

DOCKET NO. 067-SE-1112

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

DECISION OF THE HEARING OFFICER

Statement of the Case

Student, by the student's next friend and 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 Killeen Independent School District (hereinafter "Respondent" or "the district").

Petitioner was represented by Yvonnilda Muñiz, an attorney in Austin. The district was represented by Holly Wardell, an attorney with the firm of Eichelbaum, Wardell, Hansen, Powell & Mehl, attorneys in Austin.

Petitioner's request for hearing was filed on November 14, 2012. The hearing date and date for decision were continued on a number of occasions by agreement and for good cause. The hearing was conducted in the offices of the Killeen Independent School District on October 28 and 29, 2013. Before the hearing began, Petitioner filed a motion to recuse the Hearing Officer. The motion was denied and referred to another special education Hearing Officer. After a hearing on the motion by the other Hearing Officer, the motion was denied and the matter referred again to the undersigned Hearing Officer.

At the close of the hearing, the parties jointly asked for a continuance of the decision date in this matter so that they could file written closing arguments. The Hearing Officer ordered that written arguments of no more than fifteen (15) pages of length could be filed by December 2, 2013, and the decision would be issued by December 16, 2013.

After the hearing, a personal matter arose from Petitioner's counsel and the parties jointly asked for an extension of the decision date in this matter and a new date for the filing of closing arguments. The decision date was moved by joint motion and agreement to December 30, 2013, and closing arguments were to be submitted on December 16, 2013.

Respondent's counsel filed a written closing argument in compliance with the Hearing Officer's order. Petitioner's counsel exceeded the page-length requirements with an argument of twenty-two (22) pages and an appendix to the argument of twenty-four (24) pages in length. The Hearing Officer is not required to consider any argument beyond the fifteen (15) pages permitted under the scheduling order.

Petitioner alleged that the district failed to identify the student in a timely manner as eligible for special education and related services, failed to evaluate the student in all areas of suspected disability, failed to identify properly the eligibility criteria for the student under IDEA, failed to provide necessary related services, and failed to provide the student with a free appropriate public education ("FAPE").

As relief, Petitioner seeks reimbursement for the costs of private placement for the student, prospective costs for private placement and services, and compensatory educational services. In the alternative – if no private placement is ordered – Petitioner seeks an order providing compensatory services, appropriate training for the student's parent and school personnel, a behavior intervention plan, and an order declaring that the student has been denied FAPE.

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 began *** in the district in the 2010-2011 school year. [Petitioner's Exhibit 1 and Transcript Page 200]
2. The student attended the district for the student's *** year in 2011-2012. [Petitioner's Exhibits 10-12 and Transcript Page 200]

3. At the completion of the 2011-2012 school year, the student was retained in the *** for the 2012-2013 school year because the student was not reading on a *** level. [Petitioner's Exhibits 16 & 17 and Transcript Page 5]

4. School personnel believed and credibly concluded that the student's performance during that year was attributed to missing a significant amount of instruction. [Transcript Pages 498-499 & 508]

5. The student had been privately evaluated by *** in October 2010. The student was diagnosed with an adjustment disorder and possible pervasive developmental disorder – not otherwise specified (“PDD-NOS”). [Petitioner's Exhibit 2]

6. The private evaluation also noted borderline intellectual functioning and receptive language delays. [Petitioner's Exhibit 2]

7. The student's parent notified the school of the student's previous history and asked for consideration of special education services for the student. [Petitioner's Exhibit 1 and Transcript Pages 453-455]

8. A full individual evaluation (“FIE”) of the student was completed in December 2010. [Petitioner's Exhibit 5 and Transcript Page 201]

9. Two Admission, Review and Dismissal (“ARD”) committees met for the student in January 2011 and the committees determined that the student did not meet eligibility criteria for special education under IDEA and did not have a need for special education instruction. [Petitioner's Exhibits 6 & 7, Respondent's Exhibit 5 and Transcript Pages 201 & 222]

10. Before the student started *** beginning in the spring of 2009, the student was evaluated by private evaluators and school personnel on a number of occasions. Private evaluations variously found PDD-NOS, attention deficit hyper-activity disorder (“ADHD”) and issues related to the student's anxiety. [Petitioner's Exhibit 8, Respondent's Exhibit 33 and Transcript Pages 429, 458-459 & 549]

11. Evaluation of the student in August 2011 – completed as an independent educational evaluation (“IEE”) at the parent’s request – concluded that the student’s symptoms are indicative of ADHD and learning disabilities – but that the student was not on the autism spectrum. [Respondent’s Exhibit 33 and Transcript Page 549]

12. In October 2011 an ARD committee for the student determined that the student was qualified – based upon current evaluation – as eligible for special education and related services with an eligibility criterion of “other health impaired” (“OHI”) based upon ADHD. The student’s parent agreed that the district was educating the student in an environment which was the least restrictive for potential educational progress. [Petitioner’s Exhibit 11 and Respondent’s Exhibit 32]

13. In another IEE completed in September 2012, the evaluator, while not making a diagnosis, determined that the student’s academic performance was effected by cognitive deficits. [Petitioner’s Exhibit 10]

14. The student’s parent disagreed with the ARD committee’s determination of eligibility and later in October 2011 a re-convened ARD added autism (“AU”) as an eligibility criterion. [Petitioner’s Exhibits 11 & 12 and Respondent’s Exhibit 31]

15. In reviewing the student’s performance in the 2011-2012 school year, school personnel noted that the student generally missed *** hours in school every *** for private speech therapy, occupational therapy, and applied behavioral analysis (“ABA”). [Respondent’s Exhibit 33 and Transcript Pages 242-243]

16. The student’s parent routinely took the student from school for private therapies stating that no “after school” appointments were available and that the student was excused from school for the therapies based upon the student’s alleged autism. (Tex.Educ.Code Section 25.087(b-3) [Respondent’s Exhibit 33 and Transcript Pages 429-430]

17. At the conclusion of the 2011-2012 school year, the student’s grades were passing in math, social studies, science and health. The student had a language arts score of ***, in reading a ***, and in “written/oral” a ***. [Respondent’s Exhibit 9]

18. Two ARD committees for the student were convened in February 2012 to discuss the student's performance and consider additional assessment and an occupational therapy evaluation. The ARD added occupational therapy as a related service for the student (thirty minutes each three weeks) and parent training services (one hour each nine weeks). The district and parent agreed the student's educational environment was the least restrictive to enable educational progress. [Petitioner's Exhibit 14, Respondent's Exhibit 30 and Transcript Page 364]

19. An ARD committee for the student was convened again in May 2012 to review assessment addressing the student's parent's concerns about specific learning disabilities and dyslexia. The committee recommended that the student be retained for another year but the student had an opportunity to attend summer school and promote to *** grade. [Petitioner's Exhibit 15, Respondent's Exhibit 29 and Transcript Pages 328-330]

20. Because the earlier meeting ended in disagreement, the committee reconvened later in May 2012. The student's parent maintained that extended year services ("ESY") were required for the student and declined summer school. The student's parent also requested another IEE. [Petitioner's Exhibit 16, Respondent's Exhibit 28 and Transcript Page 282]

21. In October 2012 another ARD committee met to conduct an annual review of the student's individualized education plan ("IEP"). Though another IEE was being conducted, the IEE had not been completed. The student's parent discussed a need for continued ABA therapy which the parent had provided for the student. The committee developed an IEP with goals and objectives in writing, language arts/reading, and math. Accommodations including reminders, prompts, extra time for assignments, frequent breaks, shortened assignments and others were included in the IEP. [Petitioner's Exhibit 26, Respondent's Exhibit 27 and Transcript Pages 216, 226-238 & 244-254]

22. The student's parent requested at the ARD that the student be placed privately outside the district. The district provided prior written notice of refusal to make a private placement. [Petitioner's Exhibit 17, Respondent's Exhibit 27 and Transcript Pages 247-254]

23. The student's parent unilaterally withdrew the student from the district in November 2012. [Petitioner's Exhibit 17, Respondent's Exhibit 27 and Transcript Pages 247-254]

24. The student's parent enrolled the student in the *** a private school, which offers a low student-to-teacher ratio. [Petitioner's Exhibits 23 & 24, Respondent's Exhibit 27 and Transcript Page 247]

25. At the time of the student's withdrawal from the district, the student's grades in academic classes ranged from *** to *** and acceptable to exceptional performance in non-academic areas. [Respondent's Exhibits 8 & 9 and Transcript Page 18]

26. *** is a small school (with approximately *** students) which educates students with disabilities such as autism, Down syndrome, and other disabilities. The school has one certified teacher (certified though the Texas Education Agency's requirements). The school does not adopt educational curriculum and is not accredited by the Texas Education Agency. [Transcript Pages 82-86]

27. Evaluation of the student immediately preceding the one-year period prior to the filing of the request for due process (i.e., within the one-year statute of limitations) includes a diagnosis of PDD-NOS in June 2011, a diagnosis of ADHD and a determination of a specific learning disability in August 2011 (concluding that the student's symptoms were consistent with anxiety and depression and not within the autism spectrum disorder), a determination by school personnel in April 2012 that the student did not have a specific learning disability, and in September 2012 an opinion from an independent evaluator that the student has cognitive deficits (but without a reported diagnosis). [Petitioner's Exhibits 2, 8 & 19, Respondent's Exhibits 33 and 35, Transcript Pages 205, 266-267, 429, 439-462 & 560]

Discussion

The student has presented many problems for the student's parent and the district in assessing the student's performance, diagnosing any disabilities, and determining eligibility for special education and related services. The student has been variously assessed, diagnosed, and evaluated.

The student's educational performance in the district was marked by the student's absences from school when the student's parent pursued services and therapies the student's parent considered necessary. Many of the concerns addressed by the student's parent – and counsel's argument in closing – concern matters outside the one-year statute of limitations. Though the student's educational performance has not been acceptable to the student's parent, a credible consideration of the student's record – in light of the student's difficulties in cognitive ability and school attendance – demonstrates reasonable progress in academic and non-academic goals.

Petitioner's burden to prevail in this case is high. The legal presumptions are in favor of the district.

A placement in private school requires conclusive proof that the school did not – and cannot – provide a free appropriate public education for the student. And reimbursement – and prospective private placement – requires proof that the requested placement is appropriate.

According to the decision of School Committee of Town of Burlington v. Massachusetts Department of Education, 105 S.Ct. 1996, 471 U.S. 359 (1985), the Petitioner must prove that the unilateral private placement for the student is appropriate. Under the facts in this case, placement outside the district was inappropriate and the placement chosen by the student's parent was inappropriate as well.

Petitioner has the burden of proof to overcome the presumption in the law that the education program developed and implemented by the district is appropriate. Schaffer v. Weast, 126 S.Ct. 528 (2005) and Tammany Parish School Bd., 57 F.3d 458 (5th Cir. 1995).

According to the Supreme Court's decision in Board of Education of Hendrick Hudson School District v. Rowley, 458 U.S. 176 (1982), the local education agency must establish for the student a "basic floor of

opportunity” with an education program – including necessary related services – that will allow the student to make reasonable educational progress.

The Fifth Circuit has determined that the courts should look to the overall educational experience of the child, and that – if the experience is positive – the district is doing what the law requires. Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 (5th Cir.), cert.denied, 531 U.S. 817 (2000) and Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390 (5th Cir. 2012).

Counsel for both parties in this case agreed that the controlling standards for the law in this case are enunciated in Cypress-Fairbanks ISD v. Michael F., 118 F.3d 245 (5th Cir. 1997), 34 CFR 300.300, and 19 T.A.C. §89.1055.

When considering this case, it is clear that Petitioner did not meet its burden to show that the district failed in its responsibilities to the student and the student’s parent. The district affirmatively showed that the student’s IEP was reasonably calculated to provide the student with a free appropriate public education (“FAPE”) because the IEP was individualized on the basis of the student’s assessment and performance; the program was administered in the least restrictive environment; the student’s program was provided in a collaborative and coordinated manner; and the student has shown positive academic and non-academic benefit.

Conclusions of Law

1. The student is eligible for special education and related services under the provisions of IDEA, 20 U.S.C. §1400, et seq., and related statutes and regulations.
2. The Respondent Killeen Independent School District is responsible for the provision of the student’s special education.
3. Petitioner’s claims for relief are limited by a one-year statute of limitations. 19 T.A.C. §89.1151(c).

4. 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. Schaffer v. Weast, 126 S.Ct. 528 (2005) and Tammany Parish School Bd., 57 F.3d 458 (5th Cir. 1995).

5. The district's responsibilities for the student met the standard set by Michael F., supra, because the student's placement is individualized on the basis of the student's assessment and performance; the program is administered in the least restrictive environment; the services are provided in a coordinated, collaborative manner by key stakeholders in the matter; and positive academic and non-academic benefits have been demonstrated.

6. The student's educational placement is reasonably calculated to confer an educational benefit under the standard of Board of Education of the Hendrick Hudson School District v. Rowley, 458 U.S. 176 (1982), 34 CFR 300.552, and 19 T.A.C. §89.1055.

7. Unilateral private placement by the student's parent was not warranted under IDEA, and the Petitioner is not entitled to reimbursement for the costs of the placement or other related services provided the student. School Committee of Town of Burlington v. Massachusetts Department of Education, 105 S.Ct. 1996, 471 U.S. 359 (1985).

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 30th day of December, 2013.

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

DOCKET NO. 067-SE-1112

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	§	
VS.	§	HEARING OFFICER
	§	
KILLEEN INDEPENDENT SCHOOL DISTRICT	§	FOR THE STATE OF TEXAS

SYNOPSIS

ISSUE #1: Whether the student’s educational placement is reasonably calculated to confer an educational benefit.

CFR CITATIONS: 34 CFR 300.552

TEXAS CITATION: 19 T.A.C. §89.1055

HELD: For Respondent.

ISSUE #2: Whether unilateral private placement by the student’s parent was warranted under IDEA, and if the Petitioner is entitled to reimbursement for the costs of the placement or other related services provided to the student.

HELD: For Respondent.