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# DOCKET NO. 280-SE-0507

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

PETITIONER

vs. BEFORE A SPECIAL EDUCATION  
HEARING OFFICER

FOR THE STATE OF TEXAS

UVALDE INDEPENDENT

SCHOOL DISTRICT

RESPONDENT

## DECISION OF THE HEARING OFFICER

### STATEMENT OF THE CASE

Petitioner, Student b/n/f Parent ("Student"), requested a Due Process Hearing pursuant to the Individuals With Disabilities Education Improvement Act ("IDEIA"), 20 U.S.C. §1400 et. seq., contending that Respondent, Uvalde County Independent School District ("UCISD" or "the District"), denied Student a free, appropriate, public education ("FAPE") in the following particulars: 1) UCISD failed to identify Student as a student qualifying for special education services; 2) UCISD failed to timely assess Student and/or seek consent for medical documentation; 3) UCISD denied the parents an opportunity to participate in the educational planning for Student; 4) UCISD failed to provide Student with an appropriate placement; and 5) UCISD denied Student appropriate related services and extracurricular activities. Student seeks the following relief: 1) compensatory education and related services; 2) an opportunity to try-out for, and participate with, the cheerleading squad; and 3) reimbursement of all costs and attorney's fees.

## **PROCEDURAL HISTORY**

On May 31, 2007, the Texas Education Agency ("TEA") received the Request for Due Process Hearing filed by Student and assigned the case Docket No. 280-SE-0507.

On June 1, 2007, the undersigned Hearing Officer issued the Initial Scheduling Order, setting forth all relevant deadlines. Pursuant to that Order, the prehearing telephone conference was set for June 20, 2007; the Due Process Hearing was set for July 13, 2007; and the Decision deadline was set for August 14, 2007. Due to conflicting schedules the prehearing telephone conference was re-scheduled to July 12, 2007.

On June 13, 2007, the parties participated in a Resolution Session, which was not successful.

On July 12, 2007, the parties convened for the prehearing telephone conference. In attendance were the following: 1) Mr. Matthew Finch, counsel for the Student; 2) Ms. Deborah Liva, Advocate for the Student; 3) Mr. Elvin Houston, counsel for UCISD; 4) the court reporter, who made a record of the telephone conference; and 5) the undersigned Hearing Officer. During this telephone conference the parties discussed the issues and re-scheduled the Due Process Hearing to August 14, 2007, with Disclosures due August 7, 2007, and the Decision deadline extended to September 13, 2007.

The parties convened for the Due Process Hearing on August 14, 2007. In attendance throughout the hearing on that day were 1) Mr. Finch, counsel for the Student; 2) Ms. Liva, Advocate for the Student; 3) Mr. Houston and Ms. Paula Roalson, counsel for UCISD; 4) Ms. Maria Martinez, UCISD's Special Education Director; 5) the court reporter, who made a record of the hearing; and 6) the undersigned Hearing Officer. Student called eleven (11) witnesses, who were cross-examined by UCISD. The hearing did not conclude on August 14, 2007; accordingly, the parties re-scheduled the last day of hearing for August 23, 2007. The second day of hearing convened at 11:30 a.m. on August 23, 2007. In attendance throughout the hearing on that day were 1) Mr. Finch, counsel for the

Student; 2) Ms. Liva, Advocate for the Student; 3) Mr. Houston, counsel for UCISD; 4) Ms. Martinez, UCISD's Special Education Director; 5) the court reporter, who made a record of the hearing; and 6) the undersigned Hearing Officer. Student called one (1) witness and rested. Prior to calling its first witness, UCISD presented its Motion for Judgment, which was denied. UCISD then called three (3) witnesses, who were cross-examined by Student. The hearing concluded on that day. The parties filed closing arguments following the hearing.

## **FINDINGS OF FACT**

1. Student resides with parents and siblings within the jurisdictional limits of UCISD. UCISD is a political subdivision of the State of Texas and a duly incorporated independent school district.
2. Student has never been assessed for, or received, special education services by UCISD. Student is currently a \*\* at Uvalde High School where student has attended throughout high school.

### **School Year 2005-2006: \*\* Year**

3. It was during the \*\* year that student was diagnosed with a \*\*. Student's physician tried various medications to \*\* and reduce symptoms. Student has been plagued with severe headaches, nausea, dizziness, and fatigue, some, or all, of which derive from the strong medications student must take.
4. During spring 2006, Student missed a great deal of portions of school days due to her illness. Student often became ill at school and had to go home. The attendance clerk would allow student to check out of school if student spoke with mother or another authorized adult. Under the District's Student Code of Conduct, Student's absences were labeled "unexcused" but they could have been changed to "excused" if student had presented the office with a written excuse within forty-eight (48) hours of the absence. Student did not present any written excuses for these absences and they remained unexcused.
5. Under state and local authority, student was able to make up work and pass classes while concomitantly having excessive unexcused absences. Student passed all classes \*\* year and earned all required credits.
6. The Texas Assessment of Knowledge and Skills ("TAKS") is the state-mandated assessment used to ensure school accountability for student achievement. student did not meet the state-mandated levels to pass the Science portion of TAKS in spring 2006.
7. Student was a cheerleader during the \*\* year. Cheerleading is extremely important to student, and student was described as an "awesome" cheerleader. In spring 2006, student was allowed to try out for cheerleading the \*\* year. Student again made cheerleader, despite the fact that student had dozens of unexcused

absences.

**School Year 2006-2007: \*\* Year**

8. Student continued to have severe headaches, bouts of nausea and dizziness, and other severe symptoms during the \*\* year related to the pituitary problem and strong medicine prescribed by physician. Student was able to serve as a cheerleader, although mother requested that the cheerleading sponsor not allow student to perform some tasks, such as blowing up balloons, because of the potential of triggering a headache.
9. In spring 2007, Student continued to have multiple absences, mostly during part of a school day. Student accumulated at least fifty-five (55) absences from various classes. As was the case in spring 2006, if student felt ill, student would go to the attendance clerk to check out, the attendance clerk would speak to student's mother or authorized individual, and the attendance clerk would allow student to leave campus. These absences, just as those garnered the previous spring, were counted as "unexcused." Before student lost credit in classes based upon these absences, student made up class work after school, during school, or on Saturdays.
10. In spring 2007, Student signed up to try out for cheerleader for the \*\* year. Initially, there was no obstacle; however, when try outs were re-scheduled for later in the spring semester, student was informed that student was not eligible to be a cheerleader because of excessive unexcused absences.
11. Eligibility for trying out for cheerleader is set forth in the District's Cheerleading Constitution. Students are eligible if they have satisfactory performance in the areas of discipline, academics, and attendance. A student could not try out for cheerleader if he/student was absent more than ten percent (10%) of the dates classes met. Student's fifty-five (55) unexcused absences precluded student from participating further in cheerleading.
12. Student's absences could have been changed to "excused" if student had presented the office with a written excuse within forty-eight (48) hours of the absence. Student did not provide written excuses for all fifty-five (55) absences. Student's report card reflected the accumulation of excessive unexcused absences.
13. Student's mother met with the assistant principal and reminded her that student had been allowed to try out the prior year with the same attendance record. Following this meeting, student's mother prepared written excuses for the absences, but these were not acceptable under the forty-eight-hour deadline. The District remained firm in its application of the attendance requirements set forth in the Cheerleaders Constitution.
14. Student passed all classes for school year 2006-2007. Student's overall grade point average for that school year was 85.429.
15. The District provided tutoring for students who failed TAKS. However, Student did not attend these tutorials. Student failed the Science and Math parts of the TAKS taken in spring 2007. Student has the opportunity in 12th grade to re-take the TAKS. Passing all portions of the exit level TAKS is a state requirement for high school graduation.

16. Student did not reveal illness to teachers or administrators. Student requested that the mother keep this information private. Student's mother informed only three (3) people at the school of student's illness: a) the attendance clerk; b) the principals' secretary; and c) the cheerleading sponsor. Student's mother did not believe this information was the business of anyone else at the school, including the nurse or principal.
17. Student's mother did not refer student for a full, individual evaluation ("FIE") upon learning of student's diagnosis. Student's mother did not refer student for an FIE prior to filing the complaint.
18. Student's mother filed this complaint on May 31, 2007, after student learned that student would not be allowed to try out for cheerleading.
19. Student's treating physician signed two (2) conflicting other health impaired ("OHI") forms. On the first form, dated July 20, 2007, the physician indicated that student's education was not being impacted by illness and thus, student did not need special education and related services. Shortly thereafter, he changed the form to indicate that student's illness does impact student's education to the degree of requiring special education and related services.
20. After receiving notice of the complaint, the District requested consent to evaluate student. Student's mother declined to give written consent for such evaluation.
21. The District has not performed an FIE on student.
22. The evidence is sufficient to establish that student has a health impairment that causes student to have severe symptoms that arise periodically at any given time, including at school.
23. The evidence is insufficient to establish that student's health impairment adversely affects student's educational performance.
24. The evidence is insufficient to establish that student needs special education or related services.

## **DISCUSSION**

This is a child-find case. Student claims that the District should have referred student for evaluation prior to the filing of the complaint because student had declining scores on TAKS and excessive absences from valuable instruction time during the school day. UCISD counters that student's failing a portion of the TAKS is not, in and of itself, enough to trigger a referral for assessment. While the District admits that the record of student's excessive absenteeism "fell through the cracks," any harm in not referring student for assessment is de minimis in light of the fact that student does not qualify for special education services.

The IDEIA mandates that school districts, which receive federal funding, must provide FAPE to its disabled students. 20 U.S.C. §1412(a)(1)(A) & 1414(d). This is accomplished by a) the district's compliance with the procedural requirements of IDEIA and b) its preparation and implementation of a program that is "reasonably calculated" to provide the disabled student with educational benefits. *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 175, 206-207 (1982).

A disabled child is one whose disabilities fall under one or more of the eligibility categories and who, by reason thereof, needs special education and related services. 20 U.S.C. §1401(3)(A); 34 C.F.R. 300 §300.8(a). To be eligible for special education and related services, a student must establish that a) the disability has an adverse affect on educational performance, which b) requires specially designed instruction in the classroom, in a hospital, in the home and other settings. 34 C.F.R. §300.8(c)(9); §300.30(a)(1)(i).

A. Student Is Not A Disabled Student As Defined In IDEIA.

In this case, the evidence clearly established that student suffers an illness that can be debilitating at times. The key question is, however, does this illness adversely affect student's education to the point of requiring specially designed instruction?

Student bases the claim for special education services upon failing portions of TAKS and the concomitant negative educational impact resulting from lost valuable class instruction due to student's illness. However, when the probative, relevant evidence is culled from that which deals with treatment perceived to be unfair or discriminatory, there is nothing remaining to support a finding that student qualifies for special education services.

The evidence established that student failed, for the first time, a portion of the TAKS in student's \*\* year and then failed two portions of TAKS student's \*\* year. Unless student passes TAKS, student will not graduate from school. The TAKS assessment is not an insignificant component in evaluating a child's eligibility. However, it is not to be used as the sole determiner of eligibility. See Mesquite ISD, TEA Docket No. 171-SE-0406 (July 2006).

The evidence further established that over student's high school career, student maintained good grades, discipline, and respect from both peers and school administration. Student was never a behavioral problem. Student participated in cheerleading and was described by the sponsor as an "awesome" cheerleader.

Student clearly balanced a very busy extracurricular schedule with academics, maintaining passing grades and overall grade point averages in the mid \*\*. Student maintained normal attendance until student was stricken with the illness. At that point, student began accumulating excessive absences that were well documented for both the school administration and parents. However, student was able to attend make-up classes and pass all courses with a respectable grade point average during both school years 2005-2006 and 2006-2007.

This is not the record of a student in need of special education and related services. The fact that student was able to cope with the illness and still make up the work necessary for passing is an incredible statement of student's character. Student has borne the burdens admirably without special education intervention and will continue to do so.

B. UCISD Did Not Commit Procedural Violations.

Student also alleges that UCISD failed to timely assess for special education services. While the record is patently clear that student was accumulating excessive, unexplained, unprecedented absences, the failure of the District to inquire into the basis for these absences and to assess student prior to the filing of the complaint does not constitute substantive harm. *Id.*; See also *Adam J. v. Keller ISD*, 328 F.3d 804 (5th Cir. 2003). Any harm caused by the District's failure to attempt assessment prior to the complaint is minimal in light of the finding that student does not qualify for special education services. *Id.*

As to the remaining claims proffered by student, all are denied in light of the finding that student does not qualify for special education services. *Alvin ISD*, 46 IDELR 221 (S.D. Tex. 2006).

This case is not about special education. This case is about the District's treatment of student in student's bid to try out for cheerleading student's \*\* year. Both sides are right in some respects and both sides are at fault. On the one hand, the District was blind to the excessive unexcused absences accumulating over many months until they were used against student in student's bid for cheerleading. The same attendance requirements set forth in the Cheerleading Constitution were in place the prior year but were not used against student when student tried out for cheerleading for student's \*\* year. It is certainly understandable that student would be blind-sided by the application of the attendance rules in spring 2007 when student's attendance problems had not changed from one year to the next. Both student and mother apparently believed they were in compliance with the rules when student checked out of school through the attendance clerk, who knew of student's illness. The District's sudden application of the attendance requirements contained in the Cheerleading Constitution came at a time when student could do nothing to rectify the problem. On the surface, such application appeared to be nothing less than Draconian in nature.

On the other hand, the District had written policies in place and student and

mother knew about these rules. Student's attendance problems would have been corrected if a written note had been submitted within forty-eight hours of each absence. Further, certain limited District personnel had a right to know about student's illness and its ramifications on student's attendance and participation in school. Student's need for privacy is absolutely understandable, but the price paid was a complete breakdown in critical communication between student and the District. Sadly, the student is the one who will pay the price for this unfortunate state of affairs.

## **CONCLUSIONS OF LAW**

1. Student is not eligible for special education and related services because student's illness does not have an adverse affect on educational performance. 20 U.S.C. §1401(3)(A); 34 C.F.R. §300.8(a) and (c)(9); §300.30(a)(1)(i).
2. Any harm in the District's failure to identify and evaluate student for special education services in a timely manner was harmless in light of the fact that student does not qualify for special education and related services. *Adam J. v. Keller ISD*, 328 F.3d 804 (5th Cir. 2003).

## **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 Petitioner is DENIED. All other relief not specifically stated herein is DENIED.

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

SIGNED this 17th day of September 2007.

Deborah Heaton McElvaney

Special Education Hearing Officer