

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

DECISION OF HEARING OFFICER

Student, by and through her parent, (“Petitioner” or “Parent”) requested a due process hearing pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA”), 20 U.S.C. § 1400 *et seq.* The Respondent is McKinney Independent School District (“Respondent,” “District,” or “MISD”).

In the request for due process hearing, Petitioner alleged that Respondent denied the Student a Free Appropriate Public Education (“FAPE”) by its failure to identify her as a child with a disability in need of special education services and its failure to place the Student in special education. As relief, Petitioner requested that the hearing officer enter an order placing the Student at **, a private school, at District expense, and an order directing the District to reimburse Petitioner for previous costs of the private placement.

Procedural History

Petitioner filed this request for due process hearing on March 2, 2009. A First Scheduling Order was entered March 3, 2009. Petitioner was represented by attorney, Myrna Silver. Respondent was represented by attorney, Susan Graham.

On March 16, 2009, a pre-hearing conference was held at which time the parties agreed to re-schedule the due process hearing date to May 27-29, 2009. Following the hearing of May 27-29, the parties agreed to submit written closing arguments no later than June 29, 2009. By agreement of the parties, the deadline for closing arguments was extended to July 7, 2009. The decision due date was extended accordingly to August 7, 2009.

Based upon the evidence and argument of the parties, the undersigned hearing officer makes the following findings of fact and conclusions of law. Citations to the transcript will be designated as “Tr.” followed by the volume and page number. Citations to exhibits will be designated as “P” for Petitioner and “R” for Respondent, followed by the exhibit number.

Findings of Fact

1. The Student resides within the geographical boundaries of the McKinney Independent School District. At the time Petitioner filed this request for due process hearing, the Student was an ** year old, ** grader, and attended a private school, ** (“**”) in **, Texas.
2. Student attended private ** before entering the District in the ** grade. She attended MISD through the end of the fall semester of ** grade.
3. Historically, the Student is reported as having a “flat” affect, periods of staring, diminished processing speed, and general shyness. Her Parent is concerned that she has few friends and lacks social skills commensurate with her age. She has ** intelligence quotient (“IQ”). Academically, she continuously performs on grade level in all subject matter. R-1, 3, 6 and 14; P.-2, 9 and 11.
4. While Student attended private **, due to concerns with behavior and academic progress in the areas of reading, math, and written language, the Parent requested an evaluation of the Student by the District. The Parent noted concerns with the Student’s social skills and that she did not initiate interaction with her peers. The District used a variety of assessment tools and conducted a Full Individual Evaluation (“FIE”) in November, 2003. The conclusion was that the Student did not qualify as Learning Disabled (“LD”) or Speech Impaired (“SI”). The data reflected that the Student had some social skill and communication deficits when compared with her peers, but that the behaviors appeared to be more congruent with social-emotional issues than a manifestation of a PDD. The evaluators concluded that the deficits did not significantly impair her ability to function and participate in the educational setting; thus, the Student was not eligible for special education services as a student with an Autism Spectrum Disorder (“ASD”). The ARDC recommended that, among other things, the Student be referred to the general education counselor for consideration of inclusion in a social skills or friendship group, that she be allowed extra time to process oral responses, and repeat verbal instructions. The Parent agreed with the Admission, Review, and Dismissal Committee (“ARDC”) decision. R.-1; P.-3.
5. In March, 2005, due to concerns about social difficulties, communication problems, and difficulties with basic self-care activities, the Parent obtained a private, neuropsychological evaluation of Student. The neuropsychologist interviewed the Student and her parents and administered a selected battery of tests with the Student. Her IQ score was in the ** range; she exhibited a mild weakness with auditory working memory within the context of generally ** verbal and nonverbal information processing capacity; the Student’s level of academic skill development was **or ** in basic reading, math, and early written expression. The neuropsychologist determined that the Student did not have a learning disability in reading, math,

or written expression. She displayed a relative weakness with cognitive flexibility, though her ability to think abstractly appeared normal. The neuropsychologist determined that the Student did not exhibit the core deficit in social reciprocity and social interest that tends to be a defining characteristic of an ASD. He acknowledged that the Student exhibited many features of Attention Deficit Hyperactivity Disorder (“ADHD”), and concluded that there was no diagnostic clarity for the Student and recommended ongoing psychiatric intervention and detailed a variety of social opportunities for social skill development in a controlled setting at school. P.-5; R.-2.

6. In June, 2007, after Student’s ** grade year, the Parent obtained a private psychological evaluation because of concerns about the Student’s “behavior patterns and learning style.” The Parent reported that the Student preferred to play alone, did not pick up on humor or facial expressions, and hardly showed expression herself. The private examiner reviewed previous testing, obtained information from the Student and the Parent, and conducted a battery of tests. P-9; R-14.
7. The Student scored ** on the one test of pragmatic language skills that was administered by the private examiner. Based on parent report of adaptive behaviors at home and in the community, the Student scored ** her IQ. Her academic achievement scores in math were ** her grade level, while she scored in the ** range in reading and writing skills. The private examiner used one instrument to test for ASD, the Childhood Autism Rating Scale (“CARS”), which score was based on observation and parent report. The private examiner did not seek information from the District about the Student’s school functioning or behavior. The private evaluation resulted in a determination of LD in math and Asperger’s Disorder (“AD”). The private examiner made several recommendations among which are as follows:
 - a. Teachers should be aware of the Student’s social communication skills goals and be prepared to reinforce her when she used appropriate social overtures.
 - b. Because children with AD are susceptible to sensory overload and have difficulty with change, plans should be in place to help reduce such stressors.
 - c. Demands for handwritten work should be reduced as much as possible.
 - c. The Student should be given math on a ** and ** level.
 - d. Prepare the Student ahead of time for significant transitions.

At hearing, the private examiner testified that her conclusion that the Student was LD was incorrect. Tr. Vol. II, pp. 114-115; P-9; R-14.

8. Due to concerns with the private examiner’s diagnosis of AD and LD, the District conducted a second FIE in October, 2007. The Student was in ** grade. The evaluation team concluded that the Student did not demonstrate eligibility for special education as a child with a learning disability, and that her academic needs could best be addressed in the general education classroom. The evaluation team noted that the Student had a qualitative impairment in social

interaction and did not have restricted repetitive and stereotyped patterns of behavior, interests, and activities. It noted that the Student demonstrated an understanding and use of language appropriately and interpreted nonverbal gestures appropriately. She used gestures at appropriate times. Unlike children with AD who typically are pressed for speech, talking excessively about one subject, the Student was reticent to speak and often remained silent. When she spoke, it was relevant and appropriate to the subject at hand. She switched topics without distress. The team determined that the Student did not meet the criteria for Speech Impairment, Autism, or for another specific pervasive development disorder (“PDD”) for the reason that she did not exhibit the characteristics of the disorder across settings. Recommendations for accommodations were made to assist the Student with social communication and social skills. A summary of assessment tools used by the District is attached to this decision as Table I. P.-11; R.-6.

9. An ARDC meeting was held to review the October, 2007 FIE. The District committee members concluded that the Student did not meet eligibility criteria for a disability and did not exhibit an educational need for special education services. They recommended that the Student participate in a social skills group and a lunch group with her teacher to facilitate increased social communication. The Parent disagreed with the ARDC decision and requested an Independent Educational Evaluation (“IEE”). R-8.
10. An IEE was conducted by a licensed psychologist who diagnosed the Student as a child with a PDD- not otherwise specified (“NOS”). In her April, 2008 report, the IEE examiner determined that the Student had an educational need due to the Student’s weakness in the area of inferencing skills. She further listed certain Texas Essential Knowledge and Skills (“TEKS”) that she determined that the student could not meet, and indicated that the Student would be unable to meet other TEKS that require a student to work with others. A summary of assessment tools used by the IEE examiner is attached to this decision as Table II. P.-20.
11. An ARDC meeting was held to review the results of the IEE in June, 2008. The Student’s progress and TAKS results were reviewed. The Student was reported to have been raising her hand in class, and smiling and laughing more as her ** grade year progressed. The teachers reported that the Student shared in front of the class when prompted. The District members of the ARDC, again, did not believe that the Student was eligible as an autistic child in need of special education services. R-9
12. The Student ** the Texas Assessment of Knowledge and Skills (“TAKS”) in the ** and ** grades. R.-4.
13. At the Parent’s request, the Student transferred to a different elementary school for her ** grade year. Her teachers reported that she transitioned to the new school successfully, and became

more talkative and social as the semester progressed. She sought help from her teacher by raising her hand in class. She made ** in math, reading, writing, science and social studies. Tr. Vol. III, pp. 260-263; 272-279; 285-287; 292-294.

14. During the fall of her ** grade year in the District, the Student scored ** or ** in all but one subject area on a nationally normed assessment test. Tr. Vol. III; pp 278-279.
15. The Parent withdrew the Student from the District and unilaterally enrolled her in ** on January 29, 2009.
16. ** is a private school for children with learning differences and/or have difficulty functioning in a large classroom. There are no more than ten students in an elementary classroom. The majority of the children at ** have been diagnosed with specific disabilities. The school is not a therapeutic school, but is an academic school with social skills curriculum. Tr. Vol. I, pp.30-36.
17. The Student visited ** for two days prior to enrollment. Teacher comments reflected that she did well academically, but did not want to participate in board work or read aloud. She played with all the girls from other classes at recess and was much more extroverted during that time. The teacher commented that she was shy, but did speak up more after the first two days. R-15.
18. Upon her entry into ** as a second semester ** grader, the Student was administered the Brigance Basic Skills Inventory (“Brigance”) and scored ** in Reading. Although not called a weakness by **, the Student’s math scores were ** as her reading scores. In the spring, 2009, ** administered the Iowa Test of Basic Skills, a normed, standardized test. The Student’s grade equivalents in the various tests ranged from ** to **. Tr. Vol. I, pp. 37-41 and 65-67; P.-34.
19. The Student began to warm up at ** by February 2, 2009. By teacher report, she was talking more and raised her hand to ask a question about her math work. After approximately one week, she was talking more to classmates, especially at lunch, and was doing well all around. R-15.

Discussion

Public school districts must comply with the IDEIA procedures for identifying children with disabilities who need special education, and delivering appropriate services as necessary to provide 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 IDEIA bears the burden to prove that the child has been denied a FAPE. *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff’d*, 468 U.S. 883 (1984); *Schaffer v. West*, 126 U. S. 528 (2005).

A child with a disability means a child evaluated in accordance with 34 C.F.R. §§ 300.304 through 300.311 as having autism and who, by reason thereof, needs special education and related

services. Autism means a developmental disability *significantly* affecting verbal and nonverbal communication and social interaction that *adversely affects* a child's educational performance. Autism characteristics are generally evident before age three. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. *emphasis added*. 34 C.F.R. § 300.8; 19 T.A.C. §89.1040 (c)(1).

Before a district makes a determination regarding eligibility for special education services, it must conduct a FIE following statutorily prescribed standards. 20 U.S.C. §1414. Under both federal and state standards of eligibility, the presence of a disability alone is not enough to qualify a child to receive special education services; the law also requires that the child be in need of those services to progress and obtain the requisite educational benefit. *J.D. by J.D. v. Pawlet School District*, 33 IDELR 34 (2nd Cir. 2000). IDEA requires more than a diagnosis of a disability; it requires that a child exhibits symptoms of a qualifying disability *and* exhibits them to such a degree that they interfere with the child's ability to benefit from the general education setting. *** v. Lake Travis Indep. Sch. Dist.*, No. A-07-CA-152-SS (W.D. Tex. Filed Aug. 10, 2007); *Alvin Indep. Sch. Dist. v. A.D.*, 46 IDELR 221(5th Cir. 2007).

Petitioner argued that Respondent's 2007 FIE was invalid. He argued that the District did not assess pragmatic language. However, the evidence revealed that the District tested for pragmatic language. Petitioner argued that the Asperger Syndrome Diagnostic Scale ("ASDS") was invalid because the evaluators did not follow the test instructions. Each item was to have been marked with either a "1" or a "0". At hearing, the evaluators clarified that they only marked the items that they observed (with a "1"), and left blank those items that were not observed. Despite the failure to specifically follow the instructions, I do not find that the failure rendered the assessment invalid, nor do I find that the District failed to comply with evaluation requirements of the IDEA.

At hearing, the Parent reported that the Student **** and interpreted that as a repetitive activity. He reported that the Student got the other children involved with **** at ****. The Parent gave an example of what he perceived to be the Student's inability to communicate her needs when she fell during **** and ****. Although the Parent believed that she was unable to communicate to her teachers, the evidence reflected that the Student told her **** about the accident.

Petitioner expressed frustration with the Student because she ****. The Parent testified that she got into trouble for ****, and ****. At hearing, the Parent, referring to a picture of the Student, described her as having no smile, a flat affect, and having ****. The picture was perceived differently by this hearing officer.

It is clear that, across settings, the Student is quiet, and does not initiate conversation readily. The evidence shows that she responds to questions, but uses a minimal amount of explanation. She asks questions when necessary for the completion of her school work. At times, she uses words

inappropriately. She transitions easily, ** in school successfully, and moved from ** to another, then changed to ** without difficulty. She is described as having a flat affect, but does smile and laugh at times. She is seen staring at nothing in particular. She is capable of being playful with classmates.

The question to be determined is whether the Student's characteristics rise to the level of a child with a disability with autism who is in need of special education services. The Student has been diagnosed by two individuals as having a disability on the autism spectrum although they gave different diagnoses. The private examiner diagnosed her with AD. The IEE examiner diagnosed her with PDD-NOS, and testified that she is in need of special education. The District concluded more than one time that the Student is not autistic and does not need special education services.

Having a diagnosis of ASD does not fully satisfy the requirements of a child with a disability under the IDEIA. The developmental disability must *significantly* affect verbal *and* non-verbal communication *and* social interaction that *adversely affects* a child's educational performance. In other words, the disability must significantly affect all specified areas. In this case, the Student can communicate verbally and non-verbally. She uses and interprets non-verbal communication appropriately. She talks and responds, albeit without elaboration. She raises her hand to ask questions in class. Although she appears to be a shy child, she can interact socially. Both her District teachers and her ** teacher made reference to her interaction with girls during recess. The fact that she does not do so as much as one might prefer is not sufficient to determine that her characteristics *significantly* affect verbal and non-verbal communication and social interaction.

In the April, 2008 IEE, in support of her determination that the Student had an educational need for special education services, the IEE examiner stated that the Student had difficulty with inferencing in both reading and speaking. She believed that the Student's reading grades and overall test scores *may* mask her difficulty with specific types of questions. She also detailed certain TEKS that she believed the Student would not be able to achieve. These objectives are written for the ** through ** grade. She also predicted that some TEKS require students to work with others and that the Student would have difficulty doing so because of her communication and social deficits.

Contrary to the IEE examiner's opinion, the Student passed the TAKS in ** grade and did quite well on a nationally normed test during the fall of her ** grade year. The Student consistently performed successfully on grade level throughout her school years. Testimony from her teachers reflected that she is capable of working with other students. While the IEE examiner expressed concern that the Student may experience difficulty in the future, the evidence does not support a current adverse affect in educational performance.

Petitioner contends that the Student needs special education services to progress and obtain the requisite educational benefit. The evidence reflects that the Student progressed while in the District, both

academically and socially. She made friends, played during recess with other children, and interacted with them in the classroom. The Student continued to progress after enrollment in **, making friends and succeeding academically. While it is advisable that her progress and behavior be monitored closely, at this time, the Student does not need special education services to progress and obtain the requisite educational benefit.

Conclusions of Law

1. The McKinney Independent School District is the local education agency responsible for determining the Student's eligibility for special education and related services under the IDEIA. 20 U.S.C. § 1400 *et seq.* and its implementing regulations.
2. The conclusions of the District's ARDC that the Student is not eligible for special education services as a student with a disability under IDEIA are appropriate; thus, there has been no denial of FAPE. 20 U.S.C. §§ 1401(3), 1401(30), 1412(a)(1)(A); 34 C.F.R. § 300.8; 19 T.A.C. § 89.1040(c)(1); *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).

Order

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that all relief requested by Petitioner is DENIED.

SIGNED on the 27th day of July, 2009.

Brenda Rudd
Special Education Hearing Officer
For the State of Texas

| TABLE I | Results |
|--|----------------|
| McKinney ISD October, 2007 FIE Data | |
| Behavioral Observations | ** |
| Comprehensive Assessment of Spoken Language (CASL) | ** |
| Informal Articulation Assessment | ** |
| Test of Narrative Language (TNL) | ** |
| Parent Questionnaire; Childhood Asperger Syndrome Test (CAST); Children's Communication Checklist-2 (CCC-2); Sensory Profile | ** |
| Asperger Syndrome Diagnostic Scale (ASDS) | ** |
| Behavioral Profile | ** |
| Wechsler Abbreviated Scale of Intelligence Scale | ** |
| Wechsler Intelligence Scale for Children-IV | ** |
| Kaufman Assessment Battery for Children-2 nd Edition (KABC-II) | ** |
| Vineland-Adaptive Behavior Scales; Second Edition Survey Interview Form | ** |
| Texas Assessment Of Knowledge and Skills | ** |
| Woodcock-Johnson Psycho-Educational Battery-III | ** |
| Kaufman Test of Educational Achievement Test-II | ** |
| Accelerated Math Data | ** |
| Released ** grade Math TAKS | ** |
| Assistive Technology | ** |

| TABLE II | Results |
|--|----------------|
| IEE Assessment | |
| Burkes-2 | ** |
| Behavioral Observations | ** |
| Classroom Observation | ** |
| Autism Diagnostic Observation Scale (“ADOS”) | ** |
| NEPSY-2 | ** |
| Test of Written Language-** (“TOWL-**) Spontaneous Writing scale | ** |
| Key Math-R | ** |
| Standardized Reading Inventory-** (“SRI-**)”) | ** |
| Texas of Problem Solving-** (“TOPS-**)”) | ** |
| Test of Language Competence (“TLC”) | ** |
| Test of Pragmatic Language (“TOPL”) | ** |
| Social awareness and pragmatic language | ** |

NOTICE TO THE PARTIES

The decision issued by the hearing officer 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. A civil action brought in state or federal court must be initiated not more than 90 days after the date the hearing officer issued his or her written decision in the due process hearing. 20 U.S.C. §§1415(i)(2) and (3)(A) and 1415(l).

DOCKET NO. 161-SE-0309

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

SYNOPSIS

Issue Number 1: Whether the District denied the Student FAPE due to its failure to identify her as a child with a disability in need of special education services and its failure to place the Student in special education.

Held: For the school district.

Citation: 20 U.S.C. §§ 1401(3), 1401(30), 1412(a)(1)(A); 34 C.F.R. § 300.8; 19 T.A.C. § 89.1040(c)(1); *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)