

DOCKET NO. 207-SE-0409

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| STUDENT | § | BEFORE A SPECIAL EDUCATION |
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| | § | |
| V. | § | HEARING OFFICER FOR THE |
| | § | |
| FLOUR BLUFF | § | |
| INDEPENDENT | § | |
| SCHOOL DISTRICT | § | STATE OF TEXAS |

DECISION OF THE HEARING OFFICER

Statement of the Case

The student, by next friend and parent (hereinafter “Petitioner” or “the student”), brought a complaint pursuant to the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §1400, *et seq.*, complaining of the Flour Bluff Independent School District (hereinafter “Respondent” or “the district”).

Petitioner was represented by Christopher Jonas, an attorney in Corpus Christi. Respondent was represented by Cynthia Buechler an attorney with the firm of Buechler & Associates in Austin. Petitioner's request for hearing was filed on April 29, 2009, and came on for hearing by agreement of the parties and order of the hearing officer on December 1, 2009. The parties were afforded an opportunity to file written closing arguments, filed their arguments, and agreed that this decision would be timely issued on or before January 20, 2010 in accordance with the regulatory time-line.

Petitioner alleged that the district failed to identify the student as one who is eligible for special education and related services. As relief, Petitioner sought an order identifying the student as eligible, compensatory educational services, and the development of an appropriate individual education plan (“IEP”) and behavior intervention plan (“BIP”).

Based upon the evidence and argument of counsel, the Hearing Officer makes the following findings of fact and conclusions of law:

Findings of Fact

1. The student resides with the student's parent within the Flour Bluff Independent School District. [Transcript Pages 21 & 22]

2. The student is attending the *** year in *** school within the district. [Petitioner's Exhibit 8 and Respondent's Exhibit 2 and Transcript Page 22]

3. While the student did not consistently make passing grades in the *** grade year, the student passed all courses and the student's GPA at the end of the year was over ***. The student has high intellectual ability and has done well in school. [Petitioner's Exhibit 48]

4. During the 2008-2009 school year the student began having problems with truancy. [Transcript Page 138]

5. The student was diagnosed with attention-deficit hyperactivity disorder ("ADHD") in 2005. [Transcript Page 137]

6. The student's parent testified that the student additionally has obsessive compulsive disorder ("OCD"), *** syndrome, rheumatoid arthritis, autism and possibly an autoimmune disorder and lupus. [Transcript Page 25]

7. The student takes numerous medications, needs adjustments on the medications, and the medications can effect attention and behavior. [Petitioner's Exhibits 3, 18 & 44 and Transcript Pages 94-96, 112-113 & 288]

8. The parent secured evaluation on the student which was completed in January 2009. The evaluation was performed by a clinical psychologist who is not a licensed specialist in school psychology ("LSSP"). [Petitioner's Exhibit 29]

9. The psychologist noted as the student's strengths high intelligence, and excelling in reading, writing and math. The psychologist believed that the student's difficulties are with attention and self control. The psychologist recommended that the student be referred for Section 504 accommodations within the school. [Petitioner's Exhibit 29]

10. The psychologist did not diagnose any anxiety disorder, learning disabilities, or other disabilities in the student. And the psychologist stated that the student's family's circumstances were a stressor in the student's life. The student's parents were recently divorced, and the student's father sought to sever his relationship with the student. [Transcript Pages 45-47]

11. A Section 504 meeting for the student was held January 26, 2009. The 504 committee – which included the student's mother – considered the evaluation, the circumstances of the student and the student's educational needs and adopted an accommodation plan. [Respondent's Exhibit 9]

12. In March 2009 another Section 504 meeting was held for the student because of problems with the student's truancy and failure sometimes to complete assignments. A behavior intervention plan ("BIP") was developed for the student. The committee noted the student's success under Section 504. [Respondent's Exhibit 8]

13. Because of problems with truancy, the student was placed in an alternative school for thirty-one days, but while in the alternative placement, the student's behavior caused an increase in the time spent in the alternative school. The student was successful academically in the program and behavior did not interfere with educational progress. [Transcript Pages 119-121]

14. The district learned of the parent's desire to have the student evaluated for special education when the parent filed the request for hearing (April 30, 2009). The special education

director for the district met with the student's parent shortly after the request for hearing was filed – in the middle of May. The director asked the parent to sign a consent for a full individual evaluation (“FIE”) of the student and the parent declined to do so. [Transcript Pages 319-320]

15. The district did not receive consent to do the FIE until August 2009. [Respondent's Exhibit 5 and Transcript Page 320]

16. A Section 504 meeting for the student was convened September 10, 2009. Both the student and the student's parent were invited to the meeting but neither attended. The committee determined that the student remained eligible for 504 services, that the student was making progress under the plan and developed instructional modifications for the student. [Respondent's Exhibit 6 and Transcript Page 219-222]

17. An FIE for the student was completed on October 12, 2009 and a psychological evaluation by a psychologist and LSSP was completed on October 7, 2009. [Respondent's Exhibits 3 & 4]

18. The psychological evaluation examined reports from the student's parent that the student has Asperger's syndrome. The evaluation concluded that the student does not. The evaluation also showed no evidence of other special education disabilities. An admission, review and dismissal (“ARD”) committee meeting was convened for the student on November 5, 2009. The committee considered the FIE and the psychological evaluation. Counsel for the parties attended. [Respondent's Exhibit 2]

19. The committee determined that the student did not meet special education eligibility criteria as emotionally disturbed, autistic, or having a learning disability. Counsel for the parent agreed that the student did not qualify for special education because of a learning disability but disputed other eligibility. An other health impaired (“OHI”) form was provided so that the parent could provide the form to a physician to complete for the student. And, upon

completion, the ARD committee could consider eligibility for the student as OHI. The meeting ended in disagreement. [Respondent's Exhibit 2]

20. OHI forms from two physicians were received by the district shortly before Thanksgiving 2009. One indicates that the student meets the criteria for OHI based upon rheumatoid arthritis. [Respondent's Exhibit 7]

21. Another OHI form indicates that the student meets the OHI criteria based upon "hyper somnia, ADD, narcolepsy, rheumatoid arthritis." [Petitioner's Exhibit 5]

22. Prior to the hearing, the district had not had an opportunity to consider the OHI forms at another ARD meeting. The parent did not agree to attend an ARD meeting.

Discussion

Petitioner has the burden of proof to establish by a preponderance of evidence that the district violated the provisions of IDEA in some manner. Petitioner failed to meet its burden of proof.

Eligibility for special education is determined by both:

1. The student meeting eligibility criteria for a disability classification; and
2. The student's need, by reason of the disability, for special education and related services 34 CFR 300.8(a)(1) and 19 T.A.C. §89.1040.

The student made educational progress in school. Petitioner failed to prove that the district violated the provisions of IDEA in making its determinations about the student.

Available evaluations did not show the student eligible for special education. The parent did not provide new information to the ARD committee from physicians concerning OHI eligibility until shortly before the hearing began, and the parent did not agree to attend an ARD meeting to consider the information.

Conclusions of Law

1. As the party challenging the district's decision on eligibility, the Petitioner failed to meet the burden of proof in this action. Schaffer v. Weast, 546 U.S. 49 (2005).

2. Petitioner failed to meet its burden of proof to show that the actions of the district in seeking to consider special education placement for the student violated IDEA under the standard of Tatro v. Texas, 703 F.2d 823 (5th Cir. 1983), 20 U.S.C. §1400, et seq., 34 CFR 300.8(a)(1), 300.0(c)(9) and 19 T.A.C. §89.1040(a) and §89.1040(c)(8).

ORDER

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that all relief sought by Petitioner is DENIED.

SIGNED this 20th day of January, 2010.

/s/ Lucius D. Bunton
Lucius D. Bunton
Special Education Hearing Officer

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SYNOPSIS

ISSUE: Whether the district failed timely to identify the student as eligible for special education.

CFR CITATIONS: 34 CFR 300.8(a)(1), 34 CFR 300.8(a)(1), 34 CFR 300.0(c)(9)

TEXAS CITATION: 19 T.A.C. §89.1040, 19 T.A.C. §89.1040(a), 19 T.A.C. §89.1040(c)(8)

HELD: For the District.