

STUDENT <i>b/n/f</i>	§	BEFORE A SPECIAL EDUCATION
PARENTS,	§	
	§	
Petitioners,	§	
	§	
V.	§	HEARING OFFICER
	§	
RICHARDSON INDEPENDENT	§	
SCHOOL DISTRICT,	§	
	§	
Respondent.	§	FOR THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

Procedural History and Issues

***, the parents of STUDENT, (referred to as “Petitioner”), filed this request for Due Process Hearing on June 30, 2005, under the Individuals with Disabilities in Education Act, 20 U.S.C. §1400 *et seq.*, (hereafter “IDEA”), complaining about the failure of Richardson Independent School District (“Respondent,” “RISD,” or “the District”) to provide a free appropriate public education (“FAPE”), for their daughter STUDENT.

In the prehearing conference conducted on July 19, 2005, Myrna Silver, Attorney at Law, appeared on Petitioner’s behalf. Respondent was represented by Nona C. Matthews, of the law firm Walsh, Anderson, Brown, Schulze & Aldridge, P.C. Also participating in the conference was Mia Martin, in-house counsel for Richardson ISD. A certified court reporter recorded the proceedings and prepared a transcript of the conference.

The issue in this case is placement. As relief Petitioner requests reimbursement for STUDENT’s placement at the *** School from March 31, 2005, through the present date.

The Due Process Hearing was set for September 29-30, 2005, at the special services building for Richardson ISD. Both Parents attended the hearing, and were represented by Ms. Silver. ***, the director of special education, served as the corporate representative for Respondent. In addition to Ms. Matthews and Ms. Martin, Eronda N. Johnson of the Walsh, Anderson, Brown, Schulze & Aldridge law firm served as counsel for Respondent at the hearing.

During the hearing the following witnesses testified: ***, Ph.D.; ***, ***, ***, O.D.; ***, Parent; ***, L.S.S.P.; ***, and ***. The parties submitted 19 exhibits into evidence, and the transcript made of the proceedings by the certified court reporter contained approximately 440 pages. The parties were given the option to present post-hearing briefs to summarize their

arguments by October 19, 2005, and both parties submitted timely briefs. The Decision of the Hearing Officer was due October 31, 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 credible evidence:

1. STUDENT, a ***-year-old female, resides with her parents within the geographic boundaries of Richardson Independent School District. STUDENT qualifies for special education services under the classifications of emotionally disturbed (ED) and autistic (AU).
2. STUDENT attended private school for most of her early education. Doctors diagnosed her with bipolar disorder at age ***, and with autism at age ***.
3. STUDENT began attending classes in Richardson ISD beginning with the *** grade. Her parents were satisfied with the program developed for STUDENT during ***, ***, and *** grades. During school year 2002-2003, when STUDENT was in *** grade, she began having more difficulties behaviorally and academically.
4. During *** grade STUDENT's parents arranged for her to be admitted to the *** (***) in Austin, Texas on April 1, 2004, where she remained until November 12, 2004. ***'s full-time residential treatment program was extremely structured, placing it on the most restrictive end of placement options. *** provided educational services to STUDENT through its onsite *** Charter School. Upon her release from ***, STUDENT's parents home schooled her until March 29, 2005.
5. In late February or early March 2005, Parent believed it was time to transition STUDENT back to a school setting. Parent contacted Richardson ISD to start the process of getting STUDENT back into school. The Admission, Review and Dismissal (ARD) committee convened on March 21, 2005, to develop a temporary placement for STUDENT as a transfer student.
6. The ARD committee considered the neuropsychological evaluation prepared by ***, Ph.D., concerning STUDENT. Dr. *** tested STUDENT on two occasions in March 2005. She administered the Wechsler Intelligence Scale for Children (Fourth Edition), the Woodcock-Johnson Tests of Achievement (Third Edition), the Behavior Assessment System for Children, and the Adaptive Behavior Assessment System (Second Edition). Dr. *** also reviewed STUDENT's records and interviewed STUDENT and her parents. The tests revealed the following.

Educational Strengths

- Average to low average abstract verbal conceptualization
- Low Average understanding of familiar visual information
- Low average complex nonverbal problem solving, under untimed conditions when allowed to choose a solution from an array of possible options

- Low average mathematics conceptualization for an untimed, orally presented task

Educational Concerns

- Below average understanding of visual information under timed conditions which require visuomotor perception
- Below average recognition of single words
- Below average reading speed for simple information
- Below average ability to write sentences using specified words and picture cues, under timed conditions
- Well below average ability to state word definitions
- Well below average ability to perform mathematics calculations for paper and pencil tasks, whether timed or untimed
- Well below average understanding of the phonological aspects of language
- Well below average ability to compose sentences using picture cues and verbal prompts, under untimed conditions
- Well below average ability to develop “common sense” solutions to everyday situations
- Well below average memory for simple auditory information
- Well below average working memory, the ability to hold information in memory long enough to organize it, for auditory material
- Well below average graphomotor, or paper and pencil copying speed for abstract visual symbols
- Well below average visual scanning speed

Attendant Factors

- Strong family support
- Good sense of humor
- History of psychiatric hospital admission and residential treatment for noncompliance, impulsivity, mood lability, poor tolerance for stress, and distractibility
- Diagnoses of Bipolar Disorder and an unspecified PDD spectrum condition
- Deficits in motivation and organizational skills
- Sensory sensitivity and below ability to adapt flexibly to everyday demands
- Well below adaptive functioning for communication, community involvement, functional academics, self-care, leisure activities, motivation/self-direction/independence, socialization and interpersonal skills and home skills.

7. Dr. *** included three single-spaced pages of summary and recommendations for STUDENT. She noted that Student's intellectual, academic, and adaptive skills fall well below *** based upon expectations for her age. She also stated that STUDENT can, at times when motivated, appear hard-working, pleasant and cheerful, cooperative, and both willing and able to speak up when a situation calls for it. Dr. *** advised that Student remains at risk for emotional decompensation in situations where she experiences insufficient structure and predictability and, at times, even when no clear precipitator is present. She opined that STUDENT will likely do best if enrolled in a day treatment program or small educational environment which offers straightforward behavioral expectations and clear-cut, positive incentives for compliance. With respect to STUDENT's work and educational settings, Dr. *** provided specific suggestions that addressed approaches to giving instructions, handwriting, reading, mathematics, vocational preparation, and social skills.
8. Among the most important considerations for STUDENT, Dr. *** advised that STUDENT needed predictability, consistency, very clear-cut guidelines, and very strong incentives to comply. During her testimony at the hearing Dr. *** also discussed the physical environment and the problems STUDENT has with excessive sensory information.
9. The ARD committee developed an interim Individualized Educational Program (IEP) for STUDENT to cover her first 30 days at Richardson ISD. The IEP contemplated that STUDENT would receive educational services at *** School (***) in a self-contained classroom with a low teacher-student ratio. The ARD committee proposed goals and objectives for reading, writing, history, math, coping skills, social skills, self-control and pre-vocational skills – all of which were based on input from STUDENT's parents. The committee also drafted a Behavior Intervention Plan (BIP), appropriately targeting specific behaviors and incorporating strategies designed to be effective with STUDENT. The committee considered the difficult nature of transition for STUDENT and adopted an approach to ease the conversion from home schooling to attending classes at a traditional school. During the 30-day interim period, new assessments would be completed for STUDENT in the areas of speech therapy, occupational therapy, and counseling.
10. At the ARD committee meeting on March 21, 2005, STUDENT's parents were interested in the program proposed by RISD, but Parent wanted to see the classroom that was being proposed. She and STUDENT visited the room the next day with the behavior specialist and RISD's psychologist, and met the classroom teacher. The second floor classroom was quiet and on a wing with little traffic. All of the District's personnel concluded the visit had been a success, and that RISD could implement STUDENT's IEP.
11. STUDENT's mother felt concern about the setting and program proposed by RISD. At a continuation of the ARD meeting on March 30, 2005, she identified those concerns:
 - (1) The young man STUDENT had difficulties with attends ***.
 - (2) STUDENT would have limited social interaction with other students in the classroom.

- (3) There was no plan for vocational services.
 - (4) The school's handling of an incident similar to the one the previous school year
 - (5) Training of the classroom teacher
 - (6) No crisis plan
12. The school addressed the parents' concerns about each of the matters raised at the March 30, 2005, ARD meeting. According to the interim IEP, STUDENT would be moving at non-passing times and would be highly supervised and accompanied by staff. Her day would be structured in such a way that she would not have contact with the young man. Over the 30-day interim period the school would gradually increase the amount of socialization STUDENT would receive, with options to include visits to the library, a school job, partners P.E., resource class, peer tutoring, and involvement in a small peer group for specific activities with aide support. The special education vocational teacher would be involved in working to plan vocational options for STUDENT. A school job would be explored when STUDENT was settled, and teachers would work with her on pre-vocational goals. During the initial transition STUDENT would be met at school by a behavior specialist and her teacher. Anxiety displays would be met with de-escalation strategies. STUDENT would be given time to talk or go to a quiet place. Daily communication with parents would occur. Additional behavior support staff would be available with a phone call. A crisis plan would be determined at the placement ARD meeting.
 13. The behavior classroom teacher at *** is very experienced, having worked in both therapeutic environments and residential treatment environments. He has attended special training sessions on bipolar disorder and autism. Additionally, he had help available from the behavior specialist, the counselor, and the District's LSSP.
 14. The room's location on the second floor required STUDENT to take the elevator. Given STUDENT's fear of elevators and extreme anxiety when in elevators, Parent believed it would be difficult for STUDENT to manage this on a daily basis, even though the visit on March 22 had gone smoothly. Accessing the classroom by the stairway was not an option either because of STUDENT's gravitational insecurity and limited depth perception. However, Parent did not adequately voice these concerns to the ARD committee. There was no discussion about the acceptability of the second-floor location of the classroom or whether it could be moved.¹
 15. Additionally, because it was already the end of March, Parent was concerned about additional changes or transitions for STUDENT to a summer program and then another change when the fall semester started. In sum, she feared that STUDENT's stability would be jeopardized by all of these changes. These concerns were not brought to the ARD committee.

¹ For the 2005-2006 school year the classroom was located on the first floor, but Parent was unaware of the change.

16. The renovations to *** had just been completed, and the building was large and beautiful. Parent believed the size and noise level would give STUDENT problems. There is no evidence these concerns were brought to the ARD committee either.
17. Another area that worried Parent was the statement in the BIP that all of the options in the RISD Code of Conduct could be used with Student within the guidelines for special education students. She feared that the school would involve the police if STUDENT got out of control, and the school would have no jurisdiction over the police in such an event.
18. After the visit to the classroom on March 22, 2005, STUDENT's parents decided that the proposed program at RISD "had too many variables," thereby rendering it unacceptable. Instead they enrolled STUDENT at the *** on March 29, 2005.
19. *** began the *** in 1993. She has a great deal of experience as an educator of special needs children in clinical settings. The school serves students from pre-kindergarten through twelfth grade. The school is housed in a 20,000 square foot building with an atrium in the center. The high school students are on one side of the building, with eight large classrooms on two short hallways. The rooms are carpeted and low lighting or natural light predominates. Classes range in size from four to eleven students. *** uses two program tracks: work-study and college preparatory. All of the *** students have some type of disability. The school utilizes a level system to control behavior, but each student has his or her own individual behavior goals. The staff at *** regularly deal with students that exhibit severe behavior problems. *** employs a variation on a year-round program, with the same number of instructional days in a nine-month school year but spread over twelve months. Thus, the students have more frequent, but short breaks and only a four-week break for most students in the summer.
20. STUDENT had previously attended the *** school before she was enrolled at Richardson ISD. She was familiar with the layout of the school and knew the director.
21. Once STUDENT began attending *** in March 2005 she had some good days and some bad days. However, after she settled in she progressed both behaviorally and academically. She has been able to interact appropriately with adults and peers, and even attended a school dance. She has been on high privilege level every day during the 2005 fall semester, and she has worked for the full class period most days. She is on the work-study track and enjoys her job at the school's store.

Discussion

Because there is no allegation of procedural violations, only the second part of the *Rowley* test applies: whether the program was reasonably calculated to confer some educational benefit. *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 189 (1982). The Fifth Circuit has articulated a four-factor test in *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245, 253, (5th Cir. 1997) to determine whether "some benefit" is demonstrated:

- (1) the program is individualized on the basis of the student's assessment and performance;
- (2) the program is administered in the least restrictive environment;
- (3) the services are provided in a coordinated and collaborative manner by the key "stakeholders"; and
- (4) positive academic and non-academic benefits are demonstrated.

What makes this case difficult is that the District was not allowed to implement the program that had been designed for STUDENT. Therefore, we can only review the first two factors, for we have limited or no evidence on which to analyze the third and fourth factors.

All of the evidence in this case conclusively establishes that STUDENT's program was individualized on the basis of her assessment and performance. Therefore, the first factor weighs in the District's favor.

Given STUDENT's background in an extremely restrictive setting at *** and then in the quite restrictive environment of home schooling, it is not realistic to expect STUDENT to begin attending mainstream classes on her first day back in the public school setting. STUDENT's history of bolting and refusing to comply with instructions had to be considered, particularly from a safety perspective. Balancing those needs with the socialization needs of STUDENT, the approach proposed by the District for STUDENT on an interim basis was appropriate. The school personnel understood the need to provide STUDENT access to nondisabled peers, and proposed the method of gradually increasing opportunities for peer interaction, which made sense. Although the classroom had only one other student, that situation was for the remainder of the spring semester, and therefore only short-term. The Hearing Officer concludes the second factor, too, weighs in the District's favor.

Although the District was never permitted to implement the services it proposed, the program was designed to be provided in a coordinated and collaborative manner by the key stakeholders. Therefore, the reasonable inference drawn from the proposal is that had RISD been allowed to proceed, the evidence concerning the third factor likely would have weighed in its favor.

Obviously the fourth factor presents a great dilemma. No one can predict how successful STUDENT would have been with the program proposed by RISD. However, given the detail described at the hearing of what the RISD staff planned to do, and the apparent commitment of the RISD staff to achieve results with STUDENT, the Hearing Officer believes there is a very good chance STUDENT would have demonstrated academic and non-academic gains. Every request or issue presented by the parents was carefully considered by RISD, and changes were made to the proposed program to meet their concerns. Had the second floor location of the class presented a problem for STUDENT after she began attending ***, moving it was not an obstacle.

This is not to disregard the parents' very real concerns about the many variables, for indeed there are plenty of variables here. The parents made a hard decision: They placed their daughter at

*** . *** provides a very appropriate, perhaps even an excellent, program for STUDENT No one criticizes that decision. The legal question, though, is whether RISD could provide an appropriate program for STUDENT, and as that test has been defined by the United States Supreme Court, the answer in this case results in favor of the District. In placing their daughter at *** Parents deprived RISD the chance to perform their legal obligation. In so doing they are not entitled to be reimbursed for the unilateral private placement at *** .

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 who is emotionally disturbed and autistic. 20 U.S.C. §1401 (3) (A); 34 C.F.R. §300.7 (c) (1), (4); 19 TEX. ADMIN. CODE § 89.1040 (c) (1), (4).
2. Richardson ISD proposed a program for STUDENT that was reasonably calculated to provide an education benefit for STUDENT during the 2004-2005 school year. *See Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).
3. 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 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984). Petitioner failed to meet her burden of proof in this case.
4. Petitioner is not entitled to reimbursement for the placement of STUDENT at *** . 34 C.F.R. § 300.403.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the relief sought by Petitioner is DENIED.

SIGNED this 31st day of October 2005.

Lucyretia Dillard
Special Education Hearing Officer

STUDENT <i>b/n/f</i>	§	BEFORE A SPECIAL EDUCATION
PARENTS,	§	
	§	
Petitioners,	§	
	§	
V.	§	HEARING OFFICER
	§	
RICHARDSON INDEPENDENT	§	
SCHOOL DISTRICT,	§	
	§	
Respondent.	§	FOR THE STATE OF TEXAS

SYNOPSIS

ISSUE: Whether Petitioner is entitled to reimbursement for the unilateral placement at a private school?

HELD: For Respondent

CITATIONS: *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 189 (1982); *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245, 253, (***) Cir. 1997); 34 C.F.R. § 300.403.