

KELLER INDEPENDENT  
SCHOOL DISTRICT,

Petitioner,

V.

STUDENT *b/n/f*  
PARENT,

Respondent.

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BEFORE A SPECIAL EDUCATION

HEARING OFFICER

FOR THE STATE OF TEXAS

## DECISION OF THE SPECIAL EDUCATION HEARING OFFICER

### I.

#### STATEMENT OF THE CASE

Petitioner, Keller Independent School District ("KISD"), requested a Due Process Hearing pursuant to the Individuals With Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. §1400 *et. seq.*, in response to the request by Respondent, Student *b/n/f* Parent ("Student"), for an independent educational evaluation ("IEE"). KISD seeks a ruling that the full, individual evaluation ("FIE") it performed on Student is appropriate, thereby negating its duty to provide Student an IEE at public expense.

### II.

#### PROCEDURAL HISTORY

On October 26, 2006, the Texas Education Agency ("TEA") received the Request for Due Process Hearing filed by KISD against Student and assigned the case Docket No. 055-SE-1006.

On October 30, 2006, the undersigned Hearing Officer issued the Initial Scheduling Order, setting forth all relevant deadlines pursuant to the IDEIA. Pursuant to that Order, the prehearing telephone conference was set for November 15, 2006; the Due Process Hearing was set for December 4, 2006; and the Decision deadline was set for December 10, 2006. Due to conflicting schedules, the telephone conference was extended to November 20, 2006.

On November 20, 2006, the parties convened for the prehearing telephone conference. In attendance were the following: 1) Ms. Susan Graham, counsel for KISD; 2) KISD's Executive Director of Special Education; 3) KISD's Director of Special Education; 4) Student's father; 5) the court reporter, who made a record of the telephone conference; and 6) the undersigned Hearing Officer. During this telephone conference the parties discussed the issues and re-scheduled the Due Process Hearing to January 17, 2007, with Disclosures due January 10, 2007, and the Decision deadline extended to January 23, 2007.

On January 5, 2007, KISD filed a Motion for Continuance of the January 17, 2007, Due Process Hearing. Student did not oppose this continuance. The undersigned Hearing Officer

granted this Motion for Continuance and re-scheduled the Due Process Hearing for February 9, 2007, with Disclosures due February 2, 2007, and the Decision deadline extended to February 15, 2007.

The Due Process Hearing convened on February 9, 2007. The parties agreed to allow a restricted number of witnesses to remain in the hearing throughout its duration. KISD was represented by counsel, Ms. Graham; Student was represented by his Grandfather. The hearing did not conclude on February 9, 2007. The parties agreed to resume the hearing on March 6-7, 2007. The hearing re-convened on those dates and at the conclusion of the hearing, the parties agreed to a post-hearing schedule. The parties' briefing would be filed and served by April 6, 2007; the Decision Deadline would be April 11, 2007. The parties complied with this briefing schedule as to timely filing the briefs with the Hearing Officer. However, Student's advocate did not realize that he had to provide a copy of Student's brief to KISD. He immediately provided such copy upon learning of this requirement on April 10, 2007. On April 11, 2007, KISD's counsel requested permission to respond to some of the argument in Student's closing argument. This request was granted and the parties agreed to extend the Decision Deadline to April 12, 2007.

### **III. FINDINGS OF FACT**

1. Student is a young male who resides with his parents within the jurisdictional limits of KISD. KISD is a political subdivision of the State of Texas and a duly incorporated independent school district.
2. Before he was three years old, Student received services for developmental delays through the Early Childhood Intervention Program ("ECI"). At that time, Student was residing within the jurisdictional limits of Fort Worth Independent School District ("FWISD"). When he turned three, Student was tested by FWISD, which evaluated Student for autism and speech impairment. FWISD did not find autism spectrum disorder, but it did determine that Student had a communication disorder, which qualified him for special education services as speech impaired ("SI") in the Preschool Program for Children with Disabilities ("PPCD").
3. In January 2006, FWISD re-evaluated Student for autism and to determine his progress in the PPCD class. The assessors again found no autism spectrum disorder. They did find that Student continued to have a severe expressive language delay.
4. On March 24, 2006, Student's FWISD Admission, Review, and Dismissal Committee ("ARD") met for his annual ARD. It reviewed recent assessments and, based upon all information, determined that Student did not qualify for special education services as a child with autism spectrum disorder. The ARD Committee continued speech therapy thirty minutes per week. Student's father did not agree with the ARD Committee's recommendation.
5. Student's family moved from FWISD and enrolled Student in KISD at the beginning of school year 2006-2007. KISD convened a transfer ARD on August 8, 2006. Student's parents provided the ARD Committee an outside evaluation performed by the Child Study Center that determined Student had autism. The Committee agreed to an autism screening as part of an FIE and to re-convene by September 20, 2006, to review the new assessment and to finalize Student's IEP. Pending that assessment period, Student

remained in the PPCD classroom with speech therapy increased to thirty minutes, two times per week.

6. KISD performed a comprehensive FIE. It assessed Student's language and articulation. On August 24, 2006, KISD's speech pathologist administered the Clinical Assessment of Articulation and Phonology ("CAAP"), which is designed to assess the articulation and phonology of children ages 2-6 to 8-11. The assessor found that Student functions in the average range relative to children of the same age. The assessor found that Student's voice volume is appropriate; his physical oral mechanism is adequate for the support of speech; his fluency rate is appropriate; and there is no indication of a need for assistive technology.
7. On September 5, 2006, KISD's speech pathologist administered the Comprehensive Assessment of Spoken Language ("CASL"), which is an oral language assessment battery normed for ages three to twenty-one. Fifteen tests measure a plethora of language skills. Core composite scores of 78 or below indicate a language impairment per the KISD eligibility guidelines. Student's core composite score was 103, which placed him well within the normal range.
8. Also on September 5, 2006, KISD's speech pathologist administered the Test of Early Language Development-3 ("TELD-3"). This is a norm-referenced test that evaluates receptive and expressive language, syntax, and semantics. Student's language quotient was 93, which places him within the average range of language skills.
9. The speech therapist observed Student in the classroom on two occasions. She noted that Student asked and answered questions appropriately; he interacted with his peers; he transitioned well between activities.
10. Based upon the results of these assessments, the speech pathologist found that Student no longer qualified for special education services under the category of SI.
11. KISD's educational diagnostician assessed Student's cognitive ability and achievement. Student scored 94 on the Wechsler Preschool & Primary Scale of Intelligence-3<sup>rd</sup> ("WPPSI-III"), a score that places Student within the normal range of cognitive ability. Student scored 93 on the Listening Comprehension and 85 on the Oral Expressions tests within the Oral & Written Language Scales ("OWLS"), which places him within the average range.
12. On August 29, 2006, Student's mother and PPCD teacher completed the Gilliam Autism Rating Scale ("GARS-2"). This is a norm-referenced test for assessing autism. Student's mother scored him at 109, which indicates a likelihood of autism. Student's teacher scored him at 57, which indicates that autism is unlikely.
13. Student was also assessed by KISD on the Childhood Autism Rating Scale ("CARS"). This assessment rates behaviors commonly associated with autism. Student scored 15.5, which indicates no autism or pervasive developmental disorder.
14. KISD administered the Autism Diagnostic Observation Schedule Module 3 ("ADOS"), which is a structured observation tool providing diagnostic information in the areas of play and language. The areas of language and communication, reciprocal social interaction,

imagination, and stereotyped behaviors and restricted interests were assessed. Student scored 0 on all areas but for the last, in which he demonstrated occasional unusual sensory interests. This assessment indicates no autism or pervasive developmental delay.

15. Student's PPCD teacher and his parent assessed him on the Social Skills Rating System ("SSRS"), which measures a child's social behaviors affecting student-teacher relations, peer acceptance, and academic performance. Student's teacher rendered scores that place his social skills and problem behaviors in the average range. Student's parent rendered scores that place his social skills in the below average range and his problem behaviors in the average range.
16. Student's PPCD teacher and his parent assessed him on the Adaptive Behavior Assessment System-II ("ABAS-II"), which provides a norm-referenced assessment of adaptive skills. Student's teacher rendered scores that place his conceptual and social skills domains in the below average range, and his practical skills in the borderline range, giving him an overall general adaptive composite score in the below average range. Student's parent rendered scores that place his conceptual, social, and practical skills in the extremely low range, giving him an overall general adaptive composite score in the extremely low range.
17. Additional components of the FIE included academic and classroom performance rated by Student's teachers, who have observed Student manifesting skills on kindergarten, first grade, and second grade levels. He has good relationships with his peers; he transitions well; he participates and performs well in the pre-kindergarten class he attends periodically.
18. Based upon all of the autism assessments, KISD found that Student does not display characteristics of an autism spectrum disorder.
19. Student's FIE was completed and shared with his ARD Committee on September 20, 2006. Student's parents presented various evaluations performed by outside assessors in the prior year or so, all of which rendered findings of either pervasive developmental disorder or autism:

Mr. \*\*\*, a psychologist with ECI, prepared a behavioral-developmental report on December 9, 2004. Using the CARS, Student manifested a score of 31.5, indicating mild-to-moderate autism. This score was over fifteen points higher on the CARS than that obtained by KISD two years later.

Dr. \*\*\*\*, Child Study Center pediatrician, completed a Neurodevelopmental Pediatric Assessment on June 8, 2005, and suggested that Student should still be considered to fall along the autism spectrum, although more towards a pervasive developmental disorder, not otherwise specified. Dr. \*\*\* noted that Student's behaviors do not appear to affect his ability to function.

In September 2005, the Child Study Center administered the ADOS and determined that Student met the diagnostic criteria for autism. Student scored 7 on the communication domain and 7 on the reciprocal social interaction domain, with a total communication and social interaction score of 14. This score was thirteen points higher on the ADOS than that obtained by KISD one year later.

MHMR Tarrant County assessed Student on his cognitive and adaptive behavior abilities. MHMR determined that Student had an IQ of 93 and demonstrated characteristics of pervasive developmental disorder, not otherwise specified. This IQ score is only one point lower than the IQ score of 94 obtained by KISD.

20. The Committee determined that Student does not qualify for special education services under the categories of autism, learning disabled, or speech impairment. The Committee recommended that Student be removed from special education and placed in the general education environment. Student's parents disagreed with the Committee and requested an IEE.
21. The Committee adjourned until October 4, 2006. Again the ARD Committee could not reach consensus. KISD informed the parents that it would notify them of its decision regarding the requested IEE.
22. On October 4, 2006, KISD informed Student's parents in writing that it would not provide an IEE at public expense.
23. On October 26, 2006, KISD filed its Request for Due Process Hearing seeking an order that its FIE is appropriate and that it is not required to fund the IEE requested by the parents.
24. Student's parents obtained an IEE at their expense from an outside provider, Dr. \*\*\*\*\*, Clinical Psychologist. On December 11, 2006, Student's ARD Committee convened to review the new assessment.

Dr. \*\*\*\*\* used the same WPPSI-3 to assess Student's cognitive abilities that had been administered to him two months earlier by KISD. This redundancy resulted in a full intelligence quotient of 113, which is significantly higher than the former two IQ scores.

Dr. \*\*\*\*\* administered the NEPSY to assess Student's neuropsychological/developmental functions. Student scored in the below average to high average on the various scales.

Dr. \*\*\*\*\* administered the CELF-Preschool-2, which measured Student's language functioning. Student scored within the average range indicating no speech and language impairment.

Dr. \*\*\*\*\* administered the CARS. Student's score of 33 was determined by a combination of observations during the seven-hour evaluation, in addition to collateral and historical information obtained in records and through history taking. This score of 33 is a bit higher than the score of 29 obtained by Mr. \*\*\* and ECI. This score is much higher than the score of 15.5 obtained by KISD three months earlier.

Dr. \*\*\* noted that Student does not manifest classical symptoms of autism. He determined that Student has a pervasive developmental disorder with significant Asperger's traits.

25. The December 11, 2006, ARD Committee determined that its FIE was appropriate and declined to adopt the recommendations of Dr. \*\*\*\*.
26. KISD proved by a preponderance of the evidence that its FIE was conducted by a multidisciplinary team of qualified professionals who administered the assessments in accordance with the instructions provided by the producer of the assessments.
27. KISD proved by a preponderance of the evidence that it used a variety of sound assessment tools and strategies to assess cognitive, behavioral, physical, and developmental factors.
28. KISD proved by a preponderance of the evidence that the assessments were selected and administered in a non-discriminatory manner, in Student's native language, and in a manner that garnered results accurately reflecting Student's abilities.
29. KISD proved by a preponderance of the evidence that it evaluated Student in all areas related to the suspected disabilities.
30. KISD proved by a preponderance of the evidence that in making its determination that Student no longer qualified for special education services, the IEP team reviewed data provided by the parents, all prior assessments provided by the parents, all current assessments, classroom observations, and observations by Student's teachers and related-services providers.

#### **IV. DISCUSSION**

In this case, KISD presents its FIE for analysis under the operative regulations, claiming that the FIE is appropriate. If so found, the ARD Committee's determination that Student no longer qualifies either as a student in need of speech therapy or a student with autism spectrum disorder, would result in Student's dismissal from all special education services.

Student's family believes that he is, in fact, a child with autism. They have observed in the home and community characteristics manifesting autistic traits, such as obsessing over fans, flapping his hands, running in circles, ignoring peers, and failing to respond to his name or other simple commands. Student's family has dealt with these actions and more since he was very young. Their belief that Student is autistic has been encouraged by various findings of outside professionals.

Student claims that the FIE is not in compliance with federal regulations; the results are questionable in comparison to prior and subsequent assessments; assessments were performed by individuals who are not competent to do such work; and findings based upon the FIE lack credibility. Student believes that KISD had a pre-conceived idea that Student did not qualify under the autism spectrum disorder and its testing and testimony were fashioned to support this idea. They are thoroughly frustrated with KISD in its failure to acknowledge these prior findings; to conduct a valid FIE by competent personnel; and to render an honest determination that Student is, in fact, a student with autism.

Evaluation procedures are carefully spelled-out in the federal and state rules and regulations implementing IDEIA. 34 C.F.R. 300.304 specifies that in conducting the evaluation,

the public agency, *i.e.*, the school district, must 1) use a variety of assessment tools and strategies to gather functional, developmental, and academic information; 2) not use a single measure or assessment as the sole criterion for determining a disability; and 3) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The school district must ensure that the assessments are selected and administered in a non-discriminatory manner, provided in the child's native language and in a form likely to provide accurate information, used for the purposes for which the assessments are valid and reliable, administered by trained and knowledgeable personnel, and administered in accordance with any instructions provided by the producer of the assessments. The district is charged with administering assessments and other evaluation materials that are tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient. Assessments must be selected and administered in a manner that best ensures that the assessment results accurately reflect the child's aptitude or achievement level or other factors that the test is measuring. The child being assessed must be evaluated in all areas related to the suspected disability. The assessment must be sufficiently comprehensive to identify all of the child's special needs.

As part of the overall evaluation, the assessors should review all existing evaluation data, including information provided by the parents, current classroom-based, local, or state assessments, classroom-based observations, observations by the child's teachers and related-services providers. 34 C.F.R. 300.305. Once the assessments and other evaluation measures are completed, the student's IEP team must consider all of the information gathered and make a recommendation based upon that information. In determining whether the child is a child with a disability and an educational need for special education intervention, the IEP team must draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as physical condition, social or cultural background and adaptive behavior. 34 C.F.R. 300.306.

KISD assessed Student by using a plethora of instruments, consisting of standardized tests, observations, autism assessments, and interaction with Student. The assessors were qualified professionals consisting of a speech therapist, a special education teacher, a general education teacher, a diagnostician, and a Licensed Specialist in School Psychology.

Student scored within the average range on the three language tests; he scored within the normal range of intelligence, 94, on the IQ test; he demonstrated skills on kindergarten, first grade, and some second grade levels.

The autism team conducted the CARS, which rates behaviors commonly associated with autism, in the gym, PPCD classroom, and the assessment room. Student scored in the non-autistic range. The autism team observed Student for the ADOS, a structured observation tool providing diagnostic information in the areas of play and language. The team did not see any significant qualitative impairment in communication or social interaction and found no pervasive developmental disorder or autism. The team used the SSRS, which measures social behaviors affecting student-teacher relations, peer acceptance, and academic performance. The team found Student to be in the average range, taking into consideration the fact that Student's mother ranked him in the below average range. The team administered the GARS-2, which is a norm-referenced test used to assess autism through a check list. Student's mother ranked him as "very likely" having autism; Student's teacher ranked him "unlikely." The ABAD II, was also administered. This was the only autism assessment in which his teacher indicated below average or borderline functioning in some domains.

The team observed Student and consulted with his teachers regarding his behavior on a day-to-day basis. Student appears to play well with other students; he does not have tantrums or problems transitioning between activities or classrooms; he appears to have normal, age-appropriate social interaction with students and staff; he engages in humor, eye contact and gaze, and social reciprocity; he does not demonstrate a perseverance for fans or spinning and can easily be redirected from that topic of conversation. Student's teachers report he has mastered all of the goals set out in the IEP transferred from FWISD and that he is clearly ready to learn at the kindergarten level.

KISD had the burden of proving that its FIE was appropriate. KISD met that burden. However, because Student's family has placed such belief in the previous and subsequent assessments, clearly disregarding anything found by KISD, it may be important to briefly explain why those prior and subsequent assessments do not "trump" KISD's assessment.

First of all, these assessments do not meet the criteria of the federal regulations. Most of these autism findings were based upon a single autism assessment by one assessor at one sitting. The assessors did not have current behavior and academic information from the schools nor did the assessors observe Student for any reasonable length of time in the school setting.

Mr. \*\*\*, who found pervasive developmental disorder before Student turned three, testified that he appeared to have made a great deal of progress since that time. Dr. \*\*\*, although finding that Student probably had a pervasive developmental disorder, noted that Student's behaviors do not appear to affect his ability to function. Dr. \*\*\*, who assessed Student after KISD, used the same WPPSI-3 to assess Student's cognitive abilities that had been administered to him two months earlier by KISD. This resulted in an artificially higher full intelligence quotient of 113 than the two previous scores found by KISD (94) and MHMR (93). Because this is not a reliable IQ score, any assessment using that as a comparative would be invalid. Dr. \*\*\*s did not review the FIE prepared by KISD in conducting his assessment. Dr. \*\*\*s noted that Student does not manifest classical symptoms of autism, but he determined that Student has a pervasive developmental disorder with significant Asperger's traits. Dr. \*\*\*s found that Student's disability does not appear to be affecting his school activities; Dr. \*\*\* is concerned for Student's future, that as Student ages, his peers may tease him. Dr. \*\*\*\* testified that he did not have a full understanding of the concept of "educational need" as required by IDEIA.<sup>1</sup>

The essence of the conflict is that Student's family observes behaviors that apparently are not manifested at school or that are not educationally significant. Nothing prohibits Student's family from obtaining another IEE, as they have requested. However, at this juncture, KISD is not required to fund that IEE because the FIE is appropriate.

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<sup>1</sup> To qualify for special education services, IDEA's mandate, that all state school districts receiving federal funding must provide all children with disabilities FAPE, becomes applicable only when the student in question qualifies as a "child with a disability." 20 U.S.C. §1412(1) & 1414(d). 20 U.S.C. §1401(3)(A) defines a "child with a disability" as a child "(i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (hereinafter referred to as 'emotional disturbance'), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services. In this case, the evidence overwhelming established that Student does not appear to need special education and related services at this time.

**V.  
CONCLUSIONS OF LAW**

1. The FIE conducted by KISD is appropriate. 34 C.F.R. 300.304-306.
2. KISD is not required to pay for an IEE requested by Student because the current FIE is appropriate. 34 C.F.R. 300.503.

**VI.  
ORDER**

Based upon the record of this proceeding and the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the relief requested by KISD is GRANTED.

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

SIGNED this 12<sup>th</sup> day of April 2007.

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*Deborah Heaton McElvaney*  
Special Education Hearing Officer

07653/Decision

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