

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

**NORTHSIDE INDEPENDENT
SCHOOL DISTRICT,**

Petitioner,

v.

STUDENT bnf

Parent,

Respondent.

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DOCKET NO. 286-SE-0404

DECISION OF THE HEARING OFFICER

Procedural History

Petitioner Northside Independent School District (“NISD”, “Petitioner” or, “the school district”) brings this action against the Respondent Student bnf Parent (“Student”, “or “Respondent”) under the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. Sec. 1400 et. seq as amended, and its implementing state and federal regulations. Petitioner filed its initial request for hearing on April 23, 2004. Petitioner has been represented by its legal counsel Paula Roalson of Walsh, Anderson, Brown, Schulze & Aldridge, P.C. Respondent has been represented pro se by her mother, Parent and her aunt, Aunt.

Prehearing Conference

The initial prehearing conference was set in this case for May 4, 2004. The parties agreed to reset the prehearing conference for May 12, 2004 to resolve a scheduling conflict for the school district’s counsel. The initial prehearing conference was conducted on that date. The parties agreed to a reasonable continuance of the initial hearing date to allow the parties to continue informal settlement negotiations and to allow both parties an adequate opportunity to prepare for the hearing. The deadline for the Hearing Officer’s Decision was extended until July 12, 2004.

The Due Process Hearing

The special education due process hearing was conducted as agreed on June 21, 2004. Petitioner continued to be represented by its legal counsel, Paula Roalson. In addition, ***, Director of Elementary Special Education for NISD appeared as the party representative. Respondent continued to be represented pro se by her mother Parent and her aunt, Aunt.

Legal Issue

The sole legal issue in this case is whether the school district may proceed with conducting a full and individual evaluation of Student, including psycho-educational, psychological (including personality testing) and medical evaluations, despite the lack of parental consent to do so, for the

Docket No. 286-SE-0404

Decision of the Hearing Officer

Page 1 of 8

purpose of determining eligibility and need for special education services within the meaning of the Individuals with Disabilities Education Act (“IDEA”).

Relief Requested

Petitioner requests the hearing officer issue an order overriding the lack of parental consent to conduct the evaluations for special education eligibility and services. Petitioner also requests the hearing officer order Respondent to submit to and cooperate with the school district in conducting the evaluations requested.

Findings of Fact

1. At the time of the due process hearing in this case Student had just finished the *** grade at *** Elementary. She will attend *** school as a *** grader next year. However, student has not mastered the academic standards for *** grade that are required for promotion into *** grade. Instead, the parties have agreed to “place” student in the *** grade.
2. Student has a long history of academic difficulties in the NISD. She has struggled with a variety of academic tasks since *** grade. She has not met mastery criteria for promotion from grade to grade but instead has been “placed” into the next grade with an acceleration plan designed to bring her up to grade-level within a reasonable period of time. The school district has implemented a number of interventions to assist Student in reaching grade level goals but despite these efforts Student has not been successful in that regard.
3. Student is a charming and lively young lady who is eager to please and wants to do well. She is very good at watching body language and facial expressions of teachers and peers to compensate for when she doesn’t know what to do in class. Student has a keen sense of awareness of interpersonal nuances and uses this ability to help her cope with school. However, Student also requires a lot of one-to-one teacher attention, frequent redirection, and curricular and instructional modifications and accommodations.
4. Student becomes easily frustrated and overwhelmed with academic tasks that are challenging for her. She has difficulty keeping still and paying attention, needs help completing assignments, has trouble organizing her ideas for writing tasks, and trouble concentrating for longer periods of time. Student’s attentional deficits are significantly limiting her academic progress and ability to learn.
5. By *** grade the parties agreed on Student’s need for an independent educational evaluation (“IEE”) to address her academic and behavioral issues in school. Student needed frequent breaks during the assessment process – at times Student was able to finish the testing planned for the day and other times she could not. The examiner met with Student six times before she was able to complete the IEE.

6. The IEE found that Student had an overall IQ score of ***; her overall verbal score was an ***. The score of *** placed her in the low average range for her age. Student's overall performance score was a ***. The score of *** placed her in the average range for her age.
7. Student did not qualify for special education as a student with a learning disability in *** grade because her scores did not meet the 16 point discrepancy between potential and performance required by state regulations. However, the IEE specifically noted that Student demonstrated areas of weakness in reading comprehension and writing. It is possible that the gap between Student's potential and performance may now have widened since the *** grade IEE. She may now meet criteria as a student with a learning disability under IDEA. However, neither the school district nor Student's family can make that determination without a reevaluation.
8. The *** grade IEE also found that Student appeared to meet criteria as a student with Attention Deficit Hyperactivity Disorder – Combined Type (“ADHD”). IDEA requires a medical diagnosis of ADHD by a physician for purposes of eligibility under IDEA. The IEE recommended a medical evaluation to address Student's ADHD. However, Student's mother did not follow through on this recommendation.
9. The school district began serving Student through its “504” program following the results of the *** grade IEE. A number of instructional modifications and accommodations were specifically designed and implemented from *** through *** grades. Student was provided with small group instruction by specialists for reading and math in ***, *** and *** grades. She received extra assistance and attention from teachers in the school's Learning Lab. Student was also provided with individual tutoring and the opportunity to receive additional instruction during the summers. She did not always take advantage of the tutoring or summer programs to the extent she could have.
10. The school district also provided Student with special reading instruction using educational reading programs specifically designed for children with reading deficits. Her teachers received occupational therapy and behavioral consults and a specific behavior plan was implemented in *** grade. She was provided with occupational therapy for a period of time to remediate weak handwriting skills. Student also participated in small group counseling to improve self esteem in *** grade.
11. Despite these various interventions Student continued to lag behind her peers academically by the end of *** grade. Equally worrisome to school district staff was that Student began to exhibit some withdrawal behaviors along with her continued distractibility. At times, Student employed “baby talk”, indicative of a need to return to a time in her life when the demands were less. Student's father recently passed away and this has been another challenge for Student to cope with.
12. Student's mother had her evaluated by a developmental pediatrician this past March. The pediatrician concluded that Student had a “discreet learning disability” is a slow processor

(in reading) has a specific weakness in reading fluency and needed to work on both memory and reading skills. The pediatrician also noted that Student exhibits needs that go “beyond a 504 plan in school ...”

13. The transition to middle school is expected to be difficult for Student. Middle school is a much larger, more complex educational environment. The support systems Student has enjoyed in elementary school are not always duplicated in the middle school setting. Student needs an updated evaluation so that the school district and her family can better identify her specific needs and abilities to ensure sound educational programming and decision-making.

Discussion

Child Find Obligation

Both federal and state laws require a school district to identify, locate, and evaluate all children with disabilities residing within its jurisdictional boundaries. This rule is known as the “Child Find” provision. *20 U.S.C. Sec. 1412 (a)(3)(A)*. Before a child can be placed in a special education program the school district must conduct a full and individual evaluation (“FIE”) of the child’s educational needs. *34 C.F.R. Sec. 300.531*. As part of that process the school district is obligated to secure informed parental consent for the evaluation. *20 U.S.C. Sec. 1414 (a)(1)(C); 34 C.F.R. Sec. 300.505 (a)*

Parental Consent for Evaluation

The law also establishes that if state law requires parental consent for an evaluation then the state’s procedures must be used to override parental refusal to allow the evaluation. *20 U.S.C. Sec. 1414 (a)(1)(C)(ii); 34 C.F.R. Sec. 300.505 (b)*. In Texas the due process hearing is the state procedure to resolve parental refusal for an evaluation. *34 C.F.R. Sec. 300.507(a); 19 Tex. Admin. Code Sec. 89.1151(a); Northside Ind. Sch. Dist. v. Student, Dkt. No. 256-SE-499 (SEA Tex. 1999); South Texas Ind. Sch. Dist., 30 IDELR 73, 74 (SEA Tex. 1998); Grapevine-Colleyville Ind. Sch. Dist. v. Student, Dkt. No. 101-SE-995 (SEA Tex. 1995)*.

A hearing officer in a special education due process hearing has the authority to override parental refusal to give consent for a full individual evaluation for identification and eligibility purposes under IDEA. *Id.* In this jurisdiction, a school district has an unconditional legal right to evaluate a student for purposes of determining a student’s eligibility and educational needs under IDEA. *Andress v. Cleveland Ind. Sch. Dist., 64 F. 3d 176 (5th Cir. 1995); Northside Ind. Sch. Dist. v. Student, supra.*

In order to override lack of parental consent the school district must prove by a preponderance of the evidence that: (i) there is a reason to suspect the student has a disability; and, (ii) there is a reason to suspect that the student is in need of special education. *Id.; See also Student v. Northeast Ind. Sch. Dist., Dkt. No. 503-SE-895 (SEA Tex. 1995)*.

Application of the Law to the Facts in this Case

I conclude that under the credible evidence in this case the school district has met its burden of proof. The school district has reason to suspect Student might be a child with a disability. Her academic difficulties, particularly in the areas of writing and reading comprehension, continued throughout *** school. She has not met mastery criteria for promotion but has instead been “placed” into the next grade for a variety of reasons including preservation of her self esteem.

An IEE conducted in the *** grade concluded that Student appeared to meet eligibility criteria as a student with Other Health Impairment but Student’s mother chose not to follow up on the IEE recommendation that Student be evaluated by a physician for that purpose. She also barely missed meeting the discrepancy criteria for eligibility as a student with a learning disability. Furthermore, an evaluation conducted in March, 2004 by Respondent’s developmental pediatrician concluded that Student does have a learning disability and that she requires something that “goes beyond a 504 plan...”

The credible evidence showed that Student has fallen farther and farther behind as she has made her way through *** school. In her *** and final year of *** school she is reading at least two grade levels below her peers. Her writing and math skills are similarly below what can be expected of an average *** grader and she continues to struggle to retain information and apply it. Student has also consistently exhibited frequent distractibility at school. She requires frequent redirection and one-to-one attention. This year, Student began to exhibit some withdrawal behavior when faced with academic tasks that are particularly overwhelming. Thus, the school district proved by a preponderance of the evidence that not only is there a reason to suspect that Student may be a child with a disability but also that she is need of special education services and support within the meaning of IDEA. Only a full, individual evaluation that considers all areas of suspected disability will be able to confirm or refute these conclusions.

Family Concerns

Despite numerous attempts to explain, discuss and conference with Student’s mother and aunt the school district has not been successful in securing parental consent for a full individual educational evaluation in all areas of suspected disability. I am sensitive to the concerns of Student’s mother and aunt that the school district has simply not utilized the “right” instructional methods in order to reach Student. There also seems to be an underlying concern on the part of Student’s mother and aunt that identification as a student with a disability is going to be damaging for Student and that her needs will not be adequately met in special education.

However, Student is facing a difficult transition into *** school – a more complex educational environment than *** school. The demands on her ability to focus, concentrate, listen, learn, and produce will be much greater. She will also be required to work more independently.

Student is beginning to exhibit an increase in anxiety and a loss of self esteem about her school performance. She needs to be given the opportunity to understand why she is having difficulty in school and how the school can support her more effectively.

Medical Evaluation

In addition, the FIE should include a medical evaluation by a physician to determine whether Student meets the criteria for ADHD and, if so, whether medical intervention might be useful in minimizing the behaviors that interfere with her ability to learn. Student's mother and aunt should certainly have the opportunity to thoroughly discuss and review the medical evaluation and the various options with the examining physician. It would be a great disservice to Student to deny her the opportunity of the positive benefits that medical intervention might provide.

Scope of FIE

The school district must be able to evaluate Student in order to identify with greater specificity what her educational, medical, and emotional needs are so that the "right" instructional methods and educational setting *can* be identified for Student. Parental concerns do not outweigh the school district's obligation to identify and evaluate Student and then, if appropriate, to provide her with a free, appropriate public education. **20 U.S.C. Secs. 1412 (a)(1)(3); 1414 (a)(1)(b).**

Conclusions of Law

1. Petitioner met its burden of proving that there is a reason to suspect that Respondent is a student with a disability and in need of special education within the meaning of IDEA. **20 U.S.C. Sec. 1412 (a)(3)(A); 34 C.F.R. Sec. 300.531.**
2. Petitioner has an unconditional legal right to conduct a full, individual evaluation of Respondent for purposes of meeting its Child Find obligation and in order to provide her with a free, appropriate public education within the meaning of IDEA. **20 U.S.C. Sec. 1412 (a)(3); *Andress v. Cleveland Ind. Sch. Dist.*, 64 F. 3d 176 (5th Cir. 1995).**
3. Petitioner is legally entitled and obligated to conduct a full, individual educational evaluation for purposes of eligibility and educational decision-making under IDEA despite the lack of parental consent to do so. **20 U.S. C. Sec. 1414 (a)(c); 34 C.F.R. Sec. 300.505 (b); *Andress, supra*; *South Texas Ind. Sch. Dist.*, 30 IDELR 73 (SEA Tex. 1998).**

ORDERS

Based upon the foregoing findings of fact and conclusions of law it is therefore **ORDERED** that the relief sought by the Petitioner is hereby **GRANTED** and that Respondent Student bnf Parent shall cooperate with the Petitioner and present herself for purposes of conducting a full, individual evaluation to determine eligibility and educational need within the meaning of the Individuals with Disabilities Education Act and its implementing state and federal regulations. All other relief not specifically stated herein is **DENIED**.

SIGNED the 6th day of July 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. 286-SE-0404

SYNOPSIS

Issue: Whether school district has legal right to override lack of parental consent to conduct full, individual reevaluation for purposes of determining eligibility and educational need under IDEA of student about to enter middle school with history of academic difficulties and attentional deficits from *** through *** grades.

Held: **For the school district.** School district has unconditional legal right to evaluate student in order to meet its obligations under Child Find provisions of IDEA as well as to determine eligibility and educational need.

Credible evidence showed that despite wide variety of interventions including small group instruction by specialists in reading and math, one-to one tutoring, summer programs, specialized reading programs, use of Learning Lab, occupational therapy and behavioral consults, small group counseling, and, behavior and Section 504 accommodation plans, student continued to lag behind peers, struggle with academic tasks, required frequent redirection and one-to-one attention from teachers and did not meet mastery criteria for promotion from grade to grade. Student began to exhibit withdrawal behavior in *** grade when faced with overwhelming academic tasks.

Gap between potential and performance first evaluated in *** grade (but not severe enough discrepancy for IDEA eligibility) expected to widen and establish eligibility as a student with a learning disability but can't be confirmed without reevaluation. Petitioner's own developmental pediatrician concluded student had a learning disability in evaluation conducted in spring of *** grade year. In addition, student needs medical evaluation to confirm or rule out diagnosis of ADHD first identified in *** grade and thus eligibility as a student with Other Health Impairment for special education within meaning of IDEA.

CITE: *20 U.S.C. Sec. 1414 (a)(b); 34 C.F.R. Secs. 300.505, 300.507(a); Andress v. Cleveland Ind. Sch. Dist., 64 F. 3d 176 (5th Cir. 1995); 19 Tex. Admin. Code Sec. 89.1151 (a).*