

***, B/N/F	§	BEFORE A SPECIAL EDUCATION
*** &***	§	
PETITIONER	§	
	§	
VS.	§	HEARING OFFICER
	§	
HOUSTON INDEPENDENT	§	
SCHOOL DISTRICT	§	
RESPONDENT	§	FOR THE STATE OF TEXAS

FINAL DECISION OF THE HEARING OFFICER

STATEMENT OF THE CASE

Petitioner, \*\*\*, by his next friend, \*\*\* &\*\*\* (hereinafter Student or \*\*\*) brings this proceeding against Respondent Houston 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 \*\*\* an appropriate education program based on then-current Present Levels Of Performance (PLOP).
2. In the alternative, Respondent failed to implement \*\*\*'s education program.

3. Respondent's failure to provide \*\*\* an appropriate program resulted in a unilateral placement at a private school.

Petitioner seeks a finding that the private school program is appropriate. Additionally, Petitioner seeks an Independent Educational Evaluation, as well as reimbursement and prospective relief for \*\*\*'s unilateral placement at a private school.

Respondent presented three principal counter arguments. First, the public school program was appropriate, but \*\*\* attended school only a few months before his unilateral private school placement. Second, the private school program violates the requirement of the least restrictive environment. Third, the private school program is inappropriate because it perpetuates academic and non-academic issues seen in students on the autism spectrum.

#### PROCEDURAL HISTORY

Petitioner filed his request for a due process proceeding on August 31, 2005. Petitioner was represented by C. Michael Black of Houston, Texas. Hans Graff, with the Houston Independent School District General Counsel's office represented Respondent.

The Hearing Officer scheduled a prehearing conference for October 7 and the due process hearing for October 18 & 21, 2005. During the October 7 prehearing conference, the Parties requested a continuance of the due process hearing because Respondent's attorney had a conflict on October 18. Granting this request, the Hearing Officer rescheduled the hearing for November 7-8.

The due process hearing was held on November 7-8. After two days of testimony, the Parties requested additional time to complete the hearing. Granting this request, the Hearing Officer recessed the hearing and scheduled the hearing for November 16-17. The hearing resumed on November 16 and concluded the next day. At its conclusion, the Hearing Officer asked the Parties to brief certain legal issues and set a December 15 deadline for the briefs, and December 23 for Petitioner's Reply brief. Both Parties timely submitted post-hearing briefs.

Taking continuances into account, the deadline for the final decision was January 17, 2006. On January 5, the Hearing Officer had a death in her family and the Parties agreed to extend the decision due date to January 24, 2006. The Hearing Officer issued her decision on January 24, 2006.

#### FINDINGS OF FACT

1. \*\*\* is a \*\*\* year-old student residing within the Houston Independent School District. HISD is a political subdivision of the State of Texas and a duly incorporated independent school district. \*\*\* qualifies for special education services as a student with Autism, Speech Impairment, and Other Health Impairment.

2. In September 1997, at the age of \*\*\*, \*\*\* was found to have an autistic spectrum disorder and a seizure disorder. In January 1998, a speech evaluation found that \*\*\* had speech delays. \*\*\* enrolled in public school during the 1998-1999 school year at age \*\*\* and was admitted to special education under the Speech Impairment and Other Health Impairment classifications. In November 1998, Respondent conducted an Comprehensive Individual Evaluation which included the Woodcock-Johnson Tests of Achievements. In the Spring of 1999, \*\*\* was scheduled for additional evaluations, but transferred to \*\*\* School, a private school exclusively for students on the autism spectrum. \*\*\* attended

the \*\*\* School from 1999 through August 2004.

3. In August 2000 and March 2004, \*\*\* was evaluated by Dr., Ph.D., of the University of Texas Health Science Center. In addition to other evaluation instruments, Dr. \*\*\* performed the Woodcock-Johnson Tests of Achievement during both evaluations.

4. The two evaluations conducted by Dr. \*\*\* showed both grade equivalents and standard scores in the broad academic areas and subtests. The March 2004 evaluation showed improvements in the areas of Basic Reading Skills, Broad Reading, Broad Written Language, and Broad Math. Using two types of measurements for intellectual functioning, \*\*\*'s 2004 evaluation showed a decline in his scores using the TONI and the WISC-III.

5. At the hearing, there was much dispute about \*\*\*s performance on subtests of the Woodcock-Johnson instruments. As illustrated by the evaluation scores, \*\*\*'s performance was inconsistent. For example, in the March 2004 evaluation, the subtests were re-administered beginning one to two items above where \*\*\* began making scores of \*\*\*. All the retesting showed improvement in performance. Before retesting, the subtest scores showed a decline.

6. In 2004, his academic achievement scores ranged from beginning \*\*\* grade to \*\*\* grade levels. Based on the grade equivalent scores, \*\*\* gained approximately one year's improvement in basic reading during this four-year period. The one-year improvement in basic reading was his biggest academic gain during this period.

7. In the spring 2004, \*\*\*'s mother, Ms. \*\*\* contacted the District to enroll \*\*\* for the fall 2004. A Full and Individual Evaluation (FIE), including a speech evaluation, was conducted in April and May 2004. \*\*\* qualified for services under the categories of Autism, Speech Impairment, and Other Health Impairment.

8. An Admission, Review, and Dismissal (ARD) Committee met on May 16, 2004 to develop a program for the 2004-2005 school year. The ARD Committee accepted information from Ms. \*\*\* and \*\*\*'s private school teacher concerning his level of performance. His private school teacher was also \*\*\*'s private tutor.

9. A program was developed that included Language Arts, Health, Science, Social Studies, Math, and Speech services. \*\*\* had two resource classes, Science and Social Studies. The Committee also completed a functional behavior assessment, a behavior IEP, a Behavior Intervention Plan (BIP), and an Autism supplement.

10. In determining \*\*\*s "Present Level of Performance" (PLOP), the May 2004 ARD Committee reviewed his current and past evaluations, \*\*\* private school class work and teacher observations. \*\*\*'s level of performance was between \*\*\* grade and \*\*\* grade, with some areas as high as \*\*\* grade. The IEP's and the BIP developed at the May 2004 ARD were based on current assessments, parental information, and were designed to provide \*\*\* an educational benefit. The May 2004 IEPs were appropriate.

11. The May 2004 program included a BIP that identified verbal outbursts by \*\*\* as problematic behavior. Approximately 15 days after school began, \*\*\* apparently threatened to "\*\*\*" his classroom paraprofessional. The classroom teacher talked to him and found that when \*\*\* says he wants to "\*\*\*" someone, he is expressing anger at himself, and that \*\*\* was lonely, wanted new friends, and was jealous of another student who was

getting attention from the classroom aides. There was no indication from \*\*\*'s classroom teacher that this "\*\*\*" comment constituted a threat. The teacher clearly sought to use this incident as an opportunity to teach \*\*\*new coping skills.

12. Two days after the first "\*\*\*" statement, \*\*\* repeated the comment to the same aide. The school counselor interviewed \*\*\* and determined he had a plan to carry through with this "\*\*\*". The District's police were called and \*\*\* was sent home and charged with assault. The actions taken by school personnel clearly violated \*\*\*'s BIP concerning verbal outbursts.

13. A subsequent psychological assessment found that \*\*\* did not pose a risk factor for enacting violence against the classroom aide. Given the conversation with \*\*\* two days earlier, school personnel should have explored the antecedents to this behavior before calling the police and suspending \*\*\*.

14. \*\*\* did not return to school after this incident. He began exhibiting signs of anxiety and stress, had eating difficulties, and exhibited obsessive-compulsive behavior. His parents kept him out of school for a month. Thereafter, on the recommendation of his doctor, the ARD provided \*\*\* with home-bound services for eight weeks.

15. On January 6 & 18, 2005, the ARD reconvened to transition \*\*\* back to school and to develop new academic and related services plans. During this meeting, Ms. \*\*\* provided the committee a list of concerns and recommendations. She pointed out that \*\*\*'s private teacher/tutor believed \*\*\* had mastered more goals than his home-bound teacher reported. \*\*\*'s private school teacher/tutor provided input concerning \*\*\*'s level of performance.

16. The ARD developed academic IEPs for Science, Social Studies, Math, Reading Comprehension, Social Skills, Behavior, and Written language. The Committee also developed a Speech program, and a transition plan which allowed \*\*\* to gradually return to school. The ARD recessed to allow Ms. \*\*\* to visit a new middle school. After Ms. \*\*\* visited the new school, the ARD reconvened and approved the new program. \*\*\* began attending the new school shortly thereafter and completed the 2004-2005 school year.

17. In June 2005, an FIE was conducted due to Ms. \*\*\*'s concerns about academic progress. In the six categories identified in Findings of Fact No. 4, \*\*\*'s scores increased in 50% of the areas and declined in the other 50%.

18. The June 2005 evaluation report goes to great lengths to identify the measurable progress since the March 2004 Woodcock-Johnson. I find that the 2005 evaluation shows no progress or regression. It's hard to explain why \*\*\*'s performance declined in four areas yet improved in four other areas. Clearly Ms. \*\*\*'s original advice to the District holds true: \*\*\*'s school work is more representative of his strengths and weaknesses than his evaluations, and his education program should not be based solely on evaluation scores.

19. The June 2005 evaluation of \*\*\* conducted by District personnel was appropriate and conducted in accordance with 34 C.F.R. §§ 300.532 & 300.533.

20. In July 2005, Petitioner provided Respondent with notice of intent to withdraw \*\*\* and place him at the \*\*\* School, a private school for students identified as having a disorder on the autism spectrum.

21. \*\*\* is accredited by the Southern Association of Colleges and School and was designed to address issues related to disorders on the autism spectrum. For example, the school's physical environment addresses noise, light, and other sensory issues. Additionally, the school's classrooms have a low teacher-to-student ratio, usually 1:1 or 1:2. Students have limited opportunities to interact with non-disabled peers. \*\*\* enrolled at \*\*\* and began attending class for the 2005-2006 school year. This will be his \*\*\* year attending this school.

22. On August 30, 2005, an ARD met to revise \*\*\*'s program to address his mother's concerns that \*\*\* made no academic progress in his public school setting. The ARD Committee developed new IEPs for Speech, English/Language Arts, Math, Reading, Social Studies, Science, Vocational Skills and Behavior. The program was to be implemented through a combination of a self-contained and general education classes. \*\*\*'s functional behavior assessment and his BIP were also revised. Ms. \*\*\* did not agree with the proposed program, but agreed to return and try again.

23. On September 13, the Committee met again to review \*\*\*'s proposed program. Ms. \*\*\* contended that the proposed program's goals and benchmarks were too low and that \*\*\* was able to perform at a higher level. A second area of disagreement was that the goals and benchmarks were too vague and not measurable.

24. The goals and benchmarks developed on August 30, 2005 were similar and in some cases, identical to the goals and benchmarks in the January 2005 ARD which were developed with the assistance of his mother and the teacher who taught \*\*\* for three years at \*\*\*. At the hearing, the teacher testified that \*\*\*'s academic skills range from the \*\*\* grade to \*\*\* grade level. This teacher also believed that \*\*\*'s academic skills declined while attending public school.

25. Ms. \*\*\*'s proposal to the September 2005 ARD that certain subjects, i.e., Science, be taught to \*\*\* at a \*\*\* grade level was not supported by his school work or by any testing, formal or informal. While \*\*\* may be able to receive oral information at a \*\*\* grade level, an academic IEP must identify areas of weakness and provide a base level from which to develop a program that will allow the student to close the knowledge gaps.

26. The August/September 2005 proposed IEPs and related services were appropriate and designed to provide \*\*\* with an educational benefit.

27. Ms. \*\*\*'s request for a higher level of performance was not unreasonable, but due to low PLOP scores, there is no basis in the evidence for finding the goals and benchmarks inappropriate. Given his test results and his classroom performance, both at \*\*\* and in public school, \*\*\*'s Present Levels Of Performance are between \*\*\* and \*\*\* grade. The PLOPs were appropriate and supported by the documentary evidence presented at the hearing and the testimony of witnesses.

28. \*\*\* is an enigma. He has splinter skills across all academic areas. All evaluations show progress in some areas and a decline in other areas. One thing is clear: \*\*\*'s academic progress is laborious, and it is unreasonable to expect a clear delineation of academic skills. Taking a holistic approach to teaching \*\*\* will serve him best and will probably help his teachers.

## DISCUSSION

### A. STANDARD OF REVIEW

The threshold issue is whether \*\*\*, considering his unilateral placement at \*\*\*, is entitled to tuition reimbursement from Houston ISD. The next issue, reached only if reimbursement is warranted, is whether Houston ISD must pay for \*\*\*'s \*\*\* tuition for the remainder of the 2005-2006 school year.

To receive reimbursement, \*\*\* must discharge two burdens of proof. First, he must show that Houston ISD's proposed 2005-2006 program was inappropriate. Second, he must show that the \*\*\* School's program is appropriate. If \*\*\* fails to discharge either burden, he is not entitled to reimbursement. However, if the Hearing Officer finds that the District's proposed program is appropriate, it is not necessary to reach the issue of the appropriateness of the private school placement. *School Committee of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359 (1985); *Florence County Sch. Dist. Four v. Carter*, 114 S.Ct. 365 (1993); *Tatro v. State of Texas*, 703 F.2d 823, *aff'd in part and rev'd in part sub.*, *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984).

The United States Supreme Court established a two-prong test for determining whether a school district provided a free appropriate public education. 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).

Because IDEA does not provide a substantive standard defining the precise level of education required to provide a free appropriate public education, courts have defined the

required education as “personalized instruction with sufficient services to permit the child to benefit educationally from that instruction.” 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 (5<sup>th</sup> Cir 1997); cert. denied, 522 U.S. 1047 (1998).

The Fifth Circuit delineated four factors to consider as indicators of 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 2005-2006 PROPOSED PROGRAM WAS APPROPRIATE

Applying these standards and indicia of a free appropriate public education to the program proposed by Houston ISD, the Hearing Officer concludes that the 2005-2006 program was reasonably calculated to provide \*\*\* with a meaningful educational benefit. Although \*\*\*’s experience in the fall of 2004 was not successful, he was able to transition to a new school to continue his programing. The evidence presented established that \*\*\*’s educational program proved successful in the Spring 2005, making it reasonable to continue the program in the 2005-2006 school year.

Since \*\*\* attended public school for only four months, it’s difficult to surmise whether a program with a higher level of performance would have provided him an educational benefit or mere frustration. What is clear is that Houston ISD designed a program based on the student’s assessments and performance, and provided in the least restrictive

environment. In the spring 2005, \*\*\* was able to participate successfully in his classroom environment and to manage his behavior effectively enough to attain educational benefits. For any student, and particularly a student with autism, transitioning from public school to “home school” to “home bound” to a second public school in a matter of six months is challenging at best. \*\*\* was successful in handling these transitions. I give tremendous credit to his parents for understanding their child, providing him support, and for being knowledgeable advocates on his behalf.

The Hearing Officer understands that a smaller school and class size allows \*\*\* more personalized attention and is highly beneficial to him; however, the evidence demonstrates that

\*\*\*’s program at his public middle-school was not substantially different from that provided at \*\*\*. The difference is this private school is exclusively dedicated and sensitive to the behavior and academic issues associated with students on the autism spectrum.

The Hearing Officer finds that the 2005-2006 proposed program is individualized to address \*\*\*’s identified needs, and is provided in the least restrictive environment that would allow \*\*\* to achieve a meaningful educational benefit. As such, \*\*\* is not entitled to reimbursement from public funds for the cost of sending \*\*\* to the\*\*\* School.

#### CONCLUSIONS OF LAW

1. Houston Independent School District (HISD) 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 HISD, 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. Respondent's proposed 2005-2006 IEPs and placement for Petitioner were reasonably calculated to enable him to receive educational benefits under the standards enunciated in *Board of Education of Hendricks Hudson Central School District v. Rowley*, 459 U.S. 176, 102 S.Ct. 3034 (1982).

4. Petitioner is not entitled to reimbursement for tuition at \*\*\* school for the 2005-2006 school year. *School Committee of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359 (1985).

5. Petitioner's June 2005 evaluation conducted by HISD 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, this Hearing Officer hereby ORDERS that all 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 24<sup>th</sup> day of January 2006.

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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).

No. 397-SE-0804

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### SYNOPSIS

Issue: Respondent failed to provide student an appropriate education program based on Present Levels Of Performance (PLOP).

Held: For Respondent. Respondent provided Petitioner educational services based on current assessments and performance.

34 C.F.R. §300.300 & 300.532

Issue: Respondent failed to implement student's education program.

Held: For Respondent. With the exception of a violation of Petitioner's BIP, Petitioner failed to prove lack of implementation.

34 C.F.R. §§300.347 & 300.552

Issue: Whether Petitioner is entitled to reimbursement for a unilateral private school placement at \*\*\* school.

Held: For Respondent. Respondent's proposed educational program for Petitioner was reasonably calculated to provide Petitioner with educational benefit in the least restrictive environment under the standards of *Board of Education of Hendricks Hudson Central School District v. Rowley*, 459 U.S. 176, 102 S.Ct. 3034 (1982).

34 C.F.R. §§ 300.300 & 300.550

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

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.

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