

DOCKET NO. 107-SE-0110

STUDENT BNF PARENTS § **BEFORE A SPECIAL EDUCATION**
 §
VS. § **HEARING OFFICER FOR**
 §
MCKINNEY ISD § **THE STATE OF TEXAS**

DECISION OF HEARING OFFICER

Student (hereinafter “the student”) through student’s next friends Parents (Petitioner), requested a due process hearing pursuant to the Individuals with Disabilities Education Improvement Act (IDEIA), 20 U.S.C. § 1400 *et. seq.*. The Respondent is the McKinney Independent School District.

PROCEDURAL HISTORY

Petitioner alleged that the District denied the student a FAPE during the time student was enrolled in MISD, from December 2003 until student withdrew from the District on ***, 2007. Additionally, Petitioner alleged that Respondent has not fulfilled its Child Find obligations from ***, 2007 to the date of filing. Petitioner further alleged that MISD has failed to include the student in its proportionate share funding calculation, thereby denying the student services. Finally, Petitioner alleged violations of Section 504 of the Rehabilitation Act of 1973 and violations of Tex. Educ. Code § 26.006 pertaining to statewide reading assessment requirements.

A statute of limitations hearing was held on March 11, 2010. Following the hearing, I dismissed the parent’s proportionate share funding, Section 504, and Texas Education Code claims for want of jurisdiction. Additionally, all claims based on acts or omissions occurring prior to January 8, 2009 were dismissed based on the application of the one year statute of limitations. The sole remaining issue for hearing was whether the District violated its Child Find obligations with regard to the child from January 8, 2009 through the date of filing, January 8, 2010.

The parties appeared for the due process hearing on April 8, 2010. Petitioner’s parents appeared, pro se. The District appeared by and through attorney Susan Graham and its representative, Dr. Paul Foster. Both parties submitted written argument. The decision was timely rendered on April 28, 2010 and forwarded to both parties.

Based upon the evidence and argument of the parties, I make the following findings of fact and conclusions of law. References to the court reporter’s record will be designated “RR” followed by the page number. References to the exhibits will be designated “P” for Petitioner or “R” for Respondent, followed by the exhibit number and page number if applicable.

ISSUE AND RELIEF REQUESTED

The following is the sole issue for hearing:

1. Whether MISD fulfilled its Child Find obligations with regard to the student during the relevant limitations period.

The parent requested the following relief:

1. Reimbursement for an "IEE" conducted in the summer of 2009.
2. Parental education on Dyslexia through the student's graduation.
3. Future IEE's to be conducted by the parents' chosen evaluator annually through the date of the child's graduation.
4. Reimbursement of private placement costs from June 2009 to present as stated in the request for due process hearing.
5. Future actual costs for Alphabetic Phonics Tutoring with an ALTA Therapist until graduation from high school.
6. Reimbursement for ***curriculum since 10/18/07.
7. Reimbursement for legal advice.
8. Reimbursement for a laptop computer, printer, and internet service.
9. Provision of a Kindle DX Electronic Reader.
10. Provision of 12 text-to-audio books per year until graduation.
11. Provision of the Kurzweil 3000 USB.
12. Provision of the Verticy Language Program until graduation.

FINDINGS OF FACT

1. The student resides within the geographical boundaries of the McKinney ISD. The student is currently ***, and therefore attends a "private school" within the geographical boundaries of MISD.

2. The student received special education services from the District during the 2003-2004, 2004-2005, 2005-2006, 2006-2007 school years, and during the *** semester of the 2007-2008 school year. Petitioner filed petitioner's request for hearing on January 18, 2010. It is undisputed that the student has not attended MISD since ***, 2007 and that the District has not provided educational services to the student since that time. (P-1; R-C; R-D)

3. On ***, 2007, the parents withdrew the student from MISD to ***. The District sent notice to the parent that the student was entitled to receive a Free Appropriate Public Education and that it remained ready, willing and able to provide a Free Appropriate Public Education for the student in the event they chose to re-enroll in MISD. (R-D)

4. It was undisputed that from ***, 2007 to present, the parent has *** within the boundaries of the MISD.

5. The parents did not initiate communication with the school district between ***, 2007 and mid-July 2009. (RR-20, 51)

6. In July, 2009, the parents contacted the District to obtain the student's cumulative folder and educational records. I find based on a preponderance of the credible evidence that the sole purpose of contact with the District during the summer of 2009 was to obtain records. (RR-24, 25, P-1, R-E)

7. The parent testified that when she contacted the District in the summer of 2009, she had no intention of seeking services or an evaluation from the District. (R-25). The parent further testified that at the time they filed the request for hearing in January 10, 2010, they were not seeking services or an evaluation from the District, nor have they sought services from the District since the date of filing or attempted to re-enroll the student in MISD. (RR-26-27, 30) The parent acknowledged that at the time they filed their request for hearing, they were aware of their right to request a re-evaluation. (RR-21) I find, based on a preponderance of the credible evidence, that the parents did not request an evaluation from the district, nor did they attempt to re-enroll or intend to re-enroll the student at any time from January 8, 2009 through the date of hearing, nor did they seek any services from the District since the date the student was withdrawn from MISD.

8. The parent obtained an evaluation from a private evaluator, ***, during June 2009. (RR20-22) The parent did not contact MISD prior to engaging the services of the evaluator and made no contact at all with the District until after the private evaluation. (RR-20-22)

9. The student's last evaluation with the District was on ***, 2006. A three-year re-evaluation would have been due ***, 2009.

10. The parents filed the request for hearing on January 8, 2010, seeking reimbursement for an "Independent Educational Evaluation", for past and future private services and assistive technology, as well as reimbursement for legal expenses (though the parent was a pro-se litigant).

11. During the pendency of this request for hearing, the parent refused to consent to an evaluation offered by the District. (RR-28)
12. The parents received procedural safeguards following every ARD Committee meeting while the student was enrolled in MISD. (R-B)
13. The child's *** school is a private school under applicable Texas law and regulations. 19 Tex. Admin. Code 89.1096
14. Between January 8, 2009 and January 8, 2010, the school never consulted with or contacted the parent, who was also a ***. (RR-31)
15. During the above period, the District did not contact the parents regarding a re-evaluation for the student.
16. The District failed to conduct a timely re-evaluation of the student.
17. The District had actual knowledge that the student was a parentally placed private school student with a disability attending a private school within its geographical boundaries.
18. The District has routine annual meetings for students in private schools, including ***, in which the District provides information about the opportunities for private schools and students with disabilities in private schools. RR-49 The District, however, acknowledged that it had not consulted with the parents of the student.

DISCUSSION

It is undisputed that the student was identified as a student with a disability and determined to be eligible for special education services in February 2004, soon after the completion of an initial evaluation and the student's enrollment in MISD. Thereafter, the student received special education and related services from MISD until student's parents withdrew student from the District to *** in *** of 2007. Thus, the District fulfilled its initial Child Find obligation in February 2004 when it identified and evaluated the student and began to provide special education and related services. In 2007, the parents rejected the District's program when they withdrew the student to *** In *** of 2007, the student became a parentally-placed private school child with a disability as that term is defined in 34 CFR 300.130. There was no dispute that the student's *** program is a private school under Texas law. *See* 19 Tex. Admin. Code § 89.1096(a)(2).

The question of MISD's obligations to the student beginning in October 2007 depends on the role of MISD after the student's withdrawal, and that role is somewhat complicated by the fact that the student's private school is a *** and located within the same school district that had an obligation to make a FAPE available to the student. If the parents had chosen to re-enroll the student

at any time, MISD would have had a duty to provide a FAPE to the student. If the parents had contacted MISD to request a re-evaluation, MISD would have been obligated to evaluate the student to determine whether student continued to be eligible for special education services. *See Letter to Fig. 52 IDELR 136 (OSEP, Jan. 28, 2009)* However, once the parent withdrew the student from MISD, and never again contacted the District (except to request a copy of records) the school no longer had a duty to provide special education and related services to the student. *See Tex. Admin. Code § 89.1096.* However, given that MISD is also the school district where the student's private school is located, MISD assumed different obligations with regard to the student after student's withdrawal and placement in a private school within its boundaries.

A local education agency in which a private school is located is responsible for conducting a thorough and complete child find process, after consultation with private school representatives, to identify and determine the number of parentally-placed children with disabilities attending private schools located within the LEA's boundaries. 34 CFR §§ 300.130-130.144. The purpose of this process is to ensure equitable participation and an accurate count of disabled private school children. The school district, under these provisions, is not responsible for making a Free Appropriate Public Education (FAPE) available to the child, although the student may receive some proportionate share services. In fact, the child does not have an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school. 34 CFR § 300.137(a); *Cefalu v. East Baton Rouge Parish Sch. Bd.*, 117 F.3d 1371 (5th Cir. 1997). The student is not entitled to a due process hearing except with regard to a child find complaint and whether the school complied with the evaluation requirements under 34 CFR §300.300-300.311. In other words, the only issue over which a hearing officer may assume jurisdiction between a school district where a private school is located and the private school student relates to the child find complaint. Any complaints regarding equitable participation, consultation and a services plan developed for the student (if applicable) are subject only to the state's complaint process. 34 CFR § 300.140.

MISD has an obligation after consultation with private school representatives, including those who provide *** education, to locate, identify and evaluate children that attend private elementary and secondary schools within its boundaries. 34 CFR §300.131(a) In this case, an initial evaluation of the student was completed on January 8, 2004 when the student was enrolled in MISD. The ARD Committee reviewed the evaluation, identified the child as a student with a disability, eligible to receive special education and related services under the eligibility classifications of Learning Disabled and Speech Impaired. R-B. Through the District's Child Find process, it identified and began to provide special education and related services to the student and continued to do so until the student's withdrawal from the District on ***, 2007. The student's last re-evaluation prior to withdrawal from the District was completed on ***, 2006. RB-96. Following withdrawal from the District, the District sent the parent a letter stating that the student was entitled to a FAPE and that the District remained ready, willing, and able to provide an appropriate program for the student should they choose to re-enroll student. R-D. The parents contend that the District had an ongoing obligation after they withdrew the student to convene annual ARD meetings in order to fulfill its obligation to make a FAPE available. This argument is without merit. There is no requirement in the law that schools convene annual ARD meetings for students who are voluntarily

placed in private schools by their parents. Such a requirement would create an onerous burden for school districts and would be inconsistent with the proportionate share provisions of IDEA which specifically provide that a student has no individual entitlement to special education and related services that the child would receive if enrolled in the public school. 34 CFR §300.137(a) Once the District provided the ***, 2007 notice to the parent upon withdrawal of the student from the District, it was no longer responsible for providing a FAPE to the student until such a time as the parents chose to enroll the student in MISD full-time. *See* 19 Tex. Admin. Code §89.1096(b).

However, after ***, 2007, the District assumed different obligations with regard to the student. Once the parents withdrew the student from MISD and began ***, the student should have been treated as a parentally placed private school student because *** meets the definition of private school under applicable Texas law and state regulations. The District's obligations to the student changed once the student was no longer enrolled in the District, and the District then became obligated under the proportionate share provisions of IDEA to re-evaluate the student (as the student had already been identified). Although MISD did not have an obligation to provide a FAPE to the student until the parents chose to re-enroll student, MISD did have a duty to re-evaluate the student because it is the public school in which the ***, or private school, is located, *and* MISD had actual knowledge of the student's disability and of student's attendance of a private school within its boundaries. The obligation to re-evaluate the student does not arise out of an ongoing duty on the part of MISD to provide a FAPE for the student, but rather, was a part of its ongoing child find and evaluation obligations to parentally placed private school children under the proportionate share provisions of IDEA. The District's responsibilities under these circumstances include the duty to re-evaluate the student on at least a triennial basis. 34 CFR.300.131; 300.140(b); 34 CFR 300.303. *See also Questions and Answers on Serving Children with Disabilities Placed by Their Parents at Private Schools* (OSEP March 2006). MISD failed to timely re-evaluate the student.

CONCLUSIONS OF LAW

1. The student is eligible for special education services as a student with a disability under IDEIA, 20 U.S.C. §1400 *et. seq.* and its implementing regulations. MISD identified the student as a student eligible to receive special education and related services while the student was enrolled in MISD.
2. MISD's obligation to provide the student with special education and related services terminated upon the parent withdrawing the student from MISD and enrolling the student in *** when the parent did not make an effort to re-enroll the student or seek further services from the District. 19 Tex. Admin. Code § 89.1096(b).
3. The *** is a private school. 19 Tex. Admin. Code § 89.1096(a)(2).
4. The student's *** is located within the geographical boundaries of the MISD.
5. MISD had actual notice of the student's disability and that the student was a

parentally placed private school student with a disability.

6. MISD had an obligation as the local education agency where the *** was located to conduct a re-evaluation of the student. 34 CFR § 300.131(a). The District's obligation to a parentally-placed private school child under these circumstances existed without regard to whether or not the parent sought services or an evaluation on behalf of the student.

7. The student's three-year re-evaluation was due on or before ***, 2009. The District failed to timely re-evaluate the student. 34 CFR §300.303(b)(2)

8. The appropriate relief for a Child Find violation under 34 CFR §§300.131 is an order for an evaluation, or under appropriate circumstances, reimbursement for an IEE when required due to the District's failure to conduct an evaluation.

9. The parent was not required to obtain an Independent Educational Evaluation for the student due to the District's failure to re-evaluate the student. Rather, the parent obtained an evaluation from an evaluator approximately 6 months before the re-evaluation was due and without regard to MISD's obligations or notice to the District. Additionally, the parent did not intend to seek an evaluation from MISD and subsequently refused consent to an evaluation. The parent is not entitled to reimbursement for the cost of obtaining a private evaluation. Reimbursement is an equitable remedy and in determining whether to award equitable relief, the conduct of the parties should be considered. *Parents of Student W. v. Puyallup School District*, 31 F.3d 1489 (9th Cir. 1994).

ORDER

After due consideration of the record, the foregoing findings of fact and conclusions of law, I hereby **ORDER** that the following relief is **GRANTED**:

1. The District shall provide the parent with notice of re-evaluation within 10 school days of the date of this order. The notice shall comply with 34 CFR §300.304 and 300.503.

2. The District shall document its efforts to obtain informed parental consent for the re-evaluation. If the parent provides consent to the re-evaluation, the District shall complete the re-evaluation within 60 days of obtaining parental consent.

3. This Order shall not be construed as an override of parental consent as the parent has the absolute right to withhold consent to the re-evaluation. 34 CFR §§ 300.300(c)(4)(i).

All other relief not specifically granted herein is hereby **DENIED**.

Finding that the public welfare requires the immediate effect of this Final Decision and Order, the Hearing Officer makes it effective immediately.

NOTICE TO THE PARTIES

This Decision is final and is appealable to state or federal district court.

The District shall timely implement this Decision within 10 school days in accordance with 19 T.A.C. §89.1185(p). The following must be provided to the Division of IDEA Coordination at the Texas Education Agency and copied to the Petitioner within 15 school days from the date of this Decision: 1.) Documentation demonstrating that the Decision has been implemented; or 2.) If the timeline set by the Hearing Officer for implementing certain aspects of the Decision is longer than 10 school days, the district's plan for implementing the Decision within the prescribed timeline, and a signed assurance from the superintendent that the Decision will be implemented.

SIGNED this 28th day of April, 2010.

Sharon M. Ramage
Special Education Hearing Officer

SYNOPSIS

Issue: Whether the District violated its Child Find obligation with regard to the student who was *** by failing to timely complete a re-evaluation

Held: For Parent. The District failed to timely complete its reevaluation of the student and the District had notice that the student was a parentally placed private school student and had a duty to timely reevaluate student.

Citation: 34 CFR 300.131(a); 34 CFR 300.303(b)(2); 19 Tex. Admin. Code 89.1096(a)(2)