

CONSOLIDATED CASES
DOCKET NO. 333-SE-0604, 334-SE-0604, AND 335-SE-0604

Student, Student, and Student	§	BEFORE A SPECIAL EDUCATION
<i>b/n/f</i> Parent & Parent,	§	
Petitioners,	§	
	§	
V.	§	HEARING OFFICER
	§	
ALIEF INDEPENDENT	§	
SCHOOL DISTRICT,	§	
Respondent.	§	FOR THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

Procedural History and Issues

Parent and Parent, the parents of Student, Student, and Student (collectively referred to as “Petitioner”), filed separate requests for Due Process Hearing on June 2, 2004, under the Individuals with Disabilities in Education Act, 20 U.S.C. §1400 *et seq.*, (hereafter “IDEA”), complaining about the failure of Alief Independent School District (“Respondent,” “AISD,” or “the District”) to provide Student, Student, and Student with a free appropriate public education (“FAPE”). Upon the agreement of the parties, the Hearing Officer consolidated the three cases together for one hearing.

In the prehearing conference conducted on June 28, 2004, Parent appeared *pro se* for Petitioner; Respondent was represented by J. Erik Nichols, of the law firm Henslee, Fowler, Hepworth & Schwartz, L.L.P.

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

whether the Respondent should have provided services to Student, Student and Student during the extended school year, and more specifically, during the summer of 2004.

As relief Petitioner requested compensatory educational services.

On August 2, 2004, the Hearing Officer convened the Due Process Hearing. Parent again appeared *pro se* on Petitioner’s behalf, and Erik Nichols again represented Respondent. ***, director of special education for AISD also attended the hearing. Testimonial and documentary evidence were received, and 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 August 27, 2004. The Decision of the Hearing Officer was prepared in compliance with the deadline of September 9, 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 male residing with his parents within the geographic boundaries of Alief Independent School District. Student has been identified as a student eligible for special education services under the classification of speech impaired.
2. Student is a ***-year-old female residing with her parents within the geographic boundaries of Alief Independent School District. Student has been identified as a student eligible for special education services under the non-categorical early childhood classification and speech impaired classification.
3. Student is a ***-year-old male residing with his parents within the geographic boundaries of Alief Independent School District. Student has been identified as a student eligible for special education services under the classification of speech impaired.
4. Student, Student, and Student began receiving special education services from AISD on March 8, 2004, in the self-contained Preschool Program for Children with Disabilities (“PPCD”) classroom. An interim Admission, Review and Dismissal (“ARD”) committee met on March 1, 2004, and developed an interim Individualized Education Plan (“IEP”) for each of the children. The interim IEPs focused on the areas of communication, cognition, motor skills, self-help, socialization, and speech. Included were the following objectives:
 - Participate in music during circle time
 - Choose between two items (make a choice)
 - Follow simple one-step command
 - Make scribbles on paper with a crayon
 - Throw a ball
 - Imitate words
 - Wash/dry hands without assistance from an adult
5. Following completion of a Full Individualized Evaluation (“FIE”) for each child, the ARD committee met again on May 25, 2004, to review the children’s progress in the PPCD program and develop a more detailed IEP for each child for the upcoming school year. For example, Student’s IEP took each of the content areas and specified more detailed objectives. In the area of motor skills Student’s IEP listed the following objectives:
 - Pedal a tricycle

- Stand on one foot 3-4 seconds
- Hop on one foot (forward 5 hops)
- Broad jump 12", lands on both feet
- Gallop, not alternating feet
- Catch large tossed ball from 5 feet
- Walk length of balance beam
- Fold paper with a definite crease
- Build block structure after demonstration
- Hold crayon between thumb and index finger consistently
- Put together 6-8 piece puzzles
- Put small pegs in a pegboard

Similarly detailed objectives were developed for the other areas of cognition, self-help, socialization, and speech/language. The ARD committee also developed similarly, detailed and specific IEPs for Student and Student on May 25, 2004.

6. The ARD committee determined on May 25, 2004, that the children had made progress during the time they had received services in the PPCD program, and the children did not need extended school year services.
7. Because there had been no significant break from school during the time the children had been receiving services in the PPCD classroom, the ARD committee had no data to consider whether any of the children demonstrated regression.
8. The speech pathologist who worked with all three children observed that Student was making progress on her IEP goals and objectives. For example, she was making choices more at the end of the year than when she first started in the program. She was beginning to follow one-step commands and would participate in music more during the circle time. She was also saying more sounds and more words at the end of the year versus when she first began.
9. Student also demonstrated progress toward his IEP goals and objectives. He was talking more and interacting more with the other children. He was using simple phrases to request items that he wanted, and he did not need any hand-over-hand assistance in activities. When he first started the program he would just wander around the room and not really engage in any particular activity, but by the end of the year he was going up to other children and playing appropriately with the toys.
10. When Student first started in the PPCD classroom, he had a difficult time. He had a lot of tantrums and unwillingness to participate or comply with directions. By the end of the school year he was making a little better eye contact. Instead of throwing toys, he would play with them a little more appropriately and would not kick the toys as much.

11. All three children also received therapy at home all day on Tuesdays and Thursdays. They are also involved with the family and church, thus receiving support and education from a variety of sources.

Discussion

The parents' concern in this case is what happens when children, who are already working below the level of their peers, do not receive school year round? If they are already behind, will they not just be falling further behind? This very legitimate concern deserves attention. The federal regulations implementing the IDEA address this concern:

Federal Regulations

§300.309 Extended school year services.

- (a) *General.*
 - (1) Each public agency shall ensure that extended school year services are available as necessary to provide FAPE, consistent with paragraph (a)(2) of this section.
 - (2) Extended school year services must be provided only if a child's IEP team determines, on an individual basis, in accordance with §§300.340–300.350, that the services are necessary for the provision of FAPE to the child.
 - (3) In implementing the requirements of this section, a public agency may not—
 - (i) Limit extended school year services to particular categories of disability; or
 - (ii) Unilaterally limit the type, amount, or duration of those services.
- (b) *Definition.* As used in this section, the term *extended school year services* means special education and related services that—
 - (1) Are provided to a child with a disability—
 - (i) Beyond the normal school year of the public agency;
 - (ii) In accordance with the child's IEP; and
 - (iii) At no cost to the parents of the child; and
 - (2) Meet the standards of the [state educational agency].

34 U.S.C. §300.309

State Rules

Additionally, Texas Education Agency has specified criteria for determining when extended school year services must be provided.

§89.1065 Extended School Year Services (ESY Services).

Extended school year (ESY) services are defined as individualized instructional programs beyond the regular school year for eligible students with disabilities.

- (1) The need for ESY services must be determined on an individual student basis by the admission, review, and dismissal (ARD) committee in accordance with 34 Code of Federal Regulations (CFR), §300.309, and the provisions of this section. In determining the need for and in providing ESY services, a school district may not:
 - (A) limit ESY services to particular categories of disability; or
 - (B) unilaterally limit the type, amount, or duration of ESY services.
- (2) The need for ESY services must be documented from formal and/or informal evaluations provided by the district or the parents. The documentation shall demonstrate that in one or more critical areas addressed in the current individualized education program (IEP) objectives, the student has exhibited, or reasonably may be expected to exhibit, severe or substantial regression that cannot be recouped within a reasonable period of time. Severe or substantial regression means that the student has been, or will be, unable to maintain one or more acquired critical skills in the absence of ESY services.
- (3) The reasonable period of time for recoupment of acquired critical skills shall be determined on the basis of needs identified in each student's IEP. If the loss of acquired critical skills would be particularly severe or substantial, or if such loss results, or reasonably may be expected to result, in immediate physical harm to the student or to others, ESY services may be justified without consideration of the period of time for recoupment of such skills. In any case, the period of time for recoupment shall not exceed eight weeks.
- (4) A skill is critical when the loss of that skill results, or is reasonably expected to result, in any of the following occurrences during the first eight weeks of the next regular school year:
 - (A) placement in a more restrictive instructional arrangement;
 - (B) significant loss of acquired skills necessary for the student to appropriately progress in the general curriculum;
 - (C) significant loss of self-sufficiency in self-help skill areas as evidenced by an increase in the number of direct service staff and/or amount of time required to provide special education or related services;

- (D) loss of access to community-based independent living skills instruction or an independent living environment provided by non-educational sources as a result of regression in skills; or
 - (E) loss of access to on-the-job training or productive employment as a result of regression in skills.
- (5) If the district does not propose ESY services for discussion at the annual review of a student's IEP, the parent may request that the ARD committee discuss ESY services pursuant to 34 CFR, §300.344.
 - (6) If a student for whom ESY services were considered and rejected loses critical skills because of the decision not to provide ESY services, and if those skills are not regained after the reasonable period of time for recoupment, the ARD committee shall reconsider the current IEP if the student's loss of critical skills interferes with the implementation of the student's IEP.
 - (7) For students enrolling in a district during the school year, information obtained from the prior school district as well as information collected during the current year may be used to determine the need for ESY services.
 - (8) The provision of ESY services is limited to the educational needs of the student and shall not supplant or limit the responsibility of other public agencies to continue to provide care and treatment services pursuant to policy or practice, even when those services are similar to, or the same as, the services addressed in the student's IEP. No student shall be denied ESY services because the student receives care and treatment services under the auspices of other agencies.
 - (9) Districts are not eligible for reimbursement for ESY services provided to students for reasons other than those set forth in this section.

19 Texas Admin Code §89.1065

Analysis

The major difficulty in this case lies in the very short time frame that the children participated in the PPCD program at AISD. Based on data obtained in a little over 2 ½ months, one must determine whether “. . . the student has exhibited, or reasonably may be expected to exhibit, severe or substantial regression that cannot be recouped within a reasonable period of time.” Severe or substantial regression inquires into the maintenance of critical skills. In order to ascertain what is a critical skill, one of five areas must be implicated, as discussed in §89.1065 (4) above. And finally, the rule applies a reasonable period for recoupment of an acquired critical skill, but “In any case, the period of time for recoupment shall not exceed eight weeks.” *See* §89.1065 (3) above.

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SCHOOL DISTRICT,	§	
Respondent.	§	FOR THE STATE OF TEXAS

SYNOPSIS

ISSUE: Whether the Respondent should have provided services to the students during the extended school year, and more specifically, during the summer of 2004?

HELD: For Respondent.

CITATIONS: 34 C.F.R. §300.309; 19 TEX. ADMIN. CODE §89.1065