

Student b/n/f	§	SPECIAL EDUCATION
PETITIONER	§	
	§	
VS.	§	HEARING OFFICER
	§	
NORTHEAST ISD,	§	
RESPONDENT	§	STATE OF TEXAS

DECISION OF HEARING OFFICER

This matter was presented to this Hearing Officer after the petitioner and guardian of the child, filed for a Due Process Hearing pursuant to the Individuals with Disabilities Education Improvement Act (“IDEA04”), 20 U.S.C. §1400 et.seq., on May 29, 2008, complaining against Northeast ISD, the respondent.

On the 11th day of August, 2008, the petitioner and the respondent appeared at the Special Education Department of Northeast ISD for a Due Process Hearing pursuant to IDEA04. The hearing continued on the 12th day of August, 2008, recessed for the next two days due to scheduling conflicts, and finally concluded on the 15th day of August, 2008.

**, the petitioner and grandparent of the child, appeared in person and through her attorney of record, Karen D. Seal, and announced ready.

Northeast ISD appeared through its district representative, Judith Moening, and through its attorney, Jo Ann Collier, and announced ready.

A stenographic transcript of the proceeding was made by Patricia Gaddis of Gaddis Court Reporting in San Antonio, Texas.

“The Rule” was invoked by Ms. Collier and all witnesses were admonished

accordingly.

Evidence was presented during the course of the hearing through documents and witness testimony.

Issues Raised and Relief Sought

The petitioner raised four issues/complaints about the district in the Prehearing Conference held on July 8, 2008:

1. The district failed to provide the child her nutrition, including her food and dietary supplements, thus denying the child a free, appropriate public education;
2. The district failed to provide the child with extended school year services thus denying the child a free, appropriate public education;
3. The district sent the child home from school and during educational field trips when either the nurse assigned to the child was unavailable or the child's teacher was unavailable, thus denying the child a free, appropriate public education; and
4. The district failed to file a Due Process Complaint to remedy the child being out of school for a lengthy time period.

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

1. That this hearing officer order the district to give the child her nutrition products and her supplements as per the doctor's orders;
2. That this hearing officer order the district to obtain proper baseline data and develop an appropriate IEP for the child; and

3. That this hearing officer order the district to provide the child with appropriate compensatory services.

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 is hereby DENIED.

HELD, for the respondent.

Findings of Fact

1. The parties each agree that the child is ** years old and is eligible for special education services under IDEA04 based upon the child's numerous disabilities, including cerebral palsy, seizure disorder, mental retardation, visual impairment, speech impairment, orthopedic impairment, and other health impaired. (Petitioner's Exhibit #1, p. 3; Respondent's Exhibit #9).
2. This child is fed through a G-Tube by directly injecting her nutrients into her stomach. (See, Trial transcript, pp. 68-69, 175-176).
3. The petitioner prepares the child's specialized diet at home, in collaboration with the child's physician, Dr. **, and sends it to school in a container ready for injection via the G-Tube. (See, Trial transcript, pp. 38-42, 68-69, 124). Injecting food into a G-Tube requires minimal training and can be performed by a lay person.
4. The district has a policy in place which only allows for FDA-approved medications to be administered by its employees, including its nurses. (See, Respondent's Exhibit #17; Trial transcript, p. 256). This policy also prohibits the administration of homeopathic products and supplements. (See, Trial

transcript, p. 261).

5. The child's physician signed and issued a Medication Administration Request and other documents for the administering of the child's nutrition, medications, and supplements during the time the child was in school. (See, Petitioner's Exhibit #24, pp. 214-216). The district refused to comply with the doctor's orders regarding the supplements citing its policy.
6. The district also refused to give the child her food mixture sent to school by the petitioner, stating that it had no way of knowing what was in the mixture and that it needed to know exactly what was being injected into the child's body. (See, Trial transcript, pp. 48, 124-126). The district offered to have the petitioner teach them exactly how to make the mixture from its whole, unopened ingredients, so that they could administer the nutrients (See, Trial transcript, pp. 125-127), but the petitioner refused since she wanted to be the one who prepared the food. (See, Trial transcript, p. 197, 385).
7. The child's physician, Dr. **, acknowledges a nurse from the district spoke to her about the Medication Administration Request and other documents specifically regarding the problem with the supplements on that form pursuant to the district's policy. (See, Trial transcript, p. 391).
8. Subsequent to the conversation with the school nurse, Dr. ** and the petitioner then altered the child's schedule for receiving her supplements so that they were given to the child outside of school hours. (See, Trial transcript, pp. 49-50). According to the petitioner, the child's body reacted poorly to this change in scheduling, resulting in more seizures to the child.

(See, Trial transcript, pp. 49-50).

9. Consequently, and in order to allow the child to receive her nutrients, medications and supplements on the schedule that she felt was most beneficial, the petitioner had the home health nurse to accompany the child at school who did administer the nutrients, medications and supplements as per the petitioner's preferred schedule. (See, Trial transcript, p. 51).
10. The child missed many school days due to the district's refusal to administer the nutrients and supplements sent by the petitioner, and the petitioner's refusal to have the district prepare the nutrients and to administer the supplements outside of school hours.
11. According to Dr. **, the child can attend school without the necessity of taking supplements during those hours. (See, Trial transcript, pp. 391-394).

DISCUSSION - APPLICATION OF FACTS AND LAW

Issue No. 1 - The district failed to provide the child her nutrition, including her food and dietary supplements, thus denying the child a free, appropriate public education.

This issue was the focal point of this case, and the crux of it centers around whether or not a district can make policy which limits how a physician can treat her patient during school hours. The case is a fascinating one in that it pits a district's responsibility to the safety of its overall student population against the individual needs of one of its students. The policy of Northeast ISD limiting the medications administered by its staff to those which have been approved by the FDA and prohibiting its staff to administer nutritional supplements was based upon the safety considerations of its student population as a whole, as testified to by Dr. **. (See, Trial transcript, pp. 257,

269-270, 272). The question then arises: Does such a district policy preempt the IDEA04 statute? The answer seems apparent to this hearing officer: No.

IDEA04 is based, by definition, on the individual, specific needs of each child eligible for services. No plan may be implemented globally on children receiving special education services under IDEA04. Each plan must be individually tailored based upon the strengths, weaknesses, and needs of each particular child. If such is true when devising an education plan, how can it not be true when dealing with a nutrition and medication plan which directly impacts the child's ability to learn? School officials have long since recognized that a child must be fed and alert to be ready to learn. That is the rationale behind many school programs where breakfast is served at no cost to all students prior to the commencement of the school day. With the disabilities which the child in this case must deal with continually, the added burden of being unfed or unmedicated due to a school policy designed with a global view of all its students in mind, would be harsh and unfair to this child.

In this case, the child's physician has been working with the child since 2006. (See, Trial transcript, p. 376). The doctor outlined and prescribed the child's medications, nutrients and supplements as submitted to the school in her executed Medication Administration Request and related forms, which were part of her treatment plan for her fragile patient. (See, Petitioner's Exhibit #24, pp. 214-216; Trial transcript, p. 378-380). The two medicines prescribed for the child are both FDA-approved, thus there has never been a problem with the district administering these medications. As for the child's food mixture, the school stated to the petitioner that it had no problem giving the child her nutrients exactly as specified by the petitioner and Dr. ** so long as the mixture

was prepared at the school in order to be certain exactly what the school employees were injecting directly into the child's G-Tube. (See, Trial transcript, pp. 126-127). While this hearing officer fails to see a distinction between feeding a child orally (such as a soup mixture in a lunch box where the district feeds the child without requiring the soup be prepared at school) or feeding the child directly into her stomach via a G-Tube (but only by demanding the mixture be prepared at school) since both ultimately end up at the same point in the child's body, Dr. ** testified she thought this request by the district was reasonable. (See, Trial transcript, p. 394). Thus the district offered to feed the child exactly what the petitioner wanted, but the petitioner refused so as not to relinquish control over the preparation of the food. (See, Trial transcript, pp. 197, 385).

Therefore, since the district had no concerns over the child's FDA-approved medications or the exact food formula specified for the child, the only issue remaining was the district's refusal to administer the nutritional supplements as ordered by the child's physician. It is here that the district's policy ran into conflict with the doctor's orders for this child. However, contrary to the testimony from the petitioner that the child reacted poorly by exhibiting more seizures when deprived of her nutritional supplements during the school day, Dr. ** testified that the child could attend school without taking her supplements during school hours (See, Trial transcript, pp. 391-394), thus alleviating the district from having to violate its policy to administer those supplements. This was the crucial testimony on which this issue turned. Had the doctor testified that the supplements had to be given as requested during school hours due to increased seizure activity as testified to by the petitioner OR had the doctor simply have not made that critical statement, then it is this hearing officer's opinion that the district

would have violated the child's right to a free, appropriate public education based upon the United States Supreme Court ruling in *Irving Independent School Dist. v. Tatro*, 468 U.S. 883, 104 S.Ct. 3371 (1984). In the *Tatro* case, the child in question suffered from spina bifida and her symptoms included no ability to empty her bladder. The child had to have her bladder drained every 3 to 4 hours through a process known as clean intermittent catheterization ("CIC") to avoid damaging her kidneys. This process was fairly simple to learn (it could be learned in less than an hour) and could be administered by a lay person. The *Tatro* court held that CIC was a related service which was necessary to allow the child to benefit from the special education program and that it had to be provided by the district. *Irving Independent School Dist. v. Tatro*, 468 U.S. at 891. However, the court also held that the district did not have to provide related services such as administering medications or treatments if they could have been administered outside of school hours. *Irving Independent School Dist. v. Tatro*, 468 U.S. at 894. Thus, without Dr. **'s statement, it would have been undisputed that the child needed these supplements to reduce the frequency of her seizures and be able to benefit from the special education program.

The only evidence before this hearing officer throughout the entire hearing, with the sole exception of that statement by Dr. ** referenced above, was that a change in the child's supplements was made to try to accommodate the district, but that the child reacted poorly due to increased seizures throughout the day. (See, Trial transcript, pp. 49-50). No evidence was ever presented to negate that testimony, until the doctor's statement. Since Dr. ** testified the child could receive her supplements outside of

school hours and still attend school, the district was not obligated to administer these supplements as per the holding in the Tatro case.

Therefore, since the child was given her medications by the district as ordered, and since the district would have given the child her food mixture exactly as requested by the petitioner and Dr. **, and since the doctor stated the child could attend school without having her supplements during those hours, the petitioner has failed to demonstrate that the child was denied FAPE on this issue.

It is also the opinion of this hearing officer that a district policy which limits the medications which its staff will administer to a child to only those which are FDA-approved is unreasonable and would potentially deny a child FAPE when in direct conflict with a licensed physician's orders requiring the medications to be provided during school hours. That the child's physician knows the child's medical condition much better than the school staff is without dispute. For a district to stand on a global policy and adamantly state that it will not administer certain medications despite a doctor's orders violates the underlying premise under which such a policy was created in the first place.....the safety of children. It is not difficult to imagine a scenario where a doctor prescribes a drug which is not FDA-approved for a patient, such as a child with a disorder or illness who is not responding to standard treatment and an experimental or homeopathic treatment is prescribed. If a licensed physician issues the order, then it seems reasonable that the district should allow its staff to administer the medication. Perhaps a Release or other such document could alleviate the district's concerns, although there seems little fear over potential liability under the protection of Texas law.

The problem here is that one cannot create a global policy which is equally appropriate for all students, especially in the arena of special education law.

Issue No. 2 - The district failed to provide the child with extended school year services thus denying the child a free, appropriate public education.

The parents allege the district denied the child FAPE by failing to provide the child with extended school year services. This allegation is without merit. Extended school year services are to be offered upon documented proof that the child would be expected to exhibit severe regression in a critical area addressed in the child's IEP that could not be recouped within a reasonable period of time. 19 TAC §89.1065(2). The ARD Committee which met in April, 2008 found that such services were not necessary since regression was not likely to occur. (See, Trial transcript, pp. 352 and 456; Respondent's Exhibit 13, p. 12). **, the child's teacher, also testified that the child did not show regression during extended absences during the school year. (See, Trial transcript, p. 353). In fact, no testimony was presented from any witness that this child exhibited signs of regression when absent from school for prolonged periods of time. Furthermore, no documentation was submitted which showed this child regressed at all.

Additionally, even though regression did not seem to be an issue, the undisputed evidence was that the district offered the child ESY services for the summer 2008 which the petitioner refused. (See, Trial transcript, pp. 77, 142; Respondent's Exhibit #13, p. 12). The petitioner has failed to meet her burden regarding this issue.

Issue No. 3 - The district sent the child home from school and during educational field trips when either the nurse assigned to the child was unavailable or the child's teacher was unavailable, thus denying the child a free, appropriate public education.

The petitioner contends that the district denied the child FAPE by sending the child home from school or from educational field trips when either the nurse assigned to the child or the child's teacher was unavailable. The petitioner presented no evidence to prove this allegation. The evidence presented showed the child did attend certain field trips, but the petitioner admitted under cross examination that it was her choice not to allow the child to go on certain other field trips. (See, Trial transcript, pp. 133-135). That the petitioner may have been justified in keeping her child from attending some of the field trips due to the nature of the trips was not challenged, but the only evidence presented was that the child could have remained at school instead of going home. The district presented evidence from ** and ** stating that the petitioner was told that the child could remain at school instead of going on field trips and that the child would be with a certified special education teacher working with the child on the teacher's lesson plan. (See, Trial transcript, pp. 326-327, 345-346, 454-455). The petitioner denied these assertions. Thus, the petitioner failed to prove the district denied the child FAPE by sending her home from educational field trips.

Issue No. 4 - The district failed to file a Due Process Complaint to remedy the child being out of school for a lengthy time period.

The petitioner has also alleged that the district denied the child FAPE by failing to file a Due Process Complaint to remedy the child's excessive absences from the school. This allegation is unfounded since IDEA04 allows for two only instances where a district may file a Due Process Complaint against a parent or guardian of a child, none of which apply in this case: 1) when the parent requests an Independent Educational Evaluation at public expense, the district may file a Due Process Complaint to try and demonstrate that

its evaluation is appropriate; [34 C.F.R. §300.502(b)(2)] and 2) the district desires to evaluate the child and the parent or guardian refuses consent to perform the evaluation thus allowing the district to file a Due Process Complaint to override the lack of parental consent. [34 C.F.R. §300.300(c)(ii)]. Thus, the district had no standing to bring such a suit under IDEA04. It should be noted that it was the petitioner who made the decision not to take the child to school when no school personnel would administer the child her nutrients and her supplements. The petitioner had ample opportunity to file a Due Process Complaint if she felt the district was denying the child FAPE due to excessive absences. That, in fact, was done in the bringing of this action.

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. Northeast 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. The district provided the child FAPE by administering the prescribed medications, offering to feed the child her nutrients exactly as specified by the petitioner and Dr. **, and because the child could have taken her nutritional supplements outside of school hours as stated by Dr. **.
4. The petitioner failed to demonstrate by a preponderance of the evidence that the child was denied FAPE by the district for failing to provide ESY services, for sending the child home during certain educational field trips, and for

failing to file a Due Process Complaint after excessive absences from the child during the 2007-2008 school year.

ORDER

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 DENIED.

SIGNED this 12th day of September, 2008.

Tomas Ramirez III,
Special Education Hearing Officer

Cases Cited

Irving Independent School Dist. v. Tatro, 468 U.S. 883, 104 S.Ct. 3371 (1984)

Statutes and Regulations Cited

20 U.S.C. §1400 *et.seq.*
19 TAC §89.1065(2)
34 C.F.R. §300.300(c)(ii)
34 C.F.R. §300.502(b)(2)

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RESPONDENT	§	STATE OF TEXAS

SYNOPSIS

ISSUE: Whether the district failed to provide the child her nutrition, including her food and dietary supplements, thus denying the child a free, appropriate public education.

HELD: For Respondent.

ISSUE: Whether the district failed to provide the child with extended school year services thus denying the child a free, appropriate public education.

HELD: For Respondent.

ISSUE: Whether the district sent the child home from school and during educational field trips when either the nurse assigned to the child was unavailable or the child's teacher was unavailable, thus denying the child a free, appropriate public education.

HELD: For Respondent.

ISSUE: Whether the district failed to file a Due Process Complaint to remedy the child being out of school for a lengthy time period.

HELD: For Respondent.