

DOCKET NO. 133-SE-0115

KILLEEN INDEPENDENT
SCHOOL DISTRICT,
Petitioner

§
§
§
§
§
§
§
§
§

BEFORE A SPECIAL EDUCATION

v.

HEARING OFFICER FOR

██████████ b/n/f/ ██████████
Respondent

THE STATE OF TEXAS

ORDER ON PETITIONER’S MOTION FOR SUMMARY JUDGMENT

Background

On January 12, 2015, Petitioner Killeen ISD (“the District” or “KISD”) filed a due process complaint (“DPC”) pursuant to the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §1400, *et seq.*, against Respondent ██████████ (“the Student”), by next friend, ██████████ (“the Parent”). Holly B. Wardell, Eichelbaum Wardell Hansen Powell and Mehl, P.C. in Austin, Texas, represented Petitioner in this litigation. ██████████ (“the Parent”), as next friend of the Student, proceeded *pro se* in this docket.

On November █, 2014, Petitioner completed its Full and Individual Evaluation (“FIE”) of the Student and subsequently held an ARDC meeting in December 2014 to determine whether the Student qualifies for special education services. After the ARDC determined that the Student failed to qualify, the Parent disagreed and requested an Independent Educational Evaluation (“IEE”) at public expense. In accordance with the requirements of IDEA, Petitioner requested a due process hearing to defend the appropriateness of its evaluation instead of providing an IEE of the Student at public expense.¹

¹ Pleading File: DPC; 34 C.F.R. §300.502(b)(4).

Procedural History

The initial scheduling order in this dispute set the due process hearing for February 9, 2015, and the Decision Due Date as February 26, 2015. Salient procedural events in this proceeding include the following:

- January 19, 2015 Respondent failed to appear for the scheduled telephonic pre-hearing conference (“PHC”) as set out in the initial scheduling order.
- January 20, 2015 The Parent stated intent not to participate in this proceeding.
- January 21, 2015 Hearing Officer letter to the parties concerning imminent DPC response deadline, procedures to request additional time or rescheduling of the PHC if needed, resetting the telephonic PHC for January 26, 2015, and encouraging parental participation. Parties were put on notice that the rescheduled PHC would proceed on January 26, 2015, absent a request for rescheduling from either party.
- January 22, 2015 Deadline for Respondent’s Response to DPC. Respondent did not file an answer by this deadline and the Parent did not request additional time to prepare an answer.
- January 26, 2015 Respondent failed to appear for the second setting of the telephonic PHC. The conference proceeded, duly recorded by a certified court reporter. Petitioner stated intent to file a Motion for Summary Judgment (“MSJ”) and participants discussed a procedural schedule for Respondent’s response to the anticipated motion.²
- January 29, 2015 Petitioner disclosed its witness and exhibit lists to the Hearing Officer one day prior to the disclosure deadline (January 30, 2015), and transmitted copies to Respondent via overnight delivery.
- January 30, 2015 Respondent made no disclosure of evidence or witnesses in this proceeding. The Parent did not request additional time for preparation or response prior the disclosure deadline.
- January 30, 2015 Petitioner filed its Motion for Default Judgment and MSJ (“Motion”).
- February 2, 2015 By written order, the Hearing Officer set a procedural schedule previously discussed during the PHC on January 26, 2015, to ensure Respondent had the opportunity to respond to Petitioner’s Motion by February 5, 2015.³

² Transcript of telephonic pre-hearing conference, January 26, 2015, was transmitted by the certified court reporter to both parties and the Hearing Officer.

³ Transcript of telephonic pre-hearing conference, January 26, 2015, at page 10; Pleading file.

February 5, 2015 Deadline for Respondent's Response to Petitioner's Motion Respondent filed no response by this deadline and did not request additional time.

February 6, 2015 The Hearing Officer cancelled February 9, 2015, in-person due process hearing setting and transmitted a letter to the parties with a choice of two settings for a telephonic conference to take up Petitioner's Motion. Respondent did not reply with input on a second telephonic conference date and time.

February 9, 2015 Based on Petitioner's input on the conference time and date, the Hearing Officer set and held the telephonic conference on February 11, 2015, duly recorded by a certified court reporter. Respondent did not participate in the telephonic conference.

February 11, 2015 After consideration of Petitioner's Motion, the Hearing Officer orally granted Petitioner's MSJ during the second telephonic conference, with the written order to issue by the Decision Due Date of February 26, 2015.

The MSJ record admitted in this proceeding is as follows:

Petitioner's DPC and the pleading file; and,
Petitioner's MSJ (filed on January 30, 2015) with Attachments A-E, including:
Attachment A: Letter from KISD with copy of Admission, Review, and Dismissal Committee ("ARDC") documents (meeting held on December █, 2014);
Attachment B: KISD Initial Evaluation Report of the Student (November █, 2014);
Attachment C: Affidavit of █ (January 29, 2015);
Attachment D: Affidavit of █ (January 30, 2015); and,
Attachment E: Affidavit of █ (January 30, 2015).

The written order on Petitioner's MSJ timely issued on February 26, 2015.

Summary Judgment Motion

Petitioner's MSJ alleges that KISD's summary judgment proof establishes as a matter of law that there is no genuine issue of material fact regarding the elements of a cause of action concerning the appropriateness of KISD's evaluation of the Student.

To prove an entitlement to a summary judgment as the moving party, Petitioner bears the burden to prove that there is no genuine issue of material fact and that Petitioner is entitled to a

summary judgment as a matter of law on the issues expressly set out in the MSJ.⁴ Supporting and opposing affidavits may be submitted as long as they are made on the basis of personal knowledge, set forth facts that are admissible into evidence, and affirmatively show that the affiant is competent to testify to the stated matters.⁵

In this proceeding, the non-movant, Respondent, did not provide any controverting evidence to show that the evidence was sufficient to support a resolution of the factual issues in the non-movant's favor.⁶ When a non-moving party has the burden of proof at trial, the moving party may carry its burden at summary judgment by the presentation of evidence negating an essential element of the non-moving party's claim, or by pointing to specific portions of the record that demonstrate that the non-moving party cannot meet its burden of proof at trial.⁷

Implementing regulations of IDEA specify that evaluations must include all areas of suspected disability and must use and administer appropriate testing instruments to accurately measure a student's aptitude or achievement level when a student has impaired sensory, manual, or speaking skills.⁸ Evaluation results must be sufficiently comprehensive to identify all special education and related service needs, whether or not the needs are commonly linked to Student's suspected or determined disability classification.⁹ The evaluation instruments used must be technically sound and be designed to gather a variety of information about a student from educators

⁴ TEX.R.CIV. PROC. 166a(c).

⁵ TEX.R.CIV. PROC. 166a(f).

⁶ Pleading file; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

⁷ *Celotex Corp. v. Catrett*, 447 U.S. 317 (1986).

⁸ 34 C.F.R. §§ 300.301(c), 300.304(c)(3-4).

⁹ 34 C.F.R. §300.304(c)(6).

and parents without using a single measure or assessment for making a determination that a student qualifies or fails to qualify as a student with a disability.¹⁰ The sources of data considered in an FIE must include existing data, classroom observation, information provided by parents, and current classroom-based, local, or state assessment information.¹¹

Based on the summary judgment evidence admitted into this record, I make the following findings for purposes of the MSJ:

1. The Student attended KISD at the time KISD performed an FIE of the Student in September 2014 through November ■, 2014. The assessment team evaluated the Student in all areas of suspected disability, including: a) learning disability; b) speech impairment; c) other health impairment; d) autism; and, e) emotional disturbance. The FIE assessment included testing for areas of intelligence and achievement and also included a full psycho-educational evaluation. [Pleading file; Attachments B - E].
2. The assessment team chose and administered assessment and evaluation instruments that did not discriminate based on the Student's race or culture. [Attachments B - E].
3. The assessment team administered the Student's assessment and other materials in the Student's native language in a manner designed to yield accurate information regarding the Student's academic, developmental, and functional abilities. [Attachments B - E].
4. The assessment team members assert that they were trained appropriately and possessed the knowledge to administer the variety of assessment instruments used in the FIE of the Student. [Attachments C - E].
5. As part of the Student's FIE, the assessment team administered a variant of reliable assessment instruments to gather information on the Student including the following instruments:
 - Goldman-Fristoe Test of Articulation, Second Edition;
 - Oral and Written Language Scales, Second Edition;

¹⁰ 34 C.F.R. §300.304(b).

¹¹ 34 C.F.R. §300.305(a).

- Clinical Evaluation of Language Fundamentals, Fifth Edition;
 - Autism Diagnostic Observation Schedule;
 - Woodcock-Johnson III: Tests of Achievement and Tests of Cognitive Abilities;
 - Adaptive Behavior Assessment System II Parent and Teacher Forms;
 - Childhood Autism Rating Scale, Second Edition High Functioning and Questionnaire for Parents or Caregivers;
 - Gilliam Autism Rating Scale, Third Edition;
 - Pervasive Developmental Disorder Behavior Inventory; and,
 - Behavior Assessment for Children, Second Edition. [Attachment B].
6. The assessment team selected and administered testing instruments to ensure that if the Student had impaired sensory, manual, or speaking skills, the assessment results accurately reflected the Student's aptitude or achievement levels or whatever other factors purported to be measured by the chosen testing instruments. [Attachment B].
 7. The FIE testing covered all areas related to the Student's suspected areas of disability, including health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. [Attachment B].
 8. Although the assessment team ultimately made a determination that the Student did not qualify for special education services based on the testing administered, the assessment team's FIE was sufficiently comprehensive so that the variety of testing instruments administered were sufficient to identify any special education and related service needs of the Student. [Attachments A - E].
 9. The assessment team used technically sound instruments for the Student's FIE to evaluate the relative contribution of cognitive behavioral factors, physical factors, and developmental factors. [Attachments B - E].
 10. The FIE included consideration of existing evaluation data, classroom observations, and information from the Parent. [Attachment B - E].
 11. The assessment team evaluated the Student for specific learning disabilities. As part of that evaluation, the assessment team reviewed: a) parentally-provided evaluation and information from the Parent; b) current classroom-based, local, and state assessment results; c) classroom-based observation information; and, d) teacher observation information. [Attachments B - E].

Discussion

Review of Petitioner's supporting documentation supports Petitioner's view that the FIE of the Student performed by KISD met all requirements for evaluation under IDEA and its implementing regulations. Unfortunately, the record before me shows that the Parent elected not to participate in this docket and consequently, there is no contrary evidence. Respondent has not and thus cannot dispute the appropriateness of KISD's evaluation. As there is no genuine issue of material fact regarding the appropriateness of Petitioner's FIE, I must conclude that Petitioner is entitled to judgment as a matter of law.

ORDERS

Based upon the foregoing and the record on file to date in this case,

IT IS ORDERED that Petitioner's MSJ is **GRANTED** as a matter of law, as Petitioner's completed FIE of the Student in November 2014 met all requirements for an initial special education evaluation under IDEA and its implementing regulations and Respondent presented no facts or evidence to prove otherwise.

IT IS FURTHER ORDERED that Respondent is not entitled to an independent educational evaluation at public expense because Petitioner provided an appropriate evaluation of the Student by means of the FIE completed on November █, 2014.

IT IS FURTHER ORDERED that the due process hearing in this matter set for February 9, 2015, and cancelled by the Hearing Officer on February 6, 2015, remains cancelled and shall be **DISMISSED** from this Hearing Officer's docket.

All other relief not specifically stated herein is **DENIED**.

Signed this 26th day of February 2015.

/s/ Mary Carolyn Carmichael

**Mary Carolyn Carmichael
Special Education Hearing Officer for the State of Texas**

NOTICE TO THE PARTIES

This Decision of the Hearing Officer is a final and appealable order. Any party aggrieved by the findings and decision made by the Hearing Officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. 34 C.F.R. § 300.516; and 19 TEX. ADMIN. CODE § 89.1185(n).