

DOCKET NO. 311-SE-0612

STUDENT § **BEFORE A SPECIAL EDUCATION**
§
§
VS. § **HEARING OFFICER**
§
KILLEEN I.S.D. § **FOR THE STATE OF TEXAS**

DECISION OF THE HEARING OFFICER

Student (hereinafter “the student”) through student’s next friend, Parent (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 Killeen Independent School District (KISD).

In the Request for Hearing, Petitioner alleged that KISD denied the student a Free Appropriate Public Education (FAPE). In particular, Petitioner alleges:

1. KISD failed to provide appropriate occupational therapy, in-home training, parent training, social skills training, behavior intervention strategies and behavioral supports;
2. KISD failed to use peer-reviewed scientifically based methods of instruction, and strategies and interventions that address the student’s unique needs;
3. KISD failed to address sensory deficits as it impacted the student’s educational needs;
4. KISD failed to provide appropriate supportive services, including but not limited to a shadow aide;
5. KISD failed to provide appropriate ESY services during the summer of 2012;
6. KISD failed to provide appropriate IEP goals and objectives addressing the student’s academic, social and behavioral needs;
7. KISD failed to consider the student’s present levels of performance when developing IEP goals and objectives;
8. KISD denied the parent meaningful parental participation in developing the student’s IEP;
9. KISD failed to appropriately address the needs set forth in the autism supplement;
10. KISD failed to appropriately train staff working with the student;
11. The student’s proposed placement for the 2012-2013 school year is inappropriate and not in the least restrictive environment;
12. KISD failed to implement the student’s IEP;
13. KISD failed to conduct a functional behavior assessment and failed to develop an appropriate BIP;
14. KISD discontinued IEP goals without input from the parent.

Petitioner requested the following relief:

1. An order requiring the District to develop an appropriate IEP for the student;
2. An Order requiring the District to provide services included in the Autism Supplement;
3. Placement at *** at public expense;
4. An out of district transfer to another public school district;
5. An order requiring the district to consult with *** for training of staff who work with the student, tutoring, and social skills training for the student;
6. An Order requiring the District to provide appropriate related services for the student;
7. An Order requiring the District to provide the student with a communication notebook for communication with the parents;
8. An Order requiring the District to provide weekly progress reports;
9. Reimbursement for private services provided at *** by the parent and placement at *** as compensatory education;
10. An Order requiring the District to provide compensatory services for ESY;
11. Enforcement of Mediated Settlement Agreement dated March 23, 2012.

DISMISSAL OF CLAIMS

The parties stipulated during a pre-hearing conference that the mediated settlement agreement dated March 23, 2102 contained a full release of claims by the parent through the date of the agreement. Therefore, Petitioner's claims based on alleged acts or omissions occurring prior to the settlement agreement dated March 23, 2012 (Docket No. 144-SE-0112) (including claims related to the student's IEP, BIP and placement prior to March 23, 2012) are res judicata and were DISMISSED prior to the commencement of the hearing. Petitioner's complaints requesting enforcement of a mediated settlement agreement were also dismissed because they are outside the hearing officer's jurisdiction. Petitioner's requested relief for out of district placement in another public school district is outside the authority of the hearing officer and DENIED.

PROCEDURAL HISTORY

Petitioner filed this request for hearing on June 20, 2012. A hearing was held on August 16 and 29, 2012. Petitioner was represented by petitioner's parent, Pro Se. The KISD was represented by attorneys of record, Kelly Shook and Holly Wardell. At the conclusion of the hearing, both parties requested an opportunity to submit written argument and proposed findings of fact and conclusions of law. The decision due date was extended for good cause to September 17, 2012. The Decision was timely rendered and forwarded to the parties on that date.

Based upon the evidence and argument of the parties, I make the following findings of fact and conclusions of law. Citations to the transcript will be designated "RR" with a notation of the page number. Citations to Petitioner's Exhibits and Respondent's Exhibits will be designated with a notation of the "P" or "R" followed by the exhibit number.

FINDINGS OF FACT

1. The Killeen Independent School District (KISD) is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing Student a free appropriate public education (FAPE) in accordance with the Individuals with Disabilities Education Improvement Act, 20 U.S.C.A. § 1400, et seq., and the rules and regulations promulgated pursuant to IDEIA.

2. The student resides within the geographical boundaries of the KISD. KISD is responsible for providing the student with a FAPE.

3. The Petitioner meets eligibility criteria and presents educational needs for special education services as a student with disability classifications of Autism, Other Health Impairment and Speech Impaired. (R-5.202)¹

4. The student first enrolled in KISD *** of the 2009-2010 school year. (RR-546) Since enrolling in the District, the parent has filed four due process hearing requests. (RR-545) The District and the parent have entered into two separate mediated settlement agreements, with last occurring on March 23, 2012. (R-29; RR-546) The settlement agreement dated March 23, 2012 contains an executed waiver and release of claims.

5. The District conducted nine evaluations and independent evaluations of the student since student's enrollment in the District, most of which were at the request of the parent or the result of a mediated settlement agreement. (RR-546)

6. The student's placement for the 2011-2012 school year was in the general education classroom with an inclusion teacher and special education support in the *** classroom. (RR-547) This placement was made pursuant to a mediated settlement agreement at the beginning of the school year. School personnel testified that while the student made some gains during the school year, student continued to have behavioral difficulties.

7. The relevant timeframe for this hearing is March 23, 2012 to present, as all claims prior to March 23, 2012 were released. (R-29) The development or appropriateness of any IEP, BIP or placement prior to that date is not before the hearing officer.

8. During the 2010-2011 school year, the student's placement was in the *** classroom. This placement was successful for the student because of the structure and the low student to teacher ratio. (RR-151, 163, 248, 447-448)

9. The student began the 2011-2012 school year at ***. During February 2012, the student's home campus changed due to the parents' move. (RR-103) Although the campus changed, the placement arrangement did not.

¹ The District and the parent disagree as to whether the student meets the eligibility criteria for Autism, Following the completion of an IEE and a mediation, the student's status was changed to reflect Autism eligibility. (RR-100) An IEE conducted by Dr. *** indicated that the student had a diagnosis of PDD-NOS and met the eligibility criteria for Autism. (P-2.38) The issue of whether the student is accurately identified is not before the hearing officer.

10. On March 23, 2012, the parties entered into another settlement agreement wherein the student's placement arrangement remained the same, IEP goals and objectives were changed at the parent's request, and the District agreed to consult with a behavior specialist (BCBA) selected by the parent. (R29)

11. During the *** of the school year (and the time period the subject of this hearing), the student exhibited significant and frequent disruptive and aggressive behaviors in the general education classroom. The student's behaviors included *** adults and students; throwing ***; pushing and pulling ***; and *** at others. (RR-121, 122, 139, 182, 451) During the *** of the 2011-2012 school year, school personnel had to restrain student four times to prevent student from hurting ***self or others. (R-9; RR-495) School personnel collected data reflecting approximately *** incidents of noncompliance and *** instances of aggression over a 50-day period. (R-6). The student's inclusion teacher testified that she had never seen so much aggression in a student the student's age in her *** years of teaching. (RR-476) The behaviors also occurred at the student's previous campus. (RR-496)

12. Teachers reported that the student manipulated student's environment and sought opportunities to act out toward students less capable of defending themselves. (RR-449, 489)

13. The student does not respond consistently to interventions in the general education setting and student's behavior is unpredictable. (RR-123) The general consensus of school personnel (and undisputed testimony) was that the placement for the 2011-2012 school year was not appropriate due to the student-teacher ratio and lack of small group instruction. The placement was implemented based on a mediated settlement agreement at the parent's request. (The parent did not challenge the 2011-2012 *placement*.)

14. The student's behavior places other students at risk and disrupts the learning environment. Being removed from the classroom when student's behavior escalates interferes with student's learning. (RR-490)

15. One of the student's classmates refused to come to school because *** was afraid of student. The student frequently directs student's aggression to others resulting in ***. (RR-493-494, 497; R-2). The student's behavior disrupts the learning of other students.

16. School officials made efforts to provide additional support to the student in light of student's behavior. The inclusion teacher revised her schedule in order to be in the classroom at all times with the student. (RR-435-439) The inclusion teacher testified that she spent 80-90% of her time each day working with the student and responding to student's behavioral needs. (RR-442-443).

17. A preponderance of the credible evidence supports a finding that school personnel implemented the student's BIP and provided additional positive antecedent supports, interventions and reinforcements. These included the use of visual cues (RR-439-441), visual behavior classroom management (RR-465), positive rewards (RR-468, 478), and social stories (RR-483-484).

18. According to the credible testimony and the documentary evidence, the student is more successful in a setting with a highly structured environment and low student-teacher ratio. (RR-447-448; R-4)

19. The testimony is undisputed that the student's behavior was better during the 2010-2011 school year when student was in the *** classroom.

20. The proposed placement in the *** (***) classroom will provide a low student-teacher ratio and intensive ongoing social skills instruction and behavior training similar to that received in the *** classroom. (RR-374-375, 379) The student will also receive grade-level academic instruction. (R-15; RR-354)

21. In the *** classroom, once the student demonstrates appropriate behaviors in a small group setting, student will be transitioned into the general education environment to implement and practice student's behavioral skills with nondisabled peers. (RR-375-378)

22. Petitioner presented no evidence that the student requires additional speech services. Petitioner presented no evidence that the student's current speech goals are inappropriate for student.

23. Petitioner presented no evidence that the student's occupational therapy consult services were inappropriate and no evidence that the student requires physical therapy.

24. Petitioner presented no evidence that the student requires in-home training to receive a FAPE. The evidence presented established that the District offered to provide an in-home consultation and the parent refused consent. (RR-389, 553)

25. Petitioner presented no evidence that the District failed to address the student's sensory deficits. District staff testified, credibly, that they used a number of specific sensory strategies with the student to address student's deficits. (RR-124, 314, 487)

26. Petitioner presented no evidence that the District failed to provide progress reports for the student as frequently as provided for student's general education peers. (RR-463)

27. Petitioner presented no evidence that the District failed to consider services outlined in the Autism Supplement for the proposed 2012-2013 IEP. The student's IEP includes an Autism Supplement. (R-1.32) In-home training and parent training were specifically considered by the ARD Committee and a determination was made that the student did not require the services. An in-home services needs assessment was previously completed, identifying no need for in-home services. (R-22).

28. Petitioner was at all times a meaningful participant in the development of the student's educational program, along with her advocate and experts. She was an active participant in every ARD Committee meeting and mediation. The District consulted with a BCBA selected by the parent prior to and at the May 2012 ARD Committee meeting and

implemented suggestions made by her. The District also received and considered input from Dr. ***, who completed an IEE.

29. Petitioner presented no evidence that the District failed to use peer-reviewed, scientifically based methods of instruction strategies and interventions to address the student's needs. The uncontroverted testimony was that the District did use peer-reviewed, scientifically based methods. (RR-126, 175, 380, 489)

30. Petitioner failed to present any evidence that the student's ESY services for the summer of 2012 were not appropriate.

31. Petitioner failed to present any evidence that the District failed to appropriately train staff who worked with the student. The credible evidence establishes that the District adequately trained its staff.

DISCUSSION

Based on the record regarding the student's services and placement during the relevant timeframe, there are three central issues in this case. First, is the proposed 2012-2013 IEP and placement in the *** Classroom appropriate? Second, did the District provide appropriate an appropriate IEP and BIP prior to changing the student's placement to a more restrictive setting? And, third, is the proposed IEP appropriate?

*Issue No. 1: Whether the *** Classroom is appropriate and the least restrictive environment.*

The primary issue in this case revolves around the student's proposed placement in the *** class for the 2012-2013 school year. The student is currently exhibiting behaviors which are so extreme, student's ability to make adequate behavioral gains in the classroom is impacted significantly. Additionally, student's behaviors escalated to the point that student had approximately *** noncompliant and aggressive outbursts during the *** of the 2011-2012 school year. Student is physically aggressive to staff and other students, destructive of property, and ***. Student's presence in the classroom creates an environment where student is a risk to ***self and others with regard to physical safety. Additionally, student's outbursts interfere with instructional delivery on the part of the teachers, as well as the ability of the other students to receive a benefit from instruction. In fact, one student did not return to school for *** because *** and was afraid of student. Student's teachers spent a majority of the classroom time redirecting and responding to student's behaviors. The student needs a small, highly structured educational program which focuses on the retraining and coaching of replacement behaviors, with a gradual return to the regular education classroom, with supports. The proposed *** placement is appropriate to meet the student's needs.

Petitioner asserts that the proposed placement will not provide the student with an education in the least restrictive environment. The student is entitled to be educated with nondisabled peers to the maximum extent appropriate. *Daniel R.R. v. State Board of Educ.*, 874 F.2d 1036 (5th Cir. 1989). In evaluating whether Respondent is educating the student with

nondisabled peers to the maximum extent appropriate, there are two inquiries which must be made. The first question is whether education in the regular education classroom, with supplementary aids and services, can be achieved satisfactorily. If not, then we must evaluate whether Respondent proposes to mainstream the student to the maximum extent appropriate, taking into consideration student's particular disability and its manifestations.

In *Daniel R.R.*, the Fifth Circuit discussed several factors in determining whether placement in the regular education classroom is appropriate. These factors include academic benefit, benefit from association with nondisabled students, detrimental effects on the disabled child, and detrimental effects on classmates, taking into consideration the nature and severity of the child's disability. *Daniel R.R., supra.* If it is determined that education in the regular education classroom cannot be achieved satisfactorily, we must next determine whether the child is mainstreamed to the maximum extent appropriate by reviewing whether the school has taken steps to accommodate student in regular education, including intermediate steps toward a mainstream setting. Mere token gestures are not sufficient. However, the school is not required to provide every conceivable supplementary aid and service to assist the child, or to modify the curriculum beyond recognition. *Daniel R.R., supra.*

In applying the above factors to this case, it is clear that the student's behavior severely limits his ability to benefit from instruction in the regular classroom at this time. Student's disruptive behaviors have significantly hindered student's ability to remain in the classroom and receive instruction. The credible evidence supports a finding that the teachers attempted to provide antecedent supports for the student to avoid the behaviors and responded appropriately when the maladaptive behaviors occurred. The student has a history of manipulating others and engaging in behaviors at opportunistic times and directs student's aggression frequently toward students who are less able to defend themselves. The student's behavior not only disrupts student's ability to receive instruction, but also interferes with student's ability to learn appropriate peer interactions. Without intensive behavioral training in a small group setting, the student will not be successful in the regular education classroom.

Continuation of a regular education placement is detrimental to the student and others. Student is at a critical point in student's education and the behaviors must be brought under control in order for student to be successful in developing peer relationships and complying with the social expectations in the school setting. Student fails to observe appropriate boundaries with regards to the safety and integrity of other students and student's teachers by engaging in physically aggressive and non-compliant behaviors. Student engages in conduct which endangers student's own safety and that of others and the outbursts are so frequent and intense, they interfere with the teacher's ability to deliver instruction as well as the other students' ability to receive that instruction.

Respondent has exhausted all efforts to educate the student in the regular education setting, with appropriate supports and related services. For the 2011-2012 school year, the ARD Committee placed the student in an inclusion classroom with special education support in the *** classroom. As the year progressed, and additional demands placed on the student, student's behavioral outbursts and aggression continued to be an issue. The District collaborated with the parent to revise the student's IEP goals and objectives and BIP and consult with an outside

consultant specializing in behavior. The proposed placement will provide an opportunity for the student to have specialized social skills and behavior training in a small group environment with opportunities to implement those skills in the general education classroom. The *** setting is an appropriate placement for the student.

Issue No. 2 – Whether the District failed to provide appropriate behavior interventions and support services, failed to develop an appropriate Behavior Intervention Plan, or failed to conduct a Functional Behavior Assessment.

In August of 2011, the District conducted a Functional Behavior Assessment. Based on that assessment, the ARD Committee developed behavior goals for the student for the 2011-2012 school year and developed a written Behavior Intervention Plan which identified targeted behaviors and contained positive interventions and supports and other strategies to address behavior. 34 CFR § 300.324(a)(2)(i). The parent, her advocate and her expert participated in the development of the behavioral goals and objectives as well as the BIP. (R-30)

The relevant time period for this due process hearing for the 2011-2012 school year is *** through the end of the school year, roughly *** months. The student was enrolled at student's current campus on ***, 2012. During the *** months on campus (***) of which are in the relevant time period), the District implemented the IEP and BIP adopted at the beginning of the school year.

During the March 23, 2012 mediation, the parents and the District agreed that the District would consult with the parent's Board Certified Behavior Analyst (BCBA) prior to April 11, 2012 for the purpose of revising the student's behavior plan. Additionally, the ARD Committee immediately adopted goals and objectives for behavior as contained in the mediated settlement agreement. These goals and objectives were requested by the parent. (R-29). The parent's BCBA visited the school, observed the student, and made recommendations for the teachers in a written report and developed behavior tracking forms for their use. (R-8) The BCBA also participated in the May 2012 ARD Committee meeting, along with the parents when the proposed IEP and BIP placement were recommended by the school members of the ARD Committee. (R-8; 15; P-16) The parent argued at the hearing that the child requires a token economy system to be successful. However, the BCBA disagreed and stated that this was inappropriate for the school setting. (P16; RR-480). This is consistent with the testimony of school personnel. (RR-477, 391-392) The BCBA was able to articulate specific interventions and strategies that she observed being implemented appropriately in the classroom. Although she disagreed generally with the proposed placement, the BCBA acknowledged that the student would benefit from *** support. (P-16).

The parent also alleges that the District failed to provide appropriate support services including a “shadow aide.” However, the parent’s complaint is without merit for both the previous and current school years. The District essentially provided a 1:1 special education certified teacher in the general education setting for the student – the inclusion teacher. The inclusion teacher assisted other students in the classroom, but 80-90% of her time was devoted to the student because of the nature, severity, intensity, and frequency of student’s disruptive behaviors in the general education classroom. (RR-469-473) Nevertheless, the student’s behaviors continued to escalate *** of the 2011-2012 school year. Additionally, the uncontroverted testimony was that the addition of an aide to a classroom with a larger student to teacher ratio would not help to address the student’s behavioral needs as student requires small group instruction to master social skills and appropriate behaviors.

The preponderance of the credible evidence supports a finding that the teachers implemented the student’s BIP, but the placement in which it was being implemented was not appropriate (although required under a mediated settlement agreement). (RR-173, 354, 465) Additionally, the preponderance of the evidence supports a finding that the proposed BIP is based on a Functional Behavior Assessment and is appropriate for the student.

Issue No. 3 – Whether the Student’s IEP is appropriate, based on current assessment and the child’s performance.

The School District’s program is presumed to be appropriate. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983) aff’d on other grounds sub nom., *Irving Indep. Sch. Dist. V. Tatro*, 468 U.S. 883 (1984). In determining whether an IEP is appropriate for a student, the issue is whether it is reasonably calculated to confer an educational benefit. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 459 U.S. 176, 102 S. Ct. 3034 (1982). An educational program is meaningful if it is reasonably calculated to produce progress rather than regression or trivial educational advancement. *Rowley, supra.*; *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000). An IEP is reasonably calculated to provide meaningful educational benefit when it is individualized based on the student’s assessment and performance; administered in the least restrictive environment; provided in a coordinated and collaborative manner by the key stakeholders; and demonstrates positive academic and nonacademic benefits. *Cypress-Fairbanks Ind. Sch. Dist. V. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997).

The IEP in place for the portion of the 2011-2012 school year relevant to this hearing consisted of goals and objectives implemented as a result of two mediations, including the March 23, 2012 mediated settlement agreement. The parent played an integral role in the development of the goals and objectives. The student was a *** student and student’s goals and objectives were based on student’s levels of performance. (R-29, 30; R-1). As a result of the mediation, the District consulted with an independent BCBA to assist in the development of additional behavioral goals and objectives. The terms of the agreement required the BCBA to observe the student and gather information from the parent and the District during the month of April 2012, and meet with key stakeholders by May 21, 2102. (R-29). The mediated settlement agreement provided for the implementation of the existing IEP and additional goals pending a report from the BCBA. The ARD Committee had previously identified and targeted

SYNOPSIS

Issue No. 1: Whether the proposed placed in *** classroom is appropriate for the student and in the least restrictive environment.

Held: For the District. The proposed placement provides an education to the student to the maximum extent possible with nondisabled peers. The student's behaviors require intensive instruction with a low student to teacher ratio in order for the student to become successful in the general education classroom.

Citation: 34 C.F.R. § 300.114; *Daniel R.R. v. State Board of Education*, 874 F.2d 1036 (5th Cir. 1989).

Issue No. 2: Whether the District failed to provide appropriate behavior interventions and support services, failed to develop an appropriate BIP, or failed to conduct a Functional Behavior Assessment.

Held: For the District. The student's IEP during the relevant time period and the proposed IEP contains a statement that the ARD Committee considered that the child's behaviors impeded child's learning and that of others and considered the use of positive behavioral interventions and supports and strategies to address the behavior.

Citation 34 C.F.R. 300.324(a)(2)(i).

Issue No. 3: Whether the Student's IEP is appropriate?

Held: For the District. The student's IEP is reasonably calculated to provide a meaningful educational benefit and is based on student's assessment and performance, including behavioral performance and concerns. Moreover, the IEP was developed collaboratively with key stakeholders and parent participation.

Citation: 34 C.F.R. 300.320; 300.322; *Board of Hendrick Hudson Central School District v. Rowley*, 459 U.S. 176 (1982); *Cypress-Fairbanks Ind. Sch. Dist., v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997).