

DOCKET NO. 218-SE-0319

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

DECISION OF THE HEARING OFFICER

Statement of the Case

Student, by next friend and grandparent (hereinafter “Petitioner” or “the student”), filed a request for hearing on March 19, 2019. Respondent filed a counterclaim on June 11, 2019. Petitioner alleges that the Ysleta Independent School District (hereinafter “Respondent” or “the district”) failed to provide the student with a free, appropriate public education (“FAPE”) as required by the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400, et seq., and related statutes and regulations. Petitioner sought as relief an order requiring the district to provide an appropriate private placement for the student at the district’s expense, compensatory educational services (including Applied Behavioral Analysis [“ABA”] and tutoring) for the student, extended school year services, and an award of attorney’s fees.

Respondent in its counterclaim alleged that the current homebound placement provided in the student’s individual education plan (“IEP”) which had been requested by Petitioner was inappropriate. The district maintained that homebound placement was not the least restrictive environment (“LRE”) for the student and that an appropriate placement to meet the educational needs of the student was available on a school campus within the district. The district sought an order removing the student from the homebound placement and providing for direct educational services on a school campus.

Counsel for the parties stipulated at the hearing that the one-year statute of limitations for their claims applied. 19 T.A.C. 89.1151(c). [Transcript Pages 8, 25-26]

The case was set and reset for good cause on a number of occasions as the parties attempted mediation unsuccessfully and prepared for hearing. On July 22, 2019, counsel for Petitioner filed a pleading entitled, "Petitioner's Stipulation of Nonsuit and Dismissal." In a prehearing conference on August 7, 2019, counsel for the parties discussed the proposed nonsuit of Petitioner's claims and the remaining counterclaim of the district. The district insisted that the matter should proceed to hearing on its counterclaim alone. Counsel for Petitioner advised the Hearing Officer that the motion for nonsuit was withdrawn. Petitioner filed a motion withdrawing the nonsuit the day of the prehearing conference. On July 9, 2019, the Hearing Officer issued an order calling for a hearing on the merits on both parties' claims to proceed on August 21 and 22, 2019.

Petitioner was represented by Terry P. Gorman of the Gorman Law Firm in Austin. Respondent was represented by Jose Martín with the law firm of Richards, Lindsay & Martín in Austin.

The hearing was held on August 21 and 22, 2019 in the offices of the Ysleta Independent School District in El Paso, Texas. As the hearing began, Respondent objected pursuant to 34 C.F.R. § 300.512(a)(3) to the introduction of any evidence by Petitioner because Petitioner failed to timely disclose a list of witnesses who might be called to testify and copies of exhibits to be introduced at the hearing. Petitioner's failure to make timely disclosure was not disputed. The Hearing Officer excluded all proposed exhibits Petitioner brought to the hearing and testimony from an expert witness but allowed the parent and grandparent to testify.

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 attended \*\*\* within Ysleta Independent School District and began \*\*\* at the age of \*\*\* in the 2017-18 school year. [Respondent's Exhibits ("R.") 2; Transcript Pages ("T.") 12, 13]

2. The student lives with the student's grandparent in El Paso within the Ysleta Independent School District. At times, the student's \*\*\*. [R. 2; T. 11]

3. The student is qualified for special education and related services under the eligibility criteria of autism and speech impairment. The district conducted a full individual evaluation ("FIE") for the student in August 2017 and made an addendum to the evaluation in December 2017. The evaluation included a number of objective assessments which are scientifically based and appropriate for proper evaluation of the student. The evaluation was properly administered by knowledgeable professionals. [R. 2-8; T. 12, 88, 89]

4. The student functions in a below average range in intelligence assessments but performs in the average range in nonverbal measures. The student's grandparent believes that the school's assessments of the student reflect a lower level of cognitive abilities than the student actually possesses. [R. 2; T. 12-14, 94, 109]

5. An admission, review, and dismissal ("ARD") committee for the student was convened on September \*\*\*, 2017, which developed an IEP and determined the educational placement for the student. The student was placed in a \*\*\* class in \*\*\*. The student received speech therapy, autism support services, occupational therapy, a behavior intervention plan ("BIP"), and in-home training services. At the end of the school year, \*\*\* was added as a related service for the student. [R. 4, 7; T. 13, 59, 107]

6. The student's grandparent complained to school officials during the fall of 2017 about the student's classroom teacher. The grandparent believed that the student was bullied by

classmates and mistreated by school personnel. The grandparent thought discipline for the student was improperly administered and believed the student suffered \*\*\*. The grandparent's complaints were investigated by campus personnel. They were not substantiated. The grandparent's complaints and concerns were addressed at three ARD committee meetings for the student in January, April, and May 2018. [R. 5, 6, 7; T. 14, 16, 21-29, 96, 97, 147]

7. The student's grandparent asked at an ARD meeting on January \*\*\*, 2018, for a change in the student's placement to the "\*\*\*\*" classroom on the same campus. The \*\*\* class is a regular education class with several special education students taught by a regular education teacher, a special education teacher, and a classroom aide. An autism specialist for the district was assigned to facilitate the student's transition to the \*\*\* class and the ARD committee agreed to the change in placement. [R. 5; T. 97-98, 288, 313]

8. In the new placement, however, the student's behavioral problems increased. The student \*\*\*, refused instruction and directions, and \*\*\*. When the student's progress and placement were considered at another ARD committee meeting on April \*\*\*, 2018, the committee concluded that the \*\*\* class was not appropriate because of the number of students in the class, the disruption to the class caused by the student, and the amount of stimulus contributing to the student's behavior. [R. 6, 15; T. 100-101, 290, 296-297, 313]

9. At the ARD committee meeting on April \*\*\*, 2018, the committee discussed a need for the student to be placed in a \*\*\*\* unit for higher functioning students with autism (\*\*\*\*) in \*\*\*. Before the meeting, the student's grandparent had visited the campus and class but insisted that the student remain at \*\*\*. The committee agreed to continued placement in the \*\*\* class until the end of the school year. [R. 6; T. 106-107]

10. An ARD committee for the student met again on May \*\*\*, 2018. The committee considered a continuum of educational placements for the student and discussed the problems for

the student in the \*\*\* class. The committee also discussed the student's number of absences during the Spring semester and the need for regular attendance to address the student's educational progress. The student was absent for \*\*\* days during the Spring of 2018 and the ARD committee informed the grandparent that the student needed to continue working on \*\*\*-level work in the 2018-19 school year. The committee determined that the student would be placed in the \*\*\* class at \*\*\* for the 2018-19 school year with a transition into the new class. [R. 6, 7, 20; T. 105-106, 148-150, 171-172, 318-320]

11. The student's grandparent disagreed with the proposed change in placement. The grandparent stated that \*\*\* was too far away from home (though the difference in distance was less than four miles and the transportation was provided) and stated that the student would not attend \*\*\*. [R. 7, 33; T. 105, 111-112, 318]

12. The ARD committee on May \*\*\*, 2018, determined the \*\*\* placement for the student was the least restrictive environment appropriate for the student because it provides instruction and support for the student which is necessary for the student to access the educational program designed to provide educational benefit (both academic and non-academic). The student's struggles in the previous placement prevented the student's making educational progress. The student's performance in that placement required extraordinary amounts of time for school personnel and unreasonably disrupted the education of other students. The committee considered a number of placements across a continuum but determined that the new placement, while more restrictive, was required for the student to be appropriately equipped to access the educational program. [R. 7; T. 119, 150-151]

13. The ARD committee considered the student's attendance during the school year and lack of educational progress. They determined that the student's IEP goals and objectives for the 2018-19 would continue to be based on \*\*\*. The goals and objectives addressed, reading,

writing, math, \*\*\*, adaptive behavior and social skills, and speech/language. The committee members explained to the student's grandparent that the student is required to work on approved curriculum adopted by the State in any placement which is facilitated for the student – including homebound. [R. 7; T. 147-151, 261-262, 269, 277]

14. The district accommodated concerns expressed by the student's grandparent during the 2017-18 school year on many occasions and in various ways. The school assigned a different autism specialist when the grandparent complained; the ARD committee provided a \*\*\* evaluation and \*\*\*; the district provided an additional aide in the classroom, and to please the grandparent the district adjusted the student's educational setting to a placement which did not serve the student well. [R. 5-8; T. 99-100, 158-160, 170-171]

15. Another ARD committee meeting for the student was convened on August \*\*\*, 2018, to review the new placement for the student and consider its implementation. The student's grandparent did not agree with the proposed placement and stated that the student would not attend the new placement at \*\*\*. The grandparent insisted that the student would attend \*\*\* in the previous placement. [R. 13; T. 145-146]

16. On the first day of school for the 2018-19 school year, the student's grandparent took the student to \*\*\*, \*\*\*. The student and the student's grandparent were \*\*\*. [T. 49, 59-60]

17. The student did not begin attending school at \*\*\*. The student's grandparent requested an ARD committee for the student in early October 2018. An ARD committee convened on October \*\*\*, 2018, and the student's grandparent presented to the committee a form from a physician (dated October \*\*\*, 2018) stating that the student needs homebound placement for a year (until September \*\*\*, 2019) based on diagnoses of autism, ADHD (attention deficit hyperactivity disorder), and \*\*\*. [R. 11, 12; T. 152-154]

18. The student's grandparent refused consent for district personnel to contact the physician or the physician to contact the district. District personnel did not confer with the physician at any time. [R. 10; T. 193]

19. The grandparent requested homebound services for the student at the ARD on October \*\*\*, 2018. Members of the ARD committee expressed concerns about the propriety of homebound placement because it is highly restrictive and could prevent the student with opportunities to make progress academically and with social skills. The grandparent insisted on homebound services based upon the form submitted by the physician and the ARD committee developed an IEP providing eight (8) hours of homebound services each week. [R. 11; T. 152-156]

20. Based upon the IEP, the district sent two providers (teachers or service providers) to the student's home each week. Related services including speech therapy were also provided to the student. [R. 21, 23, 28; T. 156-158]

21. Experienced personnel from the district provided the services but the student's grandparent insisted upon \*\*\* in the methods, timing, content, and scoring of the student's work. The grandparent consistently \*\*\*. The school personnel, familiar with best homebound practices, were frequently met with refusal, criticism, and obstruction \*\*\*. [R. 21-26; T. 164, 207-209, 226-229, 240-242 & 255-257]

22. The homebound services program afforded the student provided an opportunity for the student to make academic progress – despite the interference by the student's grandparent. At the ARD meeting for the student on June \*\*\*, 2019, the committee moved the student from \*\*\* level IEP goals and objectives to \*\*\* goals and objectives for the 2019-20 school year. [R. 3, 14; T. 110-111, 166-169, 223, 298, 300, 308]

23. The ARD committee on June \*\*\*, 2019, offered an extended school year (“ESY”) program for the student to allow the student to make continued educational progress and prevent

problems with regression over the summer. The student, however, spent most of the summer \*\*\* in San Antonio and did not take part in the ESY program (including related services) which was available within the district. [R. 8, 16, 17]

24. The actions of the student and grandparent during the 2018-19 school year show that the student was not confined at home for serious medical reasons. The student and grandparent frequently left the home for outings in the community and travel outside of El Paso. [R. 17; T. 179]

25. The school records presented by the district are credible documentation of the district's efforts to provide FAPE for the student. The district's efforts are supported by the reasoned and credible testimony of school personnel in all stages of educational services provided – or offered – to the student and grandparent. [R. 1-9, 11-29, 31-32; T. 87-142, 145-198, 202-250, 252-273, 287-301, 310-322, 330-337]

26. District personnel who provided homebound direct instruction and related services for the student found their efforts for the student unreasonably controlled or obstructed \*\*\*. District professionals including homebound teachers, autism specialists, and speech providers documented their problems in providing educational services \*\*\*. [R. 21-25, 28; T. 206-230, 310-324, 330-337]

27. School personnel providing services for the student in the homebound program unanimously agreed that the student showed no signs of physical, emotional, or medical concerns which prevented the student from accessing services in a far less restrictive environment. [R. 14; T. 117-118, 192-195, 225, 260, 323]

28. The student's grandparent on many occasions cancelled services on agreed dates for instruction and the student missed instruction and related services because the student was



“absent” – for educational purposes – from school during homebound services. [R. 19, 22-24; T. 331-332]

29. Based on the record of homebound services and the professional opinions of professionals with direct knowledge of the student’s needs, the proposed placement \*\*\* – in the absence of a compelling change in the student’s circumstances since the hearing – would provide appropriate educational services for the student in the least restrictive environment. [R. 7, 13, 14; T. 103-106, 321]

### Discussion

Students in public school in Texas who qualify for special education are entitled to a free appropriate public education under the provisions of IDEA, 20 U.S.C. § 1400, et seq., and related statutes and regulations. The U.S. Supreme Court has defined the standards for FAPE in Board of Education of Hendrick Hudson School District v. Rowley, 458 U.S. 176 (1982) and Endrew F. v. Douglas County School District, 137 S.Ct. 988 (2017).

The Fifth Circuit has developed the elements for FAPE in Cypress-Fairbanks ISD v. Michael F., 118 F.3d 245 (5th Cir. 1997), as required by 34 C.F.R. § 300.300, and 19 T.A.C. § 89.1055. The Court determined that there are four factors to determine whether a school district’s program provides a student with the requisite meaningful, educational benefit intended under the law. The factors are:

- the program 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;
- and
- positive academic and non-academic benefits are demonstrated.

The district's program for the student in this case has been properly individualized, is provided in a collaborative manner to the extent possible \*\*\*, and positive academic and non-academic benefits are demonstrated.

The program, however, has not been administered in the least restrictive environment in the 2018-19 school year because of the unilateral action of the student's grandparent. The evidence adduced at the hearing does not support the provision of homebound instruction for the student.

In unusual situations like this one, courts have concluded that districts are "not obligated to accede to the parents' demand for homebound instruction simply because they presented a physician's statement authorizing this type of educational setting." Alcoa City Schs., 117 LRP 47632 (SEA TN 2017). The student's grandparent has refused consent for the district to confer with the student's physician and for the physician to communicate with the district. The district has been prevented from working with the key stakeholders because the student's grandparent will not cooperate. Further, the homebound form from the physician calls for homebound services to extend only through September \*\*\*, 2019. That is, the period for homebound has expired. And the medical concerns for placement have been mooted.

The burden of proof in a due process hearing is on the party challenging the proposed IEP and placement. Schaffer v. Weast, 126 S.Ct. 528 (2005); Teague Ind. Sch. Dist. v. Todd L., 999 F.2d 127 (5<sup>th</sup> Cir. 1993).

Petitioner failed to meet its burden of proof in challenging the student's placement for the 2017-18 and 2018-19 school years. Petitioner proved nothing about a need for private placement. The student was offered ESY but did not attend it. The district, however, met its burden of proof in challenging the propriety of the homebound placement insisted upon by the student's grandparent. The program afforded the student failed to meet requirements for LRE under IDEA and to meet the factor in Michael F. requiring placement in the least restrictive environment.

IDEA requires students with disabilities to be educated with other students without disabilities to the maximum extent appropriate. Special classes, schooling, or segregation based on ability or disability occurs only when the nature or severity of the student's disability is such that education in regular classes with supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a)(2)(i)(ii).

The Fifth Circuit requires LRE considerations to be considered in light of Daniel R. R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989). Determinations under Daniel R.R. are fact-specific and include the following factors (though no single factor is dispositive):

- the nature and severity of the student's disabilities;
- the student's academic achievement;
- the non-academic benefits of regular classroom placement;
- the overall experience in the mainstream environment balancing the benefits of regular education and special education to the student; and
- the effect of the student's presence on the regular class.

The student's placement in homebound for the 2018-19 school year did not afford the student appropriate opportunities to be educated with other students. As a student with autism and speech impairment, the student should be educated to the maximum extent appropriate to develop non-academic educational benefit in social skills development and interaction with other people.

Respondent met its burden of proof. Further homebound placement for the student – as of the time at the conclusion of the hearing – cannot be considered appropriate.

#### Conclusions of Law

1. The student resides within the Ysleta Independent School District in El Paso, Texas, and is eligible for special education and related services. IDEA, 20 U.S.C. § 1400, et seq., and related statutes and regulations.



NOTICE TO THE PARTIES

The Decision of the Hearing Officer in this case 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. 19 Tex. Admin. Code § 89.1185(p); Tex. Gov't Code § 2001.144(a)(b).