

STUDENT <i>b/n/f</i>	§	BEFORE A SPECIAL EDUCATION
Parent & Grandparent	§	
	§	
Petitioner	§	
	§	
V.	§	HEARING OFFICER
	§	
HOUSTON INDEPENDENT	§	
SCHOOL DISTRICT,	§	
	§	
Respondent	§	FOR THE STATE OF TEXAS

**DECISION OF THE HEARING OFFICER**

**Procedural History and Issues**

Petitioners, the mother and maternal grandmother respectively of Student, (collectively referred to as “Petitioner”), filed this request for Due Process Hearing on May 18, 2004, under the Individuals with Disabilities in Education Act, 20 USC §1400 *et seq.*, (hereafter “IDEA”), complaining about the failure of Houston Independent School District (“Respondent,” “HISD” or “the District”) to provide Student with a free appropriate public education (“FAPE”).

In the prehearing conference conducted on June 9, 2004, Grandmother appeared on Petitioner’s behalf. Respondent was represented by Hans Graff, Associate General Counsel for the District, and \*\*\*, Special Education Director for the East District of Respondent.

During the prehearing conference the case was set for hearing and the issues were identified as follows:

- (1) *Whether the Respondent failed to develop an appropriate individualized education program for the student;*
- (2) *Whether the Respondent has failed to classify Student as learning disabled;*
- (3) *Whether the Respondent failed to conduct a transition meeting before Student went to \*\*\* School;*
- (4) *Whether the Respondent failed to timely perform a hearing assessment;*
- (5) *Whether the Respondent failed to provide counseling services to the student;*
- (6) *Whether the Respondent should have provided parent training; and*
- (7) *Whether the Respondent failed to provide speech therapy to the student.*

As relief Petitioner requested compensatory services in the form of speech therapy, compensatory counseling services, a hearing assessment, intensive tutoring, and appropriate personnel to attend the Admission, Review and Dismissal committee meetings for the student.

On August 5, 2004, the Hearing Officer convened the Due Process Hearing. Grandmother and Parent appeared for Petitioner, and Grandmother served as Petitioner's advocate during the hearing. Hans Graf again served as Respondent's counsel, and Ms. \*\*\* appeared as the District representative. Student and \*\*\*, Student's uncle, also attended the hearing. Testimonial and documentary evidence were received and the hearing was closed on August 6, 2004. A transcript was made of the proceedings by a certified court reporter. The parties were given the option to present post-hearing briefs to summarize their arguments by September 1, 2004. The Decision of the Hearing Officer was prepared in compliance with the deadline of September 14, 2004.

### **Findings of Fact**

Based upon the matters of record and matters of official notice, in my capacity as a Special Education Hearing Officer for the State of Texas, I make the following findings of fact based on a preponderance of the evidence:

1. Student is a \*\*\* year-old residing with his parent within the geographic boundaries of Houston Independent School District. Student has been identified as a student eligible for special education services under the classification of other health impaired (OHI). Student attended \*\*\* grade regular education classes at \*\*\* School during the 2003-2004 school year.
2. On February 25, 2000, Dr. \*\*\*, a psychiatrist, evaluated Student and diagnosed Attention Deficit Hyperactivity Disorder – combined type. She recommended Student see a child psychiatrist for pharmacological treatment.
3. The most recent speech/language report prepared by the District is dated January 16, 2001. The report concluded that Student had no educational need for speech therapy services.
4. \*\*\*, Ph.D., psychologist, evaluated Student in August and September 1998. Dr. \*\*\* administered the Wechsler Intelligence Scale for children – Third Edition, and the Wide Range Achievement Test – Third Edition. Dr. \*\*\* concluded that Student did NOT meet the criteria for an eligibility of Learn Disability as defined by the Texas Education Agency (TEA) guidelines. However, Dr. \*\*\* also stated in his report:

This examiner is concerned, however, that Student does have some learning weaknesses and deficits which are probably most notable in language-based activities.
5. Dr. \*\*\*, Ph.D. psychologist, also evaluated Student. She performed a psychological, educational, and cognitive evaluation on April 23 and 24, 2002. Dr. \*\*\* utilized the following procedures:
  - Wechsler Intelligence Scale for Children – Third Edition (WISC – III)

- Test of Nonverbal Intelligence – 3
  - Woodcock Johnson Tests of Achievement – III
  - Wide Range Assessment of Memory and Learning (WRAML) (Story Memory and Design Memory)
  - Verbal Selective Reminding Test
  - Continuous Recognition Memory Test
  - Beery-Buktenica Developmental Tests of Visual-Motor Integration IV (VMI)
  - Grooved Pegboard
  - Word Fluency Test
  - Verbal Cancellation
  - Behavior Assessment System for Children (BASC) Parent, Teacher and Child Forms
  - Interview with Grandmother
  - Interview with Child
  - Review of Records
6. In Dr. \*\*\*'s testing Student obtained a Full Scale IQ of \*\*\* (Verbal IQ = \*\*\*; Performance IQ = \*\*\*) indicating his overall intellectual functioning to be within the low average range. Dr. \*\*\* found Student's academic skills to be within the average range, with the exception of speed and fluency in completing written arithmetic and written language. Performance on these measures was within the borderline range reflecting significant weakness which will negatively impact Student's ability to perform his work both accurately and in a timely manner. She also noted in her report that Student was experiencing clinically significant levels of depression in association with feelings of anxiety.
7. Dr. \*\*\* included the following recommendations in her report: a comprehensive psychological assessment; group counseling at school; placement in a regular education classroom with accommodations to address attention problems and self-regulation difficulties; extended time for completion of tests and other classwork; after school tutorials and summer school; access and instruction in using a word processor, grammar and spell check; close communication between the school personnel, the family and other professionals involved with Student's treatment.
8. In addition, Dr. \*\*\* conducted a speech and language evaluation for Student on April 23 and May 31, 2002. She used the following procedures during this evaluation:
- Oral Peripheral Speech Mechanism Examination
  - Peabody Picture Vocabulary Test – Third Edition (PPVT-III)

- Expressive Vocabulary Test (EVT)
  - Goldman Fristoe Test of Articulation-2 (GFTA-2)
  - Comprehensive Assessment of Spoken Language (CASL)
  - Review of Records
  - Interview with Child
9. Dr. \*\*\* found Student's language abilities within the average to low average range. The test results indicated \*\*\* errors on one sub-test, errors of tongue lateralization for /s/ and /z/ in all positions of words. The stimulability portion of the test showed Student stimutable for all error sounds following auditory and visual stimulation. Dr. \*\*\* recommended that Student receive speech intervention for correction of his misarticulations, a minimum of two thirty-minute sessions per week in a small group. She also stated that Student would benefit from increased focus on oral language, specifically vocabulary and morphology. Additionally, Dr. \*\*\* recommended Student should be seen for dental and orthodontic assessment, and his hearing should be screened.
  10. On December 10, 2002, the Admission, Review and Dismissal (ARD) committee met at \*\*\* School for an annual review and to discuss Student's progress. The meeting was convened, but tabled.
  11. On January 22, 2003, the ARD committee again met, this time for the purpose to review or discuss evaluation, annual review, and dismissal. In attendance were a regular education teacher, a special education teacher, the special education coordinator, the speech therapist, the school psychologist, and the school principal to answer questions from the parent, grandparent, and \*\*\*, a child advocate. The committee reviewed Dr. \*\*\*'s psychological assessment as well as the assistive technology assessment. After lengthy discussions from 9:30 a.m. until after 1:00 p.m. the meeting was tabled at the request of Parent. The committee agreed to reconvene on February 10, 2003, at 9:30 a.m.
  12. The ARD meeting set for February 10, 2003, did not take place because the parent could not attend. The meeting was rescheduled to February 27, 2003, and an appropriate notice was sent to the parent. The meeting went forward without the parent on February 27, 2003.
  13. At the February 27, 2003 ARD meeting, the committee determined that Student qualified for special education services in accordance with TEA guidelines as other health impaired (OHI). The committee reviewed and approved the Individualized Education Program (IEP) for math inclusion. After reviewing Dr. \*\*\*'s speech and language evaluation, the committee determined that Student did not meet the eligibility criteria as speech impaired. More specifically, the committee determined that Student's articulation and language skills did not interfere with his ability to participate in the classroom. Accordingly, the committee decided that Student should be dismissed from speech therapy. With respect to Dr. \*\*\*'s recommendation that Student's hearing be screened, the speech therapist noted that

Student had a complete audiological assessment done on January 8, 2001, and no impairment existed. The committee decided that no other hearing testing was needed at that time. The counselor reported that Student had shown great improvement in his behavior. The committee approved the IEP for counseling with specific objectives and agreed to provide 1-½ hours of counseling per week in a small group setting. With respect to required student assessments, the committee modified the requirements to permit Student to take the tests in a small group and be given frequent breaks as needed. Additionally the committee considered assistive technology, transportation, extended school year services, and additional referrals and determined they were not needed.

14. The next ARD meeting for Student occurred at the parent's request on November 12, 2003, at \*\*\* School. The meeting was scheduled for 8:55 a.m. but did not actually start until 9:35 a.m. The meeting was tabled at 11:40 a.m. because the parent and grandparent had to leave. The committee reviewed the assessment but took no action. Another meeting was tentatively scheduled for December 4, 2003.
15. Parent called to say she had not received her invitation to the December 4, 2003, ARD meeting, and that she would not be able to attend the meeting. The invitation had been returned to the school by the U. S. Postal Service.
16. The November 12, 2003 ARD meeting was continued on January 29, 2004. The participants discussed the invitation that was returned to the school. The parent and grandparent noted their disagreement with the District's evaluation dated January 21, 2003. They also asserted their belief that Student met the eligibility for learning disabled, but that the District had never addressed those needs. The meeting was tabled at 11:40 a.m. by the special education department chair without the committee taking action.
17. The ARD meeting was continued on February 19, 2004. After approximately two hours of discussion the meeting was tabled, and tentatively set to reconvene on February 27, 2004. The parent could not attend on February 27 and another date had to be selected.
18. The ARD meeting was continued on March 25, 2004. By this date it was time to discuss Student's triennial evaluation. Again the committee discussed the assessment data as well as Student's progress in his math class. The meeting recessed at 11:21 a.m. due to lack of personnel.
19. The ARD meeting was continued on May 7, 2004, and lasted approximately three hours with the participants again discussing assessment data, particularly Dr. \*\*\*'s speech and language evaluation. No action was taken.
20. The ARD meeting continued on June 2, 2004. The meeting was late getting started due to miscommunication. The meeting had been scheduled for the \*\*\* office, but Parent did not know the office had moved, so her arrival was delayed. The committee discussed Student's triennial evaluation which included language, emotional behavior, intellectual, academic, and assistive technology. The medical evaluation of Dr. \*\*\* was also reviewed. They looked at Student's scores on the

Stanford 9 and 10 tests, his report card, his scores on the Texas Assessment of Knowledge and Skills (TAKS), and his discipline file. The committee decided that Student no longer demonstrated an educational need for the OHI disability, and therefore, no longer was eligible for special education services. The parent and grandparent disagreed and so indicated on the report of the meeting. Because there was no consensus, the ARD committee scheduled another meeting for June 4, 2004.

21. The recess ARD occurred on June 4, 2004. Parent called about 9:20 a.m. and stated that she could not come to the meeting because her employer would not let her off to attend. Grandmother and \*\*\*, a child advocate, entered the meeting shortly before 11:00 a.m. Grandmother expressed the family's concern that they did not agree about the speech dismissal and counseling services for Student. She also believed that HISD had not provided Student with an appropriate education under IDEA. Ms. \*\*\*. and Ms. \*\*\* left the meeting about 11:20.
22. The committee continued its deliberations and ultimately reversed its decision about dismissing Student from special education. Although Student had made good progress in some academic areas, the committee believed he continued to have a need in the area of math. Additionally, the committee agreed on compensatory time for counseling for Student, because the counselor only saw him three times during the 2003-2004 school year. Compensatory time would begin on June 9 through June 22 from 10:00 a.m. to 11:30 a.m. daily. Counseling services would resume on August 18, 2004, through October 13, 2004, at the rate of 30 minutes per week during the school year. The committee also developed and approved a content mastery IEP for math for Student, receiving 2.5 hours per week of special education services. In addition, the committee developed and a Behavior Intervention Plan to support him during instruction.
23. The compensatory counseling services offered by the District were not used.
24. Student received the following grades for the 2003-2004 school year:
  - English \*\*\*
  - Reading \*\*\*
  - Math \*\*\*
  - Western Culture Studies \*\*\*
  - Science \*\*\*
  - PE/Health \*\*\*
  - Applied Technology \*\*\*
25. During the 2003-2004 school year the Student received conduct grades that, while not uniformly excellent, did not indicate any serious behavior problems.
26. Student obtained the following scores on the Stanford Achievement Test (10<sup>th</sup> Edition) in March 2004 while in the \*\*\* grade, expressed as a grade equivalent:
  - Total Reading \*\*\*

- Reading Vocabulary \*\*\*
- Reading Comprehension \*\*\*
- Total Mathematics \*\*\*
  - Math Problem Solving \*\*\*
  - Math Procedures \*\*\*
- Language \*\*\*
  - Language Mechanics \*\*\*
  - Language Expression \*\*\*
- Spelling \*\*\*
- Science \*\*\*
- Social Science \*\*\*
- Listening \*\*\*
- Thinking Skills \*\*\*
- Basic Battery \*\*\*
- Complete Battery \*\*\*

27. The previous year Student's scores on the Stanford Achievement Test (9<sup>th</sup> Edition) while in \*\*\* grade were:

- Total Reading \*\*\*
  - Vocabulary \*\*\*
  - Reading Comprehension \*\*\*
- Total Mathematics \*\*\*
  - Problem Solving \*\*\*
  - Procedures \*\*\*
- Language \*\*\*
  - Language Mechanics \*\*\*
  - Language Expression \*\*\*
- Spelling \*\*\*
- Study Skills \*\*\*
- Science \*\*\*
- Social Science \*\*\*
- Listening \*\*\*
- Using Information \*\*\*
- Thinking Skills \*\*\*
- Basic Battery \*\*\*
- Complete Battery \*\*\*1

28. On the various IQ tests administered to Student through the years he has obtained a Full Scale score ranging from \*\*\* (1998), \*\*\* (1998), \*\*\* (2001), and \*\*\* (2002). In the accompanying achievement tests performed at or near the same time as the IQ tests, Student's scores were within one standard deviation in comparison to his Full Scale IQ score.

29. The records indicate that appropriate personnel for the District attended all of the ARD meetings for Student during the period at issue in this case.

## Discussion

### Classification Issues – Learning Disability and Speech Impairment

Relevant to this discussion are the eligibility criteria set forth by Texas Education Agency:

#### §89.1040. Eligibility Criteria

- (c) Eligibility definitions.
  - (9) Learning disability.
    - (A) A student with a learning disability is one who has been determined by a multidisciplinary team to meet the criteria for specific learning disability as stated in 34 CFR, §300.7(c)(10), and in whom the team has determined whether a severe discrepancy between achievement and intellectual ability exists in accordance with the provisions in 34 CFR, §§300.540-300.543. A severe discrepancy exists when the student's assessed intellectual ability is above the mentally retarded range, but the student's assessed educational achievement in areas specified in 34 CFR, §300.541, is more than one standard deviation below the student's intellectual ability.
    - (B) If the multidisciplinary team cannot establish the existence of a severe discrepancy in accordance with subparagraph (A) of this paragraph because of the lack of appropriate evaluation instruments, or if the student does not meet the criteria in subparagraph (A) of this paragraph but the team believes a severe discrepancy exists, the team must document in its written report the areas identified under subparagraph (A) of this paragraph and the basis for determining that the student has a severe discrepancy. The report shall include a statement of the degree of the discrepancy between intellectual ability and achievement.
  - (10) Speech impairment. A student with a speech impairment is one who has been determined to meet the criteria for speech or language impairment as stated in 34 CFR §300.7(c)(11). The multidisciplinary team that collects or reviews evaluation data in connection with the determination of a student's eligibility based on a speech impairment must include a certified speech and

hearing therapist, a certified speech and language therapist, or a licensed speech/language pathologist.

#### 19 TEXAS ADMINISTRATIVE CODE (TAC) §89.1040

Applying the legal definition included in these criteria to the facts in this case, it is clear that Student does not meet the criteria for a learning disability under Method 1, expressed in paragraph (A) above. The achievement test scores are not more than one standard deviation below his intellectual ability as expressed by his Full Scale IQ score. Under Method 2 expressed in paragraph (B) above, there is no evidence appropriate evaluation instruments could not be used. There is likewise no evidence that the multidisciplinary team believed a severe discrepancy exists for Student. About the closest that anyone comes is the statement from Dr. \*\*\*s' 1998 report that Student has some *learning weaknesses and deficits*. The preponderance of the evidence leads the Hearing Officer to conclude that Student does not qualify under either Method 1 or Method 2.

With respect to the criteria for speech impairment, the language must be read in conjunction with the federal regulation, 34 CFR §300.7 (c) (11), which states:

- (c) *Definitions of disability terms.* The terms used in this definition are defined as follows:
  - (11) *Speech or language impairment* means a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance.

Although Student may have some impaired articulation, there is no evidence that it adversely affects his educational performance. Accordingly, the requirements of the federal regulation are not met, Student does not qualify as a child with speech impairment under this definition, and no speech therapy was required.

#### Development of an IEP

The facts demonstrate that HISD did develop an appropriate IEP for Student.

#### Transition Meeting

Student's IEP developed on February 27, 2002, was appropriate for the \*\*\* grade, his first year attending \*\*\* School. Petitioner has not cited the Hearing Officer to any specific requirements in federal or TEA rules about a transition meeting. Because Student was not yet \*\*\* years of age during the time these ARD meetings occurred, there was no need to address "transition to life outside the public school system," as referenced in §89.1055 (g) of the Commissioner's Rules.

#### Hearing Assessment

There is no evidence that another hearing assessment was necessary after the one performed in January 2001 for Student, even though Dr. \*\*\* recommended one in April 2002.

### Counseling Services

The District has conceded that, except for three occasions, it did not perform the counseling services for Student during the 2003-2004 school year. It has offered an appropriate program of compensatory services for that failure. Even though Student's parent did not take advantage of that offer during the summer of 2004, Student could nevertheless benefit from those services. The Hearing Officer respectfully requests that the District offer those services again during the 2004-2005 school year – in the same amount already offered – and that the parent accept those services for Student. However, no order will be entered to that effect.

### Parent Training

The only evidence in the record in this case concerning parent training is one question asked by Grandmother to Parent if she had ever received any parent training from HISD. The answer was no. There is no evidence of training having been requested, and thus, the Hearing Officer finds no evidence to support an order requiring provision of parent training. If the parent truly desires training about ADHD, the resources are available and the District can direct her to the appropriate place.

### **Conclusions of Law**

After due consideration of matters of record, matters of official notice, and the foregoing findings of fact, in my capacity as a Special Education Hearing Officer for the State of Texas, I make the following conclusions of law:

1. Student is a student who is eligible for special education services under the IDEA as a child with other health impairment. 20 USC §1401 (3) (A); 34 CFR §300.7 (c) (9); 19 TAC §89.1040 (c) (8).
2. The IEPs and related services developed as Student's educational program at HISD provided a program reasonably calculated to enable him to receive educational benefit under the standard of *Board of Education of the Hendrick Hudson School District v. Rowley*, 458 US 176 (1982), 34 CFR §300.347 and 19 TAC §89.1055.
3. Houston ISD failed to provide the counseling services described in Student's IEP for the 2003-2004 school year. However, Student made meaningful educational progress during that school year. See *Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5<sup>th</sup> Cir. 1997).
4. Petitioner bears the burden of proof with respect to his claims that Student was denied a free appropriate public education. *Tatro v. Texas*, 703 F.2d 823 (5<sup>th</sup> Cir. 1983), *aff'd*, 468 US 883 (1984). Petitioner did not meet his burden of proof in this case.

**ORDER**

Based upon the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the relief sought by Petitioner is DENIED. Finding that the public welfare requires the immediate effect of this Final Decision, the Hearing Officer makes it effective immediately.

SIGNED this 14<sup>th</sup> day of September 2004.

*/s/*  
\_\_\_\_\_  
*Lucretia Dillard*  
Special Education Hearing Officer

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**SYNOPSIS**

**ISSUE:** *Whether the Respondent failed to develop an appropriate individualized education program for the student?*

**HELD:** For Respondent.

**CITE:** 34 CFR §300.309, 300.347; 19 TEXAS ADMINISTRATIVE CODE (TAC) §89.1055

**ISSUE:** *Whether the Respondent has failed to classify Student as learning disabled?*

**HELD:** For Respondent

**CITE:** 34 CFR §300.540 – 300.543; 19 TAC §89.1040

**ISSUE:** *Whether the Respondent failed to conduct a transition meeting before Student went to \*\*\* School?*

**HELD:** For Respondent.

**CITE:** 34 CFR §300.29, 300.344, and 300.347; 19 TAC §89.1055 (g)

**ISSUE:** *Whether the Respondent failed to timely perform a hearing assessment?*

**HELD:** For Respondent.

**CITE:** 34 CFR §300.7 (c) (3); 19 TAC §89.1040 (c) (3)

**ISSUE:** *Whether the Respondent failed to provide counseling services to the student?*

**HELD:** For Respondent.

**CITE:** 34 CFR §300.24 (b) (7)

**ISSUE:** *Whether the Respondent should have provided parent training?*

**HELD:** For Respondent.

**CITE:** 34 CFR §300.24 (b) (7)

**ISSUE:** *Whether the Respondent failed to provide speech therapy to the student?*

**HELD:** For Respondent.

**CITE:** 34 CFR §300.24 (b) (14)