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|------------------------|---|----------------------------|
| STUDENT <i>b/n/f</i>   | § | BEFORE A SPECIAL EDUCATION |
| PARENT,                | § |                            |
|                        | § |                            |
| Petitioner,            | § |                            |
|                        | § |                            |
| V.                     | § | HEARING OFFICER            |
|                        | § |                            |
| LEWISVILLE INDEPENDENT | § |                            |
| SCHOOL DISTRICT,       | § |                            |
|                        | § |                            |
| Respondent.            | § | FOR THE STATE OF TEXAS     |

**DECISION OF THE HEARING OFFICER**

**Issues**

STUDENT’s mother (“Petitioner”) requested this Due Process Hearing on May 16, 2005, under the Individuals with Disabilities in Education Act, 20 U.S.C. §1400 *et seq.*, (hereafter “IDEA”), against Lewisville Independent School District (“Respondent,” “LISD” or “the District”). In the prehearing conference conducted on May 26, 2005, Brad Mercer, parent advocate, represented Petitioner. STUDENT’s mother, PARENT, also participated in the conference. Respondent was represented by Nona Matthews, of the law firm Walsh, Anderson, Brown, Schulze & Aldridge, P.C. During the prehearing conference the issue was identified as follows: whether for medical reasons, the student should have a shortened school day.

As relief Petitioner requested an order allowing the shortened school day.

The Due Process Hearing was initially scheduled for June 23, 2005, but during the prehearing conference on May 26, the parties informed the Hearing Officer the issue had not been presented to the Admission, Review, and Dismissal (ARD) committee. The Hearing Officer ordered the parties to convene an ARD meeting and discuss the issue. Another prehearing conference was scheduled for June 9, to review the status of the case. A second ARD meeting was necessary to review medical documents that were not available at the previous meeting, but the parties were unable to reach consensus.

The Hearing Officer conducted another prehearing conference with the parties on August 1, 2005, at which time the Due Process Hearing was rescheduled for August 22, 2005.

On August 22, 2005, the Hearing Officer convened the Due Process Hearing. STUDENT’s mother appeared in person, along with \*\*, parent advocate. \*\*, Executive Director of Special Education, appeared for Lewisville ISD, along with the District’s attorney who had participated in the prehearing conferences. The following witnesses testified during the hearing: PARENT; Dr. \*\*, D.O. (by telephone); \*\*, M.D. (by telephone); \*\*, \*\*, \*\*, \*\*. A transcript

containing 146 pages was made of the proceedings by a certified court reporter. The Decision Deadline is August 30, 2005.

### **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 girl residing with her parents within the geographic boundaries of Lewisville Independent School District. STUDENT has been receiving services from LISD since September 12, 2002, under the classifications of autism and speech impairment.
2. For STUDENT's initial placement the ARD committee decided to provide special education support in the least restrict environment to include speech therapy, occupational therapy, and in-home training. STUDENT was placed in LISD's Preschool Program for Children with Disabilities (PPCD). Although she was scheduled to attend PPCD for 3 hours, five days a week, her attendance was more like 2 hours per day, two days a week. STUDENT's parents also arranged for her to receive ABA training on a private basis.
3. LISD completed the most recent Full and Individual Evaluation for STUDENT in May 2004. Those results indicated a mental processing composite score in the average range. Achievement test results indicated that STUDENT scored in the average range for general information, low average in reading, average in mathematics, deficient in writing, and below average in spoken language.
4. When the ARD committee developed STUDENT's educational program for \*\* for the 2004-2005 school year, the plan called for STUDENT to attend \*\* three hours per day and spend the remainder in PPCD. The occupational therapy and Extended School Year goals focused on STUDENT's fine motor skills, gross motor skills, cognitive skills, socialization, and language skills. Based on STUDENT's progress during the summer of 2004, STUDENT's mother felt she had mastered the goals during the summer and they were no longer applicable. Another ARD meeting occurred August 11, 2004, to revise STUDENT's program. The meeting reconvened on August 25, 2004, because consensus was not reached on August 11. The committee agreed that services would be provided in general education \*\*, with support as needed from the PPCD teacher. Speech therapy and occupational therapy were also provided, along with in-home training and parent training.
5. The \*\* schedule began at 8:00 a.m. and continued through 3:00 p.m. each day. In October 2004 STUDENT's \*\* teacher expressed concerns about STUDENT's reading and writing. STUDENT was very distractible and had difficulty focusing. The class was moving faster than STUDENT was able to keep up with. Her teacher believed they should come up with a set of goals for STUDENT in writing and math and not hold her to the standards required for the Texas Essential Knowledge and Skills (TEKS).

6. The ARD committee met on November 18, 2004, to discuss STUDENT's progress in the general education classroom, focusing in particular on reading, writing and math. The committee proposed that STUDENT receive services in the resource classroom for writing and math. The committee believed STUDENT could be successful in reading in the general education classroom with some modifications, but the curriculum necessary for STUDENT to be successful in writing and math could better be implemented in the resource classroom. STUDENT's mother wanted to observe the resource classroom before agreeing to the placement. On December 7, 2004, the ARD committee reconvened and STUDENT's mother agreed to the change.
7. STUDENT's \*\* teacher had been teaching writing in the morning and math in the afternoons. She modified the daily schedule for her class to put the writing and math sessions back to back, and at the same time STUDENT would be in the resource classroom working on writing and math. This adjustment allowed STUDENT the benefit of maintaining the same routine as her classmates.
8. STUDENT's progress was hampered by the inconsistent times at which she arrived and left school. This affected STUDENT's opportunities to become familiar with the classroom routine. The principal met with STUDENT's mother several times to discuss the importance of STUDENT's being present for the full school day. The principal tried to convince STUDENT's mother to bring her to school for the full day. When that did not happen, the principal was required to follow the truancy process for tardies and absences.
9. In the \*\* class from approximately 12:25 p.m. to 12:45 p.m. the children were permitted to rest if they chose, go to the restroom, or read books during a quiet time when the lights were turned low. Although many students fell asleep during that time, STUDENT read her books. She always went to the restroom and did not use the time to put her head down or rest.
10. When STUDENT began her \*\* year she started on an A level book. She was very good with rote reading, but her teacher was also concerned with comprehension. By December STUDENT was reading on a D level, in which a story is actually told. STUDENT was able to relate the story back after having read it, thereby indicating her comprehension of what she had read. Lewisville ISD considers reading at the B level to be successful in \*\*.
11. STUDENT also progressed in the area of socialization. The resource teacher reported that STUDENT performed really well in her class. She had gotten comfortable with the environment. The resource teacher found that STUDENT could be successful with the \*\* TEKS but she needed the small group environment of the resource classroom. STUDENT started with rote counting coming into the class and progressed to actually counting concrete objects. STUDENT was working on phonological awareness and was learning to take the stories apart and recognize the words. STUDENT appeared to really enjoy coming to the resource class, full of energy, and stayed focused and intent on the task at hand. STUDENT only attended class for 8 school days after being placed in resource.
12. The speech therapist that worked with STUDENT also noted progress. She saw improvement with STUDENT's echolalia and noticed that she was asking her peers

- and adults for help. Toward the middle of the school year, when STUDENT did not know the answer, she would verbalize that she did not know the answer. In the beginning the speech therapist noticed a little bit of fatigue with STUDENT, but attributed it more to STUDENT's age than anything else.
13. At some point a rift developed between STUDENT's mother and STUDENT's \*\* teacher. STUDENT's mother came to believe the teacher did not like her. However, the teacher and STUDENT worked well together, and the teacher believed STUDENT was making very good progress in her class. The principal attempted to bridge the communication gap to no avail. STUDENT's last day to attend classes at LISD was December 21, 2004.
  14. Until December 2004 STUDENT's parents provided Applied Behavioral Analysis (ABA) therapy for STUDENT for 1-1/2 hours three times per week, after school from 4:30 p.m. to 6:00 p.m. Additionally, STUDENT and her mother attended religious services two or three times on weeknights from approximately 7:00 p.m. until 8:00 p.m. Beginning January 2005 the schedule for ABA therapy changed to 2 times per week, and only on the weekends.
  15. At the February 1, 2005, ARD meeting STUDENT's mother requested a different \*\* teacher. The rest of the committee believed that changing placement for STUDENT would be detrimental. STUDENT's mother stated that she would home school STUDENT
  16. At the Due Process Hearing STUDENT's mother testified that STUDENT had many food allergies, causing her to tire easily. When STUDENT came home after a full school day she would be tired and would start stimming, talking gibberish. STUDENT would lie in her room and not do anything.
  17. STUDENT's parents requested and got a letter from Dr. \*\*, D.O., dated January 11, 2005. The letter stated, "\*\*\* is under my medical care. Due to her medical problems (allergies, nutritional deficiencies, fluid in the ears and possible heavy metal toxicity), \*\* tires easily. While I am treating these medical problems it is medically necessary for her to have a shortened school day. Please allow her to be dismissed by 1:00 PM."
  18. An entry on STUDENT's medical records from Dr. \*\* dated January 11, 2005 noted:

Spoke with [\*\*'s] advocate. Her parents want to do ABA privately so want a shortened day. School services –PPCD small ratios more structure, spec. ed teacher. School just wants her to be behaved & make some academic progress. If she is there at 10 AM, she is counted present. It is legal for school to allow her to get out early. They want her out by 1:00 – 1:30 PM. Send letter to Mom.
  19. The letter from Dr. \*\* was first presented to the ARD committee on June 6, 2005. This was the first time the ARD committee had heard anything about fatigue on the part of STUDENT The school nurse also attended that ARD meeting. She reported that STUDENT could rest in the nurse's office to accommodate any fatigue. STUDENT's mother disagreed with that accommodation. The committee determined

- that it did not have sufficient information from a medical perspective to make a decision about shortening the school day for STUDENT. STUDENT's mother provided a medical release so that LISD could have a medical doctor review Dr. \*\*'s records for STUDENT.
20. \*\*, M.D., reviewed Dr. \*\*'s records and provided LISD with a written report dated July 18, 2005. Dr. \*\* is a board certified medical specialist in Internal Medicine and in Allergy and Immunology. Dr. \*\* concluded there was nothing in the medical records of STUDENT to suggest that she has any medical illness that would require a shortened school day.
  21. On July 26, 2005, the ARD committee met to review Dr. \*\*'s report. The committee noted that no one from the school had observed any fatigue on STUDENT's part that was different from that seen with other children. The committee also discussed the benefits STUDENT had received with a full day program, and concluded that any disruption to her school day would be detrimental to STUDENT. STUDENT's mother disagreed.
  22. Dr. \*\* testified at the Due Process Hearing. In his opinion fluid in the ears is not a medical condition that would limit one's ability to attend school or work. With respect to nutritional deficiency, Dr. \*\* testified that fatigue could be a symptom, but he would want to see what nutritional area was deficient. The medical records from Dr. \*\* have no information about specific nutritional deficiency. He saw nothing in the records that suggests STUDENT has any medical illness that would require a shortened school day.
  23. Dr. \*\* also testified at the Due Process Hearing. She wrote the letter dated January 11, 2005, because the parents had reported that STUDENT was tiring easily. Through her medical evaluation she found the existence of those items listed in the letter. She testified that because those things could cause fatigue in anyone, and because fatigue was being observed by the parents, she wrote the letter. She added that if those things were fatiguing STUDENT, then she needed to have the shortened school day.
  24. The preponderance of the evidence supports Dr. \*\*'s conclusion that no medical basis exists that would require a shortened school day for STUDENT.

### **Conclusions of Law**

After due consideration of matters of record, matters of official notice, and the foregoing findings of fact, in my capacity as a Special Education Hearing Officer for the State of Texas, I make the following conclusions of law:

1. STUDENT is a student who is eligible for special education services under the IDEA as a child with autism and speech impairment. 20 U.S.C. §1401 (3) (A); 34 C.F.R. §300.7 (c) (1), (11).

2. Petitioner bears the burden of proof with respect to her claims that STUDENT was denied a free appropriate public education. *Tatro v. Texas*, 703 F.2d 823 (5<sup>th</sup> Cir. 1983), *aff'd*, 468 U.S. 883 (1984). Petitioner has not met her burden of proof in this case.
3. The Individualized Education Program developed for STUDENT's at Lewisville ISD provided a program reasonably calculated to enable her to receive educational benefit under the standard of *Board of Education of the Hendrick Hudson School District v. Rowley*, 458 US 176 (1982); *Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).
4. STUDENT made meaningful education progress during the time covered by this Due Process Hearing. *Board of Education of the Hendrick Hudson School District v. Rowley*, 458 US 176 (1982); *Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).
5. A child who is enrolled in \*\* or \*\* grade is required to attend school each school day for the entire period the program of instruction is provided. TEX.ED.CODE §25.085 (a), (c).
6. Lewisville ISD is required to provide STUDENT a free appropriate public education. Under the facts of this case, Lewisville ISD is required to provide a full school day, as no medical basis exists to require a shortened school day for STUDENT 20 U.S.C. §1400 *et seq.*; 34 C.F.R. §300.1.

### **ORDER**

Based upon the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the relief sought by Petitioner is DENIED. Finding that the public welfare requires the immediate effect of this Final Decision, the Hearing Officer makes it effective immediately.

SIGNED this 30<sup>th</sup> day of August 2005.

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*Lucretia Dillard*  
Special Education Hearing Officer

DOCKET NO. 309-SE-0505

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**SYOPSIS**

**ISSUE:** Whether the student should have a shortened school day for medical reasons?

**HELD:** For Respondent

**CITATIONS:** TEX.ED.CODE §25.085 (a), (c); 20 U.S.C. §1400 *et seq.*; 34 C.F.R. §300.1