
DOCKET NO. 102-SE-1204

Student	§	BEFORE A SPECIAL EDUCATION
B/N/F Parent	§	
	§	
VS.	§	HEARING OFFICER
	§	
BROOKS COUNTY 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 12/3/04, assigned to the undersigned Impartial Hearing Officer, and set for hearing on 1/3/05, with a decision deadline of 1/17/05. A telephone pre-hearing conference convened on 12/20/04, in which the parties clarified the nature of Petitioner’s complaints and relief request. By agreement of counsel, the evidentiary hearing convened on 1/4/05, and then recessed and reconvened on 1/28/05 to accommodate the schedule conflict of a material witness. The record of evidence closed on 1/28/05 subject to the parties’ submission of final argument in written form as requested by both parties. To accommodate written submission of argument, the decision deadline was extended to 3/4/05. The Decision of the Hearing Officer was filed in the record and mailed to the parties on 3/4/05. Throughout the proceedings Petitioner Student was represented by Christopher Jonas, Attorney at Law, and Respondent Brooks County I.S.D. by Kevin O’Hanlon and Leslie McCollom, Attorneys at Law.

STATEMENT OF THE CASE

As disclosed in the Request for Hearing and clarified in the Pre-hearing Conference, Petitioner alleged that Brooks County I.S.D. (hereinafter BCISD) violated Petitioner’s right to a free, appropriate public education in the following manner:

1. Failure to provide support personnel to take student to an MHMR program as required by Student’s Individualized Education Program (hereinafter IEP).
2. Failure to provide appropriate IEP instruction by a qualified teacher in Student’s special education classroom.
3. Failure to provide specific and measurable IEP goals and objectives, with appropriate evaluation methods for assessing Student’s performance.
4. Failure to provide sufficient instruction to enable student to make meaningful progress on classroom IEP goals and objectives.

5. Failure to provide an appropriate setting for instruction in personal hygiene activities, in that Student was being taught to perform such activities as fastening and unfastening clothing and changing soiled clothing in a public rather than a private setting.
6. Failure to provide necessary appropriate instructional materials and supplementary aids and services in the classroom, including the following:
 - a. failure to provide appropriate and accessible tables to address IEP goals that required wiping and placing objects on tables;
 - b. failure to provide appropriate blocks and rings as required to implement the IEP;
 - c. failure to provide appropriate switch adaptations to allow Student to activate the computers as required by her IEP;
 - d. failure to provide living books as required by the IEP;
 - e. failure to provide classroom dividers and shelving as required by the IEP;
 - f. failure to provide communication boards and voice output devices as required by the IEP.
7. Failure to provide multiple classroom learning centers providing a variety of different educational experiences, as required by Student's IEP.
8. Failure to provide current and adequate assessment in the area of assistive technology.
9. Failure to give appropriate consideration to existing assessment recommendations for assistive technology.
10. Failure to provide any evaluation, IEP, or services in the area of adapted physical education.
11. Failure to provide any evaluation, IEP, or services in the area of community based instruction.
12. Failure to provide any evaluation, IEP, or services in the area of parent training.

As relief for the aforementioned violations, if proven, Petitioner requests an order for the District to provide student with three years of compensatory educational services.

FINDINGS OF FACT

1. Student is *** years old and living at home with her Next Friend, Parent Transcript Page(s) (hereinafter Tr.) 19
2. Student was graduated and dismissed from BCISD by her Admission, Review and Dismissal Committee (hereinafter ARDC)¹ at the end of her 2003-2004 school year. Respondent's Exhibit (hereinafter R)-1.
3. Student was eligible for special education because of mental retardation. She responds to simple verbal phrases but does not express herself verbally. According to her 2001 comprehensive assessment, her communication skills were at a *** level, social and self-help skills at a *** level, academic skills at a -*** level, and physical skills at a *** level. Student also has a speech impairment, a seizure disorder, and cerebral palsy. R-4.
4. Student had a transition plan in effect since 1999. The transition plan was reviewed by school representatives and Parent on 5/14/03, and was approved by Parent and the other participants. Essentially Student's transition plan since 1999 has been for her to transition to adult day care and possibly a group home provided through MHMR. The parties have not disputed the content

¹ 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.

of the transition plan in any meeting of record, including Student's 5/14/03 ARDC or her graduation ARD on 5/11/04. Petitioner's Exhibit (hereinafter P)-7, P-9; R-1, R-2.

5. BCISD's *** who conducted Student's 2001 comprehensive assessment also is a member of the BCISD assistive technology team. The *** recommendations for assistive technology included computer, switches, simple voice box, communication board, and object symbols. The switch was recommended to accommodate Student's motor deficits so that she could use the computer for instruction. The computer itself was recommended for Student to access living books as a way of utilizing cause and effect, and also working on increasing Student's attention span. The *** also recommended having separate centers in Student's classroom, and suggested that dividers or shelves might be used for this. Voice output devices, switches, and the communication board were recommended to work on Student's expressive communication, which was limited to using gestures and facial expressions. R-4; Tr. 245-246.
6. The report of Student's 2001 comprehensive assessment described Student's present competencies at that time, and also described her performance in terms of the developmental ages represented by her various competencies. The 2001 assessment report was sent home for Parent via hand delivery by one of Student's bus aides. R-4; Tr. 247.
7. Student's 2001 assessment contained recommendations from a physical therapist, including the recommendation for adapted physical education to address motor areas reflecting Student's inability to, among other things, consistently run, hop, skip, jump, kick, throw, catch, or manipulate a ball with specific intention in games. The physical therapist recommended individual games/activities in physical education for socialization, group games if tolerated, individual games with prompting and hand-over-hand assistance, and play with sports balls that have texture or smell. The physical therapist who assessed Student in 2001 visited and observed in Student's classroom once each semester in the 2003-2004 school year, and made suggestions for the students in the class, including Student. R-4; Tr. 181.
8. Student's 5/22/02 IEP for the 2002-2003 school year included approximately 38 short-term objectives. Her 5/14/03 IEP for the 2003-2004 school year included approximately 60 short-term objectives, some of which overlapped objectives from 2002-2003 and others of which were added for 2003-2004. Student's 2003-2004 short-term objectives for the most part were stated in terms of observable behaviors, and to that extent could be measured. P-5, P-6.
9. Student's 5/22/02 ARDC made note of deficiencies complained of by Parent regarding classroom facilities at the *** school, following Student's transfer to that campus. Specifically Parent complained that there was no changing room for personal hygiene separate from the general classroom area, and that other instructional equipment was not in place. Also there was no separate area for Student to work on IEP objectives related to manipulating clothing fasteners and changing clothes. Thereafter, Student's class moved into a new classroom in January 2003 that had a separate changing room attached to the classroom, as well as other equipment and facilities. Parent stated at the 5/14/03 ARDC meeting that the classroom facilities were satisfactory to her. R-3, P-5, P-6; Tr. 33-35, 108-109.
10. Student's teacher was absent from work for medical reasons for the six weeks following 8/13/02. The teacher was not absent for any extended period during the 2003-2004 school year. Tr. 151.
11. Student's classroom paraprofessional took Student to all of Student's scheduled appointments at the MHMR Center, except for days when Student was absent from school, or on holidays when the MHMR Center was closed. Tr. 274-275.

12. When Student first was assigned to her classroom at the *** school, her teacher did not have an accessible table for Student to use, including for instruction in certain objectives that required the use of an accessible table. However, by January 2003 an accessible table had been made available. Tr. 58, 108-109.
13. Student's ARDC met on 5/14/03 and developed the IEP for Student's 2003-2004 school year. Parent attended the ARDC and signified her agreement. A representative of Coastal Plains MHMR also attended this meeting. P-6, R-3.
14. Student's 5/14/03 ARDC scheduled Student in all special education classes except for physical education. R-3.
15. Student left the special education classroom with her paraprofessional to attend physical education and also to attend school activities such as assemblies and pep rallies with general education students, whenever such activities were scheduled. R-3; Tr. 275.
16. Student's transition services supplement from the 5/14/03 IEP provided for Student to participate in community based instruction in addition to school-related activities. The transition supplement also included a goal for Student to demonstrate mastery in use of switches to improve communication skills ("indicate choices"). R-3.
17. Student's 5/14/03 IEP referenced her goals, objectives, and progress evaluation to the CLASS curriculum, which addresses life skills, among others. Evaluation was to take place by teacher observation and a progress report. The IEP indicates Student at that time functioned developmentally in the *** range. R-3.
18. Student's 2003-2004 IEP had no specific goals and objectives for using the computer or switches. Student's teacher had switches and a computer in Student's classroom and used or attempted to use them in working with Student. Student's teacher also had living books accessible to Student via the computer. Student used switches to activate the computer and different toys and colors. Student was not motivated to use the computer for paying attention to the living books. R-3; Tr. 183, 226, 235, 245.
19. Student's teacher kept track of when Student worked on her 2003-2004 IEP objectives in school. The teacher also kept a record of Student's progress on CLASS curriculum objectives, on a separate computer printout of the objectives from Student's 2003-2004 IEP. Student's objectives stated in the IEP contain mastery criteria and codes for evaluation methods. The printout recording Student's progress, or lack of same, indicated only the objectives themselves and the level of mastery for each one. Over the course of the 2003-2004 school year, Student made progress on several of her IEP objectives in the CLASS curriculum. R-1, R-5.
20. Student's teacher generated printouts of the IEP progress reports every six weeks and sent them to Parent via hand delivery by one of Student's bus aides. Tr. 175.
21. Student's teacher did not specifically go through all of Student's IEP objectives with Parent at an ARDC meeting. Tr. 236.
22. Student has made limited progress in the area of communication skills. Tr. 177-178.
23. Student's 5/14/03 ARDC included IEP goals and modifications for adapted physical education that reflected the recommendations of the physical therapist who assessed Student in 2001, and were basically unchanged from what the physical therapist recommended at the time of the 2001 evaluation. Adapted physical education was not part of the CLASS curriculum and was not

reflected in the print out progress reports sent home to Parent by Student's teacher every six weeks. Student's teacher did not specifically assess Student's progress in physical education but noted generally some progress in Student's mobility. R-3; Tr. 182-204.

24. Student's teacher and aides in the 2003-2004 school year provided physical activities for Student including taking her walking, or moving and rubbing her extremities to deal with stiffness. Student's teacher also sent Student to P.E. where Student could exercise by walking or engage in simple ball games with hand-over-hand assistance. Tr. 179-182.
25. Student's 2003-2004 IEP included modifications for Student's mainstream physical education class. Student's paraprofessional would take Student and other students in the class to physical education in the gym, where Student would interact with general education students, walk and move her limbs for exercise, and perform activities such as rolling a ball with hand-over-hand assistance of her paraprofessional. Student's teacher considered these modifications for physical education to be the implementation of Student's adapted physical education. P-6. Tr. 179-182, 275-278.
26. At the time of Student's 2001 comprehensive assessment she was not using a communication board. By the 2003-2004 school year, Student's teacher had a communication board in Student's classroom and used it for activities with Student. However, Student's 5/14/03 IEP had no objectives specifically for a communication board. P-2; R-3; Tr. 209-211.
27. Parent. has never been provided with parent training in regard to working with Student, nor has she requested parent training, nor has assessment been done in the past year to determine if Student could benefit from the provision of parent training. Tr. 228-230.
28. Student's community based instruction in the 2004-2004 school year consisted of taking her out of school on weekly visits to MHMR. This activity was done by Student's classroom aide who accompanied her on these visits. Student's IEP had no specific objectives designated for community based instruction as such. Tr. 230-232.
29. When Student graduated in May 2004, under her transition plan she was to begin receiving services through MHMR. Parent, however, is not sure now that she wants to utilize the MHMR services for Student. R-3; Tr. 95, 106

DISCUSSION

Standard of Review

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 party must request a hearing to complain of alleged special education violations within one year of the date the complaining party knew or should have known about the action that serves as the basis of the hearing request. 19 T.A.C. 89.1151(c).

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's Complaints

Petitioner alleged that Student's IEP obligated BCISD to transport Student once a week to program activities provided for her by MHMR, but BCISD failed to do so. The evidence, however, does not bear out Petitioner's allegation. BCISD's aide responsible for providing the transportation for Student established that Student was taken to MHMR at all scheduled times that Student was present at school and the MHMR Center was open. Petitioner offered no contrary evidence from any document, nor from any witness competent to testify about this issue.

Petitioner also alleged that Student's classroom teacher with certification and qualifications to provide Student's special education was absent from the campus due to illness for a number of months, and therefore was not available to deliver or supervise Student's educational services. However, the evidence established that the teacher's extended absence occurred in the fall semester of 2002, and the teacher was not absent for any extended period of time in the 2003-2004 school year.

Petitioner asserts varying complaints in regard to BCISD's provision of assistive technology. According to 34 C.F.R. §300.308, assistive technology must be made available if required as part of the child's special education under 34 C.F.R. §300.26, related services under §300.24, or supplementary aids and services under §300.28. That is, assistive technology may be an aspect of the student's instruction as such, or it may be a service required to assist the student to benefit from special education, or it could be an aid or service to support inclusion. Student was self-contained in the special education setting other than for physical education. There was not evidence to establish that the technology itself was intended by Student's ARDC to be part of special education. So, in regard to the legal standard appropriate to Petitioner's complaints about technology, the evidence establishes that BCISD provided assistive technology as a related service. Related services for a student such as Student are services that are necessary to support the achievement of special education goals and objectives, and enabling the student to benefit from special education. 34 C.F.R. 300.24.

Petitioner complains that BCISD denied Student appropriate services because IEP goals and objectives were not written specifically for assistive technology. Petitioner also complains that assistive technology evaluation was inadequate, and that BSISD failed to make available several items of technology that were specified either in Student's IEP or in her technology assessment recommendations.

IDEA and its regulations facially do not require IEP goals and objectives for related services. See 34 C.F.R. 300.347. IDEA does not prohibit the ARDC from deciding that a particular related service as such requires IEP goals and objectives. Rather, the regulations appear to grant the ARDC latitude in deciding about the formulation of goals and objectives for related services. Here, there was no evidence that Student's ARDC ever determined that goals and objectives were necessary for implementation of the computer, switches, communication board, or any other technology, or that related service goals and objectives were necessary otherwise for Student to benefit from her special education. Nor does the preponderance of evidence establish in retrospect the necessity of goals and objectives for the technology itself. Rather, it appears that the technology was intended to support and did to some extent support other IEP goals and objectives, for example in the area of attention to task, cause and effect, and communication. Parent did not voice concern in Student's ARDC meetings about needing goals and objectives specifically for this technology, nor did any other member of Student's ARDC. Student's teacher appears to have understood the functioning and purpose of the technology. There is not persuasive evidence tending to establish that the ARDC erred in declining to write specific IEP goals and objectives in this area.

Petitioner complained that assistive technology and related items necessary for Student's IEP, including a communication board, living books, classroom activity centers and a switch adaptation for the computer, were not made available for Student. But Student's teacher testified credibly that the materials in question were available at the latest by May 2003, and were used in Student's instruction. There was not a preponderance of evidence that Student's condition or educational needs changed significantly over time, so as to make her 2001 assistive technology assessment and recommendations inappropriate and to thus necessitate further evaluation. The district could certainly have done additional assessment, and it probably would have been desirable to have done so, for example when Student failed to demonstrate the expected interest in living books on the computer. However the evidence does not prove it was necessary in order for Student to receive meaningful educational benefit overall.

Petitioner complained about the classroom facilities provided by BCISD for Student at her *** school campus, and specifically that there was not a separate changing area for personal hygiene or delivering instruction in self help skills involving clothing fasteners and changing clothing. It does appear that when Student transitioned to the *** school from her previous campus, the *** school did not have all the facilities that Student needed. Parent complained about this and over a period of weeks the *** school provided appropriate facilities for Student so that by May 2003, Parent was satisfied with the facilities and so indicated to Student's ARDC.

Petitioner also alleged that other materials referenced in Student's IEPs, specifically classroom dividers and shelving, blocks and rings, and an accessible table for use in Student's instruction, were not available in Student's *** school classroom. Student's teacher testified that shelving and an accessible table were available in the classroom prior to the 2003-2004 school year, and that classroom activities were organized in activity centers. Petitioner offered no testimony tending to show that blocks and rings were not made available for Student. The preponderance of testimony thus tends to show that the instructional materials and technology in question were available and used in Student's instruction beginning no later than May 2003.

Petitioner took issue with Student's IEP goals and objectives, contending that the objectives were not measurable and the IEP did not contain appropriate evaluation methods to assess progress on the objectives. Student's objectives were stated in behavioral terms. It is true that the IEP did not specify particular conditions and circumstances to indicate under what conditions Student's performance of the objectives was to occur. However, a review of the record and documents tends to establish that Student is a student whose very severe challenges required degrees of flexibility for the professionals working with her, and I am not persuaded that the IEP objectives are inappropriate because the exact circumstances of the expected performance were not spelled out in detail beforehand. Student's teacher did log the times when Student was engaged in instruction on her objectives, and also recorded the teacher's estimation of Student's extent of progress, if any, on CLASS curriculum objectives, which constituted the great majority of Student's IEP objectives. There is not a preponderance of evidence that Student required more, in the unique situation presented by her multiple disabilities and educational needs.

Petitioner complained that Student was not provided with appropriate community based instruction. The record shows that community based instruction was an aspect of Student's transition plan, and was included among the objectives in her 5/14/03 IEP transition supplement. BCISD demonstrated that Student was taken from school out to the community for her program at MHMR more or less weekly in the 2003-2004 school year, and this was the only community based instruction provided for Student. Student also left her self-contained special education class for physical education and for school events, but all such events took place on the *** school campus. The record evidence indicates no request or recommendation by Parent or any other member of Student's ARDC for additional or different community based instruction. Nor was any assessment requested or conducted in regard to this issue. Petitioner did not bring convincing evidence to establish that Student failed to benefit from the community based activity that was provided or that other such activities would have been necessary for Student to receive an appropriate education.

Petitioner complained that Student's adapted physical education was inappropriate and not supported by assessment. The record discloses that items of adapted physical education recommended in Student's 2001 assessment were incorporated in her physical education program through physical education instruction and modifications. There was no evidence tending to establish the need for further assessment or different adaptations for Student's physical education, nor evidence regarding a change of Student's circumstances other than making progress on motor skills and mobility, and no recommendation by any member of Student's ARDC for changes to her adapted physical education.

Basically the testimony and school records do not support Petitioner's contention that Student received no meaningful benefit from special education. On the contrary, she has demonstrated progress in a several areas targeted in her IEP, maintained her skills in other areas, and shown no apparent regression of significance. Parent attended Student's ARDC meetings, and approved of everything BCISD proposed from the 2002-2003 IEP (including the incorporated 1999 transition goals) forward, with the exception of the facilities at Student's *** school. With regard to those facilities, BCISD addressed Parent's concerns. The agreed plan at all times relevant was for Student to transition from BCISD to a program of services through MHMR, including in all likelihood residence in a group home or other supported living facility. The record discloses that Parent has not complained about, nor disclosed any difficulty in managing and working with Student in the home, whether to Student's ARDC or at the evidentiary hearing. On the contrary, the record consistently

describes Student as relatively easy to manage and to work with, within the confines of her abilities. The fact that Parent may now have concerns about the MHMR program does not justify orders for BCISD to provide compensatory education services where the record shows that Student received benefit from her school program and either maintained or progressed overall in her targeted skills.

CONCLUSIONS OF LAW

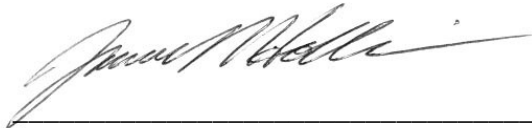
1. Brooks County I.S.D. is a local education agency and a political subdivision of the State of Texas, and is subject to requirements of IDEA, 20 U.S.C. §1400 et seq., and its implementing federal and state regulations.
2. Brooks County I.S.D. provided appropriate special education and related services to Student, and Student received a free, appropriate public education from Brooks County I.S.D. 20 U.S.C. §1412(a)(1); Board of Educ. v. Rowley, 458 U.S. 176 (1982).

ORDERS

IT IS ORDERED that any and all relief claimed by Petitioner herein is **DENIED**.

SIGNED this 4th day of March 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

DOCKET NO. 102-SE-1204

Student § **BEFORE A SPECIAL EDUCATION**
B/N/F Parent §
§
VS. § **HEARING OFFICER**
§
BROOKS COUNTY INDEPENDENT §
SCHOOL DISTRICT § **FOR THE STATE OF TEXAS**

SYNOPSIS OF DECISION

ISSUE: Whether Brooks County I.S.D. failed to provide appropriate related services.

CITATION: 34 C.F.R. §300.24

HELD: For the Respondent. The District provided appropriate transportation services as required in the IEP, and also provided and made available appropriate switches and other communication technology that were scheduled as a related service.

ISSUE: Whether Brooks County I.S.D. failed to provide appropriate special education.

CITATION: 34 C.F.R. §300.26

HELD: For the Respondent. While certain appropriate materials and facilities were not available when the District moved Petitioner to a new campus, and Petitioner’s teacher did suffer an extended illness, the deficiencies and omissions were corrected and appropriate services and facilities were in place throughout the time frame in which Petitioner may assert complaints.

ISSUE: Whether Brooks County I.S.D. failed to provide appropriate assistive technology.

CITATION: 34 C.F.R. §§300.4, 300.5

HELD: For the Respondent. The District had a current assessment in place for Petitioner’s assistive technology needs, and provided the classroom materials and software technology that were set out in the IEP.

ISSUE: Whether Brooks County I.S.D. failed to provide appropriate community based instruction.

CITATION: 34 C.F.R. §300.346

HELD: For the Respondent. Petitioner’s IEP scheduled Petitioner to attend activities at the community MHMR center for both her transition needs and her community-based instruction. The appropriateness of such activities for Petitioner was not challenged, and the evidence established that the District reliably provided Petitioner with access to the community-based instruction in the IEP.