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**DOCKET NO. 234-SE-0304**

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<b>Student</b>	§	<b>BEFORE A SPECIAL EDUCATION</b>
<b>B/N/F Parent</b>	§	
	§	
<b>VS.</b>	§	<b>HEARING OFFICER</b>
	§	
<b>LA JOYA INDEPENDENT</b>	§	
<b>SCHOOL DISTRICT</b>	§	<b>FOR THE STATE OF TEXAS</b>

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**DECISION OF THE HEARING OFFICER**

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**PROCEDURAL HISTORY**

The above-captioned Request for Impartial Due Process Hearing pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1400 et seq. (“IDEA”), was received by Texas Education Agency on March 8, 2004, assigned to the undersigned Impartial Hearing Officer on March 9, 2004, and set for hearing on March 31, 2004, with a decision deadline of April 22, 2004. A pre-hearing conference pursuant to 19 T.A.C. §89.1180 convened by telephone conference call on March 31, 2004. Christopher Jonas, Attorney at Law, represented the Petitioner. Jose R. Guerrero, Attorney at Law, represented the Respondent. The hearing was rescheduled to May 14, 2004, and the decision deadline extended to June 5, 2004, for good cause shown. The hearing convened as scheduled and all evidence was received and the record closed on May 14, 2004, subject to the filing of written closing argument at the option of counsel. This Decision was filed and mailed to the parties on June 4, 2004.

**STATEMENT OF THE CASE**

Petitioner complains that La Joya I.S.D. (“the District”) failed to evaluate and identify Student as an IDEA eligible student in a timely manner. Petitioner further complains that the District failed to provide appropriate special education and related services for Student. Petitioner contends that the District’s omissions denied Student the right to a free appropriate public education (“FAPE”) as required by IDEA. As relief for alleged violations Petitioner requests evaluation and assessment of Student, an ARDC meeting to consider appropriate services for Student, and compensatory educational services.<sup>1</sup>

**FINDINGS OF FACT**

1. In August 2003, Student enrolled in \*\*\* for the 2003-2004 school year at \*\*\* School in La Joya I.S.D. Tr. 24.

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<sup>1</sup> “ARDC” refers to the Admission, Review, and Dismissal Committee, the group of persons designated under Texas law to fulfill the responsibilities of the IEP Team as set out in 34 C.F.R. 300.344-300.346. 19 T.A.C. §89.1050.

2. Prior to his enrollment in \*\*\*, Student received speech therapy from Renaissance Outpatient Rehabilitation Institute for about two years, in connection with Student's participation in Head Start. Student has trouble speaking. P-1; Tr. 26.
3. When Student's Next Friend, Parent, enrolled Student in \*\*\* on 8/18/03, she informed an employee at Student's school that Student had speech problems and needed services. Parent gave the District employee a business card from Renaissance Rehabilitation Institute. Parent did not sign consent at that time for the District to obtain records from Head Start, and nobody at \*\*\* asked her to. When Parent came back to the school a few days later she left another card from Renaissance in the counselor's office. Tr. 27-28, 35-42.
4. A counselor at \*\*\* talked with Parent some time in September 2003, and was led to believe that Student was in special education. The counselor passed this information on to the speech therapist. Tr. 68-69.
5. Student's 10/17/03 \*\*\* progress report from \*\*\* indicated that Student needed to stay on task more, listen while others are speaking, and participate more. A 12/5/03 progress report indicated Student needed to pay more attention in the classroom, be more expressive, and receive more practice with word families and high-frequency words. A 1/29/04 progress report indicated that Student needed to listen attentively during lessons, participate in class, and receive help with letter names and sounds. P-19.
6. The District requested consent for a special education evaluation from Parent by letter dated 3/12/04. The District at that time was aware that Student had been receiving speech therapy from another agency. P-20.
7. The District completed a speech evaluation on Student on 4/8/04. Student tested with a moderate to severe expressive and receptive language disorder and a severe articulation disorder. The evaluator reported that Student was receiving outside speech therapy twice weekly. The evaluator recommended speech therapy at school for 60 minutes per week. P-22.
8. Student's ARDC at \*\*\* met on 4/16/04 to discuss Student's 4/13/04 speech evaluation. The ARDC found Student eligible for special education and scheduled speech therapy for 30 minutes two times per week. The ARDC also scheduled content mastery services for Student for 1 hour per week in Math and Reading, and recommended extended year services. The ARDC including Student's Next Friend agreed on these services for Student. P-21.
9. Since enrolling Student in \*\*\*, Parent has continued to take Student for speech therapy two times per week at Renaissance Rehabilitation Institute. This therapy has helped Student. Tr. 55-57.

## DISCUSSION

Public school districts must comply with IDEA procedures for identifying children with disabilities who need special education, and delivering appropriate services as necessary to provide FAPE. 20 U.S.C. §1412(a)(1); Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 189 (1982); Cypress Fairbanks Independent School District v. Michael F., 23 IDELR 1041, 1042 (S.D. Tex., 1995). School districts must identify, evaluate, and serve all eligible children within the district. 20 U.S.C. §1414(a)(1)(A); 34 C.F.R. §§300.128 & 300.220. A petitioner who challenges the school district's eligibility determination or offer of services under IDEA bears the burden to prove that the child has been denied a free appropriate public education. Tatro v. State of Texas, 703 F.2d 823 (5th Cir. 1983), aff'd, 468 U.S. 883 (1984).

In Student's case, Petitioner correctly contends that the District failed to undertake Student's evaluation and eligibility determination in a timely manner. It is appropriate to consider the relevant facts from the perspective of the referral process. A parent or a person involved in the education or care of the

child (including persons within the ambit of 34 C.F.R. §300.20(a)) may initiate a referral for a pre-placement evaluation of the child. 19 T.A.C. §89.1011. For a child beginning school, the parent who makes such a referral may not be familiar with IDEA terminology and procedures. However, no magic words are required. “A request for assessment is implied when a parent informs a school that a child ... [has] special needs.” Robertson County School System v. King, et al., 99 F.3d 1139, 24 IDELR 1036 (6<sup>th</sup> Cir. 1996). A parent referral triggers IDEA procedural safeguards, including the parent’s right to receive notice of procedural safeguards, and the right to receive notice of the school’s refusal of a request for pre-placement evaluation. 34 C.F.R. §300.503. The school district is responsible for ensuring compliance with these and other safeguards, including the requirement for obtaining parent consent for any action that requires consent. Robertson, supra. Timelines set out in Texas Educ. Code §29.004(a) and 34 C.F.R. §300.343(b)(2) give school districts 90 calendar days from the date of obtaining consent to complete a pre-placement evaluation and have the evaluation results considered by an ARDC.

Parent first told the District on 8/18/03 that Student had speech problems and needed services. I find this to be the date on which Parent referred Student for pre-placement evaluation. There is no evidence that the District refused, or intended to refuse, a pre-placement evaluation. The counselor who talked to Parent several days later assumed that Student was in special education. The District never took the position in hearing that Student was not entitled to an evaluation, and no evidence suggests that Parent would have refused consent for pre-placement evaluation, had the District moved promptly to obtain it. Consequently, I find 8/18/03 to be the date on which the District should have obtained consent for the pre-placement evaluation.

The District’s failure to comply with requirements governing referral and pre-placement evaluation constitutes a procedural violation. This entitles Petitioner to relief, if the violation caused a loss of educational benefit to the student, or seriously infringed the parent’s opportunity to participate in educational planning. Adam J. v. Keller I.S.D., 328 F.3d 804 (5<sup>th</sup> Cir. 2003); Houston I.S.D. v. Bobby R., 200 F.3d 341 (5<sup>th</sup> Cir. 2000).

Concerning the issue of educational benefit, the services scheduled by an ARDC are presumed as a matter of law to be appropriate. This means necessary and sufficient for the provision of FAPE. In a case of alleged failure to timely identify an eligible child, the fact that special education services eventually were scheduled is some indication that prior omission of those services was significant from the standpoint of educational benefit. Here, the fact that Student’s ARDC belatedly scheduled such services is not the only relevant fact concerning his educational needs. This is reinforced by other persuasive evidence from Student’s \*\*\* progress reports, as well as evidence that he had long been considered eligible for speech therapy in connection with Head Start. Considering all the facts, and for the limited purpose of establishing Petitioner’s entitlement to relief, I find that 8/18/03 is the date on which the special education evaluation and planning timelines of §29.004(a) and §300.343(b)(2) began to run. If the District had followed those timelines, Student would have had special education services in place beginning 11/17/03. Instead, services were initiated on 4/16/04. A preponderance of evidence establishes that the delay of approximately four-months in initiating Student’s special education services involved more than a de minimis omission.

An award of compensatory education services may be appropriate as an equitable remedy for IDEA violations. Parents of Student W. v. Puyallup School District, 31 F.3d 1489 (9th Cir. 1994); Todd v. Andrews I.S.D., 933 F.2d 1576 (11th Cir. 1991). The conduct of the parties must be considered in fashioning equitable relief to redress lost educational benefit. The purpose of compensatory educational

services is not to replace educational services exactly as they might have been delivered, but rather to provide what is necessary according to the evidence for the child to receive FAPE. Student W., *supra*.

The District cannot rely in equity on Parent's failure to give written consent as a basis to assert mitigation of its responsibility to Student, because the District had the primary duty to pursue consent. It is significant in this regard that, with Student being a \*\*\* student, Parent was not well acquainted with IDEA safeguards when she came to school to enroll Student. There is no evidence tending to show that Parent refused or would have refused consent. At the same time, the District's failure to actively pursue consent appears not to have reflected any deliberate effort to escape IDEA obligations to Student.

Student's initial ARDC thought it necessary and appropriate to provide Student with one hour of content mastery service weekly and one hour of speech therapy weekly. Student's speech therapy evaluation from the District recommended 60 minutes of speech therapy weekly and not more. There is no evaluation report in evidence tending to show that Student needs any different amount of speech therapy in order to receive FAPE. The fact is that Student was receiving and continues to receive speech therapy twice weekly outside of school from Renaissance Rehabilitation Institute, for an undisclosed amount of time. The ARDC appears not to have expressly considered the fact that Student might continue to receive outside speech therapy from Renaissance, even though the Committee included the speech therapist who evaluated Student and who knew he received outside speech therapy. The ARDC scheduled what the District's speech evaluation recommended.

Student is receiving more than the one hour weekly of speech therapy recommended by the District's evaluator to address his educational needs. There is no evidence that additional speech therapy, as a compensatory service, would benefit Student, or indeed, that it would not detract from his overall educational program. Speech therapy is a specialized area that merits considerable deference to the expertise of qualified evaluators, and under the peculiar facts of this case I will not intrude on the current evaluator's judgment concerning what speech services Student needs to receive FAPE. Student got speech therapy twice weekly from Renaissance at all times relevant to this complaint, and was perceived by Parent as showing progress in speech as a result of services Renaissance provided. Student received and continues to receive from all sources, a considerable amount of speech therapy. Student's ARDC should meet for the purpose of reviewing Student's overall program of speech therapy, including Renaissance, and revisiting his speech therapy needs, but to my thinking, the facts raise more concern about Student's educational performance. His \*\*\* progress reports tend to show persistent if not escalating classroom difficulty during the interval for which reports are in evidence.

In consideration of the ARDC's determination regarding Student's need for one hour of content mastery weekly, and other evidence documenting Student's educational needs, I will order the District to provide 16 hours of individualized instruction as compensatory services. This will take the form of individual tutoring, to be delivered at school in addition to the regular school day's instruction. This 16 hours of compensatory education is must be offered within the 12 months following entry of this Decision. Although the service of individual tutoring is my award, I will grant some latitude to Student's ARDC. The ARDC may choose to deliver this service in any manner that is deemed appropriate for Student so long as all ARDC members including Parent are in agreement, but his award of compensatory education is not intended to displace EYS services or other special education services that would otherwise be scheduled for Student during the next 12 months. The award is based on a formula reflecting one hour of special education services weekly, as scheduled by Student's 4/16/04 ARDC, for the 16 weeks in which initiation of special education was delayed on account of the District's procedural violations. I will also order the District to convene Student's ARDC within 30 days of receipt of this

Decision to review the necessary and appropriate speech therapy for addressing Student's educational needs.

### CONCLUSIONS OF LAW

1. La Joya I.S.D., is a local education agency and a political subdivision of the State of Texas, and is subject to requirements of IDEA, 20 U.S.C. §1400 et seq., and its implementing federal and state regulations.
2. Student is an IDEA-eligible student to whom La Joya I.S.D. must offer a free, appropriate public education in the least restrictive environment. 20 U.S.C. §1412(a)(1); Board of Educ. v. Rowley, 458 U.S. 176 (1982).
3. La Joya I.S.D. violated IDEA procedures in responding to Parent's referral of Student for special education. 19 T.A.C. §89.1011; 34 C.F.R. §300.503; Texas Educ. Code §29.004(a); 34 C.F.R. §300.343(b)(2).
4. La Joya I.S.D. delayed initiation of Student's special education services in a manner that denied Student a free appropriate public education. Adam J. v. Keller I.S.D., 328 F.3d 804 (5<sup>th</sup> Cir. 2003); Houston I.S.D. v. Bobby R., 200 F.3d 341 (5<sup>th</sup> Cir. 2000).
5. Student is entitled to compensatory educational services from La Joya I.S.D. Parents of Student W. v. Puyallup School District, 31 F.3d 1489 (9th Cir. 1994); Todd v. Andrews I.S.D., 933 F.2d 1576 (11th Cir, 1991).

### ORDERS

In consideration of the foregoing, the following Orders are appropriate.

**IT IS ORDERED** that La Joya I.S.D. will provide Student as compensatory education services 16 hours of individualized instruction in the form of individual tutoring at school within the 12 month period following entry of this order. Such services shall be in addition to Student's instructional day and will not displace any extended services such as extended year services to which Student may otherwise be entitled. The manner of delivery of such compensatory services shall be by agreement of Student's ARDC. The award may otherwise be modified as expressly determined appropriate by Student's ARDC and agreed to by Parent.

**IT IS FURTHER ORDERED** that La Joya I.S.D. will convene Student's ARDC within 30 days of receipt of this Decision to review appropriate speech therapy as necessary to address Student's educational needs, and to plan the delivery of compensatory services ordered herein.

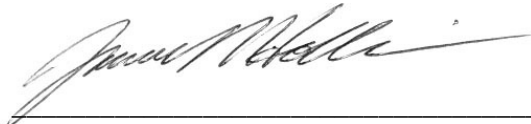
**IT IS FURTHER ORDERED** that any and all other or additional relief requested by Petitioner herein is **DENIED**.

**IT IS FURTHER ORDERED** that any findings of fact herein that are more appropriately construed as conclusions of law, and any conclusions of law that are more appropriately construed as findings of fact, shall be considered and have the same effect as if appropriately construed.

**IT IS FURTHER ORDERED** that La Joya I.S.D. shall timely implement this decision within 10 school days (except as otherwise provided herein) in accordance with 19 TAC §89.1185(q) and 34 CFR §300.514. The following must be provided to the Division of Complaints Management at the Texas Education Agency and copied to the Petitioner within 15 school days from the date of this decision: (1) documentation demonstrating that the decision has been implemented; or (2) if the timeline set by the Hearing Officer for implementing certain aspects of the decision is longer than 10 school days, the district's plan for implementing the decision within the prescribed timeline, and a signed assurance from the superintendent that the decision will be implemented.

**SIGNED** this 4<sup>th</sup> day of June 2004.

Finding that the public welfare requires immediate effect of this Decision, this Hearing Officer makes it effective immediately, pursuant to 19 Tex. Admin. Code §157.5(n).



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JAMES N. HOLLIS  
SPECIAL EDUCATION HEARING OFFICER  
FOR THE STATE OF TEXAS

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**SYNOPSIS OF DECISION**

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**ISSUE:** Whether La Joya I.S.D. provided Student with a timely and appropriate evaluation and eligibility determination following initial parent referral.

**CITATION:** 19 T.A.C. §89.1011; Texas Educ. Code §29.004(a); 34 C.F.R. §300.343(b)(2).

**HELD:** For the Petitioner.

**ISSUE:** Whether La Joya I.S.D. provided Student with a free, appropriate public education.

**CITATION:** 34 C.F.R. §§300.306, 300.553; Houston I.S.D. v. Bobby R., 200 F.3d 341 (5<sup>th</sup> Cir. 2000).

**HELD:** For the Petitioner.