

No. 268-SE-0404

STUDENT, B/N/F	§	BEFORE A SPECIAL EDUCATION
PARENT	§	
PETITIONER	§	
	§	
VS.	§	HEARING OFFICER
	§	
EVOLUTION ACADEMY	§	
CHARTER SCHOOL	§	
RESPONDENT	§	FOR THE STATE OF TEXAS

Final Decision of the Hearing Officer

STATEMENT OF THE CASE

Petitioner brings this proceeding under the Individuals with Disabilities Education Act, alleging that Respondent Evolution Academy Charter School (Evolution Academy) denied *** a free appropriate public education during the 2004 spring semester and the 2004-2005 school years. Specifically, Petitioner alleges the following:

1. Evolution Academy failed to provide appropriate Language Arts and Math program since March 2004.
2. Evolution Academy failed to provide Student appropriate counseling services since March 2004.

As relief, Petitioner seeks an ARD meeting to revise the three disputed IEP's with the assistance of an independent expert trained in the formulation of IEP goals and objectives, compensatory counseling, and tutoring in Language Arts and Math.

PROCEDURAL HISTORY

Petitioner initiated this due process proceeding on April 13, 2004. Christopher Jonas, with the Corpus Christi firm of Christopher Jonas & Associates, represents Petitioner. Russell Wilson, with the Dallas firm of the Law Office of Russell Wilson II, represents Respondent. The Texas Education Agency (TEA) initially assigned this proceeding to another hearing office, the Honorable Ann Lockwood. She scheduled a prehearing conference for April 23, 2004 and the due process hearing for May 7, 2004.

On April 23, Petitioner requested a continuance of the May 7 hearing because her attorney had a scheduling conflict. The hearing officer granted Petitioner's request and rescheduled the hearing for June 2. On May 3, Respondent requested a continuance of the June 2 hearing because Respondent's attorney had a scheduling conflict. Respondent's request was granted and the hearing was reset for July 2.

On July 1, Petitioner requested a continuance of the July 2 hearing on grounds that her attorney was ill. Granting this request, the Hearing Officer rescheduled the hearing for July 28, 2004. Due to scheduling conflicts, the hearing officer asked TEA to reassign this due process proceeding to another hearing officer.

On July 6, TEA reassigned this proceeding to the undersigned hearing officer. The Hearing Officer scheduled the due process hearing for July 28-29, 2004. The deadline for the final decision was extended to August 28, 2004.

The hearing began on July 28 and concluded that day. Taking continuances into account, the deadline for the final decision is August 28. The Hearing Officer issued her decision on August 28, 2004.

FINDINGS OF FACT

1. Student is a ***-year-old student who attends the Evolution Academy Charter School. Evolution Academy is an open-enrollment charter school licensed by the State Board of Education under Subchapter D of the Texas Education Code. (Respondent's Exhibit [RE] 2)
2. Student qualifies for special education services under the ***, Other Health Impairment, and *** classifications. (Petitioner's Exhibit [PE] 2; RE 1-2)
3. In January 2004, Student filed a due process hearing request with the Texas Education Agency. This case was assigned docket No. 153-SE-0104 and styled Student, *bnf*, Parent vs. Evolution Academy Charter School (prior case). The Texas Education Agency assigned the case to the Honorable James Holtz. A stay-put hearing was held on January 9 and the hearing on the merits was held on February 25, 2004. A Final Decision was issued on February 28, 2004. (Decision) (RE 2)
4. The Decision addressed the appropriateness of a manifestation determination and the IEPs (Individualized Education Plan) for Language Arts, Reading, and counseling. The Decision found the IEPs inappropriate for failing to provide individualized annual goals and short-term objectives and for failing to include or attach Student's IEPs to any ARD (Admission, Review, and Dismissal) documents. (RE 2, Finding of Fact (FF) No. 7-11)
5. In determining the appropriateness of the January 2004 manifestation determination, the hearing officer found that Student's then current IEPs, support services, and behavior intervention strategies were inappropriate. The Decision granted Petitioner's request for relief. (RE 2, FF, No. 34-37)
6. On March 12, 2004, the Parties met to implement the February 2004 Decision. Evolution Academy presented Petitioner with the same IEP's deemed inappropriate in the prior case.
7. Petitioner filed the current due process proceeding immediately following the March 2004 ARD meeting. This proceeding alleges the same complaints raised in the February 2004 Final Decision. (*See* First Amended Notice of Hearing and Scheduling Order)

8. Respondent alleges that since the previous hearing officer found the IEP inappropriate on procedural flaws, no substantive review of the IEPs have been conducted and it should be provided the opportunity to present evidence concerning their appropriateness. The February 2004 Decision found that the IEPs were inappropriate due to a procedural error. However, in conducting a manifestation determination review, the hearing officer must consider the appropriateness and implementation of the IEPs. Under this review, the IEPs were once again found to be inappropriate. (Transcript [Tr.] at 22-33)
9. Respondent missed an opportunity to show that despite procedural improprieties, the IEPs were designed to provide an education benefit and did provide Student with a free appropriate public education. Respondent's obligation to assert the appropriateness of Student's IEPs should have occurred in the prior case since it was connected with the subject matter of that proceeding.
10. Petitioner's request for relief is granted.

DISCUSSION

A. Standard of Review

The Individuals with Disabilities Education Act (IDEA) requires school districts to provide a special-education program, at no cost to parents, to students with a disability who exhibit an education need for such services. IDEA further requires that such a program be designed to provide the student a free appropriate public education in the least restrictive setting appropriate for that student. Evolution Academy, being Student's public school, has the responsibility to provide Student IDEA services.

B. Res Judicata Bars Respondent's Claim of Appropriateness

This case has its genesis in a prior due process hearing under Docket No. 153-SE-0104. The Decision of the Hearing Officer was issued on February 28, 2004. The issues of Student's program and placement for the 2003-2004 and 2004-2005 school year were resolved in February 2004 Decision.

In the case sub judice, Petitioner again complains that her proposed March 2003 program did not provide her with an appropriate education. Specifically, Petitioner contends that Respondent offered her the same IEPs that were deemed inappropriate in the prior Decision. Respondent contends that the prior case ruling failed to conduct a substantive review of the IEPs, but rather found the IEPs inappropriate on procedural violations. (Tr. At 22-33).

The rule of res judicata applies to the issues submitted in this case. Both the issues and relief requested are identical to the issues and relief which were fully litigated and resolved by the prior hearing and Decision. Res judicata applies to a final administrative decision in an IDEA case. *Drinker v. Colonial Sch. Dist.*, 888 F.2d 674 (D.C. Pa. 1995), *aff'd* 78 F.3d 859 (3d Cir. 1996) (placement issues were res judicata when subject of prior hearing); *Berlin Sch. Dist.* 25 IDELR

691, 692 (SEA WI. 1997) (issues of individualized instruction previously litigated and resolved means res judicata applies in subsequent proceeding); *Hawes by Hawes v. Bates*, 24 IDELR 1018 (N.D. Ind. 1996) (hearing officer properly decided that a requested due process hearing over an IEP was barred by res judicata since issues raised had been previously decided in a prior hearing).

A judgment by a competent court of jurisdiction is conclusive, not only on matters actually raised and litigated, but also on matters that could have been litigated “as an incident to or essentially connected with the subject matter of the litigation.” *Essman v. General Accident Ins. Co. of America.*, 961 S.W.2d 572, 574 (Tex. App. – San Antonio 1997, no writ) In other words, res judicata “bars litigation of all issues connected with a cause of action or defense which, with the use of diligence, might have been [litigated] in a prior suit. *Bonniwell vs. Beech Aircraft Corp.*, 663 S.W. 2d 816, 818 (Tex. 1984) (emphasis added)

Student’s present claims concerning the appropriateness of her 2003-2004 and 2004-2005 IEPs are the same complaints raised in her prior case. Through the use of diligence, Respondent should have raised the substantive merits of the IEPs in the prior case. The appropriateness of the IEPs is a defense to and an essential part of proving the appropriateness of the school’s manifestation determination. Therefore, res judicata bars re-litigation of the school’s substantive defense of appropriateness.

CONCLUSIONS OF LAW

1. Evolution Academy Charter School is an open-enrollment school and part of the public school system of the State of Texas. As such, Evolution Academy is subject to the requirements of IDEA, 20 U.S.C. §1401, and it’s implementing federal and state regulations.
2. Student is currently eligible for special education services under the ***, Other Health Impairment, and *** classifications. 20 U.S.C. §1401; 34 C.F.R. §§300.7(b); 19 TEX. ADMIN. CODE §89.1040(c)
3. Res judicata bars Evolution Academy’s defense claim concerning the appropriateness of the 2003-2004 IEPs for Language Arts, Math, and counseling because it either brought this defense or could have brought this defense in the prior due process hearing. *Rhoades vs. Prudential Leasing Corp.*, 413 S.W.2d 404, 407 (Tex.Civ.App. – Austin 1967, no writ); *Essman v. General Accident Ins. Co. of America.*, 961 S.W.2d 572, 574 (Tex. App. – San Antonio 1997, no writ)
4. From March 1, 2004 through the present 2004-2005 school year, Evolution Academy failed to provide Student an appropriate Language Arts and Math program. For an equivalent period, Petitioner is entitled to compensatory services.

5. From March 1, 2004 through the present 2004-2005 school year, Evolution Academy failed to provide Student appropriate counseling services. For an equivalent period, Petitioner is entitled to compensatory services.
6. Evolution Academy's affirmative defense concerning the appropriateness of Student's education program is precluded by the doctrine of res judicata. The affirmative defense should have been raised in the prior proceeding involving the same parties, issues, and subject matter. *Essman v. General Accident Ins. Co. of America.*, 961 S.W.2d 572, 574 (Tex. App. – San Antonio 1997, no writ)

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that by September 20, 2004, Evolution Academy shall employ an independent expert trained in the formulation of IEP goals and objectives. The Petitioner shall have final approval in the selection of this expert.

It is further **ORDERED** that by September 20, 2004, Evolution Academy shall provide Student an independent counseling evaluation.

It is further **ORDERED** that Evolution Academy provide Student compensatory Language Arts and Math program for a period equivalent to the period between the first school day in March 2004 and the last school day in September 2004, excluding any school days during the summer. The amount of compensatory time shall be calculated by multiplying the number of school days during the March-September period by one-half the number of minutes per day that Student currently receives Language Arts and Math. Evolution Academy shall provide these compensatory services in addition to the special-education instruction that it currently provides Student. If the Parties agree, Student's current special-education Language Arts and Math program may be used in providing the compensatory services.

It is further **ORDERED** that Evolution Academy provide Student compensatory counseling services for a period equivalent to the period between the first school day in March 2004 and the last school day in September 2004, excluding any school days during the summer. The amount of compensatory time shall be calculated by multiplying the number of school weeks during the March-September period by the number of minutes per week that Student currently receives counseling. Evolution Academy shall provide these compensatory services in addition to the counseling services that it currently provides Student.

It is further **ORDERED** that 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.

It is further **ORDERED** that all relief not specifically granted is denied.

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

SIGNED on the 28th day of August 2004.

/s/Olivia B. Ruiz

OLIVIA B. RUIZ

SPECIAL EDUCATION HEARING OFFICER

NOTICE TO THE PARTIES

Under State Board of Education Rules, it is no longer necessary for a Party to perfect an appeal to state district court by filing a Motion for Rehearing. However, either Party may request, within ten days after the date of this Decision, specified additional or amended findings of fact or conclusions of law. 19 TEX. ADMIN. CODE §157.8(n, o).