
DOCKET NO. 045-SE-1005

B/N/F***&***

PETITIONER

vs.

SKIDMORE-TYNAN INDEPENDENT

SCHOOL DISTRICT

RESPONDENT

BEFORE A SPECIAL EDUCATION

HEARING OFFICER

FOR THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

Procedural History and Issues

The father of student, (collectively referred to as "Petitioner"), filed this request for Due Process Hearing on October 31, 2005, under the Individuals with Disabilities in Education Act, 20 U.S.C. §1400 et seq., (hereafter "IDEA"), complaining about the failure of Skidmore-Tynan Independent School District ("Respondent," "AISD," or "the District") to provide student with a free appropriate public education ("FAPE"), in the following areas:

- A. To provide an appropriate evaluation for a learning disability, inclusion and the need for a designated aide and speech, and has failed to timely evaluate for physical and occupational therapy.
- B. To provide appropriate support services such as a designated aide, an incline chair, physical, occupational and speech therapy and a remedial reading program.
- C. To provide Free Appropriate Public Education; Petitioner is allergic to latex, and Respondent continues to use latex gloves when providing health services for Petitioner.

On November 2, 2005, the Hearing Officer provided the parties the Initial Scheduling Order in writing setting forth the dates for the procedural deadlines, including the first prehearing conference date of November 21, 2005. The prehearing conference went forward scheduled. Christopher Jonas, Attorney, Center for Special Education Law appeared on Petitioner's behalf. Respondent was represented by Stacy C. Ferguson, Attorney, Escamilla & Poneck, Inc. During the prehearing conference the parties discussed the hearing date, and due to Petitioner's attorney's conflict, the hearing was rescheduled from December 12, 2005, to January 30, 2006. Because of several other scheduling issues and other matters that arose later in the case, the Hearing Officer granted additional continuances for good cause shown.

On May 30, 2006, the Hearing Officer convened the Due Process Hearing in the board room of Skidmore-Tynan Independent School District. Mr. Christopher Jonas represented Petitioner; also appearing on Petitioner's behalf, were Mr. and Mrs. ***, Mr. Jonas's personal assistant, Roland Ramirez, was present throughout the hearing. Ms. Stacy Ferguson, represented Respondent, and ***, ***, School Principal appeared as the District representative. ***, Special Ed Director, Brush Country Co-Op (retired), appeared as the representative for Brush Country. The hearing lasted two complete days and was concluded on May 31, 2006.

The parties called ten witnesses and presented documentary evidence consisting of approximately 125 exhibits contained in five three-ring binders. The court reporter produced a 465-page transcript of the proceedings. During the hearing Petitioner withdrew the issues concerning physical therapy and occupational therapy. The parties were given the option to present post-hearing briefs to summarize their arguments by June 14, 2006. The Decision of the Hearing Officer was prepared in compliance with the deadline of June 30, 2006.

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 *** male residing with his parents within the geographic boundaries of Skidmore-Tynan Independent School District. Student has been identified as eligible for special education services under the classification of other health impaired. Student attended regular education classes at Skidmore-Tynan Elementary School during the 2005-2006 school year.
2. Student has a diagnosis of ***, which in his case has caused a ***. ***. ***. Medically this can lead to kidney problems, urinary tract infections, and can make reflux infection up into the kidneys occur with resulting kidney damage.
3. In Student's case the *** has resulted in ***. He has *** and his *** is adversely affected.
4. Student has also been diagnosed with ***, and has a *** on the ***. ***. Dr. ***, student's pediatrician, believes that no special precautions, such as helmets, are necessary for student because of the ***.
5. Dr. *** records show no problems within the past 18 months for either *** problems or problems with the *** for student.
6. *** His parents have requested the school provide *** as a related service, but the school has declined. The school's approach to changing student's *** had been on an as-needed basis, but after discussions with the parents the first two weeks into the school year, it was agreed to change student's *** on an hourly basis.
7. The Admission, Review, and Dismissal (ARD) Committee met on August 11, 2005, to discuss student's program of services. The Committee agreed that student required a full-time aide for toileting purposes, but no decision was reached whether an assistant was needed for other purposes. The Committee also agreed that no educational evaluation was needed for student. Student's parents attended and participated in the August 11, 2005, ARD meeting.
8. In spite of the ARD Committee's determination that a full-time assistant was not needed for student, the principal decided to assign an aide to student for the first two or three weeks of school. After consulting with his teachers and the aide, the principal determined student did not need the full-time assistant.
9. Relations between the school principal and Mrs. *** deteriorated during the first month or so of the school year, resulting in a letter dated November 22, 2005, asking Mrs. *** to call the school office first before she came to the campus unless it was an emergency. The issue about student's ongoing requirements for an aide had not been fully resolved, and the District attempted to schedule an ARD meeting beginning October 6, 2005. The District sent notices too numerous to recount here, none of which was successful in getting the parents to attend an ARD meeting.
10. Student's parents provided a letter from Dr. *** dated October 31, 2005, addressed "To Whom it May Concern," that stated in part, student needed to have his pull-ups changed diligently so as not to increase his risk of infection. This

- letter was meant to be an expression of their opposition to the hourly schedule for changing student's***, but no specific alternative was identified.
11. Dr. *** letter also stated that student has a *** and should not be exposed to ***. However, Mrs. *** had already brought that issue to the school principal's attention the first couple of weeks of school, and it was taken care of the same day.
 12. The school provided an assistant to monitor student's transition to and from P.E. and computer class. His classroom teacher monitored his transition to activities outside her classroom, including the cafeteria. She also helped him carry his tray. An assistant was also available during P.E. and recess to monitor his activities.
 13. According to the school's hourly schedule one paraprofessional provides primary care for student's toileting needs. Another paraprofessional changes student's *** two times during the day. Another paraprofessional has been trained as a back-up in the event that either of those persons is not available.
 14. Mr. and Mrs. *** are opposed to catheterization for student. That is the only other alternative for addressing student's hygiene relative to his toileting needs. The Respondent stipulated on the record in the hearing that it is not going to require or recommend catheterization for student as long as the parents would like for the Respondent to continue to toilet train student.
 15. Dr. ***, an expert in inclusion, expressed his opinion that student needed a designated aide for three reasons: (1) the potential health issues for injury; (2) privacy issue in the toileting area; and (3) having one person that would be most knowledgeable about his condition in implementing practices. He elaborated on the privacy concept to express importance about the potential embarrassment for a *** boy, especially with multiple people working with him. He also emphasized the idea that health and safety take precedence over learning.
 16. Student made good progress during his first grade year. He reads at an independent level, and his reading fluency is score is good. He's progressed a lot socially. Academically he falls in the middle in comparison to his peers in the class according to his teacher. The Hearing Officer finds her to be a particularly credible witness.
 17. Student gets through the school day well and transitions within the school with the assistance that has been provided by the aides. He has started carrying his own tray at the cafeteria. The schools plan of providing three aides for student throughout the day has allowed him to make educational progress. Ms. *** in particular has worked hard to help student make educational progress in all areas.
 18. From reviewing the hourly changing logs when the paraprofessionals tended to student's toileting needs, no discernible pattern can be determined. The logs show that, for the most part, student was changed every hour on the hour. There were times when student was dry and did not need to be changed at all. There were times that the *** was both wet and soiled, and needed to be changed. There is no way to determine how long student may have been wearing either a soiled or wet ***.
 19. Student's father testified that as much as 40% of the time when he picked student up from school that student would be wearing a soiled ***. He stated he could determine this was so from the smell.

20. There is no evidence that student should be evaluated for a learning disability.

Discussion

Here is the dilemma: How do you check in a way that is not embarrassing or get a *** child to report that he needs to be changed, particularly if the child has no sensation and is unable to tell you? How is the hygiene balanced with learning? At what point does the child's personal environment become unsanitary or unsafe or uncomfortable?

Petitioner makes a compelling argument that no one should have to sit in a soiled *** for an hour. However, the proposed relief of a designated aide fails to provide a satisfactory solution. Student already has what amounts to a single designated person addressing his toileting needs for most of the day. The school has already tried changing the *** on an as-needed basis, but that did not seem to work, so they went to the hourly schedule. Although the parents originally agreed to that schedule, they later changed their minds, partly because it was wasteful on occasion -- the dry *** were thrown away -- and partly because they believed student should be changed more frequently.

To remove the child from class risks exposing him to the attention of the rest of the group. Moreover, he misses precious learning time. But he should not be sitting in wet or soiled *** for extended periods of time. So what is the proper balance, if not every hour? Is it every half-hour? Perhaps every quarter-hour? Given the great emphasis put on health and safety, and the child's inability to identify his condition, in his younger years now, the balance probably should be more on the toileting aspects. Perhaps it is not so difficult just to make a brief trip to examine the condition on a more frequent basis. As he gets older and may be able to identify the condition, the schedule could be stretched out more. Having said all that and having studied the log as carefully as possible, the Hearing Officer concludes the schedule should be cut in half.

As for the other issues in the case, the evidence does not support a need for a single designated aid. The school has done a good job of training the aides in

providing assistance to student to transition within the school from his classroom to the various locations he needs to be.

With respect to whose responsibility it is to provide the ***, there is no legal authority requiring the school to do so. The Respondent's argument that the *** fall into a clothing category is persuasive to the Hearing Officer. Student would be wearing or using them even if he were at home.

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. Residing within Skidmore-Tynan Independent School District, student is a student who is eligible for special education services under the IDEA as a child with other health impairment. 20 U.S.C. §1401 (3) (A); 34 C.F.R. §300.7 (c) (9).
2. Petitioner bears the burden of proof with respect to his claims that *** 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 met his burden of proof in this case with respect to a portion of the issues.
3. Respondent's hourly schedule of changing student's *** allowed him to remain in wet or soiled *** for an inappropriate length of time, thereby depriving him of a free appropriate public education.
4. Respondent's education program for school year 2005-2006 for student was in all other respects appropriate.
5. Respondent is not required to provide *** to student or reimburse student's family for the *** student uses while at school.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is hereby ORDERED that a portion of the relief sought by Petitioner is GRANTED and a portion is DENIED. Respondent Skidmore-Tynan ISD is ORDERED:

1. To convene an ARD meeting within ten school days from the date of this order to develop a plan to update the information concerning student and develop a comprehensive program designed to meet all of the student's needs.
2. The program shall include a schedule that incorporates checking to see whether student's *** need to be changed every half-hour.

3. The program shall include developing a plan for helping student recognize his cues for when he needs to be changed and communicate those needs to adults.

PETITIONER is ORDERED to attend the ARD meeting referenced above.

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

Respondent shall timely implement this Decision within 10 school days. The following must be provided to the Division of Complaints Management at the Texas Education Agency and copied to the Petitioner within 15 school days from the date of this Decision: 1) Documentation demonstrating that the Decision has been implemented; or 2) If the time line 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 time line and a signed assurance from the superintendent that the Decision will be implemented.

SIGNED this 30th day of June 2006.

Luecretia Dillard

Special Education Hearing Officer