

**BEFORE A SPECIAL EDUCATION HEARING OFFICER
STATE OF TEXAS**

Student, bnf

**Parent,
Petitioner,**

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v.

DOCKET NO. 221-SE-0304

**SOUTH TEXAS INDEPENDENT
SCHOOL DISTRICT,
Respondent.**

DECISION OF THE HEARING OFFICER

Statement of the Case

Petitioner Student bnf Parent, (“Petitioner” or “Student”) brings this action against the Respondent South Texas Independent School District (“Respondent” or “South Texas ISD” or “the school district”) under the Individuals with Disabilities Education Act, 20 U.S. C. Sec. 1400 et. seq, (“IDEA”) and its implementing state and federal regulations. See, 34 C.F. R. Sec. 300.1 et. seq and 19 Tex. Admin. Code Sec. 89.001 et. seq.

Petitioner has been represented at all times in this litigation pro se by his mother Parent (“Student’s mother” or “Parent”). Respondent South Texas ISD has at all times in this litigation been represented by its counsel Tom Fleming of Fleming & Hernandez, Brownsville, Texas.

Procedural History

**Prior Case – Findings and Conclusions
Incorporated and Adopted**

This case has its genesis in a previous request for a due process hearing that resulted in a Decision issued on May 15, 2003 under *Student v. South Texas Independent School District and *** Independent School District; Dkt. No. 102-SE-1202* (“the prior case”). I hereby incorporate and adopt all findings of fact and conclusions of law issued in the Decision in the prior case.

Hearing Request and Initial Continuance

Petitioner's initial request for hearing in this case was filed on March 1, 2004. A prehearing telephone conference was conducted on March 10, 2004. The parties agreed to a short continuance of the initial hearing date in order to resolve a scheduling conflict for the school district's counsel and to allow the parties an opportunity to attempt mediation.

Mediation

The parties convened for a mediation on March 24, 2004 and, as an outcome of the mediation, also agreed to convene for a follow-up Admission, Review & Dismissal Committee meeting ("ARD") on April 1, 2004. The parties agreed to a second continuance of the hearing in order to go to the April ARD. The parties were unable to reach a consensus at the April ARD and unable to reach a mediation agreement. The parties agreed to reset the case for hearing on May 14, 2004. The parties later agreed to a continuance of the May 14th hearing date to resolve an unexpected scheduling conflict for the Hearing Officer.

The Hearing and Post-Hearing

The due process hearing was conducted on June 4, 2004. The parties agreed to submit written closing arguments and did so in a timely manner. The school district filed a set of objections to Petitioner's written closing statement. Student's mother contacted the hearing officer by phone to respond to the objections. She claimed that she did not understand that the written closing statement was simply a summary of the evidence presented at the hearing and not an opportunity for her to provide her own testimony. She did not personally testify at the June 4th hearing.

Student's mother submitted a written request to re-open the record for that purpose. The school district's objections to her request were overruled. Student's mother testified and was cross examined by telephone on August 4, 2004. The parties agreed to extend the Decision of the Hearing Officer to September 3, 2004.

Issues

The issues in this case are:

1. Whether the school district is providing Student with a free, appropriate public education ("FAPE") this school year; specifically, whether the certified special education classroom teacher is providing Student with appropriate instruction in order to provide him with the requisite educational benefit within the meaning of the Individuals with Disabilities Education Act ("IDEA");

2. Whether the school district is providing Student with FAPE this school year; specifically, whether the school district is providing Student with a safe school environment, including whether various physical injuries Student incurred this year are due to a failure by the school district to provide him with safe, appropriate instruction;
3. Whether the school district is providing Student with FAPE in the least restrictive environment (“LRE”); i.e., whether the school district is providing Student with appropriate mainstreaming opportunities to the maximum extent possible within the meaning of IDEA;
4. Whether the school district is implementing Student’s Individual Educational Plan (“IEP”) this school year; specifically, whether the school district is providing Student with instruction and opportunities to practice assisted daily living skills and vocational computer skills;
5. Whether the school district is complying with confidentiality provisions under IDEA; specifically, whether Student’s classroom teacher shared personal information about another student in Student’s class with Student’s mother, and, if so, whether that constitutes a violation of IDEA; and,
6. Whether the hearing officer has jurisdiction to order the installation of visual monitoring equipment in a classroom as relief under IDEA.

Relief Requested

As relief, Petitioner requests the following:

1. The school district assign a new, qualified special education teacher to provide instruction to Student and his classmates in his self-contained classroom for the remainder of the current school year;
2. The school district provide Student with 1:1 tutoring as compensatory relief for the failure to provide Student with FAPE either for the remainder of the current school year or during the summer; the site and schedule for the tutoring to be designed by an Admission, Review & Dismissal Committee (“ARD”); and,
3. The school district install visual monitoring equipment in Student’s self-contained classroom.

Findings of Fact

1. Student is a *** school student eligible for special education services as a student with Other Health Impairment (“OHI”) and Speech Impairment (“SI”). Student has epilepsy and takes a number of medications to address seizure activity that is a result of his epilepsy. Student has a long history of poorly controlled seizures and has shown impulsive, aggressive, hyperactive, and inattentive behaviors over a long period of time.

2. Student has also been diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”), personality change due to neurophysiologic abnormalities in the brain (with intermittent explosive, obsessive/compulsive and oppositional/defiant features), developmental expressive and receptive language disorder, developmental coordination disorder, grand mal epilepsy, and left temporal lobe disorder. He also has allergies, drools and has trouble with incontinence.
3. Student demonstrates significant academic deficits including difficulties with oral expression, listening comprehension, and a wide range of academic skills. Student is significantly below his chronological peers in terms of reading, writing, mathematics, and language arts and all other academic subjects. Overall, he functions at the *** level on a variety of measures of academic achievement and functional behavior. Intelligence measures also suggest Student is functioning at an intellectually deficient level for his chronological age. Student has a very short attention span and requires a lot of 1:1 attention from his teachers and school staff. Student has some basic functional independent living skills but continues to need to work on acquiring and mastering others. He needs to continue to work on social skills as well.
4. The South Texas ISD is an unusual type of school district. It is a unique creation of specific legislation initially passed in 1964 as a “rehabilitation district.” The sole purpose of the rehabilitation district was to provide education, training, special services and guidance to persons with disabilities. In 1969 South Texas ISD added a vocational/magnet set of services to its mission through legislative amendment. South Texas ISD now offers two distinct educational programs: rehabilitation services and vocational/magnet services to students in three counties.
5. Enrollment is through application and admission. Student was initially placed at the *** School campus in *** in September ***. Prior to that time he attended the public schools in the ***—his home school district.
6. Beginning in the 2003-2004 school year the focus and purpose of the *** School in *** was *** to a campus with a *** vocational program. A few special education classes remain at the campus which is now called the*** known informally as “***”.
7. An appropriate special education program with mainstreaming opportunities and a functional life skills curriculum is available to Student from *** at his home campus of *** School. Student could have attended *** School and received special education services in his home community for the 2003-2004 school year. However, due to

parental hostility towards ***, the hearing officer in the prior case ordered that Student be provided with special education by the South Texas ISD. Student's mother chose to return Student to the South Texas ISD *** school in *** despite its new focus on a *** curriculum and the availability of an appropriate program at his home school.

8. There is no dispute about whether the IEP goals and objectives for Student in the 2003-2004 school year were appropriate. Student was provided with a life skills curriculum including activities of daily living, academic skills, social skills, language development, job related skills and personal development. He was also provided with physical education, and 30 minutes of speech therapy weekly. Use of the computer is not a vocational skill contained in Student's IEP. Student received the bulk of his life skills instruction in the self contained special education class.
9. At *** Student had the opportunity for mainstreaming opportunities with his non-disabled peers during lunch, physical education, and school assemblies and programs. There were no opportunities to interact with regular education students before *** was *** vocational program. Student was a full member of the new integrated *** school community at ***. Student had to be removed from an end of the year assembly because of disruptive behavior.
10. There is a small outdoor *** on the *** school grounds. Special education staff used the ***, at times, to calm Student down when he became disruptive or to refocus following a seizure. The *** was used at other times for individualized instruction – especially to elicit and encourage language. Student's mother, grandmother and stepfather all observed Student in the *** on a number of occasions when they drove by the *** school campus or when they dropped by to observe Student at school. Student's family believes that Student was sent to the *** for an inordinate amount of time and missed appropriate instruction in the skills stated in his IEP.
11. The principal and a counselor both observed the special education teacher and all three of the special education teacher's aides working directly with Student on appropriate curriculum in his classroom. Student made some progress during the 2003-2004 school year – especially during the last 2-3 months of school. His behavior during lunch and his on-task attention to task and detail improved.
12. Student's social interaction with school staff began to improve as well and he showed signs that he was beginning to respond to his environment. For example, he danced to music and noticed that it was raining outside. At the time of the due process hearing the 2003-2004 school year was over and Student was attending a summer program. Student made progress in the summer program as well.

13. Personal hygiene has been an on-going issue and need for Student. Showering is an IEP goal for Student. There were safety concerns about Student's ability to shower at school since his behavior can be unpredictable due to seizure activity and other deficits. During the school year, school personnel began to work with Student on hand and face washing as smaller steps towards the ultimate goal of taking a full shower.
14. The special education teacher assigned to Student's classroom at *** held a valid provisional lifetime Texas teaching certificate in language and/or learning disabled PK-12 and a valid, lifetime mid-management administrator's certificate grades PK-12. The focus and emphasis of her training as a special educator was in the area of language and learning disabilities. She did, however, have training in other areas including behavior management. The *** knew the teacher and knew that she had been successful in other teaching assignments.
15. Student is supposed to wear a helmet for safety reasons. However, some days he did not bring or wear his helmet and on other days simply resisted wearing it at school. Student has a tendency to bolt or run at times. Both the seizures and bolting behavior can be unpredictable. Student has also been physically aggressive at times towards school staff or when agitated. Special ed. staff were not always able to catch or brace Student during these episodes so that he received minor injuries several times during the school year. Some injuries occurred because Student was not wearing the protective helmet.
16. The school nurse documented Student's injuries and took photographs of cuts and bruises as a matter of policy. His injuries were treated at school. At times, he came home from school soiled. These incidents upset Student's mother and she became concerned for his safety at school as the year progressed.
17. The special education teacher discussed another student on one occasion with Student's mother when she was visiting the special education classroom. Student's mother notified the administration and the teacher was counseled about confidentiality requirements. There were no other breaches of confidentiality from the teacher during the relevant school year.

Discussion

FAPE: Teacher Qualification and Appropriate Instruction

Under IDEA the term "qualified personnel" means personnel who have met state educational agency approved or recognized certification, licensing, or registration that apply to the area in which the individuals are providing special education or related services. *34 C.F.R. Sec. 300.23.*

In Texas, all teachers are required to hold an appropriate certificate or permit. *Tex. Educ. Code Sec. 21.003 (a).* All special education teachers must be certified, endorsed, or licensed in the area or areas of assignment. *19 Tex. Admin. Code Sec. 89.1131 (a).* A teacher who holds a special education certificate or an endorsement may be assigned to any level of a basic special education

instructional program serving eligible students ages 3-21 with certain specified exceptions not relevant to the facts in this case. *19 Tex. Admin. Sec. 89.1131 (b)*.

The evidence showed that Student's teacher was certified as a special education teacher. There is nothing in either state or federal regulations that require certification or licensure specifically for teaching a life skills curriculum. The evidence did suggest, as a reasonable inference, that the special education teacher may not have had a great deal of experience teaching students like Student with significant cognitive, social and behavioral deficits.

Student is a very challenging student with many needs and he requires a great deal of redirection and individualized attention. The evidence showed that the principal and diagnostician both observed the teacher and her aides working appropriately with Student. The record also shows that the teacher implemented the IEP and communicated with Student's mother quite frequently about his school day.

Therefore, Petitioner did not meet his burden of proof on this issue. *34 C.F.R. Sec. 300.23; See, Tatro v. Texas, 703 F. 2d 823 (5th Cir. 1983)(Tatro II), aff'd on other grounds sub nom Irving Ind. Sch. Dist. v. Tatro, 468 U.S. 883 (1984)(party attacking terms of IEP has burden of proof); Alamo Heights Ind. Sch. Dist. v. State Bd. of Educ., 703 F. 2d 1153 (5th Cir. 1986); Swift v. Rapides Pub. Sch. System, 812 F. Supp. 666, 672 (D.C. La. 1993)(parents challenging placement failed to meet burden of proving instruction in self contained classroom did not provide meaningful benefit).*

FAPE: Safety Issue

Student did incur some minor injuries at school. Student's seizure activity and non-compliant behavior with teacher and staff directives were, at times, precipitating factors. He also resisted wearing his protective helmet at school. At times, Student attempted to run or bolt from the classroom and could also become physically aggressive when agitated. It was very challenging for school personnel to completely protect Student from minor injury as a result of these various factors. However, Petitioner did not meet his burden of proof that these facts resulted in a denial of a free, appropriate public education. *Tatro, et al., supra; 34 C.F.R. Sec. 300.300*. Certainly any injury of a student at school is cause for concern. The credible evidence showed that school personnel made reasonable efforts to ensure Student's safety and to treat injuries that did occur at school.

Least Restrictive Environment

IDEA requires that a school district offer a continuum of placements and that every student with a disability be educated to the maximum extent appropriate with non-disabled peers. *34 C.F.R. Sec. 300.550 and 300.551*. Instructional arrangements and settings are based on the individual needs of the student and the student's IEP. *19 Tex. Admin. Code Sec. 89.63*. *Student* needs a small, focused instructional setting where a life skills curriculum can be delivered by special education personnel. The evidence showed that the integration of vocational students onto the *** School

campus provided Student with an even greater opportunity to interact with his non-disabled peers than he had in the past.

Student was a member of his *** school campus community. He had mainstreaming opportunities in the cafeteria, in physical education and by participating and attending school-wide functions. At times, Student had to be removed from those activities because of disruptive behavior. However, that fact alone does not mean that his instructional arrangement did not comport with IDEA's least restrictive environment requirement. Petitioner did not meet his burden of proof on this issue either. *Tatro et. al, supra.*

IEP Implementation – Vocational Computer Skills and Daily Living Skills

Although Student's mother claims that he should have received instruction in computer skills, the acquisition of those skills was not included as a vocational goal or objective in his IEP. Perhaps this is something for the ARD Committee to consider when it reviews Student's Individual Transition Plan but Petitioner did not meet his burden of proof that his IEP was not otherwise implemented in that regard. The evidence showed that special education staff did implement a life skills curriculum including daily living skills. Petitioner did not meet his burden of proof on this issue either. *Tatro, et al., supra; 34 C.F.R. Sec. 300.340.*

Confidentiality

On one occasion Student's special education teacher briefly discussed or referenced another special education student while speaking with Student's mother. Discussing another student with Student's mother was a violation of IDEA confidentiality provisions. The teacher was properly counseled and the matter addressed. There was no evidence that any other breach in IDEA confidentiality provisions occurred. No further harm or violations occurred. *34 C.F.R. Secs. 300.571 (a) and 300.572.* Neither Student nor his mother has the requisite legal standing to bring a claim of a breach of confidentiality on behalf of another student. That right belongs to the student and his or her parents. *See, 34 C.F.R. Secs. 500.567 (a) and 500.574.*

Jurisdiction of Hearing Officer to Order Visual Monitor

Petitioner seeks an order from the hearing officer that a visual monitoring system be installed in Student's self contained special education classroom as an item of requested relief. Respondent raises the issue of whether the hearing officer has the jurisdiction to grant such relief under IDEA. I need not reach this issue since Petitioner did not prevail on the legal claims that are tied to this item of requested relief.

Conclusions of Law

1. Petitioner did not meet his burden of proof that the South Texas ISD failed to provide him with a free, appropriate public education; specifically, that the special education teacher was not qualified and did not provide him with appropriate instruction. *Tatro, et al., supra.*
2. Petitioner did not meet his burden of proof that the South Texas ISD failed to provide him with a free, appropriate public education; specifically, that the school district failed to ensure his safety. *Id.*
3. South Texas ISD provided Petitioner with instruction in the least restrictive environment and he was educated with non-disabled peers to the maximum extent appropriate given his significant educational and behavioral needs. *34 C.F.R. Secs. 300.550-551; 19 Tex. Admin. Code Sec. 89.63.*
4. Petitioner did not meet his burden of proving that the South Texas ISD failed to properly implement his Individual Educational Plan; specifically, that it failed to provide him with instruction in vocational computer skills or daily living skills. Vocational computer skills were not included as goals or objectives in his IEP and the credible evidence showed that he was provided with instruction in daily living skills. *Tatro, et al. supra.*
5. The South Texas ISD did not violate Petitioner's privacy rights or confidentiality provisions of IDEA. Neither Petitioner nor his mother had legal standing to assert an IDEA claim that another student's privacy rights were violated. *34 C.F.R. Secs. 300.571-574.*
6. Respondent's claim that a special education hearing officer in Texas does not have jurisdiction to order the installation of visual monitoring equipment into a special education classroom is moot since Petitioner did not prevail on the legal issues that were related to that item of requested relief.

ORDERS

Based upon the foregoing findings of fact and conclusions of law it is hereby **ORDERED** that all relief sought by the Petitioner in this case is hereby **DENIED**.

SIGNED the 3rd day of September 2004.

/s/Ann V. Lockwood
Ann Vevier Lockwood
Special Education Hearing Officer

Notice to the Parties

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions 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 Sec. 89.1185 (p); Tex. Gov't Code, Sec. 2001.144(a) (b).

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DOCKET NO. 221-SE-0304

**SOUTH TEXAS INDEPENDENT
SCHOOL DISTRICT,
Respondent.**

SYNOPSIS

Issue: Whether school district failed to provide FAPE to *** school student with severe and complex set of needs and deficits; specifically whether special education teacher was qualified and whether teacher provided student with appropriate instruction.

Held: For the school district. Student failed to meet burden of proof on this issue. Teacher had valid certification in language/learning disabled PreK-12 and some professional training in behavior management. Although evidence showed focus and emphasis of teacher's experience and training had been serving students with language and learning disabilities student failed to meet burden of proof that this rose to a denial of FAPE. Credible evidence showed that teacher implemented life skills curriculum.

Cite: *34 C.F.R. Sec. 300.23; Tex. Educ. Code Sec. 21.003; 19 Tex. Admin. Code Sec. 89.1131*

Issue: Whether school district failed to provide FAPE by alleged failure to ensure student's safety at school.

Held: For the school district. Student failed to meet burden of proof on this issue. Student did incur some minor injuries at school. Student resisted use of protective helmet or, at times, did not arrive at school with helmet. Student's frequent and often unpredictable seizure activity and non-compliant and physically aggressive behavior were factors. Staff took reasonable steps to ensure student's physical safety to the extent possible given the student's sudden seizures and non-compliant behavior and minor injuries were treated at school.

Cite: *34 C.F.R. Sec. 300.300*

Issue: Whether school district provided student with instruction in least restrictive environment.

Held: For the school district. Student's life skills curriculum was delivered in special education classroom that addressed his needs for small group instruction by special education personnel.

Student had opportunities to interact with non-disabled peers who attended same *** school campus for vocational program ***. Student had lunch, physical education and attended school wide programs with non-disabled peers. Student's removal from those activities required at times due to disruptive behavior.

Cite: *34 C.F.R. Secs. 300.550-551; 19 Tex. Admin. Code Sec. 89.63*

Issue: Whether school district failed to implement *** school student's IEP by failing to provide instruction in vocational computer skills and daily living skills.

Held: For the school district. Vocational computer skills not goals or objectives stated in student's IEP. Petitioner did not meet burden of proof that school district failed to provide instruction in daily living skills.

Cite: *34 C.F. R. Sec. 300.340*

Issue: Whether school district violated confidentiality provisions of IDEA when special education teacher briefly discussed another special education student with Petitioner's mother during a school visit.

Held: For the school district. Neither Petitioner nor his mother had legal standing to assert claim that school district breached privacy rights of another student. Those rights belong only to the student and his or her parents. Even though teacher did violate another's student's privacy rights school district took appropriate corrective action and no evidence that further violations occurred.

Cite: *34 C.F.R. Secs. 300.571-574.*

Issue: Whether hearing officer has jurisdiction under IDEA to order installation of visual monitoring equipment in self contained classroom as item of requested relief.

Held: For neither party. Issue moot since Petitioner did not prevail on legal claim tied to requested relief.