

BEFORE THE THREE MEMBER DUE PROCESS PANEL

PURSUANT TO RSMo. § 162.961

____by and through

his parents, _____

Petitioners,

v.

CHARLESTON

SCHOOL DISTRICT,

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

Background

In the instant cause, the issue to be decided is whether _ meets the criteria to be classified as a disabled student and is eligible for special education and related services under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq. and the Missouri State Plan for Part B of the IDEA.

This matter was heard on July 21-22, 1997, at the facilities of Respondent in Charleston, Missouri. The Panel continued the hearing beyond the forty-five day statutory timeline at Respondent's request. (R-101). Petitioners _ and _ appeared in person and were represented by attorney Lew Polivick. Respondent Charleston School District was represented by attorney Teri B. Goldman. Petitioners' Exhibits A through D and F through I were admitted without objection. Petitioners' Exhibit E was admitted over Respondent's objection. Respondent's Exhibits 1 through 106 were admitted without objection. Each party had the opportunity to call and cross-examine witnesses. A court reporter was present and made a full record of the proceedings.

Findings of Fact

1. _ is a _ year old (DOB: _, male student who resides in the Charleston School District (the "District") in Charleston, Missouri.

2. _ was adopted by Mr. and Mrs. _ at a preschool age and the _ testified that _ had been abused and/or neglected by his biological parents. Mr. and Mrs. _ also testified that _ was sexually abused after they were given custody of him. Although the _ testified that _ had received some outside counseling to deal with sexual abuse, that testimony was inconsistent.

3. During the 1992-93 school year, _ attended kindergarten in the District. At the beginning of that year, the _ informed the District that _ was not to be spanked, but gave their permission for the school to use other disciplinary measures (R-1).

4. _ attended the District for at least a part of his first grade year (R-105). Mr. _ testified that, after _ began experiencing problems in the District, the _ transferred him to East Prairie , Missouri School District and then to St. Henry's parochial school in Charleston. Mr. _ further testified that, when _ was in the District during first grade, he was blamed for an incident for responsible and the _ became "fed up" with the District. Mr. _ testified that _ behavior at St. Henry's was appropriate and he did well there (See also R-10). _ attended second grade in the state of Alabama. Mr. _ testified that _ was able to succeed there because he received assistance from his peers. From kindergarten through second grade, _ was not referred for special education or identified as a disabled student.

5. _ returned to the Charleston School District in third grade. During the 1995-96 school year, _ was placed in Mrs. Robin Smith's regular third grade classroom. During that

year, _ received four disciplinary referrals. (R-105). _ received an out of school suspension in March 1996 because his parents refused to allow him to attend an assigned in-school suspension. (R-105). Mrs. Smith testified that _ was an average student who was capable of performing at grade level, and that, although _ could have worked on his handwriting, his fine-motor skills were more than adequate for third grade and that he spent time in class drawing pictures. Mrs. Smith also testified that _ occasionally was not in the mood to work. Although _ had been diagnosed with a seizure order at that time, Mrs. Smith did not observe have any seizure activity at school. With respect to discipline, Mrs. Smith indicated that Mr. and Mrs. _ would not allow _ to experience the natural consequences of his misconduct. For example, Mrs. Smith was not allowed by the _ to impose the same types of discipline that she used with her other students. In addition, when Mrs. Smith refused to spank _ at Mrs. _ request, Mrs. _ borrowed a paddle and spanked _ herself. Mrs. Smith also testified that _ had one or two close friends in third grade, but noted that he lacked the opportunity to make friends in the same manner as other children because the _ would not permit him to play football and similar activities while at recess. Mrs. Smith testified that her contact and communications with the _

particularly Mrs. _ were frequent. The schoolparent relationship deteriorated as the year proceeded. The Panel finds Mrs. Smith's testimony to be credible and further finds that Mr. and Mrs. _ failure to support Mrs. Smith in disciplinary and other matters was a contributing factor in _ behavior and academic performance.

The Panel further finds that, over _ school history in the District, the _ have failed to support the school in disciplinary matters. When _ was in kindergarten, the _ requested no spanking.

In November 1993, Mrs. _ gave her permission for spanking (R-2). In January, 1994, the _ informed the District that _ was not to be spanked unless one of his parents was present (R-3). During _ third grade year, Mrs. _ specifically requested that _ be spanked (R-4). In March 1996, during the third grade year, Mrs. _ requested that the parents be informed prior to the imposition of any school discipline, including spanking (R-9). On or about March 25, 1996, the _ informed the elementary principal, Mark McCutchen, that they disapproved of his imposition of a loss of five days of recess (R-21). On March 30, 1996, the _ corresponded with the District and demanded that receive no further punishment without the District's first demonstrating proof of wrongdoing to them. (R-27). On August 20, 1996, the _ notified the District that they would be responsible for determining punishment for _ school misconduct. (R-32). On February 17, 1997, the ~ informed the District that _ was not to be paddled at school for any reason. tR-65). On March 5, 1997, Mrs. _ informed the District that _ was not to be paddled, but that other punishments could be administered and without the parents' prior permission. (R-81). The Panel finds that the _ inconsistent approach and failure to support the District in disciplinary matters had significant impact on _ ability to understand and appreciate consequences of his behavior, and encouraged in _ unattitude of disrespect for school rules and authority.

7. On or about March 14, 1996, __ , referred _ for an evaluation for purposes of determining his eligibility for special education. (R-10;R-25). On the referral form, the_ informed the District that _ was on a medication for a seizure disorder. (R-10). On or about March 1996, _ physician, Dr. R.J. Tellow, informed the District that he was treating _ for a seizure disorder. (R-22). On August 8, 1996, Dr. Tellow once again informed the district that _ had a seizure disorder and listed the prescribed medications. In that notice, Dr. Tellow indicated that _ seizure disorder might be accompanied by behavioral problems. (R-31). At the hearing, Mr. _ testified that _ was diagnosed with grand mal epilepsy in 1994 and also testified that _ exhibited petit mal seizures. However, Petitioners failed to present any evidence that conclusively demonstrated these diagnoses. Mr. _ also testified that _ was placed on the medication depakote and that medication causes him to engage in aggressive behavior. Mr. _ also testified that _ continues to have seizures. However, Petitioners' Exhibit E (a letter from Dr. Burris, a pediatric neurologist

who recently examined _) indicates that _ seizures are completely controlled by medication. The Panel finds that ~ had a seizure disorder, but also finds that _ seizures are controlled by medication and that, according to the reports of Mrs. Smith and _ fourth grade teacher, Kathy Garrard, _ does not have seizures at school.

8. Following the parents' request for an evaluation, the District screened _ and determined that no evaluation was necessary because the screening showed no areas of concern. (R26). On April 2, 1996, the District sent the ~ a notice of action refused indicating its decision not to evaluate. A copy of the procedural safeguards was attached and Mrs. _ signed to indicate receipt. (R-29). The Panel finds that the ~ have been fully informed of their procedural rights at all relevant times and further finds that petitioners presented no evidence of procedural violations.

9. During the 1996-97 school year, _ was placed in Mrs. Garrard's regular fourth grade classroom. During the course of the school year, Mrs. Garrard completed citizenship reports for _ . Those reports indicate that _ was succeeding in many areas and occasionally needed to improve in others. (R-33j35j41j45;49). Mrs. Garrard testified that ~ was capable of doing fourth grade work without modification. She also testified that his lower grades were attributable to his failure to study or to turn in homework. Mrs. Garrard also testified that, on at least two occasions, _ indicated to her that he purposefully did not perform well because his parents were trying to get him into special education. (R-62). Mrs. Garrard also testified that fine-motor skills were within the average range for fourth graders and testified that _ frequently drew intricate pictures in class. The Panel finds Mrs. Garrard's testimony regarding _ academic ability to be credible and finds that _ low grades were substantially attributable to his failure to study and turn in homework as well as to the parents' apparent directives to him to do poorly so as to qualify for special education.

10. During the 1996-97 school year, Mrs. Garrard initiated approximately sixteen disciplinary referrals. Significantly, Mrs. Garrard testified that many of those referrals involved minor misconduct that she generally would handle within the classroom but, because the ~ did not support her during the school year with regard to discipline and other matters, she referred _ in order to avoid dealing with the _ . Elementary Principal McCutchen testified that sixteen disciplinary referrals in a school year was not unusual for his school, and that at least fifteen other students had that many or more disciplinary referrals during the 1996-97 school year. The Panel finds that _ did not have an unusual number of disciplinary referrals and further finds that the higher number during the 1996-97 school year is directly attributable to Mrs. Garrard's understandable reluctance to deal with the _ with respect to disciplinary matters. The Panel also

finds that _ misconduct can- be substantially attributed to the _ failure to support the school in discipline matters.

11. At hearing, Mr. _ testified that he and his wife frequently discuss school matters in front of _. The Panel finds that _ school behavior and performance is attributable, at least in part, to the family's open discussions of their disagreement with the school. This finding is consistent with the assessment performed by Dr. Larry Lowrance on March 11, 1997. (R82).

12. On October 17, 1996, Mrs. _ requested another multidisciplinary evaluation to determine _ eligibility for special education. (R-42j43). The District conducted the requisite screening and determined that no evaluation was necessary. (R-44). At the time of screening, _ grades included two D's and two C's. (R-44). On November 15, 1996, the District sent a notice of action refused with regard to this decision. (R-47).

13. On November 20, 1996, the Kenny Roger Cerebral Palsy Center conducted an occupational therapy evaluation of _ . During its evaluation, personnel administered a visual motor integration test to evaluate _ hand/eye coordination. According to the test results, the Center concluded that _ had delays with visual motor skills and recommended one thirty-minute session per week of direct occupational therapy. (R-48;R-50). The Center's therapists did not testify at hearing. However, as noted above, Mrs. Smith and Mrs. Garrard testified that _ fine motor skills, as observed in the classroom, were more than adequate for educational purposes. Moreover, the Panel notes that the work samples admitted at hearing in R-106 demonstrate that _ has the requisite fine-motor skills to perform in the classroom. The Panel, therefore, finds that _ does not require occupational therapy as a related service.

14. On December 3, 1996, Mrs. requested an independent evaluation for _ in reaction to the District's screening. (R-52). On December 16, 1996, the District conducted a student record review to consider the outside Kenny Rogers' evaluations presented by the _. The multidisciplinary team concluded that the information presented in those evaluations was not "educationally relevant" because there was no evidence in the school setting that _ fine and gross motor skills negatively impacted on his education. (R-54).

15. In January 1997, the _ filed a child abuse/neglect report against the district alleging that staff failed to properly supervise _ on the playground. (R-57). After an extensive investigation, the Division of Family Services concluded that there was no evidence to substantiate the allegations and determined that staff properly handled the playground situation at issue. (R-57). The _ then filed criminal charges against the other students involved in the playground incident.

The Panel finds that the child abuse report is an additional example of the _ failure to support the District in its attempts to impose appropriate discipline. The Panel further finds that this incident, in combination with the other incidents described in these finds of fact, has instilled a lack of respect in _ With respect to the District and its staff and is a substantial contributing factor in _ behavior and school performance.

16. On February 3, 1997, Dr. Lynn Bennett Blackburn, licensed pediatric neuropsychologist, conducted a neuropsychological assessment of _ at St. Louis Children's Hospital in St. Louis, Missouri. (R-58). Although _ history as noted in Dr. Blackburn's report indicates physical and verbal aggression in the school setting, Dr. Blackburn testified by telephone that she did not speak to any school personnel in conjunction with her assessment. She also testified that she did not believe such input would have been helpful. Dr. Blackburn's assistant administered the WISC-III intelligence test to determine _ cognitive abilities. That test indicates that _ full scale is 64, which -- if valid -- would place _ in the mildly retarded range of intelligence. Dr. Blackburn also administered the Wechler Individual Achievement Test, the Wide

Range Achievement Test, the Wide Range Assessment of Memory and Learning, and the California Verbal Learning Test. _ standard scores on those tests ranged from 55 to 108, with the majority of scores well above _ reported IQ of 64. At hearing, Dr. Blackburn conceded that _ IQ might be higher than tested. As a result of the inconsistency between _ reported IQ and the achievement test results and as a result of the testing reported by Dr. Lowrance (R-82), the panel questions the validity of Dr. Blackburn's testing and the credibility of her testimony, and finds that her test results do not present a valid basis on which to determine _ eligibility for special education. In addition, the Panel notes its concern that Dr. Blackburn did not seek the participation and input of _ teachers and other school personnel. Although Dr. Blackburn testified that she was not aware that the testing was to be used for determining _ eligibility for special education, the Panel does not find that testimony to be credible in light of Dr. Blackburn's report which not only recommends eligibility under the IDEA, but makes specific recommendations and programming.

17. On February 12-13, 1997, a multidisciplinary team convened to consider Blackburn's report as well as _ then current classroom performance. The student record review shows that _ second quarter grades consisted of two B's, three C's and one D. _ third quarter mid-term grades consisted of one A, two C's, one D and two F's. Mrs. Garrand reported that _ low grades were an indication of his failure to study for tests (R - 60; R - 61) .

18. On February 14, referral for special education. (R-63). On that same date, the District presented a notice of action refused due to the screening performed as a result of the prior request for an evaluation. (R64) . However, on February 17, 1997, the District decided to proceed with an evaluation because, as testified to by the Assistant Superintendent, Darrell Hoppe, the district had been informed that the _ had requested a due process hearing. (R - 66; see also R-73). As a first step, the District conducted another screening. (R-67) . At that time, ~ had one A and three C's. (R-67).

19. When the ~ refused to cooperate with the District's attempt to use its own personnel to evaluate (R-69; R74; R-77), the District decided to use an outside person, Dr. Lowrance, to conduct the evaluation.

20. On February 24, 1997, the _ directly informed the District and the Missouri Department of Elementary and Secondary Education (-DESE") that they wished to go to due process. (R-73; R-78). The State convened a three-member panel. (R-78; R-79).

21. On March 3, 1997, the _ finally gave their consent for an initial evaluation. (R-80) .

22. Dr. Lowrance conducted an evaluation on March 11, 1997 (R - 82). At hearing, Dr. Lowrance testified that he conducted his evaluation at the District and that he spent time speaking to _ Mrs . _ and _ teachers. In addition, he observed _ in the classroom. Dr. Lowrance administered the Stanford-Binet to determine _ IQ. In his report and at hearing, Dr. Lowrance indicated that _ tried to play games about now knowing certain test items and that he used techniques to counteract _ gameplaying. The Panel finds that Dr. Lowrance appropriately administered the IQ test and that his test results are not invalidated by the use of the strategies described. _ scores on the Stanford-Binet are as follows: verbal reasoning - 100; abstract/visual reasoning - 89; quantitative reasoning -95; short-term reasoning - 94; and test composite - 94. The composite score of 94 places _ in the average range of intellectual functioning. The Panel finds Dr. Lowrance's score of 94 to be a valid measure of _ cognitive abilities and further finds his assessment is consistent with the reports of Mrs. Smith and Mrs. Garrard as well as the achievement test scores reported by Dr. Blackburn.

23. Dr. Lowrance's testing also showed that _ did not exhibit concerns in the areas of adaptive behavior or academic achievement. Indeed, _ achievement test scores were fully consistent with his IQ of 94. Dr. Lowrance also took handwriting samples which showed _ fine-motor skills were normal for a fourth grade student. In assessing the area of social/emotional, Dr. Lowrance appropriately used both Mrs. _ and Mrs. Garrard as reporters. The behavior quotient he derived

showed that _ did not have a serious emotional disturbance as defined by the IDEA. In his diagnostic conclusions, Dr. Lowrance reported that _ not eligible for special education under the diagnoses of mental retardation, serious emotional disturbance, learning disabled or other health impaired. (R-82). More specifically, Dr. Lowrance determined that _ was not seriously emotionally disturbed because "he has learned to be disrespectful and not attentive to his work... _ misbehaviors tis a] function of what he is learning in the home." (R-82 at 145). In addition, Dr. Lowrance concluded that _ misbehavior in the school setting are the result of a social maladjustment caused by him learning inappropriate response patterns to those he disrespects and getting reinforced for this by his peers and inadvertently by the adults in his life." (R-82 at 145). The Panel finds that Dr. Lowrance's conclusions are fully supported by the evidence presented at hearing.

24. On March 19, 1997, the multidisciplinary team met to consider the results of Dr. Lowrance's evaluation and to prepare a diagnostic summary. The team concluded that _ had no handicapping condition requiring special education. (R-84). On March 20, 1997, the ~ were presented with the requisite notice of action refused (R-85).

Conclusions of Law:

1. The Individuals with Disabilities Education Act U.S.C. § 1400-1485 ("IDEA") guarantees all students with disabilities the right to a free appropriate public education. 20 U.S.C. § 1412(1). The regulations define "children with disabilities" to mean any student:

having mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, specific learning disabilities, deaf-blindness, or multiple disabilities, *and who because of those impairments need special education and related services.* 34 C.F.R. § 300.7(a)(1) (emphasis added). Accordingly, to

qualify as disabled under the IDEA, a student must have one of the enumerated disabilities and, in addition, must have a need for special education services as a result of that disability. *Id.* In this case, Petitioners contend that _ should be deemed eligible for special education as either mentally retarded, seriously emotionally disturbed or other health impaired. According, the Panel will discuss each handicapping condition in light of the evidence adduced at hearing.

2. Pursuant to the IDEA, a student who suffers from a

serious emotional disturbance must exhibit one or more of the

following characteristics:

an inability to learn that cannot be explained by intellectual, sensory or health factors;

ii. an inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

inappropriate types of behavior or feelings under normal circumstances;

iii. inappropriate types of behavior or feelings under normal circumstances;

a general pervasive mood of unhappiness or depression; or

a tendency to develop physical symptoms or fears associated with personal or school problems.

Moreover, the student must exhibit one or more of the above characteristics over a long period of time, to a marked degree and to such an extent that the student's educational performance is adversely affected. 34 C.F.R. § 300.7(b)(9)(i)(A)-(E). See *Fanquier County Pub. Sch. , 20 IDELR 579* (Virginia State Hearing Officer, August 11, 1993) (concluding that a child who exhibits one of five characteristics of SED over a long period of time does not automatically qualify for special education; rather, the condition must affect the child's education).

3. Similarly, the Missouri State Plan for Part B of the IDEA, provides that "Behavioral Disorders/Emotionally Disturbed" refers to manifestations such as the following:

a. Difficulties in building or maintaining satisfactory interpersonal relationships with peers, parents and teachers;

b. a general pervasive mood of unhappiness or depression; and, a tendency to develop physical symptoms or fears associated with personal or social problems.

Missouri State Plan A-22-23. Moreover, these behaviors must be "exhibited over an extended period of time and to a marked degree along with difficulties in learning that cannot be explained by cultural, intellectual, sensory, or other health factors. Missouri State Plan A-22-23.

4. The Missouri State Plan also provides that a multidisciplinary team may determine a student has a behavioral disorder if all of the following criteria are met:

a. the student displays a behavioral disturbance that is documented by evaluation procedures which may include observation of behavior in different environments, behavior rating scales directly administered or based on informed information or protective techniques;

b. the student's behavioral disturbance adversely affects his/her school functioning;

c. the student's behavioral disturbance and associated deficits *are not primarily* caused by:

visual or auditory acuity deficits, or motor deficits, mental retardation, language or learning disability, *environmental or economic disadvantage or cultural differences*. *Id.* (emphasis added).

5. If a student's behavior does not adversely affect educational performance, the student is not SED as defined by the IDEA. *See Fauquier, 20 IDELR at 583.*

6. The IDEA's definition of emotionally disturbed excludes students who are socially maladjusted, unless it is determined that they have a serious emotional disturbance. 34 C. F. R. § 300.7(b)(9)(ii). Socially maladjusted is defined as a "persistent pattern of violating societal norms with lots of truancy, substance and sex abuse, i.e., a perpetual struggle with authority, easily frustrated, impulsive, and manipulative." AS follows: *Sequoia, EHLR 559:133 (ND CAL 1987)* . Furthermore, the purpose of the IDEA is to provide all disabled children the opportunity to receive a free appropriate public education -- "not to address all social skills in the community and, more particularly, in the family." *See Fauquier, 20 IDELR at 584 (quoting Z. v. Fairfax County Pub. Sch. , 22 IDELR 998); Huntsville City ad. of Educ. , 22 IDELR 931, (Alabama State Educational Agency, June 26, 1997)*

7. The evidence presented during the due process hearing clearly demonstrates that _ is not SED/BD as defined by the IDEA or the Missouri State Plan. First, _ does not exhibit the characteristics of a serious emotional disturbance as described by IDEA. *See 34 C.F.R. § 300.7.* According to the evidence, _ has the ability to build and maintain satisfactory interpersonal relationships with his peers and teachers. teachers testified that they enjoyed having him in their classes, and that they frequently saw _ engage in appropriate peer interactions. In addition, there was no evidence that _ was unhappy or depressed, or that he had developed any physical symptoms or fears with respect to personal or school problems. Further, _ does not have a behavioral disorder under the Missouri State Plan, which expressly excludes this disability if the student's disturbance is primarily caused by environmental factors. The evidence at

hearing, including Dr. Lowlanders evaluation report, clearly demonstrates that _ family environment is the major contributing factor in _ school behaviors and performance.

8. Second, assuming *arguendo* that _ has exhibited the behaviors associated with a serious emotional disturbance, _ still does not qualify as seriously emotionally disturbed as defined by the IDEA or the Missouri State Plan, because his behavior did not adversely affect his educational performance. Although the panel agrees that _ has encountered numerous disciplinary problems, there is no significant evidence establishing that _ behavior adversely affected his educational performance or school functioning. Indeed, _ achievement test scores (as reported by Dr. Lowrance and Dr. Blackburn), show that _ is learning at an expected rate and is capable of maintaining average grades. Moreover, there was no evidence that anyone (including the _) have ever recommended that _ be retained.

Third, even if _ were SED/BD (which he is not), does not require special education or related services. _ has always been served in the regular classroom without services and has demonstrated the ability to benefit educationally without special education. Thus, even if _ has an educational disability, he does not require special education.

10. The evidence clearly indicates that _ is merely socially maladjusted, as Dr. Lowrance concluded. _ problems are not a result of an alleged disability, but rather a result of the family's failure to support the school and its staff and of the family's communication to _ of an attitude of disrespect for the District. Accordingly, the Panel concludes that _ is not SED/BD and is not eligible for IDEA services under that category of disability.

11. Petitioners also contend that _ is eligible for special education as mentally retarded based on Dr. Blackburn's testing. However, as noted in the findings of fact above, the Panel finds that Dr. Blackburn's cognitive testing does not accurately reflect _ cognitive abilities. Rather, the Panel finds that Dr. Lowrance's composite score of 94 is a valid indicator of _ intellectual abilities. Because _ IQ is within normal range of functioning, he is not mentally retarded and is not eligible for services under that handicapping condition.

12. Finally, Petitioners contend that _ should receive special education services as "other health impaired." Petitioners contention is based on _ diagnosis of a seizure disorder. Pursuant to the IDEA, other health impairment mean "having limited strength, vitality or alertness, due to chronic or acute health problems...that adversely affects a child's educational performance." 34 C.F.R. § 300.7(8). Although the Panel acknowledges that _ has a seizure disorder, the evidence at hearing established that _ seizures are completely controlled by medication. In addition, the

evidence at hearing demonstrated that _ seizure disorder does not adversely affect his educational performance. Rather, ~ is achieving at expected levels and does not have seizures at school. Accordingly, the Panel concludes that ~ does not meet criteria to be labeled as other health impaired.

Decision:

The foregoing duly considered, it is our opinion that the Charleston School District properly determined that _ is not disabled as defined by the IDEA and the Missouri State Plan. The foregoing duly considered, we find in favor of Respondent, Charleston School District.

DONE THIS 22nd day of September, 1997.

Robert L. Hawkins, III, Panel Chairman

All concur