

STUDENT, *B/N/F*
PARENT,

Petitioner,

V.

KILLEEN INDEPENDENT
SCHOOL DISTRICT,

Respondent.

§ BEFORE A SPECIAL EDUCATION
§
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§
§
§ HEARING OFFICER
§
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§
§
§ FOR THE STATE OF TEXAS

DECISION OF THE SPECIAL EDUCATION HEARING OFFICER

I. STATEMENT OF THE CASE

Petitioner, Student *b/n/f* Parent (“Petitioner” or “Student”), filed a Request for Due Process Hearing (“Complaint”) against Killeen Independent School District (“the District” or “Respondent” or “KISD”) with the Texas Education Agency (“TEA”), requesting a Due Process Hearing pursuant to the Individuals With Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. §1400 *et. seq.* Student alleged the following: KISD failed in its “child-find” duty to timely evaluate Student for special education and related services, 2) to find Student eligible for special education and related services, and 3) to design and implement a special education program and placement for Student in the least restrictive environment (“LRE”).¹ Student seeks an order requiring KISD to conduct a full and individual evaluation (“FIE”), to provide the Parent with a copy of the FIE, and to convene a meeting of the Admission, Review, and Dismissal Committee (“ARDC”) to review the results of the evaluation.² KISD asserts that Student is not a child with a special education disability in need of special education and related services.

II. PROCEDURAL HISTORY

TEA received Student’s Complaint on June 14, 2012, assigned the case Docket No. 306-SE-0612, and assigned the matter to the undersigned Hearing Officer. On June

¹ Student requested evaluations for ***, speech delays and impairments, Attention Deficit, Hyperactivity Disorder (“ADHD”), psychological problems (such as anxiety), and dyslexia.

² The District denied the FIE request based upon a finding that Student manifested no educational need for special education services but it did agree to assess Student for dyslexia in fall 2012.

15, 2012, the undersigned sent the Initial Scheduling Order to the parties stating that the pre-hearing telephone conference would convene on July 5, 2012, the Due Process Hearing would take place on July 31, 2012, and the Decision would issue by August 30, 2012. The pre-hearing telephone conference was continued to July 6, 2012.

On June 25, 2012, KISD filed its Answer to Student's Request for Special Education Due Process Hearing and Required Notice. In addition to its general denial, KISD asserted the affirmative defense of the one-year statute of limitations.

On June 27, 2012, KISD filed its Motion for Production of Documents. On July 3, 2012, Student filed its Motion for Production of Documents. On July 3, 2012, the undersigned granted the parties' Motions for Production of Documents, ordering both parties to serve responses and/or objections along with the production of responsive documents on, or before, July 13, 2012.

On July 6, 2012, Student filed and served student's responses and objections to KISD's Requests for Production. Student did not produce any documents.

On July 6, 2012, the parties convened the pre-hearing telephone conference. In attendance were the following: 1) ***, Student's Parent; 2) Ms. Kelly Shook and Ms. Holly Wardell, KISD's counsel; 3) ***, Special Education Director; 5) the undersigned Hearing Officer; and 6) the court reporter, who made a record of the telephone conference. The parties discussed the hearing issues, discussed discovery matters, and re-scheduled the Due Process Hearing for August 1-2, 2012. The parties scheduled a meeting between the Parent and school personnel on July 9, 2012, for the sole purpose of delivering Student's educational records to the Parent.³

On July 17, 2012, the parties convened the second pre-hearing telephone conference to discuss discovery issues. In attendance were the following: 1) ***, Student's Parent; 2) Ms. Wardell, KISD's counsel; 3) ***, Special Education Director; 4) the undersigned Hearing Officer; and 6) the court reporter, who made a record of the telephone conference. The parties discussed the discovery complaints lodged by both sides. The undersigned instructed the parties to put their objections in writing related to the specific document or category of documents. Additionally, the parties agreed to convene the Due Process Hearing on August 1-2, 2012, and extended the decision deadline to September 1, 2012.

Also on July 17, 2012, KISD filed a Motion to Compel, seeking an order requiring Student to serve responsive documents to certain specified Requests for Production that Student had declined to produce. On that same day, the undersigned sent an order to the parties via email instructing Student to produce certain specified documents. Included in this order was the ruling by the undersigned that Student's Second Set of Requests for Production concerned areas over which Texas Special Education Hearing Officers have no jurisdiction and as such, KISD did not have to file responses to these discovery

³ The meeting occurred on [***], but unfortunately, [***]. On July 10, 2012, Student filed its Second Motion for Production of Documents, requesting documents [***].

requests. Student failed to produce any responsive documents ordered by the undersigned.

On July 17, 2012, Student filed a list of the types of documents that Student requested in the first and second sets of Requests for Production that Student alleged KISD withheld. Included in this list were multiple documents unrelated to the issues in this due process proceeding.

On July 18, 2012, Student filed a Motion for Protective Order, seeking protection from producing any documents protected by the Health Insurance Portability and Accountability Act ("HIPAA"). On July 19, 2012, KISD filed a Second Motion to Compel, requesting documents related to Student's issues involving medical treatment. Also on July 19, 2012, KISD filed a Motion for Protective Order, seeking protection from Student's Request for employee records.⁴

Noting that Student's Complaint was based, in part, upon allegations that student qualifies for special education services under ADHD, ***, and speech developmental problems, by Order dated July 22, 2012, the undersigned ordered Student to produce relevant medical information. Likewise, in noting that Student's hearing issues were very limited in nature and that no issue required the production of some types of the employee records, the undersigned ordered KISD to produce a portion of the requested employee files.

The Due Process Hearing convened as scheduled on August 1, 2012. Student was represented by student's Mother; KISD was represented by counsel Holly Wardell and Kelly Shook, with *** serving as the District's representative. The Parent opened the hearing and several individuals observed during all, or part, of the proceeding that day. At the request of the Parent, the hearing concluded before 5:00 p.m., on August 1, 2012, and the parties agreed to convene the last day of the scheduled hearing on August 2, 2012.

The Due Process Hearing convened on August 2, 2012. However, Student's Parent was unavailable to participate in the hearing due to extenuating circumstances.⁵ Over the objection of KISD, the undersigned continued the Due Process Hearing to a subsequent, mutually agreeable date, September 6, 2012.

The Due Process Hearing reconvened as agreed on September 6, 2012. Student was represented by student's Mother; KISD was represented by counsel Holly Wardell and Kelly Shook, with *** serving as the District's representative. At the conclusion of the hearing, the parties and Hearing Officer agreed to a post-hearing schedule: the parties

⁴ KISD objected to some of the delineated employee records, such as "mental assessments, criminal background reports, and performance reports."

⁵ [***].

would provide their closing arguments by October 9, 2012; the Decision would issue by October 17, 2012. ⁶

III. FINDINGS OF FACT

1. KISD is a political subdivision of the State of Texas and a duly incorporated Independent School District responsible for providing FAPE under IDEIA and its implementing rules and regulations.
2. Student is an ***-year old child who resides within the jurisdictional boundaries of KISD with student's Parents and siblings. Student has attended KISD since ***, although student's Parents *** (R.11).
3. In May 2012, at the end of *** grade, Student's Parent requested that KISD assess student for special education and related services (R.3.29; T.III.305-6). KISD investigated the Parent's concerns, and on June 6, 2012, informed the Parent that KISD would not evaluate Student for special education services because a) Student did not appear to require services found only in special education; b) Student appeared to be progressing in student's current educational setting; and c) Student did not manifest a disability (P.3.32).
4. On June 7, 2012, the Parent sent KISD a completed form entitled "Consent for Full and Individual Evaluation" (P.29). The form used by the Parent was not one provided to her by the District and it was not the current form used by the District (R.6.30; T.III.381-85). On June 11, 2012, KISD again sent a written refusal to evaluate Student for special education and related services (R.6.30-31).
5. At the end of *** grade, school year 2011-12, Student was passing all of student's classes with A and B averages; student's benchmark testing showed mastery or commended performance on all areas of Math tested and on-grade-level performance in Language Arts (P.3.32). Student's teachers reported that student had not received any disciplinary referrals, that student displayed age-appropriate social behavior, and that student had friends at school (P.3.32).
6. Student's *** grade teacher reported that student completed student's work efficiently and correctly; student did not struggle with assignments; student was a "model" student behaviorally and academically (T.III. 303-5). Student participated in several activities that only "model" students were invited to do. Student was part of *** (T.III. 305).

⁶ References to the Due Process Hearing Record are identified as follows: "T.I" refers to the Certified Court Reporter's Transcription of testimony made on August 1, 2012;"T.III" refers to the Certified Court Reporter's Transcription of testimony made on September 6, 2012; the numbers following the volume designation refer to the pages within the particular volume of testimony. "P.#.#" refers to Petitioner's Exhibits by number and page; "R.#.#" refers to Respondent's Exhibits by number and page. There are no references to "T.II," which would refer to the Certified Court Reporter's Transcription of testimony made on August 2, 2012, because no testimony was taken that day due to the Parent's inability to attend the hearing.

7. Student never displayed any characteristics of ADHD, such as hyperactivity, impulsivity, or sensitivity to noises (T.III.324-35). Student's Parent affirmed that student had never been diagnosed with ADHD (T.III. 381).

School Year 2011-2012: Evaluations

8. Prior to the beginning of the 2011-2012 school year, on July 28, 2011, KISD assessed Student on the Grade Placement Assessment For *** (Stanford Achievement Test) (P.4.56). This is a test administered to all students upon their enrollment or re-enrollment in the District who have been homeschooled or who have attended non-accredited public, private, or parochial schools (P.4.56; T.I.61; T.I.171). Student scored at the *** grade level in Reading and *** grade level in Math (P.4.56). This assessment is difficult and not designed to identify weaknesses or intervention needs (T.I.137; T.I.174). This assessment was an aid in determining Student's grade placement upon student's re-enrollment in KISD, along with observations, review of prior academic records, and teacher recommendations (P.4.56). Student was placed in the *** grade for school year 2011-2012. Student's grades on the Grade Placement Assessment were not sufficient to trigger a special education referral.
9. At the beginning of *** grade, KISD administered the ***, a benchmark assessment given to all *** graders. Student scored at the *** level on some skills (P.9.80). Based upon student's *** scores at the beginning of the year, the *** generated an "at-risk" label for Student in the area of Readiness (R.8.38; T.III.261). Most *** grade students manifest skills that are *** at the beginning of the school year (T.III.238-40). *** means that the child has not mastered all of the skills in a particular area; however, it does not raise concerns or trigger a special education referral.
10. *** tests are given at the beginning, in the middle, and at the end of the school year, and they increase in difficulty throughout the year (T.I.85-86; T.III.327). Student scored *** on the first ***; *** in student's middle and end-of-year *** tests; *** in student's end-of-year *** assessment; and *** in student's end-of-year *** (T.II.238-240). Student's *** scores throughout the year showed growth and progress in all areas (T.I.111-16).
11. Student's teacher evaluated student's abilities and provided student with interventions that were for enrichment, not remediation (R.8.39).
12. Student was also assessed at the beginning of *** grade with the *** (R.3). This assessment requires students to read to their teachers and answer comprehensive questions (R.3; T.I.108; T.III.310). Student scored above-average on this assessment. Student continued to show progress on this assessment during the school year, finishing at the *** grade level (R.3; P.4.49).

13. At the beginning of *** grade, Student began working on an intervention program called ***, which is a computerized math program used for enrichment (T.I.130). Student participated in this enrichment program as part of the intervention hour in which all students at student's school participate (T.III.315). This program is self-paced and does not allow for individualized interventions that would normally be needed for struggling students (T.I.130). Student completed this program within four (4) months and achieved mastery or commended performance in all areas (R.4; T.III.315-16). Student performed so well on *** that student earned the ***, which is a special award given to top-performing students who complete the program (P.9.88; T.III.317-18). *** (T.III.317-18).
14. Student has consistently performed on grade level on the District's benchmark assessments (R.1). Student is above average academically, making *** throughout *** grade.
15. Student is socially developed. Student has friends and is considered a role model in the classroom. Student has received special awards for student's behavior and academic skills, and is *** (T.III.305-6).
16. Student has never received a disciplinary referral or manifested any behavior problem. Student did not display any characteristics of hyperactivity, impulsivity, and did not appear to have any noise sensitivities (T.III.324-25).
17. None of Student's teachers or service providers suspected any disability. The evidence failed to prove that KISD should have suspected a disability.

IV. DISCUSSION

IDEIA mandates that all state school districts receiving federal funding must provide all handicapped children a free, appropriate, public education ("FAPE"). The United States Supreme Court, in *Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 175, 102 S.Ct. 3034 (1982), established a two-part test for determining whether a school district has provided a student FAPE: 1) the school district must comply with the procedural requirements of IDEIA, and 2) the school district must design and implement a program "... reasonably calculated to enable the child to receive educational benefits."

Before this duty to provide FAPE arises, however, the student 1) must have a qualified disability and 2) must demonstrate a need for special education and related services as a result of the disability. 34 C.F.R. §300.8(a)(1).

The specific disabling conditions are identified in 20 U.S.C. §1401(3)(A): 1) mental retardation, 2) hearing impairments (including deafness), 3) speech or language impairments, 4) visual impairments (including blindness), 5) emotional disturbance, 6) orthopedic impairments, 7) autism, 8) traumatic brain injury, 9) other health impairments, 10) specific learning disabilities, 11) deaf-blindness, or 12) multiple disabilities. See also

34 C.F.R. §300.8(c)(1)–(13) (hearing impairments [§300.8(c)(5)] and deafness [§300.8(c)(3)] are separated into two (2) separate categories in the federal regulations). The identification of disabling conditions in Section 300.8 is exhaustive. *Letter to Fazio*, 21 IDELR 572 (OSEP 1994). However, the list of specific impairments included within the definition of each category of disabilities is not meant to be exhaustive.⁷ *Id.*

In the instant case, Student alleges that student qualifies for special education and related services based upon a plethora of disabilities: ADHD, ***, and speech developmental problems. However, KISD responds that Student has never provided the District with any assessment or finding that Student has been diagnosed with a qualifying disability, including ADHD. Further, KISD responds that at no time during Student’s tenure at KISD has any of teacher or other service provider suspected any disability. Student has been a top-performing student in the general education setting and has made above-average progress in that setting without any individualized assistance, modifications, or accommodations.

A District’s “Child-Find” Obligations

The “child-find” requirements of IDEIA mandate that states shall establish policies and procedures to ensure that all children with disabilities residing in the state, regardless of the severity of their disabilities, who are in need of special education and related services, are “identified, located and evaluated.” 20 U.S.C. §1412(a); 34 C.F.R. §300.111. This is an affirmative duty placed upon local school districts; accordingly, a parent is not required to request that a school district identify and evaluate a child. Indeed, a parent’s failure to request an evaluation does not relieve the school district of its “child-find” obligations. *Robertson County School System v. King*, 24 IDELR 1036 (6th Cir. 1996).

A school district’s unawareness of a student’s possible disability and need for special education and related services will not relieve the district of its obligations if it *should have suspected* that a student had a qualifying disability. However, where a parent requests that the school district evaluate the child, but the school district has no reasonable basis for suspecting that the student has such a disability, it is under no obligation to evaluate the child. *Letter to Williams*, 20 IDELR 1210 (OSEP 1003). In such a scenario, the school district must provide the parent with written notice of refusal to evaluate. 34 C.F.R. §300.503(a)(2). This written notice must include: 1) a description of the refused activity; 2) an explanation of why the district refused to evaluate the child; 3) a statement that the parents have protection under the IDEIA’s procedural safeguards and the means by which they can obtain a description of those safeguards; 4) sources for parents to contact to obtain assistance in understanding the law; and 5) a description of any other options considered and other factors relevant to the district’s decision. 34 C.F.R. §300.503(b).

⁷ ADD and ADHD are not specific disabling conditions under IDEIA, although a student with ADD/ADHD may be eligible as “other health impaired” (“OHI”).

In this case, the Parent requested a special education evaluation of Student at the end of *** grade, school year 2011-2012. The District investigated the Parent's concerns in all areas: academically, behaviorally, and socially.

KISD learned that Student was an A-B student throughout *** grade, working on general education curriculum without individual assistance, modifications, or accommodations. Student performed in the *** percent (***) of student's peers who did not receive aid from Response to Intervention ("RTI"). Student made the *** all year, which placed student with the top *** percent (***) of the student population. Student completed student's class work efficiently and correctly; student did not require breaks or appear to struggle with class assignments or homework.

Student manifested no behavioral problems. Student has never received a disciplinary referral. Student received special awards and acknowledgment for student's behavior and academic skills. Student did not have unusually high absences, tardies, or referrals to the nurse. Student did not display any of the characteristics of ADHD, such as hyperactivity, impulsivity, or noise sensitivity.

Student made, and maintained, friends; student was helpful to student's teachers and peers. Student was described by student's teacher as "a model citizen." Student was part of the ***. Student participated in the ***, which is a program that ***.

Until KISD received the evaluation request in May 2012, Student's Parent had never informed the District of any of the delineated disabilities set forth in the Complaint. Indeed, the Parent informed KISD that Student had not been diagnosed with ADHD. The Parent failed to include on Student's Health Form any information regarding ADHD, learning difficulties, speech or hearing problems, *** etc.

Based upon the information garnered during its investigation into Student's alleged qualification under special education, KISD determined 1) that it had no reasonable basis to suspect that Student has a disability, and 2) that it has no obligation to conduct the requested FIE. Upon making these determinations, KISD provided the Parent with written notice of refusal. This notice complied fully with the form and content requirements of Section 300.503(b).

Student bore the burden of proving that KISD failed in its "child-find" obligations owed to student. Student failed to meet this burden of proof.

V. CONCLUSIONS OF LAW

1. KISD did not fail in its "child-find" duty when it declined to conduct an FIE upon parental request because it had no reasonable basis for suspecting that Student has a disability. *Letter to Williams*, 20 IDELR 1210 (OSEP 1003); 20 U.S.C. §1412(a); 34 C.F.R. §300.111.

