
DOCKET NO. 085-SE-1104

STUDENT	§	BEFORE A SPECIAL
	§	EDUCATION
B/N/F PARENTS	§	
	§	
VS.	§	HEARING OFFICER
	§	
CLEAR CREEK INDEPENDENT	§	
SCHOOL DISTRICT	§	FOR THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

PROCEDURAL HISTORY

The above-captioned Request for Impartial Due Process Hearing pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1400 et seq. (hereinafter “IDEA”), was received by Texas Education Agency on 11/16/04, assigned to the undersigned Impartial Hearing Officer, and set for hearing on 12/10/04, with a decision deadline of 12/31/04. A telephone pre-hearing conference convened on 11/22/04, in which the parties clarified the nature of Petitioner’s complaints and relief request. Counsel in the pre-hearing conference identified scheduling difficulties that merited a continuance of the trial setting and an extension for good cause of the decision due date. The matter was set for hearing on 1/10-11/05, with a decision deadline of 2/1/05. The hearing convened as scheduled. Testimony of Parent was elicited and received through a certified Spanish-language interpreter. All evidence was received on 1/10-11/05, and the record was closed on that date except for final argument, which was scheduled by agreement for written submission on 2/1/05. The decision deadline was extended to 2/21/05. The record closed upon the submission of final argument on 2/1/05. The Decision of the Hearing Officer was filed in the record and mailed to the parties on 2/21/05. Throughout the proceedings Petitioner was represented by Christopher Jonas, Attorney at Law, and Respondent Clear Creek I.S.D. by Jeff Rogers, Attorney at Law.

STATEMENT OF THE CASE

As disclosed in the Request for Hearing and clarified in the Pre-hearing Conference, Petitioner alleged that Clear Creek ISD (hereinafter “CCISD”) violated Petitioner’s right to a free, appropriate public education in the following manner:

1. Failure to provide an appropriate extended school year program last year that was individualized to address Student’s needs for services to prevent regression;
2. Failure to provide appropriate in-home training

3. Failure to provide appropriate assistive technology in the area of communication;
4. Failure to provide appropriate community based instruction (hereinafter "CBI").

Petitioner requests the following items of relief from Clear Creek I.S.D. for the above-listed alleged violations:

1. Compensatory speech therapy;
2. Appropriate assistive technology evaluation by ***;
3. Compensatory extended school year services;

FINDINGS OF FACT

1. Student is ** years old and eligible special education under the classifications of Autism, mental retardation, and speech impaired. Stipulation
2. As of his current 1/16/03 assessment Student's mental deficiency is described as severe to profound, and his speech deficits as severe. His areas of educational need at the time of that evaluation included self-help skills, matching objects, following schedule independently, attending to task without prompting, attending to social speaker or initiating communication purposefully, and resisting compliance via behaviors such as flopping down on the floor refusing to move. Though lacking expressive language Student could respond to some basic verbal commands. Respondent's Exhibit (hereinafter "R")-5.
3. Student's 1/16/03 speech evaluation recommended speech-language therapy, and establishing a total communication system employing a variety of modalities. R-5.
4. In Student's Individualized Education Program (hereinafter "IEP") for the year beginning 2/22/02, Student was slated in his schedule of services to receive in-home training as an instructional service for a total of 60 minutes per month for the remainder of the 2001-02 school year, and 30 minutes per month in the 2002-03 school year leading up to his next annual IEP. Additionally parent training was scheduled at the rate of 45 minutes every 9 weeks. Petitioner's Exhibit (hereinafter "P")-21.
5. Student's ARDC¹¹ that met on 3/4/03 put in-home training in the schedule of services as a related service, in the amount of 30 minutes every 9 weeks. Student's 3/4/03 ARD / IEP Supplement for students with Autism (hereinafter "IEP Supplement") states further in regard to in-home training or viable alternatives: "in-home training will involve the transfer of skills from school to home by having the parents, teachers, and [Student] meet at school 1x9 weeks for a minimum of 30 minutes ... [t]he teachers will explain and demonstrate steps needed for the identified task." R-2.
6. At all times relevant to Petitioner's complaints, CCISD assigned in-home training responsibilities and parent training responsibilities to the same school staff member. Transcript Page (hereinafter "Tr.") 264.
7. The 3/4/03 ARDC in addition to in-home training scheduled parent training "in the form of parent / staff meetings 1x9 weeks for a minimum of 30 minutes per session." Parent training mentioned in the IEP Supplement was listed in the schedule of services as a related service, to be provided as stated in the IEP Supplement. R-2.
8. Student's 3/4/03 IEP included a goal and objectives for parent training. No IEP goal or objectives were included for in-home training. R-2.
9. The District understood based on the 3/4/03 IEP that parent training would consist of the parent and teacher meeting once per 9 weeks for the parent to observe the teacher

working with the student in order to assist the parent in modeling successful techniques for working with Student. Tr. 281-282.

10. Pursuant to the 3/4/03 IEP, one home visit occurred on 10/10/03, where in-home training was provided. Additionally the in-home trainer spent from 8:00 A.M. to 2:00 P.M. on 1/12/04 attending a workshop on training techniques at parent request. The training session took place in a hotel. The in-home trainer did not work directly with Student during that session but did discuss intervention strategies for Student with his parents. The in-home trainer also observed Student in the school cafeteria on 9/8/03 and discussed Student's eating behaviors with the parents. Also pursuant to the 3/4/03 IEP, one parent training contact took place, on 12/12/03. R-9; Tr. 301-304.
11. The District's in-home trainer understood that for the 2003-04 school year, parent training was provided but in-home training was not. Tr. 282-283.
12. No in-home training services were provided in summer 2004. The decision to omit such services was based in part on the understanding that Student had not received such services in the 2003-2004 school year. Tr. 133-134
13. Student's 3/4/03 annual IEP included among his goals that Student was to initiate communication about needing to go to the bathroom using picture symbols, communication device, or moving in the direction of the bathroom. Student's objective was to indicate need to go to the bathroom using communication devices 6 out of 10 tries. Student made progress on this objective in the classroom setting, to the extent of being 80-100% successful in spontaneously demonstrating the behavior. R-2, R-3.
14. Student's 3/4/03 IEP Supplement listed as second of two prioritized behavioral objectives, "initiate need to use bathroom."
15. Student's 3/31/04 ARDC at parent request provided parent training and eliminated in-home training. R-1.
16. The 3/31/04 ARDC determined it was not necessary to provide in-home training as part of the services scheduled for Student for summer 2004. The ARDC in making this determination considered that in-home training had been provided for many years, that in-home training was not provided in the 2003-04 school year, and that Student's parents were requesting parent training only for the 2004-05 school year. The ARDC also considered that Student had made good progress in the 2003-04 school year in several areas. Tr. 282-284; Tr. 213-215.
17. Student's 3/31/04 ARDC did not include in Student's IEP for the upcoming year an objective for indicating the need to go to the restroom using a communication device. Rather, the IEP focused on objectives related to managing his clothing after completing restroom activities.
18. Student's 3/31/04 IEP Supplement listed as the first of two prioritized behavioral objectives, "initiate the need to use the restroom." Student's toileting skills have remained a priority objective for his classroom teacher, probably a priority above everything else. R-1; Tr. 211, 238.
19. Student's 3/31/04 IEP did not include objectives nor did it schedule services in the area of parent training or in-home training. However, the IEP Supplement stated that the parent was to meet with the trainer a minimum of one time per 9 weeks to ensure consistency between home and school. R-1.
20. The BIGmack is a single-switch voice output device with a large button that, when pushed, activates a voice that has been recorded into the device. The BIGmack was used by the District with Student with the rationale that, if Student is taught and learns to push the button every time before he is taken to the restroom, he will associate needing the restroom with pushing the button. Then, he can initiate pushing the button independently,

to signal others that he needs the restroom. The BIGmack was thus conceptualized as a communication device for Student. Tr. 170-172.

21. Student's teacher began using the BIGmack with Student in or prior to spring 2003. The BIGmack has always been used for the purpose of a communication device for Student to indicate needing the restroom. Student has been successful in using the BIGmack for communication in the classroom. Tr. 234, 210.
22. The District provided a BIGmack for Student's parents to use in the home. The BIGmack was provided to the parents some time between 3/4/04 and 4/28/04. The latter date is when the District provided training for Student's parents, on how to use the BIGmack at home the same way it was being used in school. Tr. 180, 242; R-6.
23. The only training provided Student's parents in using the BIGmack at home was on 4/28/04. Student's teacher has observed Parent using the BIGmack in a different manner than is being used in the classroom. Parent observed teachers using the BIGmack at school but does not recall when this occurred. Parent told Student's teacher that she is not using the BIGmack the same way at home as it is used in school. Student has not been successful using the BIGmack at home in the way he uses it in the classroom. Tr. 190, 238-240, 141-144.
24. Parent understood that she was not supposed to tell Student to push the button on the BIGmack every time when initiating a restroom request. Tr. 140
25. Student uses picture symbols as another form of assistive technology to assist his communication. In school the picture symbols were presented and used by Student in a notebook. Student's teacher observed at or near the beginning of the 2003-04 school year that Student was not making effective use of picture symbols presented in the notebook. His teacher changed the method of presentation first placing the picture symbols in a strip on the desk, then presenting them on a post-it board. A while back Student's parents used a notebook to present his picture symbols. When Student's teacher replaced the notebook with the post-it board, she informed the in-home trainer and the assistive technology consultant, and believed that the family was asked to make this transition also. Student's in-home trainer assisted Parents in obtaining a poster board and posting picture symbols strategically in the home. R-2, R-1; Tr. 29, 198, 206-207, 230-232, 295-296.
26. Student's summer 2004 extended school year ("ESY") program prioritized toileting skills in the classroom. Student used the BIGmack during the summer, according to written instructions provided to the summer ESY teacher by Student's school-year classroom teacher. Student received 3.5 hours of ESY instruction daily for 23 days between the conclusion of the 2003-2004 school year and July 21st or 22nd 2004. Student maintained his toileting skills in the ESY classroom. R-1; Tr. 248-249.
27. Student's ESY teacher also used the picture symbol communication technology with Student, presenting the picture symbols in a strip on the desk because no post-it board was available. Student maintained his use of picture symbols in ESY. Tr. 253-254.
28. Student's ESY teacher did not communicate with Student's in-home or parent trainer and did not communicate with the school-year classroom teacher at the conclusion of ESY. The ESY teacher was not aware of how Student was communicating restroom needs at home. Tr. 254.
29. Student uses a computer in his classroom. The computer presents instructions to select among several items with the objective for Student to select the correct item. In the fall 2004 Student began to make some progress using the computer for this purpose. Tr. 215.
30. Student's classroom teacher has extensive experience working with students with Autism. Structure, consistency, and communication are extremely important in working with students having Autism. It is important that Student be taught at home in the same

way he is taught at school, and that he use picture symbols in the same way in both settings. Tr. 236-243.

31. Student regressed quite a bit over summer 2004 with respect to his indicating need for the restroom at home. When he returned to school in fall 2004 his teacher also noted that he had regressed and was having toilet accidents where he soiled himself quite often in class. Student's teacher worked to recover the level of performance that existed in spring 2004 in this area, and as of December 2004, Student recouped his prior level of performance. Tr. 45, 64, 221.
32. Student's 3/31/04 IEP for functional social studies contains five objectives, one of which is to show participation in a group by attending to an activity in the community setting. Student participated in CBI outings last school year, and those outings were very beneficial for him. As of the hearing date, no CBI outings had taken place for Student to participate in during the 2004-2005 school year. Tr. 216-217, 243.
33. Student's 3/31/04 IEP scheduled Student to receive direct speech therapy for 30 minute sessions, 30 sessions during the regular school year. No speech therapy was scheduled for Student's ESY session. All members of Student's ARDC approved this schedule for speech services. R-1.

DISCUSSION

IDEA's mandate for school districts to provide eligible students with a free appropriate public education (hereinafter "FAPE") requires that the student's IEP be developed in accordance with prescribed procedures, and be reasonably calculated to deliver educational benefit to the student. Board of Educ. V. Rowley, 102 S.Ct. 3034 (1982). Compliance with the applicable standard is demonstrated where the IEP is individualized based on assessment and performance, delivered in the least restrictive environment, implemented in a manner reflecting collaboration and coordination among key stakeholders, and ultimately produces meaningful academic and non-academic benefits. Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, (5th Cir. 1997). A school district's proposed IEP is presumed to be appropriate, and so the petitioner in a case such as this has the burden to prove by a preponderance of evidence that the student's IEP was not developed according to IDEA procedures, or that the IEP did not provide the student with an appropriate education in the least restrictive environment. Tatro v. State of Texas, 703 F.2d 823 (5th Cir. 1983); Michael F., *supra*. A district's substantial failure to satisfy IDEA's substantive or procedural requirements may, if proven, merit prospective or compensatory relief as necessary to provide FAPE. Burlington Sch. Comm. v. Department of Educ., 471 U.S. 359 (1985); Parents of Student W. v. Puyallup Sch. Dist. No. 3, 21 IDELR 723 (9th Cir. 1994). However, a procedural violation alone does not merit relief unless the violation causes a loss of educational opportunity or significantly infringes the parent's ability to participate in developing the student's IEP. Adam J. v. Keller I.S.D., 328 F.3d 804 (5th Cir. 2003).

Petitioner attacks in-home training services alleging first that services were deficient and thus inappropriate in certain regards; second that services scheduled in Student's IEP as in-home training during in the relevant portion of the 2003-04 school year were in fact parent training; and third that the District never notified the parent that Student could be entitled to receive both in-home and parent training at the same time. Although in-home training is not a related service specifically mentioned in IDEA nor in the implementing regulations, instruction in the home is a type of special education under 34 C.F.R. §300.26. Rules of the Commissioner of Education pertaining to students who have Autism address in-home

training as a service that “shall be considered and, when needed, addressed in the IEP.” 19 T.A.C. §89.1055(e). Appropriateness of in-home training may be analyzed according to the standard for special education set out in 34 C.F.R. §300.26. See Michael F., *supra*. Alternatively, in-home training also may be appropriate as a related service under 34 C.F.R. §300.24. See Daniel R. v. Spring Branch I.S.D., 146-SE-0102, 37 IDELR 213 (SEA TX 2002). The determination of appropriate in-home training is in either case subject to IDEA procedural safeguards. *Id.*

Petitioner contends that Parent’s full participation in the IEP process was infringed by the District’s failure to inform them that in-home training and parent training could be provided at the same time. However, Student’s ARDC discussed and scheduled specifically in Student’s IEP both types of services, with parent agreement. This occurred in Student’s 2/22/02 IEP, and in his 3/4/03 IEP. Both services are addressed specifically in respective sections of the IEP Supplements for students with Autism.

Petitioner’s also contends that the District confused in-home training and parent training. Uncontested testimony established that school professionals within the relevant time frame undertook a variety of activities with Student, either directly or through the parent with contemporaneous staff input, in the home and elsewhere. No legal definition of in-home training identified for purposes of this hearing excludes from the term’s scope the provision of instructional services to the student by the parent under direct supervision of, and with input from, appropriate school professionals. Furthermore, no legal definition identified for purposes of this hearing clearly prevents a parent and school district from agreeing on delivery of so-called in-home training for the student elsewhere than in the home.

The record discloses that what was characterized as in-home training involved training provided to Student with the purpose of generalizing skills learned in school to the home environment. Student’s 2/22/03 ARDC regarded in-home training as a service to be delivered in the home. The 3/4/03 ARDC decided differently, providing that in-home training would be delivered at school with the parents observing teachers working with Student. This strategy was unanimously agreed to by the 3/4/03 ARDC. Nevertheless, one in-home training session under that IEP was delivered in the home, one took place in the school cafeteria, and one took place at a hotel. Approximately 10 sessions of in-home training and parent training altogether were scheduled for the IEP year, but not all were delivered. Then in the 3/31/04 ARDC Parents declined in-home training.

Respondent argues that regardless of where and how services were delivered, the omission of a particular service does not mandate relief unless it impacts the student’s educational progress or the parent’s ability to have input, and I believe Respondent is correct on this point. See Stephen H. v. Dripping Springs I.S.D., 104 LRP 30654, 311-SE-0503 (SEA TX 2004).

This much seems true from the greater weight of evidence. Student’s ARDC and the school professionals who worked with Student did not coordinate or collaborate with respect to determining any particular site where in-home training would be delivered under the 3/4/03 IEP, which provided only that such training would take place at school. Testimony establishes that in-home training venues were determined ad hoc by the parents, the in-home trainer, and other school professionals. Student is a student with complex educational needs, including intense needs for structure and consistency. My concern here is that the failure of

professional members of the ARDC to make a determination that the venue for service delivery could appropriately be left entirely to parent and staff discretion, or alternatively, the omission of school professionals to follow the IEP's directive in regard to the venue for in-home training, appear inconsistent with the Fifth Circuit's guidance in Michael F. about how an IEP should be implemented.

Problems also arose for Student in regard to coordinating the methodology for use of the BIGmack between the home and school. After a successful trial in the classroom, CCISD introduced the BIGmack into the home setting, choosing to do so late in the school year. The BIGmack was delivered to the home prior to CCISD training the parent in how to use it. The record is silent on what Parents did at home with the BIGmack specifically between its delivery and 4/28/04. That is the date when CCISD provided parent training, and this training was provided at home contrary to the 3/31/04 IEP.

The methodology envisioned for the parents to use with the BIGmack at home was detailed, and appropriately so. But the parent's testimony, and testimony of school professionals, made it evident that the parent did not understand the methodology. My inference from the greater weight of the testimony is that the District reasonably could and should have contemplated that introducing into the home setting a relatively new (to Student) and highly-structured methodology, at the time and in the manner it was done, might result in discontinuity of the program structure that Student's teacher clearly had made efforts during the year to monitor and reinforce. The teacher's well-stated concern about Student's need for consistency and structure did not get translated through a collaborative understanding into appropriate in-home and/or parent training services with respect to using the BIGmack at home. Inferences from the evidence tend to show that failing to ensure consistency of Student's training through the summer in the home environment more likely than not led to the necessity of Student's teacher having to spend four months or more in fall 2004 recovering the specified skill. The evidence suggests no other explanation, because so long as Student was in school receiving a consistent structured program, he either maintained or progressed on the skill in question.

I am also of the opinion that the failure to deliver IEP services in a coordinated and collaborative fashion resulted in the denial to Student of a FAPE. In many cases regression on a single objective might not rise to this level of significance. However in Student's case, the ability to indicate need for the restroom was agreed by both parties to be of great significance. It is a fair inference from the record that expenditure of resources in school to cope with Student's regression in this one area affected his ability to work on other objectives, and interfered with his ability to participate in the general curriculum and function in the least restrictive environment. So long as the District and the parents regard this as an achievable objective for Student (and the record demonstrates that it was achievable, following the proper methodology consistently) I find that the denial of appropriate services to achieve this one crucial objective implicates FAPE.

In my opinion Student's difficulties did not involve errors or omissions in the planning or delivery of appropriate speech therapy for 2004 ESY, community based instruction, ESY services as such, or choice of assistive technology. Petitioner did not offer convincing evidence that Student's speech services were inappropriate or that he experienced any inordinate regression in speech or communication over summer 2004. The same is true for evidence concerning the District's choice of assistive technology in the form of picture

simulations, the BIGmack, and the computer. Petitioner did not show this technology to be inappropriate, nor that different technology might be appropriate. As for community based instruction, Student had a number of goals for community adjustment that could be implemented and were implemented in the classroom setting. Although the lack of CBI outings this school year seems problematic, the associated IEP objective was not prioritized, and more importantly the objective is still susceptible of being implemented in the time remaining under the IEP. Student's ESY services were calculated to serve their legal purpose and did so, with Student showing no regression in the critical objective in school, for the time he was attending ESY.

Concerning appropriate relief, I am not bound by Petitioner's request, but only by the guidance available from the record regarding what Student needs now in order to obtain a FAPE. I also am bound to consider the equities of the situation in fashioning relief. Burlington Sch. Comm. v. Department of Educ., 471 U.S. 359, 369-71 (1985); Alamo Heights Indep. School Dist. v. State Bd. of Educ., 790 F.2d 1153 (5th Cir.1986); Parents of Student W. v. Puyallup School District, No. 3, 21 IDELR 723 (9th Cir. 1994). Student's 3/4/03 IEP scheduled, for the IEP year, approximately five in-home training sessions and five parent training sessions, all sessions to be 30 minutes minimum. This constitutes some evidence regarding Student's educational need. As far as the record discloses, approximately four sessions total took place. Student's parents declined in-home training for the current IEP year. Student's difficulties that are of concern to me resulted from the timing of in-home and parent training on a critical objective and supporting technology, as well as the limited extent of collaboration among staff and, to some extent, Student's parents, regarding the delivery of services. The conduct of the parties is an equitable factor in fashioning relief. In terms of the problems cited here, during the relevant time frame, the parents appear to have been hobbled more by lack of understanding than by any willful refusal of proffered services, or incapacity to cooperate.

The appropriate relief to address Student's needs will consist of an ARDC meeting within 15 school days following receipt of this decision to plan specifically for collaborative in-home and/or parent training to address consistency of training methodology between home and school, and compensatory in-home or parent training in the amount of 150 minutes which CCISD will make available to Parents. Compensatory parent training is to be made available commencing after this ARDC meeting, and prior to the first day of the 2005-2006 school year, but otherwise as the ARDC finds appropriate.

CONCLUSIONS OF LAW

1. Clear Creek I.S.D. is a local education agency and a political subdivision of the State of Texas, and is subject to requirements of IDEA, 20 U.S.C. §1400 et seq., and its implementing federal and state regulations.
2. Student is an IDEA-eligible student to whom Clear Creek I.S.D. must offer a free, appropriate public education in the least restrictive environment. 20 U.S.C. §1412(a)(1); Board of Educ. v. Rowley, 458 U.S. 176 (1982).
3. Petitioner sustained his burden of proof to establish that Clear Creek I.S.D. failed to provide appropriate in-home training to address Student's needs.

ORDERS

IT IS ORDERED that Clear Creek I.S.D. convene an ARD Committee within 15 school days of this Order to plan specifically for collaborative in-home and/or parent training to address consistency of training methodology for Student between home and school.

IT IS ORDERED that Clear Creek I.S.D. will provide 150 minutes of compensatory in-home training or parent training prior to the first day of the 2005-2006 school year, consistent with the ARD Committee's determination of Student's needs.

IT IS FURTHER ORDERED that Clear Creek I.S.D. shall timely implement this decision within 10 school days (except as otherwise specifically provided herein) in accordance with 19 TAC §89.1185(q) and 34 CFR §300.514. The following must be provided to the Division of Complaints Management at the Texas Education Agency and copied to the Petitioner within 15 school days from the date of this decision: (1) documentation demonstrating that the decision has been implemented; or (2) if the timeline set by the Hearing Officer for implementing certain aspects of the decision is longer than 10 school days, the district's plan for implementing the decision within the prescribed timeline, and a signed assurance from the superintendent that the decision will be implemented.

IT IS FURTHER ORDERED that any and all additional or different relief requested by Petitioner herein is **DENIED**.

SIGNED this 21st day of February 2005.

Finding that the public welfare requires immediate effect of this Decision, this Hearing Officer makes it effective immediately, pursuant to 19 Tex. Admin. Code §157.5(n).



JAMES N. HOLLIS
SPECIAL EDUCATION HEARING OFFICER
FOR THE STATE OF TEXAS

¹¹ ARDC herein refers to the Admission, Review, and Dismissal Committee, which is the legal entity that fulfills the functions of the IEP Team under Texas' regulations implementing the IDEA.

