DOCKET NO. 137-SE-0211

Student	§	BEFORE A SPECIAL EDUCATION
b/n/f Parent, Petitioner	§	
	§	
v.	§	HEARING OFFICER
	§	
Houston Independent	§	
School District, Respondent	§	FOR THE STATE OF TEXAS

FINAL DECISION – NUNC PRO TUNC[1]

Background

Petitioner is a student in the Houston Independent School District (HISD). Student is eligible for special education services under the Individuals with Disabilities Education Act "emotionally disturbed" classification. Student lives in the district with Student's mother and next friend, ***, and a brother.

Parent has filed a string of complaints against HISD over the past several years asserting violations of the Individuals with Disabilities Education Act including several recent complaints. [2] The complaints involve both this child and this child's brother.[3]

Issues presented

The first of the cases to be filed in the current series involving this child presented two issues which Parent stated as follows in the prehearing conference held on March 7, 2011:[4]

> *Issue number one is very simple. They have not given me any progress reports [so] I can measure the progress or the non-progress [of] my children. I have requested this over and over and over again. . . . They have not given me any progress reports and I want my children's progress reports.*
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> *And then the second issue is . . . they have a history of building up my children's state folder with these . . . inappropriate ARDs. And we have an issue before Hearing Officer Dillard (my immediate predecessor in handling this litigant's complaints against HISD) in reference to evaluation. And so I am simply requesting that they wait until we get some evaluations so that we can get in compliance with the law so that an appropriate IEP can be developed. Because both of [my children's] evaluations are well out of compliance and that's issue number two.*

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[1] See Texas Rules of Civil Procedure Rule 306a. This order was originally signed on October 31, 2011 but through clerical error was undated. It is reissued with today's date to correct this clerical error pursuant to TRCP Rule 306a.

[2] Before we could hold the hearing on the original complaint in this case, Parent filed a new complaint against HISD as next friend of this child asserting other violations of the Individuals with Disabilities Education Act. I dismissed that complaint as an attempt to amend the original complaint in violation of 34 C.F.R. § 300.508 (d) (3). See similarly, *Student b/n/f Parent v. Granville County Board of Education* (North Carolina Office of Administrative Hearings, March 29, 2011-- unpublished decision included in the transcript of the prehearing conference of May 26, 2011 as hearing officer exhibit 3). After the hearing on the original complaint -- during the time needed for preparation of the transcript, briefs, and a final decision – Parent filed three additional separate requests for a hearing for this child under the Individuals with Disabilities Education Act. On the first of these complaints, I consolidated one of the issues into this case and dismissed the remainder of that complaint as redundant of issues already heard. Her two other requests for additional due process hearings on behalf of this child are still pending.

[3] I have listed the other earlier actions she has filed asserting violations by HISD of her children's rights under the Individuals with Disabilities Education Act in the decision in TEA Docket No. 177-SE-0310. I count eleven earlier cases but some of them are repeats since they were appeals of some of the hearing officer decisions listed. These actions date back to 2006. In almost all of them she has either moved for recusal of the hearing officer or filed a grievance against the hearing officer.

[4] Tr. 5-6, Transcript of prehearing conference held March 7, 2011.

Parent restated this second issue much differently at the hearing of this case on the merits as follows:

> *. . . We have another issue in reference to this docket. And this issue here was in reference to an ARD Committee failing to ARD an evaluation when the record was clear that student's evaluation was out of compliance. And they met more than once and did not ARD an evaluation.*[5]

In a separate action brought by Parent on this student's behalf before Hearing Officer Dillard prior to filing the request for due process hearing now before me, HISD countersued for authority to perform all testing required for a full evaluation of the student despite Parent's failure to give the District informed consent. Hearing Officer Dillard ruled in the HISD's favor on this issue. She entered an order that allowed HISD to test the student without Parent's signed consent in place. Parent then filed a new due process hearing request asserting, among other assertions, that the HISD is out of compliance with Hearing Officer Dillard's order authorizing psycho-educational and psychological testing of the student. I consolidated that issue with this case because the issues involved and the evidence in the two cases overlap.

The third issue is:

> *Whether HISD is in violation of Hearing Officer Dillard's order to perform a new evaluation of this student?*

We reopened the record on September 8, 2011 to take evidence on this issue.

I will rule in favor of HISD on all issues, except that I will order the HISD to provide the parent more information on student's progress in the future, for reasons stated below.

Separately stated findings of fact and conclusions of law follow.

Findings of Fact

1. Parent resides with student within the boundaries of the HISD. Student is eligible for services under the Individuals with Disabilities Education Act under the "emotionally disturbed" ("ED") classification.

2. Parent received report cards and graded papers to report the student's progress from HISD in the 2010-2011 school year. She asserts the report cards and graded papers are not the type progress reports the Individuals with Disabilities Education Act contemplates that she will receive to document the student's progress toward short-term goals. I find the report cards and graded papers she has received were sufficient to meet the requirements of the Individuals with Disabilities Education Act. However, there is other information available about the child's progress in the child's state folder that the HISD hasn't been furnishing Parent. I will order the HISD to send Parent a duplicate copy of this information every time HISD updates the child's folder in the future.

3. The evidence conflicts in our hearing record on whether HISD properly notified Parent about ARD meetings involving her child. The parties have previously presented most, if not all, of the facts related to this issue to Hearing Officer Dillard in TEA docket number 174-SE-0310. Hearing Officer Dillard decided the issue in favor of HISD. Hearing Officer Dillard wrote in part;

> *Parent complained about the dates being offered by HISD for the ARDC meeting to address student's program upon student's return from being home-schooled. HISD went forward with the March 11,*

[5] Tr. 66, Volume 1, Transcript of hearing on the merits held May 26, 2011.

2010 ARDC meeting, believing it needed to get a program in place for student without further delay. There are numerous documents expressing the parent's outcry over the failure to include her in the meeting. However, HISD offered to conduct another ARDC meeting on the exact date that parent said she was available, March 31, 2010. Parent failed to appear for the March 31, 2010 ARDC meeting.[6]

Such errors, if any, as may be contained in Hearing Officer Dillard's decision related to the March 31, 2010 ARD meeting which set the IEP in place for this student in the 2010-2011 school year are now undergoing review in the federal courts in the appeal from Hearing Officer Dillard's decision. It would therefore be inappropriate for me to address that issue here since it has already been decided and is now on appeal.[7]

4. There is no evidence in our record that the HISD conducted useless ARDs.

5. Hearing Officer Dillard also ruled on the sufficiency and appropriateness of the evaluation and placement of student for the portion of the 2010 – 2011 school year involved in both the case before Hearing Officer Dillard and this case. Hearing Officer Dillard found the evaluation to be both appropriate and sufficient under the applicable facts and circumstances. I adopt her findings here by reference. In this regard, Hearing Officer Dillard wrote in part:

*Student was re-enrolled in HISD in ***2010. At that point student's most recent formal evaluation was dated December 14, 2006. Student was placed in the ***, the same placement where student had been when parent withdrew student from school*

Parent has not signed a consent form for student to be evaluated for a complete psychological evaluation. The psychologists prefer to meet with parents in person to discuss the tests that will be preformed and answer any questions that the parents may have. The consent forms are not sent via students' backpacks or through the mail. Information was given to parent as to how to contact the psychologist at student's school in response to parent's inquiry about the type of testing that would be done for student. Parent did not contact the psychologist with any questions.

On March 11, 2010, HISD conducted an ARDC meeting to review or discuss placement, program, extended school year services ("ESY"), evaluation, annual review, and compensatory services for Student. The parent did not participate in this ARDC meeting. Persons present on behalf of HISD included representatives from the administration, general education, special education (two (2) persons), evaluation (the licensed specialist in school psychology ("LSSP"), counseling, and nursing.

*During the March 11, 2010 ARDC meeting the group reviewed student's present level of academic achievement and functional performance. Student had been attending classes for approximately *** at that point, and student's classroom teacher was able to provide meaningful input to the group. The committee also had Student's scores from the Stanford 10 Achievement Test given to all students in the 2008-2009 school year. Thus, both formal and informal sources of data informed the ARDC in the March 11, 2011 meeting. The ARDC prepared an IEP and placed student in a setting that the committee believed would provide the education and related services in the least restrictive environment.*

*The persons present and the actions taken by the ARDC on March 11, 2010, concerning student constitute a viable transfer ARDC in order to have a program in place for student's returning to school, on or about,***, 2010.*

[6] Quoted from finding of fact 13 of Hearing Officer Dillard's decision in TEA docket 174-SE-0310 (April 4, 2011 references to the transcript in docket 174-SE-0310 deleted).
[7] See *IDEA Public Charter School v. Belton,* 48 IDELR 90 (D.D.C. 2007).

HISD's LSSP conducted a Review of Existing Evaluation Data ("REED") on March 10, 2010. When performing a review of existing evaluation data the LSSP reviews previous testing and whatever current information the school may have on the child. Information concerning current academic functioning would usually be taken from prior evaluations, which may or may not necessarily mean that a student is performing precisely at the same point on the day of the review. Most of the best information comes from the schools and teachers because they are dealing with the students every day. HISD is unusual because it gives the Stanford Achievement Test to all students each year. Thus, that formal achievement test is normed on whatever grade level may be needed and available each year.[8]

6. For her third issue Parent asserts that HISD has failed to comply with Hearing Officer Dillard's decision overriding Parent's failure to show on the consent form that she understood and gave her knowing consent to the psycho-educational and psychological testing of the student. By this ruling, Hearing Officer Dillard gave HISD permission to test the student. The record shows (and I find) that the HISD sent an evaluator to test student but before the testing was completed the student said student was too tired to do any further testing that day. The evaluator then arranged to complete the testing on the following week but when the evaluator went to pick the student up for the testing, the student told the evaluator that Parent had told student not to sign anything and not to take any tests. Thus, the tests could not be completed through no fault of the school district. Although Parent denies telling student not to take the tests and not to sign anything, she has consistently refused to make student available for further testing so the psycho-educational and psychological testing of the student can be completed. On the day of the September 8, 2011 hearing Parent repeatedly refused to make an appointment for the student to complete the tests. I find from a preponderance of the evidence that Parent has failed to make student available for the testing to be completed. The failure to complete the tests therefore is not the fault of HISD.

Conclusions of Law

Law Related to Progress Reports

In an article in the LRP online service the applicable law is summarized as follows.[9]

> The IDEA requires the provision of written information to parents about student's progress toward IEP goals and objectives and establishes the parental right to receive regular reports about their child's progress in special education. 34 CFR 300.320 (a)(3). Among the required disclosures that must be contained in the IEP is a description of when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided. 34 CFR 300.320 (a)(3)(ii).
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> Although the production of a unique document called an "IEP report card" is not a regulatory requirement necessary to provide parents with documentation toward IEP goals required by 34 CFR 300.320 (a)(3)(ii), the term "IEP report card" was used with reference to this reporting requirement in congressional committee reports accompanying the 1997 reauthorization of the IDEA. S. Rep. No. 105-17, 105th Cong. 1st Sess. 22 (1997), H.R. Rep. No. 105-95, 105th Cong. 1st Sess. 102 (1997).
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> **Federal law dictates neither the form nor the precise content of the documentation of progress toward IEP goals.** Those decisions rest within the discretion of states, local school districts and educators, based on the individual circumstances of each student with a disability. As a threshold matter, a student's IEP team [ARD Committee] decides how to measure progress toward the annual goals identified in a student's IEP. 34 CFR 300.320 (a) (3) (i). By extension, it is the student's IEP

[8] Quoted from findings of fact 4-9 of Hearing Officer Dillard's decision in TEA docket 174-SE-0310 (April 4, 2011 references to the transcript in docket 174-SE-0310 deleted).

[9] LRP Special Ed Connection, SmartStart: Report Cards for Students with Disabilities (last updated February 18, 2010, accessed 10/30/2011).

team [ARD Committee] that must decide what type of reporting will adequately inform the parent of the student's progress toward meeting his individual goals. . . .

There is no prescribed remedy for parents when a school district fails to regularly inform them of the student's IEP goals as required under 34 CFR 300.320 (a) (3) (ii). Presumably, a judicial officer or administrator is empowered to select an appropriate remedy consistent with the IDEA and tailored to the specific circumstances. Because the progress report requirement is contained directly in the IEP, it may be argued that failure to inform is a failure to provide services promised in the IEP and therefore a substantive denial of FAPE. It may also be argued that a failure to comply with this requirement is a procedural violation, which may or may not deny FAPE. See, e.g. Beaverton Sch. Dist., 30 IDELR 740 (SEA ORE. 1999) (school district's failure to provide periodic reports did not interfere with the provision of appropriate services to a student with a disability, as a result, the only relief awarded was the implementation of a district corrective action to ensure that the parents would be informed of their child's IEP progress in a timely manner.) Regardless of whether this provision is treated as a substantive or procedural right, the appropriate remedy for failure to provide notice as agreed in the IEP is in the hands of the individual decision-maker. (Emphasis added.)

Page 27, Respondent's Exhibit 17, shows that the reporting method directed by the ARD committee was, "Progress Report/Report Card, Goals, and/or goals and objectives, are updated and sent home." The record shows that the HISD provided the parent with report cards, but the HISD failed to provide the parent with copies of other regular updates of student's progress that are periodically placed in the student's files. I have concluded that the school district's failure to provide Parent with more extensive information about her child's progress than the report cards did not deprive Parent of meaningful participation in directing this child's education. However, I will order the HISD to provide Parent with copies of the updated progress information that is placed in the child's state folder within ten school days of placing the information in the child's state folder in the future. There is no reason she shouldn't have as much written information regarding her child's progress as the HISD has available.

The Student's Evaluation underlying the 2010-2011 IEP

As previously stated, the issues related to the sufficiency of the student's evaluation for the 2010-2011 school year are so closely related to the issues before Hearing Officer Dillard as to be controlled by her decision as originally written or as it may be modified on appeal.

Failure to conduct the psycho-educational and psychological testing of the student ordered by Hearing Officer Dillard

The record is clear that the testing would have been completed but Parent has not made the child available to complete the testing. Failure to make a child available for testing is a statutory basis for excusing a school district's failure to perform an initial evaluation. 20 USC 1414(a)(I)(c). Although not statutory, the same rule applies when the school district's failure to revaluate the child is due to the parent's failure to make the child available for testing. Therefore, all relief claimed by Parent should be denied because the record shows that the only reason the HISD hasn't completed the tests is because Parent hasn't made the child available.

Order

Based upon a preponderance of the evidence and the foregoing findings of fact and conclusions of law I order that HISD shall in the future make and send copies of all updates to the student's folder regarding student's progress on her IEP goals and objectives to Parent within ten school days of the date when the updates are placed in the state folder. Any other or further relief requested by petitioner is denied.

The district shall timely implement this Decision within 10 school days in accordance with 19 T.A.C. §89.1185(q) and 34 C.F.R. §300.514. The following must be provided to the Division of Special Education Programs and Complaints at the Texas Education Agency and copied to the Petitioner within 15 school days from the date of this Decision: 1.) Documentation demonstrating 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.

IT IS SO ORDERED, signed November 3, 2011.

/s/ Larry J Craddock

Larry J. Craddock
Special Education Hearing Officer
for the State of Texas

Notice

Any party aggrieved by the findings and decisions of this Hearing Officer has the right to bring a civil action seeking review in a state or federal court of competent jurisdiction. The party bringing the civil action shall have no more than 90 days from the date of this Decision to file the civil action. See 20 U.S.C. § 1452 as amended.