

DOCKET NO. 111-SE-1215

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

DECISION OF THE HEARING OFFICER

Statement of the Case

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

Petitioner was represented by Sonja Kerr and Fernando Salcedo of the Austin office of the Cuddy Law Firm. Respondent was represented by Hans P. Graff with the Office of Legal Services in the Houston Independent School District.

Respondent filed a counterclaim in this matter seeking to prove that its assessment of the student was appropriate.

Petitioner's request for hearing was filed on December 8, 2015. After continuances for good cause, the matter came to hearing in the offices of the district in Houston on May 31-June 2, 2016 and June 6, 2016. The parties jointly moved for an extension of the decision due date to provide an opportunity for written closing argument. On the motion of Petitioner, the deadline for filing the argument was extended two days. On the motion of Petitioner, Petitioner was also afforded an opportunity to lengthen its written argument by ten pages. The decision is issued timely on August 15, 2016.

Petitioner alleged that the district has not provided the student with a free appropriate public education (“FAPE”). Petitioner alleges both substantive and procedural violations of the law. Petitioner contends that the district did not properly evaluate the student, identify the student’s educational disabilities, provide appropriate transition planning, and provide at all times an appropriate individual education program (“IEP”) based upon the student’s educational needs and present levels of performance with measurable goals and objectives necessary to create an opportunity to make reasonable educational progress (both academic and non-academic). Petitioner seeks compensatory educational services, reimbursement for evaluation, and further independent evaluation.

Respondent seeks an order declaring its evaluation appropriate and supporting its denial for payment for additional evaluation.

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 and family within the Houston Independent School District. [Petitioner’s Exhibits 7 & 8 and Transcript Page 353]

2. The student is eligible for special education and related services based upon eligibility criteria of autism, emotional disturbance (“ED”), intellectual disability (“ID”), and other health impairment (“OHI”). [Petitioner’s Exhibits 7 & 8; Respondent’s Exhibits 13 & 15; and Transcript Pages 81-82, 661, 769-770 & 824-825]

3. The student attended the *** grade year in the 2015-2016 school year. [Petitioner’s Exhibits 4 & 12; Respondent’s Exhibit 38; and Transcript Pages 534 & 826]

4. The student's IEP for the *** grade was developed by an admission review and dismissal ("ARD") committee including the student's parents containing the student's present levels of performance and measurable goals and objectives. [Respondent's Exhibit 31]

5. During the student's *** grade year, the student reported to the student's parents that the student was subjected to bullying by other students and a teacher at school. The student was involved in *** fights with other students. [Petitioner's Exhibit 4 and Transcript Pages 254-263]

6. A psychologist in private practice in Houston performed an evaluation of the student during the spring of 2016. The psychologist performed psychological testing, evaluated the student on four different days, and issued a report on April ***, 2016. The report assessed the student's disabilities and Student's problems as a student with autism in "interpreting social cues". The psychologist determined that the student could perceive the school environment as "hostile" even if there were no continuing bullying at school. The psychologist's evaluation was based upon reports from the student and the student's parent. The parent also reported problems with the student's behaviors at home which could be related to issues at home – rather than at school. [Petitioner's Exhibit 4 and Transcript Pages 243-338]

7. The student stopped attending school in *** 2015. The student's parent reported to the school that the student's behavior at home was explosive and related the student's distress to problems at school. The student's parent reported their concerns in a letter to the school's principal dated ***, 2015. [Petitioner's Exhibit 17 and Transcript Pages 363-364 & 434-435]

8. A senior special education manager from the district responded to the letter and met with the student's parents, conferred with staff, and considered letters from the student's psychiatrist excusing the student's attendance at school and recommending hospitalization. The district's staff sought to develop a plan for the student's return to school. The student's parents

refused to return the student to school. The testimony of the district's personnel was credible. [Petitioner's Exhibits 25 & 25A and Transcript Pages 193-199]

9. The student was ***. The student's ***". The records indicate problems with the student's behavior at school and concerns with the student's compliance in ***. [Petitioner's Exhibits 26 & 26A and Transcript Page 303]

10. While the student was out of school, school personnel sought information about a homebound program for the student but the student's parents did not provide information from a physician indicating a medical reason the student was unable to attend school for *** weeks or more. District policy for homebound instruction (both for general education and special education) requires such information. Homebound placement in the district for special education students is not considered by an ARD committee until the medical information is provided to the district. Again, the testimony of district personnel was cogent and credible. [Respondent's Exhibit 46 and Transcript Pages 360-363]

11. During the months of *** through ***, 2016, school records contain frequent communication with the student's parents concerning the student's absences. School personnel took assignments to the student's home; the student's parent returned assignments; and school personnel frequently consulted with the student's parents and school staff about setting up a homebound program for the student when the homebound application was completed. [Respondent's Exhibit 43 and Transcript Pages 210-233]

12. The student's parents told school personnel that the student was ***, and did not involve any matter related to the student's psychological status. [Transcript Pages 183 & 433-434]

13. The district conducted ARD committee meetings for the student in April, June, August, September, and November 2015 considering homebound issues, transition back to

school, and compensatory services because of the student's absences. [Respondent's Exhibits 32-36 and Transcript Pages 417-429]

14. The district proposed extended school year ("ESY") services for the student during the summer of 2015 but the schedule for the services was not immediately provided to the parent and the parent did not bring the student to ESY. [Petitioner's Exhibit 18; Respondent's Exhibit 32; and Transcript Pages 357-359]

15. The student began attending the *** grade year in *** in August 2015. In a meeting on August ***, 2015, the ARD for the student provided: "Due to [the student]'s missing approximately *** months of school in *** 2015, [the student] will be offered 2 hours per week of compensatory time totaling 20 weeks beginning 2015-2016 school year." The student's father attended the meeting and agreed to the compensatory services but stated in writing: "I reserve the right 2 update, include and whatever the current plan if not satisfactory 4 [the student]." [Respondent's Exhibit 32 and Transcript Pages 379-380]

16. The student's mother testified at the hearing that she did not agree to the provision of compensatory services. [Transcript Pages 445-446]

17. A vision screening for the student was included in a full individual evaluation ("FIE") for the student in October 2015. The student passed the vision screening unaided but the screening noted "The parents reported that [the student] is in good health at this time, but [the student] is ***." [Petitioner's Exhibit 7]

18. The student has *** in the *** eye. ***. But in using *** in the normal environment, the student's vision is within normal limits. The student needs ***. The student frequently attended school ***. Some of the student's teachers did not know that the student ***. [Petitioner's Exhibits 7 & 40 and Transcript Pages 580-581]

19. The student's IEPs have been individualized based on formal and informal evaluation in a timely fashion and addressed in ARD committee meetings during the last three years. [Respondent's Exhibits 1-13 & 30-36 and Transcript Pages 551-566, 582-590, 605-612 & 629-634]

20. The district's documentation of the student's progress was reviewed and considered in ARD committee meetings and IEPs developed in October 2014, April 2015, June 2015, August 2015, September 2015, and October 2015. [Respondent's Exhibits 31-36]

21. Progress on the student's goals was substantiated in reports for the 2015-2016 school year. [Respondent's Exhibits 37 & 53 and Transcript Pages 18, 24-26, 33-34, 86 & 97-101]

22. Some of the student's teachers were confused about the measure of the student's progress and could not discuss at the hearing all elements involved in developing the record of the progress. Some of the student's goals were not updated in two of the years of the student's IEPs. Some school personnel were not familiar with the term "applied behavioral analysis" and terms for behavior strategies which were utilized in the student's program. [Transcript Pages 232-233, 611-612 & 615-619]

23. Data considered by ARD committees for the student were based on current evaluation. An FIE was completed in March 2012, a review of existing evaluation data was completed in November 2012, and the student's current reevaluation was completed in September and October 2015. [Respondent's Exhibits 10, 11 & 13]

24. The FIE for the student concluded that the student was no longer qualified for speech therapy. [Respondent's Exhibit 13 and Transcript Pages 750-754]

25. The student's parents requested an independent educational evaluation ("IEE") in April 2016, but the request was forwarded to counsel for the district who declined the

independent evaluation. A prior written notice of the refusal was not provided declining the IEE, but this litigation was in progress and counsel for the district filed a counterclaim defending the district's evaluation. [Respondent's Exhibit 49 and Transcript Pages 203-204]

Discussion

The credible evidence adduced at the hearing demonstrated a number of problems with the district's implementation of the processes in providing the student with a free appropriate education. But Petitioner failed to prove that the program offered to the student was not FAPE and that the student did not receive a program meeting the standard of Board of Education of Hendrick Hudson School District v. Rowley, 458 U.S. 176 (1982), and Cypress-Fairbanks ISD v. Michael F., 118 F.3d 245 (5th Cir. 1997). While some of the efforts of the district in developing and providing FAPE for the student were flawed, the results were legally sufficient.

The student is a complicated *** grade student with multiple disabilities. The student's parents have worked consistently and conscientiously with the district in developing and implementing an educational program that can afford the student educational benefit. The student's behavioral problems – both at home and at school – have been challenging. The district has tried to provide what is appropriate for the student and adjust and tailor educational strategies to accommodate behaviors with educational opportunity.

The student's absence from school created additional obstacles in the educational process. Because the student's parents did not or could not provide timely information of a medical need to be away from school for a long period of time, the student was not available to access the special education services afforded the student. District employees in some instances could not explain their management of special education procedures and strategies. The student's educational program, though, was available but not accessed by the student and the student's family.

The burden of proof in these cases is a high one. Schaffer v. Weast, 126 S.Ct. 528 (2005). The standard of Tatro v. Texas, 703 F.2d 823 (5th Cir. 1983) requires a presumption in favor of the district's educational program and requires that Petitioner must prove the inappropriateness of the program. The standard of Adam J. v. Keller ISD, 328 F.3d 804 (5th Cir. 2003) established that procedural deficiency in some respects not does not, by itself, result in a loss of appropriate educational opportunity or infringe on parents' opportunity to participate in the IEP process. Essentially, the problems presented by Petitioners in this case did not prove that the district's deficiencies resulted in a denial of a free appropriate education for the student.

Instead, the evidence from the hearing, taken as a whole, established that the student's program was developed in collaborative efforts by the student's parents and appropriate school personnel. It provided the student with academic and non-academic benefit as required under Michael F., *supra*.

The district demonstrated that its reliance on substantive and timely assessments of the student was appropriate and sufficient and did not require additional independent evaluation at public expense.

The student received an individualized program based on the student's assessment and performance; it was administered in the least restrictive environment; the services were provided in a coordinated and collaborative manner by the key stakeholders; and positive academic and non-academic benefit was provided to the student.

Petitioner failed to meet its burden of proof in showing that the student was denied a free appropriate public education according to the law. Petitioner does not prevail on its claims.

Respondent demonstrated that its assessment of the student was appropriate and Petitioner is not entitled to independent evaluation at public expense.

Conclusions of Law

1. The student is eligible for a free appropriate special education program under the provisions of IDEA, 20 U.S.C. §1400, et seq., and related statutes and regulations.
2. The student's parents are residents of the Houston Independent School District, and the district is responsible for providing an appropriate educational placement and related services for the student.
3. Petitioner failed to meet the burden of proof to demonstrate a violation of IDEA under the standard of Schaffer v. Weast, 126 S.Ct. 528 (2005).
4. The student received a free appropriate public education because the educational program was properly developed to provide 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.
5. The implementation of the student's program complied with the legal framework provided under Adam J. v. Keller ISD, 328 F.3d 804 (5th Cir. 2003).
6. The district's assessment of the student was appropriate and the student's parents are not entitled to an independent educational evaluation at public expense under 34 CFR 300.502.

ORDER

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that all relief requested by Petitioner – including a request for an independent educational evaluation at public expense – is DENIED.

SIGNED this 15th day of August, 2016.

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

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	§	
HOUSTON INDEPENDENT	§	
SCHOOL DISTRICT	§	FOR THE STATE OF TEXAS

SYNOPSIS

ISSUE 1: Whether Petitioner received a free appropriate public education.

CFR CITATIONS: 34 CFR 300.552

TEXAS CITATION: 19 T.A.C. §89.1055

HELD: For Respondent.

ISSUE 2: Whether the Petitioner is entitled to an IEE at public expense.

CFR CITATIONS: 34 CFR 300.502

HELD: For Respondent.