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|------------------------|---|----------------------------|
| STUDENT <i>b/n/f</i> | § | BEFORE A SPECIAL EDUCATION |
| PARENT, | § | |
| | § | |
| Petitioner, | § | |
| | § | |
| V. | § | HEARING OFFICER |
| | § | |
| NORTH EAST INDEPENDENT | § | |
| SCHOOL DISTRICT | § | |
| | § | |
| Respondent. | § | FOR THE STATE OF TEXAS |

DECISION OF THE HEARING OFFICER

Procedural History and Issues

Parent, the mother of Student (“Petitioner”), requested this Due Process Hearing on October 28, 2003, under the Individuals with Disabilities in Education Act, 20 U.S.C. §1400 *et seq.*, (hereafter “IDEA”), complaining about the failure of North East Independent School District (“Respondent” or “the District”) to identify Student as a child with Asperger’s Syndrome, considered within the classification of autism or Pervasive Developmental Disorders. In the prehearing conference conducted on December 3, 2003, Christopher Jonas, Attorney, represented Petitioner; Respondent was represented by Craig Wood, of the law firm Langley & Banack, Inc. During the prehearing conference the case was set for hearing and the issues were identified as follows:

- (1) whether the Respondent failed to properly identify the child as autistic; and
- (2) whether the Respondent failed to provide the areas of services under the autism supplement.

As relief Petitioner requested classification as autistic, compensatory services, and provision of appropriate services under the autism supplement.

On April 30, 2004, the Hearing Officer convened the Due Process Hearing; because it could not be completed in one day, the hearing had to be continued on May 7, 2004. Both parties were represented by the same counsel that participated in the prehearing conference. Testimonial and documentary evidence was received, and a transcript was made of the proceedings by a certified court reporter. The parties agreed to present post-hearing briefs to summarize their arguments by June 8, 2004, and reply briefs by June 10, 2004. At the request of Respondent’s counsel, the deadlines were extended until June 14 and June 16 respectively. The Decision Deadline is June 30, 2004.

Findings of Fact

Based upon the matters of record and matters of official notice, in my capacity as a Special Education Hearing Officer for the State of Texas, I make the following findings of fact based on a preponderance of the evidence:

1. Student is a ***-year-old student residing with his parents within the geographic boundaries of North East Independent School District. Student has been identified as a student eligible for special education services under the classification of emotional disturbance.
2. Student is completing *** grade this 2003-2004 school year at ***, with mostly ***'s and ***'s. He has also passed all required state assessments of his academic skills.
3. Before coming to North East ISD Student's parents resided in the East Central ISD where Student attended *** at ***. On April 25, 2001 Student was tested to determine his level of performance and educational needs, and to determine if he continued to qualify for special education services. The Wechsler Intelligence Scale for Children – III (WISC-III), the Wechsler Individual Achievement Test (WIAT), and the Childhood Autism Rating Scale (CARS) were administered to Student. The examiner reported the following results:

a. WISC-III scores

| | | |
|---------------|--------------------|-------------------|
| Verbal IQ *** | Performance IQ *** | Full Scale IQ *** |
|---------------|--------------------|-------------------|

b. WIAT scores

| | Standard Score | Percentile Rank | Discrepancy (IQ – Achiev) |
|-----------------------|-------------------|--------------------|------------------------------|
| Basic Reading | *** | *** | *** |
| Reading Comprehension | *** | *** | *** |
| Math Reasoning | *** | *** | *** |
| Numerical Operations | *** | *** | *** |

4. East Central ISD also assessed Student through the Childhood Autism Rating Scale (CARS). Two members of the assessment staff observed Student's behavior in the classroom. They rated his behavior in each of the 15 categories specified in the CARS. Based upon those observations the assessment report noted that Student's score fell at the upper end of the Mildly Autistic Range, indicating that Student displayed many characteristics of autism, although he functioned at a very high level in the classroom.

5. East Central ISD concluded that based upon their assessment data Student, "... continued to meet specific eligibility criteria for special education services under the classification of Autism. Student displays characteristics of Pervasive Development Disorder."
6. In December 2001 Student was re-evaluated by North East ISD, and it was determined that he no longer qualified for services as testing did not indicate any autistic characteristics. In January 2002 ***, M.D., indicated that Student had some autism spectrum disorder features such as social skills deficits, poor self-esteem and delays in gross motor skills, but Student's characteristics were not to the magnitude to meet DSM criteria.¹ Parent requested a meeting with school officials and provided them additional private testing to confirm the previous diagnosis of Asperger's Syndrome. The school considered Parent's request to be a request for special education referral and began the assessment process.
7. *** for North East ISD, reviewed the outside testing provided by Parent, and prepared an Individual Assessment Addendum dated October 21, 2002. As part of the assessment, the Australian Scale for Asperger's Syndrome was completed by Parent and one of Student's teachers. The 12-page report summarized the information obtained from various sources and concluded that Student had been determined to meet the Texas Education Agency guidelines for Autism and other Pervasive Development Disorders. The educational implications for Student included:
 - More classroom structure and supervision than is possible with only general education support.
 - Specialized methods, materials or modified instructional content as needed to address the pervasive developmental disorder.
 - Specialized behavior management techniques.
8. An Admission, Review and Dismissal (ARD) committee meeting convened on November 7, 2002, to review the results of Student's comprehensive assessment and to discuss possible placement options. The committee determined that Student was eligible to receive special education services and developed an individualized program to address his needs. The meeting was recessed and was completed on December 5, 2002.
9. On January 21, 2003, the ARD committee again met, this time to consider whether Student required adaptive physical education. Although school officials did not believe Student needed adaptive PE, Parent strongly felt he did need it, and the committee agreed to provide it.

¹ See footnote 4 below.

10. On February 10, 2003, another ARD committee meeting was conducted. The committee discussed several issues. The meeting was not finished that day due to time constraints and was reconvened on March 10, 2003. One of the chief concerns expressed by Parent was Student's behavior. Since Christmas there had been several incidents with behavior at school. Moreover, Student had verbalized statements that could be construed to be talking about suicide. The school officials recommended that Parent consult with Dr. *** who had observed Student on January 17, 2003. The committee reviewed his observation report, but Parent was reluctant to consult with Dr. ***. Student requested additional assessment of Student for depression. Rather than just screening for depression, Mr. *** recommended that a complete psychological evaluation be performed.
11. Dr. *** prepared a two page summary of his observation of Student. He stated the reason for the observation: "Classroom observation and teacher consultation was requested for the purpose of providing school staff with information regarding Asperger's Disorder, teaching strategies, and behavior management." Dr. *** observed Student for thirty minutes during the language arts and mathematics lessons in Ms. *** class. He noted:

At no time during the observation did Student engage in any disruptive, oppositional, or otherwise challenging behaviors. Attention span, productivity, cooperation, sociability, and communication were commensurate with the style and quality observed among his classmates. He exhibited no oddities of speech with regard to tone of voice, modulation of volume, and/or prosody and did not engage in any perseverative, idiosyncratic, or self-stimulatory behaviors. Facial expressions and emotions were wide ranged, appropriately varied, and congruent.

The most salient part of the report declared:

Although Student's most recent assessment resulted in a diagnosis of Asperger's Disorder, his behaviors during this consultant's observation were more consistent with collateral assessments indicating otherwise. This is not to say that Student is not a student with Asperger's Disorder. . It is possible that Student presents with milder and more subtle characteristics of this disorder than is commonly observed and would not be definitely identified without more in depth assessment.

Dr. *** also suggested that a more thorough evaluation should contain more than just observation data and information obtained from one parent and one teacher. He noted that a clinical interview with the student was essential to appropriately evaluate the student's conversational reciprocity, presence or absence of literal interpretation, understanding of social concepts, pragmatic language skills, use of idioms and other

social expressions, and other features that would obtain information to accurately diagnose Asperger's Disorder.²

12. *** conducted a complete psychological evaluation in order to address Parent's concerns about depression and also Dr. ***'s report. The formal psychological assessment occurred over five sessions from April 8, 2003 through May 2, 2003. Mr. *** report was dated May 19, 2003. Testing was delayed because of Parent's concern about the Asperger Syndrome Diagnostic Scale. Mr. *** administered the Wechsler Abbreviated Scale of Intelligence and the Wechsler Individual Achievement Test – Second Edition. The results for Student are:

| | |
|----------------------|----------------------|
| Verbal IQ | *** |
| Performance IQ | *** |
| Full Scale IQ | *** |
| Word Reading | *** (standard score) |
| Numerical Operations | *** (standard score) |
| Written Expression | *** (standard score) |

13. Mr. *** also used a variety of instruments to test Student's emotional areas, using rating scales completed by Parent and teachers. The test results indicated that Student was experiencing elevated levels of anxiety with low self-esteem and depressive features. The report also indicated that Student excels academically but dislikes school. He has difficulty with his interpersonal relationships, but nevertheless is interactive with peers and adults. He has poor coping skills and his stress has reached the point to which he feels hopeless. Student has social skills and is aware of proper etiquette. He does not like to compromise and gets angry when he does not get his way. Away from school Student's life is isolated and limited in scope, spending much of his time by himself watching what he wants to watch on television and playing what he wants to play. Consequently he has limited opportunities to expand his social skills. Additionally, Mr. *** observed Student as capable and quite adept at using and understanding multiple nonverbal behaviors, such as eye-to-eye contact, appropriate facial expressions, body postures and gestures.

14. Mr. ***'s report also included the assessment of Ms. ***, the ***, from October 2002, who determined that Student did not qualify for speech-language services. She noted that Student did not display any perseverative words, phrases or topics and made very few irrelevant comments. He did not display echolalia or use of jargon. She also found that his communication skills were age appropriate, including a very well developed vocabulary, grammar and syntax for his age. Additionally, she found that Student appropriately initiated and sustained conversation, easily changed topics during those conversations and maintained appropriate eye contact. He understood and made jokes and metaphors.

² The Hearing Officer does not find Dr. *** to have conducted a psychological evaluation or consultation for which consent was required. It was merely a look at observable behavior to advise the school staff how to better serve Student.

15. Perhaps the most important aspect of Mr. *** evaluation of Student was the Asperger Syndrome Diagnostic Scale (ASDS). The ASDS contains five subscales: language, social, maladaptive, cognitive, and sensorimotor. Ms. ***, one of Student's teachers, and Parent completed the ratings for Student. The results were polar opposites. The responses from the teacher indicated it very unlikely that Student has Asperger's Syndrome, whereas the ASDS completed by Parent indicates that Student very likely has Asperger's Syndrome.
16. Mr. *** concluded that Student does not have Asperger's Syndrome. However, he found that Student met the Texas Education Agency guidelines for an emotional disturbance under the diagnosis of generalized anxiety disorder with depressive features.
17. On June 11, 2003, the ARD committee met to review Student's progress during the previous school year and to review the assessment conducted by Mr. ***. Ms. *** said that Student showed great progress academically, and behaviorally he also showed progress. He ended the school year with straight ***. Mr. *** explained the test results obtained for Student, but Parent disagreed with the findings. She requested an independent educational evaluation and evaluation for auditory processing disorder.
18. ***, Ph.D., Speech-Language Pathologist, evaluated Student August 5, 2003 for auditory processing and speech/language disorders. Dr. ***'s report dated August 22, 2003, indicated the results fell within the normal range of development for ***-year-olds. He stated:

Student used speech and language to communicate functionally, intelligibly, and efficiently. No atypical patterns associated with known communication disorders were identified. Student did exhibit variability in areas of communication development, with semantics and complex syntax as relative strengths and pragmatics as a relative weakness. These results indicate that Student will be relatively better at academic tasks and relatively poorer at social activities Based on these assessment results, Student does not exhibit an auditory processing disorder or a speech and language disorder and does not qualify for speech-language pathology services.
19. The ARD committee met to review the results of the independent evaluations on October 3, 2003. Parent requested that Dr. ***'s report reflect that Student was on his medication during the testing, and Dr. *** agreed to so modify the report. The committee also reviewed a report presented by Parent from ***, M.D., that indicated Student meets the requirements for Asperger's Syndrome and made recommendations for speech and language therapy, occupational therapy, use of a particular socialization curriculum, at home play skills, and ongoing medication management. The committee discussed that Student would qualify for special education services as a student with emotional disturbance in order to create a program for Student according to his needs. The District also offered in-home training and recommended that the training could focus on play skills and social skills, but the parent preferred that those concerns be addressed in Student's plan at school. The committee also decided to continue adaptive P.E. Additionally, the committee completed a new functional behavioral assessment to

- help Student with interpersonal interactions. Parent expressed concern about a more positive way of writing the comments on the behavior chart be used, and Dr. Palmer responded that a new intervention to address Student's classroom behavior could include a journal to include positive behaviors. The committee then developed the behavior intervention plan and discussed the daily debriefing sessions that occur at the end of the day. The counselor reported on Student's progress in counseling.
20. The ARD committee meeting that began on October 3 was continued on October 14, 2003. Dr. *** did not attend this portion of this meeting. The committee discussed at length the goals for Student's Individualized Education Plan (IEP) and the behavior intervention plan. The District agreed to continue offering speech consultation services and again offered to conduct an in-home assessment. Although the District offered to continue counseling services, Parent said she did not want counseling to continue until she could review the curriculum. With respect to group counseling, Parent did not want Student to participate until she was comfortable with the makeup of the group. She also said the family was seeing a counselor but did not want the District to collaborate with the counselor. At the conclusion of the meeting Parent disagreed with the committee. A ten-day recess was offered and the parent agreed to the recess.
 21. Although the recess ARD committee meeting was scheduled for October 22, 2003, it never occurred.
 22. One of the tools used to assist Student with his behavior was an Individualized Daily Self-Management Checklist/Plan. The plan divided the school day into 30-minute intervals. The teacher rated Student's behavior in five areas – responsibility, honesty, respect, self-discipline, and perseverance – on a scale of 0 to 5 according to the number of times that he had a problem in that area. The checklists from August 18, 2003 through November 21, 2003, indicate that for the most part Student obtained excellent results.
 23. During the 2003-2004 school year Student was removed from class four times due to behavioral incidents. On November 7, 2003, Student received an In-School Suspension for throwing a chair in the classroom on November 6, 2003. Another incident occurred on November 13, 2003, during which Student hit another student during lunch.³ He also received In-School Suspension for this incident.
 24. One area in which Parent disagrees with the District most strongly is the selection of a tool to determine whether Student has Asperger's Syndrome. The experts who testified at the hearing seem to concur that the Childhood Autism Rating Scale does not accurately assess for Asperger's Disorder. The other two tools used predominantly are the Asperger Syndrome Diagnostic Scale (ASDS) and the Australian Scale for Asperger's Syndrome (ASAS), sometimes also referred to as the Atwood Scale. The Atwood Scale is not a normed reference scale, but rather, is used as a screener.

³ Student's comments to the *** principal upon being ordered to the resource room reflect a possible belief that he need not be held accountable for his actions: "I should not be in trouble. Mrs. *** should be in trouble because she broke the 11th Commandment – thou shalt not punish Student[...]" When asked what punishment he should receive for fighting, Student replied, "Nothing. I shouldn't get any punishment because I am 'specialer' than he is."

Conversely, the ASDS is a newer test which has been normed, meaning it has reliability and validity.

25. According to The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition,⁴ Asperger's Disorder falls within the disorders usually first diagnosed in infancy, childhood, or adolescence, and more specifically within the group, Pervasive Developmental Disorders. Quoting from the DSM-IV, the essential features of Asperger's Disorder are:

- Severe and sustained in impairment in social interaction (Criterion A)
- The development of restricted, repetitive patterns of behavior, interests, and activities (Criterion B)
- The disturbance must cause clinically significant impairment in social, occupational, or other important areas of functioning (Criterion C)
- There were no clinically significant delays in language (e.g., single words are used by age 2 years, communicative phrases are used by age 3 years) (Criterion D)
- There are no clinically significant delays in cognitive development or in the development of age-appropriate self-help skills, adaptive behavior (other than in social interaction), and curiosity about the environment in childhood (Criterion E)
- The diagnosis is not given if the criteria are met for any other specific Pervasive Developmental Disorder or for Schizophrenia (Criterion F).

26. Criterion A – qualitative impairment in social interaction – may be manifested by at least two of the following:

- (1) marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction
- (2) failure to develop peer relationships appropriate to developmental level
- (3) a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (e.g., by a lack of showing, bringing, or pointing out objects of interest to other people)
- (4) lack of social or emotional reciprocity

27. Criterion B – restricted repetitive and stereotyped patterns of behavior, interests, and activities – may be manifested by at least one of the following:

- (1) encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus
- (2) apparently inflexible adherence to specific, nonfunctional routines or rituals
- (3) stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements)

⁴ The Hearing Officer takes official notice of the material included in the DSM-IV, recognized as authoritative by experts in the field of mental disorders.

- (4) persistent preoccupation with parts of objects.
28. Each section of the ASDS reflects one of the criteria taken from of the DSM-IV. Thus, in applying the ASDS, Mr. *** was assessing each criterion specified for Asperger's Disorder. With respect to Student, Mr. *** noted that he had a significant delay in language, thereby negating Criterion D.⁵ Moreover, Student seems to have suffered from a cognitive delay as indicated by the various IQ tests results over the years (Criterion E). Although Student's social skills are not on par with his peers, Mr. *** did not believe Student's deficit rose to the qualitative level mandated by the DSM-IV.
29. Mr. *** attributed his about-face from his earlier opinion that Student did have Asperger's Disorder primarily to an inability to interview Student one-on-one. His explanation is credible under the circumstances of this case.⁶
30. Other experts have evaluated Student and concluded that he does indeed have Asperger's Syndrome. In July 2002 ***, M.A., L.P.A. from the Center for Health Care Services stated that Student has Asperger's Syndrome. ***, M.D., in a report dated August 13, 2003, stated that Student qualifies for a diagnosis of Attention Deficit Hyperactivity Disorder in addition to his diagnosis of Asperger's Syndrome. ***, R.N., M.S.N., N.N.P., and a developmental disabilities specialist, concluded that Student has Asperger's Syndrome. ***, M.A., Speech and Language Pathologist, saw Student regarding his social language skills, and found that his difficulties in abstraction and social language functions are consistent with a diagnosis of Asperger's Syndrome.
31. ***, Ph.D. psychologist, testified at the hearing. She examined Student and concurs in the diagnosis of Asperger's Syndrome. Dr. ***'s opinion is very persuasive, and although her observations are quite relevant, she has not observed Student in the classroom context. Additionally, her testimony did not reference Student's delays in language and cognitive development.
32. In Texas for a child with autism, an ARD committee must consider the areas included on what is generally referred to as the "autism supplement." Those areas are extended educational programming, minimal unstructured time, in-home training or viable alternatives, prioritized behavioral objectives, prevocational and vocational needs, parent training, and staff-to-student ratio.
33. The District has offered a variety of family support services for Student and his family, including consultations with Dr. ***, an invitation to a lecture on the subject of services for students with autism, and access to parent facilitator. Student meets with the school counselor on a weekly basis, and the District has offered a social skills counseling group. Student's IEP focuses strongly on social skills. The District has also offered two

⁵ Dr.*** , M.D., diagnosed Student in August 1998 with a developmental language delay associated with some component of autistic-like syndrome.

⁶ The consent form signed by Parent for the first evaluation mentions interviews with teachers and parents, but does not specifically reference Student one way or the other. It was Mr. *** strong belief that Parent was not permitting him to speak with Student.

consultations between the speech therapist and the classroom teacher each month, and consultation by the adaptive P.E. teacher with the general P.E. teacher.

Discussion

The Hearing Officer, not being a professional psychologist, must rely upon the testimony of expert witnesses in this area. Both sides present good arguments why Student does – or does not – have Asperger’s Disorder. However, strictly evaluating the evidence according to DSM-IV criteria, the stronger position is that, although Student certainly exhibits many characteristics of Asperger’s Disorder, he does not meet *all* of the criteria. Perhaps there are those who would disagree that all of the criteria must be met, but that is not for me to say.

Petitioner challenges the diagnosis primarily because he believes the autism supplement should have been used, and hence a procedural violation under IDEA was committed. Whereas this argument may have carried the day in the past,⁷ the Fifth Circuit made clear in *Adam J. v. Keller ISD*, 328 F.3d 804 (5th Cir. 2003), that procedural defects alone do not constitute a violation of the right to a free appropriate public education unless they result in the loss of educational opportunity. The evidence is uncontroverted that Student has made very good academic progress. The evidence also is clear that he has even progressed in the area of behavior, although he still needs much help in the area of social skills. Thus, there is no loss of educational opportunity.

Conclusions of Law

After due consideration of matters of record, matters of official notice, and the foregoing findings of fact, in my capacity as a Special Education Hearing Officer for the State of Texas, I make the following conclusions of law:

1. Student is a student who is eligible for special education services under the IDEA as a child with an emotional disturbance. 20 U.S.C. §1401 (3) (A); 34 C.F.R. §300.7 (c) (4).
2. Petitioner bears the burden of proof with respect to his claims that Student was denied a free appropriate public education. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983), *aff’d*, 468 U.S. 883 (1984). Petitioner did not meet his burden of proof in this case.
3. With respect to North East ISD’s program developed for Student for the 2003-2004 school year, the IEP was reasonably calculated to enable him to receive educational benefits. The four factors set forth in *Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5th Cir. 1997), are met.
4. The failure of North East ISD to use the autism supplement during the ARD committee meetings for Student during the 2003-2004 school year did not prevent him from receiving a free appropriate public education. *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 175 (1982).

⁷ See *Student b/n/f Helen K. v. Kennedale ISD*, Docket No. 052-SE-1099 (SEA TX 2000).

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the relief sought by Petitioner is DENIED. Finding that the public welfare requires the immediate effect of this Final Decision, the Hearing Officer makes it effective immediately.

SIGNED this 30th day of June 2004.

/s/
Lucretia Dillard
Special Education Hearing Officer

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Synopsis

Issue: *Whether the Respondent school district failed to properly identify the child as autistic?*

Held: For the District.

Issue: *Whether the Respondent failed to provide the areas of services under the autism supplement?*

Held: For the District.

Citations: *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 175 (1982); *Adam J. v. Keller ISD*, 328 F.3d 804 (5th Cir. 2003); *Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).

20 U.S.C. § 1412 (a) (1)
34 C.F.R. § 300.7 (c) (1)
34 C.F.R. § 300.13
TEX. ADMIN. CODE § 89.1055 (e)