

KILLEEN ISD	{	BEFORE A SPECIAL EDUCATION
	}	
VS.	{	HEARING OFFICER FOR
	}	
STUDENT	{	THE STATE OF TEXAS
	}	

DECISION OF THE HEARING OFFICER

KILLEEN ISD (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 Student bnf Parents

Prior to hearing, the parent requested an Independent Educational Evaluation (IEE) at public expense. The District filed this Request for Hearing to defend the appropriateness of its assessment. The parent challenges the appropriateness of the District’s assessment and the findings as to the student’s eligibility as a student with an emotional disturbance (ED). The parent also alleges that the District violated IDEIA’s procedural requirements by not filing a complaint or authorizing the IEE without unnecessary delay upon receipt of the parent’s request for an IEE.

PROCEDURAL HISTORY

The Texas Education Agency received the District’s request for hearing on January 6, 2012. On February 15, 2012, the Agency reassigned the hearing to the undersigned Hearing Officer. The parties appeared for hearing on March 2, 2012. Petitioner appeared with counsel, Holly Wardell, and Respondent appeared with counsel Yvonnilda Muniz. At the conclusion of the hearing, both parties requested an opportunity to file written argument and proposed findings of fact. The Decision due date was extended from April 6, 2012, to April 13, 2012. This Final Decision was timely rendered and forwarded to the parties.

Based upon the testimony of the witnesses, an assessment of their credibility, and a review of the exhibits, I make the following findings of fact and conclusions of law and find that Petitioner is entitled to the relief requested in its Request for Due Process Hearing.

FINDINGS OF FACT

1. The student resides within the geographical boundaries of the Killeen ISD and at the time of the hearing was receiving special education and related services under the provisions of IDEIA, 20 U.S.C. §§ 1400, et. seq., and related statutes and regulations.

2. The student entered the KISD as a *** student at the beginning of the 2011-2012 school year. The student began exhibiting frequent, severe emotional outbursts beginning the first day of school and continuing through the date of hearing. RR-187.

3. The documented behaviors include screaming, *** and refusing to comply with adult requests. The student has *** during student’s outbursts, resulting in ***. Student attempted to ***. As of the date of the hearing, the student had received 35 discipline referrals and multiple other incidents not resulting in discipline referrals. RR-195-199; 204-206; 245; 278-281 286; P7; P Supp. 7; P 2nd Supplemental Disclosure ex. 1. As of the date of the hearing, the student had received 16 disciplinary referrals since the initiation of special education services. RR-191. The District offered numerous photographs into evidence showing destruction

resulting from the student's outbursts. Petitioner's Supp. Disclosure 7; Petitioner's Second Supp. Disclosure 1; RR-202-209; 240-241.

4. In addition to formal disciplinary referrals, there have been 56 incidents in which the student's outbursts have resulted in ***. RR-241. The student's behaviors have escalated throughout the school year.

5. The student exhibits the behaviors in structured and unstructured settings in the classroom, cafeteria, hallways, office, PE and music rooms. P2-022; R5-007.

6. The student's behavioral outbursts interfere with the student's learning and that of the other students. RR-211. On many occasions, school personnel have *** following the student's outbursts. According to the student's teacher, all learning stops when the student has an outburst. RR-279

7. The student misses significant amounts of instructional time due to student's behavioral problems. Student's teacher estimates student has missed about 40% of the instructional time as of the date of hearing.

8. As a result of the student's ongoing behavioral issues, district personnel referred the student for a Full Individual Evaluation. P13; R2.

9. On September 23, 2011, the District obtained informed, written consent from the student's parent to conduct a Full Individual Evaluation of the student based on emotional and behavioral concerns. The Informed Consent specified that the Full and Individual Evaluation would include a psychological evaluation. The parent acknowledged receipt of a copy of the Procedural Safeguards. RR-81; P13-141, 143.

10. The special education referral followed a pattern of severe behaviors that interfered with the student's learning and the learning of others. P13-151.

11. The evaluation was completed on October 28, 2011. The evaluator determined that the student met the eligibility criteria of ED and was eligible for special education and related services. P1; P2.

12. On December 6, 2011, the ARD Committee convened to review the assessment. The meeting ended in disagreement. The parent requested an IEE at public expense and the ARD meeting recessed for 10 school days. R4-059. The parent provided an outside evaluation from a psychologist to the District that indicated the student had ADHD and an adjustment disorder with mixed disturbance of emotions and conduct. The psychologist further indicated that further data should be reviewed to determine if the student meets the criteria for Depression and if the diagnosis of Oppositional Defiant Disorder could be ruled out. P3; R4. The parent informed the ARD Committee that she was seeking an additional psychiatric evaluation. District personnel requested consent to communicate with outside evaluators and the parent declined. P4-059.

13. The tenth school day following the December 6 ARD Committee meeting was January 3, 2011.

14. On January 3, 2012, the ARD Committee, after reviewing all assessment data, determined that the student was eligible to receive special education services under the eligibility categories of Emotionally Disturbed (ED) and Other Health Impaired (OHI). (The parent provided a doctor's OHI eligibility report which the ARD Committee accepted.) Although the parent disagreed with the Committee's decision that the student met eligibility criteria for ED, she consented to the provision of special education services and continued to request the IEE. P5-083, 091. The parent also consented for occupational therapy and counseling evaluations as well as a functional behavioral assessment and for the district to communicate with one of the outside evaluators. P5-083;092.

15. On January 6, 2012, Petitioner filed this Request for Due Process Hearing to defend its assessment. (See Request for Hearing) I find that the District filed its request for hearing without “unnecessary delay.”

16. KISD provided the parent notice of the evaluation that contained examples of the types of evaluations including evaluations for Emotional/Behavioral concerns. The Notice also stated that upon the parent’s request, prior to obtaining consent, the parent would be provided with the name and type of psychological evaluation or test to be given to the child and an explanation of how it would be used to develop the IEP. P13-139-140.

17. There is no evidence in the record that the parent requested the name and type of examination or test or an explanation of how the examination or test would be used.

18. KISD used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child. P-1, 2. The FIE contains information gathered from the parent, the student’s teacher, school administrators, the school nurse, the student, school records, disciplinary reports, classroom based and local assessments, observations, and formal and informal assessments. P1, 2.

19. The following testing instruments were administered: Behavior Assessment Scale for Children, Second Edition (BASC 2), the Clinical Assessment of Behavior (CAB), the Conners Comprehensive Behavior Rating Scales (Conners CBRS) the Scales for Assessment of Emotional Disturbance, Second Edition (SAED-2) and the Kaufman Assessment Battery for Children, Second Edition (KABC-II). P1, 2.

20. The parent testified that she was instructed by the school’s evaluator not to complete the parent report for the Conners CBRS. However, the evaluator denied that she instructed her not to complete it. Rather, the evaluator testified that she told the parent it was her choice. RR-375. I find the evaluator’s testimony to be credible in this regard.

21. KISD did not rely on just one measure or assessment to determine whether the student was a child with a disability.

22. The evaluators testified that the assessments used were technically sound. This testimony was uncontroverted.

23. The assessments were selected so as not to be discriminatory on a racial or cultural basis and were administered in the student’s native language. This testimony was uncontroverted.

24. The assessments were administered by trained and knowledgeable personnel and in accordance with the instructions provided by the producers of the assessments. Although Respondent alleged that one of the instruments, the Conners CBRS, was not administered appropriately because it is ***, the evaluator and the supervisor testified that it was appropriate to use the instrument to gain additional information about the student’s behavior when compared to student’s classmates RR113-114; 184. The evaluator relied on information gathered from multiple sources and from multiple instruments and not solely on the Conners.

25. The evaluator and school personnel attributed the student’s extreme behaviors to an emotional disturbance rather than ADHD due to student’s aggressiveness and the severity of student’s behaviors. RR125-127; 209.

26. The assessment included tools tailored to assess the student in the specific area of educational need. Specifically, the student’s needs were identified as being emotional and behavioral. The BASC-2, the

Conners CBRS, SAED and CAB were all designed to measure educational needs in the areas of emotional and behavior performance.

27. The student was assessed in all areas of suspected disability, including health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. P2-20.

28. The FIE also contains an analysis of the student's behavior to assist educators in understanding the frequency, location and possible functions or antecedents of the student's behavior. It also provides specific recommendations for the student's educational program. P-1; 2.

29. Based on the evaluation, the ARD Committee determined that the student meets the criteria as a student with an Emotional Disturbance. Specifically, the team determined that the student has an inability to build or maintain satisfactory interpersonal relationships with peers and teachers and engages in inappropriate types of behaviors or feelings under normal circumstances. Further the characteristics are exhibited over a long period of time, exhibited to a marked degree and adversely affect educational performance creating a need for special education and related services. The evaluator and the team determined that the behaviors are not a result of social maladjustment. P1-013; P2. The parent presented no evidence that rebutted the findings in the evaluation or the testimony regarding the nature and severity of the student's behaviors. I find that the credible evidence in this case supports the finding that the student meets the criteria for a student with an Emotional Disturbance.

30. I find that the District's evaluation is appropriate. The parent has failed to present credible evidence that the evaluation is not appropriate.

31. I find that the District timely initiated the request for hearing.

The parent is not entitled to an Independent Educational Evaluation at public expense.

DISCUSSION

Appropriateness of Evaluation

The IDEIA's implementing regulations require that school districts conduct initial evaluations before the provision of special education and related services. The initial evaluation must be conducted within 60 days of receiving parental consent and must consist of procedures to determine if the child is a child with disability and to determine the educational needs of the student. 34 CFR §300.301. The IEP team must review existing evaluation data on the student, including evaluations and information provided by the parents and classroom-based, local or state assessments and classroom observations. 34 CFR 300.305(a). The District must assess the student in all areas of suspected disability. 34 CFR 300.304(c)(4).

The evaluation procedures include provisions requiring school districts to assess such children in all areas related to their suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status and motor abilities. See 34 C.F.R. §300.304. In this case, the student presented with emotional and behavioral issues and the evaluation addressed those issues and appropriately included a psychological evaluation. Additionally, the ARD Committee considered information obtained from the parent and the student's teachers, classroom observations and information gathered from formal and informal assessments in reaching its eligibility determination.

The FIE included tools tailored to assess the specific areas of educational need. The student was referred to special education based on emotional and behavioral performance. The BASC-2, Conners CBRS, SAED and CAB were all designed to measure the student's educational needs in these areas. The student was

assessed in all areas related to *suspected* disability. The referral to special education was made for emotional and behavioral concerns, rather than academic reasons or a suspected learning disability. Therefore, the measures chosen were appropriate. Nonetheless, the evaluator administered cognitive testing and obtained a Fluid-Crystallized Index (FCI) of 113, but cautioned that the scores could be depressed due to the student's behavior during the testing. Although the student was not able to participate in formal achievement testing over more than one occasion due to behaviors, the evaluator was able to rule out that a cognitive impairment was interfering with student's ability to control student's emotions and behaviors. P1; P2. The District selected appropriate measures to assess the student in all suspected areas of disability.

Appropriateness of Eligibility Determination

In this case, after completion of the FIE, a multi-disciplinary team and the parent determined that the student is a child with a disability and in need of special education and related services and the parent consented to placement in special education. P5. In fact, the parent does not question the child's need for services at all or the child's eligibility as a student with Other Health Impairment. Rather, the central issue in this case, according to the parent, is whether the student's eligibility classification is appropriate.¹ Respondent claims that there is no educational need for services based on an emotional disturbance, but nonetheless consented to the initiation of special education and related services. Respondent's position is inconsistent with IDEIA and the underlying purposes of the Act - the provision of appropriate educational services, *individualized to address the student's educational needs*. IDEIA provides as follows

“Nothing in this chapter requires that children be classified by their disability so long as each child who has disability listed in section 1401 of this title and who, by reason of that disability needs special education and related services is regarded as a child with a disability under this subchapter.”

20 U.S.C. §1412(a)(3)(B).

If the inquiry into a student's educational program begins and ends with the eligibility “label” then the mandates of the Act are not being met. IDEIA requires that a student's educational plan be individualized for the student, based on student's needs as identified in student's assessment, not the student's eligibility classification. A bright line statement that special education must somehow look different for a student based solely on the student's eligibility classification is just as incorrect a premise as the statement that all children with a particular eligibility must require the same educational program. Both statements ignore the individual needs of the child and the reality of the school's mandate – to provide an education that is individualized to meet the student's needs. The parent does not contend that the student's IEP is inappropriate or that that it is not individualized according to student's needs. She merely disputes the eligibility label. Nothing in IDEA requires a particular disability classification so long as the student who is eligible for special education and related services receives those services. 20 USC 1412(A)(3)(B).

The case is similar to *Pohorecki v. Anthony Wayne Local School District*, 637 F.Supp.2d 547 (N.D. Ohio 2009). In that case, a parent argued that the school improperly characterized the student as eligible for services under the category of emotional disturbance rather than autism. The student had multiple diagnoses, including ADD, ADHD and seizures. The IEP team determined on the basis of its evaluation that the student was eligible to receive services under the eligibility category of emotional disturbance rather than Autism and developed an IEP for the student specific to the needs identified in the parent's and the school's evaluations. At the due process hearing level, although the hearing officer held that the district correctly classified the student, he concluded that the classification of a particular disability is not critical in evaluating a FAPE. Rather, the important issue is whether the goals and objectives are appropriate for the student. *Id.* The Court agreed and recognized that the student's disability was not easily categorized and that reasonable minds could differ as to

¹ The parent did not file a counterclaim to challenge the appropriateness of the student's IEP that was developed following the review of the FIE.

what student's disability should be called. The Court affirmed the hearing officer's decision that the student received a FAPE. In addressing the eligibility issue, the Court reasoned that "[t]he very purpose of categorizing disabled students is to try to meet their educational needs; it is not an end to itself." *Id.* In other words, the focus is ultimately on whether the student receives appropriate individualized educational services, not the definition of student's disability. In this case, the focus is ultimately on whether the student was appropriately determined to be eligible for special education and related services based on student's evaluation. The parent does not dispute student's eligibility. Rather she disputes one of student's eligibility classifications. The parent's argument is without merit.

Moreover, the evidence is consistent with a determination that the student meets the criteria for ED. The evidence presented showed destructive and persistent behaviors on the part of the student that resulted in *** and disruption to the student's learning and that of the entire classroom. Based on the evidence it is clear that student has demonstrated an inability to build or maintain satisfactory relationships with peers and other students and engages in inappropriate behaviors under normal circumstances. These behaviors have been exhibited since the first day of school and have escalated. In fact, there was evidence that the behaviors existed prior to enrollment in KISD. P-1. The behaviors have been exhibited to a marked degree and there is no doubt that the behaviors adversely affect educational performance. I find based on the evidence the student meets the criteria for a student with an emotional disturbance. *See* 34 CFR §300.8(b)(4). Although it is undisputed that the student is capable of performing academically, academic success is not dispositive in determining whether the child has an educational need for special education and related services. Educational needs include all aspects of a student's education, including social skills, development skills and functional skills. *Student v. Seguin ISD*, Dkt. No. 232-SE-0305 (Tex. Hearing Officer, 2005).

Timeliness of Request for Hearing

The parent's complaint that the District did not timely file a request for hearing to defend its assessment is also without merit. The parent initially requested an IEE during the initial ARD Committee meeting on December 6, 2011. The ARD meeting recessed for 10 school days and reconvened ten school days later, January 3, 2012. The District filed its request for hearing without unnecessary delay on January 6, 2012. *See* 34 CFR 300.502.

The totality of the evidence established that the District relied on a variety of assessment tools to determine the student's current educational needs as contemplated by IDEIA and its implementing regulations. The uncontroverted testimony establishes the appropriateness of the District's FIE, including its psychological evaluation, and the eligibility determination. Additionally, the District filed its request for hearing without unnecessary delay. The parent is not entitled to an Independent Educational Evaluation at public expense.

CONCLUSIONS OF LAW

1. The student is eligible for special education and related services under the provision of IDEIA, 20 U.S.C. § 1400, et. seq, and related statutes and regulations.
2. The Killeen Independent School District is the local education agency responsible for the provision of the student's free appropriate public education.
3. The Petitioner bears the burden of proof in its request for an Order that its evaluation was appropriate. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). Petitioner has met its burden. The District's Full Individual Evaluation of the student is appropriate and meets the requirements of 34 CFR § 300.303-300.311.
4. The parent is not entitled to an Independent Educational Evaluation at public expense.

ORDER

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that all relief requested by Petitioner is GRANTED. The District's current evaluation is appropriate. Respondent is not entitled to an IEE at public expense.

Signed this 13th day of April, 2012

Sharon M. Ramage
Special Education Hearing Officer

SYNOPSIS OF DECISION

Issue: Whether the District's current evaluation of the student is appropriate so that the parent is not entitled to an independent educational evaluation at public expense.

Citation: 34 CFR § 300.301; 34 CFR §300.304; 34 CFR §300.305

Held: For Petitioner

Issue: Whether the District timely filed its request for due process hearing to defend it's FIE.

Citation: 34 CFR §300.502(b).

Held: For Petitioner