DOCKET NO. 177-SE-0310

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

FINAL DECISION

Petitioner is self-represented and is suing on behalf of student. Respondent, Houston Independent School District, is represented by its attorney, Assistant General Counsel Hans Graff. A parent has the burden in an IDEA case to prove the school district denied rights guaranteed under IDEA. The petitioner has failed to carry that burden in this case. In addition, this petitioner has engaged in substantial previous litigation against Houston Independent School District. Some of the legal issues raised here are issues that have previously determined against the petitioner in earlier litigation between the petitioner and the District. Principles of res judicata, collateral estoppel, and issue preclusion apply to those issues.

Background

This case is part of a series of complaints all filed pro se (with the exception of the first case listed) by the petitioner. The complaints are filed by petitioner as next friend of one of her two children, ***; and also in petitioner's own name. The respondent in most of these complaints is Houston Independent School District. However, she has also filed complaints against various staff members of the Houston Independent School District, Special Education Contract Hearing Officers, and employees of the Legal Services Division of the Texas Education Agency.

The student in this case is petitioner's older child, ***. Petitioner has previously litigated the complaints listed below on this student's behalf.

1. *Student b/n/f Parent* v. *Houston Independent School District*, No. 362-SE-065 (Honorable Sharon M. Ramage, Special Education Hearing Officer, January 16, 2006). Mr. Chris Jonas, attorney, represented the student and petitioner. Assistant General Counsel, Mr. Hans Graff, represented the District. Hearing Officer Ramage held the District had failed to provide a FAPE to student in the 2004-2005 school year and in the portion of the 2005-2006 school year extending from the beginning of the school year to the date of the December 5, 2005 hearing in the case. Hearing Officer Ramage ordered Houston ISD to conduct a full individual evaluation (FIE) of the student within 45 days of January 16, 2006.

2. *Houston Independent School District v. Student b/n/f Parent*, No. 015-SE-096 (Honorable James W. Holtz, Special Education Hearing Officer, February 3, 2006). Petitioner appeared pro se. Assistant General Counsel, Mr. Hans Graff, represented the District. Petitioner claimed (and the hearing officer found) that she signed both sets of documents necessary to give her permission for the student's evaluation as ordered by Hearing Officer Ramage in the case above. However, the District either didn't receive (or lost) part of the documents granting it permission to do all evaluations ordered by Hearing Officer Ramage. The petitioner refused to sign a second set of the missing permission documents. The District sued to override her refusal to sign the missing documents so that the District could complete

the evaluation. Hearing Officer Holtz granted the school district permission to do the evaluation despite petitioner's refusal to sign a second set of the missing permission documents.

3. *Student b/n/f Parent v. Houston Independent School District,* No. 041-SE-0906 (Honorable James W. Holtz, Special Education Hearing Officer, July 14, 2006). Petitioner appeared pro se. Attorney Jeff Rogers represented the District. Case 041-SE-0906 is closely related to the case described in 2 above. At one time, Hearing Officer Holtz had consolidated the two cases but he severed them after the petitioner failed to show for the hearing of the consolidated cases. Petitioner's failure to appear was because of bad weather and other problems (unspecified in the decision). As part of his decision in case 041-SE-0906, Hearing Officer Holtz revisited his ruling in the case described in 2 above. He came to the same conclusion as before. Petitioner raised numerous other issues but failed to carry her burden on any of them.

4. **** by next of kin, [Name redacted] v. Houston ISD,* Civil Action No. 4:06-cv-1306 (U.S. Dist. Ct., So. Dist. of Tex., Houston Div., August 22, 2006) - The court dismissed this suit because petitioner was appearing pro se. At the time federal courts in the U.S. Fifth Circuit were not entertaining appeals under IDEA filed by pro se parents.

5. *[Name redacted] v. Margaret Baker, et al,* 2010 WL 4:09-cv-2222 (U.S. Dist. Ct., So. Dist. of Tex., Houston Div., March 25, 2010) - Suit against employees of the Texas Education Agency Legal Services Division responsible for hiring of hearing officers and assignment of cases to them. Petitioner asserted they knowingly hired biased hearing officers who lacked fairness and impartiality. The federal district court summarily dismissed this suit based on sovereign immunity and for failure to state a claim on which relief could be granted.

In addition, petitioner has filed the following complaints on behalf of her other child ***. **** b/n/f [Name redacted]* v. *Houston Independent School District* (Civil Action No. H-08-2415 (U.S. Dist. Ct., So. Dist. of Tex. Houston Div., August 4, 2010); *Student b/n/f Parent* v. *Houston Independent School District,* No. 174-SE-0310 (Honorable Luecretia Dillard, Hearing Officer, April 4, 2011); *Student b/n/f Parent* v. *Houston Independent School District,* No. 222-SE-407 (Honorable Mary Carolyn Carmichael, Hearing Officer, May 8, 2008); *** v. *Houston Indep. Sch. Dist. and Luecretia Dillard,* Civil Action No. 4:20-cv-00903 (U.S. Dist. Ct., So. Dist. of Tex. Houston Div., filed March 9, 2011 pending); *** v. *Dillard,* Civil Action No. 4:20-cv-Ol089 (U.S. Dist. Ct., So. Dist. of Tex. Houston Div., filed March 23, 2011, pending); and *** v. *Houston Indep. Sch. Dist., et. al.,* Civil Action No. 4:2011-cv-01501 (U.S. Dist. Ct., So. Dist. of Tex. Houston Div., filed April 14, 2011 pending).

Her complaints often raise repetitive and overlapping issues which have also been raised in prior cases she has filed. Most complaints are filed in pairs. A complaint filed on behalf of one of her children usually has a companion complaint filed on behalf of her other child.

Once she files a complaint, it is inevitably followed by a constant stream of faxes and, emails to the hearing officer outlining her grievances against allegedly corrupt hearing officers, allegedly corrupt school officials, and allegedly corrupt Texas Education Agency Legal Services Division employees sometimes having little or nothing to do with the case immediately at hand. The faxes and emails are stream of consciousness in form but occasionally she intends them as motions (often without identifying them as such) and will later inquire whether or when the hearing officer intends to rule on them or complain in a pleading or a communication to third parties that the hearing officers constantly ignore her motions and complaints. Usually, but not always, the gist of her complaints is discernable although some do not seem to have an intended point or purpose. Often her emails and faxes describe complaints she intends to file against people in the future and also the complaints that she has filed in the past and things which she asserts have occurred in her past litigation. Often these references to past complaints and litigation are especially hard to understand without the historic context.

The Instant Case (Complaint in Cause 177-SE-0310)

Petitioner initiated the instant case by sending a request for due process hearing to the Texas Education Agency on March 19, 2010. This was the first of three requests for due process hearing which were eventually consolidated to form the complaints underlying this action. The Texas Education Agency assigned the initial due process hearing request in the instant case to Hearing Officer Luecretia Dillard under docket no. 177-SE-0310. The complaint underlying the request asserted that:

(a) petitioner had asked the district to hold ARD meetings on several specific dates but the district didn't schedule ARDs on any of those dates;
(b) the district then held an ARD on a different date without inviting petitioner to take part;
(c) the district didn't mail the results of that ARD to the parent until seven days after it took place;
(d) petitioner came to the school on one of the days that the district had invited her to an ARD meeting but the district hadn't scheduled an ARD meeting for student on that day;
(e) the district violated IDEA by its failure to reevaluate student for more than four years;
(f) the individual education plan (IEP) which the ARD committee developed for student was inappropriate;
(g) the district failed to provide student a free appropriate public education (FAPE) after she reenrolled student back in the district following the period in which she home schooled student.

As relief, the petitioner asked the Hearing Officer to order the district:

(a) to pay for a full independent education evaluation (IEE);
(b) to provide an appropriate outside placement and outside psychological and social work services, tutoring and a one-on-one personal aid for student,
(c) to train the district staff to properly deal with student's problems, and
(d) to pay a fine for the ongoing violation of her and student's legal rights.

Hearing Officer Dillard issued a scheduling order on the same day that she received the complaint (March 19, 2010). Among other items, the scheduling order set a prehearing conference on April 9, 2010. At the district's request, Ms. Dillard later rescheduled the prehearing conference to April 14, 2010 after the district's Assistant General Counsel, Hans Graff, notified her that he would be on military duty with the U.S. Navy on the originally scheduled April 9, 2010 prehearing conference date but would be available on April 14. Petitioner opposed this continuance and moved to sanction Mr. Graff for not making himself available on April 9.

The Houston Independent School District filed its answer on March 26, 2010 (a week after petitioner had filed her complaint). The answer asserted that;

(a) the district attempted to schedule an ARD meeting including petitioner at a mutually agreeable time but had been unable to obtain petitioner's cooperation on the scheduling;
(b) petitioner failed to provide the district with a working telephone number or other contact information and does not respond to mail from the district making scheduling at a mutually convenient time extremely difficult; and
(c) the district had been unable to perform certain evaluations on student because it couldn't get petitioner to sign documents giving it permission to conduct the evaluations;
(d) the district claimed that it had nonetheless performed an adequate evaluation within the time period required by IDEA (although the evaluation could have been better if the petitioner had cooperated by signing the required permission documents).

Petitioner's Motion to Recuse Hearing Officer Dillard

On April 26, 2010, petitioner filed a motion to recuse Hearing Officer Dillard. Hearing Officer Dillard ruled on the motion and found no basis for removing herself from the case. Hearing Officer Dillard then abated the proceeding and forwarded the motion and her ruling to the Texas Education Agency Legal Services Division for review. The Texas Education Agency staff assigned Senior Hearing Officer Stephen Webb to

review the motion to recuse and Hearing Officer Dillard's ruling on the motion. On May 10, 2010, Senior Hearing Officer Webb held a hearing on the motion by phone after which he issued a written opinion. Petitioner made the following assertions as the grounds on which petitioner sought the recusal.

(a) Hearing Officer Dillard granted a motion to postpone the originally scheduled date for the prehearing conference by a few days. Hearing Officer Dillard did so because Houston Independent School District's attorney, Assistant General Counsel Graff, asked for the postponement because he would be on active duty in the U.S. Naval Reserve on the originally scheduled prehearing conference date.
(b) Hearing Officer Dillard allegedly "protected" respondent's violations. Petitioner alleged that she deliberately:
    (1) omitted claims,
    (2) failed to provide correct and relevant dates and
    (3) allowed respondent to ignore petitioner's requests for documents.
(c) Hearing Officer Dillard allegedly got petitioner's requested relief and counterclaim wrong in her order setting forth the issues following the prehearing conference;
(d) Hearing Officer Dillard allegedly favored the respondent in her prehearing conference rulings;
(e) Hearing Officer Dillard allegedly failed to execute subpoenas requested by petitioner.

Senior Hearing Officer Webb found no grounds for recusal of Hearing Officer Dillard and denied petitioner's motion for recusal of Hearing Officer Dillard in a written order dated May 10, 2010.

The 2nd Due Process Hearing Request Consolidated into the Instant Case

After an attempt at mediation of the above due process hearing request failed and with a hearing on the merits of petitioner's complaint scheduled to begin just two-and-a-half weeks later, petitioner filed yet another request for due process hearing on September 13, 2010. The Texas Education Agency assigned the new request to Hearing Officer Dillard under docket no. 007-SE-0910.

The complaint underlying the request for asserted that:

(a) a review of existing evaluation data (REED) given to petitioner at the mediation classified the student as having both a learning disability and emotional disturbance and that the Houston ISD had improperly added a diagnosis not supported by previous evaluations without new testing of the student;
(b) the district had misused federal funds; and
(c) the district had failed to conduct a Functional Behavior Assessment of student as required by the applicable law.

As relief, the petitioner asked the Hearing Officer to order the district:

(a) to pay for an outside person (one not affiliated with the district) to perform a Functional Behavior Assessment of student; and
(b) to add an outside person to participate in an ARD "to ensure positive modifications and accommodations are arded."

Consolidation of the Two Complaints and Continuance of Scheduled Hearing Dates on the Original Complaint

Both the petitioner and the school district moved to consolidate the two complaints and to cancel the September 29-30 hearing dates on the original due process complaint. Attorney Graff explained, "the issues in both cases are intertwined and it would save resources to try all issues in a single hearing since the district would need many of the same witnesses in both cases." Ms. Dillard granted a continuance on the hearing dates and IDEA timelines started over again as a result of the new complaint being consolidated with the old one.

Petitioner's 2nd Motion to Recuse Hearing Officer Dillard

On January 24, 2011 petitioner filed a second motion for recusal of Hearing Officer Dillard asserting "bias, personal interest of subject matter, prejudice against the parent, failure to order formal disclosure by respondent, failure to issue subpoenas requested by petitioner, and failure to submit issues and relief failure for docket 007-SE-0910, failure to obey the law and schedule due process hearing at the parent availability."

Once again Hearing Officer Dillard ruled that she had no basis on which to recuse herself and forwarded both the motion and her ruling on the motion to Austin for the Texas Education Agency staff to assign to a Senior Hearing Officer for review.

The 3rd Due Process Hearing Request Consolidated into the Instant Case

With the two unheard requests for due process hearings outlined above pending and the second recusal motion still pending, petitioner filed yet another request for due process hearing on February 23, 2011. The complaint reads in part as follows:

Request for an IMPARTIAL Due Process Hearing

Dear agency,

If you are tired of receiving these requesting then that should be evidence that the justice system has failed.

How many years have Houston ISD has repeatedly been allowed to disobey laws?

The justice system tells us as citizens to file complaints when our rights have been broken and laws has been disobeyed, but yet the justice system is designed for dishonest people to receive these complaints, and is granted the authority of making rulings in reference to the complaints.

I am fully aware this complaint will be given to Hearing Officer Dillard in spite the fact she has demonstrated actions similar or a carbon copy of what I have experienced with Houston ISD, but the record reflects Margaret Baker [Texas Education Agency staff member in charge of the due process special education hearing program] is fully aware of the experience that has been well felt by Hearing Officer Dillard's.

The parent submits the following complaint, it is in reference to [name and address of student redacted].

The school name [name of school redacted] which has had for years unacceptable ratings.

Issue One: The law states that a parent is be regularly inform of short-term goals in which demonstrate the success toward measurable annual goal-in addition the school agreed under Assurance they will provide this information to the parent, this school has not submitted one periodic report, since the enrollment date at [name of school redacted], therefore this is issue number one. [34 CFR§300.320(a) (3)(ii).]

Attorney Hans Graff admitted on the record recently the school district does not have the information, so this complaint was derived from that information.

Issue Number 2: The law states that in order to develop an appropriate IEP(Individual Education Plan) comprehensive evaluations are essential - therefore to attempt to have ARDs are useless without this information.

Violation of FAPE (Free Appropriate Public Education) is inadequate test evaluations.

[Name of school redacted] staff may say will we need to have an ARD because we have ARDs when we need to cover up wrong actions but the law also states the School District needs to re-evaluate at least every three years but that has not occurred in spite of consent.

Therefore, Issue Number 2 - preventing the School District from having useless ARD meeting until they are ordered to complete Full Individual Evaluation because the stakeholder understand through a staff member of [information redacted] the District must have their own evaluation or order on granting an IEE.

Issue Number 3 that the Houston ISD does not attempt to graduate student at the end of this school year because FAPE has been denied.

Issue Number 4 - the District failure to comply with the law in reference to the REED in which [name of person redacted] stated was an issue in Docket 177-SE-0310 - however, that is incorrect information - a document was filed to Hearing Officer Dillard requesting confirmation as to this day she has not responded - therefore it is included in this docket.

Attorney Jeffery Rogers received Summary of Judgment in reference to periodic reports not being submitted to the parent in a case that is now being appealed in a Higher Court even though that is the implementation of the IEP.

Relief

Relief- the District is ORDERED to prevent from having useless ARD meetings for the purposes of enlarging the state folder without a good cause.

The District is ORDERED to obey the law in reference to regularly informing the parent of the progress toward the goals, and to submit information on how they were determining if the goals were been met.

The District is ORDERED to conduct an ARD meeting and ORDERED to conduct an available time for the stakeholder who is the parent after the completion of an Full Individual Evaluation because before defeats the purpose of the laws they have been put in place to develop an appropriate IEP - to which parent is seeking as relief within another Due Process Hearing before Hearing Officer Dillard.

The District ARDED to pay for compensatory services due to lost education opportunities due to an appropriate IEP can not be developed at this time because it does not have a chance to be developed properly due to expired evaluations - an ORDER that an outside agency provide the services.

In addition an ORDER that an Advocate is paid for by Houston ISD to attend ARD meeting and monitor implementation of the IEP.

An ORDER for Houston ISD to provide transition services- and which should have been in place.

*The parent is fully aware Hearing Officer Dillard will translate these issues to mean something like this - Issue number one the parent is requesting if Superintendent *** is the Superintendent for Houston ISD - relief requesting ISD hang petitioners from the tree foot up.*

Change of Hearing Officers/ Dismissal of 4th Due Process Hearing Request

Texas Education Agency docketed the above complaint as complaint number 136-SE-0211 and assigned it to me as hearing officer.

On March 19, 2011, following the announcement of Hearing Officer Luecretia Dillard's pending resignation to accept a position as an assistant general counsel to a private corporation, the other complaints that are part of this action were also transferred to my docket for hearing. I consolidated all three complaints under the original cause number 177-SE-0310 and believed we were headed toward a hearing on the merits which would finally resolve the pending issues on all three pending complaints when petitioner filed yet another request for due process hearing against Houston ISD on student's behalf (the 4th in the current series) and asked that it be consolidated with her other three complaints. The Texas Education Agency gave this 4th complaint docket control number 184-SE-0411 and assigned it to my docket on April 27, 2011.

Instead of consolidating it with the other complaints and again going through the timeline delays required whenever a new case is accepted under IDEA, I dismissed it without prejudice pursuant to 34 C.F.R. § 300.508 (d) (3). In dismissing the 4th complaint, I wrote in part:

> *Both Texas and the federal government have longstanding public policy against redundant and harassing litigation. ... I am dismissing both these cases on my own motion pursuant to* 34 *C.F.R.* § *300.508 (d) (3).*
>
> *Section 300.508 (d)* (3) *says that" a party may amend its due process complaint only if-*
>
> > *(i) The other party consents in writing to the amendment and is given the opportunity to resolve the due process complaint through a meeting held pursuant to* § *300.510; or*
> >
> > *(ii) The hearing officer grants permission . ..* "
>
> *These new complaints involve the same children and are very similar to the complaints [petitioner] already has on file in the cases which I am resetting for hearing on May* 26, 27, *and* 31. *Allowing [petitioner] to file new due process hearing requests before the hearings on her existing complaints would violate the strong Texas public policy against multiple litigation of the same or very similar causes of action and would bypass the requirement in 34 C.F.R.* § *300.508 (d)* (3) *that the parent or school district obtain my permission or that of the opposing party in writing before amending the untried cases currently on file.*
> *...*
>
> *Pursuant to the discussion and authorities discussed above, I now order that,... [the two new cases petitioner has attempted to file without resolving the pending cases] are hereby, in all things, DISMISSED without prejudice to [petitioner's] right to file a motion to add these complaints by amendment to the existing cases using the proper procedure.* ***I will either add the complaints to the existing cases or not depending on what appears to be appropriate after considering the argument of the parties. (Emphasis added).***

In the transcript of the prehearing conference held on May 26, 2011, there is an extensive discussion of my ruling dismissing the petitioner's 4th due process complaint in the current series of complaints filed on behalf of this student. Petitioner asserted she has a right to file a new due process hearing anytime she wishes

instead of amending a pending due process complaint as per 34 C.F.R. § 300.508 (d) (3). Mr. Graff observed that the petitioner "always has a ball in the air", i.e., she regularly files several new due process hearing requests before there is an opportunity to adjudicate her earlier requests. As a result, the school district is unable to ever dispose of the pending cases involving petitioner's children and petitioner's children are under perpetual stay put orders. My ruling is that, in the discretion of the hearing officer and under the facts and circumstances such as those in this case, new complaints must be filed as amendments to existing litigation as per 34 C.F.R. § 300.508 (d) (3). Stated another way, the hearing officer has the discretion to require a break between the filing of new due process complaints. This will allow a school district to address the current needs of the child before another stay put order goes into effect as the result of the filing of a new due process complaint. This is the gist of a decision by the North Carolina Office of Administrative Hearings in the case of *Student b/n/j Parent* v. *Granville County Board of Education* (unpublished March 29, 2011, copy in the record of the May 26,2011 prehearing conference as Hearing Officer's Exhibit 2).

Obviously 34 C.F.R. § 300.508 (d) (3) would become a nullity and a case could be delayed indefinitely if a litigant could ignore 34 C.F.R. § 300.508 (d) (3) and just continually file new due process hearing requests instead of a litigant being required to file new complaints as amendments of their existing complaints in the manner required by 34 C.F.R. § 300.508 (d) (3) as this ruling requires.

Hearing on the Merits

The three original complaints consolidated under the docket control no. 177-SE-0310 finally came to hearing on May 27 and May 31, 2011. Below are my findings of fact and conclusions of law.

Findings of Fact

1. Student is *** years old. Student lives with petitioner (student's mother) within the Houston Independent School District. Student is eligible for special education as a student with an emotional disturbance. Although one of petitioner's complaints asserts the school also diagnosed student as a student with a learning disability, the school, in fact, never diagnosed student as learning disabled. School Evaluation Specialist *** tested student and found that student is not learning disabled, but is instead a "slow learner." The two classifications – "learning disabled" and "slow learner" – are distinguishable and require different education strategies to address. The "slow learner" classification is not a classification automatically entitling one to special education services under IDEA. (Transcript 377-380.)

2. Student has attended school in the Houston Independent School District and *** (a school operated by Harris County Department of Education for, among others, emotionally disturbed children). The Houston Independent School District transferred student to *** and student attended *** for most of student's school career. In August 2008 petitioner withdrew student from the public schools to home school student. Petitioner reenrolled him in the Houston Independent School District at *** School on November 30, 2009.

3. Petitioner gave the Houston Independent School District no advance notice that petitioner was going to reenroll student in the district in November 2009. Petitioner caught the school by surprise when student arrived with no records. (Under the applicable law petitioner was responsible for furnishing the records to the school).[1] Because the school lacked these records it was unable to promptly schedule a transfer ARD to determine student's proper placement and educational services but had to delay.

[1] See § 25.002, Texas Education Code, in part, as follows, "If the parent ... enrolls the child in a public school, the parent shall furnish to the school district ... (2) a copy of the child's records from the school the child most recently attended .. ."

4. The school sent the petitioner numerous invitations to ARD meetings but petitioner failed to attend. Petitioner was always either unavailable on the dates chosen by the district or simply failed to respond to the ARD meeting invitations. Petitioner failed to provide the district with a working phone number or other means of contact other than by U.S. mail resulting in delayed communications between petitioner and the ARD committee. Many times the post office returned the ARD committee's letters unopened. Petitioner sent the school faxes and letters telling the committee of dates when she was available. However, the ARD committee either didn't receive these communications timely or the dates petitioner requested were unavailable. Petitioner did not send her communications to the ARD committee but instead sent them to others in the Houston Independent School District system including the superintendent of schools, and an elected school board member. After several months, the ARD committee still needed to make placement decisions so the school could provide student with appropriate educational services. Finally, the ARD committee held an ARD meeting after inviting petitioner but without petitioner's presence. I find the school made a good faith effort to include the petitioner in the ARD committee's meetings before holding the transfer ARD meeting without her. The ARD committee's reported experience in not being able to get petitioner to agree to a mutually agreeable date for an ARD meeting mirrors Hearing Officer Dillard's experience in being unable to schedule hearings and prehearing conferences around petitioner's schedule or even contact petitioner over long periods as reflected in the file I inherited from Hearing Officer Dillard in this case. The difficulty of obtaining petitioner's cooperation has been a consistent theme in the hearings involving her children.

5. Petitioner has asserted the school held ARDs to which she wasn't invited. The meetings petitioner is referring to were what might be described as "unofficial" rather than real ARDs. The witness Ms. *** explained that since the student arrived at school without records necessary to conduct a real ARD, staff had to hold internal meetings to develop a tentative schedule and educational program for student while awaiting the arrival of records and a scheduling of a real ARD. (Transcript 192-197; 210-211). I find nothing illegal or improper in the staff holding these meetings to make up for the lack of formal ARD meetings while at the same time making a good faith effort to schedule formal ARD meetings. Otherwise student wouldn't have received services in the interim between student's arrival and the date of the first formal ARD committee meetings.

6. Petitioner has a power of attorney signed ***. (See Respondent's Exhibit 26.) It gives petitioner the power to make decisions related to student's education even though student is ***. Student has generally allowed petitioner to make all decisions related to student's education. However, student decided on student's own that student wanted *** in the spring of 2011. Student took part in a *** ARD representing ***self. When school officials asked about petitioner's participation in that ARD, student stated that student wanted *** despite petitioner's lack of approval. Mr. Graff's legal opinion is that student didn't give up the authority to act on student's own when making decisions about student's education when student gave petitioner student's power of attorney to act for student on most occasions. (Transcript page *493-495.)*[2]

7. The record doesn't support petitioner's claims that Houston Independent School District didn't properly evaluate the student. Eventually, the district did a full individual evaluation (FIE) using qualified personnel and techniques. The record does not show any long term adverse affects as the result of the delay in retesting the student. Part of the reason why there was a delay involved the petitioner's failure to give the district unqualified written approval for the evaluation. Similarly two prior due process hearings have involved delays in this student's evaluation by the district occasioned by petitioner's failure to give unqualified consent to the district performing FIE's on this student. (See *Houston Independent School District* v. *Student b/n/f Parent,* No. 015-SE-096 and *Student b/n/f Parent v. Houston Independent School District,* No. 041-SE-0906.)

[2] I concur in that opinion.

8. Petitioner complained the evaluation was a REED (a reevaluation of student based in part on the school's experience with and past observations of the student) instead of a full individual evaluation (FIE). This complaint is based on a misunderstanding of what a REED in Houston Independent School District consists of. Houston Independent School District considers all evaluations after the first one to be a reevaluation (or a REED). On students with whom the school has had experience, the evaluators do a review of existing data as part of an FIE (Transcript pages 50-51). The student is thus evaluated on the basis of all testing that forms part of a normal FIE *and, in addition,* on the school's experience with and past observations of the student.

9. The school administrators who testified on the point believed that student has made significant progress since transferring back into Houston Independent School District after student's home schooling. I accept this testimony as true. (Transcript pages 220-222; 263-266.) I find that student has changed substantially for the better from the patterns student exhibited in earlier years as shown by the findings in the petitioner's earlier litigation with Houston Independent School District on behalf of this student.

10. There is conflicting testimony regarding the school's alleged failure to provide short term progress reports. Respondent's Exhibit 17 is a computer print-out of report card and progress report information that was sent home to the petitioner. (See also the related testimony of Ms. *** regarding the report card and progress reports at pages 215-218 of the transcript.) I find that these reports were transmitted to petitioner and student.

11. Student wants to attend college and get a degree in a computer related field. A school witness testified that transition services offered by the school are based upon the student's preferences. The school has placed student in contact with a *** in this area of endeavor and which accepts students with petitioner's background. Student also wants to learn *** and the school has tried to help student with that. I find that the transition services offered by the school were appropriate to this student. (Transcript 212-215).

12. Petitioner has failed to carry her burden of establishing that any substantive or procedural defects in the school's procedures denied student a FAPE, denied petitioner meaningful participation in planning her child's education, or had any long term adverse impact on the student's education.

Analysis

The following dialogue is from the prehearing conference held on May 26, 2011. It frames the issues presented which relate to res judicata, collateral estoppel, and issue preclusion and how these doctrines apply to this case.

*THE HEARING OFFICER: I guess let's go on the record at this time .... My name is Larry Craddock. I'm a hearing officer for the Texas Education Agency. And let me ask -- these are the cases that have previously been filed [indicating]? Have you had an opportunity to review this, Ms. ***? –*

*MS. ***: ... [B]ecause they are involving me and my children, of course I have had an opportunity to review those. And I guess the question is -- and I know that you can't answer that because you don't have your book. Your book is here. But I guess I would have to ask, in turn to receiving these decisions, if you would also take the opportunity when you get a chance to look at some of the evidence that was in reference to some of these cases.*

THE HEARING OFFICER: My problem is this.... I don't have those files....what we're talking about are the [past] decisions [involving petitioner's children].... And she wants to introduce some records related

to the decisions, which unless you [Mr. Graff] have objection to them, I'd just as soon admit them. What I am going to be looking at is how these cases fit together.

*MS. ***: ... I just think in all fairness, if you're going to look at the decisions, [you should look at related evidence] ... because anybody can make a decision doesn't mean they made it in accordance with the law.*

THE HEARING OFFICER: Well, the decisions, once they're final, we assume that the facts are as found by the court or the hearing officer, or whoever made the decision that became final. And I'm not going to go through and re-weigh the evidence. But it might be helpful to me to go through, and if I've got a question as to what the issue was before the court, then I have some backup. But the decisions are going to speak for themselves.

MR. GRAFF: My understanding of the reason you wanted the decisions was just because of the number of cases that have been filed, to see if the issues have already been litigated.

THE HEARING OFFICER: Yes. This is a kind of a strange situation, where we have - - as I understand it, a lot of these issues are kind of new instances of something that has been litigated before. Is that not correct?

*MS. ***: No. Well, the issues are. And this is -- it's a continuation of violations that are being violated. Now, as for -- just like I indicated in a e-mail to you, I mean, you're looking at decisions on top of decisions. . . . These are a lot of cases. Somewhere in here to me, hypothetically, somebody ought to be able to say these are too many cases. It's the same old issues. You're right, there are the same issues. But they're at different times, in un-relevant times, to issues that have been litigated. For an example, Docket 187-SE - and I've never seen this cover sheet, by the way. Because on the docket he gave me didn't have this cover sheet. But at any rate, for example, this docket here, the ARD that's in reference to this docket here is in reference to March 7th, 2011. Okay. And in hearing that Mrs. Dillard heard, that was in reference to an ARD held March 11th, 2010. So if the dates are different, then you cannot say that, because this was litigated before and it was the same violation, that I'm supposed to just say, okay, they doing the same things, doing this different dates, they get away, you let it go. Or either in this case right here, you filed violations, they're not ruled on according to the law, you let -- you let it get away. Sure I'm tired. Because I'm a human being. I am tired. But to sit up and let the district just get away because we don't have an attorney or we don't have -- we're not getting favorable decisions according to the law, to say that you just drop your shield and die, no. No. And if you're going to say that you are going to review the -- every one of these decisions in reference to ***, it's still being litigated. One is in the Fifth Circuit. One is in the federal court downtown. So if the law meant -- and please hear me well -- if the law meant that a hearing officer decision was, as you say, the final decision and this is what you ought to look at, without taking into consideration that this person erroneously made an error or this person didn't rule according to the evidence, then, again, the law has failed. If it stop -- if the ball dropped there, then there was not any other remedy -- the law doesn't give me any other remedies. So just the fact that there is other remedies doesn't mean that this is -- this decision is accurate. And to weigh this decision in anything that are before us today, again, the system has failed....*

THE HEARING OFFICER: I've sort of lost focus here. But I think what I was trying to originally ask was whether I can accept into evidence the [decisions] that Mr. Graff has presented this morning. . . . I would like to have these marked as an exhibit and introduced in evidence as far as both cases are concerned. Does anybody have any objection to my doing that?

*MS. ***: Well, if you're going to include them, then I would also like to include some of the evidence that's in my disclosure book that's… right behind the same decisions that shows, how can you say it, that shows that decisions made wasn't made fully in reference to the law.*

*MR. GRAFF: … To the extent we're talking about [petitioner's ***], she disclosed documents to me … so I'm not going to really have any objection to any of her documents …*

*MS. ***: Excuse me. Mr. Craddock, just so the record is clear and I understand, you are stating that the information in reference to prior hearing officers' decisions, you want to read them based on the facts to see if they were the same issues or –*

THE HEARING OFFICER: Same issues and if we're just dealing with different instances now.

*MS. ***: Right. Right.*

THE HEARING OFFICER: And I guess as I read these decisions, some of them were and some of them weren't the same issues. Is that correct?

*MS. ***: Well, I think pretty much there have been some of the same persistent issues. And as I said in the e-mail, and I'll say it today, as far as they have been pretty much the same consistent issues, and just -- I guess it's kind of like -- probably the best way I could describe it is, is -- because I know even as a parent, I don't even feel that I am really the parent of my children. I really feel HISD is. Because decisions are always being made without me having an opportunity. And then when I present due process hearings, like you've seen through your research, there's been too many issues for – I mean, if the record is just perfect, I kind of believe that the situation would be a little bit better. That's just, you know having common sense.*

THE HEARING OFFICER: Let me clarify what I did. There's a great deal of correspondence, both conventional mail before I [came into] this case - [the case] was a transfer from another hearing officer, Ms. Dillard, and there was a great deal of conventional correspondence. . . . And then there's been a great deal of e-mail correspondence since I took the case over … I'm not sure how much of that's going to get in the record. But as a result of that, I became aware that this problem has been in litigation over the years. And I at some point got concerned that perhaps some of the issues had already been decided, and I went online just to get a feel for how much litigation there had been. In some cases there were decisions online. In some cases there was nothing but names and styles of cases. And at that point, I -- my concern is that some of the issue -- but I haven't read anything other than the final decisions posted online or the names of the cases and cites. And through the information that parties have furnished now, I have some backup as to what the issues were in those cases. And that's what I wanted this morning. I'm ready to move on to something else if the parties are ready to move on to something else.

Conclusions of Law

Petitioner's argument that hearing officers should consider the same issues anew in subsequent law suits against Houston Independent School District because earlier hearing officers allegedly misapplied the law to the facts in cases which have become final is without merit. The law is very clear that a losing party can't later relitigate the same issue on which that party lost in a subsequent law suit against the same opposing party even if the judgment in the first case is believed to have incorrectly applied the law in deciding the issue. This was clearly stated as follows by the U.S. 5th Circuit in the case of *Procter* & *Gamble* v. *Amway Corp., 376* F3d 496, 500 (U.S. 5th Cir. 2004), where the court said, "The proper remedy for an allegedly erroneous judgment is direct appeal to the proper court, not an attempt to avoid the res judicata effect of that judgment in another suit against the same party for the same cause of action ... the question whether that judgment was correct ... does not enter into our inquiry on the effect of res judicata, for even an incorrect judgment is entitled to res judicata effect."

In earlier cases, the 5th Circuit wrote similarly, "the rule of res judicata does not go on whether the judgment relied on was a right or a wrong decision." See *Kemp* v. *Birmingham News Co.,* 608 F.2d 1049, 1052 (U.S. 5th Cir. 1979), *Stevenson* v. *International Paper Co., 516* F.2d 103, 108 (U.S. 5th Cir. 1975), *Bennett* v. *Commissioner,* 113 F.2d 837, 839-840 (U.S. 5th Cir.1940).

See also, *Gleash* v. *Yuswak,* 308 F.3d 758, 760 (U.S. 7th Cir. 2002), "[An action] may be dismissed on the ground of claim preclusion (res judicata) even if the decision in the first was transparently erroneous .... In civil litigation, the final resolution of one suit is conclusive in a successor, whether or not that decision was correct."

See also Wright, Miller, and Cooper, Federal Practice and Procedure (updates current to April 2011) § 4301 to 4426, Volume 18 which contains an exhaustive discussion of res judicata and related doctrines.

The doctrines of res judicata, collateral estoppel, and claim preclusion apply to cases decided by Texas Special Education Hearing Officers under IDEA. See *Student* v. *Houston Independent School District,* No. 286-SE-0610 (Honorable Deborah Heaton McElvaney, Hearing Officer, February 2, 2011); *Student* v. *Fort Bend Independent School District,* No. 188-SE-0104 (Honorable Sharon Ramage, Hearing Officer, March 20, 2004); *Student* v. *Evolution Academy Charter School,* No. 268-SE-0404 (Honorable Olivia Ruiz, Hearing Officer, August 28, 2004).

For a pertinent out-of-state case on point arising under IDEA see *MCG.* v. *Hillsborough County Sch. Bd,* 927 So.2d 224 (Fla. Dist. Ct. App. 2006), where the court applied the doctrine of res judicata to a claim filed for a different time period to the same fact pattern that was litigated for an earlier period. The court found that the new time period created a new cause of action but the facts to be decided were essentially the same and were governed by the law of res judicata.

The doctrines of res judicata, collateral estoppel, and claim preclusion apply in this case.

Petitioner complained of the failure of Houston Independent School District to perform a timely evaluation of this student in several earlier hearings. Previous hearing officer decisions hold that when this petitioner was at least partly responsible for the delay because of her lack of cooperation with the District, it excused the District's delay in evaluating the student.[3] I will follow those decisions in this case. The evidence here is in conflict on petitioner's efforts to make herself available for the transfer ARD. The school records and witnesses reflect the school made many good faith efforts to contact her and make her part of the transfer ARD. The committee offered her many alternative dates over a several month period. She did not make herself available at the times scheduled by the ARD committee. On only one occasion during this period did she appear for an ARD committee meeting to which the committee had invited her. However, she didn't confirm in advance that she would be attending. The ARD committee was not expecting her since the meeting date and time was only tentative contingent on her acceptance of the committee's invitation. The committee was unprepared for her arrival. The committee could not get enough members together to conduct the ARD on that occasion. Petitioner insists she made herself available to the ARD committee at other times offering many alternative dates when she was available to meet. She has kept written records which support her testimony. The school insists she only made herself available at times when she knew the committee couldn't meet with her. I accept the school's version that petitioner was at least partly (if not primarily) responsible for the delay in the holding of a transfer ARD and development of appropriate IEPs for student. The delays in scheduling reported by the school district, mirror the delays my predecessor, Hearing Officer Dillard, experienced in unsuccessfully trying to schedule a prehearing conference on one of petitioner's complaints due to petitioner's failure to cooperate in the scheduling over a period of several months.

[3] See Houston Independent School District v. Student b/n/f Parent, No. 015-SE-096 and Student b/n/f Parent v. Houston Independent School District, No. 041-SE-0906.

Conclusion

In closing, I note that -- although petitioner filed this case on student's behalf – student doesn't support all of petitioner's goals in this case. For example, part of the relief petitioner requests is that the district not *** student. However, the record is clear that student, who has ***, actively sought *** and the faculty expected student to *** at the end of the Spring 2011 school semester. Although petitioner had expected student to testify on the last day of hearing, the student declined to testify in this case.

I deny all relief petitioner has requested because she has failed to carry her burden of proving the district violated rights guaranteed under the IDEA.

IT IS SO ORDERED, August 1, 2011

_____

Larry Craddock
Special Education Due Process 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. 20 U.S.C. § 1452 as amended.