

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MANATEE COUNTY SCHOOL BOARD,

Plaintiff,

vs.

Case No. 8:04-CV-1539-T-27TGW

T.D.-F., a minor, by and through his parents
J.D., individually and as parent and
next friend of T.D.-F.,

Defendant.

ORDER

BEFORE THE COURT is Plaintiff's Motion for Summary Judgment (Dkt. 48), Defendant's Response to Plaintiff's Motion for Summary Judgment (Dkt. 53), Defendant's Motion for Judgment on the Record (Dkt. 47) and Plaintiff's Response to Defendant's Motion for Judgment on the Record (Dkt. 54).

The Manatee County School Board (the "School Board") initiated this action as an appeal of the Final Order of Administrative Law Judge Daniel Manry (hereafter the "ALJ"), whereby the ALJ concluded, after a four day evidentiary hearing, that T.D.-F ("TDF") is a "child with a disability" within the meaning of § 1401(3)(A) of the Individuals with Disabilities Education Act ("IDEA") and in turn, is entitled to special education and related services.¹ The School Board moves

¹ The IDEA ensures that all children with disabilities have access to "a free appropriate public education" that emphasizes special education and related services designed to meet their unique needs. 20 U.S.C. § 1400(d)(1)(A); *Board of Educ., etc. v. Rowley*, 458 U.S.C 176, 203 (1982). To provide a free appropriate public education within the meaning of the IDEA, a child's school formulates an Individual Educational Plan ("IEP"). See 20 U.S.C. § 1414(d)(1)(A) - (B).

for summary judgment, arguing TDF is not entitled to the protections of the IDEA. TDF moves to affirm the ALJ's ruling.² (Dkts. 47, 48). This Court has undertaken a review of the administrative record with the purpose of making an independent determination of whether TDF is a child with a disability entitled to the protections of the IDEA. *See Walker Co. Sch. District v. Bennet*, 203 F.3d 1293, 1298 (11th Cir. 2000). Upon consideration of the parties' briefs and after hearing oral argument, this Court finds by a preponderance of the evidence that TDF qualifies as a "child with a disability" within the meaning of the IDEA and is entitled to its protections. The decision of the ALJ is affirmed.

Factual Background

TDF is a ten-year old boy who has been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD").³ During the relevant time period, TDF attended the third and fourth grade school years at Stewart Elementary School within the Manatee County School District. (Dkt. 1, ¶ 6). While TDF was attending Stewart Elementary, the School Board determined that TDF was a handicapped person within the meaning of Section 504 of the Rehabilitation Act of 1973 ("Section 504") by reason of his ADHD and that his ADHD substantially limits the major life activity of learning. (Transcript, p. 847).⁴ As a result, a Section 504 Plan was developed for TDF outlining

² While the School Board moved for summary judgment, the usual Rule 56 summary judgment principles do not apply in an IDEA case. *See Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 113-1314 (11th Cir. 2003). "Though summary judgment procedure does not serve to prevent a court from hearing evidence pertaining to questions of material fact . . . it is at bottom, simply a procedural vehicle requiring [the district court] to decide . . . [the IDEA] action on the basis of the administrative record." *Id.* at 1313, n.4 (citations and internal quotations omitted). This Court's decision is "better described" as a "judgment on the record." *Id.*

³ ADHD is a neurologically-based disorder commonly associated with hyperactivity and impairments in attention, adaptive skills, social skills, impulse control and handwriting. (T, pp. 44-46).

⁴ Hereafter, the Transcript will be cited as (T, p. #) and the Record will be cited as (R, p. #).

certain accommodations. (T, pp. 847-852; R, pp. 26-27). According to TDF's mother, the School Board failed to implement the Section 504 Plan. Thereafter, JD requested that school personnel consider TDF for eligibility under the IDEA. (T, p. 831). On January 14, 2004, the School Board determined that TDF was not a child with a disability within the meaning of the IDEA. (R, p. 172).

Pursuant to the IDEA, JD requested a due process hearing. After a four day evidentiary hearing, the ALJ concluded that TDF is a child with a disability within the meaning of the IDEA. Specifically, the ALJ found that TDF's "ADHD is an 'other health impairment' (OHI) within the meaning of 20 U.S.C. Section 1401(3)(A) and 34 C.F.R. Section 300.7(c)(9)." (Dkt. 1, Ex. A., pp. 3, 16). The ALJ found that TDF's "ADHD limits [his] alertness by increasing his alertness to environmental stimuli and decreasing his alertness to his educational environment (limited alertness) and adversely affects [his] educational performance." *Id.* The ALJ concluded that "by reason of his OHI, [TDF] needs special education and related services for his unique needs." (Dkt. 1, Ex. A, pp. 8, 16). In turn, the ALJ held that TDF "is a child with a disability within the meaning of 20 U.S.C. Section 1401(3)(A) and is eligible for an IEP." (Dkt. 1, Ex. A, p. 8). The School Board initiated this appeal, challenging the ALJ's ruling.

Applicable Standard

Pursuant to the IDEA, a federal court reviewing an administrative decision "(i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as it deems proper." 20 U.S.C. § 1415(i)(2)(B).⁵ "Courts owe some judicial deference to local

⁵ Here, the parties did not offer supplemental evidence and accordingly, the conclusions of the ALJ which are supported by the record may be accepted. *See Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1314 (11th Cir. 2003) ("the district court in reviewing the administrative record . . . may . . .

administrative agency judgements . . . though that's typically limited to matters calling upon educational expertise." *Loren*, 249 F.3d at 1314, n. 5 (citations omitted). "To that end, administrative factfindings are considered to be *prima facie* correct, and if a reviewing court fails to adhere to them, it is obliged to explain why." *Id.*

Discussion

The School Board challenges the ALJ's determination on three grounds: (1) TDF does not meet the two part definition of a "child with a disability"; (2) the ALJ ignored positive progress reports; and (3) the ALJ erred in finding the School Board failed to consider factors other than academic and test scores when evaluating TDF for IDEA eligibility.

The IDEA's Two Part Definition of "Child with a Disability"

To be eligible for services under the IDEA, a child must meet the two-part definition of a "child with a disability" set forth in 20 U.S.C. §1401(3)(A). Pursuant to § 1401(3)(A), "child with a disability" means a child –

(i) with mental retardation, hearing impairments, speech or language impairments, visual impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, *other health impairments*, or specific learning disabilities; and

(ii) who, by reason thereof, needs special education and related services.

20 U.S.C § 1401(3)(A) (emphasis added).

The ALJ found that TDF's ADHD qualifies as an "other health impairment" under part one of the definition. The ALJ found that by reason of TDF's ADHD, he needs special education, as required by part two of the definition. The School Board challenges the ALJ's conclusions with

accept the conclusions of the ALJ . . . that are supported by the record and reject those that are not").

respect to both parts of the definition

TDF's ADHD qualifies as an "other health impairment"

The Code of Federal Regulations expressly includes ADHD as an OHI, provided that it causes "limited . . . alertness, including a heightened alertness to environmental stimuli, that results in a limited alertness with respect to the educational environment" and "it adversely affects a child's educational performance." 34 C.F.R. 300.7(C)(9)

The ALJ concluded that TDF's ADHD limits his "alertness by increasing his alertness to environmental stimuli and decreasing his alertness to his educational environment (limited alertness)", finding that "[TDF's] unique needs include inattention, impulsivity, restlessness, fidgeting, squirming, forgetfulness, anxiety, social and adaptive skill deficits, and inability to understand directions." (Dkt. 1, Ex. A, p. 3).⁶ In addition, the ALJ found that TDF's ADHD adversely affects his educational performance in citizenship and conduct, noting that TDF's "satisfactory" grade in citizenship and conduct did not accurately reflect TDF's actual educational performance, as TDF was routinely disciplined for a variety of behaviors related to his ADHD. *Id.* at. 5-6.

The ALJ's findings regarding the severity of TDF's ADHD and its impact on his educational performance, including citizenship and conduct, are supported by the record. Vickie Stelzer, TDF's

⁶ In support of his conclusion, the ALJ found that TDF's teachers placed him in the 98th and 93rd percentiles for hyperactivity and attention problems in the third grade and in the 88th and 89th percentile in hyperactivity and attention problems in the fourth grade. (Dkt. 1, Ex. A, p. 4). According to the ALJ, TDF's teachers reported that he was "never" well organized, he "almost always" was distracted from class work, bothered other children, tapped his foot or pencil, and "almost always" was overly active. *Id.* The ALJ also found that TDF failed to "pay attention to lectures, had poor handwriting or printing, had trouble in transition from one task to another, made loud noises when playing, sang or hummed to himself, babbled to himself, and rocked for long periods of time." *Id.* at p. 5. The ALJ relied on TDF's teachers' reports, which indicated that they had "significant concerns regarding [TDF's] adaptive behaviors, including his study skills, leadership skills, and adaptability". *Id.*

third grade teacher, testified that TDF was easily distracted from his class work, tapped his pencil frequently, had a short attention span, and fidgeted and squirmed in his chair. (T, pp. 194-95; R, pp. 82-83, 89-90). In teacher questionnaires, Stelzer indicated that she was concerned about TDF's inability to control himself and transition between tasks. (T, pp. 208-209). She also indicated that other teachers reacted negatively to his "constant moving and making of sounds". *Id.* Vanzetta Thomas, TDF's fourth grade teacher, reported that TDF was distracted from class work, bothered other children, tapped his foot or pencil and was overly active "almost always". *Id.* at 263; R, pp. 85, 141. Thomas also reported her concerns regarding TDF's inability to stay on task and his low level of concentration. *Id.*

Dr. Tashawna Duncan, a Florida Certified School Psychologist, Florida Certified Special Education Teacher and a Nationally Certified School Psychologist,⁷ testified that she performed a "neuro-psych" evaluation on TDF involving an assessment of his "behavior, acting out behaviors, . . . internalizing behavior problems . . . adaptive disorders and skills, school performance, attention, memory, visual spatial processing, language . . . [and] personality." (T, p. 42, 47-48). Dr. Duncan interviewed TDF and his mother and reviewed TDF's school records, including his academic test scores, report cards, school agendas, teacher assessments and medical records. (T, pp. 48-49).

Dr. Duncan testified that TDF suffers from "Hyper-attentive behavior", meaning "he'll focus in on something but over-focuses on things that are irrelevant", and suffers from impulsive behaviors and self-control behaviors, which affect his alertness to his educational environment. (T, pp. 55-58). Additionally, Dr. Briggs Carroll, TDF's pediatrician, testified that the severity of TDF's attention

⁷ Dr. Duncan was accepted by the ALJ as an expert in the fields of psychology, neuropsychology, school psychology, behavior and special education without objection by the School Board. (T, p. 43).

deficit condition is “significant”. (T, p. 92). Dr. Carroll determined the severity of TDF’s condition after examining TDF’s records, teacher reports and reports from TDF’s mother. Dr. Carroll testified that TDF’s ADHD is significant despite his excellent grades. In this regard, Dr. Carroll testified that “[m]ost ADHD students are very gifted people.” *Id.*

The evidence also supports a finding that TDF’s ADHD affects his educational performance. Educational performance includes academic and non-academic domains. *See Yankton Sch. Dist. v. Schramm*, 93 F.3d 1369, 1371-1375 (8th Cir. 1996) (orthopedically impaired child was a child with a disability even though she received “grades in the A range”); *Corchoado v. Board of Ed.*, 86 F.Supp.2d 168, 176 (W.D.N.Y. 2000) (“satisfactory” academic achievement “should not and cannot be the litmus test for eligibility under the IDEA”).⁸

In Manatee County, a student’s performance is evaluated on academic as well as non-academic criteria. TDF received As and Bs in his academic courses and scored high on the Florida Comprehensive Assessment Test (“FCAT”).⁹ Nonetheless, the record evidence demonstrates that TDF’s ADHD impacted his ability to perform well in non-academic areas such as citizenship and conduct, an area the School Board does not dispute plays an important role in TDF’s educational

⁸ The 1990 policy letter issued by the Office of Special Education and Rehabilitation Services is also persuasive in this regard. Within the letter, the director of the Office of Special Education Programs opines:

[A] child’s educational performance must be determined on an individualized basis and should include non-academic as well as academic areas.

Since the educational needs of a child with a disabling condition include non-academic as well as academic areas, the term “educational performance” as used in the EHA-B means more than academic standards as determined by standardized measures.” (Dkt. 47, Ex. 2).

⁹ Notably, because the School Board chose to discipline TDF for missing and forgetting homework assignments, rather than marking his grades down, TDF’s grades may not reflect the effect his condition had on his overall academic performance.

experience, consistent with the School Board's Mission Statement.¹⁰

The School Board's educational mission is to provide "the knowledge, skills and resourcefulness required to become successful citizens of character". (T, p. 1097). In that regard, students, including TDF, are graded in citizenship and conduct. TDF received a "satisfactory" grade in citizenship and conduct. However, the record reflects that TDF's performance was actually less than satisfactory.

For example, TDF was repetitively disciplined for disruptive behaviors related to his ADHD, including his organizational, memory and self control limitations. Vanzetta Thomas, TDF's fourth grade teacher, testified that on several occasions, TDF was sent to the workroom during recess for missing assignments. (Dkt. 39, p. 254). While she could not remember exactly how many times, Thomas testified that TDF missed "Fun Friday" for behavior related to his ADHD condition. *Id.* at 257. TDF testified that he missed recess as punishment for talking, running in the halls, tapping his pencil, standing up to do work, forgetting his homework,¹¹ and squirming in his chair. (T, pp. 239-241). TDF confirmed in his testimony that he missed recess "a lot". *Id.* at 240. TDF also testified that his spelling answers were marked wrong because of his sloppy handwriting. *Id.* at 247. Dr. Duncan concluded that TDF's ADHD caused him "significant difficulties at school", as his "teacher ratings indicated elevated levels of impulsivity, attention problems, [and] adaptability problems . . .

¹⁰ During the due process hearing, the School Board's Mission Statement was read into the record:

The mission of the Manatee County School District is to educate, train and inspire each student with diversion in learning experiences in a safe and disciplined environment in order to provide the knowledge, skills and resourcefulness required to become successful citizens of charcter in the 21st century.
(T, p. 1097).

¹¹ TDF testified that in fourth grade, Mrs. Thomas required him to go to the workroom for forgetting his agenda. (T, p. 243).

in addition to that [teachers] reported some social skills problem, leadership problems and study skills problems.” (T, pp. 49-51). This evidence supports the ALJ’s finding that TDF suffered from ADHD and that his condition limits his alertness with respect to his educational environment and adversely affects his educational performance.

As a result of TDF’s ADHD, TDF “needs special education”

“Special education” is defined as

specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including --

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

20 U.S.C. 1401(29).

“Specially designed instruction” is defined in the Code of Federal Regulations as

adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction --

(i) To address the unique needs of the child that result from the child’s disability, and

(ii) To ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 C.F.R. 300.26(b)(3).

The ALJ concluded that TDF’s fourth grade teacher, Leslie Jones, provided TDF with specially designed instruction on a *de facto* basis. (Dkt. 1, Ex. A, p. 7). According to the ALJ, that “special education included an individualized positive behavior support program, modified presentation of directions, handwriting accommodations, accommodations for deficits in organizational skills,

preferential seating, and other modifications to the educational environment.” *Id.* The ALJ found that the specially designed instruction was “special education” within the meaning of 20 U.S.C. § 1401(3)(A) and 34 C.F.R, § 300.26 and that a comparison of TDF’s performance before and after he received that special education from Mrs. Jones demonstrates that TDF “has an OHI that adversely affects his educational performance and, by reason of his OHI, [TDF] needs special education and related services for his unique needs.” (Dkt. 1, Ex. A, p. 20).

TDF’s mother testified that at Jones’s request, she created a “behavior management plan” for TDF, which Jones called “IEPs”, and that Jones “followed every one of them”. (T, p. 403).¹² While Jones’s testimony regarding her specific teaching methodologies in this regard is limited, at a minimum, her testimony establishes that her teaching techniques differed from TDF’s other teachers and that TDF benefitted from her accommodations.¹³ At the due process hearing, Jones was not specifically asked whether she was implementing special education, specially designed instruction or a behavior management plan. However, Jones testified that she redirected TDF’s poor behavior instead of writing his name down and denying him recess time. (T, p. 295). She used a system of positive reinforcement and provided students with written instructions in addition to giving

¹² JD testified that Jones asked her to “brainstorm on a behavior management plan and give her what [JD] felt he should have for IEP needs.” (T, p. 403). JD has a degree in elementary education and psychology and has twenty years experience in teaching deaf students. (T, p. 365). While Jones is not a special education teacher, she testified that she has experience teaching children with special needs and disabilities, including children with attention deficit disorders. (T, p. 280). Jones testified that her sixteen year old son has “ADD without hyperactivity”. (T, p. 284).

¹³ TDF testified that Mrs. Stelzer and Mrs. Thomas withheld recess or required him to go to the workroom during recess for “talking or running”, “tapping [his] pencil, standing up to do work [,] . . . squirming in [his] chair” and missing assignments or forgetting his agenda book. (T, pp. 239-247). In contrast, TDF testified that Mrs. Jones did not withhold recess or send him to the workroom because she made exceptions when he violated the rules. *Id.*

instructions orally. *Id.* With respect to TDF's handwriting difficulties, she permitted TDF to write in cursive or print, considering handwriting a "non-issue". (T, p. 822).

Jones reported that while in her class, TDF appeared less anxious and was attentive. According to JD, TDF benefitted significantly from Jones's implementation of the behavior management plan. *Id.* at 403-404. JD's testimony supports the ALJ's finding that Jones implemented a plan designed to address TDF's unique needs. The ALJ found JD's testimony credible in this regard and this Court finds no reason to question the ALJ's credibility determinations. *See Shore Regional High School Board of Education v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004) ("a District Court must accept the state agency's credibility determinations 'unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion').¹⁴

Moreover, the record evidence, particularly the testimony concerning the effects of TDF's ADHD, refutes the School Board's contention that "[b]ecause [TDF] is very successful in the mainstream regular education environment, he does not need the content, methodology, or delivery of his instruction modified or altered in order to access his education." (Dkt. 48, p. 12). Admittedly, in light of TDF's excellent academic performance, this case does not present the most compelling case of a child in need of special education. The evidence demonstrates, however, that notwithstanding excellent grades, the very nature of TDF's OHI impacts his ability to understand instructions, be attentive, and control and conduct himself appropriately in the classroom. His condition, therefore, affects his educational performance and interferes with his learning process, including educational

¹⁴ To the extent the School Board challenges the implicit credibility findings of the ALJ, this Court finds no reason to reject the ALJ's findings. The ALJ was in a unique position to observe the demeanor of the witnesses during the course of the due process hearing, to make appropriate credibility determinations in evaluating all of the evidence, and to resolve conflicts in the evidence.

performance in matters of citizenship and conduct. This is evidenced by numerous reprimands and discipline for ADHD behavior, reprimands and discipline which may not have impacted his academic scores but did impact his socialization and adaptive behavior. (T, pp. 239-241, 254, 257, 407-408).

The record demonstrates that without modified instruction designed to meet TDF's unique needs, as implemented by Ms. Jones, his OHI prevents him from meeting the educational standards within the jurisdiction despite his academic grades. *See Yankton*, 93 F.3d at 1375.

The School Board suggests that TDF can be adequately protected under Section 504 of the Rehabilitation Act. Whether the School Board could have met TDF's needs via proper implementation of a Section 504 plan is not the issue before this Court. Rather, the issue is whether the record supports a finding that TDF has an "other health impairment" and by reason thereof, "needs special education."

Without question, a diagnosis of an attention deficit disorder does not necessarily equate to a need for special education. Not every child with ADHD will meet the requirements of 20 U.S.C.A. § 1401(3)(A). However, this record supports a finding that TDF's ADHD is significant and his condition affects his ability to meet the School Board's educational standards, including citizenship and conduct. The record demonstrates that TDF benefitted from modifications designed to address his unique needs and that without specialized instruction, his ability to learn and develop in the area of citizenship and conduct is negatively impacted. Accordingly, the record supports a finding that TDF needs special education.

Reports of Positive Progress

The School Board, notably without citing to the record or transcript, contends the ALJ "ignored" the testimony and reports of TDF's teachers that TDF improved in areas of citizenship and

conduct. (Dkt. 48, pp. 18-19). There is some inconsistency within the various teachers' testimony regarding the severity of TDF's behavioral problems, how often he was disciplined, and to what degree his behavior improved. However, the ALJ, having heard and evaluated the witnesses during the four day hearing, was in the best position to resolve any inconsistencies and to make appropriate credibility determinations. *See Shore Regional*, 381 F.3d at 199-200 (district court must give requisite deference to ALJ's evaluation of witnesses' credibility). The School Board fails to point to any non-testimonial evidence that undermines the evidence relied on by the ALJ. Significantly, Dr. Duncan testified that ADHD symptoms can "wax and wane" and "may become worse in stressful situations or in certain environments." (T, p. 44). Therefore, contrary to the School Board's argument, reports of sporadic improvement do not undermine the ALJ's findings regarding the severity of TDF's ADHD or his need for special education.


The ALJ's finding that the School Board failed to consider factors other than academics is not pivotal

The School Board may have considered matters other than academic performance when it made its *final* eligibility determination on January 14, 2004. However, this is not pivotal to the appeal. The ALJ determined that the School Board was wrong when it decided that TDF was not a child with a disability within the meaning of the IDEA. The record evidence supports that finding and the ALJ's conclusion that TDF qualifies under the IDEA. Regardless of the factors considered by the School Board when it made its final determination, it wrongly denied TDF eligibility under the IDEA. Accordingly, it is

ORDERED AND ADJUDGED that Defendant's Motion for Judgment on the Record (Dkt. 47) is GRANTED. Plaintiff's Motion for Summary Judgment (Dkt. 48) is DENIED. After receiving

the records of the administrative proceeding and reviewing the evidence presented by the parties, this Court independently finds by a preponderance of the evidence that TDF qualifies as a “child with a disability” within the meaning of the IDEA. The decision of Administrative Law Judge Daniel Manry is AFFIRMED. All other pending motions are DENIED as moot. The clerk is directed to close this case.

DONE AND ORDERED in chambers this 9th day of September, 2005.


JAMES D. WHITTEMORE
United States District Judge

Copies to:
Counsel of Record