

DOCKET NO. 041-SE-1013

STUDENT bnf PARENT § **BEFORE A SPECIAL EDUCATION**
§
VS. § **HEARING OFFICER**
§
MESQUITE INDEPENDENT §
SCHOOL DISTRICT § **FOR THE STATE OF TEXAS**

DECISION OF THE HEARING OFFICER

*** (hereinafter “the student”) through student’s next friend, *** (Petitioner), requested a due process hearing pursuant to the Individuals with Disabilities Education Improvement Act (IDEIA), 20 U.S.C. § 1400 *et. seq.*. The Respondent is the Mesquite Independent School District.

The issues before the hearing officer were:

1. Whether the District’s placement and/or provision of special education and related services is appropriate for the student. (Petitioner characterizes petitioner’s complaint regarding the student’s eligibility as a placement issue.)
2. Whether the student’s Resource Math and CMC services are appropriate.
3. Whether the District improperly relied on an IEE provided for the student.
4. Whether the District’s identification of the student’s eligibility is appropriate.

As relief, Petitioner requested removal from special education and related services and after school tutoring for compensatory and prospective relief.

PROCEDURAL HISTORY

Petitioner filed this request for hearing on October 8, 2013. Petitioner was represented by attorney Cheryl Powell. Gary Grimes represented the Mesquite Independent School District. Following a continuance for good cause, the hearing was held on January 10, 2013. The Decision was timely rendered and forwarded to the parties.

Based upon the evidence and argument of the parties, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The student resides within the geographical boundaries of the Mesquite ISD. Mesquite ISD is responsible for providing the student with a FAPE. The student is eligible to receive special education and related services as a student with a specific learning disability.
2. On January 30, 2012, MISD completed a Full and Individual Evaluation (FIE) for the student. RR48, R3.
3. Upon completion of the FIE, the multi-disciplinary committee determined that the

student was no longer eligible for special education and related services. R3-14. Petitioner requested an Independent Educational Evaluation (IEE) at public expense, which was agreed to by the District. The District continued to provide special education and related services for the student while the IEE was pending. R3-15.

4. ***, Ph.D., completed the IEE in August, 2012. Dr. *** administered the Wechsler Intelligence Scale for Children (WISC), which, according to MISD's diagnostician, provided a better assessment of the student's classroom functioning, compared to a more abstract assessment administered by MISD. RR52.

5. The results of the IEE indicated that the student has deficits in fluid reasoning, which correlates to the student's previously demonstrated weaknesses in math and written expression. R3-26; RR51.

6. A deficit in fluid reasoning affects higher level thinking skills in reading, writing and math. R3-26.

7. The multi-disciplinary committee, in reviewing the MISD FIE, the IEE, as well as parent and teacher reports, classroom observations, and district assessments, concluded that the student meets the eligibility criteria for a student with a Specific Learning Disability in Mathematics Problem Solving and Written Expression. R3-34-37.

8. On October 19, 2012, the ARD Committee convened to review the assessment data and determined that the student meets the criteria for Specific Learning Disability. R5.

9. Petitioner provided documentation from the student's physician regarding an ADHD diagnosis prior to the October 2012 ARD Committee meeting. R3-15; P-10. However, neither Petitioner nor the physician returned the Other Health Impairment (OHI) form to the District. R3-15. Additionally, *** evaluated the student in 2009 and identified ADHD as a suspected diagnosis.¹ The ARD Committee considered and addressed attention related deficits in the student's IEP. RR54-56; R5-83; R10-165.

10. The ARD Committee developed an IEP in October 2012 that addressed the student's academic weaknesses and included accommodations to address the student's ADHD symptoms.² The ARD Committee determined that the student would be placed in the general education setting, with a Resource math class 30 minutes, two times per week, and Content Mastery support in both math and science for 45 minutes per week. R5-89.

11. Petitioner agreed with the school members of the ARD Committee, subject to reviewing results from a *** evaluation. R5-95.

12. *** reviewed the FIE, the IEE, as well as the October 19, 2012 IEP, and recommended that the Petitioner continue to work with the District, and further informed

¹ Petitioner contends that the phrase "rule out ADHD" in the diagnosis section of the report means that ADHD was considered and eliminated as a diagnosis. Contrary to Petitioner's assertion, the phrase "rule out" in the context of the report means that ADHD was a suspected diagnosis that called for further evaluation. RR67.

² Petitioner does not challenge the IEP goals and objectives. Rather Petitioner challenges the appropriateness of the student's placement in resource math and content mastery.

petitioner that services through its program would not improve the District's educational program. R6-129; P11. Additionally, *** recommended collaboration between Petitioner and the District to address the student's ADHD symptoms that may occur in the classroom. R5-96.

13. The student did not perform satisfactorily on the 2013 Math STAAR assessment. On April 25, 2013, the ARD Committee amended the student's IEP to include accelerated math instruction, with 45 minutes per day in math tutoring to be provided partially in a group setting in the general education classroom and 30 minutes per day in the content mastery classroom. R7. The District also provided accelerated instruction for the student during the summer of 2013. R8. The acceleration program is required for all students who have not been successful on the STAAR test and is not specifically a special education program. RR81, 86.

14. The ARD Committee developed the student's annual IEP in October, 2013. The student's current IEP provides for 60 minutes per week Resource math, 45 minutes per week Content Mastery support in math, as well as 60 minutes per week Inclusion Math. R10-171. Petitioner disagreed with the school members of the ARD Committee due to the identification of the student's specific learning disability. R10-174, 181; R11-215, 222. In other words, Petitioner requested specialized instruction and services under IDEIA without the label or identification of the student as one who needs special education and related services.

15. I find, based on a preponderance of the evidence, that the student demonstrates a need for special education and related services due to a Specific Learning Disability in Math Problem Solving and Written Expression. I further find that Petitioner has not revoked consent for special education and related services.

DISCUSSION

Identification of Student and Consideration of IEE

Petitioner complains that the District improperly identified the student as learning disabled, and argued that student in fact has no disability at all. Additionally, Petitioner alleges that the District improperly relied on petitioner's IEE in identifying the student's specific learning disability.

The District conducted an FIE which initially resulted in a determination that the student was not eligible for special education and related services. Petitioner requested an IEE at public expense, which the District agreed to fund. The IEE evaluator administered different assessment instruments relevant to classroom performance and identified the student's deficits in fluid reasoning, which correlate with specific learning disabilities. The student had previously demonstrated weaknesses in math and written expression, areas specifically affected by deficits in fluid reasoning. Pursuant to 34 CFR § 502(c), the District considered the IEE, as well as a variety of assessment tools and strategies to gather relevant information to assist the ARD Committee in determining the student's eligibility status. R3-34-37. Specifically, the ARD Committee reviewed the following:

1. Woodcock-Johnson III Tests of Cognitive Abilities
2. Wechsler Individual Achievement Test - WIAT-3
3. Woodcock-Johnson Test of Achievement-III

4. Parent Information
5. Teacher Information
6. Educational Records
7. Classroom Observation
8. Counselor Report
9. District Assessments
10. Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) (IEE)
11. Gray Oral Reading Tests – Fifth Ed. (GORT-5) (IEE)
12. WJ-III ACH, Form A (selected subtests) (IEE)
13. IVA+Plus (Integrated Visual and Auditory Continuous Performance Test (IEE)
14. NEPSY-II: A Developmental Neuropsychological Assessment -2nd Ed. (IEE)
15. Behavior Rating Inventory of Executive Function – Parent Form (IEE)
16. Behavior Rating Inventory of Executive Function – Self Report (IEE)
17. Controlled Oral Word Association Test – FAS (IEE)
18. Comprehensive Test of Phonological Processing - CTOPP (IEE)
19. California Verbal Learning Test – Children’s Version – CVLT-C (IEE)
20. Wide Range Assessment of Learning and Memory – 2nd Ed. (WRAML-2), selected subtests (IEE)
21. The Grooved Pegboard Test
22. Beery-Buktenica Developmental Test of Visual Motor Integration (Beery VMI) – 5th Ed. (IEE)
23. Behavior Assessment System for Children – 2nd Ed., Parent Rating Scales (BASC-2) (IEE)
24. BASC-2 Self Report Rating Scales (IEE)
25. Diagnosis of ADHD provided by Dr. ***³

RR48-49; R3-15; R4-56. The ARD Committee did not use any single measure or assessment as the sole criterion in concluding that the student has a specific learning disability in math problem solving and written expression. 34 CFR 300.304(b). The District also complied with IDEIA’s mandate that it consider the IEE in determining that the student has a specific learning disability. 34 CFR §300.502(c)(1). Petitioner’s assertion that the ARD Committee relied solely on the IEE in determining eligibility is wholly without merit.

Petitioner further alleges that the student does not have a specific learning disability, based solely on the District’s initial FIE. However, according to the diagnostician for the District, the IEE consisted of additional assessment instruments and subtests, which, when considered in combination with the District’s assessment and the student’s performance, indicated a processing deficit in fluid reasoning. R3-23; RR-52-53. In particular, the independent evaluator administered the WISC, with subtests in arithmetic and picture concepts addressing concepts taught in the classroom and the student’s reasoning. RR52, 60. According to the totality of the data, the student has demonstrated weaknesses in written expression and math problem solving, which correlates to the student’s deficits in fluid reasoning. R5-105; RR52, 60. The ARD Committee, considering all of the data, determined the student has a specific learning disability in math problem solving and written expression. R5.

³ The parent provided information to the District regarding the ADHD diagnosis. However, the physician never returned the OHI form to the District. RR-50. Consequently, the ARD Committee did not identify the child as Other Health Impaired. R3-15.

Additionally, the District presented evidence that because of the student's disability, student needs special education and related services. Although the student was commended in 2011 on a *modified* math TAKS test, the student did not meet satisfactory grade level performance standards in Math, Reading and Writing on the *** grade STAAR administered in the Spring of 2012. R12-245. Student did not meet satisfactory standards in Math on the 2013 STAAR assessment. R12-246; R13-250. Student's performance on campus and curriculum based assessments is also indicative of a pattern of weakness in math and is not consistent. R13. The IEE reflects that the student's math reasoning, math concepts and math fluency skills were extremely low and developed to *** grade level, contrasted with student's math calculation skills which are average. R4-58. According to the uncontroverted testimony of the student's teachers, student requires special education assistance in math and would not be successful without it. RR73-74, 85. Additionally, student's teachers testified that the evaluation accurately reflects the student's weaknesses. RR71;82, 84. For example, according to the student's teachers, the student's deficits in problem solving and higher level thinking skills as reflected in the IEE are demonstrated in the area of solving multi-step math problems. RR73, 84. The student's special education teacher is able to address the student's needs with one-on-one assistance, small group instruction, a higher level of repetition and accommodations that student would not have in the general education setting. RR75, 85. Based on the uncontroverted testimony, I find that the student needs special education and related services due to student's specific learning disability.

The ARD Committee also addressed the student's needs related to ADHD symptoms. The parent provided the District with information regarding the student's ADHD diagnosis from the student's physician that noted the student's ADHD symptoms interfere with student's ability to stay on task and complete assignments. P10. This information is consistent with the findings in the IEE. R4-64. Additionally, the parent previously provided the District with a copy of an evaluation that identified ADHD as a suspected diagnosis in 2009. P3. In an effort to document OHI eligibility, the District forwarded an OHI Report form to the physician, who did not complete or return it. RR54, 61-62. When the student's physician failed to return the OHI report to the ARD Committee, precluding a finding of OHI eligibility⁴, the ARD Committee, nevertheless addressed the student's attention deficit related needs by adopting accommodations in the classroom. R5-83; R10-165. The accommodations adopted by the District are consistent with the recommendations of the independent evaluator. R465. Although the student is not identified as a student with Other Health Impairment, it was appropriate for the ARD Committee to address student's attention related deficits in the IEP. IDEIA requires that a student's educational plan be individualized based on the student's needs, not student's eligibility classification. 20 USC 1412(a)(3)(B). In other words, the focus of IDEIA is whether the services are appropriate given the student's identified needs, not the eligibility label. *See Student v. Banquette ISD*, TEA Dkt. No. 048-SE-1010 (Ramage, March 2011); *Pohorecki v. Anthony Wayne Local School District*, 637 F.Supp.2d 547 (N.D. Ohio 2009).

The district's educational program is entitled to a legal presumption of appropriateness. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983). Petitioner bears the burden of proving that it is not appropriate or that the District has not complied with the procedural requirements under the IDEIA. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). Petitioner has failed to meet this burden with

⁴ The multi-disciplinary team that makes a recommendation for OHI eligibility must include a licensed physician. 19 TAC §1040(c)(8).

regard to the identification of the student's eligibility for special education and related services.

Appropriateness of the Student's Math Resource and CMC Services

Petitioner contends that the student's Math Resource and CMC services are not appropriate in that they are not administered in the least restrictive environment. In evaluating whether an educational program is appropriate, or reasonably calculated to confer an educational benefit, the Fifth Circuit Court of Appeals has identified four factors to consider:

1. Is the program individualized on the basis of the student's assessment and performance?
2. Is the program administered in the least restrictive environment?
3. Are the services provided in a coordinated and collaborative manner by the key stakeholders?
4. Are positive academic and nonacademic benefits demonstrated?

Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245 (5th Cir 1997); cert. denied, 522 U.S. 1047 (1998). The 5th Circuit Court of Appeals has held that the four factors do not necessarily need to be applied in a particular manner or afforded the same weight. Rather, the factors are intended as a guide in the determining whether the student received a FAPE. *Richardson ISD v. Leah Z*, 580 F.3d 286 (5th Cir. 2009). The district's educational program is entitled to a legal presumption of appropriateness. Petitioner bears the burden of proving that it is not appropriate. *Schaffer v. Weast*, 126 S.Ct. 528 (2005); *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983). Petitioner has not met this burden.

Petitioner does not complain that the student's math goals are inappropriate for the student. Rather, Petitioner's sole complaint is that student's math instruction is not being provided in the least restrictive environment. However, an application of the *Michael F.* factors demonstrates that the student's educational program is appropriate. The District developed the student's program in a collaborative manner by reviewing its own FIE as well as data from the IEE. The student's special education teacher testified that the student's weaknesses demonstrated in the classroom were consistent with the weaknesses documented by the evaluator. RR73. The IEP specifically addresses the student's weaknesses in math problem solving. R5-81-82; R10-164. Additionally, the evaluator noted that the student meets the diagnostic criteria for ADHD and identified symptoms that interfere with or disrupt student's learning. R4-64. When the student's physician failed to return the OHI report to the ARD Committee, precluding a finding of OHI eligibility, the ARD Committee nevertheless addressed the student's attention deficit related needs by adopting accommodations in the classroom. R5-83; R10-165. The accommodations adopted by the District are consistent with the recommendations of the independent evaluator. R465.

The teachers provided uncontroverted testimony that the student is making progress under student's current IEP. RR71-72. The student currently receives 45 minutes content mastery per week, 60 minutes per week in resource math, and special education assistance in the general education math classroom. The remainder of student's program is provided in the general education setting. R10-171. The special education services are in addition to after school tutoring and an Acceleration Program provided based on the student's performance on the

STAAR. RR86. Based on the totality of the evidence, the student's IEP is appropriate and is administered in the least restrictive environment. According to the student's teachers, student requires the additional content mastery and resource support in math to be successful. Both teachers testified that student requires more repetition and assistance than student would receive in the general education classroom. RR74, 84-85. The student is currently receiving appropriate special education and related services in the least restrictive environment. Petitioner has failed to meet petitioner's burden on this issue.

In sum, Petitioner's primary position in this case is not whether the student, as an eligible student under IDEIA, is in an appropriate *special education* placement, i.e. a placement in which student receives specially designed instruction and related services in the least restrictive environment. Rather, petitioner's position is that student should not be eligible for special education services at all. However, the Petitioner, as a managing conservator with the right to make educational decisions, has the right under IDEIA to withdraw consent for special education and related services, and she has not done so. The right to parental consent to services is a prerequisite under IDEIA and the parent (or one acting with parental authority) has the absolute right to provide, deny or revoke consent. 34 CFR 300.9; 34 CFR 300.300(b). In fact, if the parent withholds consent, the school district may not seek a hearing officer decision to override that lack of consent. The Petitioner does not dispute that she has not withdrawn consent for services. Rather, she seeks a ruling that student is not eligible for special education and related services along with a request that the Hearing Officer order the District to provide those same services to student outside of IDEIA.

Petitioner's requested findings and relief are mutually exclusive. In order to be eligible for services under IDEIA, a student must (1) have a qualifying disability and (2) by reason thereof, need special education and related services. 20 U.S.C. § 1401(3)(A); 34 CFR 300.8(a)(1); *Alvin Independent School District v. A.D.*, 503 F.3d 378, 382 (5th Cir. 2007). If either prong is not met, the student is not eligible for services under IDEIA as a matter of law. Additionally, the jurisdiction of the Hearing Officer under IDEIA is limited to identification, evaluation, educational placement under IDEIA or the provision of a Free Appropriate Public Education under IDEIA. 34 CFR §300.507; 19 TAC §1151. A finding that the child is not eligible for special education services moots any relief under IDEIA. Petitioner is eligible for special education and related services. The student's program is appropriate. However, Petitioner has the absolute right to revoke consent for special education and related services. 34 CFR 300.9; 34 CFR 300.300(b)(4). In the event she withdraws such consent, the District will not be in violation of IDEIA for failing to provide further special education and related services. 34 CFR 300.300(b)(4).

CONCLUSIONS OF LAW

1. The student is eligible for special education and related services as a student with a disability under IDEIA, 20 U.S.C. §1400 *et. seq.* and its implementing regulations, based on a Specific Learning Disability in Math Problem Solving and Written Expression.

2. The ARD Committee's determination of eligibility is based on a variety of assessment instruments, observations, and strategies, and not on a single measure or assessment. 34 CFR 300.304(b).

3. The ARD Committee properly considered the IEE in determining that the student is eligible for special education and related services. 34 CFR §300.502(c).

4. The district's educational program is entitled to a legal presumption of appropriateness. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983). Petitioner bears the burden of proving that it is not appropriate or that the District has not complied with the procedural requirements under the IDEIA. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). Petitioner has wholly failed to meet petitioner's burden.

ORDER

Based upon a preponderance of the evidence and the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the relief requested by Petitioner is **DENIED**.

Finding that the public welfare requires the immediate effect of this Final Decision and Order, the Hearing Officer makes it effectively immediately.

SIGNED this 4th day of February, 2014.

Sharon M. Ramage
Special Education Hearing Officer

SYNOPSIS

- Issue No. 1: Did the District improperly rely on an IEE to determine the student's eligibility?
- Ruling: For the District. IDEIA requires the ARD Committee to consider an IEE in determining the student's eligibility and special education and related services. The District relied on information from a variety of sources, including multiple assessment tools and strategies, classroom observation, as well as teacher and parent input in determining the student's eligibility.
- Citation: 34 CFR 300.502(c); 34 CFR 300.304(b)
- Issue No. 2: Whether District appropriately identified the student's eligibility for special education and related services?
- Ruling: For the District. The student is eligible for special education and related services due to specific learning disability in math problem solving and written expression.
- Citation: 34 CFR 300.8(a); 34 CFR 300.8(c)(10)
- Issue No. 3: Whether the student's math instruction is provided in the least restrictive environment?
- Ruling: For the District. The student requires Resource math and content mastery support to receive an appropriate public education.
- Citation: 34 CFR 300.116