

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

DECISION OF THE HEARING OFFICER

Statement of the Case

Student, by the student’s next friend and parents (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 Lovejoy Independent School District (hereinafter "Respondent" or "LISD").

Petitioner was represented by Myrna Silver, an attorney in Dallas. Respondent was represented by Justin Graham and Mari McGowan with the firm of Abernathy, Roeder, Boyd & Joplin in McKinney.

Petitioner's request for hearing was filed on July 30, 2009 and came on for hearing by agreement of the parties and order of the hearing officer on November 16, 17, and 18, 2009, in the offices of the district. Counsel for the parties were afforded an opportunity to file written closing arguments and agreed that this decision would be timely issued on or before January 15, 2009, in accordance with the regulatory time-line.

Petitioner alleged that the district failed to timely identify and evaluate the student to determine that the student is eligible for special education and related services, that the one year statute of limitations was tolled by the district’s failure to provide information about procedural rights to the parents, and that the district failed to provide the student with a free appropriate public education (“FAPE”) and related services.

As relief, Petitioner sought an order tolling the one year statute of limitations so that relief for Petitioner could be extended for approximately six months prior to the one year authorization for jurisdiction concerning relief for Petitioners. Petitioner additionally sought compensatory private counseling for the denial of FAPE for the spring semester of 2008, removal of disciplinary records of the district, and reimbursement for: a) a private evaluation of the student; b) tuition and expenses related to the student's private placement at a school in Carrollton beginning January 19, 2009; c) costs associated with transportation of the student to and from the school; and d) costs of a psychological assessment performed in March 2009 (after the student was withdrawn from the district).

Respondent sought summary judgment on any claims for relief beyond one year prior to the filing of Petitioner's request for hearing.

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 parents within the Lovejoy Independent School District. [Petitioner's Exhibit 1]
2. The student was a \*\*\* grade student within the district in the 2007-2008 school year. [Transcript Pages 13 & 14]
3. The student had some problems with behavior during the school year and the student's parent told the district that they were trying to get medication adjusted for the student's ADHD (attention-deficit hyperactivity disorder). [Transcript Page 22]
4. One behavior incident in December 2007 resulted in a DAEP (disciplinary alternative educational placement) and, because of the student's reaction to the placement upon learning that the student would \*\*\*, the placement was extended to three weeks served in January 2008. [Petitioner's Exhibit 3 and Transcript Pages 29-31]

5. Sometime during late February, 2008, the student's parent informed the school that a psychological evaluation had previously been conducted for the student in December 2007. The evaluation was performed by David Falkstein, Ph.D. Dr. Falkstein reported that the student had a diagnosis of ADHD which was in "partial remission", that the student might possibly be bipolar and that the student should be monitored for academic process and behavior. Dr. Falkstein also noted a "disruptive behavior disorder NOS" and a "depressive disorder NOS mild." [Petitioner's Exhibit 1]

6. Dr. Falkstein reported that the student was "an appropriate candidate for psychopharmacological intervention" and recommended working with a psychotherapist to deal with the student's issues and family therapy because the student's "family life is reported to be conflictual (sic)." [Petitioner's Exhibit 1]

7. Dr. Falkstein recommended that the parents consult with a therapist and "seek out self-help materials" for dealing with ADHD and depression. Dr. Falkstein also recommended that if the student's "emotional, behavioral or attentional problems persist or worsen, and lead to a more significant educational need, then it is suggested that [the student] can be considered for a 504 intervention plan or for placement in special education as a student with an other health impairment (due to ADHD) or emotional disturbance, so that [the student] can receive any accommodations/services" needed. [Petitioner's Exhibit 1]

8. The evaluation was provided to the school but the student's parent did not meet with school personnel to discuss the evaluation. [Transcript Pages 32 & 33]

9. During the student's \*\*\* grade school year the student was successful academically and had little problems with behavior in the student's academic classes. [Respondent's Exhibit 3]

10. Counsel for the student stipulated that there was no evidence of academic need for special education for the student during the school years of 2007-2008 and 2008-2009. The

student's grades and performance on the testing of academic knowledge and skills showed academic progress. [Respondent's Exhibits 8 & 25]

11. Another behavior incident with the student resulted in a second placement at the DAEP. The district then began the process of an early response to intervention ("RTI") to consider ways to deal with the student's problem behaviors. The district utilizes the RTI process in meetings of a "Problem Solving Team" ("PST"). [Petitioner's Exhibit 4 and Respondent's Exhibit 5]

12. The initial Problem Solving Team meeting for the student was held on March 12, 2008. The team is made up of school personnel who meet to consider information about the student and to develop interventions to deal with the student's problem. The team on March 12, 2008, determined that their goals were to manage the student's behavior during the school day and to manage the student's anger when the student was frustrated or stressed. The team determined as strategies some sessions with the school counselor, strategies to manage anger, use of weekly goal sheets and completion of a reflection sheet as the student reflects on the student's behavior. [Petitioner's Exhibit 4 and Respondent's Exhibit 5]

13. The district provided a parent information form for the student's parents to gather information about the student, the parents' concerns for the student and information about how the parents deal with the student at home. The parents noted on the form that their concern was about the student's "attention-deficit." [Petitioner's Exhibit 5]

14. No referral for the student was made for Section 504 of the Rehabilitation Act consideration or IDEA evaluation because the district did not believe a referral necessary. They believed that the student could be successful with the strategies developed by the PST. And the student was successful with the behavior goals when the student returned from the DAEP placement. The student's parents did not seek further referral and were pleased with the PST

process and the development of the student's goals. [Petitioner's Exhibit 5 and Transcript Pages 110-114]

15. The parents were not provided with procedural safeguards in the March 2008 PST meeting because school personnel said it was "not a 504 meeting or a special ed meeting which is when those procedural safeguards are provided." Instead, district personnel believed that the RTI process was initiated to see if the student could be successful without more intrusive interventions through 504 or IDEA. [Transcript Page 126]

16. The student's parents were provided a student handbook in the 2007-2008 school year, and the handbook contained provisions related to Section 504 and IDEA. [Joint Exhibit 1 and Transcript Page 129]

17. The student's parent testified that school personnel informed them at the end of the 2007-2008 school year that they could request an evaluation from the school. [Transcript Page 159]

18. At the beginning of the 2008-2009 school year, the parents informed school personnel about concerns with the student having trouble with peers. [Petitioner's Exhibit 20 and Transcript Pages 160 & 161]

19. District personnel scheduled another PST meeting for the student for September 3, 2008. The team developed a behavior intervention plan ("BIP") at the meeting. The student's parents consented to an evaluation for IDEA eligibility and were provided a copy of the procedural safeguards. [Petitioner's Exhibit 11 and Respondent's Exhibit 10 and Transcript Page 172]

20. Another behavior incident involving the student and a confrontation with a substitute teacher caused the school resource officers to intervene and the student was taken home. The student was initially given three days of out of school suspension but then was to begin another DAEP placement. [Petitioner's Exhibit 7 and Transcript Page 177]

21. The student's parent placed the student at the \*\*\* for two weeks or ten school days. [Respondent's Exhibit 16 and Transcript Page 177]

22. When the student returned to the DAEP, the student was successful academically and behaviorally as long as the student attended. [Respondent's Exhibit 17]

23. A full individual evaluation ("FIE") was completed for the student on October 16, 2009. The evaluation noted high academic ability and performance and concluded that the student has ADHD and is eligible for special education and related services as emotionally disturbed ("ED"). The evaluation recommended the development of a BIP. [Petitioner's Exhibit 8]

24. An admission, review and dismissal ("ARD") meeting was held on October 21, 2009. The ARD considered positive behavioral support for the student and a level system to manage the student's behavior. [Respondent's Exhibit 18]

25. The student was making progress in behavior upon return to school. [Transcript Page 205]

26. The ARD committee could not reach an agreement on how to proceed with an IEP and BIP for the student, and counsel for the student and LISD worked out a proposal for a schedule as the committee recessed with the understanding that the committee would reconvene for further deliberations. [Petitioner's Exhibit 12 and Respondent's Exhibit 18]

27. The parties through counsel could not arrange for the ARD to reconvene until January 21, 2009. The committee noted the student's progress in academics and behavior in the DAEP and considered information from Children's Hospital in recommendations for a behavior plan for the student. The ARD committee ended in disagreement again and a manifestation determination review was scheduled for the following day – January 22, 2009. [Respondent's Exhibit 23 and Transcript Pages 324 & 325]

28. On January 22, 2009, the student's parent withdrew the student from school without giving notice to the district or asking the ARD for a private placement. [Respondent's Exhibit 24 and Transcript Pages 322-328]

29. An independent evaluation by Linda Felini-Smith, Ph.D., a psychologist, was completed on the student in March, 2009, after the student's withdrawal from the district. Dr. Felini-Smith noted the student's accomplishments and abilities academically and recommended an educational placement with a "high degree of structure." She also recommended some adjustments to the drafted BIP for the student. She did not specifically determine that private placement was required. [Petitioner's Exhibit 10]

30. The student's parents placed the student in private day placement in the \*\*\* school and the student continued placement at the \*\*\* school through the time of the hearing. [Transcript Page 193]

31. \*\*\* serves students with behavior problems. [Transcript Page 193]

### Discussion

As in many special education disputes, the controversy presented at the hearing in this matter shows basically a problem with communication. The student's parents apparently did not understand the resources and services available to them from the district, and the district did not know of the parents' frustration until they sought advice from an advocate and legal advice from an attorney.

Fortunately, the district's efforts to serve the student were sufficient for the student to demonstrate educational progress and the student's needs were met despite some problems with the student's behaviors. Petitioner has the burden of proof to demonstrate that the district's actions failed to meet the standards of IDEA. Petitioner failed to prove that the district's work with the student and the student's parent in the eighteen months prior to the filing of their request for hearing warrant any relief under the law.

Petitioner presented evidence on claims for a denial of FAPE and for reimbursement for private placement. No evidence or insufficient evidence was presented on the remainder of Petitioner's claims.

#### Conclusions of Law

1. Petitioner did not meet its burden of proof to show that the district failed in its identification, evaluation, development and proffer of an individual education plan with related services for the student failed to provide for a free appropriate education. Petitioner failed to rebut the presumption of Tatro v. Texas, 703 F.2d 823 (5th Cir. 1983).

2. Respondent timely developed an individualized education plan which offered the student the opportunity to make educational progress in the least restrictive environment appropriate under the standard of Board of Education of the Hendrick Hudson School District v. Rowley, 458 U.S. 176 (1982), 34 CFR 300.552, and 19 T.A.C. §89.1055, and Cypress-Fairbanks ISD v. Michael F., 118 F.3d 245 (5th Cir. 1997), 34 CFR 300.300, and 19 T.A.C. §89.1055.

3. Petitioner is not entitled to compensatory relief for the cost of private placement under School Committee of Town of Burlington v. Massachusetts Department of Education, 105 S.Ct. 1996, 471 U.S. 359 (1985); 20 U.S.C. §1412(a)(10)(C); and 34 CFR 300.148(c); and 19 T.A.C. §89.61.

#### ORDER

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

SIGNED this 15<sup>th</sup> day of January, 2010.

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



DOCKET NO. 283-SE-0809

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SYNOPSIS

**ISSUE #1:** Whether the student was denied FAPE.

**CFR CITATIONS:** 34 CFR 300.552, 34 CFR 300.300

**TEXAS CITATION:** 19 T.A.C. §89.1055

**HELD:** For the District.

**ISSUE #2:** Whether petitioner is entitled to reimbursement for private placement.

**CFR CITATIONS:** 34 CFR 300.148(c)

**TEXAS CITATION:** 19 T.A.C. §89.61

**HELD:** For the District.