

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

**DECISION OF THE HEARING OFFICER**

**Procedural History and Issues**

Petitioner, Parent, the mother of Student, requested this Due Process Hearing under the Individuals with Disabilities in Education Act, 20 U.S.C. §1400 *et seq.* (“IDEA”). She asserts the Respondent, Houston Independent School District (“HISD”) failed to provide Student with a free appropriate public education (“FAPE”).

Both parties are represented by attorneys. Mr. Mario Cabellero represents the student and her mother. Mr. Hans Graff is Assistant General Counsel for HISD and represents the District.

The attorneys and I conducted a telephone prehearing conference on July 8-9, 2004. The original decision deadline was July 31, 2004, but we agreed to a hearing date of August 2, 2004, to accommodate school personnel witnesses (many of whom were on summer vacation). The decision deadline was extended until September 2, 2004, to provide time for preparation of the record, written arguments by counsel, and writing the decision. The parties further agreed to hold the hearing in the administrative offices of

HISD.

We also agreed that the issues would be as follows:

1. Whether HISD failed to conduct proper and timely transfer ARD meetings following Student's transfer from \*\*\* to \*\*\* School.
2. Whether HISD made appropriate efforts to obtain Parent's participation in the development of Student's IEP (and more specifically whether the District should have used a conference telephone instead of a plain telephone to allow Parent to participate in the development of Student's IEP by telephone).

3. Whether the Texas/HISD requirement that a licensed doctor make the "other health impairment" eligibility determination violates IDEA.
4. Whether IDEA requires HISD to accept an "other health impairment" eligibility determination made by a psychologist when Student attended school in \*\*\*.
5. Whether HISD's request for an order allowing it to have a licensed physician or psychiatrist examine Student for special education eligibility in the "other health impairment" category without parental consent should be granted.

Petitioner requests relief in the form of a placement based on a \*\*\* psychologist's determination that Parent qualifies for special education services in the "other health impairment" category. Petitioner also seeks compensatory education, and \$10,000 in damages. HISD seeks an order allowing Student to be tested by a psychiatrist or medical doctor without parental consent to find out if Student meets Texas requirements for special education services in the "other health impairment" category.

### **Findings of Fact**

1. Student attended school in \*\*\* before transferring to \*\*\* School as a \*\*\* year old \*\*\* grade student in August 2003. \*\*\* School is part of HISD.
2. Student's previous school in \*\*\* was part of the Beverly Hills Unified School District. Her previous school found Student to be eligible for special education services as an "other health impaired" student based on an evaluation conducted by a psychologist in March 2002.<sup>1</sup>

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<sup>1</sup> Petitioner's Exhibit 1. Respondent's Exhibits. 1, 2, 5, and 6.

3. In the summer of 2003, Student moved from \*\*\* where she had been living with her grandfather to live with her mother, Parent, in Texas. Parent enrolled Student in \*\*\* School on August 28, 2003.<sup>2</sup>
4. Parent completed enrollment forms at \*\*\* School to show that Student had not received special education services in \*\*\*. The school had no notice that Student had been receiving special education student until it received school records from \*\*\*.<sup>3</sup>
5. Some agreement and some discrepancies exist between the testimony of Parent and the school witnesses and records recalling preliminary contacts between Parent and the Special Education Department.
6. The records kept by Special Education Department Chair, \*\*\*, and her testimony reflect that \*\*\* tried on several occasions to contact Parent by both phone and in writing to invite her to a transfer ARD meeting at a mutually convenient time. The dates on which she did this were September 2, 2003, September 4, and September 11, 2003.<sup>4</sup> Written messages went unanswered and \*\*\* was unsuccessful in reaching Parent by phone. On one occasion \*\*\* left a message for Parent on an office answering machine.
7. \*\*\*'s notes show that on September 15, 2004, \*\*\* reached Parent by phone and received her permission to do a transfer ARD with Parent taking part by phone rather than in person. \*\*\* recalls telling Parent the school had received records from \*\*\* showing Student had been a special education student there. \*\*\* said that \*\*\* School would temporarily place Student in a special education program while it gathered more information from \*\*\* and did its own assessment of

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<sup>2</sup> Respondent's Exhibit. 10.

<sup>3</sup> Tr. 115, 130.

<sup>4</sup> Respondent's. Exhibits 14-16.

Student's needs. \*\*\* advised Parent that \*\*\* School would have a follow-up ARD meeting within 30 days to develop a permanent IEP for Student after it had more information and said she would invite Parent to that ARD meeting. \*\*\* documented the file with this same information and the file shows that she sent Parent a copy for Parent's signature. The entire "meeting" with Parent took place on a "conventional" telephone (as distinguished from one with conferencing ability). Although there were other ARD committee members present, \*\*\* was the only committee member who talked to Parent on the phone.

8. \*\*\*'s notes reflect that on September 17, September 24, and October 2, 2003, \*\*\* sent Parent invitations to ARD meetings scheduled at various times. A notice issued on October 2, 2003 schedules an ARD meeting for 12:00 p.m. on October 13, 2003.<sup>5</sup>
  
9. On October 13, 2003, the school held the ARD committee meeting scheduled in the notice of October 2, 2003. Student told committee members that Parent was not coming to the meeting but they could reach her by phone. Parent had taken her son to the dentist. The ARD committee reached her on her cell phone at the dentist office. \*\*\*'s notes recorded that Parent gave permission to conduct the meeting with Parent taking part by phone. No conference phone was available and Parent could talk to only one person at a time and could not hear the discussion among other ARD committee members.

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<sup>5</sup> Respondent's Exhibit 16.

10. Several of the committee members talked to Parent one at a time according to \*\*\*'s notes. They told Parent that Student did not test as a special education eligible student except in Speech. They asked permission to have her examined by a licensed physician or psychiatrist to see if Student met special education eligibility criteria in the other health impairment (OHI) category. They explained to Parent that Texas does not accept OHI determinations by psychologists and that a psychologist made the \*\*\* OHI determination and it was therefore unacceptable in Texas. Student told Parent that she did not want to be in special education and Parent repeated several times that she did not want Student in special education. Parent refused testing permission.
  
11. Parent recalls two phone conversations with the Special Education Office about this time. The first one was to cancel an ARD meeting that she had planned to attend and the second one at the Dentist office. Her memory of the conversation at the Dentist Office is corroborative of \*\*\*'s notes of the October 13, 2003 ARD meeting. Parent was not aware that either phone conversation was an ARD meeting conducted by telephone. She does not recall anyone either asking her to take part in a telephone ARD meeting or agreeing to do so. She does not recall receiving written materials to sign and return to the Special Education Office. She explains that she had difficulty understanding some of what went on in the conversations because they were conducted in English and her native language is Spanish.<sup>6</sup>
  
12. I find that \*\*\*'s notes are accurate and that inconsistencies between her notes and Parent's memory of events are because of Parent's lack of understanding of the

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<sup>6</sup> The ARD should have been conducted in Parent's native language or the District should have provided her an interpreter. However, Exhibit 13 is a home language survey completed for the school district signed by Parent which identifies the language usually spoken in the home as English. I don't think one can blame the school district for communicating with Parent in what she told the school was her primary language.

ARD and her fading memory.<sup>7</sup> I find the school gave the written materials to Student to take home as recorded in \*\*\*'s notes but have no way of knowing whether Student delivered them to Parent.

## **Analysis**

### **Issue 1. Whether HISD failed to conduct proper and timely transfer ARD meetings following Student's transfer from \*\*\* to \*\*\* School.**

The applicable law appears in 19 TAC §89.1050(f), which reads as follows:

#### **§89.1050. The Admission, Review, and Dismissal (ARD) Committee**

(f) For a student who is new to a school district:

(1) [Inapplicable as it pertains to a student transferring from another school district within the State of Texas]

(2) . . . [For other students transferring in from outside the state] the ARD committee must meet when the student enrolls and the parents verify that the student was receiving special education services in the previous school district, or the previous school district verifies in writing or by telephone that the student was receiving special education services. At this meeting the ARD committee must do one of the following:

(A) the ARD committee may determine that it has appropriate evaluation data and other information to develop and begin implementation of a

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<sup>7</sup> I don't mean this as critical. I can seldom recall details of conversations and meetings I had a year ago. That is why I have Mr. Naegele (the court reporter) take down all my hearings and prehearing conferences.

complete IEP for the student; or

- (B) the ARD committee may determine that valid evaluation data and other information from the previous school district are insufficient or unavailable to develop a complete IEP. In this event, the ARD committee may authorize the provision of temporary special education services pending receipt of valid evaluation data from the previous school district or the collection of new evaluation data by the current school district. In this situation, a second ARD committee meeting must be held within 30 school days from the date of the first ARD committee meeting to finalize or develop an IEP based on current information.

The testimony and Respondent's exhibits 14-16 demonstrate that the ARD committee correctly followed the procedures in 19 TAC §89.1050(f)(2)(B). \*\*\* attempted to contact Parent both in writing and by telephone to invite her to attend an ARD committee meeting related to Student's transfer from her prior school in \*\*\* to \*\*\* School. Finally after two unsuccessful attempts to have an ARD meeting with Parent present, an ARD meeting was held on September 15, 2003. Parent was contacted by phone and gave her permission to proceed with the ARD without her being present. The ARD committee decided to provide temporary special education services to Student pending receipt of valid evaluation data from her prior school in \*\*\* and the collection of new evaluation data by HISD. It was also agreed that a second ARD committee meeting would be held within 30 school days to finalize or develop an IEP based on current information.

**Issue 2. Whether HISD made appropriate efforts to obtain Parent's participation in the development of Student's IEP (and more specifically whether the District should have used a conference telephone instead of a plain telephone to allow Parent to participate in the development of Student's IEP by telephone).**

The applicable law in 34 CFR 300.501 (c) reads as follows:

(c) Parent involvement in placement decisions.

- (1) Each public agency shall ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.
- (2) In implementing the requirements of paragraph (c)(1) of this section, the public agency shall use procedures consistent with the procedures described in Sec. 300.345(a) through (b)(1) [pertaining to notifying the parents of meetings and scheduling the meetings at mutually convenient times, and notifying the parents of the purpose of meetings and who will be in attendance].
- (3) If neither parent can participate in a meeting in which a decision is to be made relating to the educational placement of their child, the public agency shall use other methods to ensure their participation, including individual or conference telephone calls, or video conferencing. (Emphasis added).
- (4) A placement decision may be made by a group without the involvement of we parents, if the public agency is unable to obtain the parents' participation in the decision. In this case, the public agency must have a record of its

attempt to ensure their involvement, including information that is consistent with the requirements of Sec. 300.345(d).

The record documentation is clear that the District made every effort to involve Parent in the decision making process for Student's placement. Exhibits 14 and 15 document that Parent was sent numerous invitations to both the first and second ARD meetings and that both meetings were rescheduled several times in an attempt to get her participation. Copies of notices that the District sent to Parent are contained in Exhibit 15.

I certainly agree with Mr. \*\*\* that a conference call which allowed Parent to hear all of the ARD participants would have been preferable to a conventional phone call in which she could only hear one person unless the phone was passed around. However, the use of individual phone calls (as distinguished from conference phone calls) to secure a parent's participation is expressly authorized in 34 CFR 300.501 (c)(3) as quoted above.

**Issue 3. Whether the Texas/HISD requirement that a licensed doctor make the "other health impairment" eligibility determination violates IDEA.**

The Office of Special Education Programs (OSEP) which is the federal office that administers IDEA for the U.S. Department of Education has issued two advisory letters opining that the requirement that an "other health impairment" be diagnosed by a licensed physician or psychiatrist does not violate IDEA. These are Letter to Hudgins, 23 IDELR 347 (1995) and Letter to Parker, 18 IDELR 963 (1992). In addition, the U.S. Eighth Circuit has upheld a requirement that diagnosis be by a licensed physician for purposes of determining eligibility for OHI special education and services within the State of Nebraska. Costello v. Mitchell Pub. Sch. Dist. 79, 266 F.3d 916 (8th Cir. 2001)

**Issue 4. Whether IDEA requires HISD to accept an "other health impairment" eligibility**

**determination made by a psychologist when Student attended school in \*\*\*.**

OSEP Memorandum 96-5, 24 IDELR 320 (Dec. 1995) opines that the receiving school district has the option of either accepting the out-of-state evaluation or of doing its own. OSEP Memorandum 96-5 was quoted with approval and followed in Michael C. ex rel. Stephen C. v. Radnor Twp. Sch. Dist., (3rd. Cir.) 202 F.3d 642 cert. den. 531 U.S. 813, 148 L. Ed. 2d 17, 121 S. Ct. 47 (2000).

**Issue 5. Whether HISD's request for an order allowing it to have a licensed physician or psychiatrist examine Student for special education eligibility in the "other health impairment" category without parental consent should be granted.**

Texas Education Code § 29.016 provides that a special education hearing officer in an impartial due process hearing brought under 20 U.S.C. Section 1415 may issue an order or decision that authorizes one or more evaluations of a student who is eligible for, or who is suspected of being eligible for, special education services. Such an order or decision authorizes the evaluation of the student without parental consent as if it were a court order for purposes of any state or federal law providing for consent by order of a court.

Prior to the reauthorization of IDEA in 1997, the United States Fifth Circuit disposed of the issue of whether a school district has a right to conduct its own evaluation of a student. In Andress v. Cleveland Independent School Dist., 6 F3d 176 (Fifth Cir. 1995) the court overruled a parent's refusal to grant the district permission to conduct a three year reevaluation. The court did this in spite of the claim of the parents that the evaluation would harm the student. This is also the law in other circuits. If a student's parents want him or her to receive special education under IDEA they must allow the school itself to reevaluate the student and they cannot force the school to rely solely on an independent evaluation. Gregory K. v. Longview School Dist., 811 F.2d 1307, 1315 (9th Cir. 1987) ("If the parents want [the student] to receive special education under the Act,

they are obliged to permit such testing."); Dubois v. Conn. State Bd. Of Ed., 727 F.2d 44, 48 (2d Cir. 1984)("[T]he school system may insist on evaluation by qualified professionals who are satisfactory to the school officials."); Vander Malle v. Ambach, 673 F.2d 49, 53 (2d Cir. 1983) (School officials are "entitled to have [the student] examined by a qualified psychiatrist of their choosing.").

Texas Education Hearing Agency decisions have frequently overridden the lack of parental consent to order medical or psychiatric evaluations to confirm whether children were eligible for Special Education Services. See, for example, Spring Branch ISD v. Matthew H. bnf Mark & Collette H., TEA Docket No. 088-SE-1101 (April 8, 2002); Irene Y., bnf P. D. Y. v. Houston ISD, TEA Docket No. 153-SE-0102 (March 8, 2002); and Jerail H.bnf Brenda H. v. Alief ISD, TEA Docket No. 282-SE-0501 (September 28, 2001).

#### Conclusions of Law

1. HISD has complied with the appropriate procedures for temporary placement of a student in special education programs followed up within 30 days after more information is available with a detailed IEP.
2. HISD complied with IDEA requirements to attempt to involve the parent in the placement decision by scheduling and inviting Parent to two ARD meetings to plan Student's placement.
3. When Parent failed to attend the ARD meetings in person, HISD followed up appropriately by allowing her to participate by phone.
4. Petitioner is not entitled to relief in the form of a placement based on a \*\*\* psychologist's determination that Student qualifies for special education services in the OHI category. HISD need not accept the \*\*\* psychologist's determination of

OHI eligibility but may do its own assessment of OHI eligibility through licensed physicians or psychiatrists at state expense.

5. Petitioner is not entitled to relief in the form of compensatory education since any special education services Student may have missed were missed in part because Parent asked that Student be taken out of special education and refused to allow the school district to have a doctor or psychiatrist assess whether Student is eligible for special education services in the OHI category.
6. Tort like money damages are not available under IDEA and Petitioner's claim for \$10,000 in damages is therefore denied.<sup>8</sup>
7. HISD seeks an order allowing Student to be examined by a psychiatrist or medical doctor without parental consent to find out if Student meets Texas requirements for special education services in the "other health impairment" category. This relief is hereby granted. HISD shall pay all costs associated with the examination.

#### ORDER

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that all relief requested by Petitioner is DENIED.

The School District is authorized to have Student tested by a psychiatrist or medical doctor to find out if Student meets Texas requirements for special education services in the "other health impairment" IDEA category.

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<sup>8</sup> See Nieves-Marquez v. Puerto Rico, 353 F.3d 108, 124 (1st Cir. 2003); Crocker v. Tennessee Secondary Sch. Athletic Ass'n, 980 F.2d 382, 386-387 (6th Cir. 1992); Heidemann v. Rother, 84 F3d 1021, 1033 (8th Cir. 1996); and Sellers v. School Bd., 141 F3d 524, 527 (4th Cir.) cert. denied 525 U.S. 8711, 119 S. Ct. 168 (1998).

SIGNED this 30th day of August, 2004.

/s/ Larry J. Craddock

Larry J. Craddock

Special Education Hearing Officer

DOCKET NUMBER 346-SE-0604

Student *b/n/f* § BEFORE A SPECIAL EDUCATION  
Parent, §  
Petitioner §  
V. § HEARING OFFICER  
§  
HOUSTON INDEPENDENT §  
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SYNOPSIS

**Issue No. 1:** Whether HISD failed to conduct proper and timely transfer ARD meetings following Student's transfer from \*\*\* to \*\*\* School.

**Held:** For the School District. The ARD committee correctly followed 19 TAC §89.1050(f)(2)(B) by holding a transfer ARD meeting soon after learning that Student had been a special education student in \*\*\*. In its first meeting the ARD committee voted to provide Student temporary special education services while doing a complete assessment of her needs. The committee then scheduled a second ARD meeting within 30 school days of the first one as required by 19 TAC §89.1050(f)(2)(B). The mother took part by phone in both ARD meetings.

**Citation:** 19 TAC §89.1050(f)(2)(B).

**Issue No. 2:** Whether HISD made appropriate efforts to obtain Parent's participation in the development of Student's IEP (and more specifically whether the District should

have used a conference telephone instead of a plain telephone to allow Parent to participate in the development of Student's IEP by telephone).

**Held:** For the School District. HISD invited the mother to attend both the first and second ARD meetings and rescheduled them several times to try to get her to take part. She took part in both meetings by phone. Unfortunately, available phone equipment did not have conferencing capacity so the mother could hear only one person at a time but the procedure used complied with 34 CFR 300.501 (c).

**Citation:** 34 CFR 300.501 (c).

**Issue No. 3:** Whether the Texas/HISD requirement that a licensed doctor make the "other health impairment" eligibility determination violates IDEA.

**Held:** For the School District. IDEA leaves the issue of who will make this eligibility determination to the states.

**Citation:** OSEP advisory letters: Letter to Hudgins, 23 IDELR 347 (1995) and Letter to Parker, 18 IDELR 963 (1992); Costello v. Mitchell Pub. Sch. Dist. 79, 266 F.3d 916 (8th Cir. 2001).

**Issue No. 4:** Whether IDEA requires HISD to accept an "other health impairment" eligibility determination made by a psychologist when Student attended school in \*\*\*.

**Held:** For the School District. IDEA leaves the issue of whether to accept the out-of-state evaluation to the discretion of the receiving school district.

**Citation:** OSEP Memorandum 96-5, 24 IDELR 320 (Dec. 1995); Michael C. ex rel. Stephen C. v. Radnor Twp. Sch. Dist., (3rd. Cir.) 202 F.3d 642 cert. den. 531 U.S. 813, 148 L. Ed. 2d 17, 121 S. Ct. 47 (2000).

**Issue No. 5:** Whether HISD's request for an order allowing it to have a licensed physician or psychiatrist examine Student for special education eligibility in the "other health impairment" category without parental consent should be granted.

**Held:** For the School District. A special education hearing officer in an impartial due process hearing may issue an order that authorizes an evaluation of a student who is eligible for, or who is suspected of being eligible for, special education services without parental consent.

**Citation:** Texas Education Code § 29.016; Andress v. Cleveland Independent School Dist., 6 F3d 176 (Fifth Cir. 1995); Gregory K. v. Longview School Dist., 811 F.2d 1307, 1315 (9th Cir. 1987); Dubois v. Conn. State Bd. Of Ed., 727 F.2d 44, 48 (2d Cir. 1984); Vander Malle v. Ambach, 673 F.2d 49, 53 (2d Cir. 1983).