
DOCKET NO. 071-SE-1105

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

PETITIONER

vs. BEFORE A SPECIAL EDUCATION
HEARING OFFICER

DE SOTO INDEPENDENT SCHOOL DISTRICT
FOR THE STATE OF TEXAS

SCHOOL DISTRICT

RESPONDENT

DECISION OF THE HEARING OFFICER

Procedural History

Petitioner, student (“Petitioner,” “student.” or “S.”) brings this action against the De Soto Independent School District (“Respondent” or the “school district”) under the Individuals with Disabilities Education Improvement Act, as amended, 20 U.S.C. § 1401 et. seq (IDEIA) and its implementing state and federal regulations. Student was initially represented pro se by her grandmother *** On December 16, 2005, Christopher Jonas, Attorney at Law, Center for Special Education Law, assumed legal representation of student. Respondent has been represented at all times in this case by its legal counsel Nona Matthews of Walsh, Anderson, Brown, Schulze & Aldridge, P.C. A prehearing telephone conference was first conducted in this case on January 10, 2006. A continuance of the initial hearing date was granted in order to allow the parties more time to adequately prepare for the hearing, to resolve a preliminary interim services issue, and to allow the parties an opportunity to resolve preliminary matters related to the production of student’s educational file.

The due process hearing was conducted in this case, by agreement, on March 20, 2006. Petitioner's mother *** attended the hearing and Mr. Jonas's personal assistant, Roland Ramirez, was also present. ***, Director of Special Education, attended the hearing as the school district's party representative. *** assisted Ms. Matthews as legal counsel for the school district at the hearing. At the conclusion of the hearing both parties agreed to submit written closing arguments and extend the deadline for the Decision of the Hearing Officer by a few days, if necessary. The Hearing Officer subsequently extended the deadline for the Decision from April 10, 2006 to April 13, 2006.

Issues

Petitioner articulated the following issues for decision in this case:

1. Whether Life Skills program at the *** School is sufficiently staffed with qualified personnel in order to provide student with a free, appropriate public education (FAPE) during the current school year;
2. Whether the school district provided student with FAPE (i.e. the requisite educational services) during her absence from school as a result of her injuries arising from the accident***.

Relief Requested

As relief, Petitioner submitted the following:

1. Place student in a private school within the relevant geographic area; or, in the alternative, in a Life Skills program at the *** School; or, in the alternative place student in the *** at Elementary School.
2. Provide student. with two years of compensatory educational services to begin at the point in time at which student will lose *** eligibility for special education services, the scope, nature, and frequency of which shall be determined by an assessment to be conducted at that point in time.

Findings of Fact

1. Student is *** years old and eligible for special education services from the De Soto ISD as a student with multiple disabilities, other health impairment (based upon *** Disorder), orthopedic impairment, mental retardation and speech impairment. *** Disorder is a lifelong condition. The loss of skills is, sadly,

- generally persistent and progressive. *** Disorder is characterized by a severe impairment in expressive and receptive language development with severe psychomotor retardation. There is no dispute about student's need for special education from the De Soto ISD.
2. Student. has *** younger siblings, ages *** and ***. Her mother,*** , is a single parent and works full time ***. She is also working on *** degree and goes to school in the evenings***. *** participates in students' school activities and attends meetings as much as she can given her demanding schedule. Student's *** grandmother,***, is an important source of support for *** and student *** plays an active role in student's education, including attending meetings and serving as an emergency contact for school purposes. Student stays with her grandmother every day.
 3. Student is somewhat diminutive for her age with an engaging smile and a love of music. She is largely non-verbal and unable to express herself through oral language. In addition, she has a significant health history, given the diagnosis of *** Disorder, including a history of seizures. Student is also non-ambulatory, ***. She uses a wheelchair with seat belts. The seat belts strap student. into the wheelchair so that she won't slip out and fall student is unable to push herself in the wheelchair and always requires assistance to navigate. Student's IQ score is somewhere below a standard score of *** – in other words her intellectual abilities are quite limited. Student does not initiate communication, is unable to advocate for herself, and needs assistance in all self-help areas. Student is not on grade level developmentally and her educational progress is very slow.
 4. Last year student attended the Developmental Center located at ***. This current school year student was placed with chronological age peers at *** School in the Life Skills program at that campus. *** serves *** - *** graders. There is a separate ***h grade campus adjacent to *** School but no centralized special education services on the *** grade campus. Therefore, some students have been served in the *** for more than two years until they are ready to transition to the main ***school campus. The Life Skills program at the school serves students ages***. Although the age of a student with a disability is a factor in determining placement, it is not the only factor, and the overall needs of the student are important too.
 5. There are 16 students in the Life Skills classroom at *** – three of those students, including student, are non-ambulatory and in wheelchairs. There are a great variety of needs among the students in the Life Skills program. The 16 students vary in their abilities and skill levels. The classroom includes a restroom, changing facilities, and a barrier free lift.
 6. During the fall semester, the program at *** was initially staffed by a single certified special education teacher and two paraprofessional educational aides, with the addition of a third aide who assisted the class on a part-time basis. The school district recorded the staffing level as two and half aides. The principal at *** actively monitors the Life Skills program and drops in around 3-4 times a week. He hired all but one of the current staff personally and is responsible for determining the adequacy of staffing levels in that classroom. The teacher and the paraprofessionals all hold the requisite credentials for their positions.

7. During the fall semester, the three Life Skills staff members assisted the students at the end of the day getting to their respective buses for the return trips home. The bus drivers established the pick up schedule at *** that semester. The route to the buses required the students and staff to exit their classroom, travel down a short hallway, go through a double set of glass doors, turn left and travel down another short hallway, and finally through two more sets of double doors in order to exit the school building. The three sets of doors required at least one staff member to stand at each door and prop the doors open so that the students and staff could move through the doorways. Once outside, the students must navigate down a sidewalk, step down onto a single wide step and then over a curb and onto a circular driveway in order to board the bus. The sidewalk to the circular bus drive is built on a very slight slope thus the need for the step as a link between the sidewalk and the circular drive.
8. Because one Life Skills staff member was needed to act as a “doorman,” the remaining staff were required to assist the three students in wheelchairs, lead the rest of the class to the ***, and, assist students In order to meet the bus schedule, the staff allowed a Life Skills classmate to push student. in her wheelchair ***. Neither student’s mother nor her grandmother had ever given their permission or agreement that a classmate could be responsible for pushing student in her wheelchair.
9. ***
10. ***
11. ***. The principal was summoned and was soon on the scene.
12. ***.
13. Dr. *** examined student. on *** and signed the school district’s homebound services form the same day. ***
14. A follow up visit with Dr. *** was scheduled. Dr. *** also stated that student was physically able to do schoolwork with a homebound teacher but not permitted to participate in any activities outside the home. She also stated that student was not able to receive any instructional services on a general education campus nor were there any accommodations that would enable her to do so. Dr. *** stated that student was unable to function in the school setting and that her recommendation for homebound services was based on her professional medical evaluation of student
15. An ARD meeting was conducted on November 2, 2005 to address student’s need for homebound services. Student’s mother and grandmother both attended. A schedule of homebound services was developed for 4.5 hours of instruction per week at home with 30 minutes per week of both physical and occupational therapy each. The goals and objectives stated in student’s current IEP would continue to be addressed through the homebound instruction. Homebound services were to begin on November 3, 2005 and continue until November 28, 2005 (the date of the next scheduled exam with Dr.***). The homebound services were implemented for a period of approximately *** weeks in November 2005.
16. A number of remedial steps were taken at *** following student’s accident. First, students were no longer allowed to push other students in wheelchairs. Second, doorstops were installed for use in all three sets of doorways so that school staff

- would no longer have to prop the doors open. This allows staff to directly supervise and assist students exiting the school building. Third, a metal railing was installed as a barrier between the end of the sidewalk and the step. Fourth, the staffing level of paraprofessionals was increased to three full time educational aides during the spring semester. Fifth, the needs of the Life Skills students now dictate the *** schedule.
17. An ARD meeting reconvened on November 28, 2005 to consider student's return to school. Student's grandmother attended the ARD. A disagreement arose about student's placement for her return to school. Student's mother and grandmother did not feel that *** was a safe learning environment for student Mrs. *** requested student be placed in the Life Skills program at the *** school. School personnel disagreed and felt that student was too *** and too *** for the *** setting. They also felt that *** was a safe environment given the remedial steps that had been taken and that her needs could still best be met in the Life Skills program ***.
 18. At the November 28, 2005 ARD, Mrs. *** claimed she had new medical information but did not produce that information to the ARD nor at anytime afterwards because she felt the ARD had already made up its mind to return student to *** to consider transitioning student back into the *** environment slowly by visiting school with her mother and/or grandmother for short periods of time to address the family's anxiety about returning student. to the school. Student's family did not accept these suggestions.
 19. The parties discussed home schooling as an option and Mrs. *** indicated that the family would be seriously be considering that choice rather than return student to ***. The parties recessed without reaching an agreement. On November 30, 2005, two days after the ARD, student's mother filed her request for a due process hearing. Student has not attended school at any *** campus since ***.
 20. The ARD reconvened on December 7, 2005 while the due process hearing was pending. Mrs. *** attended this ARD. The parties continued to disagree about student's placement in order to return to school. A "Notice of Refusal" was reviewed but then the parties disagreed about what the "stay put" placement should be. School staff took the position that placement at *** was the proper "stay put" placement since the homebound services expired under the terms of Dr. *** verification.
 21. Mrs. *** had a different understanding. She conducted some Internet research and talked with a parent advocate. She concluded that the "current placement" provision in the "stay put" rule was the homebound placement. As an aspect of this disagreement, the school district subsequently served student's family with a notice that student's continued absence from school could be referred to the courts. Truancy complaints were subsequently filed and truancy charges are now pending for student's absences from school ***.
 22. Student did not return to *** nor did she receive any interim educational services from the school district until counsel for the parties negotiated an agreement ***. The interim educational services resumed shortly after that date and continued as of the date of the due process hearing. The school district stated its commitment, on the record, to continue to provide student with interim homebound services

pending a final resolution with the Hearing Officer's Decision. The interim services provided mirror the services provided in November 2005.

DISCUSSION

Adequate Staffing of Life Skills Program at ***

Denial of FAPE

The evidence showed that there was inadequate staffing in the Life Skills program for purposes of ensuring a safe, secure dismissal process during the fall semester. *** This meant the staff had to get all 16 students out of the building at once – placing a strain on the ability of the staff to adequately supervise and manage the students***.

Out of necessity, the staff allowed a special needs classmate to take on the significant responsibility of maneuvering student in her wheelchair ***– a responsibility that the student was not capable of meeting,***. As the principal admitted in his testimony, the campus placed the *** schedule ahead of the needs of the students. Due to the inadequate staff (given the absence of physical safety features that were later installed), the dismissal process created an unsafe environment and student was injured a result.***. This was a denial of a free, appropriate public education. See, *Timothy W. v. Rochester N.H. Sch. Dist.*, 875 F. 2d 954, 972 (1st Cir. 1989)(holding that all children, regardless of the severity of their disability, entitled to a free, appropriate public education); *Fermin v. Mateo-Foster City Sch. Dist.*, 33 IDELR 30 (D.C. Cal. 2000)(placement of student with orthopedic impairment in special early childhood class for students with orthopedic impairments upheld).

To its credit, the school district took the necessary remedial steps to rectify the situation by adding another educational aide to the Life Skills Program, installing the barricade railing at the end of the sidewalk, installing door stops so that teachers and aides can be more “hands on” during dismissal, and, most importantly, by re-orienting the priorities of the campus to meet the needs of the student ***.

Burden of Proof

However, this is the only aspect of student's educational program, as implemented at ***, where Plaintiff met her burden of proof. *Schaffer v. Weast*, 126 S.Ct. 528, 537 (2005) ("The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief."). There was insufficient evidence to conclude that continuing to implement student's IEP in the Life Skills classroom at *** would not provide her with a free, appropriate public education – particularly because the steps needed to remediate the inadequate staffing problem during dismissal were taken and implemented. Furthermore, Petitioner did not meet her burden of proving that another campus would be appropriate for student *Schaffer, supra*.

Staff Training and Transition Back to ***

The reluctance and mistrust that student's mother and grandmother still feel about returning her to the very site of her injury is completely understandable and must be respected. Student is a child with significant deficits, who makes slow educational progress, and for whom the future is highly uncertain. As the school district itself acknowledged by their reluctance to send student to the *** school, she is a vulnerable young lady and her family needs to feel that she is safe and well cared for while she is at school. Indeed, the school shares this view and the evidence showed that the school district was willing to work with student's family and bring her back to the *** campus slowly and carefully, with her grandmother and/or mother in attendance in order to address their concerns.

To do so, the school district needs to provide the Life Skills staff and the school administration with training in meeting the safety needs of non-ambulatory students such as student. This training can be secured through the Regional Educational Center that serves the De Soto ISD. Student's mother and grandmother have a concomitant obligation to cooperate with school staff in designing and implementing a transition plan that ensures student's safety at the *** campus. This combination, of safety training for the school personnel and family cooperation in transitioning student back to school, is appropriate meaningful relief given the unique circumstances of this case. See, *Brown Deer*

Sch. Dist., 36 IDELR 176 (SEA. WI. 2001)(complaint that alleged unsafe learning environment states an IDEA claim for which relief seeking staff training, among other equitable remedies, could be granted under IDEA).

Interim Educational Services

Interim Agreement

The school district ceased providing homebound educational services when it did not receive an updated physician's statement supporting student's continued need for those services. Student's mother and grandmother were understandably distressed ***, continued to doubt student's safety at *** and refused to return her to that campus. During the prehearing telephone conference, the Hearing Officer directed counsel for both parties to attempt to reach an agreement regarding interim educational services. It took the parties less than 10 days from the date of the prehearing conference to negotiate an interim services plan.

Gap in Educational Services

However, prior to that negotiation, there was a gap in the provision of interim services from November 29, 2005 until the week of January 22, 2006 – a time period of over four weeks. During this time period, Petitioner had already filed her request for a due process hearing. The school district had notice there was a genuine dispute between the parties about student's safety and placement at *** that was now the subject matter of a due process hearing.

Stay Put Rule

Under the IDEIA, while a due process hearing is pending, the child shall remain in the "then-current educational placement. 20 U.S.C. § 1415 (j). This is often referred to as the "stay put" rule. The rationale for this provision is to maintain the "status quo" until the underlying substantive dispute can be resolved. *Drinker v. Colonial Sch. Dist.*, 78 F. 3d 859, 865 (3d Cir. 1996). The dispositive operative factor in deciding a child's "current educational placement" is the IEP being implemented when "stay put" is invoked. *Drinker*, 78 F. 3d at 867. The IDEIA clearly contemplates that "current educational placement" encompasses the whole range of services that a child needs and the term does not simply refer to

the physical school building a child attends. See, *Spilsbury v. Dist. of Columbia*, 307 F. Supp 22, 26-27 (D.D.C. 2004).

The purpose of the “stay put” provision is to maintain the status quo. However, courts have also recognized that because of changing circumstances the status quo cannot always be exactly replicated for the purposes of stay put. *Van Scoy v. San Luis Coastal Unified Sch. Dist.*, 353 F. Supp. 1083, 1086 (D.C. Cal. 2005)(holding “stay put” was kindergarten with one on one behavior training for student with autism transitioning to first grade).

Status Quo and Changed Circumstances

In one sense, the status quo in this case was the homebound placement because that is where student’s IEP was delivered by agreement of the parties pending her recovery from her accident. Therefore, provision of educational services in the home was the proper placement for “stay put” purposes *Spilsbury*, supra. Even if it wasn’t, the *** changed circumstances for purposes of “stay put.” *Van Scoy*, supra. The delivery of student’s IEP on the *** campus was the seminal issue in dispute. Therefore, I conclude that because a child’s “current educational placement” contemplates more than simply a specific school building, and due to the changed circumstances as a result of student’s ***, the school district should have continued to provide student. with educational services in the homebound setting until the parties were able to resolve the ultimate dispute over the *** campus.

Compensatory Services

The school district’s decision to insist that placement at the *** campus was the proper “stay put” placement and it’s decision to proceed with filing truancy charges did not resolve the dispute. Instead, those decisions only drove the parties farther apart and deepened the breach of trust that arose between home and school as a result of the accident. The evidence showed that student’s IEP was implemented through the homebound services provided in November 2005 and then again per the interim services agreement. Had the school district taken a somewhat different approach to resolving the placement dispute, student would

not have lost the benefit of over four weeks of educational services. She is therefore entitled to four weeks of compensatory educational services. However, I do not agree with Petitioner that it is appropriate to grant such relief at the end of student's educational tenure. Instead, because there are only several more weeks left of the 2006 spring semester, the four weeks can be delivered before the end of the current school year.

Therefore, it makes practical sense to continue the provision of instructional services at home for four more weeks beginning with the week of *** and concluding ***. The parties will then have an opportunity to convene another ARD for the purpose of designing a transition plan back to *** for the 2006-2007 school year and provide designated staff with the safety training discussed in this Decision.

Conclusions of Law

1. The Life Skills program at *** School was sufficiently staffed for all purposes except during end of the day dismissal procedures. The failure to provide adequate staff during the end of the day dismissal process resulted in the failure to provide student. with a free, appropriate public education for that portion of her school day. See, *Fermin v. Mateo-Foster City Sch. Dist.*, 33 IDELR 30 (D.C. Cal. 2000); *Brown Deer Sch. Dist.*, 36 IDELR 176 (SEA. WI. 2001). Petitioner did not meet her burden of proof that the Life Skills program at *** High School was not adequately staffed during any other portion of her instructional day. *Schaffer v. Weast*, 126 S.Ct 528 (2005).
2. When a dispute arose between the parties about whether student should return to site of the campus where she was *** and a request for hearing was filed, the "current educational placement" (pending resolution of the dispute through the hearing process) was the provision of student's IEP in the homebound setting. *Drinker v. Colonial Sch. Dist.*, 78 F. 3d 859, 865 (3d Cir. 1996); *Spilsbury v. Dist. of Columbia*, 307 F. Supp. 22, 26-27 (D.D.C. 2004); *Van Scoy v. San Luis Coastal Unified Sch. Dist.*, 353 F. Supp 1083 (D.C. Cal. 2005).

ORDERS

Based upon the foregoing findings of fact and conclusions of law, it is hereby ORDERED that Petitioner's claims for relief are GRANTED IN PART AND DENIED IN PART as follows: the school district shall continue to provide student.

with educational services and to implement her Individual Educational Plan in a homebound setting through***; the school district shall identify and implement training to ensure the safety of non-ambulatory students for the staff of the Life Skills program and *** School administrators before the end of the current school year; the parties shall convene an ARD meeting to be conducted before the end of the current school year, or at a date selected by agreement of the parties, in order to design a transition plan for student's return to the *** School campus for the 2006-2007 school year.

All other relief not specifically stated herein is DENIED.

SIGNED ON THE 13th day of APRIL 2006

/s/ Ann Vevier Lockwood

Ann Vevier Lockwood

Special Education Hearing Officer

Notice to the Parties

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. 19 Tex. Admin. Code Sec. 89.1185 (p); Tex. Gov't Code, Sec. 2001.144(a) (b).