

DECISION

OAL DKT. NO. EDS 3123-14

AGENCY DKT. NO. 2014 20767

T.W. ON BEHALF OF A.W.,

Petitioner,

v.

WILLINGBORO TOWNSHIP

BOARD OF EDUCATION,

Respondent.

T.W., petitioner, pro se

Rocky Peterson, Esq., for respondent (Hill Wallack, LLP, attorneys)

Record Closed: September 19, 2014

Decided: October 17, 2014

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this case, the petitioner, who is the parent of A.W., disagrees with the decision of the school district that A.W. is not eligible for special education and related services, and seeks a determination that A.W. is eligible and is entitled to speech therapy as a special education related service. The matter was transmitted to the Office of Administrative Law (OAL) on March 14, 2014, for hearing as a contested case. In accordance with 20 U.S.C.A. § 1415 and 34 C.F.R. §§ 300.500 to 300.586, the Commissioner of the Department of Education requested that an administrative law judge be assigned to conduct a hearing in this matter. The Director of the OAL assigned this matter to Hon. Linda Kassekert, ALJ, pursuant to N.J.S.A. 52:14F-5(o), and the matter was scheduled for a hearing to commence on March 24, 2014. The

case was subsequently reassigned to the undersigned. The first hearing date was adjourned at the petitioner's request and the hearing was rescheduled for September 19, 2014. On September 19, 2014, the hearing was held and concluded and the record closed.

Prior to the commencement of the hearing testimony, the parties engaged in settlement discussions at my request. Because the parent was not represented, I recorded the settlement discussions in the event a dispute arose as to the terms of any settlement. That portion of the record of proceedings made on September 19, 2014, between 9:20:25 a.m. and 10:13:25 a.m. represent the settlement discussions between the parties, and I **ORDER** shall be sealed and are otherwise inadmissible for any purpose pursuant to N.J.A.C. 1:1-15.10.

FACTUAL DISCUSSION

Background

T.W. is the father of A.W., who is presently nine years of age, his date of birth being August 3, 2005. They reside within the Willingboro Township school district and A.W. attends fourth grade within that district.

In approximately February 2012, A.W. was found to be eligible for special education and related services in the eligibility category of "Speech Only." As a result, A.W. was provided with twenty sessions of individual speech therapy for treatment of stuttering from May 2012 through June 2013 (P-1). On June 13, 2013, an eligibility conference was held and A.W. was determined to be no longer eligible for speech therapy in this category (R-1). The rationale for this determination is set forth in the eligibility determination (R-1), wherein it is stated that A.W. has met his fluency goals, and dysfluent speech (stuttering) is no longer observed in speech sessions or in his classroom setting.

On September 6, 2013, the parents of A.W., T.W. and N.W., filed a due process hearing request challenging the determination that A.W. was not eligible for special

education. The matter was transmitted to the Office of Administrative Law (OAL) and was assigned OAL Dkt. No. EDS 12653-13 and was scheduled for hearing on October 4, 2013. At the hearing, the parties entered into a settlement agreement whereby the school district agreed to conduct a child study team referral consisting of an educational, psychological, speech and language and other agreed upon evaluations in order to determine A.W.'s eligibility, and the parents consented to these evaluations. As a result of this settlement, the school district conducted evaluations (C-4 and C-5) which included a speech and language reevaluation conducted by Steven M. Phillips a Speech Language Specialist employed by the school district (R-2). As a result of the review of these evaluations together with a speech language evaluation conducted by Sandy Fleming-Stein at the request of the parents (P-1), the school district determined that A.W. was not eligible for special education and related services by eligibility determination dated January 15, 2014 (R-1).

HEARING TESTIMONY

Three witnesses testified at the hearing of this matter. They were Steven M. Phillips, Speech Language Specialist, and Abdel Gutierrez, Director of Special Services who testified for the school district, and T.W. the father of A.W. Their testimony is summarized as follows:

Testimony of Steven M. Phillips

Steven M. Phillips testified that he is a Speech Language Specialist and has been with the school district since October 2013. He started employment in 1992 and he has been employed twenty-two years as a Speech Language Specialist in various school districts. These include Camden, Burlington County Special Services, Vineland, State of New Jersey Department of Children and Families and now Willingboro. He has a Masters degree in Speech Pathology and is a Speech Language Pathologist. He holds a Certificate of Clinical Competency through the American Speech and Hearing Association and has a State Certification as a Speech Language Pathologist. He has licenses as a Speech Language Pathologist in New Jersey and New York. He has never before testified as an expert witness.

Mr. Phillips identified his speech language evaluation of A.W. dated December 17, 2013 (R-2). By way of background he reported that A.W. had received speech services from the school district from February 2012 to June 2013 for stuttering. A.W. was dismissed from speech therapy in June 2013 because his stuttering events were no longer prevalent. However, his parents reported that he stutters at home and that A.W. reports that children tease him about his stuttering. A.W.'s third grade classroom teacher stated that when A.W. is nervous or confronted about missing homework he will stutter, but other than those circumstances there have been no indications of stuttering events. According to his teacher, A.W. volunteers to answer questions, reads in front of the class, and responds to questions without stuttering.

When Mr. Phillips interviewed A.W. as part of the evaluation, A.W. reported that he stutters more at home and that he thought he did so because there is more stress. Ms. Pohill, A.W.'s reading teacher, reported to Mr. Phillips that she did not see where stuttering impacted A.W. and he had made progress in the reading program.

Mr. Phillips testified that he administered the Stuttering Severity Instrument – Fourth Edition, which is the latest and most recent edition. He indicated that if an earlier edition was used by the parents' expert it might result in some differences based on some "mild" changes in the editions.

Mr. Phillips testified that A.W.'s eye contact was not good during the administration of the assessment and he observed A.W. speaking to himself before responding to him. It appeared A.W. was practicing what he was going to say before saying it, which may be a way of A.W. avoiding stuttering.

In his report Mr. Phillips explained the methodology used in reaching a score and reported that A.W. was found to present a total score of twenty-five, which represents a low range moderate stuttering impairment. If A.W. had presented with one less point he would have been classified with a mild impairment. A score over thirty-two would represent a severe stutter.

When Mr. Phillips spoke to A.W.'s teachers, Ms. Walden and Ms. Pohill, he indicated that they did not observe any frequency of stuttering events which is not to say that he did not stutter but rather they did not perceive the episodes as stuttering. Mr. Phillips acknowledged that A.W. does stutter but the issue is not whether he stutters but whether the stuttering affects his performance in school.

As a result of his evaluation, Mr. Phillips expressed the opinion that A.W. does not qualify for speech language services because his stuttering does not affect his performance in school. Mr. Phillips reemphasized that he is not testifying that A.W. does not stutter. His testimony is that any stuttering incidents do not have any impact on his educational progress. It has had no impact on his performance in class and A.W. is making progress. He reads to the class, responds to questions and is otherwise making educational progress.

Testimony of Abdel Gutierrez

Abdel Gutierrez testified that he is Director of Special Services for Willingboro and he is in his fourth year as Director. He has been employed in the field of education since 1994-1995. He has been a teacher in Trenton, Princeton, and Mercer County Special Services districts and has been an administrator in each of these school districts as well as Willingboro. He has a Masters degree in educational leadership, teaching and administration certificates, as well as principal and superintendent designations.

Mr. Gutierrez testified he is familiar with A.W. He identified the eligibility determination dated June 13, 2013 (R-1), which is the subject of this case. A meeting to determine A.W.'s continued eligibility for speech sessions was held on June 13, 2013 and was attended by A.W.'s mother, A.W.'s regular education teacher, Mrs. S. Epstein (R-3), and the speech language specialist who was providing speech sessions, Ms. J. Melvin. He testified that as of that date, A.W. had met all of the goals and objectives of his speech-only IEP. As a result of this determination he was no longer eligible and speech services were discontinued at the end of the school year in June 2013.

Following this the parents filed a due process petition challenging the determination that A.W. was no longer eligible for speech services. At the mediation session, A.W.'s teacher, reported that she did not observe him stuttering in her class at all. As far as she was concerned A.W.'s speech in no way interfered with his ability to do his work. She did notice that A.W. would pause before answering a question. Following the mediation session Ms. Epstein provided a written (hearsay) statement dated September 1, 2013 (R-3), confirming her observations.

Following the parents filing of the due process petition, the parties entered into an agreement whereby the school district agreed to conduct a psychological evaluation, educational evaluation, social assessment and a speech language evaluation, and the parents consented to these evaluations and agreed to withdraw its due process hearing petition. Following the receiving of these reports, an eligibility determination meeting was held on January 15, 2014, and it was determined that A.W. was not eligible for special education and related services (R-4). He further reported that teachers have not reported any problems with A.W.'s speech language and that any stuttering has not resulted in any impact on A.W.'s educational progress. He did testify that the school district did accept the report from the parents' speech language expert, but he pointed out that that expert did not do an evaluation of A.W. by performing an observation in the classroom.

Upon my questioning, Mr. Gutierrez testified that he did not have any input with respect to the determination made by the child study team as to A.W.'s ineligibility determination.

Testimony of T.W., parent of A.W.

T.W., the father of A.W., provided brief testimony in this matter. He relied upon the report of Sandy Fleming-Stein, Speech Language Pathologist, who performed a speech language evaluation of A.W. in October 2013 (P-1). It must be noted that Ms. Fleming-Stein did not testify at the hearing and that T.W. did not call her as a witness. In particular, he relied upon the content of this report found on page three therein where Ms. Fleming-Stein states:

According to self-report (A.W.'s) stuttering problem is negatively impacting his daily communications as he experiences anxiety and avoidance in situations where he is expected to speak such as reading aloud in class, participating in class discussions or meeting new people.

T.W. further testified that based on his own observations, A.W. is constantly stuttering and this interferes with his speech and his communication at home. He testified that this stuttering not only occurs in situations of stress but in normal situations and that his stuttering is constant. He further relied upon the testimony of Mr. Phillips who acknowledged that A.W. does stutter. His position is that until the stuttering is resolved, there will be continued lack of educational progress by A.W. and that it is the responsibility of the school district to deal with the constant stuttering being exhibited by A.W. and his self-reported impact that it is having on his education.

Report of Sandy Fleming-Stein, MACCC-SLP

This speech language evaluation dated October 12, 2013, was conducted at the request of the parents of A.W. to assess his current progress in speech therapy. According to Ms. Fleming-Stein, the results of this evaluation demonstrated a severe fluency disorder characterized by numerous blocks, many of them silent and of increased duration with noticeable concomitant behaviors that are distracting to the listeners. These include breaks in eye contact, facial grimaces, sub vocalizations, and rubbing the face. A.W. himself reported that the stuttering problem is negatively impacting his daily communications and that he experiences anxiety and avoidance where he is expected to speak such as reading aloud in class, participating in class discussions or meeting new people. Despite this, Ms. Fleming-Stein observed that receptive and expressive language development are well within average limits for A.W.'s age. Ms. Fleming-Stein further stated that A.W. is able to successfully utilize fluency enhancing techniques within a structured setting but has difficulty using his techniques independently. As a result she recommended the continuation of speech language therapy to address the areas of weakness.

Consideration of other reports and evaluations

N.J.A.C. 6A:14-3.5(c) provides:

Classification shall be based on all assessments conducted including assessments by child study team members and assessments by other specialists as specified below.

Based upon the foregoing, after the conclusion of the hearing I directed that the school district provide to me copies of all assessments and evaluations conducted by either the child study team or others. I have reviewed these other assessments and they are as follows:

1. March 20, 2001, Social Assessment by Kim Varava, MSW, School Social Worker (C-1)
2. March 21, 2001, Educational Assessment by Maryann Bowne, M.Ed., LDT/C (C-2)
3. March 21, 2001, Psychological Evaluation by Jay H. Albert, M.A., School Psychologist (C-3)
4. December 1, 2013, Educational Evaluation by Linda Headley, M.A., LDT/C (C-4)
5. December 6, 2013, Psychological Evaluation by Carrie Cummons, M.S., School Psychologist (C-5)
6. September 15, 2013, letter of Sandy Fleming-Stein, MACCC-SLP, at parent's request (C-6)
7. December 19, 2011, Speech and Language Evaluation by Linda Carbin, M.A./CCC, SLP, at parent's request (C-7)

The first three evaluations date back to March 2001 and are of minimal relevance to the current issues before me.

The fourth evaluation, is an educational evaluation dated December 1, 2013, by Linda Headley, LDT/C (C-4). Testing revealed that A.W.'s academic achievement in reading, mathematics, oral and written expression resulted in scores placed in the average or high average ranges with the exception of math fluency which placed in the superior range. A.W. displayed strength with oral language and high frequency words. His word reading and spelling placed in the high average range and written expression is well developed.

The December 6, 2013, psychological evaluation of A.W. (C-5) indicated that his cognitive assessments were in the average range and his verbal comprehension and processing speed were both in the average range. He does not exhibit any major cognitive deficits. Both emotional and behavioral assessments appear to be typical for males his age and there are no areas of major concern.

A speech language evaluation dated December 19, 2011 (C-7), was conducted by Linda Carbin, Speech Language Pathologist at Virtua In Motion, a Speech Pathology Center, and was requested by the parent. This reflected that at that time in 2011, A.W. had a moderate to severe fluency disorder which included use of some physical concomitant behaviors. It indicated that A.W. appears to be acquiring receptive processing skills but these appear to be affected, functionally, when attention and focus regulation are required. This recommended speech language services at that time.

LEGAL ANALYSIS

This case arises under the Individuals with Disability Education Act (IDEA), 20 U.S.C.A. § 1401 et seq., which makes available federal funds to assist states in providing an education for handicapped children. Receipt of those funds is contingent upon a state's compliance with the goals and requirements of the IDEA. Lascari v. Bd. of Educ. of Ramapo-Indian Hills Reg. Sch. Dist., 116 N.J. 30, 33 (1989).

New Jersey has enacted legislation, N.J.S.A. 18A:46-1 et seq., and has adopted regulations to assure all disabled children enjoy the right to a free, appropriate public education (FAPE) as required by 20 U.S.C.A. §1412(1). See also Hendrick Hudson Dist. of Educ. v. Rowley, 458 U.S. 176, 181 (1982). The IDEA requires a disabled child's FAPE be designed to meet the unique needs of that child through an IEP which is reviewed annually. Lascari, supra at 30, citation omitted. Each New Jersey district board of education, therefore, is required to provide a free, appropriate public education program and related services for educationally disabled students in the least restrictive environment. N.J.A.C. 6A:14-2.1(a).

In this case, the sole issue to be determined is whether respondent's determination to terminate A.W.'s classification as eligible for special education and related services was appropriate under the circumstances. Respondent bears the burden of proving, by a preponderance of evidence, that its action in denying classification was appropriate under the specific circumstances of this case. In opposing this decision, petitioner asserts that he is eligible on the basis of the undisputed testimony that A.W. stutters and on A.W.'s self-reporting that his stuttering problem is negatively impacting his daily communications as he experiences anxiety and avoidance in situations where he is expected to speak such as reading aloud in class, participating in class discussions or meeting new people.

N.J.A.C. 6A:14-1.3 defines a "student with a disability" as a student who has been determined to be eligible for special education and related services according to N.J.A.C. 6A:14-3.5 or 3.6. N.J.A.C. 6A:14-3.5(c) provides:

(c) A student shall be determined eligible and classified "eligible for special education and related services" under this chapter when it is determined that the student has one or more of the disabilities defined in (c) 1 through 14 below; the disability adversely affects the student's educational performance and the student is in need of special education and related services. Classification shall be based on all assessments conducted including assessment by child study team members and assessment by other specialists as specified below.

The test for eligibility, therefore, is three-pronged, and each prong must be met in order for a student to qualify for special education services. These are (1) the student has one or more of the disabilities defined in N.J.A.C. 6A:14-3.5(c) 1 through 14; (2) the disability adversely affects the student's educational performance; and (3) the student is in need of special education and related services.

The disability or impairment which appears to be the one most closely applicable to the petitioner's assertions is found at N.J.A.C. 6A:14-3.5(c)(4), "communication impaired." This section clearly requires that the language disorder must adversely affect a student's educational performance, including his receptive or expressive language.

Conclusion

Based upon the school district's speech language therapist report in which he interviewed teaching staff, it was found that A.W. has been successful in his academic subjects (R-2). This information was confirmed by the educational evaluation dated December 1, 2013 (C-3), and by the test administered by the LDT/C which determined that A.W.'s academic achievement resulted in scores placing him in the average or high average ranges with the exception of math fluency which was in the superior range. The psychological evaluation of A.W. dated December 6, 2013 (C-2), revealed that A.W.'s cognitive assessments were in the average range with no major cognitive deficits. The report of the parent's expert did not contradict these determinations but rather supported them.

Based on the foregoing, I **CONCLUDE** that A.W.'s language fluency disorder has not adversely affected A.W.'s educational performance including his receptive or expressive language. Therefore, I further **CONCLUDE** that petitioner's due process hearing request should be dismissed.

DECISION AND ORDER

For the reasons stated above, I **ORDER** that the actions of respondent school district determining that A.W. is not eligible for special education and related services in

the form of speech language services is correct and appropriate under the circumstances and is **AFFIRMED**. I therefore **ORDER** that the petitioner's due process hearing petition is **DISMISSED**.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2012) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C.A. § 1415(i)(2); 34 C.F.R. § 300.516 (2012). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education.

October 17, 2014 _____

DATE

JOSEPH F. MARTONE, ALJ t/a

Date Received at Agency

October 17, 2014 _____

Date Mailed to Parties:

JFM/cb

APPENDIX

LIST OF WITNESSES

For petitioners:

T.W.

For respondent:

Steven M. Phillips

Abdel Gutierrez

LIST OF EXHIBITS

Judge Exhibits:

- C-1 Social Assessment by Kim Varava, MSW, School Social Worker, dated March 20, 2001
- C-2 Educational Assessment by Maryann Bowne, M.Ed., LDT/C, dated March 21, 2001
- C-3 Psychological Evaluation by Jay H. Albert, M.A., School Psychologist, dated March 21, 2001
- C-4 Educational Evaluation by Linda Headley, M.A., LDT/C, dated December 1, 2013
- C-5 Psychological Evaluation by Carrie Cummons, M.S., School Psychologist, dated December 6, 2013
- C-6 Letter of Sandy Fleming-Stein, MACCC-SLP, dated September 15, 2013
- C-7 Speech and Language Evaluation by Linda Carbin, M.A./CCC, SLP, dated December 19, 2011

For petitioner:

- P-1 Speech Language Evaluation by Sandy Fleming-Stein, MACCC-SLP, dated October 12, 2013

For respondent:

- R-1 Eligibility Determination, dated January 15, 2014
- R-2 Speech and Language Re-Evaluation by Steven M. Phillips MS/CCC-SLP, SLS, dated December 17, 2013
- R-3 Unsigned, written statement of Sherrie Epstein, dated September 1, 2013
- R-4 Eligibility Determination, dated June 13, 2013