

STUDENT § BEFORE A SPECIAL
EDUCATION §
V. § HEARING OFFICER FOR THE
§
LA AMISTAD LOVE & §
LEARNING ACADEMY § STATE OF TEXAS

DECISION OF THE HEARING OFFICER

I. Statement of the Case

Petitioner brings this appeal by his next friend pursuant to the Individuals with Disabilities Education Improvement Act 20 U.S.C. § 1400 *et seq.*, (hereinafter referred to as "IDEA"), against Respondent La Amistad Love & Learning Academy (hereinafter referred to as "Respondent" or "La Amistad"). Petitioner (hereinafter referred to as "Petitioner" or "Student") filed a written request for a due process hearing which was received by the Texas Education Agency on Monday, March 10, 2008. Petitioner was represented by attorney Pamela Williams of Houston, Texas. Respondent was represented by attorney Wendle Van Smith of the law firm Anderson & Smith, P.C. in Houston, Texas.

All procedural matters have been conducted by agreement of the parties and in accordance with their schedules. A telephone prehearing conference was held on Thursday, April 10, 2008, and a Prehearing Order was issued on Wednesday, April 16, 2008. Disclosure occurred on Monday, May 12, 2008, and the due process hearing was held on Tuesday, May 20, 2008 at the Region IV Education Service Center in Houston, Texas. Petitioner and Respondent requested the opportunity to file written closing arguments and agreed that the parties would file their briefs on Tuesday, June 10, 2008. A Post Hearing Scheduling Order was issued on Wednesday, May 21, 2008, setting forth the agreed upon briefing scheduled and confirming the decision due date. In spite of the parties' requests, neither party elected to file post hearing closing arguments or briefs.

Petitioner states that Respondent has deprived Student of a free appropriate public education by suspending and expelling Student from La Amistad on January 31, 2007. Petitioner states that School refused to give Student's parents and Student's representative Student's records, which were requested on February 27, February, 28 and March 7, 2008. Petitioner contends that Respondent failed to give compensatory services to Student at an Admission, Review and Dismissal Committee meeting ("ARD") on March 7, 2008. Petitioner further alleges that Respondent refused to allow Student's parents to tape the ARD meeting on March 7, 2008, which denied Student's parents the right to a fair and accurate meeting regarding Student's needs. Petitioner contends that Respondent refused to communicate with Student's parents from January 31, 2007 through February 27, 2008, and that School's superintendent was rude, harassing, and intimidating and failed to allow Student's parents access to process.

As relief in this due process hearing, Petitioner requests Respondent should provide more than three (3) hours of compensatory services, including the amount for Student's loss of education and trauma resulting from denial of FAPE, and that Respondent should pay for appropriate services, counseling, reimbursement for care, attorney's fees and enrichment program costs for Student, as well as mental anguish and emotional distress.

Respondent contends that it proposed to provide Student with compensatory services, for the period of February 12, 2007 through February 28, 2007. This determination was made with the knowledge that School was required to provide Student with a FAPE due to the Student's disabilities even during the period immediately after Student was suspended, expelled or withdrawn. Respondent stated that the ARD meeting held on March 7, 2008 did not reach a consensus, and was rescheduled for March 12, 2008, but that Student's parents did not attend.

Respondent also stated that the Texas Education Agency ("TEA") Division of IDEIA Coordination reviewed the previous ARD documents, discipline documentation and the Memorandum of Official Notification, and determined the specific actions Respondent was required to take and services Respondent was required to provide to and for Student, which were the compensatory services that Respondent proposed to provide to Student for the period of February 12, 2007 through February 28, 2007.

Respondent requested that the parties take nothing, that Respondent be allowed to recover the costs which have been incurred by reason of the charges and allegations of Petitioner against Respondent and that the Hearing Officer give the Respondent such other and further relief as the Hearing Officer feels Respondent is entitled to.

Based upon the evidence and the argument of counsel, the Hearing Officer makes the following findings of fact and conclusions of law.

II. Findings of Fact

1. Student is a ** year-old who attended La Amistad until January 31, 2007. La Amistad is located within the geographical boundaries of Houston ISD, and Houston ISD ** School is Respondent's home campus.

2. La Amistad is an open enrollment charter school authorized by Texas Education Code §12.101. School is within the geographical boundaries of Houston ISD. Accordingly, School is required to accept students who apply for enrollment in such school on the basis of availability and is responsible for providing Student a free appropriate public education in accordance with the Individuals with Disabilities Education Improvement Act, 20 U.S.C.A. § 1400, *et seq.*, and the rules and regulations promulgated pursuant to IDEIA.

3. Student is eligible for special education placement, programs and services as a student who is learning disabled.

4. Student began attending La Amistad in August, 2005 and stopped attending La Amistad on January 31, 2007.

5. An ARD was convened at La Amistad on October 6, 2006, to review Student's progress. A Full and Individual Evaluation ("FIE") from January 8, 2005 and Student's performance on the Texas Primary Reading Inventory ("TPRI") were reviewed, with the previous year results from the TPRI shown as "developing." The ARD determined that Student's disability was still Learning Disability, and that impacted Student's performance in Reading, Written Language, and Math. The ARD stated that Student would participate in the Stanford 10 and the SDAA II, for Reading and Math, assessment testing during the 2006-2007 school year. The ARD Committee concluded that Student is able to participate in all general education activities and receive all instruction and services in the general education environment.

6. Student's Reading/ELA Record and TPRI Record for the 2006-2007 school year at La Amistad (through February 12, 2007) was as follows:

| Six Weeks Reading/ELA Record | | | |
|-------------------------------------|----------------------|----------------------|----------------------|
| Subject | 1st Six Weeks | 2nd Six Weeks | 3rd Six Weeks |
| Spelling | ** | ** | ** |
| Reading | ** | ** | ** |
| Language | ** | ** | ** |
| | | | |
| TPRI | BOY | MOY | EOY |
| Graphophonemic Knowledge | | ** | ** |
| Reading Accuracy | | ** | ** |
| Reading Fluency Rate | | ** | ** |
| Reading Comprehension | | **^ | ** |

7. On the Stanford Knowledge Achievement Test Series Tenth Edition ("Stanford 10"), which Student took in November, 2006, Student scored ** on one subject, Political Science; ** on eleven subjects; and ** on forty-two subjects.

8. Student's grading periods for the 2006-2007 school year were broken down as such: First Six weeks was September 11, 2006 through October 20, 2006; Second Six Weeks was October 23, 2006 through December 7, 2006; and Third Six Weeks was December 11, 2006 through February 1, 2007. As Student was suspended and subsequently expelled on January 31, 2007, there were no further grades for Student.

9. Student's Report Card for the 2006-2007 school year while at La Amistad shows:

| Report Card | | | |
|--------------------|----------------------|----------------------|----------------------|
| Subject | 1st Six Weeks | 2nd Six Weeks | 3rd Six Weeks |
| Reading | ** | ** | ** |
| English | ** | ** | ** |
| Spelling | ** | ** | ** |
| Mathematics | ** | ** | ** |
| Science | ** | ** | ** |
| Social Studies | ** | ** | ** |
| Handwriting | ** | ** | ** |
| PE/Health | ** | ** | ** |

11. Because of concerns about the circumstances of Student's expulsion from La Amistad, Parent filed a Complaint with the Texas Education Agency ("TEA") on February 16, 2007. Student's parent complained of the alleged retaliation of La Amistad against Student. Parent detailed a visit by a Child Protective Services ("CPS") officer at La Amistad that occurred on January 29, 2007. The CPS officer was on the La Amistad campus investigating a claim of assault by a different student against one of La Amistad's teachers. Student was apparently a witness to this incident, and spoke with the CPS officer. Parent claimed that after Student spoke to the CPS officer, the accused teacher physically assaulted Student. Two days later, on January 31, 2007, Student was suspended, and subsequently expelled by letter dated February 16, 2007.

10. According to the TEA Complaint Investigation Report, Student was suspended from La Amistad for "unacceptable and disruptive classroom, school behavior." Subsequently, on February 12, 2007, Student's parent was advised that "La Amistad has determined that Student's continued unacceptable behavior warrants Student's terminal suspension from La Amistad," effective Monday, February 12, 2007.

12. After attempts to enroll Student in another charter school were unsuccessful, Student was successfully enrolled in ** School in Houston ISD as of February 28, 2007. Student's records were obtained from La Amistad after telephone requests on February 28, 2007 and March 1, 2007, and were released after La Amistad received a written request by fax on March 1, 2007.

13. Student missed 27 full days of school and special education services from February 1, 2007 through February 27, 2007.

14. An Admission, Review, Dismissal Committee meeting ("ARD") was convened on March 2, 2007, for Student's transfer and placement in special education at ** School. A Transfer ARD was convened by ** School on March 2, 2007. The purpose of the ARD was to

review Student's academic records, determine eligibility, and plan an appropriate special education program. The ARD determined that Student meets the eligibility requirements as a student who was learning disabled. The March 2, 2008 ARD placed Student in the Behavior Support Class ("BSC") to provide structured support and reduced class size. It was also determined that Student would receive a total of twenty-five (25) hours of special education services a week.

15. An ARD was also convened at ** School on March 30, 2007 for Annual Review Placement, development of Student's Individualized Education Program ("IEP"), Discipline, Extended School Year Services Promotion and Student Progress. Although Student continues to have difficulties as a result of the learning disability, Parent is satisfied with Student's special education placement, program and services at ** School in Houston ISD.

16. In response to Parent's February 16, 2007 Complaint, TEA issued a Complaint Investigation Report ("CIR") dated April 17, 2007. Among other things, the CIR found that La Amistad:

- (a) Did "not always ensure that required procedures are followed when students are removed from their current placements;" and
- (b) "La Amistad does not always ensure that a FAPE is provided to students who have been expelled."

Accordingly, TEA ordered La Amistad to:

"Convene an ARD meeting for the student subject to the complaint to review the IEP and current progress. The ARD committee shall determine the compensatory services based on the student's needs to address the time period from February 12, 2007 until the date the student enrolled in another school district. The ARD committee shall state the frequency, location, and duration of the compensatory services."

17. La Amistad convened an ARD on March 7, 2008. The ARD committee determined that the compensatory services to be provided by La Amistad were:

- (a) Three (3) hours of special education instruction in Reading/Language Arts in the Spring Semester of School Year 2007-2008; and
- (b) Three (3) hours of special education instruction in Reading/Language Arts in the Summer Semester of School Year 2007-2008.

It was determined that no Behavior Intervention Plan ("BIP") was needed for Student.

18. Each party holds the other party responsible for the almost year delay (from April 17, 2007 until March 7, 2008) in convening an ARD in response to the TEA Complaint

Investigation Report. However, there is no evidence of communications between the parties showing attempts to schedule an ARD at a mutually convenient time.

19. Parent disagreed with the determination of the ARD Committee and filed a Request for Special Education Due Process Hearing and Required Notice on March 10, 2008, in part because Parent believes the compensatory services offered are inadequate. At the same time, Petitioner's demands for counseling, child care, enrichment programs, damages for mental anguish and emotional distress, and attorney's fees are not among the compensatory services offered by La Amistad. Finally, Parent does not wish Student to receive tutoring or any other educational services from La Amistad, and, in fact, does not want Student to return to the La Amistad campus. Parent has, however, paid for Student to receive one on one assistance with ** School homework from a private individual.

20. Other than disagreement with the compensatory services offered by La Amistad in the March 7, 2008 ARD, all the matters complained of by Petitioner occurred more than one year before the filing of the Due Process Complaint.

III. Discussion

In the absence of closing arguments requested but not submitted by either Petitioner or Respondent, it was difficult to determine how either party expected to prevail under the Individuals with Disabilities Education Improvement Act. In response to a complaint filed by Petitioner, La Amistad was found not to provide a free appropriate public education to students who are removed from current special education placements and/or expelled. La Amistad delayed in providing records to Student's current ** School and also delayed in convening an ARD for almost a year after being directed to do so by the Texas Education Agency. At the same time, Petitioner requests only monetary reimbursement and damages as relief in this due process hearing, because Petitioner stated categorically that educational services from La Amistad are not desired. Petitioner failed to state any basis under IDEIA or Federal and State implementing regulations under which either the requested monetary damages could be awarded, or to establish that the proposed compensatory services were inadequate.

Most importantly, however, both parties failed to establish how most of the matters under consideration could be considered under applicable Texas Education Agency regulations. Specifically, TEA regulations at 19 TEX ADMIN. CODE, §89.1151, state:

- (c) A parent or public education agency must request a due process hearing **within one year** of the date the complainant knew or should have known about the alleged action that serves as the basis for the hearing request.

Other than disagreement with the ARD deliberations regarding compensatory services on March 7, 2008, every action complained of by Petitioner occurred outside the one year period of record. Moreover, although Petitioner disagrees with Respondent's offer of a total of 6 hours of compensatory services, Petitioner failed to prove that more special education services were required to address the period when Student was first suspended and then expelled from La

Amistad. Petitioner did not show any legal basis under IDEIA or its implementing regulations which would justify an award of additional compensatory services or reimbursements and payments for educational services not provided by La Amistad.

IV. Conclusions of Law

1. Petitioner is a student who attended Respondent La Amistad Love & Learning Academy, from August, 2005 until Student was expelled effective February 12, 2007, a Local Educational Agency charged with providing Student a free appropriate public education. Student received special education services as a student who has a specific learning disability. 20 U.S.C.A. § 1401(3); 34 C.F.R. § 300.7; 19 T.A.C. § 89.1040.

2. Respondent had a responsibility to provide Student with a free appropriate public education during the time Student was enrolled at La Amistad. 20 U.S.C.A. § 1414; 34 C.F.R. §300.300; 19 T.A.C. § 89.1001.

3. All matters complained of by Petitioner occurred more than one year before the Request for Special Education Due Process Hearing and Required Notice was filed by Petitioner, except the March 7, 2008 Admission, Review and Dismissal Committee meeting convened by Respondent to determine compensatory services as required by an April 17, 2007 Texas Education Agency Complaint Investigation Report. 20 U.S.C.A. §1415(f); 19 T.A.C. §89.1151(c).

4. The party attacking the appropriateness of a student's IEP bears the burden of showing why the IEP and the resulting placement were inappropriate under IDEIA. [*Cypress-Fairbanks ISD v. Michael F.*, 118 F. 3d 245, 252 (5th Cir. 1997); *Tatro v. Texas*, 703 F. 2d 823, 830 (5th Cir. 1983)].

5. As to matters not barred by the one year period of record, Petitioner did not satisfy his burden and prove that Respondent's offer of compensatory services was inappropriate, or that Petitioner was entitled to additional compensatory services or payment for educational services, counseling, reimbursement for care, and enrichment program costs for Student, in addition to the free appropriate public education being provided in Student's current placement at ** School in Houston ISD.

6. Petitioner's additional requests for the reimbursement of attorney's fees, mental anguish and emotional distress are outside of the limited jurisdiction of a special education hearing officer. 20 U.S.C.A. §1415(f)(3)(E).

V. Order

After due consideration of the record, the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer ORDERS that all relief sought by Petitioner is DENIED.

SIGNED in Austin, Texas this 26th day of June, 2008.

Gwendolyn Hill Webb
Special Education Hearing Officer

STUDENT § BEFORE A SPECIAL EDUCATION
V. § HEARING OFFICER FOR THE
LA AMISTAD LOVE & §
LEARNING ACADEMY § STATE OF TEXAS

SYNOPSIS

Issue: Is the parent of a student who seeks compensatory services for loss of education and reimbursement for additional educational services entitled to recovery for events that occurred more than one year before the date that the due process hearing request is filed?

Federal Citation: 20 U.S.C.A. §1415(f)

Texas Citation: 19 T.A.C. §89.1151(c)

Held: For the Respondent. IDEIA and state rules implementing same require a request for due process hearing to be filed within one year of the date the complainant knew, or should have known, about the alleged action that serves as the basis for the hearing request.

Issue: Is a parent entitled to recover for alleged deficiencies in a student's special education program without presenting, in the hearing, specific evidence of the alleged deficiencies?

Texas Citation: *Cypress-Fairbanks ISD v. Michael F.*, 118 F. 3d 245, 252 (5th Cir. 1997); *Tatro v. Texas*, 703 F. 2d 823, 830 (5th Cir. 1983)

Held: For the Respondent. In the 5th Circuit, the party attacking the validity of a student's special education program has the burden of proof. If such party does not present specific evidence that shows that such program is deficient, that party fails to satisfy his burden.

Issue: Is a Petitioner entitled to recover compensation for mental anguish and emotional distress, as well as attorney's fees, from a special education hearing officer?

Federal Citation: 20 U.S.C.A. §1415(f)(3)(E)

Held: For the Respondent. Under IDEIA, an impartial due process hearing officer's jurisdiction is expressly limited to those specific elements of a student's special education program, as enumerated.