

Student,	§	BEFORE A SPECIAL EDUCATION
B/N/F Parent	§	
	§	
VS.	§	HEARING OFFICER
	§	
EL PASO INDEPENDENT	§	
SCHOOL DISTRICT	§	FOR THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

Statement of the Case

Student, by his next friend and parent Parent (hereinafter “Petitioner” or “Student”), brought a complaint pursuant to the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400, et seq., complaining of the El Paso Independent School District (hereinafter “Respondent” or “EPISD”). Petitioner was represented by Mark Berry, an attorney in El Paso. Respondent was represented by Rose K. George, an attorney of the El Paso firm of Mounce, Green, Myers, Safi & Galatzan.

Petitioner’s request for hearing was filed on March 30, 2004, and came to hearing by order of the Hearing Officer on May 11, 2004. Following the presentation of each party’s case, the parties filed written closing arguments and, by their agreement, the decision in this matter was to be issued on or before July 9, 2004, in compliance with the forty-five day rule.

Petitioner alleged that Respondent failed to provide Student a free, appropriate public education (“FAPE”) under the Individuals With Disabilities Education Act (“IDEA”) in that it did not perform a functional behavioral assessment (“FBA”) of Student, failed to provide measurable annual goals for Student in the areas of math, reading, science, social studies, and written language, and that his special education teacher was not a properly certified teacher. Further, Petitioner alleged that Student had been denied an appropriate educational placement because his placement in the self-contained Behavior Improvement Class (“BIC”) was not the least restrictive environment (“LRE”).

As relief, Petitioner sought an order directing Respondent to do the following:

1. Remove Student from the BIC class to an appropriate least restrictive environment;
2. Provide Student with a properly certified special education teacher;
3. Develop measurable annual goals for Student in the areas of math, reading, science, social studies, and written language; and
4. Perform a functional behavioral assessment of Student.

Findings of Fact

Based upon the evidence and argument of counsel, the Hearing Officer makes the following findings of fact and conclusions of law:

1. Student is a child born in December, ***. He resides with his mother in the El Paso Independent School District. [Petitioner's Exhibit 8]
2. Student has a moderate articulation disorder and a mild receptive/expressive language disorder, and meets the criteria as a student with speech impairment ("SI"). His communication disorder adversely affects his educational functioning to a significant degree. Student also meets eligibility criteria as a student with other health impairment ("OHI"). [Petitioner's Exhibit 9, 10 and 11]
3. Student's intellectual ability is above the mentally retarded range. [Petitioner's Exhibit 10]
4. On November 15, 2002, based on his inability to build or maintain satisfactory interpersonal relationships with peers and students, the District's Licensed Specialist in School Psychology determined that Student has an Emotional Disturbance ("ED"). [Tr. Page 224; Petitioner's Exhibit 8]
5. Student is eligible for special education and related services based upon eligibility criteria of SI, OHI because of his diagnosis of ADD, and ED. [Petitioner's Exhibits 8, 9, and 10]
6. During the 2002-2003 school year, Student was in a regular education *** classroom and initially received 60 minutes of speech therapy each week. At his parent's request in the spring of that year, Student's speech therapy was increased to 120 minutes per week. [Petitioners Exhibits 3, 4, and 5; Respondent's Exhibits 2, 3, and 4]
7. There was no evidence of discipline referrals during Student's ***.
8. During ***, Student was not aggressive toward other students. [Tr. 314]
9. Because recess with other classes upset Student, his *** teacher took her class to recess at a different time. While she worked with the other students, Student was with her. [Tr. 315-316]
10. At times, Student's regular education *** class combined with a special education *** class, called "inclusion." Student did not like to transition, but once the two classes were combined, he was comfortable. [Tr. 87]
11. Student made some academic progress during his *** year, but fell behind 90% of his class. Level one is considered to be beginning *** level. Level two is considered to be middle of the *** year. At the end of the school year, Student remained generally at level two. [Tr. 322-324; Respondent's Exhibit 2A-p.52-56 and Respondent's Exhibit 1]
12. During each of the February 27, March 12 and April 2, 2003 ARDC meetings, the placement recommendation for Student's 2003-2004 school year (his *** grade year) was the AIM class, a self-contained special education class that is for students who need modification of the general curriculum. [Petitioner's Exhibits 4 and 5; Respondent's Exhibits 2 and 3; Tr. 24]

13. At the February 27 and March 12 ARDC meetings, Student's parent requested that he be retained in ***. She did not agree to the recommended placement in the AIM class. [Petitioner's Exhibit 5; Respondent's Exhibit 2]
14. The April 2, 2003 ARDC notes indicate that Student began taking Zoloft in March and that his parent wanted Student to be placed in a regular education classroom with modifications for a six week trial period. If no progress was made, then she would be willing to discuss the AIM class. Because Student's parent did not agree with the recommended placement in the AIM class, the meeting was recessed until May 8. [Petitioner's Exhibit 4; Respondent's Exhibit 3]
15. No additional assessments of Student were conducted between the April 2, 2003 and May 8, 2003 ARDC meetings. [Tr. 148, 353-354]
16. At the May 8 ARDC meeting, Student's parent brought an advocate to the meeting. Two teachers that were present at the meeting commented about new aggressive behaviors that they had seen in Student, along with a continuation of withdrawal and low self esteem. One teacher had noticed some improvement in socialization along with some behavioral changes. The advocate recommended the BIC class for Student's placement, the committee and Student's parent agreed, and for his *** grade year, Student was placed in the BIC class, a self-contained special education class that is designed for students with emotional and behavioral difficulties. [Petitioner's Exhibit 2; Respondent's Exhibit 4]
17. Respondent's seven levels of instructional arrangement are as follows: mainstream, resource-less than 21%, resource-at least 21% less than 50%, self-contained, mild/moderate/severe regular campus-at least 50%, no more than 60%, self - contained, mild/moderate/severe, more than 60%, Moreno Annex, and VAC. Student's placement for his *** grade year was in the BIC which is a self-contained, mild/moderate/severe, more than 60% instructional arrangement. [Petitioner's Exhibit 3; Respondent's Exhibit 4]
18. The May 8 ARDC notes state, "An ARD meeting needs to be called before the end of the 1st nine week period to review placement, progress & modification during the 2003-04 school year." [Petitioner's Exhibit 3, Respondent's Exhibit 4] There was no testimony or documentation presented that reflected the occurrence of an ARDC meeting before the end of the 1st nine week period.
19. During his *** grade year, Student went to physical education ("PE") with regular education students, and spent one hour in speech therapy with two regular education students. The other hour of speech therapy was spent with special education students. [Tr. 184-185; Respondent's Exhibit 2, 3, and 4]
20. Student is described as a quiet, sweet student that is sensitive to noise and classroom activity that is hectic. He is easily frustrated, particularly when his speech is not understood, and he needs one-on-one attention from his teachers. When frustrated or upset, Student may withdraw, refuse to do a task, hide under his desk, put himself into time-out, or self-mutilate by picking at his fingers or hitting himself. [Tr. 86-88, 259-260, 311-317]
21. During his *** grade year, it was reported that Student yelled in class, hit a classmate, threatened to "punch" another student in the face, and tried to bite his teacher and a paraprofessional.[Respondent's Exhibit 8]

22. During his 2003-2004 school year in the BIC classroom, Student had no discipline referrals, but was taken for walks when he needed to calm down. [Respondent's Exhibit 8]
23. Student has received speech therapy since he was in *** and has made a great deal of progress in his ability to communicate with others. [Petitioner's Exhibit 11; Tr. 175-180]
24. Student receives one hour of counseling each week. [Petitioner's Exhibit 2]
25. At both the March 12, 2003 and February 11, 2004 meetings, the ARDC determined that Student's behavior impeded his learning or that of others and that his behavior warranted a functional behavioral assessment. [Petitioner's Exhibit 2 and 5; Respondent's Exhibit 2]
26. Respondent's policy says that a functional behavioral assessment is utilized to identify problems in areas of emotional, cognitive, social and behavior to provide information for the development of a student's BIP. It is prepared by a team working with the student that may include various highly qualified individuals that conducts the assessment. [Tr. 197-198]
27. Respondent has a preprinted form which can be used to conduct an FBA. [Tr. 137]
28. A Functional Behavioral Assessment summary appears on Student's BIPs that were prepared during the ARDC meeting of February 27, 2003 and reconvened on March 12, 2003 and the meeting of February 11, 2004. [Tr. 200, 269-270; 415-419; Petitioner's Exhibits 2 and 5; Respondent's Exhibit 2]
29. The notices of the February 17, 2003 and March 12, 2003 ARDC meeting did not notify Student's parent of an intention to conduct a functional behavioral assessment. [Respondent's Exhibit 2C, p 35-39]
30. Student's Individual Educational Plan ("IEP") for elementary written language states, "Goal: The student will master Elementary Written Language skills at the ___grade level as measured by equivalent pre and post criterion referenced tests, while addressing these identified educational needs:_____." Each of his IEPs for math, science, social studies, and reading contains similar language. Nothing is entered on the grade level blank. The IEPs contain short term objectives taken from the Texas Essential Knowledge and Skills Curriculum, each with a grade level measurement beside it, followed by the level of mastery criteria. [Petitioner's Exhibits 2 and 3; Respondent's Exhibit 4; Tr. 67-69]
31. Respondent's staff uses the grade level measurement that appears beside the short term objectives to determine the grade level goal for the areas of math, science, social studies, and reading. [Tr. 39-53, 71-74, 188-190, 333-337, 373-380]
32. Student's special education teacher in the BIC class is properly certified to teach special education. [Respondent's Exhibit 6]
33. Student's teacher in the BIC classroom testified that he became more aggressive toward the middle of his *** grade year and that his behavior has not improved. [Tr. 369]
34. Student made some academic progress during the 2003-2004 school year. [Petitioner's Exhibits 2 and 3; Respondent's Exhibit 4; Tr. 381]

Discussion

Is placement in the BIC the least restrict environment for Petitioner?

The IDEA requires that to the maximum extent appropriate, children with disabilities are educated with children who are non-disabled and that removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR § 300.550. Although a school is not required to try every conceivable supplementary aid or service, it should make more than a token effort. If education in a regular classroom with supplementary aids and services cannot be achieved satisfactorily, the school must mainstream the child to the maximum extent appropriate. Daniel R. R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989).

During Student's *** year in a regular classroom, he had no discipline referrals. He was "coded" ED in November of that year and remained in his regular classroom for the rest of the school year. During the year, his teacher made changes in her classroom approach and procedures in an effort to ease Student's frustrations. Student chose to stay with his teacher at all times even while she worked with her other students. To help Student avoid becoming upset, his teacher took the class to recess separately from the other classrooms. His classmates nurtured Student when he became upset. He received speech therapy 60-120 minutes per week during his *** year. Although Student had difficulty with transition when his class joined another classroom for "inclusion", he became comfortable after the change took place. He made some academic progress during the year, although he was behind 90% of his classmates.

After recommending the AIM class for his *** grade year, Respondent removed Student from a regular education classroom and placed him in a self-contained, special education behavior intervention classroom for more than 60% of his school day. He went to physical education and one hour weekly to speech therapy with non-disabled students. His behavior became aggressive during the year, but he is befriending his peers. He made some some academic progress during his *** grade year.

The IDEA requires schools to offer a continuum of services. 34 CFR §300.551. The school must take intermediate steps where appropriate. There are numerous placements and placement combinations that are available to Respondent. It could place Student in regular education for some academic classes and in special education for others. It could mainstream him for nonacademic classes only. It could place him in resource for some academic classes and mainstream him for some academic classes and nonacademic classes. It could consider the AIM class for some academic classes and mainstream him for some academic classes and/or nonacademic classes. There are appropriate placements available to Respondent that can serve Student's educational and emotional needs that are less restrictive than his placement in the BIC. Student's placement in the BIC classroom is not the least restrictive environment.

Did Respondent fail to provide a statement of measurable annual goals for Petitioner?

The testimony revealed that Respondent's staff tends to use the words, "goals" and "objectives," as if they are one and the same. Such is not the case. However, the issue is whether or not Respondent provided a statement of measurable annual goals for Student. The pre-printed form that Respondent uses for its IEPs provides a space in its statement of goals for the grade level to be entered. Respondent's staff consistently failed to enter a grade level in the space, but consistently entered a grade level for each of Student's short term objectives. At hearing, when questioned regarding Student's annual goals, the staff consistently referred to the levels that appeared beside the objectives.

Certainly, a complete statement of measurable annual goals would be a preferable procedure. However, since the staff had an understanding of the goals, and Student's parent participated in the ARDC meetings at which goals and objectives were discussed, the failure to complete the statement of goals was procedurally deficient only. There was no indication that such defect resulted in a loss of educational opportunity or infringed upon Student's parent's opportunity to participate in the IEP process. Adam J. v. Keller Independent School District, 328 F.3d 804 (5th Cir. 2003).

Did Respondent fail to perform a functional behavioral assessment of Petitioner?

The ARDC recommended that a functional behavioral assessment of Student be performed. However, there was insufficient evidence to support that the assessment of Student occurred. There was no evidence of notice to Student's parent regarding an intention to perform the assessment during an ARDC meeting. The summary that appears in two of Student's BIPs reflects that the ARDC discussed Student's behaviors. However, it is only a summary. Although the testimony revealed that Respondent has a form for use when conducting a functional behavioral assessment, such form was not presented at hearing. Because a functional behavioral assessment is the foundation on which a BIP is built, it is a key element to the preparation of an appropriate BIP and placement decisions.

Conclusions of Law

1. Student is a student who is 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 El Paso Independent School District is the local education agency responsible for the provision of Student's free appropriate public education.
3. Respondent failed to perform a functional behavioral assessment of Student. 34 CFR 300.520.
4. Student's BIC teacher in the 2003-2004 school year is properly certified to teach special education. 34 CFR 300.23; 19 Tex. Admin. Code §89.1131(a) and (b).
5. Respondent's omission of a complete statement of measurable annual goals was a procedural defect that did not result in the loss of an educational opportunity. Adam J. v. Keller Independent School District, 328 F.3d 804 (5th Cir. 2003).
6. Student is entitled to receive a free, appropriate, public education in the least restrictive environment appropriate. Student's placement in the Behavior Improvement Class is not the

- least restrictive environment. 34 CFR 300.550; Daniel R. R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989).
7. Because Respondent failed to place Petitioner in the least restrictive environment and did not perform a functional behavioral assessment of Petitioner, Respondent failed to provide Student with a free appropriate public education. Hendrick Hudson Central School District v. Rowley, 458 U.S. 175 (1982).
 8. The educational program proposed by the school district 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 (5th Cir. 1983), aff'd 468 U.S. 883 (1984). Petitioner met the burden of proof in this case.

Order

Based upon the record of this proceeding and the foregoing Findings of Fact and Conclusions of Law, Respondent is ordered to convene an Admission, Review, and Dismissal Committee meeting at the earliest practicable time, but no later than the first day of classes of the 2004-2005 school year, to perform a functional behavioral assessment of Student from which, if deemed necessary, an appropriate behavioral intervention plan shall be written; to remove Student from his current placement; and to consider and develop an appropriate program for Student in the least restrictive environment.

All other relief not specifically granted is hereby DENIED.

The district shall timely implement this Decision within 10 school days in accordance with 19 T.A.C. §89.1185(q) and 34 C.F.R. §300.514. The following must be provided to the Division of **Special Education Programs and Complaints** 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.

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

SIGNED this 9th day of July, 2004.

/s/Brenda Rudd

Brenda Rudd
Special Education Hearing Officer

DOCKET NO. 256-SE-0304

Student, § BEFORE A SPECIAL EDUCATION
B/N/F Parent. §
§
VS. § HEARING OFFICER
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EL PASO INDEPENDENT §
SCHOOL DISTRICT § FOR THE STATE OF TEXAS

SYNOPSIS

Issue: Whether a functional behavioral assessment of Petitioner was performed.

Held: For Petitioner

Citation: 34 CFR 300.520.

Issue: Whether measurable annual goals were provided for Petitioner in the areas of math, reading, science, social studies, and written language.

Held: For Respondent

Citation: 34 CFR 300.347; 19 Tex. Admin. Code §89.1055; Adam J. v. Keller Independent School District, 328 F.3d 804 (5th Cir. 2003).

Issue: Whether Petitioner’s special education teacher is properly certified.

Held: For Respondent

Citation: 34 CFR 300.23; 19 Tex. Admin. Code §89.1131(a) and (b)

Issue: Whether special education services were provided to Petitioner in the least restrictive environment.

Held: For Petitioner

Citation: 34 CFR 300.550; 19 Tex. Admin. Code §89.63; Daniel R. R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989).