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APPEARANCES

For Petitioner: Jonathan F. Koffa
Attorney at Law
806 N. Arendall Avenue - Suite D
P. O. Box 386
Zebulon, North Carolina 27597

For Respondent: Ann L. Majestic
Tharrington Smith, L.L.P.
209 Fayetteville Street Mall
P. O. Box 1151
Raleigh, North Carolina 27602

WITNESSES

For Petitioners:

1. Deloris Arceneaux - Advocacy Specialist, N. C. GACPD
2. Dr. David Bierman - Child, Adolescent and Adult Psychiatrist
3. BH - High School Coordinator at Love Christian Center Academy
4. PARENT - Petitioner
For Respondent:

1. Jane Cottingham - Director of Special Education Services for Wake County Public School System
2. TH - Assistant Principal at High School
3. CL - Behavior and Emotionally Disabled Case Manager for Wake County Public School System
4. RM - Principal - High School
5. CN - Algebra I Teacher at High School
6. Dr. Hal Shigley - Child and Adolescent Psychologist
7. NS - Math Teacher at High School
8. KS - Assistant Principal at Middle School
9. ST - Social Studies Teacher at High School

ISSUE

Whether Respondent has acted in compliance with state and federal law in exiting “STUDENT” from special education services?

FINDINGS OF FACT

1. Petitioner “Parent” is the parent of “Student”, a 16-year-old boy who attended the Wake County Public Schools from kindergarten through the beginning of 10th grade.

2. Respondent, the Wake County Board of Education, is a local educational agency receiving monies pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1400 et seq.

3. From first grade through ninth grade, “Student” was classified and served by the Wake County Public School System as a student with a disability under the category Behaviorally/Emotionally Disabled.

4. “Student” attended Middle School for the 8th grade.

5. “Student” attended High School for the 9th grade during the 1999-2000 school year.

6. On May 19, 2000, the Individualized Education Plan (IEP) Committee determined that “Student” no longer qualified for special education services. As a result, Respondent exited “Student” from special education programs effective June 10, 2000. This decision and the
notification of “Parent” of this decision is the focus of the dispute between the parties.

7. In spring 1999, at “Parent”’s request and agreed that “Student” would receive weekly counseling from private psychologist, Dr. Hal Shigley. (T. p. 62). Dr. Shigley has extensive experience working with students with a range of disabilities. (T. p. 235). “Parent”’s advocate, Delores Arceneaux, recommended Dr. Shigley to provide the private counseling requested by “Parent”. (T. p. 154).

8. On March 19, 1999, Dr. Shigley recommended achievement and psychological testing of “Student” in a meeting with “Parent” and school officials. (T. pp. 180, 240). The purpose of this testing was to determine whether “Student” had any specific learning disabilities. (R. Ex. 2).

9. Based on Dr. Shigley’s recommendation and “Parent”’s request, counseling services were offered for “Student” during the 1999 summer break. Dr. Shigley reported that “Student” missed many of the sessions that were scheduled. (T. p. 245-246).

10. The District arranged for a mentor to work with “Student” during the summer of 1999 to assist him in transitioning to high school. The mentor selected was D.A., “Student”’s math teacher at Middle School with whom “Student” had a positive relationship. The mentor called “Parent” to initiate the services, but she did not follow through, and “Student” did not participate in these services. (T. pp. 167, 322-323).

11. During the 1999 summer, the District also arranged for “Student” to be a volunteer helper in the extended school year, multi-handicapped classroom at High School. “Student” participated for the first week, but did not complete the second week. (T. pp. 169-171; 324-325).

12. On August 20, 1999, The IEP team met to review the results of Dr. Shigley’s evaluation. Dr. Shigley’s testing revealed no evidence of specific learning disabilities or depression. The team agreed that an additional emotional and behavioral evaluation was needed to determine whether “Student” continued to be eligible for BED services. (R. Exs. 2, 15; T. pp. 193-197).

13. At that IEP meeting on August 20, 1999, the IEP team changed “Student”’s placement from separate to resource, based on his success in mainstream classes. “Student” was scheduled for three general education classes and three special education classes. Counseling sessions with Dr. Shigley were also continued through the end of the semester. (R. Ex. 5, 15; T. pp. 254-328).


15. However, at a December 1, 1999 IEP meeting, the IEP team decided not to mainstream “Student” for his remaining class in English. “Student” indicated that he felt the need

1The following abbreviations will be used: T.=Transcript, P. Ex.=Petitioner’s Exhibit, R. Ex.=Respondent’s Exhibit, p.=Page.
for the academic support of the resource class. “Student”’s continued placement in the special education class was for academic, not behavioral reasons. (R. Ex. 18, 19).


17. Dr. Shigley’s evaluation consisted of a variety of standardized assessments and clinical interviews with “Student”. Some tests involved “Student” directly, while others were behavior checklists and rating scales completed by “Parent” and “Student”’s teachers. Dr. Shigley also reviewed weekly rating scales prepared by “Student”’s teachers that described his behavior in the classroom.

18. One of the standardized tests Dr. Shigley used was the Behavior Evaluation Scale. This scale assesses the same factors that are used to determine whether a student qualifies as behaviorally/emotionally disabled under the North Carolina Procedures Governing Programs and Services for Children with Disabilities. These factors are: 1) learning problems, 2) interpersonal difficulties, 3) inappropriate behavior, 4) unhappiness and depression, and 5) physical symptoms and fears. (T. pp. 256-266; 305-306). This scale is routinely used by Wake County psychologists in re-evaluating a student’s eligibility under the BED category. (T. pp. 353-354).

19. While Dr. Shigley had not used this specific Behavior Evaluation Scale, he had used other Hawthorne Rating scales to evaluate behavior. This scale used an “almost identical” method of taking, scoring, analyzing, and interpreting the information gathered as the scales he had used before. In addition, Dr. Shigley felt very comfortable with using this specific scale even though he had not used this specific Behavior Evaluation Scale very often. He would have advised the Respondent if he felt this scale was an inappropriate instrument to use in assessing “Student”’s continued BED eligibility. (T. pp. 305-06).

20. Dr. Shigley conducted the additional evaluation during scheduled therapy sessions. “Student”’s attendance at these sessions was inconsistent. On February 16, 2000, Dr. Shigley completed his evaluation of “Student”. He found, based on rating scales from “Parent” and “Student”’s teachers, that “Student”’s behavior was “within an average range for boys his age.” He stated that “The normative measures indicate a behavior pattern within normal limits.” Based on his own interactions with “Student”, Dr. Shigley determined that “Student” had “some attitudes and feelings which are maladaptive and indicate that he will continue to get into conflicts with peers and adults in authority positions.” He noted that “Student”’s inability to accept responsibility for his behavior indicated “a poor prognosis for changing” these patterns. Dr. Shigley concluded that based upon the evaluation results, “it appears that “Student” would not continue to qualify for Special Education Services in the BED category.” (R. Ex. 3; T. pp. 245-246; 266-268).

21. On May 19, 2000, the IEP team convened to consider the results of Shigley’s evaluation. Dr. Shigley and Petitioner also attended the meeting.

22. “Parent” received prior notice of the meeting indicating that the purposes of the meeting were to discuss reevaluation results, eligibility determination, and possible exit from special
education. (R. Ex. 12, 13). She did not dispute she received such notice. Ms. C.L., BED Case Manager, faxed a copy of Dr. Shigley’s report to “Parent” before the meeting. (R. Ex. 36).

23. During the May 19, 2000 meeting, the IEP team thoroughly discussed and considered Dr. Shigley’s report, as well as information presented by “Student”’s teachers, and “Parent” at the meeting. (R. Ex. 76). The information showed that “Student” was within the average range in terms of his behavior for boys his age.

24. As the team was nearing the completion of the BED eligibility forms, “Parent” stated she needed to leave and that it sounded like the school had already made its determination that “Student” was not eligible. When “Parent” made this statement, the team had not completely answered all the criteria eligibility questions. Later at 2:53 p.m., “Parent” left the meeting. She did not request that the meeting be continued or rescheduled, nor did she later seek a meeting to reconsider the placement decision. Although “Parent” left the meeting a few minutes before its conclusion, it was clear from her statement that she anticipated the eventual result that “Student” was not eligible for special education services.

25. When “Parent” left the meeting, the team had listened to Dr. Shigley and “Student”’s teachers, and discussed that information with “Parent” and each other. They had also discussed and answered all the questions on the five eligibility criteria listed on the reevaluation and team report, i.e. the 5 mandatory criteria a student must meet to be identified as BED. (R. Ex. 76, T. p. 567)

26. After “Parent” left, and based upon its answers to the five criteria questions, the IEP team determined that “Student” was not eligible for special education services as a BED student. The IEP team’s determination that “Student” was no longer BED eligible/identified was based upon Dr. Shigley’s evaluation and the information “Student”’s teachers and “Parent” presented. The conclusion was that although “Student” has some tendencies that were troubling and may interfere with his being a successful adult, they were not severe enough to meet the criteria for a disability. “Student” no longer had behaviors of such intensity, duration, and frequency to continue to qualify as BED. “Student”’s exit from special education was effective June 10, 2000, at the close of the school year. (R. Ex. 76; T. pp. 386-387; 389-391). The IEP meeting ended by 3:00 p.m. (T. p. 391)

27. C.L., BED case manager, was “Student”’s teacher in his 6th grade year and continued as a BED case manager for “Student” through high school. Ms. L. participated in “Student”’s IEP meetings throughout 9th grade. Ms. L. reported that “Student” had made a lot of progress behaviorally and academically in the time she has known him. She observed that “Student” was more mature, had become less verbally confrontational with his teachers, and was not physically aggressive. She also noted that “Student”’s behavior was better in his regular education classes than in his special education class, and that his behavior plan rarely needed to be used. L. felt that as long as “Student” was doing well in his academics, then his behavior is not affecting his learning process. L. thought that since “Student” was only suspended 3 times during the 1999-2000 school year, there was not a pattern to his behavior. The “majority of our BED kids, they’re being suspended once a month.” (T. p. 434) Ms. L. opined that “Student” no longer needed special education services, and that he had earned the right to be exited from programs. (T. pp. 350-352; 406).

28. C.N., “Student”’s 9th grade first semester Algebra teacher, described “Student” as a
“nice kid” who was well-behaved most of the time. “Student” only had behavioral problems a couple of times in her class. One time involved an incident with a female student prior to coming to class. That day, “Student” was easy to calm down, and started participating in class after a brief rest. (T. pp. 443-444). The second incident occurred on December 17, 1999. That day, “Student” cursed at Ms. N., saying “fuck you,” out of anger related to a homework assignment. He then cursed at the assistant principal in and outside his office. “Student” was suspended from school for 3 days for his behavior. (R. Ex. 74).

“Parent” refused to allow “Student” to return to Ms. N.’s class after the suspension. Ms. N. was surprised when “Student” did not return, and believed he could have completed her class successfully. (T. pp. 449-450). Ms. N. has had other BED students. If she had not been told that “Student” was identified as BED, she would not have known. He was similar to all the students in her class. (T. p. 461).

29. N.S. was “Student”s’ Algebra I teacher for the second semester of 9th grade. She described “Student” as a very capable young man who could have done quite well in her class. However, he did not complete his homework assignments, and was often tardy to class. (T. p. 466). Ms. S. has had BED students in her class before. She would not have thought “Student” was a BED student if she had not been informed. She did not see any real difference between “Student” and the rest of the students as far as his behavior was concerned. (T. p. 467-468). “Student” got along well with the other students in her class. (T. p. 468).

Ms. S. completed the teacher rating scales as part of Dr. Shigley’s evaluation. (T. p. 469). She also participated in the May 19, 2000 IEP meeting in which the IEP team concluded that “Student” no longer qualified as BED. She agreed with the IEP team’s decision, because she did not believe “Student” met the BED guidelines. Based on her own observations, she did not see “Student” as fitting the BED label. (T. p. 470). Ms. S. sat next to the Petitioner at the May 19, 2000 IEP meeting. She remembers that Petitioner left the meeting early, and did not ask that the meeting be rescheduled. (T. p. 471).

30. S.T. was “Student”s’ 9th grade social studies teacher and club advisor. Ms. T. described “Student” as very engaging, and willing to volunteer and participate in class. He cooperated well with his cooperative learning group. (T. p. 480-481). “Student” was well-liked and could be charming. Id. “Student” also participated in the Africentric Club for which Ms. T. was the advisor. According to Ms. T., “Student” was a leader in the club, and was very instrumental in planning and developing that year’s Kwanzaa program. (T. p. 485). “Student” was scheduled to sing the Black National Anthem at the Kwanzaa program, but was not allowed to participate in the program because he was suspended from school for cursing at a teacher when the program took place. (T. p. 485)

“Student” had a couple of behavioral issues in Ms. T.’s class throughout the school year. The first time, “Student” left T.’s classroom without permission after she asked him to stop sleeping with his head down on his desk. After Assistant Principal brought “Student” back to the classroom, “Student” apologized. “Student” did not do that again. T. does not allow any students to sleep in the classroom. During second semester, T. told “Student” and a female student to stop arguing with raised voices during class. They stopped immediately. “Student” did not repeat that behavior again
the rest of the school year. T. did not have “Student” suspended from her class. (T. p. 482-484).

Ms. T. also completed the behavior rating scales for “Student”s’ evaluation by Dr. Shigley, and attended the May 19, 2000 IEP meeting. Ms. T. agreed that “Student” did not meet the criteria for qualifying as BED. In her opinion, “Student” did not exhibit behaviors of other BED students in her class such as acting uncontrollably, disrupting class, not being necessarily apologetic, and not being easily accepted by their peers. (T. pp. 488-489). She also remembers Petitioner leaving the May 19, 2000 IEP meeting, and not asking to have the meeting rescheduled. (T. p. 489).

31. “Student”s’ 9th grade teachers’ weekly progress reports showed that “Student”s’ behavior varied in an inconsistent pattern from day to day and from week to week. He had periods of being compliant and able to perform his work, but also periods of being tardy to class, disrespectful to adult authority by using curse words, and not completing homework assignments, especially algebra homework. During the last quarter of the 2000 spring semester, “Student” only completed 11 of 31 algebra homework assignments, with homework assignments consisting of 25% of his semester grade. As the year progressed, “Student”s’ negative behavior, as listed above, lessened in frequency. From the weekly progress reports, these incidents of “Student”s’ behavior appeared to be minor in intensity, and his teachers could usually deal with his behavior without incident. (R. Ex. 2, 38-69)

32. During the 1999-2000 school year, “Student”s’ behavior rose to the level of suspension from school on only three separate occasions. On October 8, 1999, Respondent suspended “Student” for 3 days for not following a school administrator’s instruction to go to the main office after “Student” left his 5th period class without permission. “Student” repeatedly responded “Get out of my face,” and did not comply with the administrator’s request. (R. Ex. 73) On December 7, 1999, Respondent suspended “Student” for three days for cursing at Ms. N. (incident mentioned above). (R. Ex. 74). On May 3, 2000, Respondent suspended “Student” for four days for talking back, cursing, and not complying with an administrator’s direction to report to his office after he observed “Student” not being in the correct place. (R. Ex. 75)

33. “Student”s’ June 9, 2000 report card indicated that “Student” earned 4.5 credits for his spring 2000 semester courses. Under six of his courses, the report noted “Classroom conduct is above average.” (R. Ex. 81)

34. In November 2000, “Student” began seeing Dr. David Bierman, a private psychiatrist. After the initial interview, Dr. Bierman saw “Student” for a total of approximately 2.5 hours over a nine month period, ending in June 2001. (T. p. 125-126). Dr. Bierman diagnosed “Student” as having Oppositional Defiant Disorder and depression. (T. p. 80, 88).

35. During the administrative hearing, Dr. Bierman acknowledged that he had a cursory knowledge of the criteria for BED, and that he had attended one IEP meeting for an autistic child during his career. (T. p. 118, 119). Dr. Bierman did not offer an opinion regarding whether “Student” met the BED criteria.

36. Both parties’ experts, Dr. Bierman and Dr. Shigley, recognized that it is possible to have a diagnosis of ODD or other psychiatric diagnoses such as depression, and not qualify as BED
37. “Student”’s juvenile court counselor and Dr. Shigley noted that Petitioner’s tendency to “bail” “Student” out of trouble contributed to his not taking responsibility for his own actions. Dr. Shigley and Dr. Bierman observed that “Student” did and would benefit from experiencing the natural consequences of his behavior. (P. Ex. E1; T. pp. 113, 309)

38. On May 22, 2000, L. mailed to “Parent” copies of the eligibility determination forms and minutes from the May 19, 2000 IEP meeting as well as a Parents Rights Handbook. The materials were sent by certified mail to “Parent”’s home. (R. Ex. 76; T. pp. 393-395).

39. Attempts to deliver the certified mail on May 23, 2000 and June 17, 2000 were unsuccessful. When “Parent” did not pick up the mail, the envelope was returned and received by the Special Education Department on June 28, 2000. (T. Ex. 76; T. pp. 394-395).

40. As a component of a mediation agreement between the parties reached in July 1999, Ms. L. sent weekly updates to “Parent” about “Student”’s progress. On the report sent to “Parent” on May 24, 2000, Ms. L. noted: “Eligibility paperwork was mailed to your home address on 5/22/00.” The reports sent on June 1, 2000 to “Parent” reiterated this point. Ms. L. informed “Parent” again: “Papers from May 19 meeting were mailed on May 22.” (R. Ex. 67, 68).

41. On May 31, 2000, when “Parent” learned that “Student” would receive modifications for taking his final exams, she called Ms. L. and objected, stating that based on the IEP committee’s decision on May 19, 2000, “Student” should not have these modifications. Ms. L. explained that “Student” would continue to be served in special education programs until the end of the school year. Thus, although “Parent” refused to receive her certified mail containing the results of the eligibility meeting, she clearly knew that the IEP team had determined that “Student” no longer qualified for special education services. (R. Ex. 37; T. pp. 401-404).

42. On June 12, 2000, after the first unsuccessful attempt to deliver the certified mail, Ms. L. mailed the same information to “Parent” at her business address. This correspondence was sent by regular mail and was not returned. (R. Ex. 76; T. pp. 394-395)

43. Petitioner’s exhibits include a copy of Ms. L.’ June 12, 2000 letter to “Parent”. This copy of the letter is stamped “RECEIVED” on “June 30, 2000.” (P. Ex. C-1). Ms. L. had never seen a copy of her June 12, 2000 letter with a received stamp of June 30, 2000 until Respondent received Petitioner’s exhibits for this hearing. (T. p. 396). If the letter had been returned to CL’ office, it would have come directly to her, and would not have been stamped “RECEIVED.” Id.

44. Petitioner’s Exhibit C-1 also bears fax markings dated July 7, 2000. Identical fax markings appear on Petitioner’s Exhibits E1 through E4, which is a juvenile court document that “Parent” admitted she faxed to her attorney on May 8, 2001. (P. Ex. E1-E4; T. pp. 46-47, 54). Identical fax markings also appear on Respondent’s Exhibit 4 which K.S. identified at hearing as a copy of a draft IEP faxed to “Parent” from the Wake County Schools, and faxed back to Ms. S by “Parent” from her workplace. (R. Ex. 4; T. pp. 176-178).

45. “Parent” contends that she did not receive official notification of the May 19, 2000
IEP team decision to exit “Student” from special education programs until August 17, 2000 (Petitioner’s Prehearing Statement, Brief Statement of Facts, Item 10). However, the hearing exhibits, taken together, show “Parent” received formal notice as early as June 30, 2000 and no later than July 7, 2000.

CONCLUSIONS OF LAW

1. The IDEA, 20 U.S.C. § 1400 et seq., is the federal statute governing education of students with disabilities. The federal regulations promulgated under the IDEA are codified at 34 C.F.R. Parts 300 and 301.

2. The controlling state law for students with disabilities is N.C. Gen. Stat. § 115C Article 9, and corresponding state regulations, including the State Procedures governing Programs and Services for Students With Special Needs §§ 1501-1541 (2000).

3. Respondent is required under federal and state law to make available special education and related services only to those students who qualify under state and federal guidelines.

4. N.C. Gen. Stat. § 115C-109 and –111 provide that no child with special needs, ages three through twenty, shall be denied a free appropriate public education or be prevented from attending the schools of the local educational agency in which he or she receives services, or in which he or she or his or her parents/legal guardians reside.

5. NC State Procedures governing Programs and Services for Students With Special Needs § 1501 defines Behaviorally-Emotional Disabled students as:

   . . . students who, receiving specially designed educational support services and intervention strategies in the regular educational setting, still exhibit patterns of situationally inappropriate interpersonal and intrapersonal behavior. The appropriate behaviors must be longstanding patterns of behavior which occur regularly and often enough as to interfere consistently with the student’s own learning process. A behavioral-emotional disability is evidenced by one or more of the following characteristics, which cannot be attributed primarily to physical, sensory, or intellectual deficits:

   (a) inability to achieve adequate academic progress (not due to learning disability);

   (b) inability to maintain satisfactory interpersonal and/or intrapersonal relationships;

   (c) inappropriate or immature types of behavior or feelings under normal conditions;

   (d) general pervasive mood of unhappiness or depression;
a tendency to develop physical symptoms, pains or fears associated with personal or school problems.

The term does not include the socially maladjusted student unless it is determined that he/she is also behaviorally-emotionally disabled.

6. Petitioner has the burden of proving that Respondent failed to comply with state and federal law in exiting “Student” from special education services.

7. Respondent followed all required procedures in evaluating and assessing whether “Student” continued to qualify for special education services. In the summer of 1999 and in May 2000, Respondent completed proper evaluations of Petitioner and his eligibility status. Proper IEP meetings were held to consider the results of the evaluations, and determine whether “Student” continued to qualify for services, with the Petitioner either in attendance or having had the opportunity to attend.

8. On May 19, 2000, the IEP team considered all relevant information and correctly applied the eligibility criteria for learning disability and behaviorally/emotionally disabled students in finding “Student” was no longer identified as a BED student, and no longer eligible for special education services as a BED student. A preponderance of the evidence showed that 3 suspensions during the 1999-2000 school year did not a constitute pattern to “Student”s’ behavior. Although “Student” has some tendencies that were troubling, and may interfere with his being a successful adult, they were not severe enough to meet the criteria for a disability. “Student”s’ behaviors were no longer of such intensity, duration, and frequency that they consistently interfered with his learning/academic process and/or his interpersonal relationships, to continue to qualify “Student” as a BED student.

9. Although the Petitioner was not present at the exact moment on May 19, 2000 when Respondent reached the final decision to exit “Student” from services, she chose to be absent. When Petitioner left this meeting, the IEP team had completely discussed, and answered all questions regarding whether “Student” met the 5 criteria for eligibility; all questions that led to the official act of the “final decision.”

10. Petitioner refused to accept the certified mail that contained the detailed records of the May 19, 2000 IEP team decision. Petitioner received notice of the IEP team decision by regular mail on June 30, 2000, but no later than July 7, 2000. Respondent not only met, but exceeded its obligation to provide this notice in a timely fashion.

FINAL DECISION

“Student”, for whom Petitioner acts as guardian, is not eligible for special education services under the federal Individuals with Disabilities Education Act or Chapter 115C of the General Statutes of North Carolina.

NOTICE
In order to appeal this Decision, the person seeking review must file a written notice of appeal with the North Carolina Superintendent of Public Instruction. The written notice of appeal must be filed within thirty (30) days after the person is served with a copy of this Decision. G.S. § 115C-116(h) and (I).

This the 6th day of December, 2001.

__________________________________
Melissa Owens Lassiter
Administrative Law Judge