

STUDENT	§	BEFORE A SPECIAL EDUCATION
	§	
	§	
V.	§	HEARING OFFICER FOR THE
	§	
JOSHUA INDEPENDENT	§	
SCHOOL DISTRICT	§	STATE OF TEXAS

DECISION OF THE HEARING OFFICER

I. Statement of the Case

Petitioner STUDENT by next friends PARENTS (hereinafter referred to as “Petitioner” or “Student”) filed a Request for Special Education Hearing and Required Notice on August 5, 2009 pursuant to the Individuals with Disabilities Education Improvement Act 20 U.S.C. § 1400 et seq., (hereinafter referred to as “IDEIA”), against Respondent JISD (hereinafter referred to as “Respondent” or “School District”). 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 August 5, 2009. Petitioner was represented by *** next friends, *** parents, and was not represented by an attorney. Respondent was represented by Attorney Cynthia S. Buechler of Beuchler & Associates of Austin, Texas. A telephone prehearing conference was held on August 25, 2009, at which time both parties waived their right to a final decision within forty-five (45) days of the date the written request for due process hearing was filed. [34 C.F.R. §300.511(c)] A due process hearing was held on Monday, November 3, 2009, in Joshua, Texas.

Petitioner’s Request for Special Education Due Process Hearing and Required Notice (“Complaint”) originally alleged that Petitioner, now a *** grade Student in *** in *** had been denied a free appropriate public education (“FAPE”) by Joshua ISD in that School District failed to abide by the requirements of the Admission Review and Dismissal Committee meetings (“ARDs”) held on May 9, 2007 and September 17, 2009. Petitioner also complained that Student was denied FAPE by Respondent’s refusal to ***, and, further that Student was withdrawn from School District as a result of Respondent’s failure to implement the agreed Individualized Education Programs (“IEPs”) as developed and agreed upon at the ARDs.

Respondent filed a Motion to Dismiss the Complaint, citing IDEIA implementing regulations at 34 C.F.R. § 300.511(e) which states:

A parent or agency must request an impartial hearing on their due process complaint within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process complaint, or if the State has an explicit time limitation for requesting such a due process hearing under this part, in the time allowed by that State law.

Respondent also cited 19 T. A. C., 89.1151(c) which states:

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.

After consideration of Respondent's Motion and Petitioner's arguments at the Prehearing Conference, the Special Education Hearing Officer limited the issues in this Due Process Hearing. Specifically, the time period for consideration of the alleged denial of FAPE was limited to the one year time period before the Complaint was filed. Moreover, the issues raised in the Complaint which remained at issue in this Due Process Hearing were defined as follows:

1. During the due process hearing, Petitioner must present evidence which specifically identifies the special education issues associated with the denial of a *** complained of by the parents and parental placement of the student in private school which occurred during the time period extending from August 5, 2008 to August 5, 2009;
2. At the same time, because Petitioner is seeking reimbursement for private school placement, Petitioner must also address the question of notification to the School District before Student was withdrawn from school; and
3. Petitioner must also present the factual bases associated with the alleged denial of FAPE which led to the private school placement.

As relief in this due process hearing, Petitioner requests that Respondent be ordered to do the following:

1. Pay compensation for tuition for Student's previous school year, the coming school year, and any subsequent years until Student is on academic grade level as set forth by TEA or until Student completes *** grade.
2. Conduct changes at the policy and staffing level at School District as TEA oversees and directs as necessary.

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. Petitioner is a student who resides within School District. Student has been determined eligible to receive special education services on the basis of meeting eligibility criteria for the disability: Traumatic brain injury.

2. School District is a political subdivision of the State of Texas and a duly incorporated Independent School District 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 attended *** School in School District in *** during the 2006-2007 School Year. Student's Cumulative Record reveals that Student made "Below Average" progress in ***.

4. Student was evaluated by School District in September 2006 and was referred for a private evaluation to assess current cognitive abilities. Student's most recent Neuropsychological Evaluation is dated October 20, 2006. The evaluation showed difficulties with memory for unassociated visual information, significantly impaired attention, weak language abilities, impaired visual-motor integration skills, extremely weak bilateral hand finger manipulation, impaired problem solving and reasoning and significant difficulty with cognitive flexibility.

5. Student also attended *** School in School District in *** Grade during the 2007-2008 School Year. Student's special education program for *** Grade agreed upon by all members in the September 17, 2007 ARD provided for Student's inclusion in the general education classroom for all classes, with modifications to assignments, instructions, and materials, including, but not limited to the following: Reduced assignments; extra time for completing assignments; emphasis on major points; modified spelling tests; help with paper and pencil activities; short instructions; extra time for written responses; frequent feedback; sit near teacher for instructional purposes; daily motor lab breaks; and altered format of materials. Student's IEP also included goals and objectives for managing Student's behavior.

6. Special attention was given to Student's language and reading skills during the *** Grade, and an extensive list of interventions was developed for Student's use in the general education inclusion setting. Specific interventions included a smaller group setting for reading instruction, use of the Reading Lab, and Reading Mastery instruction. Standardized testing using the Texas Primary Reading Inventory ("TPRI") showed that Student made progress in Reading during the *** Grade. TPRI showed that Student progressed from the Grade ***/Story *** instructional level with *** words per minute fluency and accuracy of *** out of 15 words to Grade ***/Story *** instructional level with *** words per minute fluency and accuracy of *** out of 15 words.

7. Student earned passing grades in all subjects in *** Grade, including ***. Student was promoted to the *** Grade. Private School also provided specific Student goals in the following areas: Attention: Production Controls; Social Cognition: Verbal Pragmatics; Social Cognition: Conflict Resolution; Attention: Math. Private School noted that Student had had a rough start, but was making real progress in “social and obeying rules.”

8. In May, 2008, Petitioner met with School District’s Director of Special Education regarding Student’s special education program. Petitioner complained that Student was isolated in the classroom routinely ***, and that Student was being taught in the Resource Classroom rather than the general education classroom in accordance with Student’s IEP. Petitioner’s concerns on those two issues were resolved by removing *** and determining that Student was not being provided Resource Classroom services, and Petitioner thanked School District’s Special Education Director for the expeditious resolution.

9. In June, 2008, Petitioner requested that Student be ***. In speaking with School District personnel regarding the ***, Petitioner had two reasons for the request: (1) Student could achieve more *** (2) Student’s parent (***) ***. Parent did not ***. Parents also considered, but ultimately rejected the idea of allowing Student to repeat *** Grade. Petitioner was informed that School District would not allow *** based solely on parental or student preference for ***. Petitioner’s *** was denied.

10. Following the denial of Petitioner’s *** request, Parent ***. Parent withdrew Student from School District, stating:

“Student will be attending the Private School for the 2008-2009 school year. In doing this we are also denying Special Education services from the ISD.”

Student was enrolled in *** Grade at the Private School.

11. In *** Grade at the Private School, Student earned grades of ***. Private School did not conduct an additional evaluation and did not provide any records of standardized testing.

12. Private school teachers noted that Student was doing better in some skills such as drawing, listening and participating in Language Arts, participating in Physical Education, learning about weather and recording data for science, and showing improvement in Math. Student’s teachers in Art and Language Arts stated that focus, attention, and staying on task to complete assignments continued to be areas where Student needed work. Student’s Math teacher stated that Student had shown much improvement in Math, and might need tutoring to address more difficult concepts next year.

13. The *** School has methods of addressing the needs of students with varying levels of skills, abilities, and academic achievement. The *** School personnel stated its continued willingness to work with students, including Student, who are not achieving on grade level.

14. Petitioner seeks reimbursement for Student's tuition at Private School to assist in meeting the educational costs at the Private School, which Petitioner believes provides an educational environment where Student can progress. Petitioner believes Student is entitled to reimbursement for School Years 2008-2009, 2009-2010, "and subsequent years until Student is on academic grade level as set forth by TEA or completion of Student's *** grade year."

III. Discussion

In general, a school district must provide for the education of children with disabilities in the "least restrictive environment." *See*, 20 U.S.C.A., § 1412(a)(5), and 34 C.F.R. §§300.114 - 300.117. Under Federal regulations implementing IDEIA, a school district must ensure that:

Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. §300.114(a)(2)(ii).

Consequently, *** of a child with a disability *** is open to question if there is no evidence that such a *** is necessary in order for the student to receive FAPE.

In this special education due process hearing, Petitioner alleges denial of FAPE as a result of Respondent's refusal to allow ***. Evidence presented by both parties established that the *** was denied because the school district had a policy of not allowing ***. Various reasons offered by Petitioner for the requested *** were not related to Student's special education program or services. In fact, Petitioner offered no reason for the requested *** which was related to the alleged concerns with Student's IEP—those concerns occurred outside the one year period of review for this due process hearing and had been addressed before the *** was requested. Therefore, the evidence established that Petitioner's *** request was not related to Respondent's provision of FAPE for the child with a disability in the least restrictive environment.

A parent placing a student in private school may receive reimbursement for private school tuition in accordance with IDEIA and its implementing Federal and State regulations. In order to prevail in a special education due process hearing for private school reimbursement, Petitioner must show that Respondent failed to provide Student with "a free appropriate public education that emphasizes special education and related services designed to meet [Student's] unique needs and prepare [Student] for further education, employment and independent living." *See*, 20 U.S.C.A., §1400(d). Additionally, Petitioner would have to show that the private school placement was appropriate. *See*, 34 C.F.R. §300.148(c). A special education hearing officer may find that parents are entitled to reimbursement if she finds that the school had not made a free appropriate public education available to the child prior to that enrollment. *See*, 20 U.S.C.A., §1412(a)(10)(C); 34 C.F.R. §300.148(c); and 19 T.A.C., §89.196. At the same time,

the Hearing Officer cannot order Respondent to provide Student a private school education at public expense if she finds that the school district did provide a FAPE, including an IEP reasonably calculated to provide Student an educational benefit, and parents simply preferred the private school. An IEP must be in effect at the beginning of each school year.

Petitioner does not argue that the IEP was not in effect at the beginning of Petitioner's *** Grade school year, nor does Petitioner assert that School District failed to respond to requests for an ARD to adjust the IEP at any time before Student was withdrawn from *** School in ISD and placed in the Private School. Accordingly, there is no question of the timeliness of the IEP or the School District's refusal to consider any changes the IEP at Parents' request.

Parents herein do argue that Respondent failed to provide a FAPE because student was not on grade level at the time of the withdrawal, and that Respondent did not allow Student to ***. But, it is well-settled that school districts are not charged with maintaining all students on grade level; such a requirement would contradict IDEIA's requirement that school districts recognize the unique needs of students with disabilities. *Cypress-Fairbanks ISD v. Michael F.* 118 F. 3d 245 (5th Cir. 1997); *Hendrik Hudson Board of Education v. Rowley*, 458 US 176, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982). More importantly, school districts are charged with providing each student with an IEP which allows student to make educational progress which is more than *de minimus*. *Michael F., supra*. In this case, Respondent showed that School District implemented an IEP under which Student made educational progress, and was promoted from *** to *** Grade to *** Grade. Finally, the issues which Parents had with respect to Respondent's implementation of Student's IEP were promptly addressed and were not outstanding at either the time the *** was sought or the time Parents withdrew Student from ISD and removed Student to a private school.

One problem Petitioner faced with this Request for Special Education Due Process Hearing was that the few School District actions complained of concerning Student's IEP occurred largely outside the period of review under TEA regulations. Only the denial of the *** request, the withdrawal, and the Private School placement, which were all effective at the start of the 2008-2009 School Year, occurred within one year of the filing of the request for due process hearing. Student attended *** Grade at the Private School for the entirety of the 2008-2009 School Year. Because both Petitioner and Respondent provided information on Student's historical educational program at ISD, however, it was clear that Petitioner made comparable progress in both the public and private school settings. Both the ISD and the Private School demonstrated an ability to provide individualized accommodations to address Student's strengths and weaknesses in educational achievement. While Petitioner prefers the private school setting, Respondent cannot be held responsible for the Private School tuition costs.

IV. Conclusions of Law

1. Petitioner is a student in the School District who is eligible for special education services based on meeting eligibility criteria as a student with traumatic brain injury. 20 U.S.C.A. §1401(3)(A); 34 C.F.R. § 300.8(c)(12); 19 T.A.C., § 89.1040(c)(11).
2. Respondent ISD has a responsibility to provide Student with a free appropriate public education. 20 U.S.C.A. § 1412; 34 C.F.R. §300.2; 19 T.A.C. § 89.1001.
3. Petitioner had an appropriate Individualized Education Program (“IEP”), including special education in an ISD inclusion classroom with instructional accommodations and supports, and appropriate related services at the time Petitioner withdrew Student from ISD, denied special education services for Petitioner, and placed Student in a Private School. 34 C.F.R. §300.323; 19 T.A.C. §89.1055.
4. Petitioner made educational progress and obtained a meaningful educational benefit from the IEP which was being implemented in ISD. *Hendrik Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Cypress-Fairbanks ISD v. Michael F.*, 118 F. 3rd 245 (Fifth Cir. - 1997).
5. Petitioner did not show that Respondent’s denial of a *** was in any way related to Petitioner’s special education; therefore, the denial of the *** did not deprive Petitioner of a free appropriate public education.
6. Respondent made a free appropriate public education available to Petitioner in a timely manner under the IEP in place at the time of the withdrawal and before Petitioner was enrolled in the Private School. Petitioner’s placement in private school was not appropriate, and was not Petitioner’s least restrictive environment. Consequently, Petitioner is not entitled to reimbursement for Private School tuition. 20 U.S.C.A., §1412(a)(10)(C); 34 C.F.R. §300.148(c); and 19 T.A.C., §89.196. *Hendrik Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Cypress-Fairbanks ISD v. Michael F.*, 118 F. 3rd 245 (5th Cir. - 1997); *Tatro v. State of Texas*, 625 F.2d 557 (Fifth Circuit - 1980).

V. Order

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

SIGNED in Austin, Texas this 2nd day of December, 2009.

Gwendolyn Hill Webb
Special Education Hearing Officer

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SYNOPSIS

Issue: Was Petitioner denied a free appropriate public education when Respondent failed to allow Student to *** for reasons of potentially higher achievement or parental preference?

Federal Citation: 20 U.S.C.A., § 1412(a)(5), and 34 C.F.R. §§300.114 -300.117;

Texas Citation: 19 T. A. C. §89.1001.

Held: Petitioner was not denied FAPE by reason of Respondent’s failure to approve a *** request unrelated to special education where school district showed that FAPE was provided in the assigned *** School, and school district routinely denies *** for all students for reasons of *** preference.

Issue: Is Petitioner entitled to reimbursement for private school tuition because Respondent denied Petitioner a free appropriate public education in a timely manner or because Student’s private placement is appropriate?

Federal Citation: 20 U.S.C.A., §1412(a)(10)(C); 34 C.F.R. §300.148(c). Hendrik Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176 (1982); Cypress-Fairbanks ISD v. Michael F., 118 F. 3rd 245 (Fifth Cir. - 1997).

Texas Citation: 19 T. A. C., §89.196. Tatro v. State of Texas, 625 F.2d 557 (Fifth Circuit - 1980).

Held: Petitioner is not entitled to reimbursement for private school placement where the evidence shows that Respondent provided student with an IEP as agreed upon by the ARDC under which Petitioner made educational progress, there was no showing that Respondent denied Petitioner a free appropriate public education, and private school placement was therefore not appropriate.