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# DOCKET NO. 145-SE-0306

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

PETITIONER

vs.

MCALLEN INDEPENDENT

SCHOOL DISTRICT

RESPONDENT

BEFORE A SPECIAL EDUCATION  
HEARING OFFICER  
FOR THE STATE OF TEXAS

## DECISION OF THE HEARING OFFICER

### Statement of the Case

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

Petitioner filed her request for a due process proceeding on March 8, 2006. Petitioner was represented by Christopher Jonas of Corpus Christi, Texas. Cynthia Buechler with Buechler & Associates of Austin Texas represented McAllen ISD.

### Issues and Requested Relief

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

1. The District failed to provide Student an evaluation for the appropriateness of an American Sign Language program.
2. The District failed to provide Student an evaluation to determine the appropriateness of an inclusive program.
3. The District violated the requirements of the least restrictive environment.

As relief, Petitioner seeks two years of general compensatory services and sign language services, a sign language evaluation, a sign language program, an inclusion evaluation, and an order requiring compliance with the least restrictive environment mandate.

### **Procedural History**

After the due process hearing was filed on March 8, 2006, the Hearing Officer scheduled a prehearing conference for April 10 and the due process hearing for May 1, 2006. On April 7, Petitioner requested a continuance of the prehearing conference and the hearing because of scheduling conflicts with other hearings. Granting this request, the prehearing conference was scheduled for May 10. On May 9, Petitioner sought a second continuance of the prehearing conference because he had a conflict with another prehearing conference. Granting this request, the prehearing was scheduled and held on June 8.

During the June 8 prehearing conference, the hearing was set for June 22-23, 2006. Both Parties announced ready. On June 21, Petitioner sought a continuance of the June 22 hearing because Petitioner's attorney had not requested a court interpreter. Granting this request, the Hearing Officer rescheduled the hearing for August 29-30, 2006, which extended the due date for the Final Decision to September 18, 2006.

The due process hearing was held on August 29. At the conclusion of the hearing, the Hearing Officer asked the Parties to submit written closing arguments by October 5 and set an October 12 deadline for Petitioner's Reply. Petitioner timely submitted her closing; Respondent chose not to submit a written closing argument.

Taking continuances into account, the deadline for the final decision was October 31, 2006. The Hearing Officer issued her decision on October 31, 2006.

## **Findings of Fact**

### **Sign Language**

1. Student is a \*\*\* year-old student who resides within the McAllen Independent School District. MISD 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 having Mental Retardation, Autism, and Speech Impairment.
2. Student has attended and been served by McAllen ISD since she entered school. Due to the severity of Student's disabilities and their effects on her behavior, she is served in a self-contained classroom. Student needs constant supervision and guidance. She needs a guide to assist her in walking because she falls easily. She needs assistance dressing, going to the restroom, and communicating. Student is non-verbal and uses a communication board, a voice output device, gestures, and sign.
3. During her elementary years, Student was taught American Sign Language (ASL) as part of a total communication program. For the past seven years, however, Student was not taught signing and lost many of her signing skills.
4. In May 2004, a Full Individual Evaluation (FIE) was conducted by the District. The evaluation used non-standard assessment procedures because Student is non-verbal and uses gestures, pointing, and a picture board to communicate. The examiner accepted Student's gestures, pointing, and picture board indications as responses. The evaluation also included observation of student, parent information and interview, and developmental checklist.
5. The Assistive Technology (AT) Evaluation portion of the FIE found that Student was ambulatory, sat for long periods, and used both hands to accomplish a variety of fine motor tasks. The evaluation noted that her signing was not precise and could confuse an unfamiliar person. The evaluators stated that Student maintained interest in various tasks for more than 90 minutes when a voice output device and sign language were used together. The AT evaluation recommended the use of icons on the voice output device, a picture communication system, and sign language software compatible with icon picture program. There was no finding in the AT evaluation that Student had fine motor skill problems.
6. A speech therapy evaluation was conducted as part of the FIE. The speech evaluation used the Expressive One Word Picture Vocabulary Test and the Receptive One Word Picture Vocabulary test to evaluate Student's need for sign language. The speech evaluation like the AT evaluation found that Student used signing of words but that the signs were not precise enough to be understood by an unfamiliar person. When assessing comprehension of verbs using picture cards, Student correctly pointed with 100% accuracy. The speech evaluator recommended six 30-minute sessions per year of speech therapy.

7. The speech evaluation portion of the FIE was inappropriate because it failed to adequately evaluate Student's need for a structured sequential signing program. The evaluator testified that Student had difficulty manipulating her fingers to produce signs. Such testimony, based on the evaluator's personal observations, an outside evaluation, and the District's own Assistive Technology evaluation, is unpersuasive. The outside evaluation was not introduced at the hearing and, accordingly, is considered unreliable; the District's AT evaluation lacked any finding of difficulty in manipulation. Moreover, the evaluator noted that Student did use ten (10) to fifteen (15) signs, though inconsistently, and recommended a total communication system to include both sign language and a picture system.
8. During the 2004-2005, \*\*\*, Student's self-contained teacher, began working with her in sign language and picture communication. As her communication skills improved her behavior also began to improve. She exhibited fewer emotional outbursts and was less aggressive towards others. Student's best method of communication was still the picture board, pointing, and gestures.
9. \*\*\* worked with Student for a three-year period from 2003 to 2006. During that time, Student's behavior improved and her communication skills progressed. In September 2005, \*\*\* recommended that Student attend three general education classes: dance, art, and American Sign Language. After much discussion, the ARD Committee agreed to place Student in these three classes. The ARD committee also provided twelve 25-minute sessions of speech therapy which meant that Student received two 25-minute sessions during each six week period.
10. During the 2004-2005 school year, Student received 25 minutes of speech therapy every three weeks. In the 2005-2006 school year, Student received speech services for thirty minutes every three weeks. Student's Speech IEP for both years specifically addressed the use of the communication book/system. The speech goals did not contain objectives related to sign language. Although the therapist used sign language as part of Student's total communication system, the therapist was not responsible for teaching Student sign language as part of the IEP relating to signing or for implementing any goal related to sign language.
11. In January 2006, the ARD committee met again to review Student's program. The ARD developed an Individualized Education Program (IEP) for sign language which included goals that related to her communication system. A Communications Skills IEP was developed which did not include any goals for signing. The Speech IEP had only one goal related to "mastery of classroom communication goals/objectives".
12. During the FIE, the speech therapist stated that Student consistently used several signs and to a limited extent, was capable of expressing herself through signing. The therapist testified that Student could learn sign language for functional activities. The speech evaluation made no finding that Student's fine motor skills would adversely affect educational performance. Despite finding that Student consistently used several signs, due to her level of communication; no standardized or other tests were administered to determine the appropriateness of a sign language program.
13. From February 2005 through September 2005, Student did not have a sequential structured program to learn sign language. There was simply no IEP to address

- sign language even though the District knew Student was capable of signing. A speech therapy session every five to six weeks for 25-minutes failed to provide sufficient time to teach Student to sign. The speech therapist used sign with Student, but never was responsible for implementing all IEP related to signing.
14. The therapist's recommendation that Student's needs could be met in the classroom through the total communication system is based on the unsubstantiated conclusion that Student will not be able to attain the fine motor skills necessary for sign language due to her low cognitive level. Accordingly, no systematic plan or progression for providing sign language to Student was provided by her IEP.
  15. There is no evidence of any progress by Student over time in her signing skills as part of a total communication system or as addressed in her IEP. Although Student may only be capable of minimal progress given the nature of her disabilities, she is entitled to a program that attempts to provide her with reasonable goals and objectives which reflects a systematic plan for her education in communication.

### **Inclusion**

16. There was no evidence that an evaluation to determine the appropriateness of an inclusive program exists or that the evaluation is necessary to provide Student a free appropriate public education. There was no evidence that before a student enrolls in a Community Based Instruction class a teacher's recommendation is insufficient and a district school is required to conduct an evaluation.

### **Least Restrictive Environment**

17. Student's placement for the 2004-2005, 2005-2006, and the Fall of 2006 school years did not violate the mandate of the least restrictive environment. Student was appropriately placed in a regular education classroom when her behavior improved to the point that she could benefit from a regular education class.

## **Discussion**

### **Standard of Review**

The key issue in this case is whether McAllen ISD provided Student with a free appropriate public education. The Supreme Court has defined an appropriate education as one that consists of "personalized instruction with sufficient services to permit the child

to benefit educationally from instruction.” A two-prong analysis has been established for determining whether a school district has provided a free appropriate public education (FAPE); first, has the District complied with IDEA procedural requirements, and second, is the student’s education program reasonably calculated to confer an educational benefit? *Board of Education of Hendricks Hudson Central School District v. Rowley*, 459 U.S. 176, 206-207, 102 S.Ct. 3034 (1982).

A substantive violation of IDEA occurs when the school’s program fails to provide the student with the requisite educational benefit. The school must provide an education that is reasonably calculated to enable the child to achieve *some* benefit. *Some* benefit means an education program that is meaningful and offers more than a *de minimus* educational benefit; it must be “likely to produce progress, not 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.

Applying these standards to Student's program the Hearing Officer concludes that Petitioner met her burden of proving that Respondent's program was inappropriate under the IDEA in the following particulars.

### **B. The Speech Evaluation is Inappropriate**

In 2001, McAllen ISD used the Expressive and Receptive One Word Picture Vocabulary Test to evaluate Student and recommend a total communication system. A total communication system provides for gestures, pointing, a communication board, signing, and other possible methods of communicating.

In May 2004, McAllen conducted a three-year FIE which included a speech evaluation. The credible evidence shows that the evaluator did not consider or conduct tests to assess whether sign language would be appropriate for Student. The evaluator testified that the Receptive and Expressive One Word Picture Vocabulary Test were used to determine Student's ability to sign, but the evaluator admitted that she did not specifically test for signing.

Clearly, Student's progress cannot be measured using the same tools used for students who possess communication skills. However, there simply was no effort made to use alternative evaluation tools. Nonetheless, the law requires that all students be provided with a meaningful educational program based on appropriate assessments and one that is likely to produce progress. Student must be provided with an IEP that offers systematic progression of goals and objectives based on present performance levels and assessment. Having conducted an inadequate and inappropriate assessment of Student's ability, the District could not,

and did not, provide Student with a reasonable and appropriate educational program.

The evidence in the case established that prior to the school years in question; Student had a higher signing vocabulary than she did at the time of either the evaluation or the hearing. Furthermore, the evidence showed that when her teacher began to sign with Student and use the communication board, Student's behavior improved to the point where she could be included in regular education classes.

All school personnel testified that they believed Student could learn to sign. This information, along with the evaluator's lack of tests specific to signing leads to the conclusion that the speech evaluation is inappropriate for its failure to evaluate Student's need and ability to use American Sign Language. Since, the speech program was based on an inappropriate evaluation, Respondent's failure to offer a program reasonably designed to produce progress for Student denied her a free appropriate public education.

The Hearing Officer finds that from March 2005 to the present, Respondent has provided Student an inappropriate speech program because the program was developed using an inappropriate evaluation. As such, Student is entitled to relief.

## **CONCLUSIONS OF LAW**

1. The McAllen 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 McAllen ISD, Petitioner is currently eligible for special education services under the classifications of Autism, Speech Impairment, and Mental Retardation. 20 U.S.C. §1401; 34 C.F.R. §300.7(c) (1, 8, 9).
3. Petitioner's 2004-2005 and 2005-2006 placement was in the least restrictive environment considering Petitioner's past behaviors and her educational needs.

- Board of Education of Hendricks Hudson Central School District v. Rowley, 459 U.S. 176, 102 S.Ct. 3034 (1982).
4. Respondent's May 2004 speech evaluation was inappropriate because it failed to consider all of Petitioner's communication needs. The speech IEP for the 2004-2005, 2005-2006, and the fall of 2006 failed to provide Petitioner a program that was reasonably designed to provide an educational benefit. *Cypress-Fairbanks Indep. Sch. DIST. v. Michael F.*, 118 F.3rd 245 (5th Cir 1997); cert. denied, 522 U.S. 1047 (1998).
  5. Petitioner failed to carry her burden of proof that she is entitled to an evaluation to determine the appropriateness of an inclusive program in order to receive a free appropriate public education.

## **ORDER**

After due consideration of the record, the foregoing findings of fact and conclusions of law, this Hearing Officer hereby ORDERS that the relief sought by Petitioner is hereby GRANTED IN PART AS FOLLOWS:

1. Respondent shall provide Student an Independent Educational Evaluation (IEE) which includes speech, occupational therapy, and communication skills to determine Student's current functioning levels and educational program needs, including the appropriateness of providing a comprehensive sequential signing program. Within 10 days of receipt of this Order, Respondent shall provide Petitioner a list of providers in accordance with McAllen ISD procedures for an IEE. Parent is directed to select an evaluator and make an appointment for the IEE within ten days of receipt of the list of providers.
2. Upon receipt of the written report from Student's evaluation, Respondent is directed to convene an ARD within ten school days with the evaluator participating to consider the results of the reports.
3. The ARD Committee is directed to reformulate Student's IEP in accordance with the evaluation results and current student performance.
4. Respondent is directed to provide Student compensatory speech services in the amount and type recommended by the IEE for a period of a one and one-half years duration. This amount is in addition to the recommended amount provided by the IEE. If no speech services are recommended by the IEE, Student is not entitled to compensatory speech services. These services, if any, shall be completed by the end of two years from the issuance of the evaluators' written reports.

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

SIGNED and ENTERED this 31st day of October 2006.

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 Student with an evaluation for the appropriateness of an American Sign Language program.  
**CITATION:** 34 C.F.R. §300.301-300.306
- HELD:** For Petitioner. Respondent's speech evaluation failed to assess Petitioner's educational needs for an American Sign Language program
- ISSUE:** Respondent failed to provide Student with an evaluation to determine the appropriateness of an inclusive program.  
**CITATION:** 34 C.F.R. §§300.320-300.323
- HELD:** For Respondent. Petitioner failed to show an educational need or the existence of an evaluation to determine the appropriateness of an inclusive program.
- ISSUE:** Whether Petitioner's placement violated the least restrict environment mandate.  
**CITATION:** 34 C.F.R. §§300.320-300.323
- HELD:** For Respondent. Petitioner's placement was appropriate given her behavior and educational needs.