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OFFICE OF ADMINISTRATIVE HEARINGS
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STATE OF NORTH CAROLINA

COUNTY OF GUILFORD

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
18 EDC 05536

[redacted] by parent or guardian [redacted] Petitioner, v. Cornerstone Charter Academy, Inc. Respondent.	**FINAL DECISION**

This matter was heard before the undersigned Administrative Law Judge, J. Randall May, on March 20-21, 2019, in High Point, North Carolina.

APPEARANCES

For Petitioner: Aaron Tierney
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Waxhaw, North Carolina 28173

For Respondent: James G. Middlebrooks
Middlebrooks Law PLLC
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ADMITTED EXHIBITS

Petitioner's Exhibits:

15 [redacted] End of Grade Testing Report for 2016-17 (Fifth Grade) in English Language Arts/Reading; Mathematics; and Science

27 2018-19 [redacted] Academy Academic Profile for [redacted]

62 2019-02-24 Neuropsychological Evaluation of [redacted]

63 Curriculum Vitae for [redacted] Ph.D.

Respondent's Exhibits: None.

WITNESSES

Petitioner's Witnesses: [redacted] Ph.D.

Respondent's Witnesses: None.

ISSUES RAISED IN PETITION

The petition in this case contained five claims:

1. Cornerstone improperly refused to evaluate [redacted] for eligibility as a student with disabilities under the Individuals with Disabilities Education Act ("IDEA").

2. The IEP team failed to consider whether [redacted] qualified for special education based on a traumatic brain injury.

3. Cornerstone failed to create an IEP for [redacted]

4. Cornerstone did not follow [redacted] 504 plan.

5. Cornerstone denied the parent's right to fully participate in an April 2018 IEP team meeting.

On January 15, 2019, the undersigned informed the parties that the North Carolina Office of Administrative Hearings does not have jurisdiction over matters involving Section 504 of the Rehabilitation Act of 1973; and thus, could not exercise jurisdiction over Petitioner's Section 504 claim. *See* N.C. Gen. Stat. § 150B-1(e)(5).

At the conclusion of the Petitioner's evidence, Respondent made a motion for judgment in its favor pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure. As discussed below, the undersigned finds and concludes that, upon the fact and the law, Petitioner failed to show any right to relief; and thus, Respondent is entitled to judgment in its favor.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing and the entire record in this proceeding, the undersigned makes the following findings of fact. In making the findings of fact, the undersigned has weighed all the evidence, or the lack thereof; and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to, the demeanor of the witness; any interests, bias, or prejudice the witness may have; the opportunity of the witness to see, hear, know

or remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether the testimony is consistent with all other believable evidence in the case. From the sworn testimony of witnesses and the evidence, the undersigned makes the following:

FINDINGS OF FACT

1. [redacted] started Cornerstone Charter Academy as a [redacted] grader in the [redacted] school year. (Tr. at 186) He attended Cornerstone through the [redacted] grade during the [redacted] school year. [redacted] mother, decided in the summer of 2018 to withdraw him from Cornerstone and to enroll him in [redacted] Academy, a private school. (Tr. at 210)

2. He enrolled at [redacted] Academy on [redacted] and at the time of the hearing, he was a seventh grader there. (Tr. at 234)

3. When he enrolled at Cornerstone, [redacted] did not have an IEP and was not identified as a student with disabilities under IDEA.

4. The evidence presented by Petitioner was not clear how long [redacted] had been provided a plan of accommodations and modifications under Section 504 of the Rehabilitation Act of 1973, but it was undisputed that he had a 504 plan during the 2017-18 school year. That plan was reviewed by a Section 504 team in at least November 2017 and early June 2018. (Tr. at 215-216; Tr. at 219-220)

5. [redacted] Ph.D., was accepted by the undersigned as an expert in the field of neuropsychology. (Tr. at 38)

6. Dr. [redacted] had never testified in a special education contested case hearing before this matter. (Tr. at 32)

7. [redacted] lawyers referred her to Dr. [redacted] in February 2019 to have [redacted] evaluated so those results could be used in this hearing. (Tr. at 67)

8. Based upon that referral, Dr. [redacted] reviewed certain records and conducted a neuropsychological evaluation of [redacted] in February 2019.

9. Dr. [redacted] asked both [redacted] and her attorneys for past educational records, but neither provided educational records from Cornerstone Charter where [redacted] had attended since 2012. (Tr. at 92)

10. At the time of her evaluation, Dr. [redacted] was made aware of this proceeding and understood that her evaluation report was to be used by [redacted] in this case.

11. Dr. [redacted] report dated February 24, 2019, was accepted into evidence as Petitioner's Exhibit No. 62.

12. As part of her evaluation, Dr. [redacted] reviewed records provided to her by [redacted] and [redacted] lawyers. These records included previous evaluations conducted when [redacted] was in pre-school; first-grade; third grade; and fifth grade. Her report states that [redacted] school-age evaluations all showed academic achievement and cognitive ability scores in the average to above-average range. (Pet. Ex. 62 at 3)

13. According to Dr. [redacted] [redacted] "was actually doing quite well in the 2012 and 2015 evaluations that were focused on psychoeducational testing. His scores were, as has been stated, pretty strong, and he was making academic progress." (Tr. at 45)

14. Referring to her February 2019 testing of [redacted] Dr. [redacted] stated that [redacted] "has always performed fairly well intellectually, within normal limits, and sometimes above average or high average at least. He's still high averaged language-wise on my testing in terms of his vocabulary and his abstract verbal reasoning." (Tr. at 48)

15. [redacted] does not present as a student with learning disabilities. (Tr. at 49)

16. Dr. [redacted] testified that, in her work with [redacted] she saw no residual problems for any concussions that [redacted] allegedly had suffered. (Tr. at 50)

17. Considering [redacted] testing results from hers and previous evaluations, Dr. [redacted] stated that they did not present a profile of a child who had suffered concussions. (Tr. at 50)

18. Dr. [redacted] testified that [redacted] is "doing remarkably well from an academic standpoint." (Tr. at 58)

19. As part of her evaluation process, Dr. [redacted] asked [redacted] to provide rating scales for behavioral issues and autism concerns to a teacher at [redacted] Academy who had substantial experience with [redacted].

21. On the behavior rating scale (BASC-3), Ms. [redacted] reported "only mild hyperactivity and somatic concern, with elevations just into the 'at risk' range. Report of anxiety, depression, and attentional problems falls below threshold. The teacher also reports no conduct issues. She notes adequate adaptability, social skills, leadership skills, and functional communication skills." (Pet. Ex. No. 62 at 5; Tr. at 86-87)

22. Dr. [redacted] testified that, in her opinion, this meant that Ms. [redacted] saw no sign that [redacted] was having significant anxiety, depression, or attentional problems in the school setting. (Tr. at 86)

23. On the autism rating scale, Ms. [redacted] scores were in the normal range, meaning that she saw no likelihood that [redacted] had autism. As Dr. [redacted] interpreted Ms. [redacted] autism rating scales, [redacted] was just like other typically developing seventh graders. (Tr. at 88)

24. Ms. [redacted] testified that, in her professional experience, rating scales were usually delivered to more than one of the student's teachers. (Tr. at 151) Dr. [redacted] did not do that in this case.

Instead, after noting the significant disparity in rating scores between Ms. [redacted] report and [redacted], Dr. [redacted] allowed [redacted] to have a family friend fill out a third report. (Tr. at 85-90)

25. Dr. [redacted] administered the Wechsler Intelligence Scale for Children — Fifth Edition ("WISC-V). On this test, [redacted] February 2019 Full Scale IQ score was 100, which is in the average range. (Pet. Ex. No. 62 at 6) These results were consistent with [redacted] IQ testing from 2012, 2015, and 2017.

26. Dr. [redacted] administered the Woodcock-Johnson IV achievement test to [redacted] in February 2019. (Pet. Ex. No. 62 at 7-8)

27. Based on her evaluation, Dr. [redacted] concluded that [redacted] "[o]verall achievement falls in the high average range, commensurate with ability. Thus, there are no scores to suggest learning disability, and prior testing did not reveal any clear compromise in academic functioning either." (Petitioner Ex. No. 62 at 8)

28. By the phrase "prior testing," Dr. [redacted] explained that she was referring to evaluations conducted while [redacted] was a student at Cornerstone. (Tr. at 102)

29. Dr. [redacted] opined that [redacted] academic testing and profile did not suggest a student in academic trouble. (Tr. at. 105)

30. In the concluding paragraphs of her evaluation, Dr. [redacted] states: "[[redacted] has been receiving a wide array of accommodations, and I concur with those recommendations and that they should be ongoing as needed in this new educational environment," by which she meant his new school, [redacted] Academy. Pet. Ex. No. 62 at 14)

31. Dr. [redacted] testified that the "accommodations" and "recommendations" to which her report referred were contained in a communication dated October 9, 2015, from a [redacted] M.D. (Tr. at 105) Dr. [redacted] produced a copy of that communication from her file, but it was not entered into evidence.

32. Dr. [redacted] conceded that none of Dr. [redacted] recommended "accommodations" and "recommendations" endorsed by her required direct special education services from an Exceptional Children's teacher. Instead, each of these accommodations and modifications, according to Dr. [redacted] could be, and had been, implemented by regular education teachers. (Tr. at 108-113)

33. [redacted] a teacher at [redacted] Academy, taught [redacted] math and science during the [redacted] school year. (Tr. at 127)

34. She did not know how [redacted] performed at Cornerstone. (Tr. at 129) She admitted that she could not offer testimony relating to a general education curriculum because she had not taught in that setting. (Tr. at 131)

35. Both Cornerstone and [redacted] Academy utilize a testing program known as MAP that measures academic progress over time in various subjects. Ms. [redacted] testified that she is familiar with and uses the MAP testing program at [redacted] (Tr. at 141)

36. When [redacted] entered [redacted] in the fall of 2017, his math scores, as measured by the MAP testing program, were on par with typically developing seventh graders. (Tr. at 145) His math score at that time was "dead on average" for seventh graders. (Tr. at 146)

37. His reading score for the fall of 2017 when he entered [redacted] was at the 73rd percentile, which was significantly above average for seventh graders. (Tr. at 146-147)

38. His language score for the fall of 2017 when he entered [redacted] was high average or above average. (Tr. at 147)

39. Ms. [redacted] admitted that [redacted] testing done at [redacted] in the first month of the academic year showed that he came from Cornerstone and entered [redacted] with average to above average test scores in these key academic areas. (Tr. 147-148)

40. [redacted] the dean of students at [redacted] Academy, testified that, as far as she knew, no one at [redacted] had either observed [redacted] while he attended Cornerstone or had spoken to Cornerstone staff about [redacted] performance there. (Tr. at 167)

41. Ms. [redacted] testified that page 3 of Petitioner's Ex. No. 27, which is titled "Personalized Academic Programming" applies to all [redacted] students and was not individualized in any way for [redacted] (Pet. Ex. No. 27; Tr. at 169-170)

42. Ms. [redacted] testified that, despite being licensed in North Carolina as an exceptional children's teacher, she was not currently familiar with special education requirements that apply to public schools. (Tr. at 176) Similarly, having never been involved in the creation of a Section 504 plan, she was not familiar with the difference between Section 504 plans and IEPs. (Tr. at 177)

43. Ms. [redacted] admitted that she was not familiar with the distinction between accommodations/modifications and direct specialized instruction. (Tr. at 178)

44. [redacted] reported that, at [redacted] last Cornerstone IEP team meeting in May 2018, the team discussed his grades and academic performance, which established that [redacted] was performing in the academic range and showed no signs of needing direct specialized instruction. [redacted] disagreed with that conclusion. (Tr. at 200)

45. During the 2017-18 school year at Cornerstone, [redacted] had [redacted] for homeroom and for history. (Tr. at 252) [redacted] was in her classroom for about an hour per school day. (Tr. at 253)

46. [redacted] was well-liked, very bright, and easy to talk to. He liked to add to Ms. [redacted] classroom by providing information to enhance the material being discussed. (Tr. at 253).

47. [redacted] could and did advocate for himself. From time to time in Ms. [redacted] class, he asked for extra time because handwriting was more difficult for him. Tr. at 259. According to Ms. [redacted] handwriting "slowed him down just a little bit, but he had great grades." Tr. at 260.

48. In May 2018, Ms. [redacted] participated in the Cornerstone IEP team meeting, which considered [redacted] request that [redacted] be evaluated for special education services. (Tr. at 259)

49. [redacted] according to Ms. [redacted] had a Section 504 plan that was working; and thus, she did not believe that he showed signs of needing to be evaluated for special education services. (Tr. at 262-263)

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction of special education contested cases pursuant to N.C. Gen. Stat. Chs. 115C and 150B, as well as the Individuals with Disabilities Act (IDEA 1997); the Individuals with Disabilities Improvement Act; 20 U.S.C. § 1400, *et seq.*; and applicable implementing regulations, 34 C.F.R. Part 300.

2. The Office of Administrative Hearings does not, however, have jurisdiction over claims brought pursuant to Section 504 of the Rehabilitation Act of 1973. Accordingly, this tribunal does not have jurisdiction over the fourth claim of the Petition (alleging that Respondent failed to follow [redacted] Section 504 plan). *See* N.C. Gen. Stat. § 150B-1(e)(5).

3. The Petition in this case was filed on September 10, 2018. N.C. Gen. Stat. § 115C-109.6(b) contains a one-year statute of limitations restricting the scope of a contested case hearing to "alleged violation[s] that occurred not more than one year before the party knew or reasonably should have known about the alleged action[s] that forms the basis of the petition." Petitioner offered no evidence tending to show that any potential exception to the one-year statute of limitations was applicable. Accordingly, the relevant time period for this case is from mid-September 2017 through the remainder of the 2017-18 academic year.

4. As mentioned above, Respondent moved for entry of judgment pursuant to North Carolina Rule of Civil Procedure 41(b). Rule 41(b) states in part: "After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief."

5. Under Rule 41, the Office of Administrative Hearings may render judgment against Petitioner, not only if she failed to make out her case, but also based on the facts as found by the trier of fact. *See Goodrich v. Rice*, 75 N.C. App. 530, 331 S.E.2d 195 (1985).

6. Unlike a motion for directed verdict in a jury trial, the hearing officer is not to consider the evidence in the light most favorable to Petitioner. *Hammonds v. Lumber River Elec. Membership Corp.*, 178 N.C. App. 1, 631 S.E.2d 1(2006). Instead, the hearing officer is empowered to make his own findings of fact and then to apply the law to those findings.

7. Based upon the evidence presented in this case, Petitioner has not met her burden of proof by making out a *prima facie* case which proves that Respondent: (a) improperly refused to evaluate [redacted] for eligibility under IDEA; (b) improperly refused to evaluate him for IDEA eligibility under the category of traumatic brain injury; (c) improperly failed to develop an IEP for him; or (d) improperly denied Petitioner the right to meaningfully participate in an April 2018 IEP team meeting.

8. [redacted] went through the full special education evaluation process at Cornerstone twice: (a) in [redacted] first-grade year (201[redacted]); and (b) in his third-grade year (201[redacted]). Both instances resulted in the IEP team concluding that [redacted] was not eligible under IDEA for special education services. This evidence showed that [redacted] was familiar with IDEA procedures for referring and evaluating students suspected to be eligible for special education services. [redacted] did not challenge the results of those IEP team meetings.

9. The results of the February 2019 testing, secured at the behest of [redacted] lawyers for purposes of this hearing, were consistent with [redacted] earlier evaluations: his results have been in the average or above average range both on achievement and academic ability consistently throughout his elementary school career.

10. During his first month at [redacted] Academy, [redacted] testing scores showed that he was at or above average in the major core academic subjects. He did not come to [redacted] with academic deficits and was clearly in the average range for math and above average in reading.

11. Petitioner produced no evidence that [redacted] academic performance during the 2017-18 school year would have caused a reasonable educator to suspect the need for special education evaluation. He had good grades at Cornerstone, and the educators there had put a Section 504 plan in place for him that was working appropriately.

12. To qualify as a "student with a disability" under the IDEA, the student must: (a) meet the definition of one or more of the categories of disabilities in the statute; **and** (b) need special education and related services as a result of his disability or disabilities. 30 C.F.R. § 300.8(a)(1).

13. If an IEP team has reasonable reason to suspect that a student is a "student with a disability" as defined by IDEA, then the team should follow appropriate procedures to determine whether that child should be evaluated for special education eligibility. Petitioner offered no evidence tending to suggest that [redacted] should be evaluated for special education services.

14. In this case, the evidence showed that, in approximately April 2018, [redacted] asked Cornerstone to evaluate her son. Cornerstone convened an IEP team in May 2018 to consider that request. [redacted] as well as [redacted] father, participated in that meeting. The team decided not to evaluate [redacted] for special education services because he was making progress in the general education curriculum commensurate with that of his non-disabled peers and with the support of a Section 504 plan. Evidence that a student (including a student with evidence of some impairment) has made non-trivial educational progress after receiving general education interventions (such as

accommodations and modifications under a Section 504 plan) is a strong indicator that he does not require IDEA services. *See M.P. v. Arkansas Pass Indep. Sch. Dist.*, 67 IDELR 58 (S.D. Tex. 2016). [redacted] testing results showed him consistently at, or above average, in his core subjects; and Petitioner did not offer any evidence of academic struggles during the 2017-18 academic year.

15. There was no evidence of procedural defaults in Cornerstone's May 2018 IEP team meeting.

16. Petitioner had the burden to prove that, in May 2018, a reasonable educator would have suspected that [redacted] was a "student with disability" and thus should be evaluated for IDEA eligibility. Because she failed to produce such evidence, her first claim fails; and Cornerstone is entitled to judgment on that claim.

17. Petitioner's second and third claims — that Cornerstone improperly refused to develop an IEP for [redacted] under the traumatic-brain-injury category; and that Cornerstone improperly denied him an IEP — are effectively the same claim. Both claims fail because [redacted] offered no evidence that [redacted] satisfied the definitional requirements of any IDEA disability category. Additionally, she produced no evidence tending to show that, as a result of a suspected disability, he needed direct special education.

18. As to Petitioner's second claim — that Respondent failed to consider whether [redacted] qualified for special education services under the category of traumatic brain injury, Petitioner produced no evidence relating to this claim. Her expert, Dr. [redacted] testified that she had done a lot of work in the area of traumatic brain injury, but neither in her testimony nor in her testing report (Pet. Ex. No. 62) did she mention that term in connection with [redacted] There was no evidence presented tending to show that [redacted] had suffered a diagnosed traumatic brain injury and no evidence to show any impact of such an alleged injury.

19. Although there was evidence that [redacted] had suffered what Petitioner herself characterized as concussions, there was no evidence: (a) that the incidents were indeed medically diagnosed as concussions; (b) establishing when those alleged concussions occurred; or (c) that they impacted [redacted] academic ability during the 2017-18 school year. In fact, [redacted] expert testified that, in February 2019, she saw none of the impacts that she might have expected to see of a concussion victim.

20. Additionally, there was no evidence relating to [redacted] grades, math or otherwise, falling during the 2017-18 school year after alleged "multiple concussions."

21. Petitioner produced no evidence that, during the 2017-18 school year, a reasonable educator should have suspected that [redacted] might have suffered a traumatic brain injury leading to the need for specialized instruction.

22. [redacted] produced no evidence tending to show that [redacted] needed direct special education or related services as a result of a statutorily recognized disability. Dr. [redacted] admitted that the accommodations and modifications she endorsed did not include the provision of direct special education services. Moreover, the evidence presented by the [redacted] Academy staff who

testified was about accommodations (that were given to *all* [redacted] students), and did not include direct special education from a licensed special educator that had been individualized for [redacted].

23. Petitioner offered no documentary evidence tending to show that Cornerstone's May 2018 decision not to evaluate [redacted] for special education services was contrary to applicable law. She had the burden of proof to establish that Cornerstone's actions were taken without proper procedure, or that they were contrary to governing legal standards. She simply did not offer such proof. A hearing officer cannot guess at these matters, and without substantive proof, the party bearing the burden of proof loses.

24. As to the last claim, that Respondent denied Petitioner's right to participate in an April 2018 IEP team meeting, Petitioner produced no evidence relating to this claim. She presented no evidence that there was an IEP team meeting in April 2018, much less that she was denied the ability to participate in it. Accordingly, this claim is deemed abandoned. Alternatively, the burden of proof as to this claim was not met, and Petitioner failed to make a *prima facie* case of procedural violations in this regard.

BASED UPON the foregoing Findings of Fact and Conclusions of Law, as to all issues, the undersigned makes the following:

FINAL DECISION

Respondent's motion for entry of judgment, made pursuant to N.C. R. Civ. P. 41(b) after the completion of Petitioner's presentation of her evidence, is hereby GRANTED.

NOTICE OF APPEAL RIGHTS

In accordance with the Individuals with Disabilities Education Act and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights regarding this dismissal.

Under North Carolina's Education of Children with Disabilities laws (N.C.G.S. §§ 115C-106.1 *et seq.*) and particularly N.C.G.S. § 115C-109.9, "any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 or G.S. 115C-109.8 may **appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board** under G.S. 115C-107.2(b)(9) to receive notices. The State Board, through the Exceptional Children Division, shall appoint a Review Officer from a pool of review officers approved by the State Board of Education. The Review Officer shall conduct an impartial review of the findings and decision appealed under this section."

Inquiries regarding the State Board's designee, further notices and/or additional time lines should be directed to the Exceptional Children Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina, prior to the required close of the appeal filing period.

IT IS SO ORDERED.

This the 23rd day of May, 2019.

J Randall May
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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This the 23rd day of May, 2019.

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