
DOCKET NO. 065-SE-1105

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

PETITIONER

vs. BEFORE A SPECIAL EDUCATION
HEARING OFFICER

UNITED INDEPENDENT SCHOOL DISTRICT
FOR THE STATE OF TEXAS

SCHOOL DISTRICT

RESPONDENT

DECISION OF THE HEARING OFFICER

STATEMENT OF THE CASE

Petitioner, student, by his next friend, *** (hereinafter Student or student) brings this proceeding against Respondent United Independent School District (hereinafter Respondent or District) under the Individuals with Disabilities Education Act (hereinafter IDEA), 20 U.S.C. § 1400 et. seq.

Petitioner alleges that Respondent denied him a free appropriate public education during the 2004-2005 and 2005-2006 school years based on the following claims:

1. Respondent failed to provide student an appropriate Behavior Intervention Plan (BIP).
2. Respondent failed to provide student an appropriate reading program.
3. Respondent failed to provide Admission, Review, and Dismissal (ARD) documents and an explanation of student's Individualized Education Plan (IEP) in Spanish.
4. Respondent failed to update student's IEPs from August 2004 to March 2005.
5. Respondent failed to provide student a full school day during the 2004-2005 school year.

6. Respondent failed to evaluate student and determine if he qualified as a student with autism who is entitled to services contained in the autism supplement.
7. Respondent failed to provide student an appropriate evaluation.

Petitioner seeks compensatory services, an Independent Educational Evaluation (IEE), an appropriate reading program, and a BIP.

PROCEDURAL HISTORY

Petitioner filed his request for a due process proceeding on November 22, 2005. Petitioner was represented by Christopher Jonas of Corpus Christi, Texas. Beverly Davidek, with the San Antonio office of Escamilla & Poneck represented Respondent.

The Hearing Officer scheduled a prehearing conference for January 5, 2006 and the due process hearing for January 12-13, 2006. On January 2, 2006, Petitioner filed a motion to continue the January 12-13 hearing because Petitioner's counselor had another hearing scheduled for those dates. During the January 5, 2006 prehearing conference, the hearing was rescheduled for March 27-28, 2006.

The due process hearing was held on March 27-28. After two days of testimony, the Parties requested additional time to complete the hearing. The Hearing Officer granted the request, recessed the hearing and scheduled the continuation of the hearing for May 4-5, 2006. The hearing concluded on May 5. At its conclusion, the Hearing Officer asked the Parties to brief certain legal issues and set a June 19 deadline for the briefs, and June 23 for Petitioner's Reply brief. Both Parties timely submitted post-hearing briefs.

Taking continuances into account, the deadline for the final decision is July 16, 2006. The Hearing Officer issued her decision on July 15, 2006.

FINDINGS OF FACT

1. Student is a ***-year-old student residing within the United Independent School District. He has attended United ISD since the age of *** years old. United ISD is a political subdivision of the State of Texas and a duly incorporated independent

- school district. Student qualifies for special education services as a student with Autism, Speech Impairment, and Other Health Impairment.
2. During the 2003-2004 school year, student attended *** grade at *** Elementary. On October 27, 2003, the ARD Team met to plan his program for the 2003-2004 school year. Student's program consisted of speech and occupational therapy, social skills, math, reading, and a Behavior Intervention Plan (BIP). Student's instructional level was *** to***. The 2003-2004 IEP was valid from August 27, 2003 through August 27, 2004.
 3. The October 2003 IEP's goals, objectives, evaluation procedure, and schedule for evaluation were translated into Spanish. The method of evaluation and the evaluation codes were not translated into Spanish.
 4. In October 2003, United ISD conducted a Full Individual Evaluation (FIE), consisting of an occupational therapy assessment, a speech and language assessment, a psychological evaluation, an intellectual assessment, and achievement testing. The FIE found student functioned in the mild to moderate range of mental retardation. Student had difficulty participating in the assessments and standard testing procedures were difficult to implement, but the results obtained by the evaluation personnel provided useful information in preparing student's education program.
 5. The psychological assessment found that student had pervasive developmental disorder, a disorder in the Autism spectrum, borderline of intellectual functioning, and a reading and math disorder. Student performed on the very *** range in basic reading skills, reading comprehension, math calculations, math reasoning, written language, and written expression. The evaluation found that student's phonemic-grapheme relation was very low.
 6. The District's testing for the FIE found student was functioning in the range of mental retardation, however, at the parent's request, the ARD team agreed to use the CTONI-3 test scores obtained from the psychological evaluation. The CTONI-3 showed student as having borderline intellectual functioning. The ARD Team's decision to not classify student as having mental retardation does not invalidate the FIE. All the evaluations obtained for the FIE were conducted using appropriate instruments and procedures in accordance with 34 C.F.R. §§ 300.532 and 300.533, and thus were appropriate.
 7. On November 4, 2003, the ARD met to review the FIE and make any necessary adjustments for student's *** school year. The 2003-2004 program included a BIP which targeted aggressive behavior towards other students, taking food from other students, hitting adults, impulsive behavior, lack of self-control, and verbal abuse. This program also included the Supplement for Students with Autism and provided extended educational programming, in-home training, and parent training. In addition, the program provided for two daily reading lessons using the SRA reading program.
 8. Student's education program was to be reviewed and updated by August 2004. Student entered the *** school year with an expired education program.
 9. On October 24, 2004, the ARD team met to discuss transportation for Student. Nine of the 12 pages were deliberations written in Spanish and discussed transportation issues only. Although student's education program had expired by

- that time, United ISD did not update the *** program. The ARD documents from that meeting did not make any changes to the academic IEPs.
10. The ARD team met again on November 1, 2004, to address transportation issues and a new nutrition program but failed to review student's education program. Merely indicating on the ARD Committee Meeting Brief Form that the "Previous IEP remains in effect" fails to meet the requirement that educational programs be reviewed annually.
 11. On December 3, 2004, the ARD team met again to discuss transportation and a nutrition program. The team provided IEPs for speech therapy and occupational therapy, but once again failed to propose, review, or modify any of the academic and non-academic IEPs.
 12. Student's annual ARD meeting convened on January 14, 2005. This ARD meeting was the first review of student's August 27, 2004 program, six months after the beginning of school. At that time, the Team specified percentages of mastery for the following academic IEPs: reading, written language, language arts, independent study skills/mainstream, and math.
 13. The six-month delay in updating student's education program denied him a free appropriate public education ("FAPE"). This procedural error is a serious flaw despite the District's decision to not schedule an ARD at the mother's request. A school district has an affirmative duty to update a student's IEPs annually.
 14. A reading IEP was drafted in October 2004, but was presented for the first time at the January 2005 ARD. The reading program presented was similar to the past two reading programs, though less cohesive and more fragmented. The goals ranged widely from "match printed word to common objects" to "write familiar articles in precise manuscript from dictation" but failed to identify student's educational needs.
 15. The reading IEP proposed 15 short-term goals, each selected from a computer generated program. Such a plan does not constitute an appropriate program for student because it does not address the student's individualized identified educational needs. Lacking identified educational needs, the computer-program generates short-term goals that may or may not address the student's individualized needs. In this case, the computer-generated program, CLASS, did not target student's needs but generated short-term goals for any student on the kindergarten level.
 16. Student's 2004-2005 reading IEP was inappropriate and not designed to address his individualized educational needs. The goals and objectives do not address his identified areas of needs.
 17. United ISD identified three reading programs as the means of achieving the computer generated short-term reading goals, however, none was based on the areas of educational needs as identified in the 2003 FIE. For example, phonemic awareness was identified as one of student's more serious educational need, but his lack of phonemic awareness was addressed by only one short-term goal. Using three reading programs that target reading skills in general is inadequate unless research shows that the program is specially designed to address the specific areas of need identified. Simply providing a reading program did not render the January 2005 reading IEP appropriate if it failed to address those needs.

18. There was no evidence that the SRA reading program was a research-based program designed to address student's identified reading needs. A broad finding in another administrative hearing that SRA meets the correct standard for a "research-based" program fails to take into consideration that research must show that the program is specially designed to address particular needs. Without evidence as to the specific nature of the research, the mere assertion finding that SRA is research-based is insufficient to show that it is designed to address student's identified educational needs. In January 2005, the District was using the Reading Recovery program, the third program in two years. There was no evidence that any of the three reading programs were scientifically based to address student's identified reading needs.
19. Given student's intellectual score of ***, some progress is expected, however, he demonstrated ***. Student has remained on the pre-kindergarten and kindergarten level for over ***years. His lack of progress is the expected result of this inappropriate program.
20. Throughout the 2004-2005 school year, student and other special education students were released from school 15 minutes early every day. The lack of a full school day was a denial of a free appropriate public education.
21. The January 2005 goals and short-term objectives were translated into Spanish, but the evaluation codes and methods of evaluation were not. Student received a BIP to address his aggression with other students and hygiene problems. He was also provided with services under the Autism Supplement.
22. Student's mother wanted the January 14, 2005 IEPs and criterion evaluation and procedures translated. On February 24, 2005, the ARD Team met again to address the translated January 2005 IEPs. This ARD meeting provided her with translated IEPs .
23. Another ARD meeting was held on March 17, 2005 to implement science goals, review schedule of services, and develop an IEP for the Reading Recovery program, a supplemental reading program provided to student. The parent did not agree with the March 2005 ARD.
24. The March 17, 2005 ARD reconvened on May 17, 2005. student's mother was not present. The ARD Team adopted academic IEPs for reading, language arts, science, math, and social skills. The Team also continued the speech program, occupational therapy, and transportation. The ARD did not provide a transition plan or a Behavior Intervention Plan for middle school.
25. The May 2005 goals and short-term objective were translated into Spanish, but the mastery criteria and evaluation methods were in English. The only IEP that identified the Present Level of Performance was the reading IEP which indicated student was on kindergarten level. None of the IEPs identified student's educational needs.
26. A BIP was developed in October 2005. During the 2004-2005 school year, student did not have a BIP, and the May 2005 ARD Team failed to provide one for middle school. This failure, however, did not amount to denial of a FAPE. The District is allowed a reasonable amount of time to determine if a student who does not have a BIP, needs a new one when entering a new environment. For student, this was provided in October 2005. The ARD Team met again in January 2006

- when additional behavior difficulties were observed and conducted a Functional Behavioral Assessment (FBA). Adjustments were made to the October 2005 BIP. The lack of a BIP from August through October 2005 does not constitute a denial of a free appropriate public education.
27. Despite flaws in the translations, the Spanish translations used in the 2004-2005 and 2005-2006 were more than adequate to give notice and explain the goals and objectives set forth in the IEPs. There was no evidence that student's mother was denied the opportunity to meaningfully participate in the ARD process due to the lack of documents and material in the Spanish.
 28. United evaluated and found student was a student eligible for special education services under the Autism classification. As such, student received services under the Autism supplement for 2003-2004 and 2004-2005 school year. After the summer of 2004, his mother declined in-home training for student and herself. Student was not denied services under the Autism Supplement.

DISCUSSION

A. STANDARD OF REVIEW

The key issue in this case whether United ISD provided student with a free appropriate public education. A two-prong analysis has been established for determining whether a school district has provided a free appropriate public education (FAPE). The first inquiry is whether the District complied with IDEA procedural requirements. The second inquiry is whether the student's education program is reasonably calculated to confer an educational benefit. Board of Education of Hendricks Hudson Central School DISTRICT v. Rowley, 459 U.S. 176, 102 S.Ct. 3034 (1982).

IDEA establishes certain procedural requirements in formulating and implementing a student's IEP. Hall v. Vance County Bd. Of Ethic., 774 F.2d 629, 634 (4th Cir. 1985). A school district's violation of an IDEA procedure justifies a finding that FAPE was denied when "procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parent's opportunity to participate in the formation process or caused a deprivation of educational benefits." Roland M. V. Concerd Sch. Comm., 901 F.2d 983, 994 (1st Cir. 1990), cert. denied, 499 U.S. 912 (1991).

The educational benefit that an IEP is designed to achieve must be meaningful and likely to produce progress, rather than regression or trivial educational advancement. Although the educational benefit must be meaningful, schools are not required to maximize a child's potential or provide the best program. *Cypress-Fairbanks Indep. Sch. DIST. v. Michael F.*, 118 F.3rd 245 (5th Cir 1997); cert. denied, 522 U.S. 1047 (1998).

The Fifth Circuit delineated four factors to consider in determining whether an educational plan is reasonably calculated to provide the requisite benefits: 1) is the educational program individualized on the basis of the student's assessment and performance; 2) is the program administered in the least restrictive environment; 3) Are the services provided in a coordinated and collaborative manner by the key stakeholders; and 4) Are positive academic and non-academic benefits demonstrated? *Id.* at 253.

B. THE 2004-2005 AND 2005-2006 READING PROGRAM WAS INAPPROPRIATE

Student's reading program for the 2004-2005 and 2005-2006 school year does not meet the first of the four factors delineated by the Fifth Circuit. The reading programs goals and objectives were not individualized on the basis of the student's assessments and performance. The 2003 FIE showed that student had severe deficits in many areas of reading. Despite this information, the IEP did not specify which deficit the objectives and short-term goals were to address. The IEP's failure to show student's present level of performance seriously hampered the team's ability to develop a program that addressed his actual needs. Despite the teacher's testimony that the computer-generated assessment suggested the short-term goals, there was no testimony or documentation to

establish the correlation between the proposed goals and student's identified educational needs. In this case, the use of the computer-generated program, CLASS, may have hampered the Team's review of other programs. student needs a reading program that is designed to achieve meaningful benefit and likely to produce progress, rather than trivial educational advancement. The CLASS program has produced only a trivial educational advancement.

C. Early Dismissal Due to Transportation Issues is Inappropriate

During the 2004-2005 school year, United ISD released student 15 minutes early every school day to allow the school buses' early departure in order to avoid a traffic jam. Texas law provides that a regular school day for a disabled child is defined as the period of time determined to be appropriate by the ARD team. 19 T.A.C. §89.63(b). The Fifth Circuit has recognized that an ARD team may shorten a student's school day, provided it's appropriate. *Christopher M. v. Corpus Christi ISD*, 933 F.2d 1285, 1291 (5th Cir. 1991). There was not evidence that the ARD team made a determination that student's needs necessitated a shortened school day. The record shows that the sole reason for the shortened school day was due to the school bus schedule.

United argues that student is not being treated differently than other students. The District failure to not provide all students a full day does not relieve it of its responsibility to provide a full school day to student.

CONCLUSIONS OF LAW

1. United Independent School District is an independent school District duly constituted in and by the State of Texas, and is subject to the requirements of IDEA, 20 U.S.C. §1401, and its implementing federal and state regulations.
2. Residing within United ISD, Petitioner is currently eligible for special education services under the classifications of Autism, Speech Impairment, and Other Health Impairment. 20 U.S.C. §1401; 34 C.F.R. §300.7(c)(1, 9, 11).

3. United's failure to provide student with a BIP for the time period of August 2005 through October 2005 was not a denial of a free appropriate public education.
4. Student's 2004-2005 and 2005-2006 reading program were not appropriate because the programs were not designed to achieve a meaningful benefit and produced only a trivial educational advancement. Board of Education of Hendricks Hudson Central School District v. Rowley, 459 U.S. 176, 102 S.Ct. 3034 (1982).
5. Petitioner failed to carry the burden of proof to show that the ARD documentation and explanations were not provided in her native language.
6. United failed to provide Petitioner with a current IEP from August 2004 to March 2005. This failure was a substantial procedural violation that denied Petitioner a free appropriate public education. Board of Education of Hendricks Hudson Central School District v. Rowley, 459 U.S. 176, 102 S.Ct. 3034 (1982).
7. United failed to provide a full school day to Petitioner without making the determination that a shortened day was educationally appropriate.
8. United appropriately evaluated student and found he qualified as a student with Autism. Furthermore, United provided student services under the Autism Supplemental.
9. Petitioner's October 2003 evaluation conducted by United ISD was appropriate and conducted in accordance with 34 C.F.R. §§ 300.532 & 300.533.

ORDER

After due consideration of the record, the foregoing findings of fact and conclusions of law,

IT IS HEREBY ORDERED that United ISD provide student an appropriate reading program using a new 2006 evaluation as a basis for selecting the appropriate program. As compensatory services for reading, the ARD team shall provide student an additional four hours of reading lessons a week for the next 12 months. This compensatory time is in addition to his regularly scheduled reading program. In the alternative, United and Petitioner may provide other compensatory services as determined and agreed to be appropriate based on student's 2006 re-evaluation.

IT IS FURTHER ORDERED that United ISD calculate the number of school days in the 2004-2005 school year and provide student ten minutes per day as compensatory services for the shortened school day. This compensatory time may be distributed as United and Petitioner agree is appropriate.

IT IS FURTHER ORDERED that United provide student with one hour of compensatory services for each week of school that his IEP was expired for the period of August 2004 through the end of February 2005. This compensatory time may be distributed as United and Petitioner agree would be appropriate. IT IS FURTHER ORDERED that any and all additional 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 and ENTERED this 15th day of July 2006.

/s/ Olivia B. Ruiz

Olivia B. Ruiz

Special Education Hearing Officer

Notice to the Parties

Under State Board of Education Rules, it is no longer necessary for a Party to perfect an appeal to state district court by filing a Motion for Rehearing. However, either Party may request, within ten days after the date of this Decision, specified additional or amended findings of fact or conclusions of law. 19 Tex. Admin. Code §157.8(n, o).

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SCHOOL DISTRICT
RESPONDENT

SYNOPSIS OF DECISION

- ISSUE:** Respondent failed to provide an appropriate reading program because the program was not designed to achieve a meaningful benefit and produced only a trivial educational advancement. *Board of Education of Hendricks Hudson Central School District v. Rowley*, 459 U.S. 176, 102 S.Ct. 3034 (1982).
- CITATION:** 34 C.F.R. §300.300 & 300.532; 34 C.F.R. §§ 300.121 & 300.300; *Board of Education of the Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982); *Daniel R. R. v. State Board of Education*, et. al., 847 F.2d 1036 (5th Cir. 1989).
- HELD:** For Petitioner. The reading program was not designed to address Petitioner's identified educational needs.
- ISSUE:** Respondent failed to properly translate ARD documentation and explanations in Petitioner's native language.
- CITATION:** 34 C.F.R. §§300.347 & 300.552
- HELD:** The documentation and explanations were adequately translated into Petitioner's native language.
- ISSUE:** Whether Respondent failed to provide an appropriate Behavioral Intervention Plan (BIP)
- CITATION:** 34 C.F.R. §§ 300.346.
- HELD:** For Respondent. Respondent correctly provided Petitioner a BIP after his behavior started declining. Given Petitioner's lack of need for a BIP,

Respondent appropriately allowed a few weeks in new environment before providing a BIP.

ISSUE: Whether United's FIE was appropriate and met IDEA criteria or whether student is entitled to an IEE.

CITATION: 34 C.F.R. §§ 300.502 & 300.532-300.534

HELD: For Respondent. District's assessment met IDEA criteria. Valid, well-recognized instruments were utilized as well as other sources of information. Student is not entitled to an IEE at public expense.

ISSUE: Whether United failed to conduct an annual review of Petitioner's program for a six-month period.

CITATION: *Board of Education of Hendricks Hudson Central School District v. Rowley*, 459 U.S. 176, 102 S.Ct. 3034 (1982); 20 U.S.C. §1415(d)(2).

HELD: For Petitioner. United ISD's failure to hold an annual review in August 2004 was a substantial procedural violation that denied Petitioner a free appropriate public education.

ISSUE: Whether United failed to provide Petitioner a full school day without making the determination that a shortened day was educationally appropriate.

CITATION: 34. C.F.R. §§300.9(c)(2), 300.346 and 300.350(a); 19 T.A.C. §§89.63(a-b), 89.1121(a).

HELD: For Petitioner. United provided Petitioner a shortened school day without educational justification or need.

ISSUE: Whether United appropriately evaluated student and found he qualified as a student with Autism. Furthermore, United provided student services under the Autism Supplemental.

CITATION: 19 T.A.C. §89.1055(e); 34 C.F.R. §§300.7(c)(1), 300.13.

HELD: For Respondent. United's 2003 FIE found Petitioner qualified for services as a student with Autism and provided the appropriate services under the Texas Autism Supplement.