

DOCKET NO. 139-SE-0112

STUDENT,	§	BEFORE A SPECIAL EDUCATION
B/N/F PARENT	§	
	§	
VS.	§	HEARING OFFICER
	§	
LEWISVILLE INDEPENDENT	§	
SCHOOL DISTRICT	§	FOR THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

Statement of the Case

Student, by the student’s parent and next friend Parent (hereinafter “Petitioner” or “the student”), brought a complaint pursuant to the Individuals with Disabilities Education Improvement Act (“IDEA”), 20 U.S.C. §1400, et seq., complaining of the Lewisville Independent School District (hereinafter “Respondent” or “the district”).

Petitioner was represented by Myrna Silver, an attorney in Dallas. Respondent was represented by Nona Matthews, an attorney in the Irving office of Walsh, Anderson, Gallegos, Green & Treviño, P.C.

Petitioner’s request for hearing was filed on January 26, 2012.

The hearing was conducted in the offices of the Respondent in Lewisville, Texas, on October 30, 31 and November 1, 2012.

Prior to the hearing, a prehearing conference was held on March 19, 2012. Counsel for the parties discussed the issues raised in Petitioner’s request for hearing and the relief Petitioner was requesting.

In addition to claims arising under IDEA, Petitioner raised claims under Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act as amended in 2008, and Title VI of the Civil Rights Act of 1964. Because the Hearing Officer has no jurisdiction to rule on matters arising under those statutes – and because the parties agreed that the matters were raised to exhaust

administrative remedies – a partial summary judgment was granted on March 23, 2012, dismissing those claims.

During the prehearing conference of March 19, issues concerning discovery and requests for subpoenas were also discussed. Those issues were resolved in subsequent orders. Petitioner's claims requesting relief beyond the one-year statute of limitations were also discussed. Counsel for Petitioner stated that Petitioner was seeking relief for claims beginning in 2002. In response to the Hearing Officer's direction, counsel addressed by letter concerns raised by Respondent regarding the statute of limitations. After consideration of the pleadings and the positions advanced by the parties, a partial summary judgment was issued on May 8, 2012, on Petitioner's claims concerning matters beyond the one-year statute of limitation in accordance with 19 T.A.C. §89.1151(c). Petitioner's claims for relief prior to one year of the filing for request for hearing were dismissed.

Petitioner was afforded an opportunity at the close of the hearing to make an offer of proof to preserve claims arising beyond the one-year statute of limitations. The offer was presented through testimony shown on Pages 743-754 of the Transcript of the hearing.

During the pendency of the proceedings prior to the hearing in this matter, the Hearing Officer informed counsel that the parties would be limited to having in evidence no more than 400 pages of exhibits. Counsel were invited to present argument supporting a need for more pages of exhibits. Counsel did not.

At the hearing, the parties were informed that each party would be limited to no more than 500 pages of exhibits – unless the Hearing Officer could be persuaded to allow more. Neither party urged the admission of more than 500 pages of exhibits. At the hearing, counsel for both parties offered into evidence less than 500 pages each.

At the hearing, each party was limited to nine hours for the presentation of their cases – including direct examination of witnesses, cross-examination of witnesses, and argument. Counsel were

advised that they could request additional time. Neither party asked for additional time, and counsel cooperated with the limitations of time for the hearing and offer of evidence.

Petitioner alleged that the district failed to properly identify the student's educational disabilities, failed to timely assess the student, and failed to provide the student with an appropriate educational placement with related services necessary to provide a free appropriate public education.

Petitioner further alleged that, because of the district's failings, the parent found it necessary to place the student unilaterally in a private educational placement and procure private evaluations, tutoring, counseling, and psychological services.

As relief, Petitioner requested findings that the district failed to provide the student with timely assessments, proper identification as a special education student, and a free appropriate public education. Petitioner seeks reimbursement for tuition and expenses for a private education placement, transportation services, tutoring, evaluations, and counseling and psychological services.

At the close of hearing, counsel agreed to an opportunity to file post-hearing briefs and agreed that the decision in this matter would be issued on or before January 7, 2013.

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 was born in ***. [Petitioner's Exhibit 16; and Transcript Pages 152-153]
2. The student resides with the student's parent within the Respondent district. [Petitioner's Exhibit 5; Respondent's Exhibit 1; and Transcript Page 164]
3. The student and the student's parent moved into the district in ***. [Petitioner's Exhibit 31; Respondent's Exhibit 1; and Transcript Pages 162-164]
4. In ***, the student was served in public schools as a student with autism and a speech impairment. [Petitioner's Exhibit 1; and Respondent's Exhibits 160-165]

5. When the student enrolled in the district, the student was served in accordance with the student's educational assessment and placement in the student's previous placement in ***. [Petitioner's Exhibit 30; and Transcript Pages 168-170]

6. The student has been assessed, evaluated, and diagnosed throughout the student's life with varying educational, psychological and psychiatric conditions and classifications. The student has been described by medical, educational, and psychological professionals as developmentally delayed, autistic, learning disabled, speech impaired and emotionally disturbed. The student has been determined to have an anxiety disorder, reactive attachment disorder, disorder of written expression, and sensory integration dysfunction. [Petitioner's Exhibits 1, 5, 6, 7, 9, 10, 15, 16, 32 & 35; Respondent's Exhibits 1-5, 8, 9; and Transcript Pages 42-87, 153-260 & 297-367]

7. When the student was ***, the student had some developmental delays but after *** the student developed normally and the student's educational progress was not marked by any developmental delay. [Respondent's Exhibit 1; and Transcript Pages 153-160]

8. The student has been hospitalized on a number of occasions for problems with anxiety and emotional difficulties. The student was hospitalized for short periods of time in ***. [Petitioner's Exhibits 7, 14 & 15; and Respondent's Exhibits 1 & 2]

9. The student has been diagnosed with ***. [Respondent's Exhibits 1 & 2; and Transcript Pages 80-81 & 96-130]

10. In 2004, when the student was in *** grade, the district conducted a full individual evaluation ("FIE") of the student. The district determined that the student no longer demonstrated a disability under IDEA. The evaluation did not reflect any suspicion of autism or of speech impairment. The student showed expressive and receptive language skills in the average range. The student's pragmatic language also measured in the average range. [Petitioner's Exhibit 32; Respondent's Exhibit 1; and Transcript Pages 27-29]

11. In 2008 when the student was in *** grade, the student's parent provided the district with a private neuropsychological assessment by ***, Psy. D., dated in February 2008. Dr. *** diagnosed the student with Attention Deficit Hyperactivity disorder ("ADHD"), an articulation disorder, disorder of written expression, sensory integration dysfunction, an anxiety disorder, a cognitive disorder, and Reactive Attachment Disorder ("RAD"). [Petitioner's Exhibits 16 & 17; and Transcript Pages 466 – 472]

12. The district conducted another FIE in the spring of 2008 which considered eligibility for the student under IDEA. The assessment showed that the student had some issues with anxiety, demonstrated average intellectual abilities, needed some assistance with attention, redirection, and organization but the student was participating well in class and making passing grades in all classes. The evaluation did not demonstrate a need for specialized instruction for the student under the provisions of IDEA. [Respondent's Exhibit 2; and Transcript Pages 523-560]

13. In the fall of 2008, the student was determined to be eligible for Section 504 services to address the student's learning needs. Strategies were developed to accommodate instructional modifications for the student's educational efforts. The student was successful in all classes and passed all requirements in the Texas Assessment of Knowledge and Skills ("TAKS") tests. [Petitioner's Exhibit 17; Respondent's Exhibit 13; and Transcript Pages 572-575]

14. The student continued receiving educational services under Section 504 in the 2009-2010 school year and successfully completed *** grade year passing all courses and state required assessments. [Respondent's Exhibit 13; and Transcript Pages 539-543]

15. Because of presenting problems in the student's behavior, the Section 504 committee developed a behavior intervention plan ("BIP") for the student in October 2010. [Respondent's Exhibit 3; and Transcript Pages 569-574]

16. The district determined that the BIP should address problems with anxiety, attention-seeking behavior, and organizational issues. [Respondent's Exhibit 3; and Transcript Pages 569-574]

17. Another FIE for the student was completed in January 2011. The evaluation showed that the student was successful in school under the Section 504 plan, making appropriate educational progress, and responding to the strategies in the 504 plan and BIP. The district determined that the student was not eligible for special education under IDEA and specifically determined that the student was not eligible as other health impaired ("OHI") or emotionally disturbed ("ED"). [Respondent's Exhibit 4; and Transcript Pages 561-577]

18. The evaluation also showed that while the student's behavior was addressed successfully at school, the student had significant behavior problems at home. The student and the student's parent had problems in their relationship with one another and with their expectations of one another. The evaluation noted a history of increasing tension between the student and the student's parent. [Respondent's Exhibit 4; and Transcript Pages 21-27, 538, 552-553 & 573-574]

19. An admission, review and dismissal ("ARD") committee in the district considered the FIE in January 2011. The committee, including the student's parent, agreed that the student did not meet eligibility criteria for special education under IDEA. The student continued services under Section 504. [Respondent's Exhibit 5; and Transcript Pages 547-584]

20. The student was *** in the 2010-2011 school year and *** in March 2011. The student was *** in August 2011. The *** anxiety and depression, noted issues with the student's relationship with the student's parent, and concerns about self-injurious behavior by the student. [Respondent's Exhibits 19-24; and Transcript Pages 381-393, 696 & 708]

21. In August 2011, the student's parent notified the district that the parent no longer agreed with the agreed placement at the ARD committee meeting in January. The parent requested an

independent educational evaluation (“IEE”) and stated that the student was emotionally disturbed. The district wrote the parent agreeing to pay for an IEE. [Respondent’s Exhibit 6; and Transcript Page 426]

22. In September 2011, the student’s parent notified the district that the student would not return to school in Lewisville ISD and would be placed in a private school by the parent. [Respondent’s Exhibit 7; and Transcript Pages 324-325]

23. Another ARD committee met later in September to complete a review of existing educational data (“REED”) and consider reports from the parent and the student’s ***. The committee determined that the student was eligible for special education as emotionally disturbed. [Respondent’s Exhibits 8 & 9; Transcript Pages 586-588]

24. The September 2011 ARD committee conducted a functional behavior assessment (“FBA”), determined that the student qualified for counseling as a related service, and developed an individual educational plan (“IEP”) including counseling goals and objectives and psychological services. The committee developed a BIP for the student and devised behavioral strategies to deal with peer interaction and attention issues. The plan included cool-down opportunities when the student’s behavior escalated and plans for leaving class when necessary. The committee further developed plans to deal with any test-anxiety of the student and additional accommodations for the student’s educational program. [Respondent’s Exhibit 9; and Transcript Pages 586-595]

25. The student’s parent did not agree with the educational placement proposed by the ARD committee. The parent told the committee that the student would not be attending school within the district and that the student was already enrolled in *** School. The student’s parent refused consent for placement in special education. [Respondent’s Exhibit 9; and Transcript Pages 595-599]

26. The IEE for the student was completed in November 2011 by ***, Ph.D, and ***, Ph.D. These psychologists ***. [Respondent’s Exhibit 27; and Transcript Pages 293-297]

27. The IEE stated that the student... “displayed characteristics of a student with a significant disability, specifically depression and anxiety.” The evaluation recommended that an ARD committee consider IDEA eligibility for the student as emotionally disturbed, OHI based upon suspected ADHD, and autism. [Respondent’s Exhibit 11; and Transcript Pages 311-317]

28. ***, a licensed specialist in school psychology (“LSSP”) for the district, conducted the psychological evaluation for the FIE of the student in 2011 considered by the ARD committees in 2011 and 2012. *** attended the ARD committee meetings in 2011 and 2012 concerning the student. *** reviewed assessment data for the ARD committee meetings. *** supported a finding by the committee that the student was eligible for special education based on an eligibility criterion of emotional disturbance. *** testimony credibly showed that the student is emotionally disturbed and that the student does not qualify under IDEA as autistic. [Respondent’s Exhibits 4, 11 & 12; and Transcript Pages 523-580]

29. The district personnel and the parent disagreed about the student’s eligibility criteria and appropriate placement. The student was placed unilaterally by the student’s parent in ***. [Petitioner’s Exhibit 3; and Transcript Pages 595-599]

30. *** School, according to its director – ***, M.Ed., – is a *** school for approximately *** students with many kinds of “mental and emotional” disabilities. The school employs *** full-time counselors. All students receive group therapy and some receive individual therapy as needed. The counselors are licensed professional counselors or psychological associates. [Petitioner’s Exhibit 3; and Transcript Pages 44-50]

31. The student has attended ***. *** has observed the student and the student’s problems with anxiety and behavior. *** believes that the student’s misbehavior has decreased while at ***. [Respondent’s Exhibit 23; and Transcript Pages 51-86]

32. The student has three teachers at ***; one is a certified teacher and two are not. The student has continued to have problems turning in work and ***. The student is working on grade level with supports but failed a *** course in 2011-2012. [Respondents Exhibit 23; and Transcript Pages 51-86]

33. The student's parent believes the evaluation by Dr. *** should be considered again to determine the student's eligibility for autism. The district's assessments do not indicate autism as an issue for the student. [Respondent's Exhibit 11; and Transcript Pages 298-328]

34. In considering private evaluation for the student, timely evaluation by the district involved more assessment, observation by school personnel, and analysis from teachers and other professionals who worked extensively with the student. The observations of the student's parent were a part of the assessment by the district, but they differed from the professional evaluations of the district. The district's evaluation is more substantial, thorough, and credible than those of ***. [Respondent's Exhibits 1, 2, 4, 8, 11 & 12; and Transcript Pages 298-483, 523-560 & 572-577]

Discussion

The student in this matter presents many difficulties for the student's parent and for schools the student attends. Various assessments have shown various difficulties for the student – and in the degree of the student's disabilities.

The district's responsibility under applicable law requires it to timely and appropriately address any areas of suspected educational disabilities. The student's parent's responsibility is to meet the Petitioner's burden of proof to demonstrate that the school failed to do what is required under the law.

The parties agree that the student is eligible for special education.

Petitioner is seeking a finding that the district failed to meet its responsibilities. Petitioner alleges that the district failed to provide – and is not now offering to provide – an appropriate placement

and related services for the student. Petitioner also seeks reimbursement for costs and expenses for a unilateral placement for the student.

Petitioner failed to meet its burden.

The credible testimony of the witnesses called by Respondent demonstrates that the district provided – and is offering to provide – an appropriate educational program for the student. The witnesses called by Petitioner failed to establish credibly that the private placement made by Petitioner is appropriate.

Conclusions of Law

1. The student is eligible for special education under the provisions of IDEA, 20 U.S.C. §1400, et seq., and related statutes and regulations.
2. The Respondent Lewisville Independent School District is responsible for the provision of the student’s special education.
3. IDEA creates a presumption favoring an education plan proposed by a school district and places the burden of proof on the Petitioner challenging the plan. Schaeffer v Weast, 546 U.S. 49; 126 S.Ct 528 (2005); and Tatro v. Texas, 703 F.2d 823 (5th Cir. 1983).
4. The educational placement afforded and currently offered to the student is individualized on the basis of the student’s assessment and performance; the program was – and can be – administered in the least restrictive environment; the services were – and can be – provided in a coordinated, collaborative manner by the “key” stakeholders in the matter; and positive academic and non-academic benefits have been demonstrated. Cypress-Fairbanks ISD v. Michael F., 118 F.3d 245 (5th Cir. 1997).
5. The student’s educational placement is reasonably calculated to confer and educational benefit under the 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.

6. Petitioner failed to prove that the unilateral private placement for the student is appropriate under IDEA, and consequently, Petitioner is not entitled to reimbursement for the costs of that placement. School Committee of Town of Burlington v. Massachusetts Department of Education, 105 S.Ct. 1996, 471 U.S. 359 (1985); 34 CFR 300.148.

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 7th day of January, 2013.

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

NO. 139-SE-0112

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SYNOPSIS

ISSUE #1: Whether the district failed to provide FAPE.

CFR CITATIONS: 34 CFR 300.552

TEXAS CITATION: 19 T.A.C. §89.1055

HELD: For Respondent.

ISSUE #2: Whether Petitioner is entitled to reimbursement for the costs of private placement.

CFR CITATIONS: 34 CFR 300.552; 34 CFR 300.148

HELD: For Respondent.