

BRAZOSPORT ISD, PETITIONER	§	SPECIAL EDUCATION
	§	
VS.	§	HEARING OFFICER
	§	
STUDENT b/n/f PARENTS, RESPONDENT	§	STATE OF TEXAS

**DECISION OF HEARING OFFICER**

This matter was presented to this Hearing Officer after Brazosport ISD filed for a Due Process Hearing pursuant to the Individuals with Disabilities Education Act (“IDEA04”), 20 U.S.C. §1400 et.seq., on January 19, 2007. STUDENT b/n/f PARENTS also filed for a Due Process Hearing on March 14, 2007. This hearing officer issued a Consolidation Order on March 19, 2007, which combined both cases under the original cause number, referenced above.

On the 22<sup>nd</sup> day of May, 2007, the parties appeared at the Brazosport ISD Administration Building for a Due Process Hearing pursuant to IDEA04, and the hearing concluded on the same date.

Brazosport ISD (“the district”) appeared through its district representative, Dr. Deena Hill, and through its attorney, David Hodgins, and announced ready.

STUDENT b/n/f PARENTS, student and parents of the child, appeared through their attorney of record, Tom Sanders, and announced they were not ready to proceed. Neither the child nor the parents appeared for the hearing.

### Issues Raised and Relief Sought

The district raised one issue/complaint about the parents in the Prehearing Conference held on February 16, 2007:

1. The parents would not provide parental consent to properly evaluate the child as required by IDEA04.

The petitioner sought the following relief from the outcome of the Due Process Hearing:

1. An order overriding the lack of parental consent and allowing the district to immediately begin a full and complete evaluation of the child.

The hearing began on May 22, 2007 and concluded on the same date. After hearing the testimony of the witnesses presented, reviewing the exhibits from both parties which were admitted into evidence, and weighing such evidence in light of current law, the relief requested from the petitioner/district is hereby GRANTED.

HELD, for the petitioner, Brazosport ISD.

### BACKGROUND AND PROCEDURAL HISTORY OF CASE

This is a case of a school district filing a Due Process Complaint pursuant to 20 U.S.C. §1400 et.seq., seeking to override the lack of parental consent to perform a Full and Individual Evaluation (“FIE”) on the child.

The district convened an ARD Committee meeting on March 24, 2006 in order to review the child’s Individual Education Program (“IEP”) and obtain data on the child through an FIE. This meeting was the result of several teachers indicating they did not understand how to best educate the child, and not understanding at what academic levels

the child was functioning. [See, Trial transcript, pp. 34-35; 40-44; Petitioner's Exhibits #16, 27]. The meeting ended in nonconsensus, with the parents disagreeing the child needed an FIE. [See, Petitioner's Exhibit #3, p. 9]. The meeting was reconvened on April 7, 2006. Again, the parents disagreed that an FIE was necessary, but they ultimately agreed and gave their consent with certain stipulations. [See, Petitioner's Exhibit #3, p. 13].

After giving the district consent, the district was able to perform three assessments on the child: Music Therapy evaluation, Assistive Technology evaluation, and a Speech/Language Impairment evaluation. The remainder of the evaluations never occurred due to the failure of the parents to produce the child with the professional scheduled to perform an evaluation. [See, Trial transcript, pp. 44-46]. Numerous obstacles were raised by the parents to delay the evaluations over the next several months, until finally the parents withdrew their consent to evaluate the child on December 14, 2006. [See, Trial transcript, p. 47; Petitioner's Exhibit #53].

Meanwhile, the three year evaluation required by IDEA04 was due to be completed in December 2006. [See, Trial transcript, p. 35]. The district attempted to get the parents to provide their consent and produce the child, and even went as far as getting the parents to meet with the superintendent of the district. The superintendent ultimately wrote a letter to the parents asking them to allow the evaluations to proceed or the district would be forced to file a Due Process Complaint, since the district had a legal obligation to evaluate the child. [See, Petitioner's Exhibit # 56]. The parents did not provide consent and this Due Process Complaint was filed.

Once filed, the parents filed a response through their attorney of record, Myrna B.

Silver. Meanwhile, the parents had filed a request under the Texas Public Information Act (“TPIA”) seeking certain information from the district. The district submitted the request to the Texas Attorney General for an opinion as to whether or not the information needed to be provided.

This case continued and a prehearing conference was held on February 16, 2007. The issues in the case were discussed and the matter was set for a three day trial to begin April 9, 2007. One week later, on February 23, 2007, the parents filed a Motion to Abate the proceeding arguing that they could not effectively put on their case without the information sought from the district through the TPIA request. The parents requested the hearing be postponed until the Attorney General issued its opinion as to whether or not the information should be produced. This hearing officer denied the motion indicating that the information could be obtained using the discovery procedures available to the parties, and there did not exist good cause to postpone the hearing.

The parents filed a separate Due Process Complaint with the Texas Education Agency (“TEA”) on March 14, 2007, and that case was given a new cause number by the TEA. This hearing officer issued a Consolidation order which combined both cases into the old, existing cause number, and found that the issues in both Complaints were substantially the same, thus the same trial date of April 9, 2007 remained.

On March 20, 2007, the district filed a Motion to Compel Discovery complaining that the parents failed to fully and adequately respond to certain discovery requests. This hearing officer, on March 22, 2007, reviewed the motion along with the objections lodged by the parents and issued an Order which sustained in part and overruled in part

the objections made by the parents. The parents were ordered to fully and adequately respond to certain discovery requests by a set deadline.

Two days later, the parents, through their attorney of record Myrna B. Silver, filed a Motion to Recuse this hearing officer based upon the prior rulings issued in this case; namely, the motion to abate was denied; the consolidation order previously issued; a commission to take the oral deposition of the child's parent was issued; and the order was signed which compelled certain discovery by produced. The argument was raised that this hearing officer did not know the law governing special education cases as evidenced by the above referenced rulings. This hearing officer denied the motion, and the TEA assigned the matter to the Honorable Stephen P. Webb who upheld the ruling on April 4, 2007. However, because of the mere fact the Motion to Recuse was filed, the hearing date of April 9, 2007 had to be postponed. The case was reset to May 9, 2007.

Myrna B. Silver, counsel for the parents, filed a Motion to Withdraw on April 25, 2007 and indicated that Tom Sanders would be representing the parents from that point forward. This hearing officer, due to the perceived delay tactics employed to this point, was reluctant to sign an Order allowing Ms. Silver to withdraw since the re-scheduled hearing was only two weeks away. Instead, this hearing officer called for a telephonic conference involving himself, Mr. Hodgins, Mr. Sanders, and Ms. Silver. Ms. Silver did not appear for the hearing, but the other attorneys did. During that hearing, this hearing officer conveyed clearly that he would deny Ms. Silver's Motion to Withdraw unless Mr. Sanders could be ready to begin this hearing in May. Mr. Sanders indicated that he could begin the hearing on May 22, 2007, but that he would not be able to finish it until May 29, 2007. Mr. Hodgins indicated this would work for him and his clients, and the case

was reset to May 22, 2007. At that time, this hearing officer signed the Order granting Ms. Silver's withdrawal.

A few days later, on May 3, 2007, the parents filed a Motion for Continuance with this hearing officer requesting this hearing be postponed. This hearing officer denied the motion and the May 22, 2007 hearing date remained in place. On May 11, 2007, the parents filed another Motion for Continuance citing the fact that the child's mother was a school teacher and was scheduled to give final exams on May 22<sup>nd</sup>. This hearing officer denied that motion since the district was scheduled to put on its case in chief on May 22<sup>nd</sup>, and the parents were scheduled to put on their case in chief on May 29<sup>th</sup>, thus the child's mother could be available to testify on May 29<sup>th</sup>. Furthermore, this hearing officer noted that substitute teachers were routinely employed to handle classrooms when the regular teacher was unavailable.

On May 17, 2007, the parents filed a second Motion to Recuse this hearing officer based upon the denials of the motions for continuance, thus possibly demonstrating this hearing officer was not impartial. That motion was denied, and TEA assigned the matter to the Honorable Stephen P. Webb who once again upheld the ruling. This time, however, the hearing date remained unchanged and all parties were scheduled to appear for commencement of the hearing at 9:00 a.m. on May 22, 2007.

#### ORAL PLEA TO JURISDICTION RAISED

At 9:00 a.m. on May 22, 2007, this hearing officer called this case to trial. Mr. Hodgins announced "Ready" for the petitioner/district, and Mr. Sanders announced "Not Ready" for the respondent/parents.

When asked the rationale for why Mr. Sanders was not ready to proceed Mr.

Sanders responded that this court no longer had jurisdiction over the dispute since the parents had withdrawn the child from school on May 21, 2007, at the end of the school day. [See, Respondent's Exhibit #1 and Exhibit #2]. Mr. Sanders then raised an oral Plea to the Jurisdiction and argued this hearing should not go forward because the district no longer had any interest in this child.

The director of Special Education for the district testified that the parents had actually appeared that same morning at approximately 8:00 a.m. (1 hour before the hearing was scheduled to begin) and executed the withdrawal forms effectively taking the child out of school. [See, Trial transcript, pp. 129-130].

The district responded that nothing prevented the parents from re-enrolling the child back into the district once this matter had been dismissed, thus effectively delaying and postponing an already lengthy wait for this hearing since a brand new Due Process Complaint would have to be filed to override the lack of parental consent for testing the child.

The hearing officer found that the parents had used numerous delay tactics to postpone this proceeding, and that if this Plea to Jurisdiction were granted, nothing could stop the parents from re-enrolling the child back into the district the next day or at some point in the future prior to the commencement of the Fall 2007 semester. At that point, the district would not have the ability to evaluate the child without parental consent and the only recourse would be the filing of another Due Process Complaint, along with all its mandatory timelines. This would effectively delay the proceeding further, and be an enormous waste of time and resources. Furthermore, the parents have another child

enrolled in the district and that child has not been withdrawn. [See, Trial transcript, pp. 130-131]. The Fifth Circuit Appellate Court in *Daniel R.R. v. State Bd. Of Educ.*, 874 F.2d 1036, 441 IDELR 433 (5<sup>th</sup> Cir. 1989) ruled that courts and hearing officers retain jurisdiction over otherwise moot cases when it appears under the circumstances that the issues in dispute are capable of repetition. This hearing officer found it continued to retain jurisdiction over the matter since it was likely that the parents would simply re-enroll the child and circumvent the ability of the district to have this matter decided by a hearing officer, as permitted by law. The Plea to the Jurisdiction was denied.

IT IS THEREFORE ORDERED that the oral Plea to the Jurisdiction raised by the parents through their attorney is hereby DENIED.

PARENTS' COUNTERCLAIM DISMISSED

At that point, Mr. Sanders indicated his desire to leave the proceeding as instructed by his clients. Prior to his leaving, this hearing officer asked if Mr. Sanders was waiving his right to cross examine any witnesses called by the district and waiving his right to present evidence. He responded in the affirmative. [See, Trial transcript, pp. 14-15].

With respect to his Due Process Complaint, Mr. Sanders indicated his clients wished to have that matter against the district dismissed. [See, Trial transcript, p. 11]. At that point, Mr. Sanders exited the proceedings and the parents did not participate any further.

**IT IS THEREFORE ORDERED** that the Due Process Complaint filed originally under TEA Docket No. 182-SE-0307 and consolidated under this docket number is hereby DISMISSED at the request of the parents through their attorney.

The district then presented its case in chief by offering the testimony of \*\*, \*\*,\*\*, and \*\*..

#### Findings of Fact

1. The child is student scheduled to begin the \*\* grade in Fall 2007 and is eligible for special education services under IDEA04 based upon a diagnosis of PPD-NOS which manifests itself in Autism. The child also has a Speech impairment. [See, Trial Transcript, p. 26, Petitioner's Exhibit #3]. Even though the child should be entering the \*\* grade in the Fall 2007, it is likely the child will be enrolled in high school for several more years before he graduates. [See, Trial transcript, p. 130-131].
2. Brazosport ISD is a political subdivision of the State of Texas and a duly incorporated independent school district.
3. The child has been attending Brazosport ISD from the time he was in \*\* to May 2007. [See, Trial transcript, pp. 64-65].
4. The district proceeded to develop the child's IEP based upon incomplete data collected in 1995. [See, Trial transcript, p. 64; Petitioner's Exhibit #3]. There has never been a complete Full and Individual Evaluation ("FIE") performed on the child from the time the child has been enrolled in the district to the present. [See, Trial transcript, pp. 64-65].
5. During the 2005-2006 school year several teachers expressed concerns that they did not know how to best teach the child because they did not know at what educational level the child was functioning. [See, Trial transcript, pp.

34-35; 40-44; Petitioner's Exhibits #16, 27]. The district could not properly develop an Individual Education Program ("IEP") for the child since it did not have an accurate gauge of the child's educational functioning.

6. The parents, after giving initial consent to fully evaluate the child in the April 7, 2006 ARD Committee meeting, intentionally thwarted the completion of the evaluation process by failing to produce the child at scheduled evaluations, or raising excuses as to why the evaluation could not proceed. [See, Trial transcript, pp. 44-47].
7. After the parents withdrew their consent to evaluate the child [See, Petitioner's Exhibit #54], the district continued to have no ability to properly educate and transition the child as required by law. [See, Petitioner's Exhibits #68 and 71].
8. The deadline to conduct the three year evaluation required by law passed on December 15, 2006, [See, Trial transcript, p. 35; Petitioner's Exhibit #13] thus leaving the district open to legal exposure for failing to perform the duties owed to the child under law.
9. Since no complete FIE exists, a full and complete FIE is necessary and appropriate to properly educate and serve the child. [See, Trial transcript, pp. 48 and 62]. Such testing should include, but not be limited to, a psychological evaluation, vocational evaluation, speech evaluation, in-home training evaluation, a full vocational assessment, and a behavioral assessment. [See, Petitioner's Exhibit #1, attachment A].

10. Based upon the facts that the parents have indicated in the past they wish to see the child graduate from Brazosport High School [See, trial transcript, p. 131], that the child's sibling remains a registered student with the district [See, Trial transcript, pp. 130-131], and that the child was withdrawn as a student from the district a mere hour prior to commencement of this hearing in the hopes of having this case dismissed [See, Trial transcript, pp. 129-130], it is very likely the parents of the child will re-enroll the child into the district.
11. The parents of the child have unreasonably used delay tactics in the hopes of delaying or derailing this hearing, such as filing a Motion to Abate when the information sought was readily available through proper discovery channels; filing several Motions for Continuance; filing two Motions to Recuse; filing several Motions for Reconsideration; failing to timely respond to discovery leading to a Motion to Compel; failing to produce a parent for a properly commissioned oral deposition; filing a Motion to Withdraw and seeking to employ new legal counsel two weeks before the hearing was scheduled to begin; and withdrawing the child from enrollment in the district in the hopes the hearing would be rendered moot and would not proceed. These tactics, when examined as a whole, were unreasonable and were meant to unreasonably protract, delay or derail this proceeding.

#### DISCUSSION - APPLICATION OF FACTS AND LAW

Petitioner's Issue No. 1 – The parents would not provide parental consent to properly evaluate the child as required by IDEA04.

The petitioner complains that the child's parents would not provide parental consent needed to properly evaluate the child as required by IDEA04. \*\* and \*\* testified the parents had at one point given the required consent but then failed to allow the majority of the evaluations to proceed, ultimately culminating in the parents formally withdrawing their consent. [See, Trial transcript, pp. 44-47, 143-144; 166; Petitioner's Exhibit #54].

Federal and state law mandate that certain evaluations be performed on a child with Autism. The Autism Supplement, found in 19 T.A.C. §89.1055(g)(5), requires the district to perform a functional vocational evaluation on a child with Autism. [See, Petitioner's Exhibit #71]. \*\*, a consultant with Stetson & Associates and a specialist in vocational and transitional assessment, testified that vocational and transitional evaluations are mandated by federal law in 20 U.S.C. §1414(d)(VIII)(aa). [See, Trial transcript, p. 76; Petitioner's Exhibit #68, p. 2040].

\*\*, a Behavior and Autism consultant for the district, testified that she had personally observed the child in the classroom setting and had spoken to some of the child's teachers. She testified the child needed an unusually high number of verbal prompts to properly function in the classroom setting, and could not do so independently. [See, Trial transcript, pp. 98-107]. She further testified the child has a set of routines that the district staff does not understand. [See, Trial transcript, p. 109-110]. She stated that assessments on the child would be beneficial to understanding these behaviors, thus enabling the staff to generate a more appropriate plan for the child. [See, Trial transcript, pp. 121-123].

The teaching staff, even prior to the March 24, 2006 ARD Committee meeting which formally requested the FIE, were concerned about the appropriate placement of the

child and their inability to understand the child's behaviors and his educational functioning levels. [See, Trial transcript, pp. 128; Petitioner's Exhibits #16 and 27].

If the parents had been present to either cross examine witnesses or present evidence of their own, they might have argued that the data already available to the district would have been sufficient to properly develop the child's IEP and provide him with appropriate services. However, the majority of the data available to the district was woefully outdated. [See, Trial transcript, pp. 29-31; 126-127]. \*\* testified that children change with age and districts need updated information to properly educate the child. [See, Trial transcript, pp. 88-89]. IDEA04 recognizes this fact since it requires new evaluation data at least every three years. 20 U.S.C. §1414(a)(2)(B)(ii).

It might have been argued that the parents had a right to withhold their consent and deny the district its desire to fully and completely evaluate the child. Such an argument would not be convincing since parents could thwart federal and state law, which outlines certain evaluations which a district must perform on a child, by simply withholding their consent.

The district has proven its case by a preponderance of the evidence, and the relief they seek should be granted.

#### Conclusions of Law

1. The child is a student eligible for special education and related services under the provisions of IDEA04, and its related statutes and regulations.

2. Brazosport ISD is the local education agency responsible for the providing the child with the free appropriate public education pursuant to IDEA04, and is a legally constituted independent school district operating as a political subdivision of the State of Texas.
3. This hearing officer has jurisdiction over this matter since it appears that the issue in dispute is capable of repetition if the parents re-enroll the child in the future, and this would serve to further delay mandated evaluations of the child.
4. The district must perform federal and state mandated evaluations and must develop an IEP based upon the specific needs of the child. These needs are not currently known by the district and cannot be known without a complete FIE. A re-evaluation using existing data would not be appropriate since that data is outdated.
5. Because of the child's Autism, the child needs a full functional vocational assessment as required by law.
6. In order to properly develop an IEP for the child based upon his current needs, the district needs to perform a full and complete evaluation of the child, including but not limited to, a complete FIE, a psychological evaluation, a functional vocational evaluation, a speech evaluation, a behavioral assessment, and an In-Home training evaluation.
7. The parents wholly failed to provide any evidence to support any opposition to the evaluations sought by the district.
8. The district has demonstrated good cause to override the parents' lack of consent for the requested evaluations.

ORDER OVERRIDING LACK OF PARENTAL CONSENT

Based upon a preponderance of the evidence and the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that the relief requested by the petitioner is GRANTED.

IT IS ORDERED AND DECREED that the lack of parental consent given to the district to perform the evaluations sought is hereby OVERRIDDEN. IT IS FURTHER ORDERED that upon the re-enrollment of the child, STUDENT, at any point in the future in Brazosport ISD that the district shall immediately complete the following evaluations on the child in compliance with federal and state law: a complete Full and Individual Evaluation (“FIE”), a psychological evaluation, a functional vocational evaluation, a speech evaluation, a behavioral assessment, an In-Home training evaluation, and any other evaluations reasonably needed to gauge the child’s current levels of performance.

SIGNED this 14<sup>th</sup> day of June, 2007.

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Tomas Ramirez III,  
Special Education Hearing Officer

Cases Cited

*Daniel R.R. v. State Bd. Of Educ.*, 874 F.2d 1036, 441 IDELR 433 (5<sup>th</sup> Cir. 1989)

Statutes and Regulations Cited

20 U.S.C. §1400 et.seq.

19 T.A.C. §89.1055

TEA DOCKET NO: 127-SE-0107

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**SYNOPSIS**

ISSUES: Whether the lack of parental consent should be overridden to allow the district to perform evaluations on the child.

HELD: For Petitioner.