale score of 76 on the WISC-III implicating her cognitive ability is borderline and well below the average range. A full scale score below 70 is considered mentally retarded. An IQ score ranging from 90 to 109 reflects intelligence in the average range. Her achievement score or total composite score on the WIAT - II was

82 and considered low average. Tr. 43,77.LEA Exh. 1/49-53.

Based on 's intelligence and achievement scores she would be expected to learn, but struggle in the process, understand basic types of concepts but have difficulty understanding more integrated information, need a lot of repetition to learn material and need tasks broken down into smaller, easier to learn pieces. Tr. 25, 26, 44-45.

A full scale assessment was not done by the Public Schools because the eligibility committee believed it was not necessary during screening and deliberations. This was so because School System psychoeducational evaluation was less than a year old at the time a determination of 's eligibility was made December 2003, and the forenamed evaluation was deemed valid and a sufficient assessment of 's functioning. Tr. 38, 70, 72.

is not always willing to accept help to assist her in completion of assignments. Tr. 87

Even though has been found ineligible for special education and related services, accommodations have been made for her. They include tutoring twice a week, teachers checking her planners and study guides to see that she has the correct answers. Tr. 13. Also, at the end of the school day, one of 's teachers checks to see that she has her materials and books. Tr. 13. A teacher who works with students receiving special education and related services sometimes reads 's tests aloud to her. Tr. 14.

IV. APPLICABLE LAW AND ANALYSIS

A. The Eligibility Committee

Eligibility for special education and related services is determined by a group of qualified professionals and the parent or parents (hereinafter "eligibility committee") after the completion of administration of tests and other necessary evaluations. 8VAC20-80-56, B, C; 34CFRSection 300.534. The eligibility committee must include (i) the child's regular teacher and (ii) at least one person qualified to conduct diagnostic examinations of children such as the school psychologist, Speech-language pathologist, teacher of specific learning disabilities, or teacher of remedial reading. 34 C.F.R. Section 300.540; 8VAC 20-80-56B4.

Because of 's academic difficulties in the fourth grade, on or about October 15, 2003, 's mother referred her for a determination of eligibility for special education and related services. Tr. 12; LEA Exh. 6.

The LEA acted on the referral by convening a screening meeting and later on eligibility meeting. In fact, the day after the referral, a special education committee (hereinafter "SEC") made up of , principal/designee; , SEC chairperson; , 's math, science, and social studies teacher; , guidance counselor; , parent; and , social worker met to screen for information related to the educational needs of and decided a behavior assessment was necessary prior to determining 's eligibility for special education and related services. LEA Exh. 6.

, the school's psychologist, subsequently assessed 's behavior and provided a written report for the December 18, 2003, eligibility meeting. LEA Exh. 4. The members of the committee that determined 's eligibility were 's parent, the principal designee, 's language arts teacher, a social worker, the guidance counsel,

, and the school's psychologist. LEA Exh. 6.

The parent contends the eligibility process was flawed because, among other reasons, the school psychologist did not attend the October SEC meeting. Without the school psychologist, the parent contends, no one at the screening meeting had the expertise to identify appropriate assessments and refer for them so that those evaluations could be furnished to and considered by the eligibility committee. Tr. 69-75.

The Hearing Officer finds that members of the eligibility committee, to include, but not necessarily limited to, the social worker, guidance counselor, and assistant principal who has thirty (30) years combined experience as a teacher and administrator, had the cumulative experience to determine any necessary assessments and make a referral for them. While the school's psychologist was absent from the October screening meeting, she was an active member of the eligibility committee. The committee which made the decision about 's eligibility therefore consisted of the qualified group mandated by 34 C.F.R. Section 300.540; 8VAC 20-80-56B4.

B. Consideration of a Variety of Information

When deliberating whether a child meets the eligibility criteria, the eligibility committee must draw from a variety of informational sources. Data concerning the child's aptitude and achievement tests, physical condition, social or cultural background, adaptive behavior, parental input and teacher recommendations must be carefully considered and such consideration must be documented. 34 CFR 300.534; 8VAC 20-80-56 C 1.

The eligibility committee considered assessments, evaluations and observations of . Tr. 12.

The Behavior Assessment prepared by the school's psychologist noted the times

was not actively engaged in the class activity at hand or not looking directly at the teacher as compared to the identical behavior of randomly selected same sex peers. These behaviors were defined as "Off Task" Behaviors and characterized as inattentiveness. Tr. 39 - 41; LEA Exh. 4/14 -16. The committee discussed this behavior assessment that showed 's "Off Task behaviors" in class significantly exceeded those of other same sex classmates. LEA Exh. 4.

Among other matters, the committee discussed the extent 's off task behaviors were related to her reported ADHD diagnosis and/or her low cognitive ability. Tr. 45-47.

's intellectual functioning level and its relationship to her off task behaviors were considered in conjunction with 's performance on previously assessed and valid, Intelligence and Achievement tests, WISC III and WIAT II, where she scored in the borderline intelligence to low average intelligence range. A lengthy deliberation took place concerning 's off task/ inattentive behaviors and their effect on her academic performance. Considering observations of made by the school psychologist, parent, 's teachers and others, the committee found that teacher one on one instruction with ıni had little impact on her ability to understand work and 's inattentive behaviors were evidence of her low cognitive functioning level rather than her reported ADHD. Tr. 41, 42, 59; LEA Exh. 6.

The eligibility committee also considered 's physical condition, social or cultural background, and adaptive behavior when it reviewed the previously noted Behavior Assessment and the Psychoeducational Evaluation and other data obtained from the Public Schools concerning 's reevaluation for special education and related services eligibility. The social emotional component of the Behavior Assessment

noted had been evaluated in the adaptability areas of social skills, leadership, and study skills. The school psychologist reported in that assessment that based on behavior rating scales completed by 's teachers, 's attention and adaptability problems fell in the at risk to clinically significant range. LEA Exh. 4/16. Moreover, the adaptive functioning section of the Social History Update from the Public Schools dated January 10, 2003, indicates among other matters, that has difficulty responding appropriately to correction and criticism. LEA Exh. 1/44. The Eligibility Summary Statement dated January 29, 2003, from the Public Schools, states in pertinent part, that is a healthy child. The evidence shows the eligibility committee carefully weighed all the aforementioned data. Tr. 15 - 18; LEA Exh. 1/43,48. Accordingly, the Hearing Officer finds the eligibility committee considered 's physical condition, social or cultural background, and adaptive behavior prior to making a determination about her eligibility.

Prior to making a finding on 's eligibility, input was provided regarding observations made of . LEA Exh. 6. 's teachers, assistant principal and the school psychologist shared with the eligibility committee that can become easily distracted and has difficulty staying on task. LEA Exh. 6. The committee which included one of 's teachers recommended repetition of directions and breaking directions into several short directions. LEA Exh. 6.

's mother also provided input at the eligibility meeting. As previously mentioned herein, the screening committee met October 2003 and the eligibility committee December 2003. The parent was an active member of both committees. On December 18, 2003, the committee, including the parent, reached a consensus that is

not eligible for special education and related services. The agreement by all members of the committee is evident by no one dissenting from it. Moreover, at the due process hearing the parent stated ".. I had some concerns about her ( ) not being able to perform her school level work, and that's when we got together as a team and decided that we needed to look at some additional resources to help my daughter out." Tr. 123. LEA Exh. 6/2., Tr. 12,13, 46 (parenthetical added)

The parent now disagrees with that decision and contends the eligibility decision is flawed in part because the LEA failed to obtain from the Public Schools all records pertaining to 's enrollment in that school division from 1999 to 2003. Tr. 61. As previously mentioned herein, the Public Schools reevaluated for eligibility January 2003, less than a year before the Public Schools evaluated for eligibility. In the process of reevaluating , a Social History Background Update was obtained and a Psychoeducational Evaluation. This data was considered and deemed valid and sufficient by the entire Public Schools eligibility committee. Further, the committee documented data considered in its finding. Tr. 71-72; LEA Exh. 6.

Considering the above, the Hearing Officer can not agree with the parent that more data than was considered by the eligibility committee was needed to determine 's eligibility.

C. A Child with a Disability

(1) Qualifying Disability

must have a qualifying disability, among other requirements discussed below herein, to be eligible for special education and related services. 20 U.S.C. Section 1401

(3)(A)(ii).

The eligibility committee considered if qualified under one of the fourteen (14) disability categories: autism, deaf-blindness, a developmental delay, a hearing impairment, including deafness, mental retardation, multiple disabilities, an orthopedic impairment, other health impairment, an emotional disturbance, severe disability, a specific learning disability, a speech or language impairment, a traumatic brain injury, or a visual impairment including blindness. Tr. 53 - 66.

did not qualify as developmental delayed because this category is only available for children ages two through eight, inclusive and is ten. Tr. 53; 8 VAC 20-8--10.

Her full scale IQ is 76 so she could not qualify under the category of mental retarded because an IQ score of below 70 is required for eligibility in that category. Tr. 43; LEA Exh. 1/49-53.

Even though reportedly, is diagnosed with an attention deficit disorder, she does not qualify under the specific learning disabled category because, as discussed later herein, there is not a significant discrepancy between her ability and achievement. Tr. 54-55; LEA Exhs. 5/37 and 6.

The committee also considered whether qualified as disabled under the category of Other Health Impaired (hereinafter "OHI"). OHI is defined as ".... having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment that (I) is due to chronic or acute health problems such as a hearth condition, tuberculosis, rheumatic fever, ...attention deficit disorder or attention deficit hyperactivity

disorder...and (adversely affects a child's educational performance." 34 CFR Section 300.7(c)(9); 8 VAC 20-80-10. For reasons previously discussed herein, 's behavior characterized as off-task behaviors or inattentiveness were due to her low cognitive functioning, not her ADHD. As such, she was deemed ineligible under this category also. LEA Exhs. 5, 6; Tr. 56 - 58.

's parent argued she is emotionally disturbed and should qualify under that disability category. Tr. 62 - 65. The term "emotionally disturbed" is defined as a condition "exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affect a child's educational performance: (1) An inability to learn that cannot be explained by intellectual, sensory, or health factors, (2) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers, (3) In appropriate types of behavior or feelings under normal circumstances, (4) A general pervasive mood of unhappiness or depression, (5) A tendency to develop physical symptoms or fears associated with personal or school problems. 34 CFR Section 300.7(c)(4); 8 VAC 20-80-10.

A review of the evidence shows that 's intellectual functioning can be explained and as noted she is achieving consistent with her cognitive abilities. Further, she is able to maintain interpersonal relationships. In class teachers report she has established friendship with several of her classmates. 's mother testified that nothing emotional is going on with . Tr. 135. 's behavior is not inappropriate and on only one occasion was she directed to the administrator's office for misbehavior. Further, there is no evidence of pervasive depression or fears associated with personal or school problems. Accordingly, does not qualify as a child with a disability under the category of

emotionally disturbed.

Moreover the eligibility committee considered whether is a child with a disability under the remaining categories. They found no eligibility. Tr.53-61, 65-66. The hearing officer consideration of all the evidence and a review of the definition of those remaining categories leads her to the same conclusion.

(2.) Adverse Effect on Educational Performance

As noted herein, reportedly has been diagnosed with ADHD and ODD. Even if is deemed to have a qualifying disability (hereinafter "QD"), as defined herein, the parent must show, 's QD has a substantial adverse effect on her educational performance. Board of Education v. Rowley, 458 U.S. 176 (1982); 20 U.S.C. Section 1401 (3) (A)(ii).

The parent argues in effect that is not achieving commensurate with her ability and there has been an adverse effect on the child's academic performance, presumably because of some qualifying disability. Tr. 30.

To determine if the parent can show the requisite adverse effect, the hearing officer will consider a variety of information provided in this case, to include, 's grades, aids; accommodations, substantial efforts, assessments, behavior; discrepancies in 's achievement and academic performance; and observations.

's full scale IQ of 76 places her in the "borderline to mental retardation" to below average range of intelligence. Tr. 43; LEA Exh.1/49-53. During this school year, received grades one to three grade levels lower than those in the second grade. The relevant grades in comparison appear below:

Subject	Third Grade	Fourth Grade:(1st period)	(2nd period)
Reading	C	D-	C-
Writing	C	E (failing)	D
Math	C	D-	E
Science	C	D	D
Social Studies	B	E	E

LEA Exhs. 3,5.

In light of 's current academic performance, her teachers found capable of doing fourth grade work. The school psychologist noted that considering 's intelligence and achievement scoring, she is performing commensurate with her ability and is expected to be slow and struggle, need a lot of repetition, and have difficulty with integrated information. These expectations proved accurate. As noted previously, often did not complete assignments. She received tutoring twice a week and tests were sometimes read to her. Teachers checked 's books, materials, planners, to assure had the right materials to work with and correct answers. often spent five hours at a time doing homework and still did not complete it. 's behavior was not disruptive and she was described by one teacher as "a sweet girl." Tr. 13 - 14.

Moreover, school personnel testified that because of increased responsibilities, the fourth grade is much harder for students than the third grade and that difficulty can be compounded by a student changing school divisions as is the case with . Tr. 31, 133, 136. also made academic progress more difficult by refusing help from the teacher and other students. Tr. 29, 86-87.

The hearing officer also notes that while 's academic performance in the third

grade was overall better than it is so far during the current year, 's curriculum during the 2002-2003 school year was modified in that some of her assignments were below grade level, presumably making it easier for her to acquire better grades. Tr. 129 - 130.

As previously noted herein, the eligibility committee deliberated at length over whether 's Off task behaviors or inattentiveness were a product of her ADHD or her low cognitive functioning. Teachers and the school psychologist observed that even when received one on one instruction she continued to have difficulty understanding assignments. The eligibility committee then concluded that 's off task behaviors which affected her academic performance were caused by her low cognitive functioning.

In order for the hearing officer to find 's academic performance is substantially and adversely affected by a qualifying disability, there must be a discrepancy between 's predicted performance and actual performance. See 34 CFR Section 300.7; 8 VAC 20-80-10; 20 USC Section 1401 (3) (A) (ii). Assessments, observations, grades, and accommodations for all are consistent in showing no discrepancy in 's expected performance and actual one. Further there was no causation between 's academic performance and any disability.

Therefore, the Hearing officer finds no substantial adverse effect caused by a qualifying disability.

V. Decision and Order

I find that all requirements of notice to the parent have been satisfied that school records report has been diagnosed with ADHD and ODD. The hearing officer further finds that is not a child with a disability as defined by applicable law 34 C.F.R. Section 300.7 and is not eligible for special education and related

services for the reasons set forth herein. Moreover, the hearing officer finds that because is not a child with a disability the requirement of a free appropriate public education do not apply.

I further find that the parent has the burden of proof on the issue of eligibility in this case and the parent has not met that burden for the reasons set forth above and that the LEA has prevailed on the issue. Accordingly, I do not order any relief requested by the parent.

VI. APPEAL INFORMATION

This decision is final and binding unless the decision is appealed by a party in a state circuit court within one year of the issuance of the decision or in a federal district court.

Dated: March 31, 2004

Ternon Galloway Lee

Ternon Galloway Lee, Hearing Officer