

STUDENT b/n/f	§	BEFORE A SPECIAL EDUCATION
** & **	§	
Petitioner	§	
	§	HEARING OFFICER
VS.	§	
	§	
HOUSTON INDEPENDENT	§	FOR THE STATE OF TEXAS
SCHOOL DISTRICT,		
Respondent		

DECISION OF THE HEARING OFFICER

Statement of the Case

Student, by his next friends, \*\* and \*\*, parent and grandparent respectively, (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 Houston Independent School District (hereinafter “Respondent,” the “District,” or “HISD”). Petitioner was represented by Bobby Caldwell, an attorney in Houston, and \*\*, grandparent and advocate. Respondent was represented by Hans Graff, assistant general counsel for HISD.

Petitioner’s request for hearing was filed on May 4, 2004. Following two pre-hearing conferences during which certain issues were resolved, the matter was reassigned from one hearing officer to the undersigned. The case came to hearing by order of this hearing officer on August 25, 2004. At the end of the first day of hearing, due to a conflict in Petitioner’s attorney’s schedule, the hearing was continued until September 3, 2004. In addition to \*\*, \*\*, and Bobby Caldwell, Student was present during the first day of hearing. Present with Hans Graff was district employee, \*\*. 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 October 29, 2004, in compliance with the forty-five day rule.

Issues

The issues in this case are as follows:

1. Whether the District gave Student’ mother proper notice of her procedural rights under the Individuals with Disabilities Education Act (“IDEA”) and specifically its Child Find provisions during the 2002-2003 school year;
2. Whether the District should have identified Student as a student with a disability within the meaning of the IDEA beginning in the 2002-2003 school year up through the end of the fall semester 2003;
3. Whether the Admission, Review & Dismissal Committee (“ARD”) of January 9, 2004 could legally revise ARD documents after the parent left the meeting;

4. Whether the District should have provided Student with special education services prior to January, 2004;
5. Whether the IDEA requires that the District should have provided Student' mother with prior notice of an outside consultation conducted on April 4, 2004; and,
6. Whether Petitioner's claims arising during the 2002-2003 school year are within the requisite statute of limitations period under the IDEA and its implementing state and federal regulations.

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

#### Findings of Fact

1. At the time of this hearing, Student was beginning the \*\* grade after having repeated the \*\* grade. He resides with his mother in the Houston Independent School District. [Tr. Page 22]
2. HISD is a political subdivision of the State of Texas and a duly incorporated independent school district responsible for providing Student a free appropriate public education in accordance with the IDEA, 20 U.S.C.A. §1400, *et seq.*, and the rules and regulations promulgated pursuant to the IDEA.
3. Student has a learning disability ("LD") in the areas of written expression and math reasoning and is eligible to receive special education services. [Petitioner's Exhibit 13 and 14; Respondent's Exhibit 8]
4. Student is in the \*\* range of overall intellectual ability. [Petitioner's Exhibit 2; Tr. Page 135]
5. By letter dated March 8, 2002 to the District, Student' grandmother asked that he be assessed in "all areas to see if he has a disability." In the spring semester, 2002, Student' teacher requested a referral for him. On March 27, the Campus Referral Committee referred Student for further evaluation to address academics and behavior. [Petitioner's Exhibit 9; Respondent's Exhibit 12]
6. On May 16, 2002, the District sent Petitioner a notification of the need for additional assessment with an enclosed consent form. On May 21, a District nurse consultant faxed a letter to Parent requesting that she contact the nurse regarding Student' health history[Respondent's Exhibit 18, 20]
7. Petitioner filed a request for due process hearing with the Texas Education Agency on April 10, 2002. In addition to other considerations, after Petitioner failed to comply with the hearing officer's order to sign consent forms for counseling and medical evaluations, the hearing officer dismissed the case for want of prosecution on July 27, 2002. As part of the dismissal, Petitioner agreed to allow a medical evaluation by a psychiatrist of Student. [Respondent's Exhibit 50; Tr. 59]
8. At a September 9, 2002 ARD meeting, the committee drafted an Individualized Education Program ("IEP") for Student. Student' mother refused to give consent for a Functional Behavior Assessment ("FBA") and a psychological assessment to be performed for Student. The ARD meeting continued on October 2, the consent forms had not been returned, the Full and Individual Initial Evaluation ("FIE") was not complete; therefore, no special education services were begun. [Tr. 317-318; Petitioner's Exhibits 3 and 8; Respondent's Exhibits 3 and 4]

9. Prior to the spring semester of the 2003-2004 school year, Student received numerous discipline referrals. [Petitioner's Exhibit 11]
10. On August 25, 2003, Student transferred from \*\* School to \*\* School within the HISD and began his repeat of the \*\* grade. Enrollment information indicated that he had been tested at \*\* School, but that the parent was litigating his case. [Respondent's Exhibit 52]
11. An ARD meeting was held at \*\* School on November 18, 2003 and continued on December 9, 2003 during which the committee began to develop an Individualized Education Program ("IEP") for Student. The District asked for consent for testing and \*\* agreed to sign the consent form, but would not give the signed forms to the District on that day. She told the committee that she would present the signed forms with the first form that was signed and returned. The ARDC meeting resumed on January 9, 2004 at which time the committee continued to review and establish goals, including a Behavior Intervention Plan ("BIP") and appropriate placement for Student. \*\* did not agree with the ARD. [Petitioner's Exhibits 5, 12, and 14; Respondent's Exhibits 5-7]
12. At the November 18 ARD meeting, for the first time, the minutes reflect that Petitioner told the committee that consent forms had been signed. \*\* reiterated the information at the continuation of the meeting on December 9. The District requested that Petitioner provide a copy of a signed consent form or sign a new form. [Petitioner's Exhibit 5; Respondent's Exhibit 5]
13. Petitioner's mother and grandmother signed district forms entitled "Consent for Consult/Related Services Evaluation" (Consent for Consult) and "Consent for Comprehensive Individual Assessment" (Consent for CIA). The documents are dated July 15, 2002. On the Consent for Consult, there is no check mark in either the "yes" or "no" box beside the statement, "I have been fully informed and understand the evaluation process and why it has been recommended for my child." There is a handwritten note beside the statement that indicates that the district had not explained why Student needed a psychiatrist. The "yes" box was checked beside the statement, "I give my permission for the testing that has been recommended for my child." A handwritten note states, "I give my consent for the following counseling, FBA and Psychological only." Similar wording is repeated on the Consent for CIA. However, on that district form, the "no" box is checked beside the printed statement "I have been fully informed and understand the assessment process and why it has been recommended for my child/me." Both documents indicate questions regarding the need for a psychiatrist. [Petitioner's Exhibit 9]
14. Consent for placement in special education was given on January 21, 2004. The ARDC met on January 29 and special education services began. [Petitioner's Exhibit 10; Respondent's Exhibit 9]
15. The results of Student' performance on the Stanford Achievement Test are:
 

** (2000-01)	Grade Equivalency	**
** (2001-02)	Grade Equivalency	**
** Grade (2002-03)	Grade Equivalency	**
** Grade (2003-04)	Grade Equivalency	**

 [Respondent's Exhibit 11]
16. Dr. \*\*, a contracted licensed psychologist, prepared a Psychological Consultation Report dated April 5, 2004 and concluded that Student no longer needed a psychological evaluation. [Respondent's Exhibit 1]

17. Classroom interventions were used for Student during the time that the District attempted to obtain parental consent. [Tr. 280, 304, 365, and 387; Petitioner's Exhibit 3, 5 and 12; Respondent's Exhibit 3,5 and 6]
18. Student made passing grades during the 2003-2004 school year. [Tr. 285]
19. The District made numerous attempts to obtain parental consent from Petitioner. [Tr. 369-70, 377-79, 388-89; Petitioner's Exhibits 3, Respondent's Exhibits 3, 8, 30, 36]

## Discussion

### Statute of Limitations Issue

Petitioner filed his request for a due process hearing on May 20, 2004. Respondent argues that all claims falling outside the one year statute of limitations should be dismissed. The relevant rule in Texas is:

*Effective with requests for due process hearings filed on or after August 1, 2002, a parent or public education agency must request a due process hearing within one year of the date the complainant knew or should have known about the alleged action that serves as the basis for the hearing request. 19 Tex. Admin. Code §89.1151(c)*

This rule has been approved by the Texas Court of Appeals. Texas Advocates Supporting Kids with Disabilities v. Texas Education Agency, 112 S.W. 3d 234 (Tex. Ct. App.-Austin 2003). The one year statute of limitations rule applies to Petitioner's case since it was filed after the effective date. Therefore, any of Petitioner's claims that arose before May 20, 2003 are barred by the one year statute of limitations. This would include Petitioner's complaints about proper notice of procedural rights and failure to identify and provide services for Student as a student with a disability during the 2002-2003 school year.

### Whether the District gave Petitioner proper notice of procedural rights under the IDEA, and specifically its Child Find provisions during the 2002-2003 school year

Parents of a child with a disability must be given a copy of the procedural safeguards at a minimum:

- (1) Upon initial referral for evaluation;
- (2) Upon each notification of an IEP meeting;
- (3) Upon reevaluation of the child; and
- (4) Upon receipt of a request for due process.

The one year statute of limitations applies to the 2002-2003 school year prior to May 20, 2003. Petitioner did not meet his burden of proof that proper notice of procedural rights under the IDEA was not given from May 20, 2003 to the end of that school year.

### Whether the District should have identified Student as a student with a disability within the meaning if IDEA beginning in the 2002-2003 school year up through the end of the fall semester, 2003

Public school districts must comply with the IDEA procedures for identifying children with disabilities who need special education, and delivering appropriate services as necessary to provide a free and appropriate public education (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. §300.125. This duty is triggered at the time a school district has reason to believe that the student has a disability and suspects that special education services may be needed to address that disability. \*\* v. Houston I.S.D., No. 327-SE-596 (Texas H.O. Dec'n, May 2, 1997). Once a referral is made, the school district must *fully* evaluate the student in all areas of suspected disability. 34 C.F.R. §300.532(g). A petitioner who challenges the school district's eligibility determination or offer of services under the IDEA bears the burden to prove that the child has been denied a FAPE. Tatro v. State of Texas, 703 F.2d 832 (5<sup>th</sup> Cir. 1983), aff'd, 468 U.S. 883 (1984).

Since the spring of 2002 the parties knew of Student' learning disability. However, there were indications that further assessment was necessary, and since that time, HISD made efforts to obtain informed consent from Student' mother, \*\* Petitioner contends that the documents dated July 15, 2002, signed by both \*\* and her mother, \*\* gave consent, that the district failed to follow through with the assessments, and in doing so, failed in its child find duty to Student. (It is noted that Petitioner failed to prove that the documents were delivered to the District any time prior to December 18, 2003 when, in response to a letter from the District asking for consent for assessment, Petitioner faxed the July 15 documents to HISD.)

The questions and notations handwritten on the July 15 forms indicate that Petitioner may have been confused about a provider of the proposed services and lacked understanding of the evaluation process. Further, \*\*'s testimony revealed that she did not understand the consent form. She testified that the July 15 documents also gave consent for placement. However, the documents speak to consent for assessments, not consent for placement.

The IDEA requires that a parent is fully informed of all information relevant to the activity for which consent is sought. It requires that the parent understands and agrees in writing to the carrying out of the activity for which consent is sought. 34 C.F.R. §300.500(b)(1)(i) and (ii). Petitioner did not provide *informed* consent in the July 15 documents.

Informed parental consent must be obtained before a district conducts an initial evaluation or reevaluation and before it initially provides special education services to a child with a disability. C.F.R. §300.505. Despite the District's efforts, Petitioner refused to sign another document to give consent for the additional assessments, and refused to give consent for initial placement. Without consent, the District could not go forward with further assessment, or initial placement of Student.

Petitioner contends that when consent became an issue, the District should have used its remedy in the form of a due process hearing under the IDEA, and the District recognizes that such remedy may be used. Considering the District's concession that such possibility exists, one wonders why it did not use the due process hearing in this case when there had been indications of a possible need for special education from at least the spring semester, 2002. On the other hand, when \*\* and \*\* continually expressed a desire that Student' needs be met, one also wonders why they continued to refuse to sign another consent form so that Student could be assessed more fully and ultimately receive special education services.

If a parent refuses to provide informed consent, a school district *may* file a request for a due process hearing and seek an order overriding parental refusal to consent. South Texas

Independent School District, 30 IDELR 73 (SEA Tex. 1998); Northside Independent School District v. \*\*, Docket No. 256-SE-499 (SEA Tex. 1999). The statute does not *require* that a district use the due process procedure to override parental refusal to consent.

The child find duty is an affirmative duty placed on the District. In light of the one year limitations rule, close attention is paid to the District's efforts to obtain consent from May 20, 2003. HISD had known of Student's learning disability since at least 2002 and had made attempts to obtain consent for further assessments. The summer months of 2003 passed without efforts toward that end. When Petitioner enrolled in \*\* School in August, 25, 2003, information given to the school indicated a possible need for special education services. However, because there was no check mark beside "SPECIAL-ED student..." on the District's Enrollment Data Sheet, the District's procedure that required that the special education chairperson be contacted was not followed. Nothing further occurred until the November 18 ARD, 85 days after Petitioner enrolled in \*\* School. The 85 day lapse in efforts by the District to serve Student constitutes a procedural violation.

A procedural violation of the IDEA entitles Petitioner to relief if the violation caused a loss of educational benefit to him, 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); Cypress Fairbanks Independent School District v. Michael F., 118 F.3d 245 (5<sup>th</sup> Cir. 1997).

During his \*\* grade year, and his first year in the \*\* grade, Student made some academic progress. After his transfer to \*\* School, his classroom teacher sat next to him and worked with him in small groups. He also went to \*\* and \*\* where he received one-on-one instruction, and the social worker worked with him. The record reflects that Student made a significant change both academically and behaviorally after he entered \*\* School. His behavior improved and he made good progress academically. He made passing grades in the 2003-2004 school year. Petitioner failed to carry his burden of proof that Student suffered a loss of educational benefit.

Petitioner has other children who receive special education services and is experienced in the IDEA procedures. The District consistently took unusual efforts to include Petitioner in the ARD meetings. Contrary to its usual practice, the District regularly sent three invitations to ARD meetings to Petitioner. Meetings were tabled and continued more than one time. At Petitioner's request, an ARD meeting was called. When writing Student's current IEP, the committee accepted Petitioner's request to require 85% mastery level rather than the recommended 75% mastery level in language arts and math reasoning. The District did not infringe on Petitioner's opportunity to participate in the educational planning for Student.

It is clear from the record that Student's chances for educational success would be greatly enhanced if his next friends would attempt to cooperate with the efforts of the District. His mother and grandmother are major stakeholders in Student's education. However, they have been more of an obstacle than essential participants in the process of identification of and educational planning for Student. If Student is to be academically and behaviorally successful in the coming years, it is crucial for them to assist the District and Student in that endeavor.

#### Whether the January 9 ARD could legally revise ARD documents after the parent left the meeting

\*\* left the January 9, 2004 ARD meeting before it concluded. Petitioner complains that the copies of the documents that were given to her at time of departure were changed after she left the meeting. There were some changes for clarification purposes made to the *final* ARD minutes that were not reflected on Petitioner's copies. A review of the evidence reflects that no

changes to the minutes were made in violation of the requirements of an ARD report. 19 Tex. Admin. Code §89.1050(e).

Whether the District should have provided Student with special education services prior to January, 2004

The IDEA requires that a school district obtain informed, written consent before it may provide special education services to a child with a disability. C.F.R. §300.505; Letter to Manasevit, 41 IDELR 36 (OPEP 2003). Petitioner gave consent for initial placement on January 21, 2004. The District then provided special education services to Student.

Whether the IDEA requires that the District should have provided Student' mother with prior notice of an outside consultation conducted on April 4, 2004

The consultation performed by Dr. \*\* was a review of existing data concerning Student. There were no evaluations performed by Dr. \*\*, nor did she have personal contact with him. Prior notice by the District was not required for the consultation. C.F.R. §300.503.

Conclusions of Law

1. Student is a student in the HISD who is eligible for special education services under the provisions of the IDEA and its implementing regulations as a student with a learning disability.
2. Respondent HISD is an independent school district duly constituted in and by the state of Texas, and subject to the requirements of the IDEA and its implementing regulations. HISD is Student' resident district and has the responsibility to provide him with a free appropriate public education under the IDEA. 20 U.S.C. §1401(a)(18).
3. Petitioner's claims arising outside the applicable one year statute of limitations period in Texas are outside the jurisdiction of the special education hearing officer and must be dismissed. Claims arising prior to May 20, 2003 are outside the applicable one year limitation period. 19 Tex. Admin. Code §89.1150(c); Texas Advocates Supporting Kids with Disabilities v. Texas Education Agency, 112 S.W. 3d 234 (Tex. Ct. App.-Austin 2003).
4. Respondent did not fail to provide Petitioner's mother with notice of her procedural rights under the Individuals with Disabilities Education Act ("IDEA") and specifically its Child Find provisions after May 20, 2003 through the end of the 2002-2003 school year. 20 U.S.C. §1415(d)
5. Petitioner did not meet his burden of proof on his claims regarding child find duties after May 20, 2003. Although Respondent committed procedural violation, it did not deny FAPE to Petitioner. Board of Education of the Hendrick Hudson School District v. Rowley, 458 U.S. 176 (1982); Cypress Fairbanks Independent School District v. Michael F., 118 F.3d 245 (5<sup>th</sup> Cir. 1997).
6. Petitioner did not meet his burden of proof on his claim that the copies of ARD minutes given to his mother during the January 9, 2004 meeting were illegally

revised. 19 Tex. Admin. Code §89.1050(e). C.F.R. §300.505; Tatro v. State of Texas, 703 F. 2d 823 (5<sup>th</sup> Cir. 1984).

7. Petitioner did not meet his burden of proof on his claims that he should have received special education services prior to January, 2004. Tatro v. State of Texas, 703 F. 2d 823 (5<sup>th</sup> Cir. 1984).
8. Respondent was not required to provide Petitioner's mother with prior notice of an outside consultation conducted on April 4, 2004. C.F.R. §§300.503 and 300.505.

**IT IS HEREBY ORDERED** that all relief requested by or on behalf of the Petitioner is hereby **DENIED**.

Signed the 29<sup>th</sup> day of October, 2004.

\_\_\_\_\_/s/\_\_\_\_\_  
Brenda Rudd  
Special Education Hearing Officer  
For the State of Texas

Notice to the Parties:

The Decision of the Hearing Officer is a final and appealable order. With respect to the issues presented at the due process hearing, an aggrieved party may bring a civil action in any state court of competent jurisdiction or in a district court of the United States. 19 Tex. Admin. Code §89.1185(p); Tex. Gov't Code, §2001.144(a)(b).

DOCKET NO. 318-SE-0504

STUDENT b/n/f	§	BEFORE A SPECIAL EDUCATION
** & **, Petitioner	§	
	§	
VS.	§	HEARING OFFICER
	§	
HOUSTON INDEPENDENT SCHOOL DISTRICT, Respondent	§	FOR THE STATE OF TEXAS

**SYNOPSIS**

- Issue:** Whether Petitioner’s claims arising during the 2002-2003 school year are within the requisite statute of limitations period under the IDEA and its implementing state and federal regulations.
- Held:** **For the school district.** Petitioner’s claims arising more than one year prior to filing date of due process request dismissed for want of jurisdiction as outside applicable one year of statute of limitations. Claims arising prior to May 20, 2003 are outside the applicable one year limitation period. 19 Tex. Admin. Code §89.1150(c);
- Issue:** Whether the District gave Petitioner’s mother proper notice of her procedural rights under the IDEA and specifically its Child Find provisions during the 2002-2003 school year.
- Held:** **For the school district.** From May 20, 2003 through the end of the 2002-2003 school year, Respondent did not fail to give notice of procedural rights. 20 U.S.C. §1415(d)
- Issue:** Whether the District should have identified Petitioner as a student with a disability within the meaning of the IDEA beginning in the 2002-2003 school year up through the end of the fall semester 2003;
- Held:** **For the school district.** From May 20, 2003 through the end of the fall semester 2003, Respondent committed procedural error by delaying efforts to obtain parental consent, but did not deny Petitioner FAPE. Board of Education of the Hendrick Hudson School District v. Rowley, 458 U.S. 176 (1982); Cypress Fairbanks Independent School District v. Michael F., 118 F.3d 245 (5<sup>th</sup> Cir. 1997).
- Issue:** Whether the ARD committee of January 9, 2004 could legally revise ARD documents after the parent left the meeting.
- Held:** **For the school district.** Changes to documents after copies were given Petitioner were for clarification purposes. The requirements for an ARD report were not violated. 19 Tex. Admin. Code §89.1050(e); Tatro v. State of Texas, 703 F. 2d 823 (5<sup>th</sup> Cir. 1984).

**Issue:** Whether the District should have provided Student with special education services prior to January, 2004.

**Held:** **For the school district.** Petitioner did not meet his burden of proof on his claims regarding provision of special education services prior to January, 2004. C.F.R. §300.505; Tatro v. State of Texas, 703 F. 2d 823 (5<sup>th</sup> Cir. 1984).

**Issue:** Whether the IDEA requires that the District should have provided Petitioner's mother with prior notice of an outside consultation conducted on April 4, 2004.

**Held:** **For the school district.** Respondent was not required to provide Petitioner's mother with prior notice of an outside consultation conducted on April 4, 2004. C.F.R. §§300.503 and 300.505.