

STUDENT	§	BEFORE A SPECIAL
EDUCATION	§	
	§	
V.	§	HEARING OFFICER FOR THE
	§	
BROWNSVILLE INDEPENDENT	§	
SCHOOL DISTRICT	§	STATE OF TEXAS

DECISION OF THE HEARING OFFICER

I. Statement of the Case

Petitioner STUDENT brings this appeal by his next friend, PARENT, pursuant to the Individuals with Disabilities Education Improvement Act 20 U.S.C. § 1400 *et seq.*, (hereinafter referred to as "IDEA"), against Respondent Brownsville Independent School District (hereinafter referred to as "Respondent" or "Brownsville ISD"). Petitioner STUDENT by next friend PARENT (hereinafter referred to as "Petitioner" or "STUDENT") filed a written request for a due process hearing which was received by the Texas Education Agency on September 1, 2005. Petitioner was represented by Attorney Christopher L. Jonas of Corpus Christi, Texas. Respondent was represented by Attorney J. Erik Nichols of the law firm Henslee Fowler Hepworth & Schwartz, LLP of Houston, Texas. A telephone prehearing conference was held on September 21, 2005, at which time both parties waived their rights to a final decision within forty-five (45) days of the date the written request for due process hearing was filed. [34 C.F.R. §300.511(c)] A due process hearing was held on Tuesday, November 1, 2005, in Brownsville, Texas. The parties agreed and filed post-hearing briefs is before Thursday, December 1, 2005.

Petitioner alleged that STUDENT is a ***-year-old student in Brownsville ISD who received special education placement, programs and services on the basis of meeting eligibility criteria as a student who was born without arms and legs, and was classified as other health impaired ("OHI"). Petitioner asserted the following:

1. STUDENT is not currently taking medication. He is attending ***, though it is not his neighborhood campus. It is the only school that has an inclusion class to serve him.
2. There was a mediation held in November, 2004, the parents signed the agreement, but there was no release. STUDENT's parents felt that the District did not follow any part of the agreement. Petitioner does not agree that the issues in this case should be, in any way, limited by the mediation or the agreement.
3. STUDENT's parents met with the District's Superintendent and asked for occupational therapy ("OT") and physical therapy ("PT") evaluations. The District only

performed an OT evaluation and have yet to do a PT evaluation. Moreover, the District has not performed an assistive technology evaluation (“AT”).

4. STUDENT’s parents disagree with the District over the appropriateness of the OT evaluation.

5. STUDENT’s classroom does not have an accessible restroom. He cannot move around in a restroom and an aide merely picks him up and places him in the restroom.

6. STUDENT has normal cognitive abilities and is not mentally retarded. He is not learning disabled.

7. STUDENT needs assistive technology devices to assist him in becoming independent and would allow him to move around and eat with minimized assistance. The parents suggested a feeding device to the District and it never responded to the request.

8. Respondent has placed Petitioner in a PPCD class for the last two school years and Petitioner should be in a regular education classroom with special education support.

9. Respondent has failed to establish special education transportation services as a related service. Petitioner’s next friend has transported Petitioner to and from school each day for this school year without means of transporting Petitioner’s motorized wheel chair.

10. Respondent continues to have IEP goals and objectives in place which are not obtainable due to the lack of a motorized wheel chair for use on campus and in the classroom. Respondent has failed to provide Petitioner with appropriate IEP goals and objectives.

11. Respondent has failed to conduct an appropriate assistive technology (“AT”) evaluation, Positioning Evaluation and Adaptive Play Evaluation.

Respondent contended the following:

In the Order of Agreement that resulted from the referenced mediation, STUDENT’s parents dismissed the prior due process hearing requests. The issues in this case should be limited to allegations that occurred after that mediation agreement. Any alternate placement to another District campus is a general education matter. The District has offered compensatory services to STUDENT for the delay in the start of services and the parents have consistently refused them. The Order of Agreement authorized an IEE in certain areas and the parents have responded that they are satisfied with existing evaluations. Regarding AT, OT, and PT evaluations, all three evaluations have been completed and the parents are aware of them. The District reasserts that it is without notice of new matters that have not been addressed by prior District responses.

Based upon the evidence and the argument of counsel, the Hearing Officer makes the following findings of fact and conclusions of law.

II. Findings of Fact

1. STUDENT is a *** year old boy born on July 31, 2004 who is eligible for special education services as a student with an orthopedic impairment. He has a congenital absence of both arms and both legs. He receives special education services through the District's Early Childhood Intervention ("ECI") services.

2. On March 18, 2004, Brownsville ISD prepared a Full and Individual Educational ("FIE") Disability Report regarding STUDENT. The report acknowledged that STUDENT has a severe orthopedic impairment that adversely affects his educational performance and noted the following implications of his impairment on the educational process:

- STUDENT would have difficulty transferring on and off the bus independently;
- STUDENT would have difficulty with mobility within a general education classroom;
- STUDENT would have difficulty with self-help skills such as feeding, dressing and toileting; and
- STUDENT would have difficulty performing activities found in a general education classroom and may require special adaptations to the general education program.

3. The March 18, 2004 FIE Disability Report concluded that STUDENT would require physical therapy (PT) and occupational therapy (OT).

4. On April 1, 2004, Brownsville ISD completed a Texas ECI Nutrition Screening Form, and ECI Assistive Technology Screening Form, a Vision Screening Form, and a Hearing Screening Form on STUDENT. The District determined that STUDENT has normal hearing, vision communication, and nutritional needs. Regarding assistive technology, the evaluator determined that STUDENT required support in his positioning, but could maintain a stable head positioning. STUDENT was referred for a positioning evaluation that was received on April 15, 2004. The screening indicated that STUDENT can move about the classroom and home and explore when he wants to. The screening included an adapted play evaluation wherein his abilities and disabilities were assessed.

5. Brownsville ISD developed an Individualized Family Service Plan on May 5, 2004. In the Integrated Summary, the Plan reflected the use of data from STUDENT's physicians and family of his existing physical capabilities and requirements, his cognitive abilities, his personality and preferences and his family's concerns and goals for him. The Plan summarized E.P.'s assistive technology needs and transportation requirements, need for OT and service coordination.

6. Following the initial meetings between E.P.'s family and Brownsville ISD and Brownsville ISD's evaluations of STUDENT, no one from Brownsville ISD called STUDENT's parents until August 13, 2005, the start of the 2004-2005 school year. The call came from a

diagnostician with ***, after STUDENT's mother had called Brownsville ISD's superintendent to ask why no one had called her. STUDENT's family filed a due process hearing in Docket No. 053-SE-1004 wherein the alleged issues included a failure of Brownsville ISD to timely offer services, develop an IEP, and implement an IEP for ECI services.

7. The issues surrounding the delay in Brownsville ISD's communicating with STUDENT's family and providing special education services were resolved in a successfully mediated settlement of the due process hearing docket 053-SE-1004. That docket was dismissed with prejudice on Friday, December 1, 2004.

8. An ARD meeting was convened on October 14, 2004 on STUDENT's behalf that was not attended by his family. The ARD meeting was an initial ARD in which Brownsville ISD found STUDENT to be eligible for special education under the category of orthopedic impairment. The October 14, 2004 ARDC concluded that STUDENT had normal intelligence and cognitive functioning and should receive general education, ECI curriculum in a mainstreamed instructional arrangement with related services, and modifications including: Preferential seating, frequent breaks, special instructional adaptive equipment, and individualized assistance. The ARDC determined that STUDENT required OT and PT.

9. On October 19, 2004, Brownsville ISD offered STUDENT compensatory educational services in the form of a full school day, instead of the usual half day allotted for students at STUDENT's age. In an alternative to the offer of the full school day, Brownsville ISD offered to provide educational programming specific to EP during the summer of the 2004-2005 school year, if needed. STUDENT's parents declined the full school day because they thought that it was too long for STUDENT, at that time.

10. STUDENT began school in January of 2005, even though the mediated agreement that resolved previous due process hearing docket 053-SE-1004 in November, 2004, stated that he would go to school, immediately. However, because STUDENT did not begin school in August, 2004 as he expected, he became disappointed. After the resolution of the prior docket, STUDENT's parent wanted to reassure him and prepare him, emotionally, for the Spring semester. STUDENT's parent so informed Brownsville ISD.

11. STUDENT has two wheelchairs; a manual wheelchair and a motorized wheelchair equipped with head controls. He has had the motorized wheelchair for two years. STUDENT is able to control the motorized wheelchair by movements of his head. STUDENT likes the motorized wheelchair because it makes him feel independent and free.

12. STUDENT had the use of his motorized wheelchair in January, 2005, and then when school ended in May, 2005. For the 2005-2006 school year, STUDENT first had his motorized wheelchair available at school when Brownsville ISD picked it up from his parents' home at 1:45pm, November 1, 2005. During the Spring semester of the 2004-2005 school year, Brownsville ISD's procedure of handling STUDENT's school use of his motorized wheelchair

was to pick the chair up from his parents' home on Mondays and return it to his parents' home on Fridays. His parents agreed to this procedure so that STUDENT would feel free at school.

13. During the Spring of 2005, a Brownsville ISD occupational therapist, ***, showed STUDENT and his aide how he could move around his campus in a motorized wheelchair.

14. STUDENT's motorized wheelchair was not being transported between his home and his school until sometime after the March 31, 2005 ARD meeting. Thereafter, the frequency with which the motorized wheelchair was transported between the school and his home was at the request of and an accommodation to STUDENT's parents, who did not have a way to personally transport his motorized wheelchair.

15. Brownsville ISD never told STUDENT's family that it or they could not bring STUDENT's motorized wheelchair to school.

16. Ms. *** was a bus monitor on the school bus that STUDENT rode. Ms. *** sat next to STUDENT and provided him with drinking water or anything that he required during the commute between home and school. STUDENT liked Ms. *** and he felt safe with her. When Pr. *** was reassigned, STUDENT was not comfortable riding the bus.

17. Brownsville ISD has a certified aide who acts as bus monitor on the bus to which STUDENT is assigned. STUDENT's parent petitioned Brownsville ISD for Ms. ***'s reinstatement as STUDENT's bus monitor, but Brownsville ISD did not approve their request. Because the monitor is not ***, STUDENT's family declined the District's transportation offer in the morning. The school bus transports STUDENT in the afternoons. This is working out satisfactorily.

18. STUDENT has a toilet seat at his house that incorporates four small wheels and a high back for him to sit correctly. By placing STUDENT on his mobile seat, the seat can be rolled and positioned above a regular toilet seat when he has to use the bathroom.

19. As of STUDENT's March 31, 2005 ARD meeting, STUDENT's school did not have the mobile toilet. Days after the ARD meeting Brownsville ISD acquired a portable chair that fits on the small toilet that the non-disabled children in the general education kindergarten class use. The space for child size toilets is cramped for STUDENT and he prefers a full sized toilet. After the March 31, 2005 ARD meeting, STUDENT was provided with a portable toilet chair comparable to his at home.

20. STUDENT is incapable of positioning himself on any toilet seat regardless of the design. An aide must pick him up and place him on all type of toilet seats. STUDENT has a one to one aide that accompanies him to the restroom. The aide's presence ensures that STUDENT does not slip and fall while he is in the rest room. Even though STUDENT's aides pick him up to go to the bathroom he has not lost any educational opportunity.

21. After the November 16, 2004 mediated agreement, STUDENT was being changed in one of his aide's lap because there was insufficient space in the restroom.

22. STUDENT has an aide that feeds him when he is at school. STUDENT's family feeds him at home. STUDENT's private aide gave STUDENT's family information about a device called a "feeder," that could conceivably allow STUDENT a greater role in feeding himself. However, no one, including STUDENT's family, have actually seen the device.

23. STUDENT is in an "inclusion" *** class. In this classroom, half of the students have special education disabilities and half do not.

24. STUDENT is performing regular *** class work and he is making substantial progress in that curriculum. In STUDENT's inclusion class, the District has assigned two teachers who co-teach the disabled and general education students in the class. STUDENT currently interacts socially with his classmates in his inclusion class. His interaction is limited only by his personal shyness. Also, STUDENT has been working on the computer and has been making a great deal of progress on it. He assimilates the information very quickly.

25. STUDENT currently interacts well with his classmates and teachers during classroom activities. In fact, STUDENT is one of the top students in his inclusion class.

26. At March 31, 2005 ARD meeting, an OT, *** was present at the meeting. STUDENT's ARD Committee discussed assistive technology and physical therapy. *** was assigned the responsibility of OT, AT, and PT for STUDENT. The District's PT, ***, provided recommendations to the ARDC pertaining to STUDENT's use of his motorized wheelchair, computer access, adapted toilet seat, and "boppy pillow" for lateral support. Ms. *** recommended PT on a consultative basis to monitor his ability and equipment needs.

27. Brownsville ISD performed an Assistive Technology evaluation on STUDENT on March 24, 2005. The AT evaluation was a part of an OT evaluation, that was performed at the same time. The report discusses the switch that was incorporated into STUDENT's computer instruction, and the role of an assigned paraprofessional in his instruction. The District OT evaluation recommended that STUDENT receive 27 OT sessions per year.

28. Brownsville ISD has implemented the following AT devices for STUDENT's use in his classroom:

- Physical manipulative activities adapted to his disability;
- Computer switch interface that STUDENT Can activate using his shoulder blade; and
- Low-tech devices such as a utensil holder, slant board and stabilizing pillow.

29. Brownsville ISD AT consultant has made the following recommendations for AT devices for STUDENT as he grows and develops educationally:

- Infrared switch device for a dedicated computer for his use for composing sentences for text-generated software;
- A device for turning pages; and
- A specially design v-shaped mouth stick that facilitates talking and use as a printer.

30. STUDENT has made educational progress using the various AT devices that have been developed on his behalf and his wheelchairs, manual and motorized.

31. STUDENT has used the bathroom outside of his class by having his one to one aide carry him to the bathroom and place him on the specially designed seat. Using securing straps, STUDENT is safe and has not had any accidents where he has fallen. STUDENT's in-class bathroom was not accessible as of the hearing but was in the process of being made accessible.

32. STUDENT's mother attended the March 31, 2005 ARD meeting and signed in agreement with STUDENT's recommended program, including related services and equipment.

33. In the classroom STUDENT had a mother's helper" arm with a cup and straw.

34. Brownsville ISD completed an AT evaluation on STUDENT On October 10, 2005. The evaluation address AT responses to E.P.'s needs in the areas of mobility, class participation, written communication through the use of manual instruments and computer, and prevention of secondary disabling conditions such as scoliosis, related to his adaptations.

35. In Brownsville ISD, *** inclusion classes are classes that are composed of approximately half general student and has disabled students. In the classes, all the students in the class are "team taught" by a general education teacher and a special education teacher.

III. Discussion

The challenges of developing and implementing an appropriate special education program for an intelligent and charming child such as STUDENT, who was born without arms or legs, are as enormous as they are obvious. The extreme orthopedic impairment should be addressed with careful, multiple assessments; followed by occupational and physical therapy and diligent study of the available means of assistive technology. In responding to a new, young student like STUDENT, the logical response would be an initial set of assessments before the start of classes followed by subsequent assessments, based on empirical data and the child's developing needs.

The existing history between STUDENT and Brownsville ISD reflects a logical, if flawed beginning. When Brownsville ISD officials first met E.P and his family, they arranged

for and performed the appropriate evaluations related to his need for mobility, personal maintenance (toileting and eating) and actual educational performance. Unfortunately, there was an inappropriate delay in the implementation of a program that ultimately resulted in the filing of prior docket 053-SE-1004. The successful mediation of that case resolved the initial issues of Brownsville ISD's failures and even resulted in Brownsville ISD offering compensatory education to STUDENT and his family.

In this docket, the record shows that Brownsville ISD is appropriately applying its initial program to STUDENT's needs and continuing to evaluate and improve his program. Since he began ECI classes in January, 2005, he has been making so much educational progress that he is one of the top students in his class. His intelligence is allowing him to pick up his general education ECI curriculum quickly and the mobility, transportation and personal maintenance challenges are being studied and adjusted, as necessary. The March 31, 2005 ARD meeting wherein there was unanimous agreement, is a testament to Brownsville ISD's greatly improved responsiveness to STUDENT's needs.

Petitioner raised several prominent issues in the complaint: mobility issues, surrounding his need for a motorized wheelchair; transportation issues, directly related to the motorized wheelchair; toileting and eating issues; and a general need for assistive technology issues. The District's responses to each issue has been appropriate since January, 2005. The wheelchair issue, whether in class or during the commute between home and school, is a function of STUDENT's family's wishes/needs being considered. Brownsville ISD is willing to transport STUDENT in his motorized wheelchair to and from school daily, STUDENT's family situation precludes this. Undoubtedly the motorized wheelchair affords him greater independence at school, (though not necessarily in class) but working out the availability of the motorized chair with his family is the problem. Either with manual or motorized chair, STUDENT is making progress. Brownsville ISD has an appropriate bus monitor to see to STUDENT During the bus commute. It is not obligated to maintain the specific bus monitor that STUDENT's family prefers. The toileting issue is difficult and sensitive, and the record shows that Brownsville ISD has purchased a toilet seat on STUDENT's mother's recommendation and is altering STUDENT's classroom bathroom to make it more accessible and private. Brownsville ISD is also adjusting STUDENT's program *vis a vis* assistive technology using a fresh AT evaluation (10/10/05) and a consistent monitoring of new technology, where appropriate, for such a young student. In the final analysis, all of these issues are best addressed by a one-to-one aide, which STUDENT has always had. The quest for independence is appropriate, but independence is currently beyond E.P.'s capabilities and existing technology. STUDENT's educational progress, however, has not been delayed by Brownsville ISD.

In summary, Brownsville ISD has shown that, after a shaky start, it is appropriately responding to STUDENT's educational needs. As his capabilities and educational requirements increase, so will Brownsville ISD's obligation to employ more creative uses of assistive technology, social services, and related services in his program. This record shows, however, that at this time, STUDENT is receiving a free appropriate public education.

IV. Conclusions of Law

1. Petitioner STUDENT is a student in Brownsville ISD who is eligible for special education services based on his classification as a student with an orthopedic impairment. 20 U.S.C.A. § 1401(3); 34 C.F.R. § 300.7; 19 T.A.C. § 89.1040.
2. Respondent Brownsville ISD has a responsibility to provide STUDENT with a free appropriate public education. 20 U.S.C.A. § 1412; 34 C.F.R. §300.300; 19 T.A.C.§ 89.1001.
3. Respondent Brownsville ISD demonstrated that it has developed and is implementing appropriate individualized education plan, complete with appropriate related services.
4. Respondent demonstrated that STUDENT is making substantial educational progress in an appropriate setting with an appropriate curriculum and related services.

V. Order

After due consideration of the record, the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer ORDERS that the relief sought by Petitioner is hereby DENIED.

Finding that the public welfare requires the immediate effect of this Final Decision, the Hearing Officer makes it effective immediately.

SIGNED this 9th day of December, 2005.

Stephen P. Webb
Special Education Hearing Officer

DOCKET NO. 395-SE-0805

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SYNOPSIS

Issue: Whether Brownsville ISD developed and implemented an appropriate Early Childhood Intervention individualized education plan, including the necessary related services of occupational therapy (“OT”), physical therapy (“PT”), and assistive technology (“AT”) for a *** year old student who was born without arms and legs.

Federal Citation: 20 U.S.C.A. §1414;34 CFR §§ 300.340-300.350; *Hendrik Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Daniel R.R. v. State Board of Education*, 874 F.2d 1036 (Fifth Circuit - 1989)

Texas Citation: 19 T.A.C. §§ 89.1050, 89.1055; *Tatro v. State of Texas*, 625 F.2d 557 (Fifth Circuit - 1980)

Held: For Respondent. Brownsville ISD has undertaken to initially evaluate STUDENT’s substantial need for OT, PT, and AT and is reviewing STUDENT’s changing needs. Its existing program, however, is providing STUDENT with a free appropriate public education.