

DOCKET NO. 307-SE-0707

STUDENT § BEFORE A SPECIAL EDUCATION
b/n/f Parents §
§
V. § HEARING OFFICER FOR THE
§
NORTHWEST INDEPENDENT §
SCHOOL DISTRICT § STATE OF TEXAS

DECISION OF HEARING OFFICER

Student (“Student”), by next friends, Parents (“Parent” or “Petitioner”), brought this action against Respondent, Northwest Independent School District (“District” or “Northwest ISD”) under the Individuals With Disabilities Education Improvement Act, as amended, 20 U.S.C. § 1401 et. seq. (“IDEIA”) and its implementing state and federal regulations. Student was represented by Myrna Silver, attorney at law. Susan Heiligenthal, attorney at law, assisted in the presentation of Petitioner’s case. The District was represented by Cynthia Buechler, attorney at law. At Petitioner’s request, the hearing was open to the public.

Procedural History

This request for due process hearing was filed with the Texas Education Agency on July 12, 2007. The parties agreed in writing to waive the resolution session and participate in mediation, and the matter was continued. A pre-hearing conference occurred August 16, 2007. On September 19, 2007, following orders denying Petitioner’s Motion to Quash Respondent’s Notice of Intent to Take Oral Deposition and granting Respondent’s Motion to Compel Assessment, Petitioner filed a Request for Declaratory Judgment with the United States District Court for the Eastern District of Texas (“Court”), and requested an abatement of this proceeding until the Court ruled on the request. Without objection from Respondent, the hearing on this due process matter was continued until December 12, 2007. On December 11, 2007, the Court granted dismissal in part and denial in part of the interlocutory appeal that Petitioner filed. Petitioner filed its Memorandum in Support of Motion to Alter or Amend the Judgment with the Court. Without objection, the hearing was continued three more times. On April 21, 2008, this hearing officer allowed Petitioner to submit a motion to Reconsider Respondent’s Motion to

Compel Assessment, after which, the motion was denied. After this hearing officer granted another continuance, disposed of motions to compel production, objections to requests for production, and motions for sanctions, the hearing was held September 24-26, 2008. On November 20, 2008, the parties submitted written closing arguments. In keeping with the 45 day deadline, the decision due date was extended to December 13, 2008.

Issues

The issues for decision in this case are as follows:

1. Whether the District failed to identify all areas of the child's disabilities in that it failed to identify the child with a learning disability in reading and written expression;
2. Whether, following the parent's written consent for an full, individual evaluation in August, 2004, the District failed to evaluate the child until May, 2005;
3. Whether the District failed to timely provide the child with a dyslexia program in reading and writing; and whether, following the District's provision of a dyslexia program, it discontinued the program without providing notice to the parent and provided a different, less effective dyslexia program for the child;
4. Whether the District failed to timely evaluate the child for speech in that it did not evaluate the child until December, 2006 and did so without requesting parental consent;
5. Whether, after an agreed recess of a May 14, 2007 Admission, Review, and Dismissal Committee ("ARDC") meeting to May 30, 2007, the District failed to hold the ARD;
6. Whether, following parental requests for documentation personally identifiable to the child, the District either failed to provide a complete set of copies or failed to allow the parent to review all requested documents;
7. Whether the District denied the child a free, appropriate public education ("FAPE") from August, 2004 to the present date; and
8. Whether the statutory exceptions to the Texas one-year limitations period should apply in this case.

Requested Relief

As relief, the Petitioner requested the following:

1. Placement of the child at the ** School ** at District expense for three years as compensation for a denial of FAPE for three years;

2. Reimbursement to the parent of the child for expenses incurred for the provision of a private reading tutor for the child for approximately six months;
3. Reimbursement to the parent of the child for expenses incurred for the provision of private speech services to the child for three years; and
4. Reimbursement to the parent of the child for expenses incurred for the provision of private counseling services from approximately February, 2007 until the date of the decision in this matter.

Held for Respondent.

Findings of Fact

Based upon the evidence and argument of the parties, I make the following findings of fact and conclusions of law. (All references to exhibits will be designated as “Ex.” and all references to Petitioner’s and Respondent’s exhibits will be designated as “R” or “P” respectively, followed by the exhibit number. All references to the transcript will be designated as “Tr” followed by the volume designated as “Vol.” and the page number.)

1. The Student resides within the geographical boundaries of the Northwest Independent School District. The Student attended the District as a special education Student from August, 2004 until August 27, 2007 when the Parent unilaterally placed him in private school. While a Student in the District, he was eligible for special education and related services as a child with speech/language impairment (“SI”) and other health impairment (“OHI”) based on a diagnosis of Attention Deficit Hyperactivity Disorder (“ADHD”).
2. The Student has a history of significant attention difficulties even on a one-on-one basis, is consistently distracted, and exhibits a weakness in ability to manipulate the sounds of English. His IQ is in the low average range. [Ex. P-2; Tr. Vol. II, Pgs.49, 64,69, 86; Vol. III, Pg. 85]
3. At the beginning of the Student’s ** grade year, he enrolled at Northwest ISD as a transfer Student from California. Parental information led Northwest ISD to list his disabilities as learning disabled (“LD”) and SI at that time. The District reduced the Student’s special education time by 15 minutes per day to coincide with the California percentage of time, i.e., 40% of the Student’s day. The Parent, an administrator and a general education counselor attended the meeting. The Explanation of Procedural Safeguards (“procedural safeguards”) was give to the Parent. [Ex. P-1; R-26; R-28; Tr. Vol. II, Pgs. 14 and 20].

4. At the September 13, 2004 ARDC meeting, the classification of LD was removed, California assessments were accepted, and goals and objectives were written on a ** grade level. The District listed OHI as the disability, but continued speech services at a reduced amount. [Exhibits P-3; R-24; Tr. Vol. I, Pg. 164; Vol. II Pgs. 20, 24; Vol. III, Pgs. 154-155]
5. Upon entry into the District, the Student's receptive language scores were in the low average range and the expressive language scores were moderately to severely impaired. He had not met grade level standards as a ** grade Student. [Exhibit P-2; Tr. Vol. I, Pgs. 156-160]
6. At a February, 2005 ARDC meeting at which the Parent asked for further evaluation, academic and IQ evaluations were ordered. No special education teacher or speech pathologist attended the meeting. [Exhibits P-4; R-23; Tr. Vol. I, Pgs. 180-182; Vol. II, Pgs. 22-23; 204]
7. Northwest ISD's May, 2005 Full Individual Evaluation ("FIE") in the academic and IQ areas indicated that the Student's intellectual scores were within the average range, excluding cognitive efficiency which fell in the below average range. Achievement scores were in the low to below average range. Due to the discrepancy between IQ and achievement, the diagnostician deferred to the ARDC committee to decide if eligibility was LD or OHI due to ADD. [Ex. R-22]
8. The May, 2005 evaluation covered areas that have characteristics of dyslexia including basic reading components, reading comprehension, and word attack skills. The ARDC did not change the Student's eligibility classification. [Ex. R-22; Tr. Vol. III, Pgs. 139-142, 168]
9. The January, 2006 ARDC acknowledged and accepted a Scottish-Rite Hospital ("Scottish-Rite") diagnosis of developmental dyslexia, disorder of written expression, mathematics problem, and ADHD. Although the Student's IEP did not designate the particular program, at the Parent's request, the Student was placed in a Reading Attainment Program ("RAP") and made progress during the spring semester, 2006. The RAP was a District-developed general education program that incorporated some Scottish-Rite materials as the basis for the curriculum. The RAP was used with dyslexic Students and could be provided by a teacher or on tape. [Ex. P-8; P-9; Tr. Vol. II, Pgs. 229-231; Vol. III, Pgs. 18; 159; 297]

10. The recommendations that Scottish-Rite made in its evaluation of the Student had been in place at the District from the time the Student enrolled in the District. [Tr. Vol. III, Pgs. 70-74, 167]
11. The District discontinued the RAP program at the beginning of the Student's ** grade year, and the Parent elected for the Student to receive a dyslexia curriculum in the resource room, rather than receiving the RAP program on tape.
12. Prior to the August, 2006 ARDC meeting, the speech pathologist discussed the need for further assessment with the Parent. She did not attend the meeting. Speech services were cut in half. [Ex. R-12; R-14; Tr. Vol. II, Pgs. 109-110; Vol. III, Pg.213]
13. On December 4, 2006, the District conducted a language evaluation of the Student without parental consent. The Parent gave signed consent on December 11, 2006. [Ex. R-11; Tr. Vol. II, Pg.93]
14. No changes were made to the Student's speech services as a result of the re-evaluation. [Ex. R-10; Tr. Vol. III, Pg. 213]
15. At a parent-requested May, 2007 ARDC meeting, the Parent requested placement at a private school in the fall, 2007 at District expense for three years compensatory time, alleging that the District had denied FAPE to the Student. The meeting was to reconvene at a later date. [Ex. P-17; R-5]
16. In May, 2007, the Parent revoked consent for assessment of the Student and removal from the classroom for speech therapy. The District complied with the request. [Ex. P-17; R-5]
17. The Student was privately assessed in July, 2007. The Student's global intellectual ability was determined to be**, or low average. The verbal score was **, thinking ability was **, and cognitive efficiency was **. Processing speed, working memory and long-term memory were all low. Such results are common in children with dyslexia and ADHD. The Student was severely delayed in rapid naming skills and moderately delayed in reading fluency. [Exhibit P-23; Tr. Vol. I, Pgs.302-306]
18. The Student's private school does not provide speech services, and the Student received no speech therapy after he was withdrawn from the District in August, 2007 until June, 2008 when the Parent began private speech sessions. [Tr. Vol. II, Pg. 249]
19. The Student made one year's progress on the mathematics and reading portions of the Texas State-Developed Alternative Assessment II ("SDAA") between the spring, 2006

and spring, 2007. At the end of his ** grade year at the District, he was ready to begin ** grade work. [Ex. R-16, R-7]

20. The Student made continual progress toward his speech goals and objectives, but did not master them in 2006-2007. [Tr. Vol. II, Pg. 148]
21. After one year in his private school, assessment results showed the Student at a grade equivalent of ** in oral reading comprehension, ** in silent reading comprehension. His reading fluency was a grade equivalent of **, letter word identification at a level of **, and word attack skills at a level of **. In writing fluency, the Student scored at a grade level of **, spelling at a level of **, and spelling of sounds at a level of **. The Student scored a level of ** in punctuation and capitalization. The mathematics fluency score was ** and calculation score was a level of **. [Ex. R-4]
22. During the time that the Student attended Northwest ISD, his reading programs met the elements of dyslexia instruction. The instruction was direct, explicit, systematic, cumulative and sequential and his IEPs were written for reading and writing disabilities. [Ex. P-8; Tr. Vol. II, Pgs. 71-72, 81-82; Vol. III, Pgs. 11, 70-74]
23. During the three years that the Student was enrolled in the District, the Parent attended all ARDC meetings except for the August, 2008 meeting that occurred on the day that the Parent withdrew the Student from the District.

Discussion

Public school districts must comply with the IDEA procedures for identifying children with disabilities who need special education, and delivering appropriate services as necessary to provide a free and appropriate public education (FAPE). 20 U.S.C. § 1412(a)(1); Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 189 (1982); Cypress Fairbanks Independent School District v. Michael F., 118 F.3d 245 (5th Cir. 1997).

A petitioner who challenges the school district's eligibility determination or offer of services under the IDEA bears the burden to prove that the child has been denied FAPE. Tatro v. State of Texas, 703 F.2d 832 (5th Cir. 1983), aff'd, 468 U.S. 883 (1984); Schaffer v. Weast, 126 U. S. 528 (2005).

The IDEIA states, "A hearing officer's determination of whether a child received FAPE must be based on substantive grounds...." 34 C.F.R. §300.513(a). In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free, appropriate

public education only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE to their child, or caused a deprivation of educational benefits. 34 C.F.R. §300.513(a).

In order to prevail on a claim under the IDEIA, the party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP. Rather, the challenging party must show that substantial or significant provisions of the IEP were not implemented. Houston Independent School Dist. V. Bobby R., 200 F 3d 341 (5th Cir. 2000).

Statute of Limitations Issue

Petitioner complains of a denial of FAPE over the course of three school years – 2004-2005 through 2006-2007. Petitioner filed this request for hearing on July 12, 2007. The applicable federal law provides the following with regard to the statute of limitations:

A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this part, in such time as the State law allows.” 20 U.S.C. §1415(f)(3)(C).

Texas has established a one year time limitation within which a petitioner must request a special education due process hearing:

....[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. 19 T.A.C. § 89.1151(c).

The timeline does not apply to a parent if the parent was prevented from requesting a due process hearing due to-

- i. specific misrepresentations by the local education agency that it had resolved the problem forming the basis of the complaint; or
- ii. the local education agency's withholding of information from the parent that was required under this part to be provided to the parent. 20 U.S.C. §1415(f)(D)

The one year statute of limitations would bar any recovery for the District's actions or omissions occurring prior to July 12, 2006 unless a finding is made that the district prevented the parent

from requesting the hearing by making specific misrepresentations that it had resolved the problem in this case or that the District withheld information from the Parent that was required under 20 U.S.C. §§ 1411-1419 (Part B.)

Petitioner alleges that Respondent denied FAPE when it failed to identify all disabilities of the Student, failed to timely conduct a May, 2005 FIE and failed to provide a dyslexia program prior to July 12, 2006. Petitioner's other issues involve allegations of acts or omissions by the District that occurred after July 12, 2006.

Did the District make specific misrepresentations that it had resolved the problem in this case?

The District told the Parent that only the principal and counselor were required at the meeting that the District referred to as a Transfer ARD. This meeting was held when the Student was first transferred into the District at the beginning of the school year. Thirty days later, an ARDC meeting was held with the mandatory members present. The applicable federal law provides the following with regard to transfer Students:

If a child with a disability (who had an IEP that was in effect in a previous public agency in another State) transfers to a public agency in a new State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency —

- (1) Conducts an evaluation pursuant to §§ 300.304 through 300.306 (if determined to be necessary by the new public agency); and
- (2) Develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in §§ 300.320 through 300.324. 34 C.F.R. §300.323(f)(1) and (2).

Applicable Texas law provides the following:

When a Student transfers from another state and the parents verify that the Student was receiving special education services in the previous school district or the previous school district verifies in writing or by telephone that the Student was receiving special education services, the school district must meet the requirements of 34 CFR, §300.323(a) and (f), regarding the provision of special education services. The timeline for completing the requirements outlined in 34 CFR, §300.323(f)(1) and (2), shall be 30 school days from the date the Student is verified as being a Student eligible for special education services. TAC §89.1050 (f).

Although the Student did not transfer into the District *within the same school year*, the District consulted with the Parent upon enrollment and based upon the information from her, implemented an IEP with comparable services for the Student until such time that a full ARDC meeting occurred, thirty days later, in compliance with state and federal regulations.

The Parent sought the RAP program for the Student, and was happy with his progress. The discontinuation of the program, and whether the District provided a dyslexia program timely, were the issues that Petitioner brought forward. While there may have been misunderstanding on the part of the Parent as well as District staff about the RAP program and whether it was a Scottish-Rite program, there was no evidence to show that the District specifically misrepresented that it had resolved the problem. *Dyslexia Teacher Academy Strategies in Reading* was used by the Student's ** grade special education teacher. She used *The SRA Corrective Reading*, a phonics based program, in his ** grade year. Both programs were direct, explicit, systematic instruction, as well as cumulative and sequential. Despite the fact that the RAP program was used one semester only, the evidence supports a finding that the District provided the Student with a reading program that contained the elements of dyslexia instruction.

The Parent testified that, in the summer, 2005, a District administrator told her that it wasn't in the Student's best interest to be in the RAP program and that he would lose his special education privileges. However, the administrator specifically told the Parent that the ARDC made the decisions about the Student's program. An ARDC meeting was held approximately a month after the conversation, and the RAP teacher attended to discuss her program, but, although future state testing was discussed, there was nothing in the record to show that the Parent requested an evaluation for dyslexia at that meeting.

The running of limitations begins at the time a litigant is entitled to seek a remedy, and contemplates the exercise of reasonable diligence on the part of the litigant to discover the facts giving rise to the claim. *See, e.g., Trinity River Authority v. URS Consultants*, 889 S.W.2d 259 (Tex. 1994). Although the Parent indicated that she was like a broken record in asking for a dyslexia evaluation, there is nothing in the ARDC minutes to support that she requested dyslexia evaluation at ARDC meetings, although she requested, and was granted, other evaluations of the Student. In light of the evidence that the administrator told the Parent that the ARDC made decisions about the Student's program, reasonable diligence would require that the Parent follow through with her request to the decision-making team. I find that the Parent failed to exercise reasonable diligence to discover the facts giving rise to the claim that the District prevented her from requesting a hearing due to specific misrepresentations by the District.

Did the District withhold information from the parent that was required under IDEIA?

A school district is required under IDEIA to provide prior written notice to a parent when it proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child. 20 U.S. § 1415 (c). Other information required under IDEIA relevant to this exception includes the Procedural Safeguards Notice (§1415(d)); the opportunity to review and examine the child's educational records (§1415(a)); certain notices pertaining to evaluations and re-evaluations (§1414(a), (b) and (c)); and copies of evaluations (§1414(b)). Evaluation is defined as "procedures used in accordance with §§ 300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs. 20 U.S.C. § 1414(a)(c).

Petitioner argued that the District failed to provide copies of the Texas Primary Reading Inventory ("TPRI") that was administered during the Student's ** grade year. The TPRI was administered to the Student's class and a letter regarding the screening and inventory was sent to the Parent. The TPRI is not an instrument that is used to determine whether a child has a disability; therefore, it is not an evaluation as defined under the IDEIA. The District did not withhold information from the Parent that is required under IDEIA if it failed to provide copies of the TPRI.

Petitioner argued that the District failed to give notice of ARDC meetings. While timely notice was not regularly provided, with the exception of the August 27, 2008 meeting, the Parent attended all ARDC meetings, some of which the Parent requested. Because the Parent was present at the ARDC meetings, there is an inference that she had knowledge that the meetings were to occur.

Petitioner alleged that Northwest ISD failed to provide notice of its intent to discontinue the RAP program. During the summer, another parent told Petitioner that the RAP program was to be discontinued. The RAP program was not specifically designated in the Student's IEP. At the ARDC meeting, the Parent had the choice to continue with the program, albeit on tape with assistance from a paraprofessional, and declined. The Petitioner failed to carry her burden of proof that the District withheld information by not giving notice that a District program was discontinued.

The IDEIA requires that Procedural Safeguards must be given to parents in the following instances:

(a) General. A copy of the procedural safeguards available to the parents of a child with a disability must be given to the parents only one time a school year, except that a copy also must be given to the parents —

(1) Upon initial referral or parent request for evaluation;

(2) Upon receipt of the first State complaint under §§ 300.151 through 300.153 and upon receipt of the first due process complaint under § 300.507 in a school year;

(3) In accordance with the discipline procedures in § 300.530(h); and

(4) Upon request by a parent. 20 U.S.C. 1415(d)

In August, 2004, in keeping with District practice to obtain consent for an FIE if it became necessary in a transfer case, Northwest ISD obtained consent for an FIE. Procedural safeguards were given to the Parent who gave written acknowledgment of receipt. The District accepted California's evaluations. The Parent requested new evaluations in early 2005, and the District evaluated for IQ and achievement in May, 2005. When an FIE was not conducted during the nine month period, the Parent made no effort to find out why the evaluation did not take place. Petitioner failed to exercise reasonable diligence to discover the facts giving rise to Petitioner's claim that the assessment was untimely. When additional language assessment was requested in August, 2006, the Parent, again, gave written acknowledgment of receipt of procedural safeguards.

Based on a preponderance of the credible evidence, including testimony from the individuals responsible for giving notice and Procedural Safeguards, I find that the District did not withhold information from the Parent that was required by the IDEIA.

The legislature intended that special education disputes be resolved expeditiously. The one year statute of limitations, and an expectation of the exercise of reasonable diligence on the part of the litigant, is consistent with that intent. *Texas Advocates Supporting Kids, supra*. Petitioner's claims based on acts or omissions of the district arising prior to July 12, 2006 (i.e., the 2004-2005 and 2005-2006 school years) are time barred.

Failure to Identify the Student with a Learning Disability

The District did not identify the Student with a Learning Disability, although it accepted the Scottish-Rite diagnosis of dyslexia. The preponderance of the evidence reflected that the District continually had in place an education program that incorporated the elements of a dyslexia program that met the State requirements, mirrored the recommendations of Scottish-Rite, and had the characteristics that Petitioner's expert witness testified were necessary in such a program. In this Student's case, he had a history of extreme concentration difficulties, speech difficulties, and reading and math weaknesses, and the District based his IEPs on his individual

needs, strengths and weaknesses. In other words, the evidence showed that the Student's program would have been no different if the District had determined him eligible as LD. I find that the failure to identify the Student as LD did not harm his educational program.

Speech Evaluation Without Parental Consent

The evidence is clear that formal language assessment was discussed during an August, 2006 ARDC meeting and in December, 2006, the District conducted the assessment without prior written consent from the Parent, in violation of the IDEIA. 34 C.F.R. § 300.300. However, there was no credible evidence that the child's right to FAPE was impeded as a result. The Parent knew the assessment had been requested, freely signed consent "after the fact," and participated in both the ARDC meeting when the assessment was requested and the meeting that reviewed the results. The Student's speech services were continued as previously determined; thus, there was no deprivation of educational benefits as a result of the evaluation without consent. 34 C.F.R. §300.513(a).

Failure to hold ARDC Meeting following May 14, 2007 Recess

The May 14, 2007 ARDC meeting was recessed to May 30, 2007. Because the District elected to have its attorney present, and the Parent then chose to bring an attorney, calendar conflicts ensued throughout the summer months. Ultimately, the ARDC meeting was held August 27, 2007 and the Parent, who withdrew the Student that day, did not attend. The ARDC meeting was not held timely, but since the delay occurred in the summer months and Extended School Year ("ESY") services were not in question, there was no deprivation of educational benefits.

Failure to allow Parent to Review All Requested Documents

The IDEIA gives a Parent the right of access to educational records, and Petitioner alleged that the District failed to provide a complete set of copies or failed to allow her to review all requested documents. Petitioner argued that the records were either incomplete or had been altered. The evidence reflects that there had been changes to the documents through the use of "white out" or marks through wording. The District's document maintenance was less than organized. However, the Parent failed to prove by a preponderance of the credible evidence that the alterations were for anything other than to correct mistakes.

A hearing officer may find a denial of FAPE *only* if procedural inadequacies impeded the child's right to FAPE, *significantly* impeded the parents' opportunity to participate in the

decision making process regarding the provision of FAPE to their child, or caused a deprivation of educational benefits.

The Parent was unsure if she began to request documents in April, 2006 or April, 2007. She testified that, when she was given the first set of documents by the District, she numbered them at the top of the white pages. Among those white, numbered pages were documents dated after April, 2006. Thus, the first request for documents had to occur in April, 2007. The District gave the Parent certain requested documents after the May, 2007 ARDC meeting. The Student was accepted to his private school in the spring, 2007. He was out of school during the summer, 2007. The Parent paid the private school registration fee in July, 2007, and filed this request for due process hearing July 12, 2007. The Student withdrew from Northwest ISD in August, 2007. In this instance, a finding of a denial of FAPE defies logic in light of the fact that, during the time that the Parent complains of a denial of access to records, i.e., the summer of 2007 and thereafter, there were no educational services for the District to provide, and no reason for decisions to be made regarding the provision of FAPE to the Student. During that time frame, the District could not have impeded the Parent's opportunity to participate in the decision making process regarding FAPE since the Parent had registered the Student for private school, had no intention to return him to the District, and did not return him to Northwest ISD. I do not find that the District denied the Parent an opportunity to review all requested documents

Allegation of Denial of FAPE

Because the question of a denial of FAPE is at the heart of this due process matter, attention is directed to the requirements of FAPE as those requirements are applied to the evidence. The Fifth Circuit has defined a free appropriate public education by delineating four factors to consider as indicators of whether an educational plan is reasonably calculated to provide the requisite benefits: 1) Is the educational program individualized on the basis of the child's assessment and performance; 2) Is the program administered in the least restrictive environment; 3) Are the services provided in a coordinated and collaborative manner by the key stakeholders; and 4) Are positive academic and non-academic benefits demonstrated? Cypress Fairbanks, 118 F.3d at 253.

A May, 2005 FIE, classroom based assessments and observations, as well as teacher observations were reviewed at the annual ARDC meeting in August, 2006. The committee put IEPs for the coming year in place. Both Parent and teachers agreed that the Student had made "great strides in the past year." The Student was working on an ending ** grade/beginning **

grade level in both reading and math. The Student's resource time was increased to 90 minutes per day in reading whereas the prior semester, reading was taught in the RAP general education setting. Speech services were reduced. The Parent was in agreement with the decisions.

A language assessment was performed December 4, 2006. Following a review of the evaluation, the ARDC elected to continue with the Student's speech services from the August, 2006 meeting.

During the Student's ** grade year, the teacher and Parent communicated about the Student, and discussed the Student's frustration resulting from being held accountable for his behavior. The Parent indicated great improvement in reading.

The Student's ** grade report cards reflected grades in the **'s and **'s. The Student's achievement level on the spring, 2007 SDAA was **, indicating that he was ready to begin instructional level, grade **.

During his ** grade year, the Student received special education instruction in the areas of need, i.e., language arts and math. He received general education instruction in all other subjects. Petitioner did not bring forth an issue of LRE.

Four ARDC meetings occurred after July 12, 2006 until the date of the hearing. The speech pathologist did not attend the August, 2006 meeting; however, the IDEIA does not include a speech pathologist among the required team members. A speech pathologist may be in attendance at the discretion of a parent or a district. 20 U.S.C. §1414(d)(1)(B)-(d)(1)(D). All mandatory ARDC members attended both the December, 2006 and May, 2007 meetings.

The evidence confirms that, at the August, 2006 meeting, the Parent was allowed to select among two program options to address her Student's dyslexia issues. Throughout the 2006-2007 school year the Parent was an active member of the ARDC team until after the request for due process hearing was filed during the summer, 2007. On the day of the August, 2007 ARDC meeting, the Parent withdrew the Student from Northwest ISD.

In the spring, 2006, the Texas State-Developed Alternative Assessment II ("SDAA") was administered for the first time to the Student as a ** grader. The instructional level tested was level **. The Student's achievement level in mathematics and reading was ** (proficient knowledge and skills related to the Texas Essential Knowledge and Skills at the instructional level).

The SDAA was administered to the Student as a ** grader during the spring, 2007. The instructional level tested was level **. The Student's achievement level in mathematics and

reading was ** (proficient knowledge and skills related to the Texas Essential Knowledge and Skills at the instructional level). The SDAA writing results reflected ** which reflects a baseline for the Student since 2007 was the first time for the Student to be assessed in writing. In reading and mathematics, the Student exhibited one year's growth during the year and was ready to begin ** grade work at the beginning of the 2007-2008 school year. He began attending his private school at that time.

During the Student's ** grade year in the District, he was described as happy, social, and had no problems relating to the other Students.

Based on a preponderance of the credible evidence, I find that the Student's education program was appropriate and there was no denial of FAPE.

Conclusions of Law

1. Prior to his unilateral placement at a private school, the Student resided within the geographical boundaries of the Northwest Independent School District, a legally constituted independent school district within the state of Texas. The District was responsible for providing the Student with a Free Appropriate Public Education.
2. The Student was eligible for special education services during the time of his enrollment at Northwest Independent School District under IDEIA, 20 U.S.C. § 1400 *et. seq.* and its implementing regulations.
3. The one year limitations period bars Petitioner from seeking relief for acts or omissions of the District prior to July 12, 2006. 19 Tex. Admin. Code § 89.1151(c).
4. The District's educational program is entitled to a legal presumption of appropriateness. Tatro v. Texas, 703 F.2d 823 (5th Cir. 1983). Petitioner bears the burden of proving that the educational program is not appropriate or that the District has not complied with the procedural requirements under the IDEIA. Schaffer v. Weast, 126 S.Ct. 528 (2005); Houston Independent School Dist. V. Bobby R., 200 F 3d 341 (5th Cir. 2000); Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 189 (1982); Cypress Fairbanks Independent School District v. Michael F., 118 F.3d 245 (5th Cir. 1997). Petitioner failed to meet his burden.

Order

Based upon a preponderance of the evidence and the forgoing findings of fact and conclusions of law, it is **ORDERED** that Petitioner's requests for relief are **DENIED**.

SIGNED on the 12th day of December, 2008.

BRENDA RUDD
Special Education Hearing Officer
For the State of Texas

NOTICE TO PARTIES

This decision is final, except that any party aggrieved by the findings and decision made by the hearing officer, or the performance thereof by any other party, may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States, as provided in 20 U.S.C., §1415(i)(2), and 34 C.F.R., §300.516.

DOCKET NO. 307-SE-0707

STUDENT

BEFORE A SPECIAL
EDUCATION

b/n/f PARENTS

§

V.

§

HEARING OFFICER FOR THE

§

NORTHWEST INDEPENDENT
SCHOOL DISTRICT

§

§

STATE OF TEXAS

§

SYNOPSIS

Issue No. 1: Did the District fail to identify all areas of the child's disabilities in that it failed to identify the child with a learning disability in reading and written expression?

Held: For Respondent; the District failed to identify the child as Learning Disabled (dyslexia), but provided him with a dyslexia based reading program that addressed his individual needs.

Citation: 34 C.F.R. § 300.111

Issue No. 2: Following the parent's written consent for a full, individual evaluation in August, 2004, did the District fail to evaluate the child until May, 2005?

Held: For Respondent; outside the one year limitations period

Citation: 34 C.F.R. § 300.300; 34 C.F.R. § 300.507; 19 T.A.C. § 89.1151(c)

Issue No. 3: Did the District fail to timely provide the child with a dyslexia program in reading and writing; and whether, following the District's provision of a dyslexia program, did it discontinue the program without providing notice to the parent and provide a different, less effective dyslexia program for the child?

Held: For the Respondent

Citation: 34 C.F.R. § 300.320

Issue No. 4: Did the District fail to timely evaluate the child for speech in December, 2006 and did it evaluate without requesting parental consent?

Held: For Respondent; the District evaluated the child without parental consent, but there was no denial of FAPE.

Citation: 34 C.F.R. § 300.300; 34 C.F.R. §300.513(a)

- Issue No. 5:** After an agreed recess of a May 14, 2007 Admission, Review, and Dismissal (“ARDC”) meeting to May 30, 2007, did the District fail to hold the ARD meeting?
- Held:** For Respondent; the District failed to hold the ARDC meeting due to calendar conflicts on the part of both parties, and since the child was on summer break until the ARDC meeting was held, there was no denial of FAPE.
- Citation:** 34 C.F.R. § 300.324; 19 T.A.C. § 89.1050(h)
- Issue No. 6:** Did the District fail to provide a complete set of copies or to allow the parent an opportunity to review all requested documents?
- Held:** For Respondent
- Citation:** 34 C.F.R. § 300.613; 19 T.A.C. § 26.004
- Issue No. 7:** Did the District deny FAPE to the child from August, 2004 to present date?
- Held:** For Respondent
- Citation:** 34 C.F.R. § 300.101; Schaffer v. Weast, 126 S.Ct. 528 (2005);
- Issue No. 8:** Should the statutory exceptions to the Texas one year limitations period apply in this case?
- Held:** For Respondent
- Citation:** 34 C.F.R. § 300.507; 19 T.A.C. § 89.1151(c)