



The University of the State of New York

The State Education Department State Review Officer

No. 07-003

Application of a CHILD SUSPECTED OF HAVING A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Wappingers Central School District

Appearances:

Family Advocates, Inc., attorney for petitioners, RosaLee Charpentier, Esq., of counsel

Donoghue, Thomas, Auslander & Drohan, attorney for respondent, James P. Drohan, Esq., of counsel

DECISION

Petitioners appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their daughter's tuition costs at the Oakwood Friends School (Oakwood) for the 2004-05 school year and which upheld a determination of respondent's Committee on Special Education (CSE) that petitioners' daughter was ineligible for special education programs and services. The appeal must be dismissed.

At the commencement of the impartial hearing in April 2006, petitioners' daughter was 14 years old and attending 9th grade at respondent's school. The student's prior educational history is discussed in Application of the Board of Educ., Appeal No. 04-098, and will not be repeated here in detail. At the time of the impartial hearing, the student was not classified as eligible for special education services and her classification remains a matter in dispute.

The student attended respondent's schools from kindergarten through the middle of seventh grade (Dist. Ex. 2 at p. 2).¹ During that time, petitioners made numerous referrals to

¹ Respondent entered each volume of the transcript and several sets of exhibits from the prior appeal as a series of consecutively numbered exhibits in the instant appeal. Accordingly, several of the citations in this decision refer to

respondent's CSE (Dist. Exs. 21 at pp. 538-39, 566, 570; 24 at Exs. 19, 23; 25 at Exs. RR, NNN); however, in each instance the CSE determined that the student was not a student with a disability and therefore ineligible for special education services (Dist. Exs. 24 at Exs. 9, 12, 16, 21, 27; 25 at Ex. NN). Beginning in second grade (September 1998) the student was provided with accommodation plans pursuant to Section 504 of the Rehabilitation Act of 1973 (section 504) (29 U.S.C. §§ 701-796[I]), which included a variety of accommodations such as preferential seating, extended time for tests, occupational therapy, counseling services and the use of assistive technology (Dist. Exs. 17 at p. 131; 21 at pp. 541, 554-56, 564-66; 24 at Exs. 33, 34; 25 at Exs. MM, PP, QQ, EEEE, FFFF). Among other things, the student was diagnosed with Asperger's Syndrome (Asperger's) in January and June 2003 (Dist. Exs. 24 at Ex.25, pp. 11-12; 25 at Ex. HH). Following a September 2003 CSE meeting, the CSE declined to find the student eligible for special education services, and petitioners requested an impartial hearing (Hearing 1) (Dist. Ex. 23 at Ex. 1). During the course of Hearing 1, petitioners removed their daughter from respondent's school and unilaterally placed her in Oakwood for the remainder of the 2003-04 school year (Dist. Exs. 18 at pp.183-84; 20 at p. 491).

After the conclusion of Hearing 1, the impartial hearing officer determined that the student should have been found eligible for special education services as a student with an other health impairment (Parent Ex. AA at pp. 9-11; see 8 NYCRR 200.1 [zz][10]). In a decision dated March 4, 2005, I annulled in part the decision of the impartial hearing officer in Hearing 1 with respect to the 2003-04 school year, determining that the student was not eligible to receive special education services and programs (Application of the Board of Educ., Appeal No. 04-098).² Petitioners' instant appeal relates to the 2004-05 and 2005-06 school years.

After the close of evidence in Hearing 1 and prior to the impartial hearing officer's decision, petitioners noted in a letter to the CSE chairperson dated August 17, 2004 that they continued to disagree with the respondent's CSE regarding the student's eligibility for special education services, and they informed respondent that they would place their daughter at Oakwood for the 2004-05 school year (Parent Ex. A). Petitioners' letter further stated that they intended to seek full tuition reimbursement, including costs for any special education/learning differences classes and related costs (Parent Ex. A).

While the student attended Oakwood for the 2004-05 school year, she received one period of individual instruction every other day at the school's academic support center (Parent Ex. R; see also Tr. pp. 75, 79, 169). Staff at Oakwood developed a learning skills program for the student that included goals and strategies related to reading, written expression, study skills, and mathematical skills (Parent Ex. P; see also Tr. p. 87). The plan included recommendations for extended time on quizzes and tests, use of a computer for written assignments and essay tests, preferential seating in the front of the classroom, use of a scribe for notes taken in class and from lengthy reading assignments, and use of a "Dana" device for taking notes in class (Parent Ex. P at p. 2).

exhibits which, in turn, contain multiple lettered or numbered exhibits entered into evidence in the prior appeal (e.g. District Ex. ___ at Ex. ___).

² Petitioners have sought judicial review of the decision rendered in Appeal No. 04-098 in the United States District Court for the Southern District of New York. As of the date of this decision, that case remains pending.

According to reports by her teachers at Oakwood, the student had a strong work ethic, was conscientious and displayed a good attitude (Parent Exs. H at p. 1; J at p. 1; M at pp. 2, 4; N; O at pp. 3-4). The student was an active participant in class and she asked questions when she needed clarification (Parent Exs. H at p. 1; J at pp. 1- 3; I at p. 2; M at p. 2; O at p. 2-4; N). At least one teacher at Oakwood reported that the student worked well with others during group projects (Parent Ex. M at p. 1). However, the student was also described as being "chatty," having difficulty with organization, having trouble focusing, and needing to improve her writing skills (Parent Exs. E at pp. 3-7; H at p. 1; I; J at pp. 1-2, 4-5; L at pp. 1-3; M at pp. 1, 3-4, 6; N). Two teachers noted occasional problems with homework completion (Parent Exs. E at p. 1; M at pp. 3-4). For the 2004-05 school year the student received above average grades in all subjects with the exception of science, in which she received a C+ (Dist. Ex. 2 at p. 2, Parent Ex. O; see also Parent Exs. I; K; M at p. 1).

By letter dated June 13, 2005, petitioners requested an impartial hearing for the 2004-05 school year, asserting that respondent had not placed their daughter in special education nor offered any appropriate services (IHO Ex. 1; see also Tr. pp. 78-79). An impartial hearing officer was appointed on June 17, 2005 (IHO Ex. 2); however the hearing (Hearing 2) was adjourned numerous times (IHO Exs. 8, 9, 12, 13, 15, 18, 20, 21, 23).³

On July 20, 2005, respondent's psychologist conducted a psychoeducational evaluation of the student (Dist. Ex. 2; see also Tr. p. 90). Respondent's psychologist described the student as personable and easily engaged in conversation (Dist. Ex. 2 at pp. 3, 8; see Tr. p. 251). She noted that the student maintained good attention throughout the evaluation (Dist. Ex. 2 at p. 3, 8). Administration of the Wechsler Intelligence Scale for Children - Fourth Edition (WISC-IV) yielded the following composite and percentile scores: verbal comprehension 126 (96th percentile), perceptual reasoning 108 (70th percentile), working memory 116 (86th percentile), processing speed 91 (27th percentile), and full scale IQ 115 (84th percentile) (Dist. Ex. 2 at p. 4). Respondent's psychologist noted that there was a significant 18-point discrepancy between the student's verbal comprehension and perceptual reasoning scores, suggesting that the student's language skills might be more developed than her visual motor perceptual skills (Dist. Ex. 2 at p. 3). She also noted that this was consistent with previous assessments of the student (Dist. Ex. 2 at p. 3). Respondent's psychologist reported that the student's processing speed was inconsistent and that she scored slightly below average on the subtest that measured speed and short term memory and attention (Dist. Ex. 2 at p. 5).

The student's academic skills were assessed by respondent's psychologist using the Wechsler Individual Achievement Test, Second Edition (WIAT-II), the Gray Oral Reading Test, Fourth Edition (GORT - 4) and selected subtests of the Test of Written Language, Third Edition (TOWL-3) (Dist. Ex. 2 at pp. 5-6). According to respondent's psychologist, the student's academic achievement in most areas was at the "above average to superior level" and the student

³ I note that Hearing 2 commenced nearly 10 months after the impartial hearing request was made and that, in many circumstances, the hearing was adjourned upon the agreement of the parties for the purpose of allowing them to pursue litigated positions and then await a ruling in the pending judicial review of the decision in petitioners' previous appeal (see note 1 above) (IHO Exs. 8; 9; 12-13; 15; 17-19; 20-21). However, I note that this rationale is not among the exceptions to the time periods identified in the Commissioner's Regulations (see 8 NYCRR 200.5[j][5] [ii]-[iii]), and expeditious resolution of these matters was hindered.

did not score "below average" or "at risk" in any academic area (Tr. pp. 246-49; Dist. Ex. 2 at p. 8). On measures of silent reading, she found that the student's reading speed was average to above average and her reading comprehension was at the 93rd percentile (Dist. Ex. 2 at p. 5). When the student was asked to read out loud, respondent's psychologist determined that her comprehension was minimally compromised but that it was still within the average range (Dist. Ex. 2 at pp. 5-6). The psychologist reported that the student performed within the average range on measures of written expression (Dist. Ex. 2 at pp. 5-6). According to the evaluation report, the student's writing was well-organized and her hand writing was legible, however, the student's use of punctuation was described as "basic" (Dist. Ex. 2 at pp. 5-6; see Tr. p. 249).

Respondent's psychologist assessed the student's behavior using the self-report form of the Behavior Assessment System for Children (BASC) (Dist. Ex. 2 at p. 7). The student's responses resulted in the following T scores and percentile scores: school maladjustment 45 (36th percentile), clinical maladjustment 47 (46th percentile), personal adjustment 45 (24th percentile) and emotional symptoms index 54 (70th percentile). On the clinical scales, the student's score for social stress fell in the "at-risk" range, and on the adaptive scales the student's score for self-esteem fell in the "at risk" range (Dist. Ex. 2 at pp. 7, 8). According to respondent's psychologist, neither score was in the clinically significant range (Dist. Ex. 2 at pp. 7, 8; see also Tr. pp. 249-51, 282-85). In her evaluation report, respondent's psychologist concluded that the student's scores, as well as her testing behavior, did not support a learning disability or special education intervention (Dist. Ex. 2 at p. 7).

The CSE convened on August 17, 2005 and determined that the student did not meet the criteria for classification as a student with a disability and did not require special education (Tr. p. 90; Parent Ex. Q; Dist. Ex. 3). According to the student's mother, past assessments of the student were not included in the July 2005 psychoeducational evaluation report (Dist. Exs. 3 at p. 2; 4 at p. 2). An independent neuropsychological evaluation was requested by petitioners and approved by the CSE (Tr. p. 91; Dist. Exs. 3 at p. 2; 4 at p. 2). The CSE rejected petitioners' request for an independent psychoeducational evaluation (Dist. Ex. 3 at p. 2; Dist. Ex. 4 at p. 2).

The independent neuropsychological evaluation was conducted over the course of several days in November and December 2005 (Dist. Ex. 7). The neuropsychologist administered many of the same tests that were used by respondent's psychologist in July 2005 and noted that the quality and pattern of the student's performance was similar in both sets of testing (Dist. Ex. 7 at p. 5). Administration of the WISC-IV yielded the following composite and percentile scores: verbal comprehension 119 (90th percentile), perceptual reasoning 112 (79th percentile), working memory 126 (96th percentile), processing speed 91 (27th percentile) and full scale IQ 117 (87th percentile) (Dist. Ex. 7 at p. 14). The neuropsychologist's January 2006 evaluation report indicated that the student demonstrated general intellectual ability in the high average to superior range, with evidence of significant variability in executive and cognitive information processing (Dist. Ex. 7 at p. 8). She noted that inconsistencies were most apparent in the areas of working memory, retrieval fluency, response inhibition, and processing speed (Dist. Ex. 7 at p. 8). The neuropsychologist noted that this pattern and the student's history were consistent with attention deficit hyperactivity disorder (ADHD) (Dist. Ex. 7 at p. 8).

The student's academic skills were assessed by the neuropsychologist using the WIAT-II, GORT-4, Stanford Diagnostic Reading Test, and the Woodcock-Johnson III Tests of Cognitive Abilities (Dist. Ex. 7 at pp. 5-7, 19, 20, 21). The neuropsychologist concluded that academically, the student's skills were at or above grade level "across the board," although the student demonstrated weaknesses, relative to herself, in written expression and reading for meaning (Dist. Ex. 7 at p. 8). The neuropsychologist described the student as "comfortable and well related, although mildly anxious" (Dist. Ex. 7 at p. 3). She further described the child as cooperative and highly motivated during testing (Dist. Ex. 7 at p. 4) and noted that the student's pragmatic language skills were within expectation (Dist. Ex. 7 at p. 5). The neuropsychologist noted that a social perception deficit was less apparent at this time than on prior evaluation, which might reflect increased social maturity (Dist. Ex. 7 at p. 8). The evaluation report indicates that on the Beck Youth Inventory, a self report checklist, the student's rating on the self-concept scale was in the "much lower than average" range (Dist. Ex. 7 at p. 5). According to the neuropsychologist, scales related to anxiety, depression, and anger were in the average range (Dist. Ex. 7 at p. 5). On the Connors-Wells Adolescent Self-Report Scale, the evaluation report indicates that none of the scales were elevated; however, on the Connors' Parent Rating Scale, completed by petitioners, all of the ADHD scales were extremely elevated (Dist. Ex. 7 at p. 5).

The student attended respondent's John Jay High School in a regular education class for ninth grade (2005-06 school year) (Tr. pp. 74-75). A student report from John Jay High School dated December 16, 2005 indicated that her grades for social studies, English, and science were in the 80-89 grade range while her grades for math were in the 90-100 grade range (Parent Ex. V). The science teacher noted in the report that the quality of the student's lab work needed improvement (Parent Ex. V). The student received the following second marking period grades: social studies 87, math 98, English 86 and science 84 (Dist. Ex. 6).

A classroom observation of the student was conducted on April 7, 2006, during her honors English class (Parent Ex. Z at p. 1). The observer described the student as attentive and focused on a film shown during the class (Parent Ex. Z at p. 1). The student was observed talking with classmates (Parent Ex. Z). In one instance the student was observed "chatting with a neighbor" for approximately 20 seconds (Parent Ex. Z at p. 1). The observer indicated that the student re-focused without prompting from the teacher (Parent Ex. Z at p. 1). An assessment of student performance, conducted as part of the observation, rated the student's following skills as good: attends class on time, behavior is suitable for age, interacts positively with peers and teacher, is attentive, follows oral directions, follows written directions, completes work on time and completes written assignments satisfactorily (Parent Ex. Z). Rated as fair were the student's abilities to begin work promptly and contribute meaningfully to class discussions (Parent Ex. Z at p. 2). The assessment of the student's performance was completed by the observer with input from the student's teacher (Parent Ex. Z at p. 2). The observation report indicated that the student had been recommended for an honors class for the next school year (Parent Ex. Z at p. 2).

The CSE reconvened on April 18, 2006 to review the results of the neuropsychological evaluation as well as the classroom observation (Parent Ex. Y). According to CSE meeting minutes, the neuropsychological evaluation report indicated that the student did not exhibit evidence of a learning disability; however the CSE noted that the student qualified for section

504 services (Parent Ex. Y at p. 1). The CSE concluded that the student did not qualify for special education services at that time (Parent Ex. Y at p. 2). The student's mother reportedly objected to the CSE's determination at the meeting (Tr. p. 110).

Hearing 2 was held on April 3 and 28, May 18, June 9 and July 20, 2006. When Hearing 2 commenced on April 3, 2006, petitioners' claim was limited to tuition reimbursement while the student attended Oakwood during the 2004-05 school year, and they contended that the CSE had improperly failed to classify the student as having autism or an other health impairment for the 2004-05 school year. When the hearing resumed on May 18, 2006, petitioners entered a request for an impartial hearing for the 2005-06 school year (Tr. pp. 46-47; IHO Ex. 25). In the request, petitioners alleged that there were pertinent evaluations missing from the student's permanent records that were previously accepted by the CSE; that the district's psychoeducational evaluation focused on academics and did not include significant testing in the social, emotional, and behavioral areas that would be most relevant given the student's diagnoses of ADHD and Asperger's; and that the CSE failed to consider recommendations made by the neuropsychologist in her report (IHO Ex. 25). Petitioners alleged that the April 18, 2006 CSE made its decision without giving due consideration to all submitted evaluations and reports, and requested an impartial hearing to challenge respondent's action and the CSE's decision not to classify the student as eligible for special education services (IHO Ex. 25). At Hearing 2, the parties agreed to consolidate both the 2004-05 and 2005-06 hearing requests (Tr. p. 47).

By decision dated December 7, 2006, the impartial hearing officer presiding over Hearing 2 denied both petitioners' claim for tuition reimbursement for Oakwood and their request that the student be classified as a student with a disability (IHO Decision at p. 24).⁴ The impartial hearing officer determined that the student was not referred to the CSE for the 2004-05 school year and was not eligible for classification for either the 2004-05 or 2005-06 school years because she did not meet the definitions of other health impaired or autism (IHO Decision at pp. 20-21). In evaluating the evidence, she placed little weight upon the testimony of petitioners' expert (IHO Decision at p. 23). She concluded that the student did not require special education for the purposes asserted by petitioners (IHO Decision at p. 22). She also noted that it did not appear that the student's social difficulties, as described by her parents, adversely affected the student's educational performance (IHO Decision at pp. 21-24). The impartial hearing officer ordered respondent to create a section 504 accommodation plan for the student (IHO Decision at pp. 24-25).

Petitioners appeal and assert that the impartial hearing officer erred by failing to find the student eligible for special education services. Petitioners also argue that the impartial hearing officer's decision must be annulled, alleging that it was rendered more than two months late and that it overlooked the evidence adduced in Hearing 1, including diagnoses of Asperger's, anxiety disorder, attention deficit disorder or ADHD, and learning disorder(s) including dysgraphia. Petitioners claim that the impartial hearing officer failed to consider that the student's condition impaired social activities rather than academic activities. According to petitioners, testing results of the psychoeducational evaluation reflect serious discrepant and inconsistent performance. Petitioners state that the student understands much less than it appears and that respondent

⁴ A decision was apparently issued on November 6, 2006; however, the corrected decision dated December 7, 2006 appears in the record.

performed no assessment functioning in social or group settings. Petitioners also contend that they demonstrated that the student's disability negatively interferes with her education achievement in key areas such as social development. Petitioners further assert that the student has poor social adjustment, poor coping skills, and that she is unable to function in community environments. Petitioners also contend that the independent neuropsychologist's evaluation report supports classification of the student because the recommendations therein constituted services that would be required under an individualized education program.

Respondent contends that many of petitioners' allegations were already adjudicated in the previous appeal (Application of the Board of Educ., Appeal No. 04-098). Respondent asserts that any alleged deficits the student may have do not adversely affect her educational performance. Respondent also argues that the student does not qualify for classification as a student with a disability under the definitions of autism or other health impaired.

The central issue in this appeal is whether the student has become eligible for special education services since the determination in petitioners' last appeal.⁵ Tuition reimbursement is among the remedies available when a school district fails to offer a student a free appropriate public education (FAPE) (see Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]).⁶ However, FAPE extends only to students who meet the criteria for identification as children with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 USC §1400 et seq.) and Article 89 of the New York Education Law (Application of a Child Suspected of Having a Disability, Appeal No.03-063; Application of a Child Suspected of Having a Disability, Appeal No.01-107; Application of the Bd. of Educ., Appeal No. 01-058). Unless the student was eligible for classification as a child with a disability, petitioners cannot prevail in their claim for tuition reimbursement.

In order to be classified as a "child with a disability" under federal regulation (34 C.F.R. § 300.8[a];[c],⁷ see 8 NYCRR 200.1[zz]), a student must not only have a specific physical, mental or emotional condition, but such condition must adversely impact upon a student's educational performance to the extent that he or she requires special services and programs

⁵ I note that the evidence before impartial hearing officer 1 and the State Review Officer in Application of a Child Suspected of Having a Disability, Appeal No. 04-098, was entered into evidence in this case. The impartial hearing officer in Hearing 2 reviewed this evidence (IHO Decision, pp. 17-18), giving this evidence the weight that it is due, and I have done the same.

⁶ The term "free appropriate public education" means special education and related services that -
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.
20 U.S.C. § 1401[9].

⁷ The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. In this case, none of the new provisions contained in the amended regulations are applicable because all relevant events occurred prior to the effective date of the new regulations. However, for convenience, citations herein refer to the regulations as amended because the regulations have been reorganized and renumbered.

(Application of the Board of Educ., Appeal No. 06-120; Application of a Child Suspected of Having a Disability, Appeal No. 05-090; Application of a Child Suspected of Having a Disability, Appeal No. 01-107; Application of a Child Suspected of Having a Disability, Appeal No. 94-42; Application of a Child Suspected of Having a Disability, Appeal No. 94-36). Evidence of other health impairment must show that the student has "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 ... attention deficit disorder or attention deficit hyperactivity disorder . . .; and (ii) Adversely affects a child's educational performance" (34 C.F.R. § 300.8[c][9]; see 8 NYCRR 200.1[zz][10]). Evidence of autism must show that the student has "a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a student's educational performance" (34 C.F.R. § 300.8[c][1][i]; see 8 NYCRR 200.1[zz][1]).

In this case, petitioners informed respondent that they would seek tuition reimbursement for Oakwood in August 2004 (see Parent Ex. A), however, they seek a determination of classification for both the 2004-05 and 2005-06 school years. Because petitioners' tuition reimbursement claim for 2004-05 turns on whether the student was eligible for classification, I will first address the issue of the student's eligibility.

I agree with the impartial hearing officer's determination that the child is not eligible for classification as a student with autism or an other health impairment for either the 2004-05 or 2005-06 school year (see 34 C.F.R. § 300.8[c][9]; see 8 NYCRR 200.1[zz][10]). With respect to the classification of other health impairment, the record does not support either a finding that the child exhibited limited strength, vitality or alertness with respect to her educational environment, and it does not support a finding that ADD or ADHD adversely affects her educational performance (see Application of a Child Suspected of Having a Disability, Appeal No.06-015). With respect to the classification of autism, the evidence in the record that such a condition adversely affects the student's educational performance is equally unpersuasive.

The record does not support petitioners' contention that the student's alleged weaknesses in social or emotional development are a disability that affects her educational performance to the extent that she requires special education (see Application of the Board of Educ., Appeal No. 06-120). In the course of petitioners' prior appeal, I reviewed the student's educational performance through November of 2003 (seventh grade) and concluded that the student was not eligible for special education services (Application of the Board of Educ., Appeal No. 04-098). In January or February 2004, petitioners unilaterally placed the student at Oakwood (Parent Ex. AA at p. 1; see also Dist. Exs. 18 at pp. 183-84; 21 at p. 491). There is no evidence in the record that additional evaluations were either requested by petitioners or conducted by respondent for the period between June 2003 and August 2004.

The student's final grades for the 2003-04 school year were above average in all subjects with the exception of biology in which she received a C+ (Parent Ex. G at pp. 1-3). The student's teachers described her as enthusiastic and an active participant in class (Parent Ex. G at pp. 1, 3). The student's learning skills teacher reported that the student struggled with organization toward the end of the spring semester (Parent Ex. G at p. 4). The teacher also noted

that overall the student worked independently and diligently, asking for help when needed and usually accepting suggestions when offered (Parent Ex. G at p. 4). Upon reviewing the student's academic performance at Oakwood, I note that, in general, her grades were consistent with the grades she earned while attending respondent's schools, both before and after her attendance at Oakwood.

Upon review of the November and December 2005 independent evaluation conducted by the neuropsychologist (Dist. Ex. 7 at p. 4-5), I note that the findings in the evaluation report were consistent with the results of the psychoeducational evaluation conducted by the respondent's psychologist in July 2005 (Dist. Ex. 2). Based on the results of standardized testing, respondent's psychologist determined that the student's full scale IQ was above average (Tr. p. 266) and her academic achievement was, in most areas, at the "above average to superior level" (Dist. Ex. 2 at p. 8; see also Tr. pp. 246-49). She noted that when compared with the student's full scale IQ, all of the student's achievement scores were consistent or above expectation (Tr. pp. 246-47). Respondent's psychologist acknowledged that on the BASC, the student's score for social stressors was in a high range and that her score for self esteem was low, but not to the point where it would be "a real significant concern" (Tr. pp. 250-51). She indicated that there was no need for further referrals or interventions such as a psychiatric evaluation (Tr. pp. 250-51). Consistent with the findings by respondent's psychologist, the neuropsychologist found that the student's self concept was, based on self report, somewhat diminished (Dist. Ex. 7 at p. 5). In addition, the neuropsychologist noted that on a parent rating scale the student's score on ADHD scales was "extremely elevated" (Dist. Ex. 7 at p. 5).

The student was described by respondent's psychologist as "personable and easily engaged in conversation" (Dist. Ex. 2 at pp. 3, 8) and by the neuropsychologist as "friendly" and "comfortable and well related" (Dist. Ex. 7 at p. 3). During a classroom observation conducted by another of respondent's psychologists, the student appeared focused and attentive, talkative with classmates, and she was able to re-focus her attention without prompting from the teacher (Parent Ex. Z at p. 1). The student's teacher reported that the student's eye contact was "generally very good," that the student was friendly with other students, seemed to like to work in a group and could do so independently (Tr. pp. 289, 291-92, 296).

I also find that petitioners' argument in favor of classification is further undermined because, since the time the neuropsychologist conducted her evaluation in 2003, her opinion regarding the student's needs has changed as a result of the 2005 evaluation. The neuropsychologist noted that the student's pragmatic language skills were within expectation and "a social perception deficit was less apparent at this time than on prior evaluation, which may reflect increased social maturity" (Dist. Ex. 7 at pp. 5, 8). During Hearing 1, the neuropsychologist opined that the student met the diagnostic criteria for Asperger's and that her difficulties in school were not so much academic but related to her ability to function emotionally and socially in the school program (Dist. Ex. 22 at pp. 689-90, 692). In 2003, the student's responses on a symptoms checklist completed as part of that evaluation reflected a depressed mood and anxiety about friends and school (Dist. Exs. 22 at pp. 703-04; 24 at Ex. 25, p. 7). At that time, the neuropsychologist concluded that the student was mild to moderately depressed and moderately anxious in terms of a mood disturbance (Dist. Ex. 22 at p. 704).

In contrast to her 2003 evaluation report, the neuropsychologist's January 2006 evaluation report indicated that the student's scores on self reported measures of anxiety and depression were in the average range (Dist. Ex. 7 at p. 5). While in her 2003 evaluation of the student the neuropsychologist recommended a psychiatric consultation and opined that the student would benefit from involvement in a small structured social program where she could learn social and teamwork skills (Dist. Ex. 24 at Ex. 25, p. 12), the neuropsychologist's 2006 evaluation report made no recommendation for either of these services (Dist. Ex. 7 at pp. 8, 9).

Petitioners also rely on the expert testimony of a psychologist to prove that the student has limited social skills and severe deficits in her ability to engage in unstructured social activities. I agree with the impartial hearing officer's conclusion that the opinion testimony of petitioners' expert should be accorded little weight. The record indicates that petitioners' expert employs the student's mother and that his contact with the student was limited to observing her while hosting Memorial Day picnics at his residence in 2005 and 2006 (Tr. pp. 200, 209, 211). He did not conduct standardized testing of the student (Tr. p. 200), nor did he treat her (Tr. p. 220). Petitioners' expert testified that his opinion was based upon his review of testing conducted by other professionals and information provided to him by the student's mother (Tr. pp. 200-01, 202, 206, 225, 229-30). However, during much of his testimony, petitioners' expert could not recall the facts upon which he relied to form his opinion (Tr. pp. 202-06, 208-09, 213-14, 217, 222, 226) (see Application of a Child with a Disability, Appeal No. 06-123). While the psychologist offered a general commentary on social and educational expectations for student's diagnosed with Asperger's (Tr. pp. 194-96, 198), a decision to classify a student as a child with a disability must be based on the student's present needs and not on general speculation about his or her future success (Application of a Child Suspected of Having a Disability, Appeal No. 04-113; Application of a Child Suspected of Having a Disability, Appeal No. 94-36; Application of a Child with a Disability, Appeal No. 93-18; Application of a Child Suspected of Having a Handicapping Condition, 24 Ed. Dept. Rep. 3). Accordingly, I find that the opinion proffered by petitioners' expert regarding this student's educational performance offered little probative value.

In summary, petitioners did not present persuasive new evidence of eligibility for the 2004-05 or 2005-06 school years or some other change in circumstance that would require me to conclude that the student should be classified as a student with a disability. I note that the evidence in the record indicates that the student has been offered and has received section 504 accommodations such as preferential seating, extended testing time and special location, and computer access (Tr. pp. 288-89, 292-93, 297-98, 301; Dist. Ex. 5 at pp. 2-3; Parent Ex. BB).⁸ I find petitioners' arguments that the student's educational performance was adversely affected unpersuasive because petitioners did not adduce evidence that showed her educational performance was adversely affected in a way that she required special education (see J.D. v. Pawlett School Dist., 224 F. 3d 60, 68 [2d Cir. 2000]). The evidence in the record documenting recent testing and direct observation of the student in her educational setting persuades me that the student is performing academically in the average to above average range without special education or related services. The evidence also persuades me that in the educational setting, the

⁸ I have considered the evidence regarding the accommodations made for the student under section 504 (29 U.S.C. §§ 701-796[I]) insofar as it is relevant to petitioners' claims under the IDEA; however, I do not review the impartial hearing officer's findings or order directing relief pursuant to section 504 (see Application of a Child Suspected of Having a Disability, Appeal No. 04-087).

student interacts well with her classmates, teachers and evaluators. In light of this determination, I need not address the remainder of petitioners' arguments regarding tuition reimbursement.

I also find that petitioners' claim that the decision of the impartial hearing officer was untimely also fails. Although the record does not reveal why the decision was rendered late, no relief is warranted because I have determined that the student is ineligible for services pursuant to the IDEA, and accordingly, respondent is not required to offer her a FAPE (see Pawlett, 224 F. 3d. at 69).

I have examined petitioners' remaining contentions and find them without merit.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
February 7, 2007**

**PAUL F. KELLY
STATE REVIEW OFFICER**