

**DOCKET NO. 183-SE-0104**

**STUDENT** § **BEFORE A SPECIAL EDUCATION**  
§  
§  
**VS.** § **HEARING OFFICER FOR THE**  
§  
**TEXAS YOUTH COMMISSION** § **STATE OF TEXAS**

**DECISION OF THE HEARING OFFICER**

**STATEMENT OF THE CASE**

On January 26, 2004, parent , requested a due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et. seq.* Petitioner alleges that Respondent failed to provide him with a Free Appropriate Public Education (FAPE) under the Individuals With Disabilities Education Act (hereinafter IDEA) and complained as follows:

1. Respondent failed to identify student as a student with mental retardation.
2. Respondent denied student a FAPE by failing to implement the recommendations of the psychologist who conducted the Independent Educational Evaluation (IEE) for student, thereby failing to provide student with a Free Appropriate Public Education (FAPE).
3. Respondent failed to provide student an appropriate placement and failed to develop an appropriate IEP for student.

For relief, Petitioner requests a finding that student be identified as a student with mental retardation, as well as an order that Respondent develop an appropriate IEP and/or placement and implement the recommendations of the psychologist who conducted the IEE.

Petitioner further requests that the hearing officer order that student be placed into TYC's mentally impaired offender program. This portion of the complaint was denied in the Pre-Hearing Conference Order as being outside the jurisdiction of the Hearing Officer.

Held, for Respondent.

**PROCEDURAL HISTORY**

This matter was initially filed by parent as student's next friend. At the time of the initial filing student was 18 years of age, having reached the age of 18 on \*\*\*. However, at the time of

filing, student had a pending Application for Guardianship pending in Travis County Probate Court. At the Pre-Hearing Conference on February 3, 2004, the matter was abated until such time as the guardianship issue was resolved.

On September 29, 2004, the parties notified the Hearing Officer that the Guardianship Application had been dismissed and the Abatement Order was lifted as of that date. During a Pre-Hearing conference on September 30, 2004, both parties notified the hearing officer that student had authorized his mother, \*\*\*, to represent him as an advocate in any special education proceedings. Written authorization was provided to the Hearing Officer designating parent as his advocate. Therefore, the Hearing Officer allowed the matter to proceed to hearing, with parent acting as his advocate.

On October 18, 2004, both parties appeared for hearing. Petitioner appeared in person and authorized both parents, to act as his advocates, and further authorized the continuation of this proceeding. Texas Youth Commission appeared by and through its representative, Forest Novy, along with counsel, Howard Hickman. On October 18, 2004, both parties presented evidence, but requested additional time to present expert testimony. The matter reconvened on November 1, 2004, for the presentation of expert testimony. Following the hearing and additional procedural matters, the Decision Due date was extended to December 8, 2004. This opinion was rendered on December 8, 2004, and a copy was timely mailed to both parties.

Based upon a preponderance of the evidence, I find that Petitioner has failed to meet his burden of proof on all issues and make the following findings of fact and conclusions of law. (All references to the transcript will be designated as "Tr." followed by the page number; all references to Petitioner's and Respondent's exhibits will be designated as "R" and "P", followed by the exhibit number.)

### **FINDINGS OF FACT**

1. Student is an \*\*\* year old student who resides in a facility and attends a school operated by the Texas Youth Commission.
2. In May 2002, as a result of a hearing in Docket No. 194-SE-0202, a Special Education Hearing Officer entered an Order that student was entitled to an Independent Educational Evaluation at public expense to assess student in all areas of suspected disability. *See Student. b/n/f Parent vs. Texas Youth Commission*, Docket No. 194-SE-0202 (May 2002). At the time the IEE was ordered, student had been evaluated on numerous occasions, with the evaluation data presenting mixed results.
3. In July, 2000, Dr. \*\*\*, a licensed psychologist employed by the Texas Youth Commission, conducted a psychological evaluation on behalf of TYC. The stated purpose of the evaluation was to assess intellectual and psychological functioning and to determine whether student met the criteria for discharge as a mentally impaired offender. (R-12; P-11). This

was not an educational evaluation. Dr. \*\*\* administered a standardized test (WISC-III) to determine student 's intellectual functioning, as well as an objective measure of his adaptive behavior (Vineland), and found that student was a child with Mild Mental Retardation. (R-12; P-11). Student's Full Scale IQ on the July 2000 WISC-III was \*\*\*. This was significantly below student IQ scores on previously administered measures of intellectual functioning. (R-12; R-14; Tr. II-25-27, 38-40). There were concerns at the time that the results reflected underperformance due to perceived personal gain, as well as distractibility. (R-2; R-12). Dr. \*\*\* testified and stated in her evaluation that she could not conclusively state that student was intentionally underperforming, but that a number of factors including distractibility, could have impacted the test. Subsequent evaluators also suggested that distractibility could have impacted the results. (R-14) In July 2000, Dr. \*\*\* recommended further testing to confirm the results due to the inconsistency with prior testing. (*See* Testimony of Dr. Sanders; R-12).

4. As a result of Dr. \*\*\* evaluation, Respondent released student from its care, custody and control as a mentally impaired offender, and referred him to the Austin Travis County Mental Health Mental Retardation Center (MHMR). MHMR conducted its own assessment of student, utilizing a different standardized test (Stanford-Binet Intelligence Scale-Fourth Edition), as well as an objective measure of his adaptive behavior which gave considerable weight to maladaptive behaviors. The results of this evaluation placed student's intellectual functioning within the borderline range, with a Full Scale IQ of \*\*\*, and suggested that adaptive behavior deficits, if any, were heavily influenced by maladaptive behaviors and student's lack of choice and/or opportunity. As a result of this testing, MHMR found that he was not mentally retarded and not eligible to receive their services. (R-14). The MHMR data with regard to student's intellectual functioning was consistent with prior testing.
5. While he was no longer in the care, custody and control of TYC, student was subjected to another psychological evaluation at the request of another independent school district. Dr. \*\*\* administered the WISC-III in January, 2001, more than six months after Dr. \*\*\* administration of the same instrument. Dr. \*\*\* testified that given the fact that six months had elapsed since prior administration of the WISC-II, and given the consistency of the data with prior testing, she believed the January 2001 testing to be a reliable measure of student's intellectual functioning. (Tr. II 44) This testing reflected a Full Scale IQ of \*\*\*, with a Verbal IQ of \*\*\* and a Performance IQ of \*\*\*. (R-15) These results were consistent with prior testing.
6. In the Spring of 2001, student returned to the care, custody and control of the Texas Youth Commission and has been served since that time as an eligible student with a disability - Other Health Impaired.
7. In January 2002, Dr. \*\*\* prepared an Addendum to her prior evaluation. The purpose of the Addendum was to review all existing diagnostic data and clarify student's special education eligibility. (R-2). Dr. \*\*\* concluded that a review of all existing data did not support a

finding that student functioned in the mentally retarded range. She stated in the report that the variability in testing was due to distractibility, inattention, impulsivity, and the possibility of personal manipulation. She concluded that student did not meet the criteria for a student with mental retardation pursuant to 34 CFR § 300.7(c) (6).

8. In August of 2002, in response to a Hearing Officer Order, Dr. \*\*\* evaluated student, administering the WISC-III. This testing reflected a Full Scale IQ of \*\*\*. However, Dr. \*\*\* did not evaluate student's adaptive behavior skills. Although the test results yielded an IQ of \*\*\*, Dr. \*\*\* noted in his report that student was not mentally retarded. Dr. \*\*\* opined that the test results could be questionable given mixed data, the possibility that student was underperforming due to a perceived personal gain, or distractibility. (R-23).
9. The ARD Committee convened in October 2002, to consider Dr. \*\*\* report. The ARD Committee also considered Dr. \*\*\* Addendum which explained all prior testing data. The ARD Committee concluded that student was eligible to receive special education services as a student with Other Health Impairment, not Mental Retardation. (R-1A)
10. Dr. \*\*\* administered the Vineland Adaptive Behavior Scale in July 2003, and submitted an Addendum to his previous report. Dr. \*\*\*, based primarily on the Vineland administration, withdrew his previous opinion and concluded that student was a student with Mental Retardation. (R-1D; R-24; P6). Based exclusively on parental report, Dr. \*\*\* found that student exhibited concurrent deficits in adaptive behavior that justified a finding of Mental Retardation. Dr. \*\*\* obtained information for the Vineland only from student's parents in 2003, when student had not been in their care, custody and control for a period of approximately 18 months. Consequently, Dr. \*\*\* did not consider data from persons who were responsible for student's care on a daily basis, the staff at \*\*\* TYC facility. His failure to properly administer the test invalidates the results. (Tr. II 13-14, 53; R-1D). Consequently the results of the July 2003 Vineland and the Addendum will not be considered.
11. Historical data considered by the ARD Committee indicates that student functions in the Borderline Intellectual Functioning range. According to Dr. \*\*\* most recent report, the majority of the testing establishes that student functions above the Mentally Retarded range, although the data has been highly variable. (R-24; P-6).
12. The ARD Committee convened in September 2003 to consider Dr. \*\*\* change of opinion with regard to student's intellectual functioning. Dr. \*\*\* participated in the ARD Committee Meeting, as did student's parents. Additionally, teachers, caseworkers, instructional specialists, psychologists and special education personnel responsible for working with student participated. The ARD Committee considered information from a variety of sources and determined that student was not a child with Mental Retardation as that term is defined in 19 Tex. Admin. Code § 89.1040 and 34 CFR § 300.7. That is, they determined, based on a preponderance of the data before them, that student did not function at two or more standard deviations below the mean on individually administered scales of verbal ability, and

either performance or non-verbal ability, with concurrent deficits in adaptive behavior. (R-1D). *See* 19 Tex. Admin Code. § 89.1040(c)(5).

13. Petitioner presented no evidence that student's IEP was not appropriate in light of all the circumstances.
14. Petitioner presented no evidence that student's placement was not appropriate.

### **DISCUSSION**

The primary issue in this case concerns whether based on all existing data, Respondent erred in determining that student does not meet the eligibility criteria for a student with mental retardation. A student with mental retardation is one who has been determined to be functioning at two or more standard deviations below the mean on individually administered scales of verbal ability, and either performance or nonverbal ability, and who concurrently exhibits deficits in adaptive behavior. *See* 19 Tex. Admin. Code § 89.1040(c)(5). In terms of an Intelligence Quotient, this would mean an IQ score of \*\*\* or below. (Tr. II 50-51) The evidence in this case is certainly mixed. It is somewhat concerning that at least two test administrations resulted in Intelligence Quotients of \*\*\* and \*\*\*. However, the preponderance of the evidence presented is consistent with these tests not being reliable measures of student's intellectual functioning. In fact, both evaluators questioned the results at the time they interpreted the data. Therefore, these test results will be accorded little weight in comparison with other testing.

Other testing involving reliable and/or valid measures of intellectual functioning place student's Full Scale IQ in the \*\*\* to \*\*\* range. Testing in 1993 yielded a Full Scale IQ of \*\*\*. In 1996, \*\*\* Full Scale IQ was \*\*\*. Administrations of the TONI-3 (Test of Non-Verbal Intelligence) yielded much higher scores, but according to Dr. \*\*\* are not valid measures of intellectual functioning and will not be considered. (Tr. II 48; R12) Administration of the Kaufman Assessment Battery for Children (KABC) indicated that student functions in the \*\*\* range. The August 2000 administration of the Stanford-Binet indicated a Full Scale IQ of \*\*\* (Borderline Intellectual Functioning). The February 2001 testing yielded a Full Scale IQ of \*\*\*, with a Verbal IQ of \*\*\* and a Performance IQ of \*\*\*. All examiners consistently indicated that tests results indicated a conservative estimate of \*\*\* true intellectual functioning. Except for Dr. Sanders' and Dr. \*\*\* evaluations (which reflect \*\*\* IQ scores), no other testing reflects that student functions at two or more standard deviations below the mean (\*\*\*) or below) on scales of verbal ability **and** either performance or non-verbal ability as required in 19 Tex. Admin. Code §89.1040(c) (5). In fact, student's scores have been consistently above \*\*\* on non-verbal and/or performance scales. As a determination of mental retardation would require deficits in both verbal and non-verbal or performance abilities, the data in its entirety is not consistent with a finding of \*\*\*. The ARD Committee reasonably concluded, based on all the data before it, that student is not a student with Mental Retardation.

It is troubling that Respondent's own expert made a diagnosis of mental retardation in the

process of discharging student from its program as a mentally impaired offender. Of course, such a discharge, may have qualified student for services from another agency. However, following student's discharge from TYC, \*\*\* evaluated student on behalf of MHMR and noted that Dr. Sanders made a diagnosis of Mild Mental Retardation when the IQ scores obtained from her testing were within the range of Moderate Mental Retardation, and other existing data supported neither finding. The MHMR report also considered the impact of student's maladaptive behaviors on any finding of concurrent adaptive behavior deficits. Dr. \*\*\* certainly had prior psychological data before her when she evaluated student and acknowledged in her report that the June 2000 results were inconsistent with all other data. According to her own testimony, variability in testing requires the professional to view data from a number of sources in determining an individual's true intellectual functioning. It appears that Respondent readily accepted the questionable results of Dr. Sanders' evaluation when it discharged him from their program as a mentally retarded youth, but retracted its position upon student's return to TYC and upon resuming its obligation to provide a Free Appropriate Public Education to student. Given the history and relationship of the parties, it is certainly understandable that Respondent's actions would undermine parent's confidence in the psychological testing conducted by Respondent or its agents, and it is understandable that parents have become so vigilant in their efforts to have a Hearing Officer review the ARD Committee's determination that student is not mentally retarded. However, it is clear from a preponderance of the credible evidence that in determining student's special education eligibility and developing his IEP and educational placement, the ARD Committee reviewed and considered all existing data, and its conclusion that student is a student with Other Health Impairment and not a student with Mental Retardation is certainly reasonable in light of all the evidence. Petitioner has failed to establish by a preponderance of the evidence that student is a student with Mental Retardation and that the Respondent failed to properly identify him as such. Petitioner has also failed to prove by a preponderance of the evidence that the IEP and placement are inappropriate.

### **CONCLUSIONS OF LAW**

1. Student is a student 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 Texas Youth Commission is the local education agency responsible for the provisions of student's free appropriate public education.
3. The District's educational program is presumed to be appropriate. As the party challenging the educational program proposed by the district, Petitioner bears the burden of proof. *Tatro v. State of Texas*, 703 F.2d 823 (5<sup>th</sup> Cir. 1983), *aff'd* 468 U.S. 883 (1984); *Houston ISD v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000). Petitioner has not met that burden.
4. Petitioner has failed to establish by a preponderance of the evidence that student is a student with Mental Retardation pursuant to 19 Tex. Admin. Code § 1040(c)(5).

**ORDER**

Based upon a preponderance of the evidence and the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the relief requested by Petitioner is **DENIED**.

Finding that the public welfare requires the immediate effect of this Final Decision and Order, the Hearing Officer makes it effectively immediately.

*Signed and entered* on December 8, 2004.

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SHARON M. RAMAGE  
Special Education Hearing Officer

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**SYNOPSIS**

**Issue:** Whether TYC failed to properly identify student as a student with Mental Retardation.

**Held:** For Respondent. Petitioner failed to establish by a preponderance of evidence that student is a student with Mental Retardation.

**Cite:** *Tatro v. State of Texas*, 703 F.2d 823 (5<sup>th</sup> Cir. 1983), aff'd 468 U.S. 883 (1984); *Houston ISD v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000)  
34 C.F.R. § 300.7(c)(6); 300 C.F.R. § 300.535; 19 Tex. Admin. Code § 89.1040(c)(5).

**Issue:** Whether TYC failed to develop an appropriate IEP and placement for student in light of existing evaluation data.

**Held:** For Respondent. Petitioner failed to establish by a preponderance of evidence that student's IEP and placement were not appropriate in light of existing evaluation data.

**Cite:** *Tatro v. State of Texas*, 703 F.2d 823 (5<sup>th</sup> Cir. 1983), aff'd 468 U.S. 883 (1984); *Houston ISD v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000)  
34 C.F.R. § 300.346, 300.347, 300.535; 19 Tex. Admin. Code §89.1055