

Docket No. 375-SE-0704

**Student bnf Parent & Parent
v.
HOUSTON INDEPENDENT
SCHOOL DISTRICT**

**§ BEFORE A SPECIAL EDUCATION
§ HEARING OFFICER
§ FOR THE STATE OF TEXAS
§**

Final Decision

Procedural Matters

This is a special education due process hearing filed July 14, 2004. The original decision due date was August 28, 2004. The parties have extended the deadline to January 10, 2005. We held a prehearing conference by telephone on July 30, 2004. We held hearings in HISD offices at Houston, Texas, on August 31, 2004 and September 27, 2004. We took the testimony of the last witness by telephone on December 9, 2004.

Representation of the Parties

Attorney Ayesha Mutope-Johnson represents the Petitioner, Student bnf Parent and Parent.

Mr. Hans Graff, Assistant General Counsel, represents the Respondent, Houston Independent School District (HISD).

Issues Presented

Petitioner's Contentions

Petitioner has repeatedly tried to use this hearing to attack HISD's determination that Student knowingly possessed marijuana on the *** School campus. I have repeatedly ruled that I have no jurisdiction to review that determination.

In addition, Petitioner asserts that HISD denied a free available public education (FAPE) to Student during portions of the last school year. Petitioner also asserts there was a deficiency in the manifestation determination ARD which determined there was no link between her possession of marijuana and her learning disabilities in math and English. The deficiency asserted is that the parents requested (and the ARD committee denied) a psychological evaluation. The parents contend this evaluation is necessary to a proper understanding of the conduct for which HISD is disciplining Student.

Petitioner also challenges the legality of HISD's 45-day disciplinary placement of Student in the *** (***) school, an interim alternative educational setting, away from the *** School campus. Petitioner argues the marijuana possession may have been a manifestation of Student's disabilities and that, therefore, I should set aside her 45-day disciplinary transfer to the *** school.

HISD's Response

HISD asserts authority to discipline Student to the same extent as her non-disabled peers under 34 C.F.R. § 300.524(a) and the HISD Code of Student Conduct. Students without disabilities can be sentenced for up to one year in *** for marijuana possession. If there was no link between Student's possession of marijuana and her learning disabilities she can receive the same sentence.¹

HISD further asserts that it properly conducted the manifestation determination ARD and the requested psychological evaluation was not a necessary part of that ARD. HISD also asserts that it made a good faith effort to confer a FAPE on Student in the 2003-2004 academic year. HISD asserts that any deficiencies in Student's education last year arose because (1) her parents transferred her from school-to-school, (2) quit sending her to school before she completed the school year, and (3) Student consistently refused to complete her assigned work. Therefore, HISD asserts it was not responsible for any defects in the special education services provided Student last year.

HISD agrees to provide Student with the requested psychological evaluation if and when she returns to HISD and the *** school.

Findings of Fact

1. Student is a *** year old special education student who lives with her parents in the Houston Independent School District. She has learning disabilities in English and math. She was *** years old at the beginning of the 2003-2004 academic year.

2. 2003-2004 was her first year in high school. She entered the *** grade at *** School on a transfer from *** School after completing *** School in the spring of 2003. All of these schools are part of the HISD.

3. Student received her final ARD at *** on April 7, 2003. *** School began an ARD for Student in the fall of the 2003 academic year but stopped it when school officials learned that Student's parents were transferring her to *** School. Student arrived at *** School on August 18, 2003. Although Student's mother began asking for an ARD in September 2003, Student did not receive an ARD at *** or an individual evaluation plan (IEP) until December 9, 2003.² A report card issued for the period ending October 31, 2003 reflects that at the end of her first two six-weeks at ***, Student was making failing grades in five of her eight courses. She was failing English ***, Algebra ***, Int Psychology & Chemistry ***, Spanish, and Dance.³ After the ARD, *** School changed Student to different English and math courses (in keeping with her IEP) instead of those that HISD assigned her at the start of the year. She ended the semester by passing both subjects. She also passed Int Psychology & Chemistry ***. She failed her Spanish and Dance classes in the fall 2003-2004 semester at ***.

4. In her second semester at ***, a gang of male and female *** School students threatened and intimidated Student. Student and her parents asked to transfer Student to another high school. HISD

¹ See 34 C.F.R. § 300.524 (a) (if it is determined that behavior is not a manifestation of a child's disability, the same discipline may be applied as would be applied to other members of the student body who commit the same infraction). See also Petitioner's Exhibit 12S, the HISD Code of Student Conduct. It authorizes placement in a DAEP for up to one year for possession of *** on campus. (Level IV violations pages 8 & 9).

² Tr. 67-72

³ Petitioner Exhibit 5S printout for period ending 10/26/03.

granted this request and transferred Student to the *** School. She was enrolled at *** on February 17, 2004.

5. On March 11, 2004, after Student had been in *** for only *** calendar days, ***, a drug control officer for the school (acting on a student informant's tip) asked Student to follow him to his office. When she arrived at his office, he asked her to empty her pockets. Her pockets contained a paper containing two "****" (cigars from which someone had removed tobacco and replaced it with marijuana).

6. *** took Student to the school police officer, ***. Officer *** placed Student under arrest and placed the marijuana in a baggie and marked it for identification. He also arranged to have Student transported to the Houston Police Department for fingerprinting and booking.

7. Vice-Principal *** suspended Student from school for three days. When Student returned to the school at the end of the suspension period, *** placed Student in "in-school-suspension" (ISS) until a manifestation determination ARD could be conducted. The ARD committee met on March 29, 2004. The committee methodically went through all of the steps outlined in 34 CFR § 300.523 and determined that Student's behavior of possessing the marijuana was not a manifestation of her learning disabilities in English and math. The committee determined that relevant disciplinary measures applicable to non-disabled students might therefore be applied to Student except the District must continue to provide her a FAPE during the disciplinary period.⁴ Student's mother requested a psychological evaluation as part of the ARD so the committee might better understand Student's conduct. The committee determined the psychological evaluation was not necessary to its determination but agreed to discuss it at the next ARD committee meeting. Student's mother would not agree to approve the ARD committee recommendation until the committee put in writing its agreement to discuss the psychological evaluation at its next meeting. In the end all the committee members, including Student's mother, agreed to the ARD committee findings.

8. Vice-Principal *** then imposed a penalty of a 180-day disciplinary assignment to the *** (***) school, an interim alternative educational setting, away from the *** School campus. *** School Principal *** later reduced this sentence to 45 days in the *** school. The parents appealed *** ruling to ***, PhD, Northwest District Director. *** upheld *** decision to assign Student to *** school for 45 days as discipline for possession of marijuana on the *** campus.

9. Student remained in ISS awaiting transfer to the *** school for several weeks. ***, supervised Student while she was in ISS. *** primary job is to keep order in ISS and to make certain the ISS students are in ISS when they should be there and that they are doing productive work. *** has a master's degree in education but not in special education. He does not exercise any significant role in providing academic instruction to the ISS students.

10. There is a conflict in the evidence on the degree to which Student received academic assignments in ISS, on the instruction that was available to her while she was in ISS, and on what Student did in ISS. At first Student testified that she received no assignments and no visits from her teachers while she was in ISS. She stated she had nothing to do other than to read magazines, draw pictures, and run errands for the school nurse and for ***. She later admitted to receiving some assignments and visits from teachers while she was in ISS. After admitting to receiving the assignments, Student said that she didn't always receive them every day and didn't do most of the ones she did receive because she didn't understand

⁴ ARD report of 3/29/04, HISD's Exhibit 6, pages 12-13. See also related testimony of ***, Tr. 208-211; 226-228.

them. *** said he checks each day to make certain all the ISS students have work to do. He says Student regularly received folders containing assignments and received some visits from several of her teachers while she was in ISS. On request, *** issues hall passes to students to go to their teachers for assignments (but did not say that he issued any hall passes to Student to go to her teachers or that she ever requested any hall passes for that purpose). Director of Special Education *** testified that he checked with all of Student's teachers and all reported that they continued to send Student assignments in ISS but that he did not know if she completed and returned them. Several of Student's teachers testified they gave Student assignments and periodically checked on her while she was in ISS. I find based on what I consider to be the more credible evidence that Student continued to regularly receive class assignments in ISS and that periodic help from her teachers was available to her. I find that she received the same opportunity for education and instruction that was available to any other student in ISS. It was not the same opportunity for instruction Student would have received in a regular classroom because she did not have the same access to her teachers she would have had in a regular classroom.

11. The *** school held a placement ARD for Student on May 10, 2004. The ARD made class assignments for Student for the 2004-2005 academic year. The parent disagreed with assigning Student to the *** school and indicated her disagreement when signing the ARD committee report. When Student quit attending *** (citing medical reasons), Vice-Principal *** withdrew her from *** anticipating Student's disciplinary placement in the *** school. Student did not complete the 2003-2004 semester at *** School. She has never reported to the *** school (and did not receive any grades or credits for the spring 2003-2004 semester). HISD will not allow her to return to her regular high school or a transfer school until she completes her disciplinary placement at the *** school. Her parents have enrolled her in the *** School for the 2004-2005 academic year. They represent that they will return her to HISD if I set the *** placement aside and order HISD to allow her to resume her schooling in the regular HISD schools with suitable support services and accommodations for her disabilities.

12. All the evidence is to the effect that the *** school provides learning opportunities which are at least comparable to those available in ***.

Conclusions of Law

Lack of Jurisdiction to Review Hearings on School Rule Infractions and Discipline

I have no jurisdiction to review HISD disciplinary hearings or the determination that Student possessed the marijuana. Chapter 37 of the Texas Education Code contains the Texas law related to student discipline. It includes requirements pertaining to a hearing to decide whether students have, in fact, possessed marijuana or committed some other disciplinary infraction of school rules and the appeals available from that hearing and determination. Neither Chapter 37 of the Education Code nor any other state or federal law confers jurisdiction on a Texas Special Education Due Process Hearing Officer to review that determination or set it aside. Such errors, if any, as may underlie HISD's findings that Student knowingly possessed marijuana on March 11, 2003 are not subject to my review. Constitutionally guaranteed due process rights in a student disciplinary hearing are extremely limited. They do not include a right to appeal as a matter of due process. See Goss v. Lopez, 419 U.S. 565 (1975). Any appeal available is statutory and there is no statutory right to appeal a student disciplinary hearing to a Special Education Hearing Officer under Texas or other applicable law.

See Rudy F. bnf Frances F. v. Poteet Independent School District, Texas Education Agency Docket No. 382-SE-898 (1998). This was an earlier holding by a Texas Special Education Hearing Officer that Texas Special Education Hearing Officers have no jurisdiction to review or set aside a decision in a school hearing determining whether a special education student violated school rules and, if so, the appropriate penalty.

Whether The Manifestation Determination ARD Was Correctly Conducted?

I have concluded the manifestation determination ARD was correctly conducted. The committee considered all of the issues required to be considered under 34 CFR § 300.523 and their decision that the offense of marijuana possession is not related to a learning disability in math or English appears reasonable. HISD met its burden of proving that the manifestation determination ARD properly considered all relevant information related to the incident that occurred on March 11 2004 and any linkage to Student's learning disabilities and concluded that there was no linkage.

The ARD committee was not required to order a psychological evaluation to determine if psychological problems caused Student to possess the marijuana. This was because there is no past history of psychological problems interfering with Student's ability to learn. The ARD committee therefore had no reason to order a psychological evaluation as part of the manifestation determination ARD.

Whether Student Received a FAPE During The 2003-2004 School Year?

Turning to the issue of whether Student received a FAPE during the 2003-2004 school year, I have concluded that HISD failed to provide Student a FAPE for the first 113 days of 2003-2004. 34 C.F.R. § 300.343 provides that school boards are responsible for initiating and conducting ARD meetings for the purpose of developing, reviewing, and revising the IEP of a child with disabilities. These meetings must be held prior to every school year, 34 C.F.R. § 300.342, and must yield a written IEP which states the individual child's current level of achievement, goals for the upcoming year, specific services to be rendered, dates for the implementation of the IEP and criteria for evaluating the child's progress. 34 C.F.R. § 300.346. The IEP is produced by a team, which must include a qualified special education representative of the agency, one or more of the child's regular education teachers, one or more of the child's special education teachers or providers and one or more of the child's parents, and which may also include other individuals who can evaluate the child or provide special education services to the child. 34 C.F.R. § 300.344 and 300.345.

From August 18, 2003 until December 9, 2003, a period of 113 calendar days, *** School delivered services to Student without the benefit of an IEP and during this period, Student was failing most of her courses. I have concluded that Student is entitled to compensatory education for at least a comparable period to provide her the special education instruction she should have received in math and English during the first 113 calendar days of the 2003-2004 school year.

HISD Agreement To Provide A Psychological Evaluation

The HISD has agreed to provide the requested psychological evaluation to Student if she decides to return HISD.

ORDER

Based upon a preponderance of the evidence and the foregoing findings of fact and conclusions of law (and the agreement of HISD to provide a psychological evaluation to Student if she returns to the District), it is hereby **ORDERED** that the relief requested by Petitioner is **GRANTED** in part and **DENIED** in part.

It is **ORDERED** that Student shall return to the *** school for 45 days and that if Student returns to HISD, the District shall convene an ARD meeting as soon as possible, but in no case later than two weeks from the date that she returns, to determine the appropriate amount and type of compensatory education necessary for Student to help her catch up academically and regain lost credits. The District shall also provide a psychological evaluation as it has agreed to do as soon as possible after Student returns to HISD to begin her 45 days in the *** school.

NOTICE TO THE PARTIES

This Decision is final and may be appealed to a state or federal district court.

The district shall timely implement this Decision within 10 school days in accordance with 19 T.A.C. §89.1185(q) and 34 C.F.R. §300.514. The following must be provided to the Division of Special Education Programs and Complaints at the Texas Education Agency and copied to the Petitioner within 15 school days from the date of this Decision: 1.) Documentation demonstrating 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.

SIGNED this 10th day of January, 2005.

Larry J. Craddock
Special Education Hearing Officer

Docket No. 375-SE-0704

**Student bnf Parent & Parent
v.
HOUSTON INDEPENDENT
SCHOOL DISTRICT**

**§ BEFORE A SPECIAL EDUCATION
§ HEARING OFFICER
§ FOR THE STATE OF TEXAS
§**

SYNOPSIS

Issue No. 1: Whether a TEA hearings officer has jurisdiction to review school disciplinary hearings involving rule infractions allegedly committed by a child with a disability eligible for special education services under IDEA.

Held: For the School District. Chapter 37 of the Texas Education Code contains the Texas law related to hearings and appeals related to student discipline. It does not confer jurisdiction on TEA hearings officers to review that determination or set it aside. No other Texas or federal statute confers that jurisdiction on TEA hearings officers.

Citation: Chapter 37, Texas Education Code; Goss v. Lopez, 419 U.S. 565 (1975); Rudy F. bnf Frances F. v. Poteet Independent School District, TEA Hearing Officer Decision # 382-SE-898 (1998).

Issue No. 2: Whether HISD correctly conducted a manifestation ARD to determine if there was a linkage between a student's disabilities and her possession of marijuana.

Held: For the School District. The ARD committee considered all the issues which 34 CFR § 300.523 CFR requires it to consider in determining the offense of marijuana possession is unrelated to the student's learning disabilities. 34 CFR § 300.523 did not require the committee to order a psychological evaluation where the student had no history of psychological problems interfering with her school performance.

Citation: 34 CFR § 300.523.

Issue No. 3: Whether the HISD provided a FAPE to the Petitioner during the 2003-2004 school year when an ARD was not conducted and no IEP was developed until 113 calendar days after the beginning of the school year when the student was already failing several courses.

Held: For the Parent. 34 CFR § 300.342 requires that an ARD be held prior to every school year.

Citation: 34 CFR § 300.342.