
DOCKET NO. 142-SE-0306

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

PETITIONER

vs.

PEARLAND INDEPENDENT

SCHOOL DISTRICT

RESPONDENT

BEFORE A SPECIAL EDUCATION
HEARING OFFICER
FOR THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

Statement of the Case

Student by his next friend *** (hereinafter "Petitioner" or "**"), brought a complaint pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §1400, et seq., complaining of Pearland Independent School District (hereinafter "Respondent" or "the district").

Petitioner was represented by Christopher Jonas, an attorney in Corpus Christi, Texas. Respondent was represented by Mary Schneider-Vogel, an attorney with the firm of Bracewell and Giuliani in Houston, Texas.

Petitioner's request for hearing was filed on March 7, 2006, and came on for hearing on August 22 and 23, 2006. The parties filed written closing arguments, and the parties agreed that the decision in this matter would be timely issued on or before October 10, 2006.

Petitioner alleged that the district failed to provide student with an appropriate educational placement and that Petitioner is entitled to a twenty-four hour residential placement.

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

Findings of Fact

1. Student is a *** year old student who resides with his *** and *** within the Pearland Independent School District. [Petitioner's Exhibit 2] and [Transcript Pages 19 & 20]
2. Petitioner is currently placed at the *** Treatment Center, a private day school. [Respondent's Exhibit 5]
3. Student's mother resides in *** but has allowed her sister (***) who acts as student's next friend to care for him for approximately *** years. [Transcript Pages 19-60]
4. Student receives special education and related services based upon an eligibility criterion of emotional disturbance. [Respondent's Exhibit 5]
5. Student has been diagnosed by various medical, psychological, and educational professionals as having attention-deficit hyper-activity disorder, post traumatic stress disorder, and autism. [Petitioner's Exhibit 2] and [Transcript Pages 20-60]
6. When student was *** years old his mother left him in the care of others and he was *** abused. [Petitioner's Exhibit 2 and Respondent's Exhibit 2] and [Transcript Pages 22 & 23]
7. Student became a student in the district in the spring of *** and was placed in *** School with individual educational program ("IEP") goals in secondary English skills at the *** grade functional level and secondary reading skills at the *** grade functional level. [Respondent's Exhibit 11]
8. Student has been receiving educational and related services paid for by the district at the *** for a year and a half paid for by the district. Student also receives extended day services in what is termed a "home" by *** with one on one supervision. [Petitioner's Exhibits 5-25 and Respondent's Exhibits 5-10] and [Transcripts Pages 58 & 59]
9. The district has also provided in-home training for student and *** and ***'s husband. [Petitioner's Exhibits 5-25 and Respondent's Exhibits 5-10] and [Transcripts Pages 58 & 59]
10. *** and her husband believe that student's behavior is sometimes unmanageable in their home and believe that he can be a danger to others in the community. [Transcript Pages 44-53]
11. *** [Transcript Pages 43-50, 167, 168 & 220]
12. Student has had a number of behavioral incidents at *** and has been restrained. [Petitioner's Exhibit 1]
13. Student's teacher at *** testified that student should be in a residential placement so that he might have an opportunity for consistent behavior instruction to benefit from his educational program. [Petitioner's Exhibit 46] and [Transcript Pages 177, 178, 184 & 221]
14. Student was referred by his primary care physician to a licensed psychologist who has worked with student to deal with his behavior. The psychologist described

- some behavior as psychotic and delusional. [Petitioner's Exhibit 42] and [Transcript Page 338]
15. The district retained a licensed specialist in school psychology who is also a licensed psychologist in Texas to review student's educational program. She believes that student does not need residential placement in order to receive educational benefit from his program because she believes he is progressing at a rate equal to or greater and could be reasonably anticipated. [Transcript Pages 443-449]
 16. Student's progress is affected by his functional ability and his extensive disabilities. Student is functionally illiterate and has significant delays in his verbal abilities. His full scale IQ is approximately ***. The psychologist retained by the district believes that student's progress is reasonable based upon his ability. [Transcript Page 419]
 17. Student was first placed in *** in *** 2005 and his teacher administered a criterion-referenced test to determine his functioning level; student was instructed at that level. [Transcript Page 188]
 18. The IEPs developed for student in 2005 and 2006 were based upon current assessment of student, and *** agreed with the IEPs developed for student [Petitioner's Exhibits 5 & 6 and Respondent's Exhibits 8-10] and [Transcript Pages 188 & 264]
 19. The district additionally provided extended day services for student and in-home training services for student and his *** and***. [Respondent's Exhibits 1 & 5] and [Transcript Page 485]
 20. *** has given input into the preparation of the in-home training IEPs and believes that their objectives were appropriate. [Transcript Page 264]
 21. In the *** of 2005 modifications were made to student's program; he was removed from the classroom, and the *** staff implemented an intervention program known as extinction. Extinction intervention involves ignoring student's inappropriate behavior. The program was implemented and was effective. [Transcript Pages 130-133 & 488]
 22. The district has considered whether or not student requires placement in a residential program. The district considered whether or not student was making progress, whether student required a long time to recoup skills when he returned from breaks, the severity of his behavior, and the pervasiveness of his inappropriate behavior. The district determined that student was making progress in the day program and the number of incidents of his severe behaviors is decreasing. The district concluded that residential placement was not required and that student could receive an appropriate educational program in his current placement. [Transcript Pages 518-528]
 23. The district provided educational placement in behavioral programs in the public school and transferred student to a day school program at *** where he was provided extended day services in a structured setting to work on his behavioral and social skills. [Petitioner's Exhibits 5, 6, 16, 17 & 22 and Respondent's Exhibits 5-10]
 24. The district considered whether or not student's problems at home had become so intertwined in his educational program that residential placement is required.

- Behavior logs for student showed that student was usually cooperative when he arrived at school and that his agitation could be controlled. Student has been able to control off-task behaviors in his educational program and engage in academic instruction. The psychologist retained by the district believes that the assessment data showed that his behavior at home has not affected his success at school. [Transcript Pages 419-431]
25. *** testified that student has never acted aggressively towards her or tried to hurt her. Outside her home, *** has made inappropriate *** comments to a child in the neighborhood, been involved in a fist fight with another boy, and grabbed ***child by an arm and tried to drag the child across the park. All of the incidents occurred when student was not under direct supervision outside the home. [Transcript Pages 50, 51, 237 & 352]
 26. Student has been able to participate in community activities and is taken into the community by his *** and ***. Student has also been taken into the community on many occasions by personnel from ***. Though student has poor social skills, his *** and *** and *** personnel believe that he is easily redirected and that he has never been aggressive to anyone in the community when he is supervised. [Transcript Pages 77-82, 121-129 & 267-268]
 27. Student has inappropriate social skills but his behavior can be stabilized and he has been able to generalize skills he has learned in the community. [Transcript Page 436]
 28. Student's *** and ***, school personnel, and *** personnel worked in a coordinated and collaborative manner to provide him educational services including working with student's behavioral skills. [Petitioner's Exhibits 7, 9-15 & 18-22 and Respondent's Exhibits 4-10] and [Transcript Pages 494-499 & 694]
 29. A psychologist with the district observed student in his program at *** and was available to student's private psychologist to discuss student's program and progress. [Transcript Pages 354, 355 & 507]
 30. Student's teacher at *** believes that student is only making minimal educational progress at ***. [Transcript Page 163]
 31. Locally determined alternative assessment ("LDAA") for student in the spring of 2006 showed that student met the admission, review, and dismissal ("ARD") committee's expectations for educational progress. Student had difficulty in the fall of 2005, but his program was modified and he was more successful in the spring of 2006. [Petitioner's Exhibit 8 and Respondent's Exhibit 15]
 32. Student's IEPs for the spring of 2005 and fall of 2006 show progress in his mastery of academics and behavior. Student made gains in written language, writing legibility, punctuation and writing basic personal information. Student mastered all of his objectives in math. Student's progress in science was scattered. And student mastered many objectives in social skills. [Respondent's Exhibit 18]
 33. Student's ***, though, believes that *** is a bright student who is not reaching his potential and testified that she thinks his grades would be "better" if he were residentially placed. She concedes, though, that student is making progress. [Transcript Pages 191-199]
 34. *** and district personnel believe that student has made behavioral progress. Student's teacher at *** believes he is more easily redirected to positive behavior,

- has to be restrained less often, and displays fewer severe behaviors. [Transcript Pages 129 & 200-219]
35. Behavior reports from *** show significant improvement in student's behavior; his restraints have been short in duration, and he has been able to get on-task after short periods of time. [Petitioner's Exhibits 1 & 4 and Respondent's Exhibit 16]
 36. His severe behavior incidences have decreased in number and he has had only a dozen restraints (usually very short restraints) in the *** he has been at ***. [Petitioner's Exhibit 1 and Transcript Pages 427-436]
 37. Student's teacher at *** does not believe that he is performing at his potential but that he has improved. [Transcript Pages 194-197]
 38. Student's behavior presents the biggest problem interfering with his access to his educational program. The behaviors have not been so severe that residential placement is necessary for him to make educational progress. He has not demonstrated extreme aggression or such self-injurious behavior that a twenty four hour residential treatment program is required for him. [Transcript Pages 422, 423, 446 & 447]
 39. Petitioner's expert testifying about residential placement was his private psychologist. The psychologist, however, testified that she could not make a recommendation for placement for student without seeing him in the school setting and could not testify that his current placement is inappropriate. Instead, she said that residential placement should be considered. She stated that his current educational program was not working but that: "If you need to pin me down, I would say, yes, I believe that he does not need a residential placement." [Transcript Pages 333 & 361-363]

Discussion

Petitioner has demonstrated that student is a student with severe disabilities – some of which are innate – and some caused by tragedies in his life. Student has had the benefit of an *** and *** who have worked diligently and lovingly to provide him with a stable and nurturing environment. His disabilities are so severe that his educational placement has required extensive services and restrictions in his educational environment.

The district demonstrated that it has sought to serve student in a continuum of educational placements which now involve placement in a non-public day school program with extended day services. The issue for determination in this matter is whether or not student's placement needs to be even more restricted so that he requires a twenty-four hour residential placement.

Counsel for the parties have advanced their positions cogently, but the testimony from the witnesses is conflicting and requires analysis based upon the credibility and the weight accorded the witnesses's testimony.

Student's teacher testified that she believes he needs residential placement. An expert psychologist who has seen student privately testified that residential placement should be considered, that his current placement is not working but that she could not make an affirmative statement that residential placement is required now for student to benefit from his current educational placement.

In assessing student's current educational placement and the progress he has made or failed to demonstrate, IDEA requires that a student be placed residentially only if such a placement is necessary to deliver educational and related services in order to afford an opportunity for educational benefit to the student. Petitioner has a difficult burden of proof to show that residential placement is required under the law. Petitioner must demonstrate that a student's current educational placement is inappropriate and does not afford him an opportunity for meaningful educational benefit. Petitioner must prove that residential place is appropriate and necessary for the student.

Controlling law from the Fifth Circuit has been established in *Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5th Cir. 1997). The court developed a test to determine whether or not an IEP has been reasonably calculated to enable a student to receive meaningful educational benefit. The Court considered four factors: the student's educational program must be individualized on the basis of the student's assessment and performance; the educational program must be administered in the least restrictive environment; the educational services for the student must be provided in a coordinated and collaborative manner by the key stakeholders; and positive academic and nonacademic benefits must be demonstrated.

Student's disabilities and life experience make an assessment of the appropriateness of his educational placement difficult. But in applying the standard of *Cypress-Fairbanks ISD v. Michael F.*, supra, the evidence at the

hearing leads to the conclusion that the district has met the standard for educational programming articulated by the Fifth Circuit. The complications of student's situation may at some point require the severe restrictions of a residential placement for some period. Residential placement is not required now.

Conclusions of Law

1. Student is a student who is eligible for special education and related services under the provisions of IDEA, 20 U.S.C. §1400, et seq., and related statutes and regulations.
2. The Pearland Independent School District is responsible for the delivery of the special education and related services for student
3. The current placement developed by the district for student was properly developed and provides student with an educational placement and related services reasonably calculated to enable him to receive educational benefit under the standard of *Board of Education of the Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982), 34 CFR 300.552, and 19 T.A.C. §89.1055.
4. The educational program developed by the district for student meets the standards of *Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245 (5th Cir. 1997), 34 CFR 300.300, and 19 T.A.C. §89.1055, because the program is individualized based on the student's assessment and performance, the program is administered in the least restrictive environment, the services are provided in a coordinated and collaborative manner by the key stakeholders, and positive academic and nonacademic benefits have been demonstrated.

ORDER

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that all relief requested by Petitioner is DENIED.

SIGNED this 10th day of October, 2006.

Lucius D. Bunton

Special Education Hearing Officer

DOCKET NO. 142-SE-0306

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

PETITIONER

vs. BEFORE A SPECIAL EDUCATION
HEARING OFFICER

PEARLAND INDEPENDENT FOR THE STATE OF TEXAS

SCHOOL DISTRICT

RESPONDENT

SYNOPSIS OF DECISION

ISSUE: Whether Petitioner is entitled to residential placement.

CITATION: 34 CFR 300.552 and 34 CFR 300.300, and 19 T.A.C. §89.1055

HELD: For Respondent.