

DOCKET NO. 074-SE-1113

STUDENT	§	BEFORE A SPECIAL EDUCATION
B/N/F PARENTS	§	
	§	
VS.	§	HEARING OFFICER
	§	
GRAPEVINE-COLLEYVILLE	§	
INDEPENDENT SCHOOL DISTRICT	§	FOR THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

Statement of the Case

Student, by the student’s next friends and parents (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 Grapevine-Colleyville Independent School District (hereinafter “Respondent” or “the district”).

Petitioner’s request for hearing was filed with the Texas Education Agency on November 5, 2013. The Honorable Lynn Rubinett was assigned to be the hearing offer. Dorene Philpot, an attorney in Galveston, represented the Petitioner. Nona Matthews and Gwendolyn Maez, attorneys in the Irving office of Walsh, Anderson, Gallegos, Green & Treviño, P.C., represented the district.

The matter came on for hearing in Grapevine in the offices of the district by agreement of the parties and order of the Hearing Officer. The hearing was conducted on February 18 and 19, 2014. The Honorable Lynn Rubinett was unable to preside over the hearing because of an illness and the matter was transferred to the undersigned Hearing Officer on February 13, 2014. At the close of the hearing, the parties jointly moved for an extension of the decision deadline in this matter so that counsel could file written closing arguments on or before March 17, 2014, and the decision would be issued on March 31, 2014.

Petitioner alleged that the district violated its Child Find duties (under IDEA, 20 U.S.C. § 1412 and 1414, and 34 CFR 300.301, and 19 T.A.C. § 89.1011). Petitioner also alleged that the district failed to provide timely prior written notice required for the parents under IDEA.

Petitioner brought evidence about educational need for special education services, problems with homebound services, concerns about results of standardized testing and the meaning of those results, complaints about qualifications of teachers, and possible psychological harm to the student.

In the request for hearing, Petitioner sought up to three (3) years of compensatory services, reimbursement for private evaluation and services, placement in special education, and evaluation by the district. Petitioner also sought relief under other statutes other than IDEA. Hearing Officer Lynn Rubinett dismissed all claims raised by Petitioner except for the IDEA claims.

In Petitioner's written closing argument, Petitioner stated that the remedies requested were [The student's gender from the closing argument has been sanitized to use the term "the student"]:

“...The student wants to go to college and needs ‘learning and education’ in order to do so. (Citation to the record). The student needs a program that enables the student to graduate with a recommended diploma, not a watered down one based on the district's failures to comply with the laws.

...Petitioners request that the hearing officer order an evaluation to assist with eligibility and with devising ‘a plan that is going to fill the holes that (the student) has in the student's education over the last three years...and to get the student caught up on the stuff that the student didn't learn’. (Citation to the record).

...Petitioner requests eligibility, as the staff admitted to already having in hand all the information need to consider eligibility.

...Petitioner request (sic) teachers qualified to teach the homebound subjects, compensatory services for the periods of time that the student was denied the student's right to timely evaluation and appropriate services (including the months of no services and the improper wait periods imposed), staff training, videotaping or Skype as a means for the student to receive access to the same instruction as the student's peers. (Citation to the record).

...the student needs specially designed instruction that allows flexibility, videotaping or Skype, having teachers who come to the student's house who know the material the student needs to be taught, and specially designed compensatory services. (Citation to the record). The director agreed that 'specially designed instruction' means the instruction has been designed especially by a certified specialized tech with the student's own individual goals, whether behavioral, academic, or functional, in mind to help them meet their IEP goal. Individually tailored means the instruction is tailored to meet the child's individual needs, whether designed by gen ed (sic) or special ed(sic). (Citation to the record)."

The district in its closing statement sought a finding – raised at one time by both parties – under 34 CFR 300.517 about unreasonably protracting litigation. The district's counsel stated: "If Petitioner's attempt to seek special education eligibility for a high performance student with all A's year after year in advanced courses is not frivolous, one cannot imagine what is frivolous for purposes of this provision. All of the facts support the conclusion that Petitioner's request for

a due process hearing was frivolous, unreasonable, without foundation, protracted, and filed only to harass the district.”

Based upon the evidence and argument of counsel, the Hearing Officer makes the following findings of fact and conclusions of law:

Findings of Fact

1. The student resides with the student’s parents within the Grapevine-Colleyville Independent School District. [Petitioner’s Exhibit 5 and Respondent’s Exhibit 2]

2. The student was born ***. [Petitioner’s Exhibit 5 and Respondent’s Exhibit 2]

3. The student was diagnosed with *** in December 2010. ***. [Transcript Pages 29-30, 113 & 352 and Respondent’s Exhibits 2, 3 & 5]

4. In the *** school year, the student attended the *** grade within the district and received homebound services. [Transcript Pages 354-355, 385 & 391 and Respondent’s Exhibits 2-5]

5. *** is a chronic *** disease which can effect *** and other conditions. [Respondent’s Exhibit 2 and Transcript Pages 30, 76 & 214]

6. The student’s physical condition interferes with the student’s ability to attend school regularly. [Petitioner’s Exhibit 17 and Respondent’s Exhibit 2, 3, 10 & 21 and Transcript Pages 37, 166, 179-197, 205-245, 254-257]

7. The student attended the *** grade within the district with general education homebound services and accommodations though Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794, et seq.). [Respondent’s Exhibit 2-5 and Transcript Pages 388-389]

8. During the year, the student passed the reading and math assessments in the Texas Assessment of Knowledge and Skills (“TAKS”). [Respondent’s Exhibit 30]

9. The student was also assessed with the Cognitive Abilities Texas (“CogAT”) which showed the student has average cognitive abilities, average verbal and nonverbal cognitive abilities, and above average quantitative abilities. [Respondent’s Exhibit 4 and Transcript Page 351]

10. When the student was tested with the CogAT in the *** grade, the scores were in the normal range (in each the student was above average) but had decreased since the *** grade assessment. [Petitioner’s Exhibit 14 and Transcript Page 531]

11. During the *** grade the student was educated by ***. The student’s grades were straight A’s in the program. [Petitioner’s Exhibit 12]

12. The student’s parents testified that they were told that the homebound program for the *** grade could only offer four hours of instruction each week – in placements for homebound under either special education or general education – and they believed that four hours would be insufficient. [Petitioner’s Exhibit 3 and Transcript Pages 355 & 391]

13. The student began the 2012-2013 school year within the district in the *** grade. The student received accommodations though Section 504 but did not receive homebound instruction. For ***, *** the student did not attend school. [Respondent’s Exhibits 7 & 15 and Transcript Pages 114 & 387]

14. In the spring of 2013, the student passed the math and reading portions of the State of Texas Assessments of Academic Readiness (“STARR”), and the student did well on the Measurement of Academic Progress (“MAP”) according to district personnel. The district personnel believe that the MAP score was administered to learn the mastery of some content which may not have been taught during the semester at the time. [Respondent’s Exhibit 30 and Transcript Pages 77-78 & 92]

15. The student's mother advised the district that the student was having surgery in *** 2013 and believed the student would return to school within a week of the surgery. No information from the parent was provided from a physician that homebound services were indicated for the student for the *** grade year. Later in *** the student's parent told the district that the student's physician recommended that the student remain at home for some period of time. [Petitioner's Exhibit 15 and Respondent's Exhibit 7 and Transcript Pages 72 & 226-227]

16. In January 2013, the student was assessed again with the CogAT. The student scored within the average range of nonverbal and verbal cognitive abilities and above average in quantitative abilities. The student's grades were A's in ***. [Respondent's Exhibits 7 & 8 and Transcript Page 95]

17. As the student began the *** grade for the 2013-2014 school year, the district held a Section 504 committee meeting. The student's mother wanted the district to advise all of the student's teachers of the student's Section 504 plan – and specifically, the accommodation that the student could go the restroom at any time. [Respondent's Exhibits 10 & 19]

18. The student's Section 504 plan permitted the student to leave for the restroom at any time and provided other accommodations such as extended time for completion of assignments, frequent breaks in school, access to the school nurse, limitations on physical activities, access to water and snacks, and other accommodations. [Respondent's Exhibit 10 and Transcript Pages 507-508]

19. The student's teachers testified credibly that they were familiar with the student's Section 504 plan and that the student did not ask for nor require many of the accommodations in the Section 504 plan and performed well in all classes. [Respondent's Exhibit 23 and Transcript Pages 444 & 507-508]

20. After the student's mother told the district in *** 2013 that the student could not return to school for some period after the student's surgery, the district convened another Section 504 committee meeting to determine how to address the student's absences. The district asked the parents to have the student's physician make a recommendation on homebound services, but the information provided to the district did not state how long the student was expected to be absent from school. [Petitioner's Exhibit 3 and Respondent's Exhibit 10, 11, 12 & 23 and Transcript Pages 447-450]

21. The District got consent from the student's parents on ***, 2013, to communicate with the physician and asked the physician to complete a general education assessment for homebound placement. The physician completed the assessment and recommended homebound services for the student. [Respondent's Exhibit 11-14 and Transcript Pages 205-207, 448-450 & 447-448]

22. A Section 504 committee met on ***, 2013, to discuss services for the student and the committee agreed to general education homebound instruction for four hours a week. During the meeting, the student's parents asked the district to conduct an evaluation to determine whether the student was eligible for special education services. [Respondent's Exhibits 15 & 23 and Transcript Pages 457-459]

23. In response to the parent's request for a special education evaluation, district personnel asked on ***, 2013, to meet with the student's parents to consider how to meet the student's needs. Because a medical procedure interfered with an initial meeting with the parents, the meeting was not convened until ***, 2013. At the meeting, the district told the parent about the opportunity to enroll in *** available at the district. The parents asked for general education homebound support for the student. [Respondent's Exhibits 19 and Transcript Pages 85-87]

24. On ***, 2013, the Executive Director of Special Services with the district told the student's mother about differences in general education homebound services and special education homebound services. The Executive Director said that the difference is essentially in certification of the homebound instructor. The student's mother, according to credible testimony by the district's personnel, declined a special education evaluation asking the district to "bend the rules" and place the student in special education without the required special education evaluation. [Respondent's Exhibit 19 and Transcript Pages 585-588]

25. On ***, 2013, attorneys for the parties began discussion of litigation in this matter. [Respondent's Exhibit 16 and Transcript Pages 591-592]

26. Petitioner filed its request for hearing on November 5, 2013.

27. The student's parents testified that they believe they indicated to the district an interest in special education evaluation by the district in an oral inquiry to district personnel in the student's *** grade year and in a Section 504 meeting in *** 2013.

28. The district's personnel who testified at the hearing credibly described the student as one – though with difficult medical problems – who performed well in school, passing all of the student's courses while attending school within the district or in an online program, and showing successful (or exceptional) academic progress while attending school on campus or in homebound placements. The testimony was supported by numerous documentary evidence. [Petitioner's Exhibit 3 and Respondent's Exhibits 4, 8 & 30 and Transcript Pages 73, 83, 92, 115, 467-468, 507-508, and 555]

29. Petitioner's special education expert witness reviewed correspondence and some educational records concerning the student. The expert did not observe the student in school or consult with the student's teachers. The expert did not conduct an evaluation of the student. The witness consistently qualified her expert opinions – such as using the word "probably" on many

occasions. The expert testified that she was familiar with some of the assessment of the student or the current evaluation used by the State of Texas. The expert's opinions were inconclusive and not credible. [Transcript Pages 259-262, 281-298 & 305-312]

30. Petitioner's parents have been concerned about the certification or the quality of homebound instruction for the student under Section 504 in the general education program. Petitioner's parents believe that the instruction should have been done by teachers considered "highly qualified". The student's teachers of record (those who made assignments, reviewed the student's work, and assigned grades) are considered highly qualified. [Transcript Pages 81, 123-124, 135-137, 168-182, 191 & 503-522]

31. The student's homebound program consisted of one-on-one homebound instruction by a certified teacher for four hours each week. This amount of instruction equates to a five day school week under the standards of the Student Attendance Accounting Handbook for 2013-2014. [Respondent's Exhibit 23 and Transcript Page 189]

32. The student's homebound instructor for the school year 2013-2014 has a Bachelor's degree from *** University and a Master's degree from *** University. She is a certified teacher in family consumer science, needs one class to be highly qualified in Spanish, and is highly qualified in math. [Transcript Pages 187-189]

33. The student's parents have been concerned about social and emotional issues about the student which are inherent in medical complications in the student's life. The student has, however, exhibited at school appropriate social interactions and participated in *** in the 2012-2013 school year – leading into additional *** experience in 2014. [Petitioner's Exhibit 15 and Transcript Pages 55 & 534-535]

Discussion

The essential controversies in this case are whether the district failed to timely assess and identify the student as one who is entitled to special education and placement and whether the student should be identified as such a student. The burden on Petitioner is to prove the district did not do what they should have done in the process of the student's evaluation and identification. The burden is a heavy one. Schaffer v. Weast, 126 S.Ct. 528 (2005).

Petitioner is not entitled to the relief it requested in its pleadings and written argument. The district is not responsible under IDEA to make the student ready for college education. Petitioner did not demonstrate the need for a special education evaluation to develop a plan, as described by testimony, that will "fill the holes" in the student's education over the past three years. Petitioner did not prove special education eligibility for the student. The student is not entitled under the law to determine qualification for homebound teachers other than those already established under the law. Petitioner showed no proof that the student is entitled to compensatory services or requires adaptive instructional techniques which could be required under IDEA.

Petitioner sought to prove that the student's medical condition entitled the student to special education placement and services. Petitioner did prove that the student's medical condition results in a number of problems (suggesting that the student is other health impaired ("OHI") under IDEA) but did not prove that the student's condition adversely affects the student's educational performance – as required under 34 CFR 300.8 (c)(9).

The student's own innate abilities and determination to succeed – re-enforced by the student's parents – have shown that the student does not need specially designed instruction as a special education student as contemplated under IDEA.

Neither party proved a credible case for a finding of unreasonable protraction of litigation.

Conclusions of Law

1. The Grapevine-Colleyville Independent School District is responsible for properly identifying and evaluating the student for special education services under the provisions of IDEA, 20 U.S.C. § 1412 and 1414; 34 CFR 300.301; and 19 T.A.C. § 89.1011.

2. The district properly fulfilled its responsibilities under IDEA, 20 U.S.C. § 1412 and 1414; 34 CFR 300.301; and 19 T.A.C. § 89.1011.

3. The student is not eligible as a special education student under the provisions of IDEA, 20 U.S.C. § 1400, et seq.; 34 CFR 300.301; and 19 T.A.C. § 89.1011.

ORDER

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

SIGNED this 31st day of March, 2014.

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

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SYNOPSIS

ISSUE: Whether the district properly identified and evaluated the student for special education services under the provisions of IDEA.

CFR CITATIONS: 34 CFR 300.301

TEXAS CITATION: 19 T.A.C. §89.1011

HELD: For Respondent.

ISSUE #2: Whether the student is eligible as a special education student under the provisions of IDEA.

CFR CITATIONS: 34 CFR 300.301

TEXAS CITATION: 19 T.A.C. §89.1011

HELD: For Respondent.