
DOCKET NO. 169-SE-0307

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

PETITIONER

vs.

MCMULLEN COUNTY 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 of friend, Parent, (hereinafter Student) brings this proceeding against Respondent McMullen County Independent School District (hereinafter Respondent, District, or McMullen County) under the Individuals with Disabilities Education Act (hereinafter IDEA), 20 U.S.C. §1400 et. seq.

Petitioner alleges that McMullen County denied student a free appropriate public education (FAPE) during Spring 2006 and the 2006-2007 school year based on the following claims:

1. Respondent McMullen County ISD failed to timely evaluate student for special education services during the 2006-2007 school year; and
2. Respondent McMullen County ISD failed to provide student counseling services during the Spring 2006 and the 2006-2007 school year.

Petitioner seeks a Full Individual Evaluation (FIE) to find student eligible for special education services under the Other Health Impaired and Learning Disabled classifications or, in the alternative, a finding that student is eligible for

special education services, the development of an Individual Education Plan (IEP), counseling, individual tutoring, and compensatory services.

PROCEDURAL HISTORY

Petitioner filed her request for a due process hearing on March 2, 2007.

Petitioner was represented by Christopher Jonas with the Corpus Christi Center for Special Education Law. Respondent was represented by Denise Pierce, with the Austin firm of Bickerstaff, Heath, Delgado and Acosta, LLP.

The Hearing Officer scheduled a prehearing conference for March 23, 2007 and the due process hearing for April 24, 2007. The Resolution Meeting in this proceeding was to be held no later than March 18, 2007, but due to the spring holidays, Respondent scheduled the Resolution Meeting for March 22, 2007. The Parties were unable to hold the Resolution Meeting and were unable to obtain an agreement.

On March 23, 2007, the prehearing conference was held. Both Parties requested a continuance of the April 24, 2007 hearing in order to participate in mediation. The hearing was rescheduled for May 23, 2007. On May 15, the District filed a Motion to Extend the Disclosure Deadline because of a technical difficulty in electronically transmitting the voluminous documents. Over Petitioner's objections, the Hearing Officer granted the District's motion and reset the case for June 19, 2007.

The due process hearing was held on June 19, 2007. At its conclusion, the Hearing Officer requested briefs on certain legal issues and set an August 3, 2007 deadline for the briefs. Both Parties timely submitted post hearing briefs. Taking continuances into account, the deadline for the final decision is September 6, 2007. The Hearing Officer issued her decision on September 6, 2007.

FINDINGS OF FACT

1. Student is enrolled in the McMullen County ISD. McMullen County has 180 students in Kindergarten through Twelfth grade. Student currently qualifies for Section 504 services as a student with Attention Deficit Disorder (ADD).
2. During ** grade, student's teacher referred student to the Section 504 Campus Committee. That year, student exhibited frequent letter reversals, was unable to read satisfactorily, had difficulty with spelling, handwriting, and remembering letter shapes, and showed a short attention span. An October 2003 evaluation by Dr. ** found that student suffered from ADD. In October 2003, student was referred to the 504 Coordinator for Section 504 services. The Section 504 Committee noted that student had Attention Deficient Disorder and accordingly provided accommodations. Student is currently receiving accommodations through this program.
3. In 2004, student was diagnosed with Irlen Syndrome. Persons with Irlen Syndrome may experience distortion on the printed pages which can cause strain, fatigue, slow reading, and poor reading comprehension. Student was prescribed a blue-gray colored overlay to address this reading distortion. The District provided student with the color overlays only in third and fourth grade; thereafter, none were provided. The overlays were never an accommodation under Section 504.
4. Student had the same math teacher for **, **, and ** grade. In ** grade, student failed math class. In ** grade, math grades showed improvement, and student passed ** grade math with a ** average for the year. Other than an occasional need for tutorial assistance, there was no evidence that student needed special education services to progress in math.
5. Student did not have trouble reading in ** grade and received the following grades: a ** in English, a ** in Spelling, and a ** in Reading. Student, mother, and ** grade reading teacher testified that student did not have problems reading. Even without using color overlays, student showed progress in Reading during ** and ** grade.
6. During ** grade, student experienced a number of emotional outbursts, both at home and at school. Student got frustrated with school work and had several crying episodes related to this. Student also experienced emotional stress caused by student's relationships with friends. Student's parents were concerned that student was too emotional and was suffering from an emotional disturbance. The school counselor met with the mother on several occasions to discuss student's emotional problems. The school counselor found nothing in these outbursts that warranted a special education referral to determine if student has an emotional disturbance.
7. During student's ** grade year, 2005-2006, student received services under Section 504. In the spring 2006, student took and passed the **grade Texas Assessment of Skills and Knowledge (TAKS). Though student's math and reading scores weren't commendable, they were more than adequate.
8. In August 2006, the Section 504 Committee met to review student's Accommodation Plan for the 2006-2007 school year. Despite failing math class the previous (** grade) year, all committee members including the mother, agreed that there was no reason to believe student would experience academic difficulties

- in ** grade. The only accommodation recommended was counseling and tutoring as needed.
9. During this August 2006 meeting, there was discussion about the emotional difficulties student experienced in ** grade. Student's mother discussed a special education evaluation, but the Section 504 documents indicate that she too believed student would make progress in ** grade.
 10. During ** grade, student experienced frustration with the Science teacher. Again, student had emotional outbursts at home and at school and experienced a few crying episodes due to friendship problems. Generally, however, student had many friends and was involved in school athletics. Both the mother and the school counselor provided student with emotional support and counseling. There was no indication that student's emotional difficulties interfered with student's academic progress.
 11. In the spring 2007, student took the **-grade TAKS math test, passed it by one point, and passed the TAKS reading test. At school student was making adequate progress on all core classes and received grades of **'s and **'s. Academically, student showed no signs of needing special education services. Behaviorally, student showed no signs that student's conduct interfered with student's ability to progress both socially and emotionally.
 12. There was insufficient documentation to make an independent finding that student was eligible for special education services. The Other Health Impairment form provided by Petitioner did not have a medical diagnosis, did not explain the impact student's ADD had on her educational progress, and was never presented to an Admissions, Review, and Dismissal Committee for review and deliberation.

DISCUSSION

The IDEA entitles every student with a disability to receive a free appropriate public education (FAPE). 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).

Student alleges that McMullen County ISD violated the procedural guarantees of IDEA pertaining to an evaluation referral. Under IDEA, procedural violations warrant a finding that a school has failed to provide a free appropriate public education only when the procedural violation results in the loss of an educational

opportunity, i.e., result in substantive harm, or seriously infringes on a parent's opportunity to participate in the ARD process. Petitioner's second allegation, failure to provide counseling, will be addressed only if there is an affirmative finding that McMullen County ISD violated the IDEA's procedural guarantees. *Adam J. v. Keller ISD*, 328 F.3d 804 (5th Cir. 2003).

I. CHILD FIND

Both federal and state law requires a school district to identify, locate, and evaluate all children with disabilities residing within its jurisdictional boundaries. This rule is known as the "child find" provision. 20 U.S.C. Sec. 1414 (a)(1)(A); 34 C.F.R. 300.111(a).

The "child find" provision requires a school district to have procedures in place to ensure that "All children with disabilities . . . , and who are in need of special education and related services, are identified, located, and evaluated." This provision imposes an affirmative duty on a school district to seek out and identify students with disabilities. Although parents may request a referral for such services, they are not required or obligated to do so. The parents' lack of a referral does not alleviate the District's obligation to look for children who may qualify for special education services. 34 C.F. R. §300.111.

In the present case, Petitioner asserts two bases for the District's violation of the child find provision. First, based on the facts and circumstances known to the District, it should have identified and evaluated student for a special education evaluation on its own initiative. Secondly, Petitioner asserts that during the 2006-2007 school year petitioner requested but did not receive a special education evaluation. The District counters that it complied with the "child find" provision by providing student services through Section 504.

The IDEA requires a two-prong analysis for determining whether a child should be identified and referred for special education services. First, the student must have a specific physical or mental impairment identified through an appropriate evaluation. Identifying an impairment does not alone satisfy the eligibility test under Part B of the IDEA. Second, the district must have reason to suspect the student is in need of special education services. This is usually determined by the student's inability to progress in a regular education program.

In this case, I am asked to determine whether the IDEA "child find" duty required McMullen County ISD to refer student for a special-education evaluation and, if so, the date such referral was required. Whether student should have qualified for special-education services or whether student even qualifies for special-education services, is not relevant to this determination. *Spring Branch ISD v. Paris A.*, bnf

Alice A., Docket No. 197-SE-0392 (SEA Tex. 1992); B.C. v. Seguin ISD, Docket No. 232-SE-0305 (SEA Tex. 2005).

II. HEARING EVIDENCE

Most cases are decided on credible witness testimony and the documentation. Generally, “credible evidence” turns on whether a witness is believable, whether the testimony is supported by the circumstances of the case, and whether the testimony is supported by the documents. Normally, the story line of the case develops by listening to the various witnesses, assessing their personal interests and responsibilities, and finding documentation to support or minimize the respective testimony.

I found all witnesses were credible and all had an interest in seeing students succeed. For example, I believe Petitioner asked for a special education referral during the August 2006 Section 504 Committee meeting. At the same time, based on student’s grades and documentation, I believe the Section 504 Committee members discussed providing student with accommodations and that they believed student could be successful in ** grade. In fact, student was successful in that year. My final analysis of the facts is not a determination that one witness was more credible than another, rather this Final Decision relied most heavily on documentation instead of witness testimony.

III. QUALIFYING DISABILITY

McMullen County ISD does not challenge the first prong of the “child find” provision that student has a qualifying disability, specifically, Attention Deficit Disorder. However, students with an identified disability are not automatically entitled to special education services. The student must also be in need of such services because of the disability. In 2003, Petitioner provided the District with a medical diagnosis of ADD. The District began providing accommodations through the District’s Section 504 program. Additionally, Petitioner kept the District informed of any medication changes that have occurred since 2003. The District, however, does challenge the contention that student has a Learning Disability in either reading or math.

IV. SPECIAL EDUCATION SERVICES

Under the second prong of the “child find” analysis, McMullen County ISD claims that despite her ADD, student did not need special education and related services. Student’s mother testified that she asked that student be evaluated for an Emotional Disturbance and believes student may also have a Learning Disability in reading and math.

With regard to reading, both student and mother testified that student currently has no trouble reading and can read without the Irlen color overlays. There was no evidence to show that student needed special education services to make progress in reading. Student has never failed a reading course or the TAKS reading test and made passing grades in both ** and ** grade. Student’s ** grade reading teacher

said student never had trouble reading orally during class. There was simply no testimony or documentation to show that the District should have referred student to a special education evaluation for reading difficulties.

With regard to math, Petitioner argues that student's failure to pass ** grade math class, a failing grade in Science for one six-week grading period in ** grade, and student's TAKS math scores for ** and ** grade provide evidence that student has a learning disability in math. Student barely passed the ** grade TAKS. Student passed ** and ** grade TAKS math tests. Student's **-grade math grade of ** was student's lowest grade in ** grade.

Both student's reading and math teachers testified that student did not exhibit any academic problems in their classes. Despite failing ** grade math class, student maintained a ** average for student's ** grade core classes, including math. All witnesses, including the mother, agreed that student made math progress from ** to ** grade. All these factors taken as a whole are insufficient to establish that student had a Learning Disability in math.

With regards to her Attention Deficit Disorder, the symptoms did not prevent student from making educational progress. Student focused in class, was easily redirected, was not impulsive, and did not fidget. Student's ADD did not interfere with friendships and social activities and did not create any disciplinary problems. Student was a successful participant in the school's volleyball and basketball teams. There simply was no evidence that student exhibited problems usually associated with ADD, such as socialization, organization, or emotional problems. There was no evidence that student needed special education services to address academic or socialization problems associated with student's ADD.

The Hearing Officer concludes that the evidence fails to establish that during the spring 2006 and the 2006-2007 school years, the District had a reason to suspect that student was in need of special education services. Furthermore, the Hearing Officer concludes that student received an educational benefit in student's regular education program with Section 504 support.

V. COUNSELING SERVICES

Based on the finding that the District did not violate the child find provision, I have no jurisdiction to consider compensatory counseling services. Student may have a claim for such services under Section 504, but a Texas Special Education Hearing Officer does not have jurisdiction to address Section 504 issues in a due process hearing.

VI. CONCLUSION

It is undisputed that student experiences emotional distress due to school-related issues and/or problems with friends. Student's mother believes that student needs special education services because without such support student's continuing emotional distress will further erode her self-confidence. Providing Section 504

education services is a way to decrease future problems and prevent student from developing a need for special education services. Student's Section 504 support is almost nonexistent and does not provide any more support than is provided to any student. Given student's family history, and the emotional turmoil she experiences from school and home life, the District should be concerned about student's low self-esteem and emotional stress. A program to assist student in developing coping skills will ensure that student's emotional problems do not begin to interfere with student's educational progress.

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 6th day of September 2007.

Olivia B. Ruiz

Special Education Hearing Officer

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MCMULLEN COUNTY INDEPENDENT

SCHOOL DISTRICT

RESPONDENT

BEFORE A SPECIAL EDUCATION

HEARING OFFICER

FOR THE STATE OF TEXAS

SYNOPSIS OF DECISION

ISSUE: Whether the District failed to timely evaluate Petitioner for special education services.

CITATION: 34. C.F.R. §300.111(a)

HELD: For the District. The evidence failed to establish that the District had reason to suspect that Student was in need of special education services. Furthermore, the Student received an educational benefit in her regular education program with Section 504 support.

ISSUE: Whether the District failed to provide counseling services.

HELD: For the District. A Texas Special Education Hearing Officer does not have jurisdiction to consider counseling services provided under Section 504.